374 Phil. 474

FIRST DIVISION

[G.R. No. 127777, October 01, 1999]

PETRONILA C. TUPAZ, PETITIONER, VS. HONORABLE BENEDICTO B. ULEP PRESIDING JUDGE OF RTC QUEZON CITY, BRANCH 105, AND PEOPLE OF THE PHILIPPINES, RESPONDENTS.

D E C I S I O N

PARDO, J.:

The case before us is a special civil action for *certiorari* with application for temporary restraining order seeking to enjoin respondent Judge Benedicto B. Ulep of the Regional Trial Court, Quezon City, Branch 105, from trying Criminal Case No. Q-91-17321, and to nullify respondent judge's order reviving the information therein against petitioner, for violation of the Tax Code, as the offense charged has prescribed or would expose petitioner to double jeopardy.

The facts are as follows:

> On June 8, 1990, State Prosecutor (SP) Esteban A. Molon, Jr. filed with the Metropolitan Trial Court (MeTC), Quezon City, Branch 33, an information against accused Petronila C. Tupaz and her late husband Jose J. Tupaz, Jr., as corporate officers of El Oro Engravers Corporation, for nonpayment of deficiency corporate income tax for the year 1979, amounting to P2,369,085.46, in violation of Section 51 (b) in relation to Section 73 of the Tax Code of 1977.[1] On September 11, 1990, the MeTC dismissed the information for lack of jurisdiction. On November 16, 1990, the trial court denied the prosecution's motion for reconsideration.
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> On January 10, 1991, SP Molon filed with the Regional Trial Court, Quezon City, two (2) informations, docketed as Criminal Case Nos. Q-91-17321[2] and Q-91-17322,[3] against accused and her late husband, for the same alleged nonpayment of deficiency corporate income tax for the year 1979. Criminal Case No. Q-91-17321 was raffled to Branch 105,[4] presided over by respondent Judge Benedicto B. Ulep; Q-91-17322 was raffled to Branch 86, then presided over by Judge Antonio P. Solano. The identical informations read as follows:
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> "That in Quezon City, Metro Manila and within the jurisdiction of this

Honorable Court and upon verification and audit conducted by the Bureau of Internal Revenue on the 1979 corporate annual income tax return and financial statements of El Oro Engravers Corp., with office address at 809 Epifanio delos Santos Avenue, Quezon City, Metro Manila, it was ascertained that said corporation was found liable to pay the amount of P2,369,085.46, as deficiency corporate income tax for the year 1979 and that, despite demand of the payment of the aforesaid deficiency tax by the Bureau of Internal Revenue and received by said corporation, which demand has already become final, said El Oro Engravers Corp., through above-named accused, the responsible corporate-officers of said corporation, failed and refused, despite repeated demands, and still fail and refuse to pay said tax liability.

"CONTRARY TO LAW."[5]

On September 25, 1991, both accused posted bail bond in the sum of P1,000.00 each, for their provisional liberty.

On November 6, 1991, accused filed with the Regional Trial Court, Quezon City, Branch 86, a motion to dismiss/quash[6] information (Q-91-17322) for the reason that it was exactly the same as the information against the accused pending before RTC, Quezon City, Branch 105 (Q-91-17321). However, on November 11, 1991, Judge Solano denied the motion.[7]

In the meantime, on July 25, 1993, Jose J. Tupaz, Jr. died in Quezon City.

Subsequently, accused Petronila C. Tupaz filed with the Regional Trial Court, Quezon City, Branch 105, a petition for reinvestigation, which Judge Ulep granted in an order dated August 30, 1994.[8]

On September 5, 1994, Senior State Prosecutor Bernelito R. Fernandez stated that no new issues were raised in the request for reinvestigation, and no cogent reasons existed to alter, modify or reverse the findings of the investigating prosecutor. He considered the reinvestigation as terminated, and recommended the prompt arraignment and trial of the accused.[9]

On September 20, 1994, the trial court (Branch No. 105) arraigned accused Petronila C. Tupaz in Criminal Case No. Q-91-17321, and she pleaded not guilty to the information therein.

On October 17, 1994, the prosecution filed with the Regional Trial Court, Quezon City, Branch 105, a motion for leave to file amended information in Criminal Case No. Q91-17321 to allege expressly the date of the commission of the offense, to wit: on or about August 1984 or subsequently thereafter. Despite opposition of the accused, on March 2, 1995, the trial court granted the motion and admitted the amended information.[10] Petitioner was not re-arraigned on the amended information. However,

the amendment was only on a matter of form.[11] Hence, there was no need to re-arraign the accused.[12]

On December 5, 1995, accused filed with the Regional Trial Court, Quezon City, Branch 105, a motion for leave to file and admit motion for reinvestigation. The trial court granted the motion in its order dated December 13, 1995.

