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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.*

SYLLABUS

1. TAXATION; TAX EVASION; THE CRIME IS COMPLETE WHEN A FRAUDULENT RETURN IS KNOWINGLY AND WILLFULLY FILED WITH INTENT TO EVADE AND DEFEAT THE TAX; EFFECT THEREOF; CASE AT BAR. — It is clear that I.S. No. 00-956 involves a separate offense and hence *litis pendentia* is not present considering that the outcome of I.S. No. 00-956 is not determinative of the issue as to whether probable cause exists to charge the private respondents with the crimes of attempt to evade or defeat tax and willful failure to supply correct and accurate information and pay tax defined and penalized under Sections 254 and 255, respectively. For the crime of tax evasion in particular, compliance by the taxpayer with such subpoena, if any had been issued, is irrelevant. As we held in *Ungab v. Cusi, Jr.*, "[t]he crime is complete when the [taxpayer] has x x x knowingly and willfully filed [a] fraudulent [return] with intent to evade and defeat x x x the tax." Thus, respondent Secretary erred in holding that petitioner committed forum shopping when it filed the present criminal complaint during the pendency of its appeal from the City Prosecutor's dismissal of I.S. No. 00-956 involving the act of disobedience to the summons in the course of the preliminary investigation on LMCEC's correct tax liabilities for taxable years 1997, 1998 and 1999.

2. ID.; ID.; THE LACK OF CONSENT OF THE TAXPAYER UNDER INVESTIGATION DOES NOT IMPLY THAT THE BUREAU OF INTERNAL REVENUE (BIR) OBTAINED THE INFORMATION FROM THIRD PARTIES ILLEGALLY OR THAT THE INFORMATION RECEIVED IS FALSE OR MALICIOUS. — We have held that the lack of consent of the

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taxpayer under investigation does not imply that the BIR obtained the information from third parties illegally or that the information received is false or malicious. Nor does the lack of consent preclude the BIR from assessing deficiency taxes on the taxpayer based on the documents. In the same vein, herein private respondents cannot be allowed to escape criminal prosecution under Sections 254 and 255 of the NIRC by mere imputation of a "fictitious" or disqualified informant under Section 282 simply because other than disclosure of the official registry number of the third party "informer," the Bureau insisted on maintaining the confidentiality of the identity and personal circumstances of said "informer."

3. ID.; NOTICE OF ASSESSMENT; DEFINED AND CONSTRUED; CONTENTS THEREOF, DISCUSSED. — A notice of assessment is: [A] declaration of deficiency taxes issued to a [t]axpayer who fails to respond to a Pre-Assessment Notice (PAN) within the prescribed period of time, or whose reply to the PAN was found to be without merit. The Notice of Assessment shall inform the [t]axpayer of this fact, and that the report of investigation submitted by the Revenue Officer conducting the audit shall be given due course. The formal letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall **state the fact, the law, rules and regulations or jurisprudence on which the assessment is based, otherwise the formal letter of demand and the notice of assessment shall be void**. As it is, the formality of a control number in the assessment notice is not a requirement for its validity but rather the contents thereof which should inform the taxpayer of the declaration of deficiency tax against said taxpayer. Both the formal letter of demand and the notice of assessment shall be void if the former failed to state the fact, the law, rules and regulations or jurisprudence on which the assessment is based, which is a mandatory requirement under Section 228 of the NIRC. Section 228 of the NIRC provides that the taxpayer shall be informed in writing of the law and the facts on which the assessment is made. Otherwise, the assessment is void. To implement the provisions of Section 228 of the NIRC, RR No. 12-99 was enacted. Section 3.1.4 of the revenue regulation reads: 3.1.4. *Formal Letter of Demand and Assessment Notice.* – The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. **The letter of demand calling for payment of the taxpayer's deficiency**

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tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void. The same shall be sent to the taxpayer only by registered mail or by personal delivery. x x x.

4. ID.; TAX AMNESTY, DEFINED; THE TERMS OF THE AMNESTY LIKE THAT OF A TAX EXEMPTION MUST BE CONSTRUED STRICTLY AGAINST THE TAXPAYER AND LIBERALLY IN FAVOR OF THE TAXING AUTHORITY; APPLICATION TO VOLUNTARY ASSESSMENT PROGRAM (VAP) IN CASE AT BAR. — Tax amnesty is a general pardon to taxpayers who want to start a clean tax slate. It also gives the government a chance to collect uncollected tax from tax evaders without having to go through the tedious process of a tax case. Even assuming *arguendo* that the issuance of RR No. 2-99 is in the nature of tax amnesty, it bears noting that a tax amnesty, much like a tax exemption, is never favored nor presumed in law and if granted by statute, the terms of the amnesty like that of a tax exemption must be construed strictly against the taxpayer and liberally in favor of the taxing authority. For the same reason, the availment by LMCEC of VAP under RR No. 8-2001 as amended by RR No. 10-2001, through payment supposedly made in October 29, 2001 before the said program ended on October 31, 2001, did not amount to settlement of its assessed tax deficiencies for the period 1997 to 1999, nor immunity from prosecution for filing fraudulent return and attempt to evade or defeat tax. As correctly asserted by petitioner, from the express terms of the aforesaid revenue regulations, LMCEC is not qualified to avail of the VAP granting taxpayers the privilege of *last priority in the audit and investigation* of all internal revenue taxes for the taxable year 2000 and all prior years under certain conditions, considering that *first*, it was issued a PAN on *February 19, 2001*, and *second*, it was the subject of investigation as a result of verified information filed by a Tax Informer under Section 282 of the NIRC duly recorded in the BIR Official Registry as Confidential Information (CI) No. 29-2000 even prior to the issuance of the PAN. x x x Given the explicit conditions for the grant of immunity from audit under RR No. 2-99, RR No. 8-2001 and RR No. 10-2001, we hold that respondent Secretary gravely erred in declaring that petitioner is now estopped from assessing any tax deficiency against LMCEC after issuance of the aforementioned documents of

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immunity from audit/investigation and settlement of tax liabilities. It is axiomatic that the State can never be in estoppel, and this is particularly true in matters involving taxation. The errors of certain administrative officers should never be allowed to jeopardize the government's financial position.

