

## THIRD DIVISION

[ G.R. No. 177279, October 13, 2010 ]

**COMMISSIONER OF INTERNAL REVENUE, PETITIONER, VS. HON. RAUL M. GONZALEZ, SECRETARY OF JUSTICE, L. M. CAMUS ENGINEERING CORPORATION (REPRESENTED BY LUIS M. CAMUS AND LINO D. MENDOZA), RESPONDENTS.**

### DECISION

**VILLARAMA, JR., J.:**

This is a petition for review on certiorari under Rule 45 of the 1997 Rules of Civil Procedure, as amended, assailing the Decision<sup>[1]</sup> dated October 31, 2006 and Resolution<sup>[2]</sup> dated March 6, 2007 of the Court of Appeals (CA) in CA-G.R. SP No. 93387 which affirmed the Resolution<sup>[3]</sup> dated December 13, 2005 of respondent Secretary of Justice in I.S. No. 2003-774 for violation of Sections 254 and 255 of the National Internal Revenue Code of 1997 (NIRC).

The facts as culled from the records:

Pursuant to Letter of Authority (LA) No. 00009361 dated August 25, 2000 issued by then Commissioner of Internal Revenue (petitioner) Dakila B. Fonacier, Revenue Officers Remedios C. Advincula, Jr., Simplicio V. Cabantac, Jr., Ricardo L. Suba, Jr. and Aurelio Agustin T. Zamora supervised by Section Chief Sixto C. Dy, Jr. of the Tax Fraud Division (TFD), National Office, conducted a fraud investigation for all internal revenue taxes to ascertain/determine the tax liabilities of respondent L. M. Camus Engineering Corporation (LMCEC) for the taxable years 1997, 1998 and 1999.<sup>[4]</sup> The audit and investigation against LMCEC was precipitated by the information provided by an "informer" that LMCEC had substantial underdeclared income for the said period. For failure to comply with the subpoena *duces tecum* issued in connection with the tax fraud investigation, a criminal complaint was instituted by the Bureau of Internal Revenue (BIR) against LMCEC on January 19, 2001 for violation of Section 266 of the NIRC (I.S. No. 00-956 of the Office of the City Prosecutor of Quezon City).<sup>[5]</sup>

Based on data obtained from an "informer" and various clients of LMCEC,<sup>[6]</sup> it was discovered that LMCEC filed fraudulent tax returns with substantial underdeclarations of taxable income for the years 1997, 1998 and 1999. Petitioner thus assessed the company of total deficiency taxes amounting to P430,958,005.90 (income tax - P318,606,380.19 and value-added tax [VAT] - P112,351,625.71) covering the said period. The Preliminary Assessment Notice (PAN) was received by LMCEC on February 22, 2001.<sup>[7]</sup>

LMCEC's alleged underdeclared income was summarized by petitioner as follows:

Year	Income Per ITR	Income Per Investigation	Undeclared Income	Percentage of Underdeclaration
1997	96,638,540.00	283,412,140.84	186,733,600.84	193.30%
1998	86,793,913.00	236,863,236.81	150,069,323.81	172.90%
1999	88,287,792.00	251,507,903.13	163,220,111.13	184.90% <sup>[8]</sup>

In view of the above findings, assessment notices together with a formal letter of demand dated August 7, 2002 were sent to LMCEC through personal service on October 1, 2002.<sup>[9]</sup> Since the company and its representatives refused to receive the said notices and demand letter, the revenue officers resorted to constructive service<sup>[10]</sup> in accordance with Section 3, Revenue Regulations (RR) No. 12-99<sup>[11]</sup>.

