The Theory of Imprescriptibility in Criminal Tax Actions

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> *But even as we concede the inevitability and indispensability of taxation, it is a requirement in all democratic regimes that it be exercised reasonably and in accordance with the prescribed procedure. If it is not, then the taxpayer has a right to complain and the courts will come to his succor. For all the awesome power of the tax collector, he may still be*

stopped in his tracks if the taxpayer can demonstrate, as it has here, that the law has not been observed.[1]

INTRODUCTION

The power of taxation is an inherent prerogative of sovereignty, the purpose of which is to secure revenue for the support of the government. Revenue legislation is not only geared towards the realization of taxes, but also extends to the enactment of safeguards, such as statutes of limitations upon assessment and collection, and upon the right to prosecute criminal offenses.

The limitation on assessment and collection is intended to safeguard taxpayers against unreasonable investigation. On the other hand, the limitation upon criminal actions is intended to bar prosecutions based on aged and untrustworthy evidence, or when, due to the lapse of reasonable time, no further danger to society is contemplated from the criminal activity.

In this connection, the *Theory of Imprescriptibility* (*Theory*) posits that certain prescriptive periods in the Tax Code appear to be imprescriptible: (1) the extraordinary ten-year period under Section 222(a); and (2) the five-year prescriptive period under Section 281.[2]

This Note intends to determine whether there is basis for the argument of imprescriptibility for the two prescriptive periods mentioned. Additionally, this Note will show that, as to the prescriptive period for criminal tax actions, the Supreme Court's interpretation in the case of *Emilio E. Lim, Sr. v. Court of Appeals*[3] renders said period

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1. Commissioner of Internal Revenue (CIR) v. Algue, 158 SCRA 9, 17 (1988).
2. The National Internal Revenue Code of the Philippines, as amended by Republic Act No. 8424 [hereinafter TAX CODE].
3. Lim, Sr. v. Court of Appeals (CA), 190 SCRA 616 (1990).

imprescriptible. There is a need to reexamine the ruling in order to achieve the purpose for which the statute of limitations was established.

In other words, this Note seeks to evaluate whether the statutes of limitations under the Tax Code (i.e. in relation to the assessment and collection of taxes, and the institution of criminal tax actions) actually bestow the benefits intended by the legislature to the taxpayers, or they are, in reality, a form of Indian giving.[4] Such a determination in turn will contribute towards the formulation of an effective statute of limitations that will protect and advance the rights and needs of both the Government and the taxpayer.

Specifically, this Note will analyze the provisions of the Tax Code governing the different prescription periods it provides, particularly Sections 203, 222 and 281. Likewise, jurisprudence on taxation relating to and interpreting the Tax Code's prescriptive periods will be examined. Finally, the role of criminal tax actions as a remedy, will be examined, relating it to the analysis of prescriptive periods in the Tax Code. Annotations on statutes of limitation, in general and as applied to taxation, will likewise be reviewed.

PART I: OVERVIEW OF TAXATION AND THE THEORY OF IMPRESCRIPTIBILITY

A. General Principles of Taxation

The term *taxation* defines the power by which the sovereign raises revenue to defray the necessary expenses of government.[5] Taxation is the mode by which governments make exactions for revenue in order to support their existence and carry out their legitimate objectives. The power to tax, an inherent prerogative of sovereignty, has to be availed of to assure the performance of vital state functions. It is the source of the bulk of public funds. Without taxes, the machinery of the State will grind to a halt and all government functions will be paralyzed.[6] Taxes

4. WEBSTER'S 3RD NEW INTERNATIONAL DICTIONARY 1149 (1976 ed.) (The term *Indian giver* is defined as one who gives something to another then takes it back or expects an equivalent in return).

5. 51 AM. JUR. *Taxation* § 34 (1944).

6. CIR v. Cebu Portland Cement Company, 156 SCRA 535, 541 (1987).

are unquestionably the lifeblood of the Government and their prompt and certain availability are an imperious need.[7]

Thus, the principal and basic purpose of taxation is to secure revenue for the support of the government for it is upon taxation that the state relies for its existence. Taxation, therefore, embraces two phases: (1) relating to the levying or imposition of the taxes on persons or property, (2) the collection of the taxes levied. The first is constituted by the provisions of law which determine the persons or property to be taxed, the sum or sums to be raised, the rate thereof, and the time and manner of levying and receiving and collecting taxes. It definitely and conclusively establishes the sum to be paid by each person taxed, or to be borne by each property assessed, and creates a fixed and certain demand in favor of the state or a subordinate governmental agency, and a definite and positive obligation on the part of those taxed. The second is constituted by those provisions that prescribe the manner of enforcing the obligation on the part of those taxed to pay the demand thus created. The two processes together constitute the taxation system.[8]

Revenue legislation, however, is not altogether geared towards the realization of taxes. Congress has seen fit to provide for safeguards to protect taxpayers against possible abuses to the power of taxation. Accordingly, Congress has provided statutes of limitation upon the assessment and collection of internal revenue taxes, as well as upon the right of Government to prosecute criminal offenses.

The statute of limitations upon the right to assess a tax means that if, after a certain period, a tax, which would have been properly due, is not ascertained or determined, the government can no longer assess or inspect the books of account of the taxpayer.[9] The same holds true for the government's right to collect taxes due and its right to file actions against tax offenders. Once the period established by law for collecting taxes or filing actions expire, the government's corresponding right to enforce said action is forever barred by provision of law. The Supreme Court, in explaining the purpose and significance of a statute of limitation on assessment and collection, has said:

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7. CIR v. Pineda, 21 SCRA 105, 110 (1967).

8. 51 AM. JUR. *Taxation* § 35 (1944).

9. JESUS P. LUKBAN & SEVERINO S. TABIOS, PRINCIPLES AND REMEDIES FOR INCOME TAX MANAGEMENT 391 (1993).

> The law prescribing a limitation of actions for the collection of income taxes is beneficial to both the Government and its citizens: to the Government because tax officers would be obliged to act promptly in the making of assessment, and to citizens because after the lapse of the period of prescription, citizens would have a feeling of security against unscrupulous tax agents who will always find an excuse to inspect the books of taxpayers … Without such a legal defense taxpayers would furthermore be under obligation to always keep their books and keep them open for inspection subject to harassment by unscrupulous tax agents.[10]

Whereas the limitation on assessment and collection intends to safeguard the interest of taxpayers against unreasonable investigation, the limitation upon criminal actions on the other hand serves to bar prosecutions on aged and untrustworthy evidence, as well as to cut off prosecution for crimes a reasonable time after its completion when no further danger to society is contemplated from the criminal activity.[11]

B. The Theory of Imprescriptibility

The *Theory* posits that taxpayers are unjustly robbed of the benefits of the statutes of limitations, either through the actual application of law or by judicial interpretation construing the prescriptive period established. Specifically, it maintains that in two specific provisions of the Tax Code, the prescriptive period provided for, although definite and determinable on its face inasmuch as a period is explicitly laid down, appears imprescriptible.

First, the extraordinary ten-year period under Section 222(a), the pertinent portion of which reads:

> In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten years after the discovery of the falsity, fraud or omission; provided, that in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof …[12]

10. Republic of the Philippines v. Ablaza, 108 Phil. 1105, 1108 (1960).

11. 22 C.J.S. *Criminal Law* § 223 (1940).

12. TAX CODE, § 222(a).

And second, the five-year prescriptive period under Section 281, which in full, states that:

> All violations of any provision of this Code shall prescribe after five years.
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> Prescription shall begin to run from the day of the commission of the violation of the law, and if the same be not known at the time, from the discovery thereof and institution of judicial proceedings for its investigation and punishment.
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> The prescription shall be interrupted when the proceedings are instituted against the guilty persons and shall begin to run again if the proceedings are dismissed for reasons not constituting jeopardy.
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> The term of prescription shall not run when the offender is absent from the Philippines.

As for the first occurrence of the *Theory*, as evidenced by Section 222(a), the same is confirmed in the work of one authority of the Tax Code who posits the view that:

> [I]t is essential that the discovery of the falsity or fraud or of failure to file must have been made within the three-year period following the general rule (Section 203). The exceptions refer to the ten-year period when assessment may be made from the date of discovery. The discovery period cannot be without time limit for otherwise the purpose of the law would be rendered nugatory.[13]

Thus, the contention is: if the discovery was not limited by such a period, then the Philippine Government (Government) may allege any date it pleases as the date of discovery – subject of course to proof the date of which could be 20, 30, 40, or even 50 years after the date the return was filed. Consequently, this would not have the effect of prescription upon the Government's right to assess or collect taxes, inasmuch as the prescriptive period is counted from the date of discovery. In this case, the prescription period, in its application, is alleged to be indefinite. Clearly, such indefiniteness is prejudicial to the taxpayers who have a right to be protected against unreasonable investigations after the lapse of the period prescribed.[14]

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13. HECTOR S. DE LEON, THE NATIONAL INTERNAL REVENUE CODE ANNOTATED 806-807 (1998).

14. Vol. 1 Philippine Tax Commission Report, 98 (1939).

With regard to its second application, the *Theory* has been reduced into the following words by the Supreme Court:

> As Section 354 [Section 281] stands in the statute books (and to this day it has remained unchanged) it would indeed seem that tax cases, as the present one are practically imprescriptible for as long as the period from the discovery and institution of judicial proceedings for its investigation and punishment, up to the filing of the information in court does not exceed five years.

The imprescriptibility of the prescriptive period under Section 281 exists for two reasons. First, as stated by the Court, the period from the discovery up to the institution of judicial proceedings is indeterminate. What was not stated, though implied, was that such period is veritably under the control of the Government, which may or may not choose to institute the required judicial proceedings, thereby precluding the prescriptive period from running. Second, the phrase "from the discovery thereof and the institution of judicial proceedings" has been interpreted to mean exactly as it is stated, that is, discovery must be coupled with the institution of judicial proceedings in order for the prescriptive period to commence. Markedly, such a literal interpretation not only causes the period of prescription to be indefinite but virtually amounts to no prescriptive period at all, because, as will be elaborated upon later, the moment of instituting judicial proceedings marks both the point at which the prescriptive period shall begin and the point where it will be interrupted.