5. ID.; TAX ASSESSMENTS; ASSESSMENT MAY BE PROTESTED BY FILING A REQUEST FOR RECONSIDERATION OR REINVESTIGATION WITHIN 30 DAYS FROM RECEIPT OF THE ASSESSMENT BY THE TAXPAYER; EFFECT OF FAILURE; CASE AT BAR. — Tax assessments by tax examiners are presumed correct and made in good faith, and all presumptions are in favor of the correctness of a tax assessment unless proven otherwise. We have held that a taxpayer's failure to file a petition for review with the Court of Tax Appeals within the statutory period rendered the disputed assessment final, executory and demandable, thereby precluding it from interposing the defenses of legality or validity of the assessment and prescription of the Government's right to assess. Indeed, any objection against the assessment should have been pursued following the avenue paved in Section 229 (now Section 228) of the NIRC on protests on assessments of internal revenue taxes. Records bear out that the assessment notice and Formal Letter of Demand dated August 7, 2002 were duly served on LMCEC on October 1, 2002. Private respondents did not file a motion for reconsideration of the said assessment notice and formal demand; neither did they appeal to the Court of Tax Appeals. Section 228 of the NIRC provides the remedy to dispute a tax assessment within a certain period of time. It states that an assessment may be protested by filing a request for reconsideration or reinvestigation within 30 days from receipt of the assessment by the taxpayer. No such administrative protest was filed by private respondents seeking reconsideration of the August 7, 2002 assessment notice and formal letter of demand. Private respondents cannot belatedly assail the said assessment, which they allowed to lapse into finality, by raising issues as to its validity and correctness during the preliminary investigation after the BIR has referred the matter for prosecution under Sections 254 and 255 of the NIRC. x x x The determination of probable cause is part of the discretion granted to the investigating prosecutor and ultimately, the Secretary of Justice. However, this Court and the CA possess the power to review findings of prosecutors in preliminary

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> investigations. Although policy considerations call for the widest latitude of deference to the prosecutor's findings, courts should never shirk from exercising their power, when the circumstances warrant, to determine whether the prosecutor's findings are supported by the facts, or by the law. In so doing, courts do not act as prosecutors but as organs of the judiciary, exercising their mandate under the Constitution, relevant statutes, and remedial rules to settle cases and controversies. Clearly, the power of the Secretary of Justice to review does not preclude this Court and the CA from intervening and exercising our own powers of review with respect to the DOJ's findings, such as in the exceptional case in which grave abuse of discretion is committed, as when a clear sufficiency or insufficiency of evidence to support a finding of probable cause is ignored.

APPEARANCES OF COUNSEL

The Solicitor General for petitioner.
Orioste Lim & Calderon Law Offices for private respondent.

D E C I S I O N

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[1] dated October 31, 2006 and Resolution[2] dated March 6, 2007 of the Court of Appeals (CA) in CA-G.R. SP No. 93387 which affirmed the Resolution[3] dated December 13, 2005 of respondent Secretary of Justice in I.S. No. 2003-774 for

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[1] CA *rollo*, pp. 130-137. Penned by Associate Justice Juan Q. Enriquez, Jr. and concurred in by Associate Justices Ruben T. Reyes (now a retired member of this Court) and Vicente S.E. Veloso.

[2] *Id.* at 155-156.

[3] *Id.* at 31-41.

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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.[4] 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).[5]

Based on data obtained from an "informer" and various clients of LMCEC,[6] 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 ₱430,958,005.90 (income tax — ₱318,606,380.19 and value-added tax [VAT] — ₱112,351,625.71) covering the said period. The Preliminary Assessment Notice (PAN) was received by LMCEC on February 22, 2001.[7]

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[4] *Id.* at 49.

[5] *Id.* at 64.

[6] Records, p. 102.

[7] CA *rollo*, pp. 102-104.

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

Year	Income Per ITR	Income Per Investigation	Undeclared Income	Percentage of Under-declaration
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%[8]

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.[9] Since the company and its representatives refused to receive the said notices and demand letter, the revenue officers resorted to constructive service[10] in accordance with Section 3, Revenue Regulations (RR) No. 12-99.[11]

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 ₱630,164,631.61, inclusive of increments, which had become final and executory as a result of the said

[8] Records, p. 159.

[9] CA *rollo*, pp. 50-60.

[10] Records, pp. 139-140.

[11] Revenue Regulations No. 12-99, Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extrajudicial Settlement of a Taxpayer's Criminal Violation of the Code through Payment of a Suggested Compromise Penalty, September 6, 1999.

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taxpayer's failure to file a protest thereon within the thirty (30)-day reglementary period.[12]

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 assail 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.[13]

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[14] dated June 1, 1999 issued by petitioner and signed by the Chief of the Assessment Division.[15] 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 Authority No. 174600 Dated November 4, 1998	EWT - ₱ 6,000.00 VAT - 540,605.02 IT- 3,000.00

[12] CA *rollo*, pp. 42-48.

[13] *Id.* at 61-62.

[14] Records, p. 97.

[15] CA *rollo*, p. 62.

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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[16]

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 availment 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 availment 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.[17]

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

[16] *Id.* at 62-63.

[17] *Id.* at 64.

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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.[18]

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 (distraint, 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.[19]

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]

[18] *Id.* at 65.

[19] Records, pp. 158-159.

[20] *Id.* at 157-158.

[21] Nos. L-41919-24, May 30, 1980, 97 SCRA 877.

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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]

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[22] Records, pp. 156-157.

[23] *Id.* at 154-155.

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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

[24] *Id*. at 153-154.

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protection, including the identity of the informant against LMCEC.[25]

In their Joint Rejoinder-Affidavit,[26] 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 availment 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[27] 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

[25] *Id.* at 152-153.

