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Justice Lorenzo Relova, the Court Administrator, concurred in the foregoing recommendation.

We hold that inasmuch as Commissioner Romeo N. Firme of the Comelec is now beyond the pale of this Court's disciplinary jurisdiction, the instant case has become moot and academic.

Therefore, this case is dismissed and considered closed.

SO ORDERED.

Barredo (Chairman), Concepcion Jr., Abad Santos, and *De Castro, JJ.,* concur.

FIRST DIVISION

[G.R. No. L-29485. November 21, 1980]

COMMISSIONER OF INTERNAL REVENUE, *petitioner, vs.* **AYALA SECURITIES CORPORATION and THE HONORABLE COURT OF TAX APPEALS,** *respondents.*

SYLLABUS

TAXATION; ASSESSMENT AND COLLECTION OF TAXES; LIMITATION; PRESUMPTION; APPLICABILITY TO CASE AT BAR.— Such ruling was in effect upheld by this Court *en banc* upon its dismissal of the taxpayer's appeal for lack of merit as abovestated. The Court is persuaded by the fundamental principle invoked by petitioner that limitations upon the right of the government to assess and collect taxes will not be presumed in the absence of clear legislation to the contrary and that where the government has not by express statutory provision provided a limitation upon its right to assess unpaid taxes, such right is imprescriptible. The Court, therefore, reconsiders its ruling in its decision' under reconsideration that

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the right to assess and collect the assessment in question had prescribed after five years, and instead rules that there is no such time limit on the right of the Commissioner of Internal Revenue to assess the 25% tax on unreasonably accumulated surplus provided in Section 25 of the Tax Code, since there is no express statutory provision limiting such right or providing for its prescription.

RESOLUTION

TEEHANKEE, *J.*:

Before the court is petitioner Commissioner of Internal Revenue's motion for reconsideration of the Court's decision of April 8, 1976 wherein the Court affirmed *in toto* the appealed decision of respondent Court of Tax Appeals, the dispositive portion of which provides as follows:

"WHEREFORE, the decision of the respondent Commissioner of Internal Revenue assessing petitioner the amount of ₱758,687.04 as 25% surtax and interest is reversed. Accordingly, said assessment of respondent for 1955 is hereby cancelled and declared of no force and effect. Without pronouncement as to costs."

This Court's decision under reconsideration held that the assessment made on February 21, 1961 by petitioner against respondent corporation (and received by the latter on March 22, 1961) in the sum of ₱758,687.04 on its surplus of ₱2,758,442.37 for its fiscal year ending September 30, 1955 fell under the five-year prescriptive period provided in Section 331 of the National Internal Revenue Code and that the assessment had, therefore, been made after the expiration of the said five-year prescriptive period and was of no binding force and effect.

Petitioner has urged that

"A perusal of Sections 331 and 332(a) will reveal that they refer to a tax, the basis of which is required by law to be reported in a return such as for example, income tax or sales tax. However, the surtax imposed by Section 25 of the Tax Code is not one such tax.

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Accumulated surplus are never returned for tax purposes, as there is no law requiring that such surplus be reported in a return for purposes of the 25% surtax. In fact, taxpayers resort to all means and devices to cover up the fact that they have unreasonably accumulated surplus."

Petitioner, therefore, submits that

"As there is no law requiring taxpayers to file returns of their accumulated surplus, it is obvious that neither Section 331 nor Section 332(a) of the Tax Code applies in a case involving the 25% surtax imposed by Section 25 of the Tax Code. x x x"

Petitioner cites the Court of Tax Appeals' ruling in the earlier case of *United Equipment & Supply Company vs. Commissioner of Internal Revenue* (CTA Case No. 1795, October 30, 1971) which was appealed by petitioner taxpayer to this Court in G. R. No. L-35653 bearing the same title, which appeal was denied by this Court *en banc* for lack of merit as per its Resolution of October 25, 1972. In said case, the tax court squarely ruled that the provisions of Sections 331 and 332 of the National Internal Revenue Code for prescriptive periods of five (5) and ten (10) years after the filing of the return do not apply to the tax on the taxpayer's unreasonably accumulated surplus under Section 25 of the Tax Code since no return is required to be filed by law or by regulation on such unduly accumulated surplus on earnings, reasoning as follows:

"In resisting the assessment amounting to ₱10,864.26 as accumulated earnings tax for 1957, petitioner also invoked the defense of prescription against the right of respondent to assess the said tax. It is contended that since its income tax return for 1957 was filed in 1958, and with the clarification by respondent in his letter dated May 14, 1963, that the amount sought to be collected was petitioner's surtax liability under Section 25 rather than deficiency corporate income tax under Section 24 of the National Internal Revenue Code, the assessment has already prescribed under Section 331 of the same Code.

"Section 331 of the Revenue Code provides:

"SEC. 331. *Period of limitation upon assessment and collection.* — Except as provided in the succeeding section,

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> internal revenue taxes shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. For the purpose of this section a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day; Provided, That this limitation shall not apply to cases already investigated prior to the approval of this Code.

