**REPUBLIC OF THE PHILIPPINES**
**COURT OF TAX APPEALS**
**QUEZON CITY**

**ENRON SUBIC POWER CORPORATION,**
Petitioner,

- versus -

C.T.A. CASE NO. 6029

**COMMISSIONER OF INTERNAL REVENUE,**
Respondent.

**Promulgated:**

NOV 04 2003

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# DECISION

This is an assessment case involving deficiency 5% tax in the amount of P1,288,649.00 and deficiency expanded withholding tax in the amount of P102,520.00 or in the aggregate amount of P1,391,169.00 covering the taxable year 1993.

Petitioner is a domestic corporation duly registered with the Securities and Exchange Commission (SEC) and with the Subic Bay Metropolitan Authority (SBMA) as a Subic Bay Freeport (SBF) Enterprise.

As a Subic Bay Freeport Enterprise duly registered with the SBMA, petitioner is entitled to the 5% preferential tax rate under Republic Act No. 7227, otherwise known as the "Bases Conversion and Development Act of 1992".[1]

Petitioner's business activity in the SBF is the operation and maintenance of two power plants in the SBF, pursuant to an Energy Conversion Agreement (ECA) with

[1] Joint Stipulation of Facts, par. 1.

National Power Corporation (NAPOCOR). The power plants being operated by petitioner under the ECA are owned by, and leased from the SBMA.[2]

Under the ECA, petitioner is obliged and required by NAPOCOR to secure insurance coverage for the power plant facilities and that the insurer must be acceptable to NAPOCOR. NAPOCOR is named as the insured while petitioner is merely permitted to be named as co-insured.[3]

Petitioner entered into an O & M Supervision Agreement with Batangas Power Corporation (BPC), for the operation and maintenance of the BPC power plant facilities. The payments made under the O & M Supervision Agreement represented reimbursements paid by BPC, for actual costs incurred by the petitioner, in the performance of the latter's obligation under the agreement.[4]

On July 26, 1999, petitioner received from respondent two (2) Formal Assessment Notices (both numbered 018-34-93-00004 and dated July 6, 1999) covering the year 1993 assessing it of deficiency 5% tax and expanded withholding tax, detailed hereunder:[5]

| | |
|---|---|
| Deficiency 5% Tax | |
| Tax Due | P 621,825.00 |
| Add: Surcharge | 155,456.00 |
| Interest | 466,368.00 |
| Compromise Penalty | 45,000.00 |
| Total Amount Payable | P1,288,649.00 |

| | |
|---|---|
| Deficiency Expanded Withholding Tax | |
| Tax Due | P 44,260.00 |
| Add: Surcharge | 11,065.00 |
| Interest | 33,195.00 |
| Compromise Penalty | 14,000.00 |
| Total Amount Payable | P 102,520.00 |

[2] *Ibid*. par. 2.
[3] *Id*., par. 3
[4] *Id*., par. 4.
[5] Exhibits M & M-1.

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On August 23, 1999, petitioner filed with respondent, through the Regional Director of Revenue Region No. 4 in San Fernando, Pampanga, its protest letter dated August 19, 1999.[6]

Claiming inaction on the part of the respondent, petitioner filed the instant petition on March 16, 2000.

By way of an Answer, respondent raised the following Special and Affirmative Defenses:

a) The herein Petitioner, through its authorized representative, REBECCA B. PALO, had executed its WAIVER OF THE STATUTE OF LIMITATIONS UNDER THE NATIONAL INTERNAL REVENUE CODE specified under Sections 203 and 223 and other relevant provisions of the Tax Code, as amended, on February 10, 1997. The intent and purpose of the said waiver is to afford the Commissioner of Internal Revenue ample time to finish the investigation and likewise give the tax payer sufficient time within which to complete the required documents that are needed in the conduct of the investigation;

b) Therefore, the issuance of the Formal Assessment Notices dated July 6, 1999 are well within the time allowed under the waiver executed by the herein petitioner;

c) The respondent had complied with the provisions of the Tax Code as to the required notice and information to the petitioner of the findings of the Respondent's examiner prior to the issuance of the assessment. In fact, the petitioner had, for several occasions, filed their comment/opposition to the proposed findings of the respondent's examiners, the latest of which is their letter dated November 27, 1998 prior to the issuance of the assessment and on August 19, 1999 as to the filing of the protest letter to the assessment notice;

d) "Plant Insurance" in the amount of P3,005,726.00 which was disallowed by the respondent's examiners in computing the deficiency 5% tax, is not a direct cost or expenditure that go into production neither is it one of those expressly allowable under Revenue Regulation No. 1-95;

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[6] BIR Records, pages 117 to 129.