[26] *Id.* at 114-119.

[27] CA *rollo*, pp. 67-74.

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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 thus defective and allowing the collection on the assailed assessment notices would already be in the context of a "fishing expedition" or "witch-hunting." Consequently, there is nothing to speak of regarding the finality of assessment notices in the aggregate amount of ₱630,164,631.61.

Petitioner filed a motion for reconsideration which was denied by the Chief State Prosecutor.[28]

Petitioner appealed to respondent Secretary of Justice but the latter denied its petition for review under Resolution dated December 13, 2005.[29]

The Secretary of Justice found that petitioner's claim that there is yet no finality as to LMCEC's payment of its 1997 taxes since the audit report was still pending review by higher authorities, is unsubstantiated and misplaced. It was noted that the Termination Letter issued by the Commissioner on June 1, 1999 is explicit that the matter is considered closed. As for taxable year 1998, respondent Secretary stated that the record shows that LMCEC paid VAT and withholding tax in the amount of ₱61,635.40 and ₱38,404.55, respectively. This eventually gave rise to the issuance of a certificate of immunity from audit for 1998 by the Office of the Commissioner of Internal Revenue. For taxable year 1999, respondent Secretary found that pursuant to earlier LA No. 38633 dated July 4, 2000, LMCEC's 1999 tax liabilities were still pending investigation for which reason LMCEC assailed the subsequent issuance of LA No. 00009361 dated August 25, 2000 calling for a similar investigation of its alleged 1999 tax deficiencies when no final determination has yet been arrived on the earlier LA No. 38633.[30]

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[28] *Id.* at 76-85.

[29] *Id.* at 31-41, 86-101.

[30] *Id.* at 36-37.

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On the allegation of fraud, respondent Secretary ruled that petitioner failed to establish the existence of the following circumstances indicating fraud in the settlement of LMCEC's tax liabilities: (1) there must be intentional and substantial understatement of tax liability by the taxpayer; (2) there must be intentional and substantial overstatement of deductions or exemptions; and (3) recurrence of the foregoing circumstances. *First*, petitioner miserably failed to explain why the assessment notices were unnumbered; *second*, the claim that the tax fraud investigation was precipitated by an alleged "informant" has not been corroborated nor was it clearly established, hence there is no other conclusion but that the Bureau engaged in a "fishing expedition"; and *furthermore*, petitioner's course of action is contrary to Section 235 of the NIRC allowing only once in a given taxable year such examination and inspection of the taxpayer's books of accounts and other accounting records. There was no convincing proof presented by petitioner to show that the case of LMCEC falls under the exceptions provided in Section 235. Respondent Secretary duly considered the issuance of Certificate of Immunity from Audit and Letter of Termination dated June 1, 1999 issued to LMCEC.[31]

Anent the earlier case filed against the same taxpayer (I.S. No. 00-956), the Secretary of Justice found petitioner to have engaged in forum shopping in view of the fact that while there is still pending an appeal from the Resolution of the City Prosecutor of Quezon City in said case, petitioner hurriedly filed the instant case, which not only involved the same parties but also similar substantial issues (the joint complaint-affidavit also alleged the issuance of LA No. 00009361 dated August 25, 2000). Clearly, the evidence of *litis pendentia* is present. Finally, respondent Secretary noted that if indeed LMCEC committed fraud in the settlement of its tax liabilities, then at the outset, it should have been discovered by the agents of petitioner, and consequently petitioner should not have issued the Letter of Termination and the Certificate of Immunity From Audit. Petitioner thus should have been more circumspect in the issuance of said documents.[32]

[31] *Id.* at 37-39.

[32] *Id.* at 39-41.

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Its motion for reconsideration having been denied, petitioner challenged the ruling of respondent Secretary *via* a *certiorari* petition in the CA.

On October 31, 2006, the CA rendered the assailed decision[33] denying the petition and concurred with the findings and conclusions of respondent Secretary. Petitioner's motion for reconsideration was likewise denied by the appellate court.[34] It appears that entry of judgment was issued by the CA stating that its October 31, 2006 Decision attained finality on March 25, 2007.[35] However, the said entry of judgment was set aside upon manifestation by the petitioner that it has filed a petition for review before this Court subsequent to its receipt of the Resolution dated March 6, 2007 denying petitioner's motion for reconsideration on March 20, 2007.[36]

The petition is anchored on the following grounds:

I.

The Honorable Court of Appeals erroneously sustained the findings of the Secretary of Justice who gravely abused his discretion by dismissing the complaint based on grounds which are not even elements of the offenses charged.

II.

The Honorable Court of Appeals erroneously sustained the findings of the Secretary of Justice who gravely abused his discretion by dismissing petitioner's evidence, contrary to law.

III.

The Honorable Court of Appeals erroneously sustained the findings of the Secretary of Justice who gravely abused his discretion by inquiring into the validity of a Final Assessment Notice which has become final, executory and demandable pursuant to Section 228 of the Tax Code of 1997 for failure of private respondent to file a protest against the same.[37]

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[33] *Id.* at 130-137.

[34] *Id.* at 155-156.

[35] *Id.* at 158.

[36] *Id.* at 206.

[37] *Rollo,* p. 202.

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The core issue to be resolved is whether LMCEC and its corporate officers may be prosecuted for violation of Sections 254 (Attempt to Evade or Defeat Tax) and 255 (Willful Failure to Supply Correct and Accurate Information and Pay Tax).