In effect, this means that the period does not ever begin to run since it is interrupted by the very same event from which it commences. Thus, the judicial interpretation of the phrase "from the discovery thereof and the institution of judicial proceedings" renders offenses under the Tax Code practically imprescriptible because the Government's right to prosecute such offenses can never be barred by the passage of time. This gives the Government a veritable *Sword of Damocles* to eternally and endlessly hang over the heads of taxpayers, making it fall when proof and evidence which might have been available to the taxpayer for his defense, have been eroded by the mere lapse of time.

PART II: CRIMINAL ACTION AS A TAX REMEDY

A. The Prior Rule: There Can be no Collection of Taxes in Criminal Proceedings

Prior to the enactment of Presidential Decree No. 69 (PD 69)[15] on 24 November 1972, the remedies of Government to enforce the collection of taxes were limited to the administrative remedies of distraint or levy and the filing of a civil proceeding for the collection of taxes in court. A review of jurisprudence prior to PD 69 shows that criminal actions were instituted strictly as a means of penalizing violators of the tax statutes. In the case of *Garcia v. Collector of Internal Revenue*,[16] when the plaintiff was sentenced in a criminal case to pay a fine for taking from a distillery a certain amount of alcohol in order to remove the same to a distant store without first paying the corresponding specific tax, he was also subsequently required by the Collector of Internal Revenue (CIR) to pay the amount of said tax. The plaintiff paid under protest and thereafter filed a complaint to recover the amount paid. The Supreme Court upheld the trial court which ruled in favor of the plaintiff, stating:

> In view of the fact that in the former criminal case against the herein plaintiff, for violation of Section 2727 of the Administrative Code, the payment of the tax owing from him was not sought, inasmuch as its sole object was to impose upon the offender the corresponding penalty, the said tax should have been collected by the Government in an independent action because the confiscation in the criminal case was nothing more than an accessory penalty imposed by Article 25 of the Revised Penal Code and the penalty is an entirely different thing from the payment of the tax. A violator of a law should suffer the consequences of his own acts, and one of these consequences is the aforesaid confiscation.[17]

In the case, the Supreme Court recognized that the sole object of a criminal action was to impose a penalty upon the tax offender. Such criminal action could not have been utilized for the payment of taxes due (i.e. the corresponding civil liability) inasmuch as the proceeding

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15. An Act Amending Certain Sections of the National Internal Revenue Code, Presidential Decree No. 69 (1972) [hereinafter PD 69].

16. Garcia v. CIR, 66 Phil. 441 (1938).

17. *Id.* at 442-43.

was not a proper forum, as deemed by law. Hence, it was necessary for the CIR to institute separate proceedings for the recovery of the tax due. Unquestionably, this resulted to multiplicity of suits. Still, it could not be avoided, as the law was clear in establishing the remedies available to the Government for the collection of taxes.

In the case of *People of the Philippines v. Arnault*,[18] where the trial court, in a criminal proceeding for failure or neglect to pay taxes, in addition to convicting the defendant, further ordered the latter to indemnify the Government in the amount of tax not paid, the Supreme Court again ruled that a criminal proceeding was not one of the remedies provided by law in enforcing the collection of taxes. It declared:

> While Section 73 of the National Internal Revenue Code provides for the imposition of the penalty for refusal or neglect to pay income tax or to make a return thereof, by imprisonment or fine, or both, it fails to provide for the collection of said tax in criminal proceedings. As well contended by counsel for appellant, Chapters I and II of Title IX of the National Internal Revenue Code provide only for civil remedies for the collection of the income tax, and under Section 316, the civil remedy is either by distraint of goods, chattels, etc. or by judicial action. It is a commonly accepted principle of law that the method prescribed by statute for the collection of taxes is generally exclusive, and unless a contrary intent can be gathered from the statute, it shall be followed strictly.[19]

This was followed by the cases of *People of the Philippines v. Tierra*[20] and *Republic of the Philippines v. Patanao*[21] where the Supreme Court found the respective trial courts in error for having ordered the indemnification to the Government the amounts of unpaid deficiency taxes. The Supreme Court in both cases quoted from *Arnault*, reiterating that there was no legal sanction for the imposition of payment of civil indemnity to the Government in a criminal proceeding for the violation of income tax laws.

The above cases established the former rule that the conviction of a person in a criminal case arising out of the violation of any penal

18. People v. Arnault, 92 Phil. 252, 254 (1952).

19. *Id.* at 260.

20. People v. Tierra, 12 SCRA 666, 667 (1964).

21. People v. Patanao, 20 SCRA 712, 713 (1967).

provision of the Tax Code did not amount, at the same time, to a decision for the payment of unpaid taxes. First, because, according to the Supreme Court, there was no provision in the Tax Code allowing it. But more importantly, and corollary to the rule that the civil indemnification cannot be awarded in a criminal action for violations of the Tax Code, the conviction or acquittal obtained in the criminal action did not pose a bar to a civil action to enforce the civil liability of the tax offender.

This is diametrically opposed to the rule in ordinary criminal cases where the civil action is deemed instituted with the criminal action. As the Supreme Court held in *Republic v. Patanao*:

> [I]n applying the principle underlying the civil liability of an offender under the Penal Code to a case involving the collection of taxes the court a quo fell into error. The two cases are circumscribed by factual premises which are diametrically opposed to each other, and are founded on entirely different philosophies. Under the Penal Code the civil liability is incurred by reason of the offender's criminal act … The situation under the income tax law is the exact opposite. Civil liability to pay taxes arises from the fact, for instance, that one has engaged himself in business, and not because of any criminal act committed by him. The criminal liability arises upon failure of the debtor to satisfy his civil obligation. The incongruity of the factual premises and foundation principles of the two cases is one of the reasons for not imposing civil indemnity on the criminal infractor of the income tax law.
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> Considering that the Government cannot seek satisfaction of the taxpayer's civil liability in a criminal proceeding under the tax law or, otherwise stated, since the said civil liability is not deemed included in the criminal action, acquittal of the taxpayer in the criminal proceeding does not necessarily entail exoneration from his liability to pay the taxes… The acquittal in the said criminal cases cannot operate to discharge defendant-appellee from the duty of paying the taxes which the law requires to be paid, since that duty is imposed by statute prior to and independently of any attempts by the taxpayer to evade payment. Said obligation is not a consequence of the felonious acts charged in the criminal proceeding nor is it a mere civil liability arising from crime that could be wiped out by the judicial declaration of non-existence of the criminal acts charged.[22]

22. *Id.* at 715-16.

Patanao not only reaffirmed *Arnault* (which recognized the exclusiveness of tax collection remedies as provided by law) it also clarified that the taxpayer's civil liability did not arise from the same cause as that of the civil liability of an offender under the Penal Code. In the latter, the source of the civil liability is the criminal infraction, whereas in the former, the civil liability is caused by the Government's imposition of a tax applicable to the person – as in the case for instance of engaging in some business. Consequently, an acquittal in the criminal action for a violation of tax laws does not pose a bar to a civil action for recovery of the tax due.[23] This principle is embodied in the present Tax Code. Under Section 253(a) thereof, the payment of the tax due after apprehension shall not constitute a valid defense in any prosecution for violation of any provision of this Code or in any action for the forfeiture of untaxed articles.[24] This is because the duty to pay the tax is imposed by statute, and is independent of any attempt on the part of the taxpayer to evade payment.[25]

Hence, the primacy of law was again reaffirmed. The collection of taxes could not be enforced in the criminal action for the prosecution of criminal violations of the then Tax Code because the said Code did not permit such at the time. It established the remedies available to Government for the collection of taxes; which remedies, absent a contrary intent, were deemed exclusive.[26]

B. *Presidential Decree No. 69*

Possibly realizing that by expanding the purpose of criminal actions to include award of the civil indemnity, the number of suits needed to be filed by the Government would be reduced, Section 10 of PD 69 provided for the amendment of, among others, Section 316 of the then Tax Code, relating to the collection of delinquent taxes.[27] Thus, the law was amended to say:

23. *Tierra*, 12 SCRA at 672; *Arnault*, 92 Phil. at 262.
24. TAX CODE, § 253(a).
25. *Tierra*, 12 SCRA at 672.
26. *Arnault*, 92 Phil. at 260.
27. An Act to Revise, Amend and Codify the Internal Revenue Laws of the Philippines, Commonwealth Act No. 466 (1939) [hereinafter TAX CODE OF 1939].

> Section 316. Remedies for the collection of delinquent taxes.—The civil remedies for the collection of internal revenue taxes, fees, or charges and any increment thereto resulting from delinquency shall be (a) by distraint of goods, chattels, or effects and other personal property of whatever character, including stocks and other securities, debts, credits, bank accounts, and interests in and rights to personal property, and by levy upon real property and interest in or rights to real property; and (b) by civil or criminal action. Either of these remedies or both simultaneously may be pursued in the discretion of the authorities charged with the collection of such taxes; Provided, however, That the remedies of distraint and levy shall not be availed of where the amount of tax is not more that one hundred pesos.
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> *The judgment in the criminal case shall not only impose the penalty but shall also order payment of the taxes subject of the criminal case as finally decided by the Commissioner of Internal Revenue.*[28]

The enactment of PD 69 served to bolster tax collection remedies by addressing the perceived failure of the law to provide for the collection of taxes in criminal actions. In effect, this particular amendment introduced by PD 69 could be seen as remedial or curative in character in the sense that it was designed to streamline the collection of deficiency taxes by making such civil indemnity enforceable in criminal actions for violations of the Tax Code of 1939. In doing so, the law reduced the number of suits filed and eliminated duplicity of work on the part of the Government. Indeed, the intention of the law was commendable.

Nevertheless, it must be pointed out that the possible effects of integrating the tasks of punishing violations of tax laws and collecting taxes in one action were not fully considered at that time and are only lately being uncovered.

C. Is Assessment a Prerequisite in Criminal Tax Actions?

With collection now possible in criminal actions under tax laws, the most logical jurisprudential development was to merge the different natures of both actions, specifically the problem on how to reconcile collection, as necessarily preceded by an assessment, with criminal punishment.