"Obviously, Section 331 applies to assessment of national internal revenue taxes which requires the filing of returns. A return, the filing of which is necessary to start the running of the five-year period for making an assessment, must be one which is required for the particular tax. Consequently, it has been held that the filing of an income tax return does not start the running of the statute of limitation for assessment of the sales tax. (*Butuan Sawmill, Inc. v. Court of Tax Appeals*, G.R. No. L-20601, Feb. 28, 1966, 16 SCRA 277).

"Although petitioner filed an income tax return, no return was filed covering its surplus profits which were improperly accumulated. In fact, no return could have been filed, and the law could not possibly require, for obvious reasons, the filing of a return covering unreasonable accumulation of corporate surplus profits. A tax imposed upon unreasonable accumulation of surplus is in the nature of a penalty. (*Helvering v. National Grocery Co.*, 304 U.S. 282). It would not be proper for the law to compel a corporation to report improper accumulation of surplus. Accordingly, Section 331 limiting the right to assess internal revenue taxes within five years from the date the return was filed or was due does not apply.

"Neither does Section 332 apply. Said Section provides:

> "SEC. 332. *Exceptions as to period of limitation of assessment and collection of taxes.* — (a) 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 begun without assessment, at any time within ten years after the discovery of the falsity, fraud, or omission.
>
> "(b) Where before the expiration of the time prescribed in the preceding section for the assessment of the tax, both the Commissioner of Internal Revenue and the taxpayer have consented in writing to its assessment after such time, the tax

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may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

"(c) Where the assessment of any internal revenue tax has been made within the period of limitation above-prescribed such tax may be collected by distraint or levy by a proceeding in court, but only if begun (1) within five years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner of Internal Revenue and the taxpayer before the expiration of such five-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

"It will be noted that Section 332 has reference to national internal revenue taxes which require the filing of returns. This is implied from the provision that the ten-year period for assessment specified therein treats of the filing of a false or fraudulent return or of a failure to file a return. There can be no failure or omission to file a return where no return is required to be filed by law or by regulations. It is, therefore, our opinion that the ten-year period for making an assessment under Section 332 does not apply to internal revenue taxes which do not require the filing of a return.

"It is well settled limitations upon the right of the government to assess and collect taxes will not be presumed in the absence of clear legislation to the contrary. The existence of a time limit beyond which the government may recover unpaid taxes is purely dependent upon some express statutory provision, (51 Am. Jur. 867; 10 Mertens Law on Federal Income Taxation, par. 57. 02.). It follows that in the absence of express statutory provision, the right of the government to assess unpaid taxes is imprescriptible. Since there is no express statutory provision limiting the right of the Commissioner of Internal Revenue to assess the tax on unreasonable accumulation of surplus provided in Section 25 of the Revenue Code, said tax may be assessed at any time." (Italics supplied)

Such ruling was in effect upheld by this Court *en banc* upon its dismissal of the taxpayer's appeal for lack of merit as above-stated.

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The Court is persuaded by the fundamental principle invoked by petitioner that limitations upon the right of the government to assess and collect taxes will not be presumed in the absence of clear legislation to the contrary and that where the government has not by express statutory provision provided a limitation upon its right to assess unpaid taxes, such right is imprescriptible.

The Court, therefore, reconsiders its ruling in its decision under reconsideration that the right to assess and collect the assessment in question had prescribed after five years, and instead rules that there is no such time limit on the right of the Commissioner of Internal Revenue to assess the 25% tax on unreasonably accumulated surplus provided in Section 25 of the Tax Code, since there is no express statutory provision limiting such right or providing for its prescription. The underlying purpose of the additional tax in question on a corporation's improperly accumulated profits or surplus is as set forth in the text of Section 25 of the Tax Code itself[1] to avoid the situation where a corporation unduly retains its surplus earnings instead of declaring and paying dividends to its shareholders or members who would then have to pay the income tax due on such dividends received by them. The record amply shows that respondent corporation is a mere holding company of its shareholders through its mother company, a registered co-partnership then set up by the individual shareholders belonging to the same family and

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[1] "SEC. 25. *Additional tax on corporations improperly accumulating profits or surplus.* —

x x x x x x x x x

"(b) *Prima facie evidence.* — The fact that any corporation is a mere holding company shall be *prima facie* evidence of a purpose to avoid the tax upon its shareholders or members. Similar presumption will be in the case of an investment company where at any time during the taxable year more than fifty per centum in value of its outstanding stock is owned, directly or indirectly, by one person.

"(c) *Evidence determinative of a purpose.* — The fact that the earnings or profits of a corporation are permitted to accumulate beyond the reasonable needs of the business shall be determinative of the purpose to avoid the tax upon its shareholders or members unless the corporation, by clear preponderance of evidence, shall prove the contrary."

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that the *prima facie* evidence and presumption set up by the Tax Code, therefore, applied without having been adequately rebutted by the respondent corporation.

Thus, Mr. Lamberto J. Cabral, the accountant of the corporation, testified before the court as follows:

"Atty. Garces

> The investigation Your Honor, shows that for the year 1955, the Ayala Securities Corporation had 175,000 outstanding shares of stock and out of these shares of Ayala Securities Corporation, the Ayala and Company owned 174,996 shares of stock.

