



Republic of the Philippines
Supreme Court
Manila

FIRST DIVISION

NOTICE

Sirs/Mesdames:

*Please take notice that the Court, First Division, issued a Resolution dated **March 3, 2021** which reads as follows:*

“G.R. No. 197688 (*Lapaz Kaw Ngo v. Commissioner of Internal Revenue*). – This Petition for Review on *Certiorari*¹ under Rule 45 of the Rules of Court assails the Decision² dated January 24, 2011 and the Resolution³ dated July 15, 2011 of the Court of Appeals (CA) in CA-G.R. SP No. 99603 setting aside the Resolutions⁴ of the Secretary of Justice and ordering that an Information for tax evasion be filed against petitioner Lapaz Kaw Ngo.

Facts of the Case

In 2005, the then Commissioner of Internal Revenue (CIR) Jose Mario Bunag and his revenue officers filed a complaint against Lioni T. Ngo and Lapaz Kaw Ngo, President and Vice-President/Treasurer, respectively, of Fishwealth Canning Corporation (Fishwealth), for tax evasion.⁵

According to the CIR and the revenue officers, on August 25, 2000, the CIR issued a Letter of Authority (LOA) No. 00009366 for the examination of the books of accounts and other accounting records of Fishwealth covering taxable years 1999 and uninvestigated prior years. Since Fishwealth unjustifiably refused to present its books of accounts and other accounting records, they were constrained to proceed with the investigation through a Third Party Information

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¹ *Rollo*, pp. 8-34.

² Penned by Associate Justice Jose C. Reyes, Jr. (former Member of this Court), with the concurrence of Associate Justices Antonio L. Villamor and Ruben C. Ayson; *id.* at 39-55.

³ Penned by Associate Justice Jose C. Reyes, Jr. (former Member of this Court), with the concurrence of Associate Justices Antonio L. Villamor and Elihu A. Ybanez; *id.* at 57.

⁴ Penned by Secretary Raul M. Gonzalez; *CA rollo*, pp. 30-37, 179-187,

⁵ *Rollo*, p. 157

(TPI) under Section 5(B), in relation to Section 6(A) and (B) of the National Internal Revenue Code (NIRC), as amended. The TPI allegedly revealed that Fishwealth underdeclared its sales and taxable income in the amounts of ₱227,215,251.79 and ₱18,177,220.14, respectively, by under-declaring its importation of raw materials for the taxable year 1999. The aforesaid amounts should have been subjected to value-added tax (VAT) and income tax, respectively.⁶

The CIR and revenue officers evaluated and compared the data gathered from the Audit Information, Tax Exemption, and Incentives Division of the Bureau of Internal Revenue (BIR) with the declaration of Fishwealth in its audited financial statements, annual income tax return, and quarterly VAT returns and found that Fishwealth deliberately failed to declare its correct taxable base. The revenue officers believed that the under-declaration was not a product of mere omission or negligence but a deliberate and calculated effort to illegally reduce its tax liabilities. As a result of the under-declaration, the revenue officers stated that Fishwealth failed to pay the amounts of ₱54,599,824.57 for VAT and ₱12,997,512.18 for income tax or a total of ₱67,597,336.75 for taxable year 1999.⁷

For the defense, only Lapaz Kaw Ngo submitted her counter-affidavit because Lioni Ngo died after the filing of the complaint. Lapaz Kaw Ngo countered that on May 16, 2000, Fishwealth received LOA No. 00061371 for the examination of its books of accounts and accounting documents for taxable year 1999. Fishwealth fully cooperated thereto which led into the assessment of ₱2,395,825.88 representing deficiency income tax, VAT, withholding taxes, and miscellaneous taxes. Fishwealth allegedly paid and settled the amount on August 30, 2000. However, on September 1, 2000, Fishwealth received LOA No. 00009366 for the examination of its books of accounts for the same taxable year and uninvestigated prior years. According to Lapaz Kaw Ngo, the issuance of the second LOA is prohibited in the absence of fraud, irregularity, or mistake discovered during the first investigation.⁸ Since Fishwealth refused to submit itself to examination pursuant to the second LOA, the revenue officers filed a complaint against them for violation of Section 5(C) in relation to Section 266 of the NIRC for failure to obey subpoena. However, the complaint was dismissed by the City Prosecutor of Quezon City. Fishwealth likewise asserted that contrary to the finding of the revenue officers that Fishwealth only declared the amount of

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⁶ Id. at 157-158

⁷ Id. at 158.

