SYLLABI/SYNOPSIS

THIRD DIVISION

[G.R. No. 128315. June 29, 1999]

COMMISSIONER OF INTERNAL REVENUE, *petitioner, vs.* PASCOR REALTY AND DEVELOPMENT CORPORATION, ROGELIO A. DIO and VIRGINIA S. DIO, *respondents.*

D E C I S I O N

PANGANIBAN, *J.:*

An assessment contains not only a computation of tax liabilities, but also a demand for payment within a prescribed period. It also signals the time when penalties and interests begin to accrue against the taxpayer. To enable the taxpayer to determine his remedies thereon, due process requires that it must be served on and received by the taxpayer. Accordingly, an affidavit, which was executed by revenue officers stating the tax liabilities of a taxpayer and attached to a criminal complaint for tax evasion, cannot be deemed an assessment that can be questioned before the Court of Tax Appeals.

Statement of the Case

Before this Court is a Petition for Review on *Certiorari* under Rule 45 of the Rules of Court praying for the nullification of the October 30, 1996 Decision[1] of the Court of Appeals[2] in CA-GR SP No. 40853, which effectively affirmed the January 25, 1996 Resolution[3] of the Court of Tax Appeals[4] in CTA Case No. 5271. The CTA disposed as follows:

"WHEREFORE, finding [the herein petitioner's] 'Motion to Dismiss' as UNMERITORIOUS, the same is hereby DENIED. [The CIR] is hereby given a period of thirty (30) days from receipt hereof to file her answer."

Petitioner also seeks to nullify the February 13, 1997 Resolution[5] of the Court of Appeals denying reconsideration.

The Facts

As found by the Court of Appeals, the undisputed facts of the case are as follows:

"It appears that by virtue of Letter of Authority No. 001198, then BIR Commissioner Jose U. Ong authorized Revenue Officers Thomas T. Que, Sonia T. Estorco and Emmanuel M. Savellano to examine the books of accounts and other accounting records of Pascor Realty and Development Corporation. (PRDC) for the years ending 1986, 1987 and 1988. The said examination resulted in a recommendation for the issuance of an assessment in the amounts of P7,498,434.65 and P3,015,236.35 for the years 1986 and 1987, respectively.

"On March 1, 1995, the Commissioner of Internal Revenue filed a criminal complaint before the Department of Justice against the PRDC, its President Rogelio A. Dio, and its Treasurer Virginia S. Dio, alleging evasion of taxes in the total amount of P10,513,671.00. Private respondents PRDC, et. al. filed an Urgent Request for Reconsideration/Reinvestigation disputing the tax assessment and tax liability.

"On March 23, 1995, private respondents received a subpoena from the DOJ in connection with the criminal complaint filed by the Commissioner of Internal Revenue (BIR) against them.

"In a letter dated May 17, 1995, the CIR denied the urgent request for reconsideration/reinvestigation of the private respondents on the ground that no formal assessment has as yet been issued by the Commissioner.

"Private respondents then elevated the Decision of the CIR dated May 17, 1995 to the Court of Tax Appeals on a petition for review docketed as CTA Case No. 5271 on July 21, 1995. On September 6, 1995, the CIR filed a Motion to Dismiss the petition on the ground that the CTA has no jurisdiction over the subject matter of the petition, as there was no formal assessment issued against the petitioners. The CTA denied the said motion to dismiss in a Resolution dated January 25, 1996 and ordered the CIR to file an answer within thirty (30) days from receipt of said resolution. The CIR received the resolution on January 31, 1996 but did not file an answer nor did she move to reconsider the resolution.

"Instead, the CIR filed this petition on June 7, 1996, alleging as grounds that:

'Respondent Court of Tax Appeals acted with grave abuse of discretion and without jurisdiction in considering the affidavit/report of the revenue officer and the indorsement of said report to the secretary of justice as assessment which may be appealed to the Court of Tax Appeals;

Respondent Court of Tax Appeals acted with grave abuse of discretion in considering the denial by petitioner of private respondents' Motion for Reconsideration as [a] final decision which may be appealed to the Court of Tax Appeals.'

