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[G.R. No. 160756, March 09, 2010]

CHAMBER OF REAL ESTATE AND BUILDERS' ASSOCIATIONS, INC., PETITIONER, VS. THE HON. EXECUTIVE SECRETARY ALBERTO ROMULO, THE HON. ACTING SECRETARY OF FINANCE JUANITA D. AMATONG, AND THE HON. COMMISSIONER OF INTERNAL REVENUE GUILLERMO PARAYNO, JR., RESPONDENTS.

D E C I S I O N

CORONA, J.:

In this original petition for *certiorari* and *mandamus*,[1] petitioner Chamber of Real Estate and Builders' Associations, Inc. is questioning the constitutionality of Section 27 (E) of Republic Act (RA) 8424[2] and the revenue regulations (RRs) issued by the Bureau of Internal Revenue (BIR) to implement said provision and those involving creditable withholding taxes.[3]

Petitioner is an association of real estate developers and builders in the Philippines. It impleaded former Executive Secretary Alberto Romulo, then acting Secretary of Finance Juanita D. Amatong and then Commissioner of Internal Revenue Guillermo Parayno, Jr. as respondents.

Petitioner assails the validity of the imposition of minimum corporate income tax (MCIT) on corporations and creditable withholding tax (CWT) on sales of real properties classified as ordinary assets.

Section 27(E) of RA 8424 provides for MCIT on domestic corporations and is implemented by RR 9-98. Petitioner argues that the MCIT violates the due process clause because it levies income tax even if there is no realized gain.

Petitioner also seeks to nullify Sections 2.57.2(J) (as amended by RR 6-2001) and 2.58.2 of RR 2-98, and Section 4(a)(ii) and (c)(ii) of RR 7-2003, all of which prescribe the rules and procedures for the collection of CWT on the sale of real properties categorized as ordinary assets. Petitioner contends that these revenue regulations are contrary to law for two reasons: *first*, they ignore the different treatment by RA 8424 of ordinary assets and capital assets and *second*, respondent Secretary of Finance has no authority to collect CWT, much less, to base the CWT on the gross selling price or fair market value of the real properties classified as ordinary assets.

Petitioner also asserts that the enumerated provisions of the subject revenue regulations violate the due process clause because, like the MCIT, the government collects income tax even when the net income has not yet been determined. They contravene the equal protection clause as well because the CWT is being levied upon real estate enterprises but not on other business enterprises, more particularly those in the manufacturing sector.

The issues to be resolved are as follows:

(1) whether or not this Court should take cognizance of the present case;

(2) whether or not the imposition of the MCIT on domestic corporations is unconstitutional and

(3) whether or not the imposition of CWT on income from sales of real properties classified as ordinary assets under RRs 2-98, 6-2001 and 7-2003, is unconstitutional.

OVERVIEW OF THE ASSAILED PROVISIONS

Under the MCIT scheme, a corporation, beginning on its fourth year of operation, is assessed an MCIT of 2% of its gross income when such MCIT is greater than the normal corporate income tax imposed under Section 27(A).[4] If the regular income tax is higher than the MCIT, the corporation does not pay the MCIT. Any excess of the MCIT over the normal tax shall be carried forward and credited against the normal income tax for the three immediately succeeding taxable years. Section 27(E) of RA 8424 provides:

> Section 27 (E). [MCIT] on Domestic Corporations. -
>
> (1) Imposition of Tax. - A [MCIT] of two percent (2%) of the gross income as of the end of the taxable year, as defined herein, is hereby imposed on a corporation taxable under this Title, beginning on the fourth taxable year immediately following the year in which such corporation commenced its business operations, when the minimum income tax is greater than the tax computed under Subsection (A) of this Section for the taxable year.
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> (2) Carry Forward of Excess Minimum Tax. - Any excess of the [MCIT] over the normal income tax as computed under Subsection (A) of this Section shall be carried forward and credited against the normal income tax for the three (3) immediately succeeding taxable years.
>
> (3) Relief from the [MCIT] under certain conditions. - The Secretary of Finance is hereby authorized to suspend the imposition of the [MCIT] on any corporation which suffers losses on account of prolonged labor dispute, or because of *force majeure*, or because of legitimate business reverses.

The Secretary of Finance is hereby authorized to promulgate, upon recommendation of the Commissioner, the necessary rules and regulations that shall define the terms and conditions under which he may suspend the imposition of the [MCIT] in a meritorious case.

(4) Gross Income Defined. - For purposes of applying the [MCIT] provided under Subsection (E) hereof, the term `gross income' shall mean gross sales less sales returns, discounts and allowances and cost of goods sold. "Cost of goods sold" shall include all business expenses directly incurred to produce the merchandise to bring them to their present location and use.