e) Verification of the petitioner's account shows that the "Reimbursable Income" of P2,373,347.00 were collectibles from Batangas Power Corporation (an affiliate) representing charges for services rendered by petitioner to said BPC. While this account was properly recorded as part of petitioner's "other income" it was, however, presented as an "offsetting" item from the allowable deductions claimed per income tax return, hence no effect on taxable income;

f) The records of the petitioner shows that no foreign exchange gain, whether realized or unrealized, has been reported for tax purposes. The inclusion of the unrealized portion for deficiency 5% tax purposes was made due to the procedures of the petitioner in failing to record such upon realization. Thus, upon the inclusion of the unrealized portion, the asset/liability accounts have already been adjusted as of the end of the taxable accounting period;

g) All presumptions are in favor of the correctness of respondent's assessment for deficiency taxes; and

h) Failure on the part of the complainant to dispute the presumption of correctness of the assessment shall be fatal to its case.

The parties mutually agreed that the issues to be resolved by this court are:

(1) Whether or not the assessment has prescribed under Section 203 of the Tax Code;

(2) Whether or not the assessment is void under Section 228 of the Tax Code; and

(3) Whether or not petitioner is liable for the deficiency 5% tax and expanded withholding tax in the amounts of P1,288,649.00 and P102,520.00, respectively, for the taxable year 1993.

Anent the first issue, petitioner asserts that the assessments have prescribed pursuant to Section 203 of the Tax Code, as amended.

Respondent, on the other hand, argues that by virtue of the Waiver of the Statute of Limitations executed by petitioner's authorized representative, Rebecca B. Palo, on

February 10, 1997, the issuance of the formal assessment notices dated July 6, 1999 are well within the time allowed by law. According to respondent, the intent and purpose of the said waiver was to afford the Commissioner of Internal Revenue ample time to finish the investigation and likewise give the taxpayer sufficient time within which to complete the required documents that are needed in the conduct of the investigation.

We find for the petitioner.

Section 203 of the Tax Code, as amended, is hereby quoted for easy reference:

> **SEC. 203.** ***Period of Limitation Upon Assessment and Collection.*** – Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day. (Underscoring supplied.)

Section 222 provides for exceptions as to period of limitation of assessment and collection of taxes and we quote paragraph (b) thereof as it is relevant to this case, *viz*:

> (b) **If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon.** The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon. (Emphasis ours.)

Based on the above provisions, if before the expiration of the three-year period to assess, both the Commissioner and the taxpayer agreed in writing that an assessment may still be had after such time, the tax may be assessed **within the period agreed upon**. And the period agreed upon may be extended by subsequent written agreement **made before the expiration of the period previously agreed upon**.

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Thus, the law is quite clear that the three-year prescriptive period to assess may be extended upon mutual agreement by the Commissioner and the taxpayer in writing and such period may still be extended if another written agreement is executed before the expiration of the new period to assess. Meaning to say, the period agreed upon also expires. The Tax Code is quite plain, definite and free from ambiguity on the matter. It does not provide that the prescriptive period to assess may be waived altogether or that there will be no more prescriptive period to assess the taxpayer by the mere execution of the Waiver of Statute of Limitations, as the written agreement between the Commissioner and the taxpayer is so described. That is why Revenue Memorandum Order No. 20-90 mandates that:

> "The waiver must be in the form identified hereof. This form may be reproduced by the Office concerned but there should be no deviation from such form. The phrase "but not after ________ 19___" should be filled up. This indicates the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription. The period agreed upon shall constitute the time within which to effect the assessment/collection of the tax in addition to the ordinary prescriptive period." (Underscoring ours.)

In other words, the three-year period to assess is merely **extended** when the Commissioner and the taxpayer execute a Waiver of Statute of Limitations. It is not therefore valid when the waiver totally removes the limit within which to assess a taxpayer of deficiency taxes. Hence, the waiver executed by petitioner's authorized representative and the Commissioner's alleged representative is not valid. For clarity, said waiver[7] is hereby reproduced:

[7] Annex A, Answer, CTA Records, page 63.

WAIVER OF THE STATUTE OF LIMITATIONS
UNDER THE NATIONAL INTERNAL REVENUE CODE

> I, ENRON SUBIC POWER CORP., in connection with my pending internal revenue case involving the taxable year 1993, hereby waive the running of the prescriptive period provided for in *Sections 203 and 223* and other relevant provisions of the National Internal Revenue Code.
>
> The intent and purpose of this Waiver is to afford the Commissioner of Internal Revenue ample time to finish the investigation and likewise give the taxpayer sufficient time within which to complete the required documents that are needed in the conduct of the investigation.
>
> It is understood, however, that the undersigned taxpayer does not, by the execution of this Waiver, admit in advance the correctness of the assessment which may be made against him for the period above-mentioned; nor does he waive his right to use any of the legal remedies accorded by law to secure a credit or refund on such tax that may be assessed and paid for the same period pursuant to *Sections 204 and 230* of the National Internal Revenue Code.
>
> Executed this 10th day of FEBRUARY, 1997 in Olongapo City, Philippines.

