669 Phil. 371; 08 OG No. 26, 3115 (June 25, 2012)

EN BANC

[G.R. No. 193007, July 19, 2011]

RENATO V. DIAZ AND AURORA MA. F. TIMBOL, PETITIONERS, VS. THE SECRETARY OF FINANCE AND THE COMMISSIONER OF INTERNAL REVENUE, RESPONDENTS.

D E C I S I O N

ABAD, J.:

May toll fees collected by tollway operators be subjected to value- added tax?

The Facts and the Case

Petitioners Renato V. Diaz and Aurora Ma. F. Timbol (petitioners) filed this petition for declaratory relief [1] assailing the validity of the impending imposition of value-added tax (VAT) by the Bureau of Internal Revenue (BIR) on the collections of tollway operators.

Petitioners claim that, since the VAT would result in increased toll fees, they have an interest as regular users of tollways in stopping the BIR action. Additionally, Diaz claims that he sponsored the approval of Republic Act 7716 (the 1994 Expanded VAT Law or EVAT Law) and Republic Act 8424 (the 1997 National Internal Revenue Code or the NIRC) at the House of Representatives. Timbol, on the other hand, claims that she served as Assistant Secretary of the Department of Trade and Industry and consultant of the Toll Regulatory Board (TRB) in the past administration.

Petitioners allege that the BIR attempted during the administration of President Gloria Macapagal-Arroyo to impose VAT on toll fees. The imposition was deferred, however, in view of the consistent opposition of Diaz and other sectors to such move. But, upon President Benigno C. Aquino III's assumption of office in 2010, the BIR revived the idea and would impose the challenged tax on toll fees beginning August 16, 2010 unless judicially enjoined.

Petitioners hold the view that Congress did not, when it enacted the NIRC, intend to include toll fees within the meaning of "sale of services" that are subject to VAT; that a toll fee is a "user's tax," not a sale of services; that to impose VAT on toll fees would amount to a tax on public service; and that, since VAT was never factored into the formula for computing toll fees, its imposition would violate the non-impairment clause of the constitution.

On August 13, 2010 the Court issued a temporary restraining order (TRO), enjoining the implementation of the VAT. The Court required the government, represented by respondents Cesar V. Purisima, Secretary of the Department of Finance, and Kim S. Jacinto-Henares, Commissioner of Internal Revenue, to comment on the petition within 10 days from notice. [2] Later, the Court issued another resolution treating

the petition as one for prohibition. [3]

On August 23, 2010 the Office of the Solicitor General filed the government's comment. [4] The government avers that the NIRC imposes VAT on all kinds of services of franchise grantees, including tollway operations, except where the law provides otherwise; that the Court should seek the meaning and intent of the law from the words used in the statute; and that the imposition of VAT on tollway operations has been the subject as early as 2003 of several BIR rulings and circulars. [5]

The government also argues that petitioners have no right to invoke the non-impairment of contracts clause since they clearly have no personal interest in existing toll operating agreements (TOAs) between the government and tollway operators. At any rate, the non-impairment clause cannot limit the State's sovereign taxing power which is generally read into contracts.

Finally, the government contends that the non-inclusion of VAT in the parametric formula for computing toll rates cannot exempt tollway operators from VAT. In any event, it cannot be claimed that the rights of tollway operators to a reasonable rate of return will be impaired by the VAT since this is imposed on top of the toll rate. Further, the imposition of VAT on toll fees would have very minimal effect on motorists using the tollways.

In their reply [6] to the government's comment, petitioners point out that tollway operators cannot be regarded as franchise grantees under the NIRC since they do not hold legislative franchises. Further, the BIR intends to collect the VAT by rounding off the toll rate and putting any excess collection in an escrow account. But this would be illegal since only the Congress can modify VAT rates and authorize its disbursement. Finally, BIR Revenue Memorandum Circular 63-2010 (BIR RMC 63-2010), which directs toll companies to record an accumulated input VAT of zero balance in their books as of August 16, 2010, contravenes Section 111 of the NIRC which grants entities that first become liable to VAT a transitional input tax credit of 2% on beginning inventory. For this reason, the VAT on toll fees cannot be implemented.