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28. PD 69, § 10 (emphasis supplied). This amendment is now embodied in § 205 of the TAX CODE.

The first decision which dealt with such problem was that of *Ungab v. Cusi, Jr.*[29] In this case, the Supreme Court ratiocinated that inasmuch as one's civil liability, while enforceable in a criminal action for violation of the Tax Code, is founded upon a cause of action wholly independent of such criminal act, a final assessment determining the exact amount of a person's tax liability is not necessary in order to institute criminal proceedings against such person.[30] Thus, the Supreme Court said:

> What is involved here is not the collection of taxes where the assessment of the Commissioner of Internal Revenue may be reviewed by the Court of Tax Appeals, but a criminal prosecution for violations of the National Internal Revenue Code which is within the cognizance of courts of first instance. While there can be no civil action to enforce collection before the assessment procedures provided in the Code have been followed, there is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution under the Code.[31]

The Court, quoting from *Guzik v. United States*[32] and Merten's Law of Federal Income Taxation,[33] added:

> The contention is made, and is here rejected, that an assessment of the deficiency tax due is necessary before the taxpayer can be prosecuted criminally for the charges preferred. The crime is complete when the violator has, as in this case, knowingly and willfully filed fraudulent returns with intent to evade and defeat a part or all of the tax.
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> An assessment of a deficiency is not necessary to a criminal prosecution for willful attempt to defeat and evade the income tax. A crime is complete when the violator has knowingly and willfully filed a fraudulent return with intent to evade and defeat the tax. The perpetration of the crime is grounded upon knowledge on the part of the taxpayer that he has made an inaccurate return, and the government's failure to discover the error and promptly to assess has no connections with the commission of the crime.[34]

29. Ungab v. Cusi, Jr., 97 SCRA 877 (1980).
30. *Id.* at 878.
31. *Id.* at 883-84.
32. Guzik v. United States, 54 F.2d 618 (1932).
33. 10 MERTEN'S LAW OF FEDERAL INCOME TAXATION, § 55A.05.
34. *Ungab*, 97 SCRA at 884.

Here, the Supreme Court distinguished between the functions of a criminal tax action: that for the purpose of penalizing; and, that for the purpose of collecting. It stands repeating the Supreme Court's words:

> while there can be no civil action to enforce collection before the assessment procedures of the Code have been followed, there is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution under the Code.

It is clear from *Ungab* that, for purposes of enforcing collection, the taxes due must be definitely ascertained, as through the prior requisite of an assessment. But when the Government intends to merely punish the tax offender without demanding the civil indemnity, an assessment is not necessary to institute a criminal action.

The *Ungab* doctrine was blurred by the subsequent case of *Commissioner of Internal Revenue v. Court of Appeals.*[35] In this case, the Court of Appeals upheld the issuance by the trial court of a writ of preliminary injunction restraining preliminary investigations into charges of tax evasion filed against Fortune Tobacco. The Supreme Court, in upholding the decisions of the lower courts, said:

> [W]e share with the view of both the trial court and Court of Appeals that before the tax liabilities of Fortune are first finally determined, it cannot be correctly asserted that private respondents have willfully attempted to evade or defeat the taxes sought to be collected from Fortune. In plain words, before one is prosecuted for [a] willful attempt to evade or defeat any tax under Sections 253 and 255 of the Tax Code, the fact that a tax is due must first be proved.
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> Suppose the Commissioner eventually resolves Fortune's motion for reconsideration of the assessments by pronouncing that the taxpayer is not liable for any deficiency assessment, then, the criminal complaints filed against private respondents will have no leg to stand on.[36]

The Supreme Court, however, pointed out that *Ungab* was not being overturned. Rather, the Supreme Court seemed to be trying to cut a fine line between when an assessment is a prerequisite to a criminal action for evasion of taxes and when it is not. In the process, the Supreme Court differentiated the facts obtaining in *Ungab* with those of the Fortune case.

35. CIR v. CA, 257 SCRA 200, 208 (1996).

36. *Id.* at 226.

> Reading *Ungab* carefully, the pronouncement therein that deficiency assessment is not necessary prior to prosecution is pointedly and deliberately qualified by the Court with [the] following statement quoted from *Guzik v. U.S.*: "The crime is complete when the violator has knowingly and willfully filed a fraudulent return with intent to evade and defeat a part or all of the tax." In plain words, for criminal prosecution to proceed before assessment, there must be a *prima facie* showing of a willful attempt to evade taxes. There was a willful attempt to evade tax in *Ungab* because of the taxpayer's failure to declare in his income tax return "his income derived from banana saplings." In the mind of the trial court and the Court of Appeals, Fortune's situation is quite apart factually since the registered wholesale price of the goods, approved by the BIR, is presumed to be the actual wholesale price, therefore, not fraudulent and unless and until the BIR has made a final determination of what is supposed to be the correct taxes, the taxpayer should not be placed in the crucible of criminal prosecution. Herein lies a whale of difference between *Ungab* and the case at bar.[37]

The difference between *Ungab* and this particular case is heavily factual in nature. In the former, the taxpayer intentionally omitted his income derived from banana saplings from his return, whereas in the latter, the registered wholesale price which served as the basis for computing Fortune's tax liability was approved by the Bureau of Internal Revenue (BIR) itself. This consequently negated the assertion that Fortune had willfully attempted to evade the payment of taxes.

Hence, what may be gleaned from a comparison of the two cases is that a final assessment of deficiency is a prerequisite to the institution of a criminal tax action where the determination of the basis of the taxpayer's liability is under the direct supervision of the BIR. But where, as in the case of *Ungab*, the violator has knowingly and willfully filed fraudulent returns with intent to evade and defeat a part or all of the tax, a final assessment is no longer necessary in order to institute the criminal action against the tax violator – the crime is already complete.

The subsequent case of *Commissioner of Internal Revenue v. Pascor Realty and Development Corporation*[38] followed *Ungab's* lead. Here, the respondents failed to file income tax returns for the years 1986, 1987 and 1988, thereby prompting the BIR to conduct an examination of

37. *Id.*

38. CIR v. Pascor Realty and Development Corporation, 309 SCRA 402, 404 (1999).

respondents' books of account. Eventually, the BIR, upon the judgment of the CIR, filed a tax evasion case against respondents but without the prior issuance of an assessment. The respondents contended that a tax assessment should precede a criminal indictment. The Supreme Court disagreed, and, relying mainly on *Ungab*, declared that an assessment was unnecessary in instituting a criminal complaint for tax evasion. The Supreme Court reasoned thus:

> [P]rivate respondents maintain that the filing of a criminal complaint must be preceded by an assessment. This is incorrect, because Section 222 of the NIRC specifically states that in cases where a false or fraudulent return is submitted or in cases of failure to file a return such as this case, proceedings in court may be commenced without an assessment. Furthermore, Section 205 of the same Code clearly mandates that the civil and criminal aspects of the case may be pursued simultaneously. In *Ungab v. Cusi*, petitioner therein sought the dismissal of the criminal complaints for being premature, since his protest to the CTA had not yet been resolved. The Court held that such protest could not stop or suspend the criminal action which was independent of the resolution of the protest in the CTA. This was because the Commissioner of Internal Revenue had, in such tax evasion cases, discretion on whether to issue an assessment or to file a criminal case against the taxpayer or to do both.[39]

The Supreme Court further declared that a *prima facie* showing of failure to file a return was sufficient to support the criminal charge in *Pascor* – wholly consistent with the *Ungab* pronouncement.[40] Thus, the Court concluded that the fact of failing to file a return need not be proven by an assessment.[41]

In both *Ungab* and *Pascor* the willful attempt to evade the payment of taxes was complete upon the filing of the fraudulent returns. On the contrary, in the Fortune case there was no such willful attempt, inasmuch as the tax liability of Fortune was pre-approved by the BIR and therefore stamped with the imprimatur of validity.

39. *Id.* at 414.

40. *Id.* at 415.

41. *Id.*

D. The Two Facets of Criminal Action in Taxation: To Penalize or to Collect?

The aforementioned amendment introduced by PD 69 modified the rulings of the Supreme Court prior to the effectivity of said law. Where before, the Supreme Court omitted the order of payment of delinquent taxes in a judgment convicting a taxpayer for willful refusal to pay the tax, on the ground that the law did not permit such an award in the criminal case, today, as the law stands, it is now mandatory that the order of payment of such taxes be included in the judgment rendered by the court. This mandate is, however, obscured by pronouncements of the Supreme Court that a criminal complaint is instituted not to demand payment, but to penalize the taxpayer for violation of the Tax Code.[42] However, it must be understood that such declarations be interpreted to mean that criminal actions are first and foremost a penalty. Their function as a collection remedy is merely secondary.

Criminal actions, therefore, have two facets: as a penalty and as a collection remedy. Given the two separate collecting and penalizing facets of a criminal tax action, the following query may be presented: supposing the three-year period to assess or collect under Section 203 of the NIRC has expired, may the court in a criminal action against the taxpayer render judgment for payment of the deficient taxes considering that the criminal action prescribes in five years even if the period to assess or collect has already expired?

The answer is, when from the civil aspect, the right of the Government to assess or collect has prescribed, no judgment can be rendered in a criminal proceeding ordering the taxpayer to pay the delinquent tax, taking into account the laudable purpose of limiting the right of the Government to assess and collect to a shorter period of three years.[43] Thus, if the prescriptive period within which the Government is permitted to assess or collect deficiency taxes has expired, it is the corresponding civil liability of the taxpayer that is remitted. On the other hand, if it is only the criminal action that has prescribed, it is only the criminal liability that is remitted, the right to

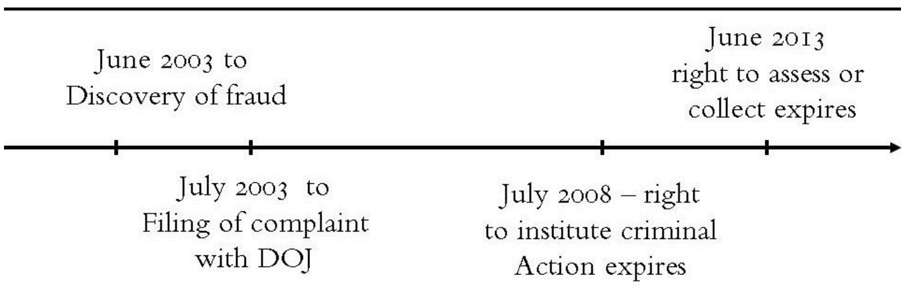
42. *Id.* at 416.