Petitioner filed the criminal complaint against the private respondents for violation of the following provisions of the NIRC, as amended:

> SEC. 254. *Attempt to Evade or Defeat Tax.* – Any person who **willfully attempts in any manner to evade or defeat any tax** imposed under this Code **or the payment thereof** shall, in addition to other penalties provided by law, upon conviction thereof, be punished by a fine of not less than Thirty thousand pesos (₱30,000) but not more than One hundred thousand pesos (₱100,000) and suffer imprisonment of not less than two (2) years but not more than four (4) years: *Provided,* That the conviction or acquittal obtained under this Section shall not be a bar to the filing of a civil suit for the collection of taxes.
>
> SEC. 255. *Failure to File Return, Supply Correct and Accurate Information, Pay Tax, Withhold and Remit Tax and Refund Excess Taxes Withheld on Compensation.* – Any person required under this Code or by rules and regulations promulgated thereunder to pay any tax, make a return, keep any record, or supply any correct and accurate information, **who willfully fails to pay such tax,** make such return, keep such record, or **supply such correct and accurate information,** or withhold or remit taxes withheld, or refund excess taxes withheld on compensations at the time or times required by law or rules and regulations shall, in addition to other penalties provided by law, upon conviction thereof, be punished by a fine of not less than Ten thousand pesos (₱10,000) and suffer imprisonment of not less than one (1) year but not more than ten (10) years.
>
> x x x (Emphasis supplied.)

Respondent Secretary concurred with the Chief State Prosecutor's conclusion that there is insufficient evidence to establish probable cause to charge private respondents under the above provisions, based on the following findings: (1) the tax deficiencies of LMCEC for taxable years 1997, 1998 and 1999 have all been settled or terminated, as in fact LMCEC was issued a Certificate of Immunity and Letter of Termination,

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and availed of the ERAP and VAP programs; (2) there was no prior determination of the existence of fraud; (3) the assessment notices are unnumbered, hence irregular and suspect; (4) the books of accounts and other accounting records may be subject to audit examination only once in a given taxable year and there is no proof that the case falls under the exceptions provided in Section 235 of the NIRC; and (5) petitioner committed forum shopping when it filed the instant case even as the earlier criminal complaint (I.S. No. 00-956) dismissed by the City Prosecutor of Quezon City was still pending appeal.

Petitioner argues that with the finality of the assessment due to failure of the private respondents to challenge the same in accordance with Section 228 of the NIRC, respondent Secretary has no jurisdiction and authority to inquire into its validity. Respondent taxpayer is thereby allowed to do indirectly what it cannot do directly – to raise a collateral attack on the assessment when even a direct challenge of the same is legally barred. The rationale for dismissing the complaint on the ground of lack of control number in the assessment notice likewise betrays a lack of awareness of tax laws and jurisprudence, such circumstance not being an element of the offense. Worse, the final, conclusive and undisputable evidence detailing a crime under our taxation laws is swept under the rug so easily on mere conspiracy theories imputed on persons who are not even the subject of the complaint.

We grant the petition.

There is no dispute that prior to the filing of the complaint with the DOJ, the report on the tax fraud investigation conducted on LMCEC disclosed that it made substantial underdeclarations in its income tax returns for 1997, 1998 and 1999. Pursuant to RR No. 12-99,[38] a PAN was sent to and received by LMCEC

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[38] Revenue Regulations No. 12-99, Section 3.1.2.

SECTION 3. Due process requirement in the issuance of a deficiency tax assessment. –

x x x x x x x x x

3.1.2 Preliminary Assessment Notice (PAN). – If after review and

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on February 22, 2001 wherein it was notified of the proposed assessment of deficiency taxes amounting to ₱430,958,005.90 (income tax - ₱318,606,380.19 and VAT - ₱112,351,625.71) covering taxable years 1997, 1998 and 1999.[39] In response to said PAN, LMCEC sent a letter-protest to the TFD, which denied the same on April 12, 2001 for lack of legal and factual basis and also for having been filed beyond the 15-day reglementary period.[40]

As mentioned in the PAN, the revenue officers were not given the opportunity to examine LMCEC's books of accounts and other accounting records because its officers failed to comply with the subpoena *duces tecum* earlier issued, to verify its alleged underdeclarations of income reported by the Bureau's informant under Section 282 of the NIRC. Hence, a criminal complaint was filed by the Bureau against private respondents for violation of Section 266 which provides:

SEC. 266. *Failure to Obey Summons.* – Any person who, being duly summoned to appear to testify, or to appear and produce books of accounts, records, memoranda, or other papers, or to furnish information as required under the pertinent provisions of this Code, neglects to appear or to produce such books of accounts, records, memoranda, or other papers, or to furnish such information, shall, upon conviction, be punished by a fine of not less than Five thousand pesos (₱5,000) but not more than Ten thousand pesos (₱10,000) and suffer imprisonment of not less than one (1) year but not more than two (2) years.

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evaluation by the Assessment Division or by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing in detail, the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based. If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN, he shall be considered in default, in which case, a formal letter of demand and assessment notice shall be caused to be issued by the said Office, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.

[39] CA *rollo*, pp. 102-104.

[40] Records, p. 120.

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It is clear that I.S. No. 00-956 involves a separate offense and hence *litis pendentia* is not present considering that the outcome of I.S. No. 00-956 is not determinative of the issue as to whether probable cause exists to charge the private respondents with the crimes of attempt to evade or defeat tax and willful failure to supply correct and accurate information and pay tax defined and penalized under Sections 254 and 255, respectively. For the crime of tax evasion in particular, compliance by the taxpayer with such subpoena, if any had been issued, is irrelevant. As we held in *Ungab v. Cusi, Jr.*,[41] "[t]he crime is complete when the [taxpayer] has x x x knowingly and willfully filed [a] fraudulent [return] with intent to evade and defeat x x x the tax." Thus, respondent Secretary erred in holding that petitioner committed forum shopping when it filed the present criminal complaint during the pendency of its appeal from the City Prosecutor's dismissal of I.S. No. 00-956 involving the act of disobedience to the summons in the course of the preliminary investigation on LMCEC's correct tax liabilities for taxable years 1997, 1998 and 1999.