The Issues Presented

The case presents two procedural issues:

1. Whether or not the Court may treat the petition for declaratory relief as one for prohibition; and

2. Whether or not petitioners Diaz and Timbol have legal standing to file the action.

The case also presents two substantive issues:

1. Whether or not the government is unlawfully expanding VAT coverage by including tollway operators and tollway operations in the terms "franchise grantees" and "sale of services" under Section 108 of the Code; and

2. Whether or not the imposition of VAT on tollway operators a) amounts to a tax on

tax and not a tax on services; b) will impair the tollway operators' right to a reasonable return of investment under their TOAs; and c) is not administratively feasible and cannot be implemented.

The Court's Rulings

A. On the Procedural Issues:

On August 24, 2010 the Court issued a resolution, treating the petition as one for prohibition rather than one for declaratory relief, the characterization that petitioners Diaz and Timbol gave their action. The government has sought reconsideration of the Court's resolution, [7] however, arguing that petitioners' allegations clearly made out a case for declaratory relief, an action over which the Court has no original jurisdiction. The government adds, moreover, that the petition does not meet the requirements of Rule 65 for actions for prohibition since the BIR did not exercise judicial, quasi-judicial, or ministerial functions when it sought to impose VAT on toll fees. Besides, petitioners Diaz and Timbol has a plain, speedy, and adequate remedy in the ordinary course of law against the BIR action in the form of an appeal to the Secretary of Finance.

But there are precedents for treating a petition for declaratory relief as one for prohibition if the case has far-reaching implications and raises questions that need to be resolved for the public good. [8] The Court has also held that a petition for prohibition is a proper remedy to prohibit or nullify acts of executive officials that amount to usurpation of legislative authority. [9]

Here, the imposition of VAT on toll fees has far-reaching implications. Its imposition would impact, not only on the more than half a million motorists who use the tollways everyday, but more so on the government's effort to raise revenue for funding various projects and for reducing budgetary deficits.

To dismiss the petition and resolve the issues later, after the challenged VAT has been imposed, could cause more mischief both to the tax-paying public and the government. A belated declaration of nullity of the BIR action would make any attempt to refund to the motorists what they paid an administrative nightmare with no solution. Consequently, it is not only the right, but the duty of the Court to take cognizance of and resolve the issues that the petition raises.

Although the petition does not strictly comply with the requirements of Rule 65, the Court has ample power to waive such technical requirements when the legal questions to be resolved are of great importance to the public. The same may be said of the requirement of *locus standi* which is a mere procedural requisite. [10]

B. On the Substantive Issues:

One. The relevant law in this case is Section 108 of the NIRC, as amended. VAT is levied, assessed, and collected, according to Section 108, on the gross receipts derived from the sale or exchange of services as well as from the use or lease of properties. The third paragraph of Section 108 defines "sale or exchange of services" as follows:

> **The phrase `sale or exchange of services' means the performance of all kinds of services in the Philippines for others for a fee, remuneration or consideration, including those performed or rendered by construction and service contractors; stock, real estate, commercial, customs and immigration brokers; lessors of property, whether personal or real; warehousing services; lessors or distributors of cinematographic films; persons engaged in milling, processing, manufacturing or repacking goods for others; proprietors, operators or keepers of hotels, motels, resthouses, pension houses, inns, resorts; proprietors or operators of restaurants, refreshment parlors, cafes and other eating places, including clubs and caterers; dealers in securities; lending investors; transportation contractors on their transport of goods or cargoes, including persons who transport goods or cargoes for hire and other domestic common carriers by land relative to their transport of goods or cargoes; common carriers by air and sea relative to their transport of passengers, goods or cargoes from one place in the Philippines to another place in the Philippines; sales of electricity by generation companies, transmission, and distribution companies; services of franchise grantees of electric utilities, telephone and telegraph, radio and television broadcasting and all other franchise grantees except those under Section 119 of this Code and non-life insurance companies (except their crop insurances), including surety, fidelity, indemnity and bonding companies; and similar services regardless of whether or not the performance thereof calls for the exercise or use of the physical or mental faculties.** (Underscoring supplied)

