

**REPUBLIC OF THE PHILIPPINES, PLAINTIFF AND APPELLANT, VS.
KER & COMPANY, LTD., DEFENDANT AND APPELLANT.**

G.R. No. 21609. September 29, 1966

Ponente: BENGZON, J.P., J.

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BENGZON, J.P., J.:

Ker & Co., Ltd., a domestic corporation, filed its income tax returns for the years 1947, 1948, 1949 and 1950 on the following dates:

Year

Date Filed

1947

April 12, 1948

1948

April 30, 1949

1949

May 15, 1950

1950

May 9, 1951

It amended its income tax returns for 1948 and 1949 on May 11, 1949 and June 30, 1950, respectively.

In 1953 the Bureau of Internal Revenue examined and audited Ker & Co., Ltd.'s returns and books of accounts and subsequently issued the following assessments for deficiency income tax:

Year

Amount

Date Assessed

1947

P42,342.30

July 25, 1953

1948

18,651.87

Feb. 16, 1953

1949

139.67

Feb. 16, 1953

1950

12,813.00

Feb. 16, 1953

due and payable on dates indicated in the accompanying notices of assessment. The assessments for 1948 and 1950 carried the surcharge of 50% authorized under Section 72 of the Tax Code for the filing of fraudulent returns.

Upon request of Ker & Co., Ltd., through Atty. Jose Leido, its counsel, the Bureau of Internal Revenue reduced the assessments for the year 1947 from P42,342.30 to P27,026.28 and for the year 1950 from P12,813.00 to P8,542.00, imposed the 50% surcharge for the year 1947 and eliminated the same surcharge from the assessment for the year 1950. The assessments for years 1948 and 1949 remained the same.

On March 1, 1956 Ker & Co., Ltd. filed with the Court of Tax Appeals a petition for review with preliminary injunction. No preliminary injunction was issued, for said court dismissed the appeal for having been instituted beyond the 30-day period provided for in Section 11 of Republic Act 1125. We affirmed the order of dismissal in L-12396. [1]

On March 15, 1962, the Bureau of Internal Revenue demanded payment of the aforesaid assessments together with a surcharge of 5% for late payment and interest at the rate of 1% monthly. Ker & Co., Ltd. refused to pay, instead in its letters dated March 28, 1962 and April 10, 1962 it set up the defense of prescription of the Commissioner's right to collect the tax. Subsequently, the Republic of the Philippines filed on March 27, 1962 a complaint with the Court of First Instance of Manila seeking collection of the aforesaid deficiency income tax for the years 1947, 1948, 1949 and 1950. The complaint did not allege fraud in the filing of any of the income tax returns for the years involved, nor did it pray for the payment of the corresponding 50% surcharge, but it prayed for the payment of 5% surcharge for late payment and interest of 1% per month without however specifying from what date interest started to accrue.

Summons was served not on the defendant taxpayer but upon Messrs. Leido and Associates, its counsel in the proceedings before the Bureau of Internal Revenue and the Court of Tax Appeals.

On April 14, 1962 Ker & Co., Ltd. through its counsel, Leido, Andrada, Perez & Associates, moved for the dismissal of the complaint on the ground that the court did not acquire jurisdiction over the person of the defendant and that plaintiff's cause of action has prescribed. This motion was denied and defendant filed a motion for reconsideration. Resolution on said motion, however, was deferred until trial of the case on the merits.

On May 18, 1962, Ker & Co., Ltd. filed its answer to the complaint interposing therein the defense set up in its motion to dismiss of April 14, 1962.

On September 18, 1962 the Republic of the Philippines amended its complaint, in answer to which Ker & Co., Ltd. adopted the same answer which it had filed on May 18, 1962.

On January 30, 1963 the Court of First Instance rendered judgment, the dispositive portion of which states:

"WHEREFORE, this Court dismisses the claim for the collection of deficiency income taxes for 1947, but orders defendant taxpayer to pay the deficiency income taxes for 1948, 1949 and 1950, in the amounts of P18,651.87, P139.67 and P8,542.00, respectively, plus 5% surcharge thereon on each amount and interest of 1% a month computed from the date the complaint was filed, or from March 27, 1962 until full payment thereof is made, plus the costs of suit."

On February 20, 1963 the Republic of the Philippines filed a motion for reconsideration contending that the right of the Commissioner of Internal Revenue to collect the deficiency assessment for 1947 has not prescribed by a lapse of merely five years and three months, because the taxpayer's income tax return was fraudulent in which case prescription sets in ten years from October 31, 1951, the date of discovery of the fraud, pursuant to Section 332(a) of the Tax Code; and that the payment of delinquency interest of 1% per month should commence from the date it fell due as indicated in the assessment notices instead of on the date the complaint was filed.

