

SECOND DIVISION

[G.R. No. 177982, October 17, 2008]

FITNESS BY DESIGN, INC., PETITIONER, VS. COMMISSIONER ON INTERNAL REVENUE, RESPONDENT.

D E C I S I O N

CARPIO MORALES, J.:

On March 17, 2004, the Commissioner on Internal Revenue (respondent) assessed Fitness by Design, Inc. (petitioner) for deficiency income taxes for the tax year 1995 in the total amount of P10,647,529.69.^[1] Petitioner protested the assessment on the ground that it was issued beyond the three-year prescriptive period under Section 203 of the Tax Code.^[2] Additionally, petitioner claimed that since it was incorporated only on May 30, 1995, there was no basis to assume that it had already earned income for the tax year 1995.^[3]

On February 1, 2005, respondent issued a warrant of distraint and/or levy against petitioner,^[4] drawing petitioner to file on March 1, 2005 a Petition for Review (with Motion to Suspend Collection of Income Tax, Value Added Tax, Documentary Stamp Tax and Surcharges and Interests subject of this Petition)^[5] before the Court of Tax Appeals (CTA) before which it reiterated its defense of prescription. The petition was docketed as CTA Case No. 7160.

In his Answer,^[6] respondent alleged:

The right of the respondent to assess petitioner for deficiency income tax, VAT and Documentary Stamp Tax for the year 1995 has not prescribed pursuant to Section 222(a) of the 1997 Tax Code. Petitioner's 1995 Income Tax Return (ITR) filed on April 11, 1996 was false and fraudulent for its deliberate failure to declare its true sales. Petitioner declared in its 1995 Income Tax Return that it was on its pre-operation stage and has not declared its income. Investigation by the revenue officers of the respondent, however, disclosed that it has been operating/doing business and had sales operations for the year 1995 in the total amount of P7,156,336.08 which it failed to report in its 1995 ITR. Thus, for the year 1995, petitioner filed a fraudulent annual income return with **intent to evade tax.** Likewise, petitioner failed to file Value-Added Tax (VAT) Return and reported the amount of P7,156,336.08 as its gross sales for the year 1995. Hence, for **failure to file a VAT return and for filing a fraudulent income tax return for the year 1995, the corresponding taxes may be assessed at any time within ten (10) years after the discovery of such omission or fraud** pursuant to Section 222(a) of the 1997 Tax Code.

The subject deficiency tax assessments have already become final, executory and demandable for failure of the petitioner to file a protest within the reglementary period provided for by law. The "alleged protest" allegedly filed on June 25, 2004 at the Legal Division, Revenue Region No. 8, Makati City is nowhere to be found in the BIR Records nor reflected in the Record Book of the Legal Division as normally done by our receiving clerk when she receive[s] any document. The respondent, therefore, has legal basis to collect the tax liability either by distraint and levy or civil action.^[7] (Emphasis and underscoring supplied)

The aforecited Section 222(a)^[8] of the 1997 Tax Code provides:

In the case of a false or fraudulent return with intent to evade tax or of 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 the civil or criminal action for the collection thereof. (Underscoring supplied)

The Bureau of Internal Revenue (BIR) in fact filed on March 10, 2005 a criminal complaint before the Department of Justice against the officers and accountant of petitioner for violation of the provisions of "The National Internal Revenue Code of 1977, as amended,^[9] covering the taxable year 1995." The criminal complaint was docketed as I.S. No. 2005-203.

On motion of petitioner in CTA Case No. 7160, a preliminary hearing on the issue of prescription^[10] was conducted during which petitioner's former bookkeeper attested that a former colleague - certified public accountant Leonardo Sablan (Sablan) - illegally took custody of petitioner's accounting records, invoices, and official receipts and turned them over to the BIR.^[11]

On petitioner's request, a subpoena *ad testificandum* was issued to Sablan for the hearing before the CTA scheduled on September 4, 2006 but he failed to appear.^[12]

Petitioner thus requested for the issuance of another subpoena *ad testificandum* to Sablan for the hearing scheduled on October 23, 2006,^[13] and of subpoena *duces tecum* to the chief of the National Investigation Division of the BIR for the production of the Affidavit of the Informer bearing on the assessment in question.^[14] Petitioner's requests were granted.^[15]