In the Details of Discrepancies attached as Annex B of the PAN,[42] private respondents were already notified that inasmuch as the revenue officers were not given the opportunity to examine LMCEC's books of accounts, accounting records and other documents, said revenue officers gathered information from third parties. Such procedure is authorized under Section 5 of the NIRC, which provides:

> SEC. 5. *Power of the Commissioner to Obtain Information, and to Summon, Examine, and Take Testimony of Persons.* – In ascertaining the correctness of any return, or in making a return when none has been made, or in determining the liability of any person for any internal revenue tax, or in collecting any such liability, or in evaluating tax compliance, the Commissioner is authorized:
>
> (A) To examine any book, paper, record or other data which may be relevant or material to such inquiry;

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[41] *Supra* note 21 at 884, citing *Guzik v. United States*, 54 F2d. 618.

[42] CA *rollo*, p. 104.

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(B) To obtain on a regular basis **from any person other than the person whose internal revenue tax liability is subject to audit or investigation**, or from any office or officer of the national and local governments, government agencies and instrumentalities, including the *Bangko Sentral ng Pilipinas* and government-owned or -controlled corporations, any information such as, but not limited to, costs and volume of production, receipts or sales and gross incomes of taxpayers, and the names, addresses, and financial statements of corporations, mutual fund companies, insurance companies, regional operating headquarters of multinational companies, joint accounts, associations, joint ventures or consortia and registered partnerships, and their members;

(C) To summon the person liable for tax or required to file a return, or any officer or employee of such person, or any person having possession, custody, or care of the books of accounts and other accounting records containing entries relating to the business of the person liable for tax, or any other person, to appear before the Commissioner or his duly authorized representative at a time and place specified in the summons and to produce such books, papers, records, or other data, and to give testimony;

(D) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry; x x x

x x x (Emphasis supplied.)

Private respondents' assertions regarding the qualifications of the "informer" of the Bureau deserve scant consideration. We have held that the lack of consent of the taxpayer under investigation does not imply that the BIR obtained the information from third parties illegally or that the information received is false or malicious. Nor does the lack of consent preclude the BIR from assessing deficiency taxes on the taxpayer based on the documents.[43] In the same vein, herein private respondents cannot be allowed to escape criminal prosecution under Sections 254 and 255 of the NIRC by mere imputation of a "fictitious" or disqualified informant under Section 282 simply because other than disclosure of the official registry number of the third party "informer," the Bureau insisted on maintaining the

[43] *Fitness By Design, Inc. v. Commissioner of Internal Revenue,* G.R. No. 177982, October 17, 2008, 569 SCRA 788, 797.

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confidentiality of the identity and personal circumstances of said "informer."

Subsequently, petitioner sent to LMCEC by constructive service allowed under Section 3 of RR No. 12-99, assessment notice and formal demand informing the said taxpayer of the law and the facts on which the assessment is made, as required by Section 228 of the NIRC. Respondent Secretary, however, fully concurred with private respondents' contention that the assessment notices were invalid for being unnumbered and the tax liabilities therein stated have already been settled and/or terminated.

We do not agree.

A notice of assessment is:

> [A] declaration of deficiency taxes issued to a [t]axpayer who fails to respond to a Pre-Assessment Notice (PAN) within the prescribed period of time, or whose reply to the PAN was found to be without merit. The Notice of Assessment shall inform the [t]axpayer of this fact, and that the report of investigation submitted by the Revenue Officer conducting the audit shall be given due course.
>
> The formal letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall **state the fact, the law, rules and regulations or jurisprudence on which the assessment is based, otherwise the formal letter of demand and the notice of assessment shall be void**.[44]

As it is, the formality of a control number in the assessment notice is not a requirement for its validity but rather the contents thereof which should inform the taxpayer of the declaration of deficiency tax against said taxpayer. Both the formal letter of demand and the notice of assessment shall be void if the former failed to state the fact, the law, rules and regulations or jurisprudence on which the assessment is based, which is a mandatory requirement under Section 228 of the NIRC.

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[44] *Commissioner of Internal Revenue v. Enron Subic Power Corporation,* G.R. No. 166387, January 19, 2009, 576 SCRA 212, 216, citing *http://www.bir.gov.ph/taxpayerrights/taxpayerrights.htm.*

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Section 228 of the NIRC provides that the taxpayer shall be informed in writing of the law and the facts on which the assessment is made. Otherwise, the assessment is void. To implement the provisions of Section 228 of the NIRC, RR No. 12-99 was enacted. Section 3.1.4 of the revenue regulation reads:

> 3.1.4. *Formal Letter of Demand and Assessment Notice.* – The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. **The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void.** The same shall be sent to the taxpayer only by registered mail or by personal delivery. x x x.[45] (Emphasis supplied.)

The Formal Letter of Demand dated August 7, 2002 contains not only a detailed computation of LMCEC's tax deficiencies but also details of the specified discrepancies, explaining the legal and factual bases of the assessment. It also reiterated that in the absence of accounting records and other documents necessary for the proper determination of the company's internal revenue tax liabilities, the investigating revenue officers resorted to the "Best Evidence Obtainable" as provided in Section 6(B) of the NIRC (third party information) and in accordance with the procedure laid down in RMC No. 23-2000 dated November 27, 2000. Annex "A" of the Formal Letter of Demand thus stated:

> Thus, to verify the validity of the information previously provided by the informant, the assigned revenue officers resorted to third party information. Pursuant to Section 5(B) of the NIRC of 1997, access letters requesting for information and the submission of certain documents (*i.e.*, Certificate of Income Tax Withheld at Source and/or Alphabetical List showing the income payments made to L.M. Camus Engineering Corporation for the taxable years 1997 to 1999) were sent to the various clients of the subject corporation, including but not limited to the following:

[45] *Id.*; See also *Commissioner of Internal Revenue v. Reyes,* G.R. Nos. 159694 & 163581, January 27, 2006, 480 SCRA 382.

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1. Ayala Land Inc.
2. Filinvest Alabang Inc.
3. D.M. Consunji, Inc.
4. SM Prime Holdings, Inc.
5. Alabang Commercial Corporation
6. Philam Properties Corporation
7. SM Investments, Inc.
8. Shoemart, Inc.
9. Philippine Securities Corporation
10. Makati Development Corporation

From the documents gathered and the data obtained therein, the substantial underdeclaration as defined under Section 248(B) of the NIRC of 1997 by your corporation of its income had been confirmed.

x x x[46] (Emphasis supplied.)