On March 6, 1963 Ker & Co., Ltd. also filed a motion for reconsideration reiterating its assertion that the Court of First Instance did not acquire jurisdiction over its person, and maintaining that since the complaint was filed nine years, one month and eleven days after the deficiency assessments for 1948, 1949 and 1950 were made and since the filing of its petition for review in the Court of Tax Appeals did not stop the running of the period of limitations, the right of the Commissioner of Internal Revenue to collect the tax in question has prescribed.

The two motions for reconsideration having been denied, both parties appealed directly to this Court.

The issues in this case are:

1. Did the Court of First Instance acquire jurisdiction over the person of defendant Ker & Co., Ltd.?
2. Did the right of the Commissioner of Internal Revenue to assess deficiency income tax for the year 1947 prescribe?
3. Did the filing of a petition for review by the taxpayer in the Court of Tax Appeals suspend the running of the statute of limitations to collect the deficiency income tax for the years 1948, 1949 and 1950?
4. When did the delinquency interest on the deficiency income tax for the years 1948, 1949 and 1950 accrue?

First Issue

Ker & Co., Ltd. maintains that the court a quo did not acquire jurisdiction over its person inasmuch as summons was not served upon it but upon Messrs. Leido and Associates who do not come under any of the class of persons upon whom summons should be served as enumerated in Section 13, Rule 7 of the Rules of Court, [2] which reads:

"SEC. 13. Service upon private domestic corporations or partnership. – If the defendant is a corporation formed under the laws of the Philippines or a partnership duly registered, service may be made on the president, manager, secretary, cashier, agent, or any of its directors."

Messrs. Leido and Associates acted as counsel for Ker & Co., Ltd. when this tax case was in its administrative stage. The same counsel represented Ker & Co., Ltd. when it appealed said case to the Court of Tax Appeals and later to this Court. Subsequently, when the Deputy Commissioner of Internal Revenue, by letter dated March 15, 1962, demanded the payment of the deficiency income tax in question, it was Messrs. Leido, Andrada, Perez & Associates who replied in behalf of Ker & Co., Ltd. in two letters, dated March 28, 1962 and April 10, 1962, both after the complaint in this case was filed. At least therefore on April 2, 1962 when Messrs. Leido and Associates received the summons, they were still acting for and in behalf of Ker & Co., Ltd. in connection with its tax

liability involved in this case. Perforce, they were the taxpayer's agent when summons was served. Under Section 13 of Rule 7, aforequoted, service upon the agent of a corporation is sufficient.

We observe that the motion to dismiss filed on April 14, 1962, aside from disputing the lower court's jurisdiction over defendant's person, prayed for dismissal of the complaint on the ground that plaintiff's cause of action has prescribed. By interposing such second ground in its motion to dismiss, Ker & Co., Ltd. availed of an affirmative defense on the basis of which it prayed the court to resolve controversy in its favor. For the court to validly decide the said plea of defendant Ker & Co., Ltd., it necessarily had to acquire jurisdiction upon the latter's person, who, being the proponent of the affirmative defense, should be deemed to have abandoned its special appearance and voluntarily submitted itself to the jurisdiction of the court. [3]

Voluntary appearance cures defects of summons, if any. [4] Such defect, if any, was further cured when defendant filed its answer to the complaint. [5] A defendant can not be permitted to speculate upon the judgment of the court by objecting to the court's jurisdiction over its person if the judgment is adverse to it, and acceding to jurisdiction over its person if and when the judgment sustains its defenses.

Second Issue

Ker & Co., Ltd. contends that under Section 331 of the Tax Code the right of the Commissioner of Internal Revenue to assess against it a deficiency income tax for the year 1947 has prescribed because the assessment was issued on July 25, 1953 after a lapse of five years, three months and thirteen days from the date (April 12, 1948) it filed its income tax return. On the other hand, the Republic of the Philippines insists that the taxpayer's income tax return was fraudulent, therefore the Commissioner of Internal Revenue may assess the tax within ten years from discovery of the fraud on October 31, 1951 pursuant to Section 332(a) of the Tax Code.

The stand of the Republic of the Philippines hinges on whether or not taxpayer's income tax return for 1947 was fraudulent.