On May 21, 2003, petitioner, through then Commissioner Guillermo L. Parayno, Jr., referred to the Secretary of Justice for preliminary investigation its complaint against LMCEC, Luis M. Camus and Lino D. Mendoza, the latter two were sued in their capacities as President and Comptroller, respectively. The case was docketed as I.S. No. 2003-774. In the Joint Affidavit executed by the revenue officers who conducted the tax fraud investigation, it was alleged that despite the receipt of the final assessment notice and formal demand letter on October 1, 2002, LMCEC failed and refused to pay the deficiency tax assessment in the total amount of P630,164,631.61, inclusive of increments, which had become final and executory as a result of the said taxpayer's failure to file a protest thereon within the thirty (30)-day reglementary period.<sup>[12]</sup>

Camus and Mendoza filed a Joint Counter-Affidavit contending that LMCEC cannot be held liable whatsoever for the alleged tax deficiency which had become due and demandable. Considering that the complaint and its annexes all showed that the suit is a simple civil action for collection and not a tax evasion case, the Department of Justice (DOJ) is not the proper forum for BIR's complaint. They also assailed as invalid the assessment notices which bear no serial numbers and should be shown to have been validly served by an Affidavit of Constructive Service executed and sworn to by the revenue officers who served the same. As stated in LMCEC's letter-protest dated December 12, 2002 addressed to Revenue District Officer (RDO) Clavelina S. Nacar of RD No. 40, Cubao, Quezon City, the company had already undergone a series of routine examinations for the years 1997, 1998 and 1999; under the NIRC, only one examination of the books of accounts is allowed per taxable year.<sup>[13]</sup>

LMCEC further averred that it had availed of the Bureau's Tax Amnesty Programs (Economic Recovery Assistance Payment [ERAP] Program and the Voluntary Assessment Program [VAP]) for 1998 and 1999; for 1997, its tax liability was terminated and closed under Letter of Termination<sup>[14]</sup> dated June 1, 1999 issued by petitioner and signed by the Chief of the Assessment Division.<sup>[15]</sup> LMCEC claimed it made payments of income tax, VAT and expanded withholding tax (EWT), as follows:

TAXABLE YEAR		AMOUNT OF TAXES PAID
1997	Termination Letter Under Letter of	EWT - P 6,000.00

	Authority No. 174600 Dated November 4, 1998	VAT - 540, 605.02 IT - 3,000.00
1998	ERAP Program pursuant to RR #2- 99	WC - 38,404.55 VAT - 61,635.40
1999	VAP Program pursuant to RR #8- 2001	IT - 878,495.28 VAT - 1,324,317.00 <sup>[16]</sup>

LMCEC argued that petitioner is now estopped from further taking any action against it and its corporate officers concerning the taxable years 1997 to 1999. With the grant of immunity from audit from the company's avilment of ERAP and VAP, which have a feature of a tax amnesty, the element of fraud is negated the moment the Bureau accepts the offer of compromise or payment of taxes by the taxpayer. The act of the revenue officers in finding justification under Section 6(B) of the NIRC (Best Evidence Obtainable) is misplaced and unavailing because they were not able to open the books of the company for the second time, after the routine examination, issuance of termination letter and the avilment of ERAP and VAP. LMCEC thus maintained that unless there is a prior determination of fraud supported by documents not yet incorporated in the docket of the case, petitioner cannot just issue LAs without first terminating those previously issued. It emphasized the fact that the BIR officers who filed and signed the Affidavit-Complaint in this case were the same ones who appeared as complainants in an earlier case filed against Camus for his alleged "failure to obey summons in violation of Section 5 punishable under Section 266 of the NIRC of 1997" (I.S. No. 00-956 of the Office of the City Prosecutor of Quezon City). After preliminary investigation, said case was dismissed for lack of probable cause in a Resolution issued by the Investigating Prosecutor on May 2, 2001.<sup>[17]</sup>