"In denying the motion to dismiss filed by the CIR, the Court of Tax Appeals stated:

'We agree with petitioners' contentions, that the criminal complaint for tax evasion is the assessment issued, and that the letter denial of May 17, 1995 is the decision properly appealable to [u]s. Respondent's ground of denial, therefore, that there was no formal assessment issued, is untenable.

'It is the Court's honest belief, that the criminal case for tax evasion is already an assessment. The complaint, more particularly, the Joint Affidavit of Revenue Examiners Lagmay and Savellano attached thereto, contains the details of the assessment like the kind and amount of tax due, and the period covered.

'Petitioners are right, in claiming that the provisions of Republic Act No. 1125, relating to exclusive

appellate jurisdiction of this Court, do not, make any mention of 'formal assessment.' The law merely states, that this Court has exclusive appellate jurisdiction over decisions of the Commissioner of Internal Revenue on disputed assessments, and other matters arising under the National Internal Revenue Code, other law or part administered by the Bureau of Internal Revenue Code.

'As far as this Court is concerned, the amount and kind of tax due, and the period covered, are sufficient details needed for an 'assessment.' These details are more than complete, compared to the following definitions of the term as quoted hereunder. Thus:

'Assessment is laying a tax. Johnson City v. Clinchfield R. Co., 43 S.W. (2d) 386, 387, 163 Tenn. 332. (Words and Phrases, Permanent Edition, Vol. 4, p. 446)

'The word assessment when used in connection with taxation, may have more than one meaning. The ultimate purpose of an assessment to such a connection is to ascertain the amount that each taxpayer is to pay. More commonly, the word 'assessment' means the official valuation of a taxpayer's property for purpose of taxation. State v. New York, N.H. and H.R. Co. 22 A. 765, 768, 60 Conn. 326, 325. (Ibid. p. 445)'

'From the above, it can be gleaned that an assessment simply states how much tax is due from a taxpayer. Thus, based on these definitions, the details of the tax as given in the Joint Affidavit of respondent's examiners, which was attached to the tax evasion complaint, more than suffice to qualify as an assessment. Therefore, this assessment having been disputed by petitioners, and there being a denial of their letter disputing such assessment, this Court unquestionably acquired jurisdiction over the instant petition for review.'"[6]

As earlier observed, the Court of Appeals sustained the CTA and dismissed the petition.

Hence, this recourse to this Court.[7]

Ruling of the Court of Appeals

The Court of Appeals held that the tax court committed no grave abuse of discretion in ruling that the Criminal Complaint for tax evasion filed by the Commissioner of Internal Revenue with the Department of Justice constituted an "assessment" of the tax due, and that the said assessment could be the subject of a protest. By definition, an assessment is simply the statement of the details and the amount of tax due from a taxpayer. Based on this definition, the details of the tax contained in the BIR examiners' Joint Affidavit, [8] which was attached to the criminal Complaint, constituted an assessment. Since the assailed Order of the CTA was merely interlocutory and devoid of grave abuse of discretion, a petition for *certiorari* did not lie.

Issues

Petitioners submit for the consideration of this Court the following issues:

"(1) Whether or not the criminal complaint for tax evasion can be construed as an assessment.

(2) Whether or not an assessment is necessary before criminal charges for tax evasion may be instituted.

(3) Whether or not the CTA can take cognizance of the case in the absence of an assessment."[9]

In the main, the Court will resolve whether the revenue officers' Affidavit-Report, which was attached to the criminal Complaint filed with the Department of Justice, constituted an assessment that could be questioned before the Court of Tax Appeals.

The Court's Ruling

The petition is meritorious.