43. JOSE N. NOLLEDO & MERCEDITA S. NOLLEDO, THE NATIONAL INTERNAL REVENUE CODE OF THE PHILIPPINES ANNOTATED, 1037 (1993). *See*, TAX CODE, § 203, which prescribed a three year period from the last day provided for filing a return within which the Government may make an assessment or collect judicially.

assess and collect being available to Government inasmuch as the period to do so still subsists.

To illustrate: Taxpayer A filed a fraudulent return with the intent to evade the payment of income tax in 2002. On the following year, on June 2003, the BIR discovered the fraud employed by A. On that same year, on July 2003, upon discovery of the fraud, the BIR filed a complaint for tax evasion against A with the Department of Justice. Under Section 222(a) of the Tax Code, the BIR has ten years from discovery to assess or collect the deficiency tax, that is, until June 2013. Under Section 281, as interpreted in *Lim, Sr.*, the BIR has five years from discovery and institution of judicial proceedings to exercise its right to prosecute the crime of tax evasion, that is, until July 2008.

ILLUSTRATION 1



Given the above circumstances, the following conclusions may be gathered:

1. If the Government timely institutes the proper criminal action for tax evasion within the period between July 2003 and July 2008, it can seek indemnification not only for Taxpayer A's criminal liability but also for the latter's civil liability as provided by Section 205.

2. If after July 2008, the Government fails to institute the proper criminal action for tax evasion, it is only Taxpayer A's criminal liability that is extinguished. The Government may still exercise its right to assess or collect until June 2013. However, the remedies available to it shall only be by distraint or levy, or by civil action.

Given the same set of facts, except that the BIR files a complaint with the Department of Justice against A for tax evasion only on July 2014, the following conclusion may be drawn: if no assessment or no collection proceeding in court without assessment has been made by the Government after June 2013, even if the Government institutes the proper criminal action within five years from July 2014, the time judicial proceedings for the investigation and punishment for tax evasion were instituted, the Government cannot demand that the civil indemnity be enforced in the criminal action for tax evasion. This is because its right to assess or collect had already expired. In such case, Government may only seek a redress of Taxpayer A's criminal liability.

PART III: THE STATUTE OF LIMITATION ON ASSESSMENT AND COLLECTION OF TAXES

A. The Period of Prescription on Assessment

Section 203 of the Tax Code provides the general rule as to the prescriptive period for assessment, thus:

> Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period; provided, that in a case where a return is filed beyond the period prescribed by law, the three-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered filed on such last day.[44]

Therefore, where a return has been filed, it being neither false nor fraudulent, the prescriptive period is within three years after the date the return was due or was filed, whichever is later. In cases where the return has been amended after it has been filed, the prescriptive period begins to run from the filing of the amended return if it is substantially different from the amended return.[45] To count the period from the filing of the original return will enable taxpayers to evade taxes by simply reporting losses and deductions in the original return and later filing an amended return when it is no longer possible for the Government to make a tax assessment within the prescriptive period.[46]

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44. TAX CODE, § 203.
45. CIR v. Phoenix Assurance, 14 SCRA 52, 59 (1965).
46. DE LEON, *supra* note 13, at 702.

Section 222, on the other hand, provides for the exceptions to the general rule. Subsection (a) thereof states:

> In the case of a false or fraudulent return with intent to evade tax or failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten years after the discovery of the falsity, fraud or omission; provided, that in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

Thus, in the case of a false or fraudulent return with intent to evade payment of taxes or of failure to file a return, the Government is given ten years after the discovery to make a fraud assessment. The purpose for this extraordinary ten-year period is to provide the Government, which is placed at a disadvantage, ample time for its agents to properly assess the taxpayer's liabilities.[47] Thus, where the return filed by the taxpayer is a wrong return, the Supreme Court said that it was as if there was no return filed, and the extraordinary period of ten years applies.[48] Furthermore, Section 222 has been interpreted by the Supreme Court to mean that the cases of a false return, the filing of a fraudulent return and the failure to file a return are considered separate and distinct from each other. The Supreme Court held that in these three different cases, the tax may be assessed, or a proceeding in court for the collection of such tax may be commenced, without assessment, at any time within ten years after the discovery of the falsity, fraud or omission.[49]

The law, however, fails to provide the moment when discovery is considered to have occurred. Fortunately, the BIR, as the Government's agent in the enforcement of tax laws, has enacted Revenue Memorandum Circular No. 101-90 (RMC No. 101-90), which provides

47. Aznar v. Court of Tax Appeals (CTA), 58 SCRA 519, 522 (1974).

48. Butuan Sawmill v. CTA, 16 SCRA 277, 283 (1966).

49. In this regard, the Court distinguished between a false return and a fraudulent return in that the first merely implies a deviation from the truth, whether intentional or not; while the second implies an intentionally deceitful entry with the intent to evade the taxes due. Furthermore, fraud is a question of fact and the circumstances constituting fraud must be alleged and proved in court, it is never lightly presumed because fraud is a serious charge. *Aznar*, 58 SCRA at 532; CIR v. Ayala Securities Corp., 70 SCRA 205, 209-10 (1976).

that the discovery happens only after the manner of commission and the nature of the fraud has been definitely ascertained. Specifically, this occurs when the BIR renders its final decision and requires the taxpayer to pay the deficiency tax.[50]

B. The Period of Prescription on the Collection of Taxes

The period for collecting taxes depends on the existence or non-existence of an assessment. In the absence of an assessment, Section 203 provides that taxes shall be collected within three years from the date the return was filed or the prescribed date for its filing, whichever comes later.[51] Moreover, collection in this case may be enforced only by judicial action. Where there is falsity, fraud or omission, on the other hand, Section 222 grants the Government ten years to collect the tax from discovery of the falsity, fraud, or omission.[52] Again, collection may be resorted to only by judicial action.

On the other hand, where an assessment has been made and has become final, Section 222(c) provides that the tax shall be collected within five years from the finality of the assessment. Here, the Government may avail itself of the administrative remedies of distraint and levy, from the judicial remedies in order to enforce collection of the tax. However, this provision explicitly refers to taxes which have been assessed within the extraordinary period contemplating falsity, fraud, or omission of the return.[53] Apparently, there is no specific provision that supplies the collection period in the case where an assessment has been made but without falsity, fraud, or omission in the return.

Ideally, it should follow that the general rule for collecting taxes after an assessment has been made should be found under Section 203

50. Bureau of Internal Revenue, Revenue Memorandum Circular No. 101-90 (Nov. 26, 1990) (Determination of when cause of action for willful failure to pay deficiency tax occurs; and prescription under Section 280 of the Tax Code).

51. TAX CODE, § 203.

52. *Id.* § 222.

53. § 222(c) reads: Any internal revenue tax which has been assessed within the period of limitation as prescribed in paragraph (a) hereof may be collected by distraint or levy or by a proceeding in court within five years following the assessment of the tax.

inasmuch as this provision lays down the general rule for the prescription of ordinary assessments. However, Section 203 speaks only of a three-year limitation for collection by a proceeding in court without assessment. This has led some to believe that the general prescriptive period for collection after an ordinary assessment has been made shall likewise be three years counted from the finality of the assessment.

The lack of a specific provision has been further compounded by the numerous amendments to the periods of prescription. Historically, the first Tax Code, effective 15 June 1939, provided for a uniform prescriptive period for both assessment and collection of taxes. Under Section 331 thereof (which was the precursor of Section 203), "internal revenue taxes shall be assessed within five years after the return was filed and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."[54] Likewise, Section 332(c) (the precursor of Section 222(c)), provided that internal revenue taxes that have been assessed may be collected by distraint or levy or by a proceeding in court, but only "if begun within five years after the assessment."[55] Therefore, it was immaterial to distinguish which between Section 203 and Section 222 was the basis for the length of the prescriptive period for collection inasmuch as both provided for a period of five years.

Subsequently, Batas Pambansa Bilang 700 (BP 700) reduced the five-year period for both assessment and collection to three years.[56] The shortened periods of limitation prescribed by BP 700 were made

54. TAX CODE OF 1939, § 331.

55. § 332(c) of the TAX CODE OF 1939 reads in full: Where the assessment of any internal-revenue tax has been made within the period of limitation above prescribed such tax may be collected by distraint or levy or by a proceeding in court, but only if begun (1) within five years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Collector of Internal Revenue and the taxpayer before the expiration of such five-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

56. An Act Amending Sections 318 and 319 of the National Internal Revenue Code, as Amended, so as to Reduce the Period of Limitation for Assessment of Internal Revenue Taxes from Five to Three Years, Batas Pambansa Bilang 700 (1984) [hereinafter BP 700].

applicable to internal revenue taxes beginning taxable year 1984.[57] Again, it was immaterial to point out which provision was the basis for the prescriptive period of collection since the law provided for a uniform three-year period.

On 1 January 1998, Republic Act No. 8424 (R.A. No. 8424), otherwise known as the *Tax Reform Act of 1997* again amended the periods of prescription.[58] Curiously, it was only the prescriptive period under now Section 222(c) that was changed – extended from three years to five years, the same as the period for collection under the Tax Code of 1939. Significantly, Section 203 of the present Tax Code retained the three-year period introduced by BP 700. In short, R.A. No. 8424 restored the original five-year period but applied it to Section 222(c) only. Obviously, this erased the uniformity of prescriptive periods characteristic of the 1939 and 1977 Tax Codes. Thus, the resulting confusion as to whether collection must be had within three years or five years from assessment, absent falsity, fraud, or omission.