The court a quo, confining itself to determining whether or not the assessment of the tax for 1947 was issued within the five-year period provided for in Section 331 of the Tax Code, ruled that the right of the Commissioner of Internal Revenue to assess the tax has prescribed. Said the lower court:

"The Court resolves the second issue in the negative, because Sec. 331 of the Revenue Code explicitly provides, in mandatory terms, that 'Internal Revenue taxes shall be assessed within 5 years after the return was filed, and no proceedings in court without assessment, for the collection of such taxes, shall be begun after expiration of such period.'" The attempt by the Commissioner of Internal Revenue to make an assessment on July 25, 1953, on the basis of a return filed on April 12, 1948, is an exercise of authority against the afore-quoted explicit and mandatory limitations of statutory law. Settled in our system is the rule that acts committed against the provisions of mandatory or prohibitory laws shall be void (Art. 5, New Civil Code). x x x"

Said court resolved the issue without touching upon fraudulence of the return. The reason is that the complaint alleged no fraud, nor did the plaintiff present evidence to prove fraud.

In reply to the lower court's conclusion, the Republic of the Philippines maintains in its brief that Ker & Co., Ltd. filed a false return and since the fraud penalty of 50% surcharge was imposed in the deficiency income tax assessment, which has become final and executory, the finding of the Commissioner of Internal Revenue as to the existence of the fraud has also become final and need not be proved. This contention suffers from a flaw in that it fails to consider the well-settled principle that fraud is a question of fact [6] which must be alleged and proved. [7] Fraud is a serious charge and, to be sustained, it must be supported by clear and convincing proof. [8] Accordingly, fraud should have been alleged and proved in the lower court. On these premises We therefore

sustain the ruling of the lower court upon the point of prescription.

It would be worth mentioning that since the assessment for deficiency income tax for 1947 has become final and executory, Ker & Co., Ltd. may not anymore raise defenses which go into the merits of the assessment, i.e., prescription of the Commissioner's right to assess the tax. Such was our ruling in previous cases. [9] In this case however, Ker & Co., Ltd. raised the defense of prescription in the proceedings below and the Republic of the Philippines, instead of questioning the right of the defendant to raise such defense, litigated on it and submitted the issue for resolution of the court. By its actuation, the Republic of the Philippines should be considered to have waived its right to object to the setting up of such defense.

Third Issue

Ker & Co., Ltd. impresses upon Us that since the Republic of the Philippines filed the complaint for the collection of the deficiency income tax for the years 1948, 1949 and 1950 only on March 27, 1962, or nine years, one month and eleven days from February 16, 1953, the date the tax was assessed, the right to collect the same has prescribed pursuant to Section 332(c) of the Tax Code. The Republic of the Philippines however contends that the running of the prescriptive period was interrupted by the filing of the taxpayer's petition for review in the Court of Tax Appeals on March 1, 1956.

If the period during which the case was pending in the Court of Tax Appeals and in the Supreme Court were not counted in reckoning the prescriptive period, less than five years would have elapsed, hence, the right to collect the tax has not prescribed.

The taxpayer counters that the filing of the petition for review in the Court of Tax Appeals could not have stopped the running of the prescriptive period to collect because said court did not have jurisdiction over the case, the appeal having been interposed beyond the 30-day period set forth in Section 11 of Republic Act 1125. Precisely, it adds, the Tax Court dismissed the appeal for lack of jurisdiction and said dismissal was affirmed by the Supreme Court in L-12396 aforementioned.

Under Section 333 of the Tax Code, quoted hereunder:

"SEC. 333. Suspension of running of statute. - The running of the statute of limitations provided in section 331 or three hundred thirty-two on the making of assessments and the beginning of distraint or levy or a proceeding in court for collection, in respect of any deficiency, shall be suspended for the period during which the Collector of Internal Revenue is prohibited from making the assessment or beginning distraint or levy or a proceeding in court, and for sixty days thereafter."

the running of the prescriptive period to collect the tax shall be suspended for the period during which the Commissioner of Internal Revenue is prohibited from beginning a distraint and levy or instituting a proceeding in court, and for sixty days thereafter.

Did the pendency of the taxpayer's appeal in the Court of Tax Appeals and in the Supreme Court have the effect of legally preventing the Commissioner of Internal Revenue from instituting an action in the Court of First Instance for the collection of the tax? Our view is that it did.

From March 1, 1956 when Ker & Co., Ltd. filed a petition for review in the Court of Tax Appeals contesting the legality of the assessments in question, until the termination of its appeal in the Supreme Court, the Commissioner of Internal Revenue was prevented, as recognized in this Court's ruling in *Ledesma, et al. v. Court of Tax Appeals*, [10] from filing an ordinary action in the Court of First Instance to collect the tax. Besides, to do so would be to violate the judicial policy of avoiding multiplicity of suits and the rule on *lis pendens*. [11]