Main Issue: *Assessment*

Petitioner argues that the filing of the criminal complaint with the Department of Justice cannot in any way be construed as a formal assessment of private respondents' tax liabilities. This position is based on Section 205 of the National Internal Revenue Code[10] (NIRC), which provides that remedies for the collection of deficient taxes may be by either civil or criminal action. Likewise, petitioner cites Section 223(a) of the same Code, which states that in case of failure to file a return, the tax may be assessed or a proceeding in court may be begun *without assessment*.

Respondents, on the other hand, maintain that an assessment is not an action or proceeding for the collection of taxes, but merely a notice that the amount stated therein is due as tax and that the taxpayer is required to pay the same. Thus, qualifying as an assessment was the BIR examiners' Joint Affidavit, which contained the details of the supposed taxes due from respondent for taxable years ending 1987 and 1988, and which was attached to the tax evasion Complaint filed with the DOJ. Consequently, the denial by the BIR of private respondents' request for reinvestigation of the disputed assessment is properly appealable to the CTA.

We agree with petitioner. Neither the NIRC nor the revenue regulations governing the protest of assessments[11] provide a specific definition or form of an assessment. However, the NIRC defines the specific functions and effects of an assessment. To consider the affidavit attached to the Complaint as a proper assessment is to subvert the nature of an assessment and to set a bad precedent that will prejudice innocent taxpayers.

True, as pointed out by the private respondents, an assessment informs the taxpayer that he or she has tax liabilities. But not all documents coming from the BIR containing a computation of the tax liability can be deemed assessments.

To start with, an assessment must be sent to and received by a taxpayer, and must demand payment of the taxes described therein within a specific period. Thus, the NIRC imposes a 25 percent penalty, in addition to the tax due, in case the taxpayer fails to pay the deficiency tax within the time prescribed for its payment in the notice of assessment. Likewise, an interest of 20 percent per annum, or such higher rate

as may be prescribed by rules and regulations, is to be collected from the date prescribed for its payment until the full payment.[12]

The issuance of an assessment is vital in determining the period of limitation regarding its proper issuance and the period within which to protest it. Section 203[13] of the NIRC provides that internal revenue taxes must be assessed within three years from the last day within which to file the return. Section 222,[14] on the other hand, specifies a period of ten years in case a fraudulent return with intent to evade was submitted or in case of failure to file a return. Also, Section 228[15] of the same law states that said assessment may be protested only within thirty days from receipt thereof. Necessarily, the taxpayer must be certain that a specific document constitutes an assessment. Otherwise, confusion would arise regarding the period within which to make an assessment or to protest the same, or whether interest and penalty may accrue thereon.

It should also be stressed that the said document is a notice duly sent to the taxpayer. Indeed, an assessment is deemed made only when the collector of internal revenue releases, mails or sends such notice to the taxpayer.[16]

In the present case, the revenue officers' Affidavit merely contained a computation of respondents' tax liability. It did not state a demand or a period for payment. Worse, it was addressed to the justice secretary, not to the taxpayers.

Respondents maintain that an assessment, in relation to taxation, is simply understood to mean:

"A notice to the effect that the amount therein stated is due as tax and a demand for payment thereof."[17]

"Fixes the liability of the taxpayer and ascertains the facts and furnishes the data for the proper presentation of tax rolls."[18]

Even these definitions fail to advance private respondents' case. That the BIR examiners' Joint Affidavit attached to the Criminal Complaint contained some details of the tax liabilities of private respondents does not *ipso facto* make it an assessment. The purpose of the Joint Affidavit was merely to support and substantiate the Criminal Complaint for tax evasion. Clearly, it was not meant to be a notice of the tax due and a demand to the private respondents for payment thereof.

The fact that the Complaint itself was specifically directed and sent to the Department of Justice and not to private respondents shows that the intent of the commissioner was to file a criminal complaint for tax evasion, not to issue an assessment. Although the revenue officers recommended the issuance of an assessment, the commissioner opted instead to file a criminal case for tax evasion. What private respondents received was a notice from the DOJ that a criminal case for tax evasion had been filed against them, not a notice that the Bureau of Internal Revenue had made an assessment.