Prior to this, on October 18, 1995, Judge Ulep issued an order directing the prosecution to withdraw the information in Criminal Case No. Q-91-17322, pending before Regional Trial Court, Quezon City, Branch 86, after discovering that said information was identical to the one filed with Regional Trial Court, Quezon City, Branch 105. On April 16, 1996, State Prosecutor Alfredo P. Agcaoili filed with the trial court a motion to withdraw information in Criminal Case No. Q-91-17321. Prosecutor Agcaoili thought that accused was charged in Criminal Case No. Q-91-17321, for nonpayment of deficiency contractor's tax, but found that accused was exempted from paying said tax.

On May 15, 1996, Prosecutor Agcaoili filed with the Regional Trial Court, Quezon City, Branch 86, a motion for consolidation of Criminal Case No. Q-91-17322 with Criminal Case No. Q-91-17321 pending before the Regional Trial Court, Quezon City, Branch 105. On the same date, the court[13] granted the motion for consolidation.

On May 20, 1996, Judge Ulep of Regional Trial Court, Quezon City, Branch 105, granted the motion for withdrawal of the information in Criminal Case No. Q-91-17321 and dismissed the case, as prayed for by the prosecution.

On May 28, 1996, Prosecutor Agcaoili filed with the Regional Trial Court, Quezon City, Branch 105, a motion to reinstate information in Criminal Case Q-91-17321,[14] stating that the motion to withdraw information was made through palpable mistake, and was the result of excusable neglect. He thought that Criminal Case No. Q-91-17321 was identical to Criminal Case No Q-90-12896, wherein accused was charged with nonpayment of deficiency contractor's tax, amounting to P346,879.29.

Over the objections of accused, on August 6, 1996, the Regional Trial Court, Quezon City, Branch 105, granted the motion and ordered the information in Criminal Case No. Q-91-17321 reinstated.[15] On September 24, 1996, accused filed with the trial court a motion for reconsideration. On December 4, 1996, the trial court denied the motion.

Hence, this petition.

On July 9, 1997, we required respondents to comment on the petition within ten (10) days from notice. On October 10, 1997, the Solicitor General filed his comment.[16]

On October 26, 1998, the Court resolved to give due course to the petition and required the parties to file their respective memoranda within twenty (20) days from notice. The parties have complied.

Petitioner submits that respondent judge committed a grave abuse of discretion in

reinstating the information in Criminal Case No. Q-91-17321 because (a) the offense has prescribed; or (b) it exposes her to double jeopardy.

As regards the issue of prescription, petitioner contends that: (a) the period of assessment has prescribed, applying the three (3) year period provided under Batas Pambansa No. 700; (b) the offense has prescribed since the complaint for preliminary investigation was filed with the Department of Justice only on June 8, 1989, and the offense was committed in April 1980 when she filed the income tax return covering taxable year 1979.

Petitioner was charged with nonpayment of deficiency corporate income tax for the year 1979, which tax return was filed in April 1980. On July 16, 1984, the Bureau of Internal Revenue (BIR) issued a notice of assessment. Petitioner contends that the July 16, 1984 assessment was made out of time.

Petitioner avers that while Sections 318 and 319 of the NIRC of 1977 provide a five (5) year period of limitation for the assessment and collection of internal revenue taxes, Batas Pambansa Blg. 700, enacted on February 22, 1984, amended the two sections and reduced the period to three (3) years. As provided under B.P. Blg. 700, the BIR has three (3) years to assess the tax liability, counted from the last day of filing the return, or from the date the return is filed, whichever comes later. Since the tax return was filed in April 1980, the assessment made on July 16, 1984 was beyond the three (3) year prescriptive period.

Petitioner submits that B.P. Blg. 700 must be given retroactive effect since it is favorable to the accused. Petitioner argues that Article 22 of the Revised Penal Code, regarding the allowance of retroactive application of penal laws when favorable to the accused shall apply in this case.

The Solicitor General, in his comment, maintains that the prescriptive period for assessment and collection of petitioner's deficiency corporate income tax was five (5) years. The Solicitor General asserts that the shortened period of three (3) years provided under B.P. Blg. 700 applies to assessments and collections of internal revenue taxes beginning taxable year 1984. Since the deficiency corporate income tax was for taxable year 1979, then petitioner was still covered by the five (5) year period. Thus, the July 16, 1984 tax assessment was made within the prescribed period.