Indeed, the manner in which Section 222(c) is worded contributes, in a large part, to such confusion. It states: "any internal revenue tax which has been assessed within the period of limitation as prescribed in paragraph (a) hereof…" Paragraph (a) of Section 222 refers to fraud assessments and not to ordinary assessments under Section 203. On the other hand, the 1939 and 1977 Tax Codes merely referred to "the period of limitation above-prescribed." The legislators, in drafting the 1997 Tax Code, interpreted the word *above-prescribed* as referring to subsection (a) of Section 222. Admittedly therefore, those who espouse the view that collection in ordinary cases must be made within three years from the filing of return, or from the date when the return is due, whichever is later, have a valid argument.

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57. Bureau of Internal Revenue, Revenue Memorandum Circular No. 33-84, Publishing Batas Pambansa Bilang 700 amending Sections 318 and 319 of the National Internal Revenue Code, as amended, reducing the period of limitation for assessment and collection of internal revenue taxes from five to three years (Nov. 12, 1984).

58. An Act Amending the National Internal Revenue Code of the Philippines, as Amended, and for Other Purposes, Republic Act No. 8424 (1998) [hereinafter R.A. No. 8424].

It is submitted that where an assessment has been made, whether an ordinary or a fraud assessment, the tax assessed shall be collected within five years following the assessment. This finds basis in Section 222(c), which more fully provides that,

> any internal revenue tax which has been assessed within the period of limitation as prescribed in paragraph (a) hereof may be collected by distraint or levy or by a proceeding in court within five (5) years following the assessment of the tax.

That the prescriptive period is five years also finds support in: (1) case law, which points to Section 222(c) as the prescriptive period for collection with assessments, even absent falsity, fraud, or omission, (2) the inability to point out any legal provision stating that the prescriptive period is three years, and, (3) the principle that statutes of limitation on assessment and collection must be construed strictly in favor of Government. Considering the ramifications of such an argument, it is thus now imperative to discuss, in detail, these three points.

1. Case Law Points to §222 (c) as Basis for the Five-Year Period

In the early case of *Collector of Internal Revenue v. Servando de los Angeles,*[59] the question posed was "What is the prescriptive period for collection under ordinary circumstances, absent falsity, fraud or omission, where an assessment has been issued?"[60] The Supreme Court ruled that the collection period was five years from the assessment of the tax. Admittedly, at the time the case was decided, the uniform period of five years found in Sections 331 and 332 of the Tax Code of 1939 was in force. But what was significant about this case was that the Supreme Court applied the five-year period in Section 332(c), to the case of ordinary assessments. It stated:

> We are not concerned here with the exception embodied in subdivision (a) of the section, because this is not a case of a false or fraudulent return or of a failure to file a return. Neither are we concerned with the exception contained in subdivision (b), it not appearing that a different period has been consented to by both the Collector of Internal Revenue and the taxpayer. But the exception prescribed in subdivision (c) applies to the present case, because the

59. CIR v. de los Angeles, 101 Phil. 1026 (1957).

60. *Id.* at 1028.

> tax now sought to be collected appears to have been assessed within five years after the return in accordance with section 331.
>
> Having been assessed within the time fixed by law, the tax in question could, pursuant to subdivision (c) of section 332, be collected by distraint or levy or by court proceeding, 'only if begun within five years after the assessment of the tax.' After the expiration of that period of limitation, collection of the tax by any of those methods would be without authority of law.[61]

It is explicitly clear from the foregoing that Section 332(c) of the Tax Code of 1939, presently Section 222(c) of the present Tax Code, applies to both ordinary and fraud assessments.

In the case of *Republic of the Philippines v. Ledesma,*[62] the Supreme Court noted that under Section 331 of the Tax Code of 1939, internal revenue taxes shall be assessed within five years after the last day prescribed by law for the filing of the return, and if there is no assessment a proceeding in court for collection must be commenced within the same period.[63] The Court went on to state that under Section 332(c), where an assessment is made, the court proceeding must be filed within five years thereafter.[64] In other words, as long as there is timely assessment, the Government has an additional five years within which to bring an action for collection.

In *Republic of the Philippines v. Salud Hizon*,[65] the Supreme Court, finding that the collection case of the Government was not barred by prescription, quoted Section 223(c) of the 1977 Tax Code which provided that, "any internal revenue tax which has been assessed within the period of limitation above-prescribed may be collected by distraint or levy or by a proceeding in court within three years following the assessment of the tax."[66]

All the above-cited cases involved assessments which have been issued under ordinary circumstances, that is, without falsity, fraud or

61. *Id.* at 1029-30.

62. Republic of the Philippines v. Ledesma, 19 SCRA 455 (1967).

63. *Id.* at 457.

64. *Id*.

65. Republic of the Philippines v. Salud Hizon, 320 SCRA 574 (1999).

66. *Id.* at 582.

omission. And in each case, the Supreme Court applied what is presently Section 222(c) of the Tax Code, providing for a five-year period to collect taxes where an assessment has been made. Therefore, the rule is that collection of taxes must be made within five-years from assessment regardless of the existence or non-existence of falsity, fraud or omission of the return.

2. Absence of Legal Provision Stating that the Period is Three Years

Section 222(c) is the only provision in the Tax Code which makes mention of what the period should be for the collection of taxes where an assessment has been made. Section 203 is deafeningly silent on this. It only provides that a proceeding in court without assessment for the collection of taxes may be had within three years from the filing of the return, or the date when it is due, whichever is later. Evidently it does not give any indication as to what the period should be in cases where an assessment has been made. Those who advocate the view that the period of collection in ordinary cases where an assessment has been made should follow the three-year period based on Section 203 have therefore no legal provision to support their stance. Thus, it would seem reasonable to adopt the period under Section 222(c) inasmuch as this at least specifically pertains to collection of taxes with assessment.

3. The Five-Year Period is Consistent with Established Principle

Finally, the longer period of five years is more in accord with the principle that statutes of limitations barring the assessment and collection of taxes justly due and unpaid receive a strict construction in favor of the Government, and the limitations in such cases will not be presumed in absence of clear legislation to the contrary.[67] This longer period also gives the Government more time to collect, thereby achieving the obvious intent of the legislators in extending the period to collect from three years to five years.

To recapitulate, collection under ordinary circumstances must be completed within five years from the date of final assessment, or if no assessment has been made, within three years – and only by judicial action – after the last day prescribed by law for the filing of the return or on the date the return was filed, whichever comes later. Under the extraordinary circumstances of falsity, fraud or omission, a proceeding

67. 10 MERTEN'S LAW OF FEDERAL INCOME TAXATION § 57.02 (1985).

in court without assessment for the collection of the tax may be filed at any time within ten years from the discovery of the falsity, fraud or omission. Where a fraud assessment has been issued, collection may also be had within five years from the finality of the fraud assessment.

PART IV: THE STATUTE OF LIMITATION ON CRIMINAL TAX ACTIONS

A. *The Origin of the Prescriptive Period of Tax Offenses*

The earliest statute of limitation governing tax crimes was Act No. 3326, a special law which provided for the periods of prescription for violations penalized by special acts and municipal ordinances.[68] It was enacted in 1926, way before the Tax Code of 1939. Up to the present, Act No. 3326 continues to apply to special acts that do not otherwise establish a period of prescription for criminal proceedings.

The pertinent portion of Section 1 reads:

> … That all offenses against any law or part of law administered by the Bureau of Internal Revenue shall prescribe after five years.[69]

The subsequent section, on the other hand, states:

> Prescription shall begin to run from the day of the commission of the violation of the law, and if the same be not known at the time, from the discovery thereof and the institution of judicial proceedings for its investigation and punishment.
>
> The prescription shall be interrupted when proceedings are instituted against the guilty person and shall be dismissed for reasons not constituting jeopardy.[70]

When the Tax Code of 1939 was enacted, said Sections 1 and 2 of Act No. 3326 were incorporated into the Code as Section 354 thereof. Significantly, the second paragraph of Section 354, and presently

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68. An Act to Establish Periods of Prescription for Violations Penalized by Special Acts and Municipal Ordinances and to Provide When Prescription Shall Begin to Run, Act No. 3326, as amended (1926) [hereinafter Act No. 3326].

69. *Id.* § 1.

70. *Id.* § 2.

Section 281 of the Tax Code, contain the exact language found in the aforequoted Section 2 of Act No. 3326.

That Section 281 of the Tax Code, governing the prescription of criminal offenses in the Tax Code, originated from Act No. 3326 can be gleaned from the foregoing excerpt from the case of *People of the Philippines v. Ching Lak.*[71]

> Evidently, appellee was charged with an offense against a law administered by the Collector of Internal Revenue, for it appears from Section 9 of Republic Act No. 55, that the execution of all its provisions was entrusted to the Collector of Internal Revenue; and in accordance with Section 1 of Act 3585 which amended Act 3326, all offenses against any law or part of law administered by the Collector of Internal Revenue shall prescribe after five years. Acts 3326 and 3585 were not repealed by Act 3815, the Revised Penal Code. It follows that Article 90 of the said Code providing for the prescription of crimes would not apply to prescription of violations of special laws or parts of laws administered by the Bureau of Internal Revenue, in view of the provisions of Article 10. The prescriptive law applicable is Act 3326, as amended by Act 3585.[72]

The significance of the relation of Section 281 to Act No. 3326 is explained by the following postulate: if a certain law is derived from a prior law, and to an extent, copies the exact language of the prior law, then the interpretation ascribed to the prior law must necessarily also apply to the later law. It is submitted that since Section 281 finds its origin in Act No. 3326, and to the extent that pertains to taxation, copies the exact language of Act No. 3326, then, the interpretations ascribed to Act No. 3326 must necessarily apply also to Section 281.

B. Section 281 of the Tax Code

Section 281 of the Tax Code, governing the prescriptive period for criminal tax actions, provides for two modes of determining the start of prescription. The first-level or mode of prescription deals with the case where the commission of the offense was known at the time it was committed. Here, prescription sets in from the time of the commission of the offense. On the other hand, in case the commission of the offense

71. People v. Ching Lak, 103 Phil. 1149 (1958).

72. *Id.* at 1149.

was not known at the time it was committed, prescription begins only from the time of discovery of the offense and the institution of judicial proceedings for its investigation and punishment – this is the second-level of prescription.[73] An offense under the Tax Code is considered discovered only after the manner of commission and the nature and extent of the fraud has been definitely ascertained. This occurs when the BIR renders its final decision and requires the taxpayer to pay the delinquency tax.[74]

Determining when prescription begins is therefore a matter of whether the offense is known or unknown at the time of its commission. The following cases illustrate instances when an offense is considered known or not, and more importantly, the two modes of prescription under Section 281.