An examination of the above waiver discloses that the phrase "but not after _____ 19___" does not appear. Section 222(b) [then Section 223(b)] requires that the period to extend assessment of the tax after three years should be agreed upon before the expiration of such three year-period. Said agreed period must be indicated in the agreement because the same can still be extended provided another agreement is entered into before its expiration.

The agreement to "waive the running of the prescriptive period" should not be interpreted to mean as a waiver of the prescriptive period. After all, what has been waived was merely the **running of the prescriptive period** and not the prescriptive period *per se*. Besides, if we take the agreement to mean as a waiver of the prescriptive period, then the provision of Section 222(b) becomes useless. Expressed otherwise, a law

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has been made inutile by a mere written agreement of the parties. Indeed, parties may enter into any contract and may establish such stipulations, clauses, terms and conditions as they may deem convenient. However, such stipulations, clauses, terms and conditions must not be contrary to law, morals, good customs, public order, or public policy.[8]

In the case at bar, Section 222(b) requires that a period be specified in the written agreement or waiver signed by the Commissioner and the taxpayer before the lapse of the three-year period to effect assessment. We found no such agreed period in the subject waiver. Therefore, the same is null and void.

In addition, Section 222(b) provides that the written agreement to extend the period to assess a taxpayer should be made by the Commissioner and the taxpayer. Although Revenue Memorandum Order No. 20-90 authorizes other persons other than the Commissioner to sign the waiver, to wit:

"3. The following revenue officials are authorized to sign the waiver:

A. In the National Office

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|---|---|
| 1. ACIRs for collection, Special Operations, National Assessment, Excise and Legal on Taxes pending before their respective Offices. In the absence of the ACIR, the Head Executive Assistant may sign the waiver. | For tax cases involving not more than P500,000.00 |
| 2. Deputy Commissioner | For tax cases involving more than P500,000.00 but not more than P1M |
| 3. Commissioner | For tax cases involving more than P1M |

[8] Article 1306, Civil Code of the Philippines.

B. In the Regional Offices

1. The Revenue District Officer with respect to tax cases still pending investigation and the period to assess is about to prescribe regardless of amount.

2. The Regional Director, the Assistant Regional Director, the Chief, Assessment Branch or the Chief, Legal Branch with respect to cases still pending review and the period to assess/collect is about to prescribe, regardless of amount.

3. The Regional Director, the Assistant Regional Director, the Chief, Collection Branch or the Chief, Legal Branch with respect to cases still pending collection and the period to assess/collect is about to prescribe regardless of amount.

Respondent in this case presented a Waiver of the Statute of Limitations signed by an unidentified person for the Commissioner of Internal Revenue. However, we have no way of determining whether the said person was really an authorized person of the Commissioner. Respondent did not present the person who allegedly signed for and in behalf of the Commissioner. In fact, his or her name was not indicated in the waiver nor his or her designation. We cannot really ascertain if indeed he or she was an authorized representative of the Commissioner.

Taking into account that the waiver is not valid, the three-year period within which to assess the petitioner has not, therefore, been extended. This case involves the assessment of 5% tax and expanded withholding tax for the taxable year 1993. Petitioner filed its Corporate Annual Income Tax Return on April 15, 1994. Respondent had only three years therefrom to assess petitioner or until April 15, 1997. In like manner, petitioner filed its consolidated expanded withholding tax returns on March 1, 1994. Respondent had until March 1, 1997 within which to assess petitioner of deficiency expanded withholding tax. Indubitably, the assessment notices dated July 6, 1999 were issued beyond the prescriptive period allowed by law.

With the foregoing findings, it is no longer necessary to discuss the merits of the assessment. Since the assessment notices were issued beyond the prescriptive period, the same are not valid. Accordingly, petitioner is not liable to pay 5% tax and expanded withholding tax totaling P1,391,169.00.

**IN VIEW OF THE FOREGOING**, the assessments issued against petitioner for deficiency 5% tax in the amount of P1,288,649.00 and deficiency expanded withholding tax in the amount of P102,520.00 covering the year 1993 are hereby **CANCELLED** and **SET ASIDE**.

**SO ORDERED.**

Juanito C. Castañeda, Jr.
**JUANITO C. CASTAÑEDA, JR.**
Associate Judge

**WE CONCUR:**

**ERNESTO D. ACOSTA**
Presiding Judge

**LOVELL R. BAUTISTA**
Associate Judge

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# CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

**ERNESTO D. ACOSTA**
Presiding Judge

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