At the outset, it must be stressed that "internal revenue taxes are self-assessing and no further assessment by the government is required to create the tax liability. An assessment, however, is not altogether inconsequential; it is relevant in the proper pursuit of judicial and extra judicial remedies to enforce taxpayer liabilities and certain matters that relate to it, such as the imposition of surcharges and interest, and in the application of statues of limitations and in the establishment of tax liens."[17]

An assessment contains not only a computation of tax liabilities, but also a demand for payment within a prescribed period. The ultimate purpose of assessment is to ascertain the amount that each taxpayer is to pay.[18] An assessment is a notice to the effect

that the amount therein stated is due as tax and a demand for payment thereof.[19] Assessments made beyond the prescribed period would not be binding on the taxpayer.[20]

We agree with the Solicitor General that the shortened period of three (3) years prescribed under B.P. Blg. 700 is not applicable to petitioner. B.P. Blg. 700, effective April 5, 1984, specifically states that the shortened period of three years shall apply to assessments and collections of internal revenue taxes beginning taxable year 1984. Assessments made on or after April 5, 1984 are governed by the five-year period if the taxes assessed cover taxable years prior to January 1, 1984.[21] The deficiency income tax under consideration is for taxable year 1979. Thus, the period of assessment is still five (5) years, under the old law. The income tax return was filed in April 1980. Hence, the July 16, 1984 tax assessment was issued within the prescribed period of five (5) years, from the last day of filing the return, or from the date the return is filed, whichever comes later.

Article 22 of the Revised Penal Code finds no application in this case for the simple reason that the provisions on the period of assessment can not be considered as penal in nature.

Petitioner also asserts that the offense has prescribed. Petitioner invokes Section 340 (now 281 of 1997 NIRC) of the Tax Code which provides that violations of any provision of the Code prescribe in five (5) years. Petitioner asserts that in this case, it began to run in 1979, when she failed to pay the correct corporate tax due during that taxable year. Hence, when the BIR instituted criminal proceedings on June 8, 1989, by filing a complaint for violation of the Tax Code with the Department of Justice for preliminary investigation it was beyond the prescriptive period of five (5) years. At most, the BIR had until 1984 to institute criminal proceedings.

On the other hand, the Solicitor General avers that the information for violation of the Tax Code was filed within the prescriptive period of five (5) years provided in Section 340 (now 281 in 1997 NIRC) of the Code. It is only when the assessment has become final and unappealable that the five (5) year period commences to run. A notice of assessment was issued on July 16, 1984. When petitioner failed to question or protest the deficiency assessment thirty (30) days therefrom, or on August 16, 1984, it became final and unappealable. Consequently, it was from this period that the prescriptive period of five (5) years commenced. Thus, the complaint filed with the Department of Justice on June 8, 1989 was within the prescribed period.

We agree with the Solicitor General that the offense has not prescribed. Petitioner was charged with failure to pay deficiency income tax after repeated demands by the taxing authority. In *Lim, Sr. v. Court of Appeals*,[22] we stated that by its nature the violation could only be committed after service of notice and demand for payment of the deficiency taxes upon the taxpayer. Hence, it cannot be said that the offense has been committed as early as 1980, upon filing of the income tax return. This is so because prior to the finality of the assessment, the taxpayer has not committed any violation

for nonpayment of the tax. The offense was committed only after the finality of the assessment coupled with taxpayer's willful refusal to pay the taxes within the allotted period. In this case, when the notice of assessment was issued on July 16, 1984, the taxpayer still had thirty (30) days from receipt thereof to protest or question the assessment. Otherwise, the assessment would become final and unappealable.[23] As he did not protest, the assessment became final and unappealable on August 16, 1984. Consequently, when the complaint for preliminary investigation was filed with the Department of Justice on June 8, 1989, the criminal action was instituted within the five (5) year prescriptive period.

Petitioner contends that by reinstating the information, the trial court exposed her to double jeopardy. Neither the prosecution nor the trial court obtained her permission before the case was dismissed. She was placed in jeopardy for the first time after she pleaded to a valid complaint filed before a competent court and the case was dismissed without her express consent. When the trial court reinstated the information charging the same offense, it placed her in double jeopardy.

Petitioner also asserts that the trial court gravely erred when, over her objections, it admitted the amended information. She submits that the amendment is substantial in nature, and would place her in double jeopardy.

On the other hand, the Solicitor General contends that reinstating the information does not violate petitioner's right against double jeopardy. He asserts that petitioner induced the dismissal of the complaint when she sought the reinvestigation of her tax liabilities. By such inducement, petitioner waived or was estopped from claiming her right against double jeopardy.