It would be interesting to note that when the Commissioner of Internal Revenue issued the final deficiency assessments on January 5, 1954, he had already lost, by prescription, the right to collect the tax (except that for 1950) by the summary method of warrant of distraint and levy. Ker & Co., Ltd. immediately thereafter requested suspension of the collection of the tax without penalty incident to late payment pending the filing of a memorandum in support of its views. As requested, no tax was collected. On May 22, 1954 the projected memorandum was filed, but as of that date the Commissioner's right to collect by warrant of distraint and levy the deficiency tax for 1950 had already prescribed. So much so, that on March 1, 1956 when Ker & Co., Ltd. filed a petition for review in the Court of Tax Appeals, the Commissioner of Internal Revenue had but one remedy left to collect the tax, that is, by judicial action. [12] However, as stated, an independent ordinary action in the Court of First Instance was not available to the Commissioner pursuant to Our ruling in *Ledesma, et al. v. Court of Tax Appeals*, supra, in view of the pendency of the taxpayer's petition for review in the Court of Tax Appeals. Precisely he urgently filed a motion to dismiss the taxpayer's petition for review with a view to terminating therein the proceedings in the shortest possible time in order that he could file a collection case in the Court of First Instance before his right to do so is cut off by the passage of time. As moved, the Tax Court dismissed the case and Ker & Co., Ltd. appealed to the Supreme Court. By the time the Supreme Court affirmed the order of dismissal of the Court of Tax Appeals in L-12396 on January 31, 1962 more than five years had elapsed since the final assessments were made on January 5, 1954. Thereafter, the Commissioner of Internal Revenue demanded extra-judicially the payment of the deficiency tax in question and in reply the taxpayer, by its letter dated March 28, 1962, advised the Commissioner of Internal Revenue that the right to collect the tax has prescribed pursuant to Section 332(c) of the Tax Code.

Thus, did the taxpayer produce the effect of temporarily staying the hands of the Commissioner of Internal Revenue simply through a choice of remedy. And, if We were to sustain the taxpayer's stand, We would be encouraging taxpayers to delay the payment of taxes in the hope of ultimately avoiding the same.

Under the circumstances, the Commissioner of Internal Revenue was in effect prohibited from collecting the tax in question. This being so, the provisions of Section 333 of the Tax Code will apply.

Fourth Issue

The Republic of the Philippines maintains that the delinquency interest on the deficiency income tax for 1948, 1949 and 1950 accrued and should commence from the date of the assessments as shown in the assessment notices, pursuant to Section 51(e) of the Tax Code, instead of from the date the complaint was filed as determined in the decision appealed from.

Section 51(e) of the Tax Code states:

"SEC. 51(e) Surcharge and interest in case of delinquency. - To any sum or sums due and unpaid after the dates prescribed in subsections (b), (c) and (d) for the payment of the same, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum a month upon said tax from the time the same became due, except from the estates of insane, deceased, or insolvent persons."
(Underscoring supplied)

Exhibit "F" - the letter of assessment - shows that the deficiency income tax for 1948 and 1949 became due on March 15, 1953 and that for 1950 accrued on February 15, 1954 in accordance with Section 51(d) of the Tax Code. Since the tax in question remained unpaid, delinquency interest accrued and became due starting from said due dates. The decision appealed from should therefore be modified accordingly.

WHEREFORE, the decision appealed from is affirmed with the modification that the delinquency interest at the rate of 1% per month shall be computed from March 15, 1953 for the deficiency income tax for 1948 and 1949

and from February 15, 1954 for the deficiency income tax for 1950. With costs against Ker & Co., Ltd.

SO ORDERED.

Concepcion, C.J., Reyes, J.B.L., Barrera, Dizon, Regala, Makalintal, Zaldivar, Sanchez, and Ruiz Castro, JJ., concur.

[1] Ker & Company, Ltd. v. The Court of Tax Appeals and The Collector of Internal Revenue, promulgated on January 31, 1962.

[2] Now Section 13, Rule 14.

[3] Flores v. Zurbito, 37 Phil. 746; Menghra v. Tarachand and Rewachand, 67 Phil. 286.

[4] Infante v. Toledo and Santiong, 44 Phil. 834, 840.

[5] Ramos v. Mañalac, et al., 89 Phil. 270.

[6] Gutierrez v. Court of Tax Appeals, L-9738, L-9771, May 31, 1957.

[7] Section 12, Rule 15 (now Section 5, Rule 8), Rules of Court.

[8] Collector of Internal Revenue v. Benipayo, L-13656, January 31, 1962.

[9] Republic of the Philippines v. Albert, L-12996, December 28, 1961; Republic of the Philippines v. Lim Tian Teng Sons & Co., Inc., L-21731, March 31, 1966.

[10] L-11343, January 29, 1958.

[11] Par. (d), Section 1, Rule 8, now Par. (g), Section 1, Rule 16, Rules of Court.

[12] See Sec. 316, Tax Code.

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