LMCEC further asserted that it filed on April 20, 2001 a protest on the PAN issued by petitioner for having no basis in fact and law. However, until now the said protest remains unresolved. As to the alleged informant who purportedly supplied the "confidential information," LMCEC believes that such person is fictitious and his true identity and personality could not be produced. Hence, this case is another form of harassment against the company as what had been found by the Office of the City Prosecutor of Quezon City in I.S. No. 00-956. Said case and the present case both have something to do with the audit/examination of LMCEC for taxable years 1997, 1998 and 1999 pursuant to LA No. 00009361.<sup>[18]</sup>

In the Joint Reply-Affidavit executed by the Bureau's revenue officers, petitioner disagreed with the contention of LMCEC that the complaint filed is not criminal in nature, pointing out that LMCEC and its officers Camus and Mendoza were being charged for the criminal offenses defined and penalized under Sections 254 (Attempt to Evade or Defeat Tax) and 255 (Willful Failure to Pay Tax) of the NIRC. This finds support in Section 205 of the same Code which provides for administrative (distrain, levy, fine, forfeiture, lien, etc.) and judicial (criminal or civil action) remedies in order to enforce collection of taxes. Both remedies may be pursued either independently or simultaneously. In this case, the BIR decided to simultaneously pursue both remedies and thus aside from this criminal action, the Bureau also initiated administrative proceedings against LMCEC.<sup>[19]</sup>

On the lack of control number in the assessment notice, petitioner explained that such is a mere office requirement in the Assessment Service for the purpose of internal control and monitoring; hence, the unnumbered assessment notices should not be interpreted as irregular or anomalous. Petitioner stressed that LMCEC already lost its right to file a protest letter after the lapse of the thirty (30)-day reglementary period. LMCEC's protest-letter dated December 12, 2002 to RDO Clavelina S. Nacar, RD No. 40, Cubao, Quezon City was actually filed only on December 16, 2002, which was disregarded by the petitioner for being filed out of time. Even assuming for the sake of argument that the assessment notices were invalid, petitioner contended that such could not affect the present criminal action, [20] citing the ruling in the landmark case of *Ungab v. Cusi, Jr.* [21]

As to the Letter of Termination signed by Ruth Vivian G. Gandia of the Assessment Division, Revenue Region No. 7, Quezon City, petitioner pointed out that LMCEC failed to mention that the undated Certification issued by RDO Pablo C. Cabreros, Jr. of RD No. 40, Cubao, Quezon City stated that the report of the 1997 Internal Revenue taxes of LMCEC had already been submitted for review and approval of higher authorities. LMCEC also cannot claim as excuse from the reopening of its books of accounts the previous investigations and examinations. Under Section 235 (a), an exception was provided in the rule on once a year audit examination in case of "fraud, irregularity or mistakes, as determined by the Commissioner". Petitioner explained that the distinction between a Regular Audit Examination and Tax Fraud Audit Examination lies in the fact that the former is conducted by the district offices of the Bureau's Regional Offices, the authority emanating from the Regional Director, while the latter is conducted by the TFD of the National Office only when instances of fraud had been determined by the petitioner. [22]

Petitioner further asserted that LMCEC's claim that it was granted immunity from audit when it availed of the VAP and ERAP programs is misleading. LMCEC failed to state that its availment of ERAP under RR No. 2-99 is not a grant of absolute immunity from audit and investigation, aside from the fact that said program was only for income tax and did not cover VAT and withholding tax for the taxable year 1998. As for LMCEC'S availment of VAP in 1999 under RR No. 8-2001 dated August 1, 2001 as amended by RR No. 10-2001 dated September 3, 2001, the company failed to state that it covers only income tax and VAT, and did not include withholding tax. However, LMCEC is not actually entitled to the benefits of VAP under Section 1 (1.1 and 1.2) of RR No. 10-2001. As to the principle of estoppel invoked by LMCEC, estoppel clearly does not lie against the BIR as this involved the exercise of an inherent power by the government to collect taxes. [23]

Petitioner also pointed out that LMCEC's assertion correlating this case with I.S. No. 00-956 is misleading because said case involves another violation and offense (Sections 5 and 266 of the NIRC). Said case was filed by petitioner due to the failure of LMCEC to submit or present its books of accounts and other accounting records for examination despite the issuance of subpoena *duces tecum* against Camus in his capacity as President of LMCEC. While indeed a Resolution was issued by Asst. City Prosecutor Titus C. Borlas on May 2, 2001 dismissing the complaint, the same is still on appeal and pending resolution by the DOJ. The determination of probable cause in said case is confined to the issue of whether there was already a violation of the NIRC by Camus in not complying with the subpoena *duces tecum* issued by the BIR.