1. The First Mode of Prescription Under Section 281: When the Commission of the Offense is Known

In the case of *Petronila C. Tupaz v. Honorable Benedicto B. Ulep*,[75] the petitioner was charged under an information for nonpayment of deficiency corporate income tax for the year 1979 amounting to P2,369,085.46, in violation of Section 51(b) in relation to Section 273 of the Tax Code of 1977.[76] It was alleged by the petitioner, among others, that the offense has already prescribed.[77] She claimed that inasmuch as the preliminary investigation was filed with the Department of Justice only on 8 June 1989, and the offense was committed on April 1980 when she filed the income tax return covering the taxable year 1979, the offense had prescribed as provided by Section 281 declaring that criminal tax actions shall prescribe in five years. The facts however, show that the BIR had issued a notice of assessment on 16 June 1984 which the Supreme Court found to be well-within the five-year period for making assessments.[78] The Supreme Court held that it was only

73. TAX CODE, § 281.

74. Revenue Memorandum Circular No. 101-90, § 2(d).

75. Tupaz v. Ulep, 316 SCRA 118, 121 (1999).

76. *Id.* at 121.

77. *Id.* at 125.

78. *Id.* at 126. The assessment issued covered the taxable year 1979, prior to the date of effectivity of Batas Pambansa Blg. 700, which applies only to

when the assessment had become final and unappealable that the five-period commenced to run. Particularly, the Supreme Court stated:

> [P]etitioner was charged with failure to pay deficiency income tax after repeated demands by the taxing authority. In *Lim, Sr. v. Court of Appeals*, we stated that by its nature the violation could only be committed after service of notice and demand for payment of the deficiency taxes upon the taxpayer. Hence, it cannot be said that the offense has been committed as early as 1980, upon filing of the income tax return. This is so because prior to the finality of the assessment, the taxpayer has not committed any violation for nonpayment of the tax. The offense was committed only after the finality of the assessment coupled with taxpayer's willful refusal to pay the taxes within the allotted period. In this case, when the notice of assessment was issued on 16 July 1984, the taxpayer still had thirty days from receipt thereof to protest or question the assessment. Otherwise, the assessment would become final and unappealable. As she did not protest, the assessment became final and unappealable on 16 August 1984. Consequently, when the complaint for preliminary investigation was filed with the Department of Justice on 8 June 1989, the criminal action was instituted within the five (5) year prescriptive period.[79]

Tupaz is a clear example of a first-level case wherein the offense committed was known to the BIR. Thus, the prescriptive period, applying Section 281, commences to run from the commission of the offense. In this case, the violation was for willful refusal to pay deficiency income taxes which can only be committed once notice and demand for payment had been made to the taxpayer.[80] Prior to this, the taxpayer cannot be said to be in violation for willfully refusing to pay the taxes. Such an offense is only committed after the finality of the assessment coupled with the taxpayer's willful refusal to pay the tax within the allotted period.[81]

Significantly, one's attention is called to the Supreme Court's statement that "when the complaint for preliminary investigation was

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assessments and collections beginning taxable year 1984. Prior to this date, the period to assess and collect under ordinary circumstances was five years.

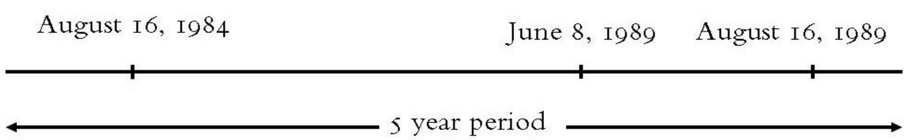
79. *Id.* at 128.

80. TAX CODE, § 255.

81. *Tupaz*, 316 SCRA at 128.

filed with the Department of Justice on 8 June 1989, the criminal action was instituted within the five-year period."[82]

ILLUSTRATION 2



It was on 16 August 1984 that the assessment became final and unappealable. Therefore, it was on this date that the prescriptive period began to run since this was the date the offense was committed, such offense being known. This prescriptive period consequently lapsed five years after or on 16 August 1989.

2. Prescriptive Period Interrupted by Preliminary Investigation

It appears that inasmuch as the filing of the preliminary investigation was the event taken by the Court to be well-within the five-year period, and thus the basis for ruling that the criminal action was timely instituted, it may be concluded that it is the filing of the preliminary investigation with the Department of Justice that tolls the prescriptive period. This is in accord with the Revised Rules of Criminal Procedure which provides that, where a preliminary investigation is required, the filing of such investigation institutes the criminal action.[83] Section 281 itself provides that the prescriptive period shall be interrupted when proceedings are instituted against the guilty persons and shall begin to run again if the proceedings are dismissed for reasons not constituting jeopardy.[84] The point where the period commences and is interrupted is important in illustrating the prescriptibility of what has been termed as a first-level case. Such prescriptibility, however, shall later be shown as absent on the second level.

82. *Id.*

83. The Revised Rules of Criminal Procedure, A.M. No. 00-5-03-SC, rule 110, § 1(a) (2000).

84. TAX CODE, § 281.

3. The Second Mode of Prescription Under Section 281: When the Commission of the Offense is Unknown

In the case of *Emilio E. Lim, Sr. v. Court of Appeals*,[85] petitioners Emilio Lim and his spouse were prosecuted for filing fraudulent consolidated income tax returns with intent to evade the payment of taxes.[86] The petitioners contended that the offense has prescribed inasmuch as five years had already lapsed from the date of discovery of the alleged fraud. The Solicitor General, in behalf of the Government, countered that the crime of filing false returns was deemed discovered only after the manner of the commission, and the nature and extent of the fraud has been definitely ascertained. Moreover, the Solicitor General argued that when Section 354 spoke of "from the discovery thereof and the institution of judicial proceedings," it meant exactly that: in addition to the fact of discovery, there must be a judicial proceeding for the investigation and punishment of the tax offense before the five-year limiting period can begin to run.[87]

The Supreme Court favored the Government, ruling in this wise:

> The Court is inclined to adopt the view of the Solicitor General. For while that particular point might have been raised in the Ching Lak case, the Court, at that time, did not give a definite ruling which would have settled the question once and for all. As Section 354 (now 281) stands in the statute books (and to this day it has remained unchanged) it would indeed seem that tax cases, as the present one are practically imprescriptible for as long as the discovery and institution of judicial proceedings for its investigation and punishment, up to the filing of information in court, does not exceed five years.
>
> xxx
>
> Unless amended by the Legislature, Section 354 stays in the Tax Code as it was written during the days of the Commonwealth. And as it is, must be applied regardless of its apparent one-sidedness in favor of the Government. In criminal cases, statutes of limitations are acts of grace, a surrendering by the sovereign of its right to prosecute. They receive a strict construction in favor of the Government and

85. Lim, Sr. v. CA, 190 SCRA 616, 618 (1990).

86. *Id.* at 618.

87. *Id.* at 624.

> limitations in such cases will not be presumed in the absence of clear legislation.[88]

Lim, Sr., is a clear illustration of the second mode of prescription under Section 281 – wherein the offense committed was not known at the time of its commission. Here, the unknown offense was the filing of fraudulent consolidated income tax returns with intent to evade tax. Being so unknown, the five-year prescription period commenced from the discovery and institution of judicial proceedings. Noticeably, the Supreme Court did not bother to determine when the discovery actually took place.[89] It concentrated on the date when the judicial proceedings were instituted, merely stating:

> As Section 354 stands in the statute books (and to this day it has remained unchanged) it would indeed seem that tax cases, such as the present ones, are practically imprescriptible for as long as the period from the discovery and institution of judicial proceedings for its investigation and punishment, up to the filing of the information in court does not exceed five years.[90]

In the case, the petitioners alleged that the discovery was made on 15 October 1964. On the other hand, the Solicitor General claimed that discovery occurred on 10 October 1967. The filing of the preliminary investigation was made on 1 September 1969. The Supreme Court held that the prescriptive period was initiated on this later date.[91]

ILLUSTRATION 3

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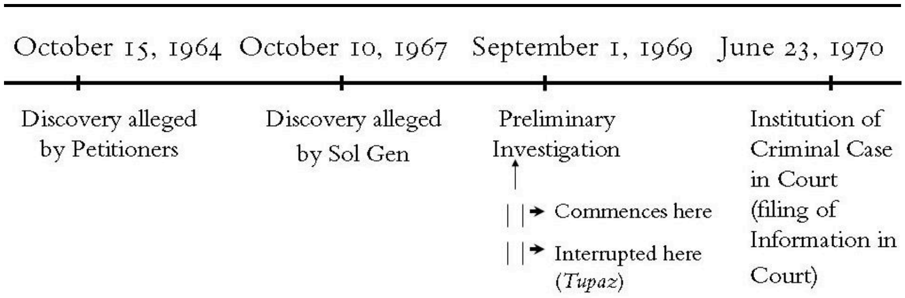
88. *Id.* at 625-26.

89. Petitioners advanced the view that the date of discovery was Oct. 15, 1964, the same date stated by the Court of Appeals in its resolution as the date the fraudulent nature of the returns was unearthed. The Solicitor General, on the other hand, claimed that discovery occurred only after the manner of commission and the nature and extent of the fraud have been definitely ascertained. It was only on Oct. 10, 1967 when the BIR rendered its final decision holding that there was no ground for the reversal of the assessment and therefore required the petitioners to pay P1,237,190.55 in deficiency taxes that the tax infractions were discovered. *See Lim, Sr.*, 190 SCRA at 624. Regrettably, the Supreme Court did not state which date was the true date of discovery.

90. *Lim, Sr.*, 190 SCRA at 625.

91. *Id.* at 624.



To summarize, the prescriptive period for offenses, the commission of which were concealed from the Government is five years, was reckoned from the institution of judicial proceedings for the investigation and punishment thereof. And, as noticed by Justice Gutierrez, Jr., making the discovery of the fraud and institution of judicial proceedings conjunctive renders meaningless the date of discovery.