⁸ Id. at 159.

₱132,078,961.66 as purchases in its financial statement for 1999, the truth is that, it declared ₱275,239,044.00. According to Fishwealth, the allegation of the revenue officers that it had purchases of raw materials amounting to ₱325,209,199.00 is false and bloated. Even if Fishwealth indeed made such purchases, the alleged under-declaration would not be more than 30%. Hence, it was not substantial under-declaration that would lead to a *prima facie* evidence of fraud.⁹

Finding of the State Prosecutor

In a Resolution¹⁰ dated November 8, 2005, the state prosecutor dismissed the complaint for insufficiency of evidence.¹¹ The state prosecutor noted that the BIR improperly served the second LOA against Fishwealth. According to the state prosecutor, the issuance of the second LOA is contrary to Section 235 of the NIRC prescribing that the examination of the books of a taxpayer may only be done once in a taxable year except in the presence of fraud, irregularity, or mistake. In this case, the state prosecutor is of the belief that the second LOA was not supported by a finding of fraud, irregularity, or mistake. The state prosecutor observed that at the time of the issuance of the second LOA, the first examination pursuant to the first LOA was still in effect. Hence, when the second LOA was issued, it was not yet premised on the finding of fraud, irregularity, or mistake. The state prosecutor agreed with Lapaz Kaw Ngo that assuming the revenue officers are correct, still, the alleged under-declaration does not constitute 30% which would give rise to a *prima facie* finding of fraud. The state prosecutor gave credence to the fact that during the issuance of the first LOA, Fishwealth willingly cooperated with the BIR. It had paid and settled its deficiency taxes. Thus, the state prosecutor concluded that element of willful or deliberate intent on the part of Fishwealth to under-declare its tax base to constitute tax evasion is wanting.¹²

Finding of the Secretary of Justice

The CIR filed an appeal to the Secretary of Justice (SOJ). In its Resolution¹³ dated December 11, 2006, the SOJ reversed the resolution of the state prosecutor and ordered the filing of the Information for tax evasion against Lapaz Kaw Ngo. The SOJ disagreed with the state prosecutor and held that the issuance by the

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⁹ Id. at 160-161.

¹⁰ Penned by State Prosecutor Josefino A. Subia; id. at 157-168.

¹¹ Id. at 168.

¹² Id. at 166-167.

¹³ Id. at 222-230.

BIR of the second LOA against Fishwealth is proper. According to the SOJ, the first LOA was issued for regular investigation while the second LOA was issued for fraud investigation. In addition, the SOJ stated that the CIR has the discretion to order the issuance of a second LOA. The SOJ noted that a taxpayer who maintains an honest, true, and accurate entries will readily and without hesitation, present its books of accounts and other accounting records to the BIR.¹⁴

However, on reconsideration,¹⁵ the SOJ reversed himself in its Resolution¹⁶ dated January 20, 2007, and held that there was no probable cause to indict Lapaz Kaw Ngo for tax evasion. The SOJ stated that when the second LOA was issued, it was not yet premised on fraud, irregularities, or mistake because it was issued during the pendency of the examination pursuant to the first LOA. The SOJ likewise agreed that assuming there was under-declaration, it was not more than 30% to constitute *prima facie* evidence of fraud.¹⁷

The CIR moved for reconsideration, however, it was denied in a Resolution¹⁸ dated April 18, 2007. Hence, the CIR filed a Petition for *Certiorari*¹⁹ to the CA.