In addition, what private respondents sent to the commissioner was a motion for a reconsideration of the tax evasion charges filed, not of an assessment, as shown thus:

"This is to request for reconsideration of the tax evasion charges against my client, PASCOR Realty and Development Corporation and for the same to be referred to the Appellate Division in order to give my client the opportunity of a fair and objective hearing"[19]

Additional Issues: ***Assessment Not Necessary Before Filing of Criminal Complaint***

Private respondents maintain that the filing of a criminal complaint must be preceded by an assessment. This is incorrect, because Section 222 of the NIRC specifically states that in cases where a

false or fraudulent return is submitted or in cases of failure to file a return such as this case, proceedings in court may be commenced *without an assessment*. Furthermore, Section 205 of the same Code clearly mandates that the civil and criminal aspects of the case may be pursued simultaneously. In *Ungab v. Cusi,* [20] petitioner therein sought the dismissal of the criminal Complaints for being premature, since his protest to the CTA had not yet been resolved. The Court held that such protests could not stop or suspend the criminal action which was independent of the resolution of the protest in the CTA. This was because the commissioner of internal revenue had, in such tax evasion cases, discretion on whether to issue an assessment or to file a criminal case against the taxpayer or to do both.

Private respondents insist that Section 222 should be read in relation to Section 255 of the NIRC,[21] which penalizes failure to file a return. They add that a tax assessment should precede a criminal indictment. We disagree. To reiterate, said Section 222 states that an assessment is not necessary before a criminal charge can be filed. This is the general rule. Private respondents failed to show that they are entitled to an exception. Moreover, the criminal charge need only be supported by a *prima facie* showing of failure to file a required return. This fact need not be proven by an assessment.

The issuance of an assessment must be distinguished from the filing of a complaint. Before an assessment is issued, there is, by practice, a pre-assessment notice sent to the taxpayer. The taxpayer is then given a chance to submit position papers and documents to prove that the assessment is unwarranted. If the commissioner is unsatisfied, an assessment signed by him or her is then sent to the taxpayer informing the latter specifically and clearly that an assessment has been made against him or her. In contrast, the criminal charge need not go through all these. The criminal charge is filed directly with the DOJ. Thereafter, the taxpayer is notified that a criminal case had been filed against him, not that the commissioner has issued an assessment. It must be stressed that a criminal complaint is instituted not to demand payment, but to penalize the taxpayer for violation of the Tax Code.

WHEREFORE, the petition is hereby *GRANTED*. The assailed Decision is *REVERSED* and *SET ASIDE*. CTA Case No. 5271 is likewise *DISMISSED*. No costs.

SO ORDERED.

Vitug, Purisima, and *Gonzaga-Reyes, JJ.,* concur.
Romero (Chairman), J., abroad on official business.

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[1] *Rollo*, pp. 37-41.

[2] Fifteenth Division, composed of *J*. Salome A. Montoya, chairman and *ponente;* and *JJ*. Godardo A. Jacinto and Maximiano C. Asuncion, members, concurring.

[3] *Rollo*, pp. 56-62.

[4] Composed of Ernesto D. Acosta, presiding judge; and Ramon O. De Veyra and Manuel K. Gruba, associate judges.

[5] *Rollo*, p. 42.

[6] Assailed Decision, pp. 1-4; *Rollo*, pp. 37-40.

[7] The case was deemed submitted for resolution on October 5, 1998, upon receipt by this Court of the petitioner's Memorandum. Respondents' Memorandum was received earlier on September 29, 1998.

[8] Annex "C" and "C-1" of respondent's Comment; *Rollo*, pp. 100-101.

[9] Memorandum for Petitioner, p. 4; *Rollo*, p. 225.

[10] "Sec. 205. Remedies for the Collection of Delinquent Taxes. -- The civil remedies for the collection of internal revenue, fees,

or charges, and increment thereto resulting from delinquency shall be:

(a) By distraint of goods, chattels, or effects, and other personal property of whatever character, including stocks and other securities, debts, credits, bank accounts, and interest in and rights to personal property, and by levy upon real property and interest in or rights to real property; and

(b) By civil or criminal action.