4. The Difficulty with Accepting *Lim, Sr*.

There are two problems with the interpretation ascribed by the Supreme Court to the prescriptive period under the second mode in Section 281. First, as acknowledged by the Supreme Court, the period renders tax cases in this class "practically imprescriptible."[92] Here, the imprescriptibility referred to is the indefinite interval from the time of discovery up to the institution of judicial proceedings. This is similar to the alleged imprescriptibility due to Section 222. In this case, from the time of discovery, perpetuity could pass, and the offense will still not have prescribed for lack of the required judicial proceedings. Thus, a simple crime of tax evasion can, upon discovery, fail to prescribe even after fifty years, should Government choose not to institute the judicial proceedings mentioned. This is clearly unfair to the taxpayer since he stands to be imprisoned in the event the Government suddenly, after an absurdly long period, decides to pursue the tax evasion case and file the necessary action in court. By that time obviously, books of account or other pieces of evidence that the taxpayer can utilize for his defense will have already been corroded by time.

But the second problem seems to have escaped the Supreme Court. Essentially, it lies in the fact that prescription is made to run technically from the institution of judicial proceedings for the investigation and

92. *Id.* at 625.

punishment of the offense. In effect, the point of commencement and the point of interruption of the prescriptive period are one and the same. The point of commencement according to *Lim, Sr.* is the institution of judicial proceedings which was interpreted to be the filing of the preliminary investigation. On the other hand, as shown in *Tupaz*, the preliminary investigation also interrupts the running of the prescriptive period. Therefore, the filing of the preliminary investigation starts and simultaneously interrupts the period, resulting in no period at all!

C. The Case of Duque*, Interpreting Section 2 of Act No. 3326*

In *People of the Philippines v. Duque*,[93] the Supreme Court was tasked to interpret Section 2 of Act No. 3326, as amended. Herein lies another example of judicial recognition of the imprescriptibility.

In this case, the appellants contended that a literal reading of Section 2 suggested that two elements must coincide for the prescriptive period to commence: first, the element of discovery of the commission of the violation of the special law; and second, the institution of judicial proceedings for its investigation and punishment. He therefore concluded that because the co-existence of these two requirements was necessary under Section 2 of Act No. 3326, the relevant prescriptive period will never begin to run. He thus contended that the provisions of the Revised Penal Code should instead apply and the offense should be considered to have already prescribed. The Supreme Court, in addressing the issue of imprescriptibility, said:

> [W]e do not think there is any real need for such a literal reading of Section 2. As is well-known, initiation of proceedings for preliminary investigation of the offense normally marks the interruption of the period of prescription. *Under appellant Duque's literal reading, the prescription period would both begin and be interrupted by the same occurrence; the net effect would be that the prescription period would not have effectively begun, having been rendered academic by the simultaneous interruption of that same period ...* The applicable well-known principles of statutory interpretation are that statutes must be construed in such a way as to give effect to the intention of the legislative authority, and so as to give a sensible meaning to the language of the statute and thus avoid nonsensical or absurd results, departing to the extent unavoidable from the literal language of the

93. People v. Duque, 212 SCRA 607 (1992).

> statute. Appellant's literal reading would make nonsense of Section 2 of Act No. 3326.
>
> In our view, the phrase 'institution of judicial proceedings for its investigation and punishment' may be either disregarded as surplusage or should be deemed preceded by the word 'until.' Thus, Section 2 may be read as:
>
> *"Prescription shall begin to run from the day of the commission of the violation of the law; and if the same be not known at the time, from the discovery thereof;" or as:*
>
> *"Prescription shall begin to run from the day of the commission of the violation of the law, and if the same be not known at the time, from the discovery thereof and until institution of judicial proceedings for its investigation and punishment."*[94]

Indeed, Justice Gutierrez, Jr., the *ponente* of the aforequoted decision, stated in his concurring opinion in *Lim, Sr.*, that:

> Again, to make discovery of the fraud and institution of judicial proceedings conjunctive seems to me illogical because the judicial proceedings always come after discovery. The date of discovery becomes meaningless under our decision. Perhaps the law needs amendment to make it clearer.[95]

PART V: THE THEORY OF IMPRESCRIPTIBILITY

The *Theory of Imprescriptibility* thus manifests itself in these two provisions of the Tax Code.

First, as posited by Professor De Leon[96] and echoed by then Judge Saga of the Court of Tax Appeals (CTA)[97] in his dissenting opinion in the

94. *Id.* at 614-15.

95. *Lim, Sr.*, 190 SCRA at 628.

96. DE LEON, *supra* note 13, at 590.

97. An Act Expanding the Jurisdiction of the Court of Tax Appeals (CTA), Elevating its Rank to the Level of a Collegiate Court with Special Jurisdiction and Enlarging its Membership, Amending for the Purpose Certain Sections of Republic Act No. 1125, as Amended, Otherwise Known as the Law Creating the Court of Tax Appeals, and for Other Purposes, Republic Act No. 9282 (2004) (R.A. 9282 expanded the jurisdiction of the CTA and elevated its rank to the level of a collegiate court, thereby granting the Presiding Judge and Associate Judges of said court the title of Presiding Justice and Associate Justice, respectively).

CTA case of *Menguito v. Commissioner of Internal Revenue*,[98] the *Theory* exists in cases of fraud, falsity or omission of the returns, where the Government's right to make an assessment appears perpetual for until and unless discovery takes place, the ten-year prescriptive period fails to run, thereby rendering nugatory the purpose of the statute of limitation.

And second, quoting the Supreme Court in *Lim, Sr.*:

> As Section 354 stands in the statute books (and to this day it has remained unchanged) it would indeed seem that tax cases, such as the present ones, are practically imprescriptible for as long as the period from the discovery and institution of judicial proceedings for its investigation and punishment, up to the filing of the information in court does not exceed five years.[99]

In both instances, the law establishes a determinate period which, however, upon application, appears imprescriptible. In other words, it turns out to be an indeterminate or indefinite period, or even worse, it amounts to no period at all.

A. The "Theory of Imprescriptiblity" under Section 222 (a)

The pertinent portion of Section 222(a) reads:

> In the case of a false or fraudulent return with intent to evade tax or failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten years after the discovery of the falsity, fraud or omission.

98. Dominador Menguito v. CIR, CTA Case No. 5886, Apr. 2, 2002. The facts of this case, briefly, are as follows: Petitioner Menguito was engaged in the restaurant business. His books of account for the years 1991, 1992, and 1993 were examined by BIR resulting in findings of deficiency percentage and income taxes. Before BIR could issue an assessment, it received information that Petitioner had underdeclared income such that a new investigation was conducted. On Sept. 2, 1997, the BIR issued assessment notices to Petitioner. The latter protested, and filed the present case seeking the cancellation of the deficiency income and percentage tax assessments on the ground of prescription. The CTA held that there was indeed fraud thus making the ten-year period applicable. It found that the assessments were made within this ten-year period.

99. *Lim, Sr.*, 190 SCRA at 625.

Imprescriptibility, in this instance, manifests itself from the time the return is filed until the date the fraud, falsity, or omission is discovered. It is argued, in the words of Judge Saga, that this interval is *perpetual* for until the time discovery takes place, prescription does not set in, and the taxpayer is placed at the mercy of the BIR who may stretch the Government's right to assess or collect indefinitely, even 10, 20, or 50 years from the time the return was filed.[100]

> [T]he majority seems to hold the view that in cases of fraud, falsity or omission, the Government's right to make an assessment is perpetual, for unless and until the discovery takes place, the ten-year period does not begin to run. I believe that such an application of Section 223 is rather stretched beyond its limit.
>
> For me, the discovery of the falsity or fraud or of failure to file must take place within the three-year period provided for under Section 203. "The discovery period cannot be without time limit for otherwise the purpose of the law in fixing prescriptive periods would be rendered nugatory."[101]

He reasoned that the prescriptive period on assessment was designed to afford taxpayers security against "unscrupulous tax agents who will always find an excuse to inspect the books of taxpayers not to determine the latter's real liability, but to take advantage of every opportunity to molest peaceful, law-abiding citizens."[102] Judge Saga further supported his argument by citing Section 235 of the Tax Code mandating that books of account and other accounting records be preserved by the taxpayer for "a period beginning from the last entry in each book until the last day prescribed by Section 203…" Said provision implies that the records of the taxpayer must be preserved only for a period of three years from the date of the last entry made therein.[103]

To demonstrate the argument of imprescriptibility, the following illustration is given (*see* Illustration 4):

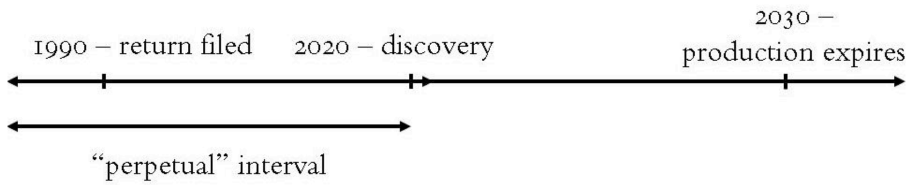
ILLUSTRATION 4

100. *Menguito*, CTA Case No. 5886, Apr. 2, 2002.

101. *Id.* (citing Republic v. Ablaza, 108 Phil. 1105 (1960)).

102. *Id.*

103. *Id.*



The concern here is not with the ten-year period from discovery which clearly commences and lapses at a definite point in time. What is alleged to be imprescriptible, as shown in the illustration, is the interval from the year 1990 up to the time of discovery. Admittedly, such an interval can run perpetually and the Government's right to assess or collect the tax will still not prescribe.

Herein lies precisely the *Theory of Imprescriptibility*. For while the law sets down a definite period of ten years, the actual prescriptive period could run beyond that which the taxpayer might have contemplated.