During the scheduled hearing of the case on October 23, 2006, on respondent's counsel's manifestation that he was not furnished a copy of petitioner's motion for the issuance of subpoenas, the CTA ordered petitioner to file a motion for the issuance of subpoenas and to furnish respondent's counsel a copy thereof.^[16] Petitioner complied with the CTA order.^[17]

In a related move, petitioner submitted written interrogatories addressed to Sablan and to Henry Sarmiento and Marinella German, revenue officers of the National

Investigation Division of the BIR.^[18]

By **Resolution^[19] of January 15, 2007**, the CTA denied petitioner's Motion for Issuance of Subpoenas and disallowed the submission by petitioner of written interrogatories to Sablan, who is not a party to the case, and the revenue officers,^[20] it finding that the testimony, documents, and admissions sought are not relevant.^[21] Besides, the CTA found that to require Sablan to testify would violate Section 2 of Republic Act No. 2338, as implemented by Section 12 of Finance Department Order No. 46-66, proscribing the revelation of identities of informers of violations of internal revenue laws, except when the information is proven to be malicious or false.^[22]

In any event, the CTA held that there was no need to issue a subpoena *duces tecum* to obtain the Affidavit of the Informer as the same formed part of the BIR records of the case, the production of which had been ordered by it.^[23]

Petitioner's Motion for Reconsideration^[24] of the CTA Resolution of January 15, 2007 was denied,^[25] hence, the present Petition for Certiorari^[26] which imputes grave abuse of discretion to the CTA

I.

x x x in holding that the legality of the mode of acquiring the documents which are the bases of the above discussed deficiency tax assessments, the subject matter of the Petition for Review now pending in the Honorable Second Division, is not material and relevant to the issue of prescription.

II.

x x x in holding that Mr. Leonardo Sablan's testimony, if allowed, would violate RA 2338 which prohibits the BIR to reveal the identity of the informer since 1) the purpose of the subpoena is to elicit from him the whereabouts of the original accounting records, documents and receipts owned by the Petitioner and not to discover if he is the informer since the identity of the informer is not relevant to the issues raised; 2) RA 2338 cannot legally justify violation of the Petitioner's property rights by a person, whether he is an informer or not, since such RA cannot allow such invasion of property rights otherwise RA 2338 would run counter to the constitutional mandate that "no person shall be deprive[d] of life, liberty or property without due process of law."

III.

x x x in holding that the issuance of subpoena ad testificandum would constitute a violation of the prohibition to reveal the identity of the informer because compliance with such prohibition has been rendered moot and academic by the voluntary admissions of the Respondent himself.

IV.

x x x in holding that the constitutional right of an accused to examine the witness against him does not exist in this case. The Petitioner's liability for tax deficiency assessment which is the main issue in the Petition for Review is currently pending at the Honorable Second Division. Therefore, it is a prejudicial question raised in the criminal case filed by the herein Respondent against the officers of the Petitioner with the Department of Justice.

V.

x x x in dismissing the request for subpoena ad testificandum because the Opposition thereto submitted by the Respondent was not promptly filed as provided by the Rules of Court thus, it is respectfully submitted that, Respondent has waived his right to object thereto.

VI.

x x x when the Honorable Court of Tax Appeals ruled that the purpose of the Petitioner in requesting for written interrogatories is to annoy, embarrass, or oppress the witness because such ruling has no factual basis since Respondent never alleged nor proved that the witnesses to whom the interrogatories are addressed will be annoyed, embarrassed or oppressed; besides the only obvious purpose of the Petitioner is to know the whereabouts of accounting records and documents which are in the possession of the witnesses to whom the interrogatories are directed and to ultimately get possession thereof. Granting without admitting that there is annoyance, embarrassment or oppression; the same is not unreasonable.

VII.

x x x when it failed to rule that the BIR officers and employees are not covered by the prohibition under RA 2338 and do not have the authority to withhold from the taxpayer documents owned by such taxpayer.

VIII.

x x x when it required the "clear and unequivocal proof" of relevance of the documents as a condition precedent for the issuance of subpoena duces tecum.

IX.

x x x when it quashed the subpoena duces tecum as the Honorable Court had issued an outstanding order to the Respondent to certify and forward to the CTA all the records of the case because up to the date of this Petition the BIR records have not been submitted yet to the CTA.^[27]

Grave abuse of discretion implies such capricious and whimsical exercise of judgment as equivalent to lack of jurisdiction or, in other words, when the power is