In the same letter, Assistant Commissioner Percival T. Salazar informed private respondents that the estimated tax liabilities arising from LMCEC's underdeclaration amounted to ₱186,773,600.84 in 1997, ₱150,069,323.81 in 1998 and ₱163,220,111.13 in 1999. These figures confirmed that the non-declaration by LMCEC for the taxable years 1997, 1998 and 1999 of an amount exceeding 30% income[47] declared in its return is considered a substantial underdeclaration of income, *which constituted* ***prima facie*** *evidence* of false or fraudulent return under Section 248(B)[48]

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[46] CA *rollo*, p. 60.

[47] *Id.* at 59.

[48] SEC. 248. *Civil Penalties.* –

x x x x x x x x x

(B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud; *Provided,* That a substantial underdeclaration of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, shall constitute *prima facie* evidence of a false or fraudulent return: *Provided, further,* That *failure to report sales, receipts or income in an*

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of the NIRC, as amended.[49]

On the alleged settlement of the assessed tax deficiencies by private respondents, respondent Secretary found the latter's claim as meritorious on the basis of the Certificate of Immunity From Audit issued on December 6, 1999 pursuant to RR No. 2-99 and Letter of Termination dated June 1, 1999 issued by Revenue Region No. 7 Chief of Assessment Division Ruth Vivian G. Gandia. Petitioner, however, clarified that the certificate of immunity from audit covered only income tax for the year 1997 and does not include VAT and withholding taxes, while the Letter of Termination involved tax liabilities for taxable year 1997 (EWT, VAT and income taxes) but which was submitted for review of higher authorities as per the Certification of RD No. 40 District Officer Pablo C. Cabreros, Jr.[50] For 1999, private respondents supposedly availed of the VAP pursuant to RR No. 8-2001.

RR No. 2-99 issued on February 7, 1999 explained in its Policy Statement that considering the scarcity of financial and human resources as well as the time constraints within which the Bureau has to "clean the Bureau's backlog of unaudited tax returns in order to keep updated and be focused with the most current accounts" in preparation for the full implementation of a computerized tax administration, the said revenue regulation was issued "providing for *last priority in audit and investigation* of tax returns" to accomplish the said objective "without, however, compromising the revenue collection that would have been generated from audit and enforcement activities." The program named as "Economic Recovery Assistance Payment (ERAP) Program" granted immunity from audit and investigation of income tax, VAT and percentage tax returns for 1998. It

amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding thirty percent (30%) of actual deductions, shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions, as mentioned herein.

[49] See *Santos v. People,* G.R. No. 173176, August 26, 2008, 563 SCRA 341, 347.

[50] Records, p. 138.

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expressly excluded withholding tax returns (whether for income, VAT, or percentage tax purposes). Since such immunity from audit and investigation does not preclude the collection of revenues generated from audit and enforcement activities, it follows that the Bureau is likewise not barred from collecting any tax deficiency discovered as a result of tax fraud investigations. Respondent Secretary's opinion that RR No. 2-99 contains the feature of a tax amnesty is thus misplaced.

Tax amnesty is a general pardon to taxpayers who want to start a clean tax slate. It also gives the government a chance to collect uncollected tax from tax evaders without having to go through the tedious process of a tax case.[51] Even assuming *arguendo* that the issuance of RR No. 2-99 is in the nature of tax amnesty, it bears noting that a tax amnesty, much like a tax exemption, is never favored nor presumed in law and if granted by statute, the terms of the amnesty like that of a tax exemption must be construed strictly against the taxpayer and liberally in favor of the taxing authority.[52]

For the same reason, the availment by LMCEC of VAP under RR No. 8-2001 as amended by RR No. 10-2001, through payment supposedly made in October 29, 2001 before the said program ended on October 31, 2001, did not amount to settlement of its assessed tax deficiencies for the period 1997 to 1999, nor immunity from prosecution for filing fraudulent return and attempt to evade or defeat tax. As correctly asserted by petitioner, from the express terms of the aforesaid revenue regulations, LMCEC is not qualified to avail of the VAP granting taxpayers the privilege of *last priority in the audit and investigation* of all internal revenue taxes for the taxable year 2000 and all prior years under certain conditions, considering

[51] *Bañas, Jr. v. Court of Appeals*, G.R. No. 102967, February 10, 2000, 325 SCRA 259, 273.

[52] *Id.* at 274, citing *People v. Castañeda, Jr.*, No. L-46881, September 15, 1988, 165 SCRA 327, 341 and *Commissioner of Internal Revenue v. Guerrero*, No. L-20942, September 22, 1967, 21 SCRA 180. See also *Philippine Banking Corporation (Now: Global Business Bank, Inc.) v. Commissioner of Internal Revenue*, G.R. No. 170574, January 30, 2009, 577 SCRA 366, 392.

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that *first*, it was issued a PAN on *February 19, 2001*, and *second*, it was the subject of investigation as a result of verified information filed by a Tax Informer under Section 282 of the NIRC duly recorded in the BIR Official Registry as Confidential Information (CI) No. 29-2000[53] even prior to the issuance of the PAN.

Section 1 of RR No. 8-2001 provides:

SECTION 1. COVERAGE. – x x x

Any person, natural or juridical, including estates and trusts, liable to pay any of the above-cited internal revenue taxes for the above specified period/s who, due to inadvertence or otherwise, erroneously paid his internal revenue tax liabilities or failed to file tax return/ pay taxes may avail of the Voluntary Assessment Program (VAP), **except those falling under any of the following instances:**

1.1 **Those covered by a Preliminary Assessment Notice (PAN),** Final Assessment Notice (FAN), or Collection Letter **issued on or before July 31, 2001;** or

1.2 **Persons under investigation as a result of verified information filed by a Tax Informer under Section 282 of the Tax Code of 1997, duly processed and recorded in the BIR Official Registry Book on or before July 31, 2001;**

1.3 Tax fraud cases already filed and pending in courts for adjudication; and

x x x (Emphasis supplied.)