"Q.– Is that right, Mr. Cabral?

"Atty. Ong

> Objection, Your Honor, on the materiality of the question.

"Judge Alvarez

> What is the materiality of the question?

"Atty. Garces

> We want to prove to this Honorable Court that Ayala Securities Corporation is a holding or investment company, the parent company being Ayala and Company.

"Judge Alvarez

> Witness may answer.

"A.– I think so; yes.

"Q.– And Ayala and Company is owned almost wholly by the Zobel Family and the Ayala Family?

"Atty. Ong

> If Your Honor please, objection again on the materiality. What would counsel for the respondent prove on this point?

"Atty. Garces

> Same purpose, Your Honor; to prove that Ayala Securities Corporation is a mere investment or holding company.

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"Atty. Ong

What is the materiality of the case if it is a mere investment company. In fact, we are here in court to prove the reasonableness or unreasonableness of the accumulation of profit. I think counsel for the respondent is trying to harp on presumption; but actually we will not be delving on presumption but on actual facts proving the reasonableness of the accumulation based on actual evidence.

"Judge Alvarez

In order to determine the reasonableness or unreasonableness, there must be a basis. Witness will have to answer the question.

"A.– Yes.

"xxx xxx xxx

"Q.– As of September 30, 1955 when the Ayala Securities Corporation filed its income tax return, were the officers of the Ayala Securities Corporation and the Ayala and Company housed in the same building?

"A.– Yes, sir; they were.

"Q.– And also are the employees of the Ayala Securities Corporation and the Ayala and Company the same — meaning that the employees of the Ayala Securities Corporation are also the employees of the Ayala and Company?

"A.– At the time, if I remember right, Ayala and Company was the operating company and the employees were the employees of the Ayala and Company; (t.s.n., pp. 32-37).

Another witness, Mr. Salvador J. Lorayes, the Secretary and head of the Legal Department of the corporation, also testified that:

Judge Alvarez questions

"Q.– May we know from you whether Ayala Securities Corporation is an affiliate of Ayala and Company?

"A.– Yes, Your Honor.

"Q.– Do we understand from you that Ayala and Company is the mother corporation of this affiliate?

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"A.– That is correct.

"Q.– And that the policy of Ayala Securities Corporation is practically governed by the officers or partners of Ayala and Company?

"A.– They have a strong influence over the policy of Ayala Securities Corporation.

"Q.– So that whatever is decided by the partners of Ayala and Company for a certain investment or project would also be followed by Ayala Securities Corporation?

"A.– If the project is assigned to Ayala Securities Corporation, it will be followed by Ayala Securities Corporation; if to another affiliate, no (t.s.n., pp. 149-150). x x x"

Respondent corporation was therefore fully shown to fall under Revenue Regulation No. 2 implementing the provisions of the income tax law which provides on holding and investment companies that

"SEC. 20. *Holding and Investment Companies.* — A corporation having practically no activities except holding property, and collecting the income therefrom or investing therein, shall be considered a holding company within the meaning of Section 25."

Petitioner commissioner's plausible alternative contention is that even if the 25% surtax were to be deemed subject to prescription, computed from the filing of the income tax return in 1955, the intent to evade payment of the surtax is an inherent quality of the violation and the return filed must necessarily partake of a false and/or fraudulent character which would make applicable the 10-year prescriptive period provided in Section 332(a) of the Tax Code and since the assessment was made in 1961 (the sixth year), the assessment was clearly within the 10-year prescriptive period. The Court sees no necessity, however, for ruling on this point in view of its adherence to the ruling in the earlier case of United Equipment & Supply Co., *supra*, holding that the 25% surtax is not subject to any statutory prescriptive period.

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ACCORDINGLY, the Court's decision of April 8, 1976 is set aside and in lieu thereof, judgment is hereby rendered ordering respondent corporation to pay the assessment in the sum of ₱758,687.04 as 25% surtax on its unreasonably accumulated surplus, plus the 5% surcharge and 1% monthly interest thereon, pursuant to Section 51 (e) of the National Internal Revenue Code, as amended by R.A. 2343. With costs.

Makasiar, Fernandez, Guerrero, and *De Castro,* JJ.*, concur.

Melencio-Herrera, J., took no part.

SECOND DIVISION

[G.R. No. L-29576. November 21, 1980]

FRANCISCO COCOTANO, MARCIANO LABORA, and ANGEL MALALAY, *petitioners-appellants, vs.* **REPUBLIC OF THE PHILIPPINES and HON. CELEDONIO SALVADOR, Presiding Judge of the Municipal Court of Cebu City,** *respondents-appellees.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; JURISDICTION; CITY COURT COMPETENT TO PASS ON A MOTION FOR THE RECONSIDERATION OF ITS ORDER DENYING A MOTION FOR DISMISSAL.— On the merits of the petition, namely, the competence of a City Court to pass on a motion for the reconsideration of its order denying a motion for dismissal, it is quite apparent from its interlocutory character that no valid objection could be made. So it was made quite clear in the brief

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* Mr. Justice de Castro was designated to sit with the First Division.