Ruling of the Court of Appeals

On January 24, 2011, the CA rendered its Decision,²⁰ which granted the *certiorari* petition and ordered the filing of Information for tax evasion against Lapaz Kaw Ngo.²¹

According to the CA, there was nothing irregular in the issuance of the second LOA for examination of the books of accounts and other accounting records of Fishwealth. While Section 235 of the NIRC provides that an examination and inspection of the books of accounts of a taxpayer may only be done once in every taxable year, nevertheless, the provision admits of an exception. Among the exceptions include the determination by the CIR of fraud, irregularity, or mistake. The CA likewise ruled that the issuance of the second LOA enjoys in its favor the presumption of regularity. The CA noted that in accordance with the findings of the revenue officers, there was indeed remarkable discrepancy between Fishwealth's Importer's

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¹⁴ Id. at 227-230.
¹⁵ Id. at 231-251.
¹⁶ Id. at 96-101.
¹⁷ Id. at 99-101.
¹⁸ Id. at 94.
¹⁹ Id. at 68-90.
²⁰ *Supra* note 2.
²¹ *Rollo*, pp. 54-55.

Detail Report as compared to its audited financial statements and tax returns filed and submitted to the BIR. The findings of the revenue officers show that there is sufficient evidence to engender a well-founded belief that Fishwealth had been concealing some figures in its tax return to evade payment of its tax liability.²²

Aggrieved, Lapaz Kaw Ngo moved for reconsideration but the same was denied in a Resolution²³ dated July 15, 2011.

Petitioner's Arguments

Thereafter, on September 8, 2011, Lapaz Kaw Ngo filed her Petition for Review on *Certiorari* before this Court alleging that the CA erred in substituting its own determination of the existence of probable cause to that of the prosecutors, in violation of the settled rule that such determination is an executive function and the prosecutor's discretion is paramount.²⁴ Lapaz Kaw Ngo insists that the issuance of the second LOA against Fishwealth was illegal and void.²⁵

Respondent's Arguments

On January 9, 2012, the CIR filed its Comment.²⁶ The CIR agreed with the CA that the issuance of the second LOA was valid because it is an exception to the rule that only one LOA may be issued in a taxable year.²⁷ The CIR likewise added that even assuming that the second LOA was void, still, the determination of the existence of probable cause cannot be based on the validity of the second LOA. The validity of the second LOA is insignificant for as long as the revenue officers were able to substantiate their finding of Fishwealth's misdeclaration and under-declaration of its purchases in the tax returns in violation of the NIRC.²⁸

Petitioner's Reply

On June 18, 2012, Lapaz Kaw Ngo filed her Reply²⁹ essentially reiterating the arguments raised in her petition.

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²² Id. at 50-53.
²³ Supra note 3.
²⁴ *Rollo*, p. 16
²⁵ Id. at 23.
²⁶ Id. at 326-337.
²⁷ Id. at 327.
²⁸ Id. at 331-332.
²⁹ Id. at 355-363.

Issue

The issue in this case is whether there was probable cause to indict Lapaz Kaw Ngo of tax evasion.

Ruling of the Court

After a perusal of the records of the case, this Court resolves to deny the Petition for Review on *Certiorari* for failure of Lapaz Kaw Ngo to show that the CA committed a reversible error in finding the existence of probable cause for tax evasion against her.

Tax evasion is penalized under Section 254, in relation to Section 255 of the NIRC, to wit:

Section. 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 not less than Five hundred thousand pesos (P500,000) but not more than Ten million pesos (P10,000,000) and suffer imprisonment of not less than six (6) years but not more than Ten (10) 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.