Moreover, private respondents cannot invoke LMCEC's availment of VAP to foreclose any subsequent audit of its account books and other accounting records in view of the strong finding of underdeclaration in LMCEC's payment of correct income tax liability by more than 30% as supported by the written report of the TFD detailing the facts and the law on which such finding is based, pursuant to the tax fraud investigation authorized by petitioner under LA No. 00009361. This conclusion finds support in Section 2 of RR No. 8-2001 as amended by RR No. 10-2001 provides:

[53] *Rollo*, p. 116.

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SEC. 2. TAXPAYER'S BENEFIT FROM AVAILMENT OF THE VAP. – A taxpayer who has availed of the VAP shall not be audited except upon authorization and approval of the Commissioner of Internal Revenue when there is strong evidence or finding of understatement in the payment of taxpayer's correct tax liability by more than thirty percent (30%) as supported by a written report of the appropriate office detailing the facts and the law on which such finding is based: Provided, however, that any VAP payment should be allowed as tax credit against the deficiency tax due, if any, in case the concerned taxpayer has been subjected to tax audit.

x x x x x x x x x

Given the explicit conditions for the grant of immunity from audit under RR No. 2-99, RR No. 8-2001 and RR No. 10-2001, we hold that respondent Secretary gravely erred in declaring that petitioner is now estopped from assessing any tax deficiency against LMCEC after issuance of the aforementioned documents of immunity from audit/investigation and settlement of tax liabilities. It is axiomatic that the State can never be in estoppel, and this is particularly true in matters involving taxation. The errors of certain administrative officers should never be allowed to jeopardize the government's financial position.[54]

Respondent Secretary's other ground for assailing the course of action taken by petitioner in proceeding with the audit and investigation of LMCEC — the alleged violation of the general rule in Section 235 of the NIRC allowing the examination and inspection of taxpayer's books of accounts and other accounting records only once in a taxable year — is likewise untenable. As correctly pointed out by petitioner, the discovery of substantial underdeclarations of income by LMCEC for taxable years 1997, 1998 and 1999 upon verified information provided by an "informer" under Section 282 of the NIRC, as well as the necessity of obtaining information from third parties to ascertain the correctness of the return filed or evaluation of tax compliance in collecting taxes (as a result of the disobedience to the summons issued by the Bureau against the private respondents), are

[54] *Commissioner of Internal Revenue v. Procter & Gamble PMC*, No. 66838, April 15, 1988, 160 SCRA 560, 565.

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circumstances warranting exception from the general rule in Section 235.[55]

As already stated, the substantial underdeclared income in the returns filed by LMCEC for 1997, 1998 and 1999 in amounts equivalent to more than 30% (the computation in the final assessment notice showed underdeclarations of almost 200%) constitutes *prima facie* evidence of fraudulent return under Section 248(B) of the NIRC. Prior to the issuance of the preliminary and final notices of assessment, the revenue officers conducted a preliminary investigation on the information and documents showing substantial understatement of LMCEC's tax liabilities which were provided by the Informer, following the procedure under RMO No. 15-95.[56] Based on the *prima*

[55] SEC. 235. *Preservation of Books of Accounts, and Other Accounting Records.* – All the books of accounts, including the subsidiary books and other accounting records of corporations, partnerships, or persons shall be preserved by them for a period beginning from the last entry in each book until the last day prescribed by Section 203 within which the Commissioner is authorized to make an assessment. The said books and records shall be subject to examination and inspection by internal revenue officers: *Provided*, That for income tax purposes, such examination and inspection shall be made only once in a taxable year, *except in the following cases:*

(a) *Fraud, irregularity or mistakes as determined by the Commissioner*;

x x x x x x x x x

(c) Verification or compliance with withholding tax laws and regulations;

x x x x x x x x x

(e) *In the exercise of the Commissioner's power under Section 5(B) to obtain information from other persons, in which case, another or separate examination and inspection may be made.* x x x

[56] RMO No. 15-95 dated June 9, 1995.

C. PROCEDURE

A Preliminary Investigation must first be conducted to establish the *prima facie* existence of fraud. This shall include the verification of the allegations on the confidential information and/or complaints filed, and the determination of the schemes and extent of fraud perpetrated by the denounced taxpayers.

The Formal Fraud Investigation, which includes the examination of the taxpayers books of accounts through the issuance of Letters of Authority, shall be conducted only after the *prima facie* existence of fraud has been established.

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facie finding of the existence of fraud, petitioner issued LA No. 00009361 for the TFD to conduct a formal fraud investigation of LMCEC.[57] Consequently, respondent Secretary's ruling that the filing of criminal complaint for violation of Sections 254 and 255 of the NIRC cannot prosper because of lack of prior determination of the existence of fraud, is bereft of factual basis and contradicted by the evidence on record.

Tax assessments by tax examiners are presumed correct and made in good faith, and all presumptions are in favor of the correctness of a tax assessment unless proven otherwise.[58] We have held that a taxpayer's failure to file a petition for review with the Court of Tax Appeals within the statutory period rendered the disputed assessment final, executory and demandable, thereby precluding it from interposing the defenses of legality or validity of the assessment and prescription of the Government's right to assess.[59] Indeed, any objection against the assessment should have been pursued following the avenue paved in Section 229 (now Section 228) of the NIRC on protests on assessments of internal revenue taxes.[60]

Records bear out that the assessment notice and Formal Letter of Demand dated August 7, 2002 were duly served on LMCEC on October 1, 2002. Private respondents did not file

TAX FRAUD DIVISION

1.1. Where indications of fraud have been established in a preliminary investigation, the TFD thru the Assistant Commissioner, Intelligence and Investigation Service (IIS), shall request/recommend the issuances of the corresponding Letter of Authority by the Commissioner which will automatically supersede all previously issued Letters of Authority with respect thereto.

x x x

[57] RMO No. 49-2000, II (2).