It is plain from the above that the law imposes VAT on "all kinds of services" rendered in the Philippines for a fee, including those specified in the list. The enumeration of affected services is not exclusive. [11] By qualifying "services" with the words "all kinds," Congress has given the term "services" an all-encompassing meaning. The listing of specific services are intended to illustrate how pervasive and broad is the VAT's reach rather than establish concrete limits to its application. Thus, every activity that can be imagined as a form of "service" rendered for a fee should be deemed included unless some provision of law especially excludes it.

Now, do tollway operators render services for a fee? Presidential Decree (P.D.) 1112 or the Toll Operation Decree establishes the legal basis for the services that tollway operators render. Essentially, tollway operators construct, maintain, and operate expressways, also called tollways, at the operators' expense. Tollways serve as alternatives to regular public highways that meander through populated areas and branch out to local roads. Traffic in the regular public highways is for this reason slow-moving. In consideration for constructing tollways at their expense, the operators are allowed to collect government-approved fees from motorists using the tollways until such operators could fully recover their expenses and earn reasonable returns from their investments.

When a tollway operator takes a toll fee from a motorist, the fee is in effect for the latter's use of the tollway facilities over which the operator enjoys private

proprietary rights [12] that its contract and the law recognize. In this sense, the tollway operator is no different from the following service providers under Section 108 who allow others to use their properties or facilities for a fee:

1. Lessors of property, whether personal or real;
2. Warehousing service operators;
3. Lessors or distributors of cinematographic films;
4. Proprietors, operators or keepers of hotels, motels, resthouses, pension houses, inns, resorts;
5. Lending investors (for use of money);
6. Transportation contractors on their transport of goods or cargoes, including persons who transport goods or cargoes for hire and other domestic common carriers by land relative to their transport of goods or cargoes; and
7. Common carriers by air and sea relative to their transport of passengers, goods or cargoes from one place in the Philippines to another place in the Philippines.

It does not help petitioners' cause that Section 108 subjects to VAT "all kinds of services" rendered for a fee "regardless of whether or not the performance thereof calls for the exercise or use of the physical or mental faculties." This means that "services" to be subject to VAT need not fall under the traditional concept of services, the personal or professional kinds that require the use of human knowledge and skills.

And not only do tollway operators come under the broad term "all kinds of services," they also come under the specific class described in Section 108 as "all other franchise grantees" who are subject to VAT, "except those under Section 119 of this Code."

Tollway operators are franchise grantees and they do not belong to exceptions (the low-income radio and/or television broadcasting companies with gross annual incomes of less than P10 million and gas and water utilities) that Section 119 [13] spares from the payment of VAT. The word "franchise" broadly covers government grants of a special right to do an act or series of acts of public concern. [14]

Petitioners of course contend that tollway operators cannot be considered "franchise grantees" under Section 108 since they do not hold legislative franchises. But nothing in Section 108 indicates that the "franchise grantees" it speaks of are those who hold legislative franchises. Petitioners give no reason, and the Court cannot surmise any, for making a distinction between franchises granted by Congress and franchises granted by some other government agency. The latter, properly constituted, may grant franchises. Indeed, franchises conferred or granted by local authorities, as agents of the state, constitute as much a legislative franchise as though the grant had been made by Congress itself. [15] The term "franchise" has been broadly construed as referring, not only to authorizations that Congress directly issues in the form of a special law, but also to those granted by administrative agencies to which the power to grant franchises has been delegated by Congress. [16]