For trading or merchandising concern, "cost of goods sold" shall include the invoice cost of the goods sold, plus import duties, freight in transporting the goods to the place where the goods are actually sold including insurance while the goods are in transit.

For a manufacturing concern, "cost of goods manufactured and sold" shall include all costs of production of finished goods, such as raw materials used, direct labor and manufacturing overhead, freight cost, insurance premiums and other costs incurred to bring the raw materials to the factory or warehouse.

In the case of taxpayers engaged in the sale of service, "gross income" means gross receipts less sales returns, allowances, discounts and cost of services. "Cost of services" shall mean all direct costs and expenses necessarily incurred to provide the services required by the customers and clients including (A) salaries and employee benefits of personnel, consultants and specialists directly rendering the service and (B) cost of facilities directly utilized in providing the service such as depreciation or rental of equipment used and cost of supplies: Provided, however, that in the case of banks, "cost of services" shall include interest expense.

On August 25, 1998, respondent Secretary of Finance (Secretary), on the recommendation of the Commissioner of Internal Revenue (CIR), promulgated RR 9-98 implementing Section 27(E).[5] The pertinent portions thereof read:

Sec. 2.27(E) [MCIT] on Domestic Corporations. -

(1) Imposition of the Tax. - A [MCIT] of two percent (2%) of the gross income as of the end of the taxable year (whether calendar or fiscal year, depending on the accounting period employed) is hereby imposed upon any domestic corporation beginning the fourth (4^{th}) taxable year immediately following the taxable year in which such corporation commenced its business operations. The MCIT shall be imposed whenever such corporation has zero or negative taxable income or whenever the amount of minimum corporate income tax is greater than the normal income tax due from such corporation.

For purposes of these Regulations, the term, "normal income tax" means the income tax rates prescribed under Sec. 27(A) and Sec. 28(A)(1) of the Code xxx at 32% effective January 1, 2000 and thereafter.

xxx xxx xxx

(2) Carry forward of excess [MCIT]. - Any excess of the [MCIT] over the normal income tax as computed under Sec. 27(A) of the Code shall be carried forward on an annual basis and credited against the normal income tax for the three (3) immediately succeeding taxable years.

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Meanwhile, on April 17, 1998, respondent Secretary, upon recommendation of respondent CIR, promulgated RR 2-98 implementing certain provisions of RA 8424 involving the withholding of taxes.[6] Under Section 2.57.2(J) of RR No. 2-98, income payments from the sale, exchange or transfer of real property, other than capital assets, by persons residing in the Philippines and habitually engaged in the real estate business were subjected to CWT:

Sec. 2.57.2. Income payment subject to [CWT] and rates prescribed thereon:

xxx xxx xxx

(J) Gross selling price or total amount of consideration or its equivalent paid to the seller/owner for the sale, exchange or transfer of. - Real property, other than capital assets, sold by an individual, corporation, estate, trust, trust fund or pension fund and the seller/transferor is habitually engaged in the real estate business in accordance with the following schedule -

Those which are exempt from a withholding tax at source as prescribed in Sec. 2.57.5 of these regulations.	Exempt
With a selling price of five hundred thousand pesos	1.5%

(P500,000.00) or less.	
With a selling price of more than five hundred thousand pesos (P500,000.00) but not more than two million pesos (P2,000,000.00).	3.0%
With selling price of more than two million pesos (P2,000,000.00)	5.0%

xxx xxx xxx

Gross selling price shall mean the consideration stated in the sales document or the fair market value determined in accordance with Section 6 (E) of the Code, as amended, whichever is higher. In an exchange, the fair market value of the property received in exchange, as determined in the Income Tax Regulations shall be used.

Where the consideration or part thereof is payable on installment, no withholding tax is required to be made on the periodic installment payments where the buyer is an individual not engaged in trade or business. In such a case, the applicable rate of tax based on the entire consideration shall be withheld on the last installment or installments to be paid to the seller.

However, if the buyer is engaged in trade or business, whether a corporation or otherwise, the tax shall be deducted and withheld by the buyer on every installment.

This provision was amended by RR 6-2001 on July 31, 2001:

Sec. 2.57.2. Income payment subject to [CWT] and rates prescribed thereon:

xxx xxx xxx

(J) Gross selling price or total amount of consideration or its equivalent paid to the seller/owner for the sale, exchange or transfer of real property classified as ordinary asset. - A [CWT] based on the gross selling price/total amount of consideration or the fair market value determined in accordance with Section 6(E) of the Code, whichever is higher, paid to the seller/owner for the sale, transfer or exchange of real property, other than capital asset, shall be imposed upon the withholding agent,/buyer, in accordance with the following schedule:

Where the seller/transferor is exempt from [CWT] in accordance with Sec. 2.57.5 of these regulations.	Exempt

Upon the following values of real property, where the