[58] *Rizal Commercial Banking Corporation v. Commissioner of Internal Revenue*, G.R. No. 168498, April 24, 2007, 522 SCRA 144, 149-150, citing *Commissioner of Internal Revenue v. Hantex Trading Co., Inc.*, G.R. No. 136975, March 31, 2005, 454 SCRA 301, 329.

[59] *Id.* at 150, citing Benjamin B. Aban, *Law of Basic Taxation in the Philippines*, Revised Edition (1997), p. 247.

[60] *Marcos II v. Court of Appeals*, G.R. No. 120880, June 5, 1997, 273 SCRA 47, 65.

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a motion for reconsideration of the said assessment notice and formal demand; neither did they appeal to the Court of Tax Appeals. Section 228 of the NIRC[61] provides the remedy to dispute a tax assessment within a certain period of time. It states that an assessment may be protested by filing a request for reconsideration or reinvestigation within 30 days from receipt of the assessment by the taxpayer. No such administrative protest was filed by private respondents seeking reconsideration of the August 7, 2002 assessment notice and formal letter of demand. Private respondents cannot belatedly assail the said assessment, which they allowed to lapse into finality, by raising issues as to its validity and correctness during the preliminary investigation after the BIR has referred the matter for prosecution under Sections 254 and 255 of the NIRC.

As we held in *Marcos II v. Court of Appeals:*[62]

> It is not the Department of Justice which is the government agency tasked to determine the amount of taxes due upon the subject estate, but the Bureau of Internal Revenue, whose determinations and assessments are presumed correct and made in good faith. The taxpayer has the duty of proving otherwise**. In the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed. Even an assessment based on estimates is *prima facie* valid and lawful where it does not appear to have been arrived at arbitrarily or capriciously**. The burden of proof is upon the complaining party to show clearly that the assessment is erroneous. Failure to present proof of error in the assessment will justify the judicial affirmance of said assessment. x x x.
>
> **Moreover, these objections to the assessments should have been raised, considering the ample remedies afforded the taxpayer by**

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[61] Revenue Regulations No. 12-99, Section 3.1.5.

3.1.5 Disputed Assessment. — The taxpayer or his duly authorized representative may protest administratively against the aforesaid formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof. x x x

[62] *Supra* note 60, at 66-67.

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the Tax Code, with the Bureau of Internal Revenue and the Court of Tax Appeals, as described earlier, and cannot be raised now via Petition for *Certiorari*, under the pretext of grave abuse of discretion. The course of action taken by the petitioner reflects his disregard or even repugnance of the established institutions for governance in the scheme of a well-ordered society. **The subject tax assessments having become final, executory and enforceable, the same can no longer be contested by means of a disguised protest.** In the main, *Certiorari* may not be used as a substitute for a lost appeal or remedy. This judicial policy becomes more pronounced in view of the absence of sufficient attack against the actuations of government. (Emphasis supplied.)

The determination of probable cause is part of the discretion granted to the investigating prosecutor and ultimately, the Secretary of Justice. However, this Court and the CA possess the power to review findings of prosecutors in preliminary investigations. Although policy considerations call for the widest latitude of deference to the prosecutor's findings, courts should never shirk from exercising their power, when the circumstances warrant, to determine whether the prosecutor's findings are supported by the facts, or by the law. In so doing, courts do not act as prosecutors but as organs of the judiciary, exercising their mandate under the Constitution, relevant statutes, and remedial rules to settle cases and controversies.[63] Clearly, the power of the Secretary of Justice to review does not preclude this Court and the CA from intervening and exercising our own powers of review with respect to the DOJ's findings, such as in the exceptional case in which grave abuse of discretion is committed, as when a clear sufficiency or insufficiency of evidence to support a finding of probable cause is ignored.[64]

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[63] *Social Security System v. Department of Justice*, G.R. No. 158131, August 8, 2007, 529 SCRA 426, 442, citing *Ladlad v. Velasco*, G.R. Nos. 172070-72, 172074-76 & 175013, June 1, 2007, 523 SCRA 318; *Principio v. Barrientos*, G.R. No. 167025, December 19, 2005, 478 SCRA 639; *Acuña v. Deputy Ombudsman for Luzon*, G.R. No. 144692, January 31, 2005, 450 SCRA 232.

[64] See *Tan v. Ballena*, G.R. No. 168111, July 4, 2008, 557 SCRA 229, 252.

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WHEREFORE, the petition is *GRANTED*. The Decision dated October 31, 2006 and Resolution dated March 6, 2007 of the Court of Appeals in CA-G.R. SP No. 93387 are hereby *REVERSED* and *SET ASIDE*. The Secretary of Justice is hereby *DIRECTED* to order the Chief State Prosecutor to file before the Regional Trial Court of Quezon City, National Capital Judicial Region, the corresponding Information against L. M. Camus Engineering Corporation, represented by its President Luis M. Camus and Comptroller Lino D. Mendoza, for Violation of Sections 254 and 255 of the National Internal Revenue Code of 1997.

No costs.

SO ORDERED.

Carpio Morales (Chairperson), Brion, Bersamin, and *Sereno, JJ.,* concur.

SECOND DIVISION

[G.R. No. 177881. October 13, 2010]

EMMANUEL C. VILLANUEVA, *petitioner, vs.* **CHERDAN LENDING INVESTORS CORPORATION,** *respondent.*

SYLLABUS

1.CIVIL LAW; MORTGAGE; EXTRAJUDICIAL FORECLOSURE OF A REAL ESTATE MORTGAGE; WRIT OF POSSESSION; WHEN MAY BE ISSUED. — A writ of possession is an order of the court commanding the sheriff to place a person in possession of a real or personal property. It may be issued in an extrajudicial foreclosure of a real estate mortgage under Section 7 of Act 3135, as amended by Act 4118, either 1) within the one-year redemption period, upon the filing of a bond, or 2) after the lapse of the redemption period, without need of a bond or of a separate and independent action.