Either of these remedies or both simultaneously may be pursued in the discretion of the authorities charged with the collection of such taxes: *Provided, however*, That the remedies of distraint and levy shall not be availed of where the amount of tax involved is not more than One hundred pesos (P100).

The judgment in the criminal case shall not only impose the penalty but shall also order payment of the taxes subject of the criminal case as finally decided by the Commissioner.

The Bureau of Internal Revenue shall advance the amounts needed to defray costs of collection by means of civil or criminal action, including the preservation or transportation of personal property distrained and the advertisement and sale thereof, as well as of real property and improvements thereon."

[11] Revenue Regulation 12-85.

[12] Section 249 (b).

[13] "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."

[14] "Sec. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* --

(a) In the case of a false or fraudulent return with intent to evade tax or of the failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: *Provided*, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in civil or criminal action for the collection thereof.

(b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both 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.

(c) Any internal revenue tax which has been assessed within the period of limitation as prescribed in paragraph (a) hereof may be collected by distraint or levy or by a proceeding in court within five (5) years following the assessment of the tax.

(d) Any internal revenue tax, which has been assessed within the period agreed upon as provided in paragraph (b) hereinabove, may be collected by distraint or levy or by a proceeding in court within the period agreed upon writing before the expiration of the five (5)-year period. The period so agreed upon may be extended by subsequent written agreements made before the expiration of the period previously agreed upon.

(e) *Provided, however*, That nothing in the immediately preceding Section and paragraph (a) hereof shall be construed to authorize the examination and investigation or inquiry into any tax return filed in accordance with the provisions of any tax amnesty law or decree."

[15] "SEC. 228. *Protesting of Assessment*. -- When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however*, That a preassessment notice shall not be required in the following cases:

(a) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the face of the return; or

(b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or

(c) When a taxpayer who opted to claim a refund or tax credit of excess creditable withholding tax for a taxable period was determined to have carried over and automatically applied the same amount claimed against the estimated tax liabilities for the taxable quarter or quarters of the succeeding taxable year; or

(d) When the excise tax due on excisable articles has not been paid; or

(e) When an article locally purchased or imported by an exempt person, such as, but not limited to, vehicles, capital equipment, machineries and spare parts, has been sold, traded or transferred to non-exempt persons.

The taxpayer shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.

Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings."

[16] Basilan Estates *v.* Commissioner of Internal Revenue, 21 SCRA 17, September 5, 1967.

[17] Citing Philippine Law Dictionary, 2nd ed., p. 49.

[18] Citing Black's Law Dictionary, 5th ed., p. 107.

[19] Urgent Request for Reconsideration, p. 1; *Rollo*, p. 110.

[20] 97 SCRA 877, May 30, 1980.

[21] "SEC 255. Failure to File Return, Supply Correct and Accurate Information, Pay Tax, Withhold and Remit Tax and Refund Excess Taxes Withheld on Compensation. -- Any person required under this Code or by rules and regulations promulgated thereunder to pay any tax, make a return, keep any record, or supply correct and accurate any information, who willfully fails to pay such tax, make such return, keep such record, or supply correct and accurate information, or withhold or remit taxes withheld, or refund excess taxes withheld on compensation, at the time or times required by law or rules and regulations shall, in addition to other penalties provided by law, upon conviction thereof, be punished by a fine of not less than one (1) year but not more than ten (10) years.

Any person who attempts to make it appear for any reason that he or another has in fact filed a return or statement, or actually files a return or statement and subsequently withdraws the same return or statement after securing the official receiving seal or stamp of receipt of an internal revenue office wherein the same was actually filed shall, upon conviction therefor, be punished by a fine of not less than Ten thousand pesos (P10,000) but not more than Twenty thousand (P20,000) and suffer imprisonment of not less than one (1) year but not more than three (3) years."