Section 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 correct and accurate information, who willfully fails to pay such tax, make such return, keep such record, or supply correct and accurate information, or withhold or remit taxes withheld, or refund excess taxes withheld on compensation, 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 (P10,000) and suffer imprisonment of not less than one (1) year but not more than ten (10) years.**

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Any person who attempts to make it appear for any reason that he or another has in fact filed a return or statement, or actually files a return or statement and subsequently withdraws the same return or statement after securing the official receiving seal or stamp of receipt of internal revenue office wherein the same was actually filed shall, upon conviction therefore, be punished by a fine of not less than Ten thousand pesos (P10,000) but not more than Twenty thousand pesos (P20,000) and suffer imprisonment of not less than one (1) year but not more than three (3) years. (Emphasis supplied)

In *Ungab v. Judge Cusi, Jr.*,³⁰ this Court ruled that tax evasion is deemed complete when the violator has knowingly and willfully filed a fraudulent return with intent to evade and defeat a part or all the taxes due. The perpetration of the crime is grounded upon knowledge on the part of the taxpayer that he has made an inaccurate return.³¹

In this case, through a third-party information, the CIR and the revenue officers found that Fishwealth underdeclared its sales and taxable income in the amounts of ₱227,215,251.79 and ₱18,177,220.14, respectively, by under-declaring its importation of raw materials for the taxable year 1999. The revenue officers found that Fishwealth made purchases in the amount of ₱325, 209,199.00 but it only declared the amount of ₱132,078,961.55 in its financial statement for 1999. Hence, Fishwealth failed to pay the amounts of ₱54,599,824.57 for VAT and ₱12,997,512.18 for income tax or a total of ₱67,597,336.75. The huge amount undeclared by Fishwealth in its tax returns led the revenue officers to believe that the same was not a product of mere omission or negligence but a deliberate and calculated effort to illegally reduce its tax liabilities.³²

Probable cause has been defined as the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. The term does not mean “actual or positive cause” nor does it import absolute certainty. It is merely based on opinion and reasonable belief. Thus, a finding of probable cause does not require an inquiry into

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³⁰ 186 Phil. 604 (1980).

³¹ Id. at 610-611.

³² *Rollo*, pp. 163-167.

whether there is sufficient evidence to procure a conviction. It is enough that it is believed that the act or omission complained of constitutes the offense charged.³³

Here, the records of the case and the complaint of the revenue officers, as held by the CA, support the finding of probable cause for tax evasion against Lapaz Kaw Ngo. The defenses adduced by Lapaz Kaw Ngo are matters of evidence which should be best threshed out during the trial of the case.

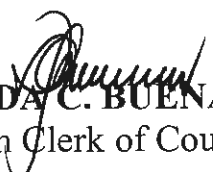
The allegation of whether the second LOA issued by the BIR against Fishwealth was valid or not is immaterial in determining the existence of probable cause. The state prosecutor and the SOJ erred in basing their determination of the non-existence of probable cause just because they found that the issuance of the second LOA was improper. As discussed, the essence of tax evasion is the knowledge of the taxpayer that he has made an inaccurate return, regardless of whether another LOA is issued against him.

Finally, while the determination of the existence of probable cause of the prosecutor is given weight, nevertheless, this does not preclude the CA to review the findings of the prosecutors in preliminary investigations.³⁴

WHEREFORE, the Petition for Review on *Certiorari* is **DENIED**. The Decision dated January 24, 2011 and the Resolution dated July 15, 2011 of the Court of Appeals in CA-G.R. SP No. 99603 are hereby **AFFIRMED**.

SO ORDERED.”

By authority of the Court:


LIBRADA C. BUENA
Division Clerk of Court ₂₀₂₁

by:

MARIA TERESA B. SIBULO
Deputy Division Clerk of Court
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³³ *Unilever Philippines, Inc. v. Tan*, 725 Phil. 486, 498 (2014), citing *Metropolitan Bank & Trust Co. v. Hon. Gonzales*, 602 Phil. 1000, 1009 (2009).

³⁴ *Commissioner of Internal Revenue v. Hon. Gonzales*, 647 Phil. 462, 493 (2010).



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