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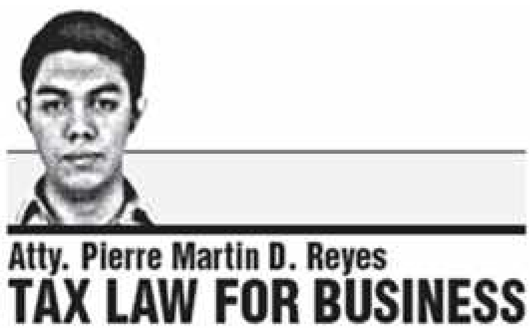

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Failure to protest and its effect on prescription

IN tax assessments nothing is more settled than the rule that the assessment shall become final, executory and demandable if the taxpayer fails to file a valid protest against the Formal Letter of Demand and Final Assessment Notice (FLD/FAN) within 30 days from date of receipt of the said FLD/FAN. By failing to timely file a protest, the taxpayer can no longer dispute the assessment and its appeal to the Court of Tax Appeals (CTA) shall be dismissed for lack of jurisdiction. However, what if the taxpayer argues on appeal that the FLD/FAN was issued beyond the prescriptive period to assess? Will the assessment still remain to be final and unappealable?

To date, the Supreme Court (SC) has only been able to address the effect of the failure of the taxpayer to file a timely protest on the issue of prescription in relation to the collection of taxes, not the assessment thereof. In *Commissioner of Internal Revenue (CIR)* v *Hambrecht and Quist* (GR 169225, November 17, 2010), the SC ruled that the taxpayer's failure to file a protest only means that the validity or correctness of the assessment may no longer be questioned on appeal. The issue of whether the right of the CIR to collect the validly assessed tax has prescribed is a separate and distinct issue well within the jurisdiction of the CTA to decide.

Insofar as the CTA is concerned, the jurisprudence is conflicting. In the recent CTA Case 8751, November 17, the Bureau of Internal Revenue (BIR) argued that the CTA has no jurisdiction over the assessment, considering that the taxpayer belatedly protested the FLD/FAN, making it final and executory. The taxpayer, on the other hand, argued that the FLD/FAN is void for being issued beyond the three-year prescriptive period. The CTA, citing the above-cited case of *Hambrecht and Quist*, held that the fact that the assessment has become final for failure to file a protest within the time allowed only means that the validity or correctness of the assessment may no longer be questioned on appeal. However, the validity of the assessment itself is a separate and distinct from the issue of prescription. In the said case, the CTA found that the right of the BIR to assess the taxpayer had already prescribed as the FLD/FAN was issued beyond the three-year prescriptive period provided by law.

In contrast, in a later case where the BIR likewise argued that the CTA had no jurisdiction, considering that the assessment has become final, executory and demandable for failure of the taxpayer to validly protest the assessment and where the taxpayer also raised that the BIR's right to assess had already prescribed, the conclusion reached by the CTA was the diametrically opposite. In CTA Case 8433, November 24, the CTA ruled that it has jurisdiction over decisions of the CIR in cases involving disputed assessments and this does not cover an assessment which has become final, executory and demandable. Citing also *Hambrecht and Quist,* the CTA ruled that the fact that an assessment has become final for failure of the taxpayer to file a protest within the time allowed means the validity or correctness of the assessment may no longer be questioned on appeal. Since the taxpayer failed to file a timely protest, the assessment has become final, executory and demandable. Hence, the CTA ruled that it was without jurisdiction to rule on the validity or correctness of the assessment.

All told, it appears that the decision in CTA Case 8751 is the better rule and is more consistent with the *Hambrecht and Quist* case. However, in the absence of a clear-cut SC decision on the matter and given the conflicting jurisprudence, the more prudent course of action for taxpayers is to ensure that a timely protest to the FLD/FAN is filed, notwithstanding the fact that the BIR's right to assess had already prescribed. The defense of prescription may be of no avail in case of a belatedly filed protest.

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