[24]

Petitioner contended that precisely the reason for the issuance to the TFD of LA No. 00009361 by the Commissioner is because the latter agreed with the findings of the investigating revenue officers that fraud exists in this case. In the conduct of their investigation, the revenue officers observed the proper procedure under Revenue Memorandum Order (RMO) No. 49-2000 wherein it is required that before the issuance of a Letter of Authority against a particular taxpayer, a preliminary investigation should first be conducted to determine if a *prima facie* case for tax fraud exists. As to the allegedly unresolved protest filed on April 20, 2001 by LMCEC over the PAN, this has been disregarded by the Bureau for being pro forma and having been filed beyond the 15-day reglementary period. A subsequent letter dated April 20, 2001 was filed with the TFD and signed by a certain Juan Ventigan. However, this was disregarded and considered a mere scrap of paper since the said signatory had not shown any prior authorization to represent LMCEC. Even assuming said protest letter was validly filed on behalf of the company, the issuance of a Formal Demand Letter and Assessment Notice through constructive service on October 1, 2002 is deemed an implied denial of the said protest. Lastly, the details regarding the "informer" being confidential, such information is entitled to some degree of protection, including the identity of the informant against LMCEC.<sup>[25]</sup>

In their Joint Rejoinder-Affidavit,<sup>[26]</sup> Camus and Mendoza reiterated their argument that the identity of the alleged informant is crucial to determine if he/she is qualified under Section 282 of the NIRC. Moreover, there was no assessment that has already become final, the validity of its issuance and service has been put in issue being anomalous, irregular and oppressive. It is contended that for criminal prosecution to proceed before assessment, there must be a *prima facie* showing of a willful attempt to evade taxes. As to LMCEC's avilment of the VAP and ERAP programs, the certificate of immunity from audit issued to it by the BIR is plain and simple, but petitioner is now saying it has the right to renege with impunity from its undertaking. Though petitioner deems LMCEC not qualified to avail of the benefits of VAP, it must be noted that if it is true that at the time the petitioner filed I.S. No. 00-956 sometime in January 2001 it had already in its custody that "Confidential Information No. 29-2000 dated July 7, 2000", these revenue officers could have rightly filed the instant case and would not resort to filing said criminal complaint for refusal to comply with a subpoena *duces tecum*.

On September 22, 2003, the Chief State Prosecutor issued a Resolution<sup>[27]</sup> finding no sufficient evidence to establish probable cause against respondents LMCEC, Camus and Mendoza. It was held that since the payments were made by LMCEC under ERAP and VAP pursuant to the provisions of RR Nos. 2-99 and 8-2001 which were offered to taxpayers by the BIR itself, the latter is now in estoppel to insist on the criminal prosecution of the respondent taxpayer. The voluntary payments made thereunder are in the nature of a tax amnesty. The unnumbered assessment notices were found highly irregular and thus their validity is suspect; if the amounts indicated therein were collected, it is uncertain how these will be accounted for and if it would go to the coffers of the government or elsewhere. On the required prior determination of fraud, the Chief State Prosecutor declared that the Office of the City Prosecutor in I.S. No. 00-956 has already squarely ruled that (1) there was no prior determination of fraud, (2) there was indiscriminate issuance of LAs, and (3) the complaint was more of harassment. In view of such findings, any ensuing LA is