The Solicitor General further contends that, assuming *arguendo* that the case was dismissed without petitioner's consent, there was no valid dismissal of the case since Prosecutor Agcaoili was under a mistaken assumption that it was a charge of nonpayment of contractor's tax.

We sustain petitioner's contention. The reinstatement of the information would expose her to double jeopardy. An accused is placed in double jeopardy if he is again tried for an offense for which he has been convicted, acquitted or in another manner in which the indictment against him was dismissed without his consent. In the instant case, there was a valid complaint filed against petitioner to which she pleaded not guilty. The court dismissed the case at the instance of the prosecution, without asking for accused-petitioner's consent. This consent cannot be implied or presumed.[24] Such consent must be expressed as to have no doubt as to the accused's conformity.[25] As petitioner's consent was not expressly given, the dismissal of the case must be regarded as final and with prejudice to the re-filing of the case.[26] Consequently, the trial court committed grave abuse of discretion in reinstating the information against petitioner in violation of her constitutionally protected right against double jeopardy.

WHEREFORE, we GRANT the petition. We enjoin the lower court, the Regional Trial

Court of Quezon City, Branch 105, from trying Criminal Case No. Q-91-17321 and order its dismissal. *Costs de oficio*.

SO ORDERED.

Puno, Kapunan, and *Ynares-Santiago*, JJ., concur.

Davide, Jr., C.J., (Chairman), see dissenting opinion.

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[1] Now Section 56(b), in relation to Section 255 of the 1997 NIRC.

[2] RTC records, Vol. I, p. 1.

[3] RTC records, Vol. III, p. 1.

[4] Initially presided over by Judge Tomas V. Tadeo, Jr., and later by Judge Benedicto B. Ulep.

[5] RTC records, Vol. I, p. 1.

[6] RTC records, Vol. III, p. 39.

[7] *Ibid*, p. 45.

[8] 8 RTC records, Vol. I, p. 47.

[9] *Ibid*, p. 48.

[10] *Ibid*, p. 97.

[11] People *v.* Molero, 144 SCRA 397, 406 (1986); People *v.* Rivera, 33 SCRA 746 (1970).

[12] Teehankee, Jr. *v.* Madayag, 207 SCRA 134, 130[1992].

[13] Then presided over by Judge Teodoro A. Bay, RTC records, p. 63.

[14] RTC records, Vol. I, pp. 165-169.

[15] RTC records, Vol. I, pp. 203-205.

[16] Rollo, pp. 90-114.

[17] Vitug and Acosta, Tax Law and Jurisprudence, 1st Edition, 1997, p. 267.

[18] Commissioner of Internal Revenue *v.* Pascor Realty and Development Corporation, G. R. No. 128315, June 29, 1999.

[19] Moreno, Philippine Law Dictionary, 3rd ed., p. 75.

[20] Commissioner *v.* Ayala Securities Corporation, 70 SCRA 204 (1976).

[21] Revenue Memorandum Circular No. 33-84.

[22] 190 SCRA 616, 623 (1990).

[23] Sec. 229 of 1977 NIRC, as amended, (now Sec 228 of 1997 NIRC).

[24] Caes *v.* Intermediate Appellate Court, 179 SCRA 54 (1990).

[25] *Ibid*.

[26] *Ibid*., at p. 60.

DISSENTING OPINION

DAVIDE, JR., C.J.:

I am unable to agree with the conclusion in the *ponencia* that reinstating the information in Criminal Case No. Q-91-17321 would expose petitioner to double jeopardy.

As shown in the summary of facts in the *ponencia* petitioner entered a plea of not guilty on 20 September 1994 to the information in Criminal Case No. Q-91-17321. But, the information was amended by the prosecution to indicate therein the date of the commission of the offense, to with: "on or about August 1994 or subsequently thereafter."

The amended information was admitted by public respondent Judge in the order of 2 March 1995.

There is at all no showing that petitioner was re-arraigned on the amended information. On the contrary, on 5 December 1995 she filed a motion for leave to file and admit motion for reinvestigation, which the trial court granted in its order of 13 December 1995.

Not having been re-arraigned on the amended information, which validly supplanted the original information, the erroneous withdrawal of the information in Criminal Case No. Q-91-17321 and its subsequent reinstatement cannot place the petitioner in double jeopardy. Firstly, the withdrawal had no legal effect since the information was

amended. Secondly, petitioner was not arraigned on the amended information. And, thirdly, petitioner is estopped on the matter since she had asked for a reinvestigation on the basis of the amended information.

I vote then to **DENY** this petition.