B. The Theory of Imprescriptibility under Section 281 as Fashioned by Lim, Sr.

The law provides that all violations of any provision of the Tax Code prescribe after five years.[104] The five-year prescriptive period commences to run from the day of the commission of the violation of the law, and if the same is not known at the time, from the discovery thereof and the institution of judicial proceedings for its investigation and punishment.[105] Moreover, the period of prescription is interrupted when proceedings are instituted against the tax violator and shall run again in the event the proceedings are dismissed for reasons not constituting jeopardy.[106] Neither will prescription run if the offender is absent from the Philippines.[107]

On its face, the law appears reasonable enough. The prescriptive period for instituting an action for criminal violations of the Tax Code

104. TAX CODE, § 281.

105. *Id.*

106. *Id.*

107. *Id.*

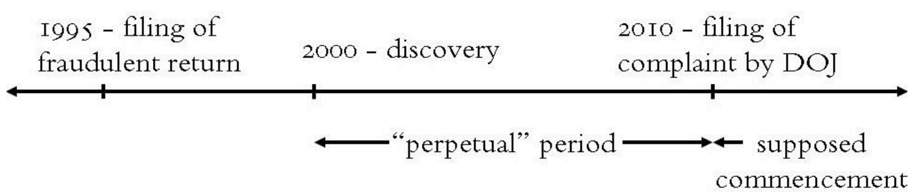
shall be five years. The *Theory of Imprescriptibility* appears upon a re-examination of when the prescriptive period is to commence. Where the commission of the offense is known, the prescriptive period runs from the time of commission. Here, there is no *Theory of Imprescriptibility*, as shown in *Tupaz.* On the other hand, where the commission of the offense is unknown, then prescription begins from the time of discovery *and* the institution of judicial proceedings. This is where the problem of imprescriptibility arises.

Section 281, in part, states:

> Prescription shall begin to run from the day of the commission of the violation of the law, and if the same be not known at the time, from the discovery thereof and the institution of judicial proceedings for its investigation and punishment.[108]

The first problem of imprescriptibility under the aforementioned second mode pertains to the indefinite period from the time of discovery up to the institution of judicial proceedings.

ILLUSTRATION 5



As acknowledged by the Supreme Court in *Lim, Sr.*, tax offenses which are unknown at the time of their commission “are practically imprescriptible for as long as the period for discovery and institution of judicial proceedings, up to the filing of information does not exceed five years.”[109] Here, the Supreme Court itself admitted that prescription does not run until the institution of judicial proceedings. Thus, the interval from discovery up to said judicial proceedings could be perpetual or imprescriptible.

Before delving into the second problem, it is important at this juncture to examine the phrase “judicial proceedings for the

108. *Id.*

109. *Lim, Sr.*, 190 SCRA at 625.

investigation and punishment thereof" inasmuch as it plays a crucial role in the determination of the prescriptive period in question. In *Lim, Sr.*, the period was only deemed commenced upon the filing of the complaint with the Fiscal's Office.[110] This is buttressed by RMC No. 101-90, paragraph 2(d) of which provides:

> The 5-year prescriptive period in Section 280 of the Tax Code does not commence to run by the mere fact of discovery. This must be coupled by judicial proceedings *such as a preliminary investigation before the Prosecutor's Office*, before the 5-year limitation period begins to run.[111]

In *Tupaz*, on the other hand, the Supreme Court impliedly held that the filing of the preliminary investigation with the Department of Justice tolled the prescriptive period. Although not explicitly stated, it could be deduced from counting the dates that the filing of the preliminary investigation had tolled the prescriptive period. Otherwise, the offense in this case would have prescribed. Pertinently, the facts showed that the prescriptive period commenced from the finality of the assessment on 16 August 1984. The complaint for preliminary investigation was filed on 8 June 1989, about 4 years, 10 months and 8 days from the time prescription had set in. Had the BIR filed the complaint a little over two months later, the period would not have tolled and the offense would have prescribed. [112]

Reading both *Lim, Sr.* and RMC No. 101-90 together with *Tupaz*, one is led to the conclusion that the institution of judicial proceedings for the investigation and punishment of the offense marks both the commencement and interruption of the prescriptive period.

110. In other words, in addition to the fact of discovery, there must be a judicial proceeding for the investigation and punishment of the tax offense before the five-year limiting period begins to run. It was on Sept. 1, 1969 that the offenses subject of Criminal Cases Nos. 1790 and 1791 were indorsed to the Fiscal's Office for preliminary investigation. Inasmuch as a preliminary investigation is a proceeding for investigation and punishment of a crime, it was only on Sept. 1, 1969 that the prescriptive period commenced. *See Lim, Sr.*, 190 SCRA at 624.

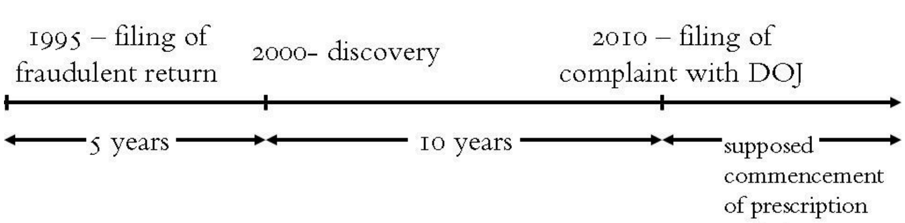
111. Revenue Memorandum Circular No. 101-90, § 2(d). It would be well to note that, as of this writing, this circular has not been amended or repealed by any subsequent circular, revenue regulation, ruling or administrative order of the BIR.

112. *See* Tupaz v. Ulep, 316 SCRA 118, 128 (1999).

Hence, there is a second problem, where the prescriptive period begins and is interrupted by the same occurrence (i.e. the institution of judicial proceedings), the net effect will be that the prescriptive period will not have effectively begun, having been rendered academic by the simultaneous interruption of that same period.

To illustrate this situation the following example is given: In 1995, Taxpayer A filed his income tax returns which contained substantial underdeclarations of income for the purpose of evading the payment of taxes. It was only after five years, in 2000, that the BIR discovered the fraud employed by A. The BIR filed the complaint for tax evasion with the Department of Justice only ten years after discovery, or in 2010. Taxpayer A strongly argued for the dismissal of the complaint on the ground that the offense had prescribed (*see* Illustration 6).

ILLUSTRATION 6



Under the current interpretation ascribed by *Lim, Sr.* to the second mode under Section 281, the offense has not yet prescribed. In fact, the prescriptive period will start in 2010, upon the filing of the complaint with the Department of Justice. It can thus be seen that what purportedly was a five-year prescription period could be extended indefinitely by the mere inaction of the Government to the prejudice of the taxpayer. Worse, the simultaneous commencement and interruption of the period amounts to no period at all, rendering the law ineffectual.

PART VI: ANALYSIS

As demonstrated, the imprescriptibility of the statutes of limitations, as explained, can either take the form of an indefinite period thereby negating the purpose for establishing a period of limitation, or worse, it could mean that the statute of limitation provided by law is plainly inoperative, amounting to the inexistence of a formerly functional prescriptive period as found in the case of *Lim, Sr.* Regardless of the form imprescriptibility takes, it clearly negates any possible efficacy of the prescriptive period.

A different problem arises when one is forced to question the validity of the prescriptive periods and the statutes which give them life. Must one call for an amendment of the laws providing for such or is it more logical to let imprescriptibility stay?

A. Section 222 (a)

The imprescriptibility in Section 222(a) of the Tax Code pertains solely to the interval from the time of filing the return up to the time that fraud is discovered, discovery being reckoned from the time that the BIR renders its final decision and requires the taxpayer to pay the deficiency tax. The argument for imprescriptibility, in this case, is that until and unless discovery happens, the prescriptive period will not run. Consequently, the prescriptive period contravenes its very essence of delimiting the period beyond which the right to assess or collect without assessment can no longer be effected. As a solution, some advance the idea that the time to make the discovery must itself have a period, and the period limiting discovery must be three years corresponding to the general period under Section 203 of the Tax Code. Yet, despite such argument, it is submitted that the interval from filing the return up to discovery is, to a certain extent, imprescriptible and should remain that way. This is because of the circumstances of falsity, fraud, or omission present in the return, which prevents the Government from properly determining the amount of taxes due. The fraud effectively precludes the BIR from performing its mandate as agent of the Government charged with the administration and enforcement of tax laws.

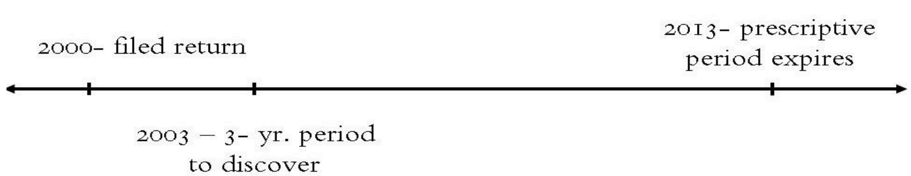
This situation is much like the case of an accused who cannot be served processes because he is hiding. The prescriptive period of crimes does not run if the accused is absent in the Philippines or, when he is in the country, but the proceedings to prosecute him is suspended for causes imputable to him. The same can be said of the prescriptive period in Section 222(a). The fraud is perpetrated by the taxpayer against the Government, thus precluding the latter from prosecuting the tax liabilities of the taxpayer. Following the principle in criminal cases, the prescriptive period in the aforementioned section must be deemed held in abeyance for the duration that the Government, by reason of the fraud imputable to the taxpayer, is precluded from performing its task of assessing or collecting the proper taxes. In this sense, imprescriptibility under Section 222(a) only operates in a limited sense because, following logic, it is not perpetual but merely suspended by reason of fraud. Once commenced, it expires after a definite period of ten years.

Thus, the proposition to delimit the time of discovery to three years cannot be sustained primarily because the period is actually prescriptible. However, it is merely held in abeyance during the time that the fraud committed remains concealed from the knowledge of the Government.

There are other reasons to discard the three-year theory. *First*, there is nothing in Section 222(a) that states or implies that discovery must be made within the three-year period provided for the assessment and collection of taxes under ordinary circumstances as provided by Section 203. Rather Section 222(a) deals with the situation where fraud or falsity taints the return or where such return was not filed at all. Under these circumstances, the Government is placed at a disadvantage such that the Legislature deemed it proper to extend the period to assess and collect to ten years so as not to unduly deprive the Government of taxes rightfully due. This is equitable because the extended ten-year period provides the Government with ample time to review and ascertain the proper amount of taxes due, such ascertainment having been obscured or made more difficult by the falsity, fraud or omission employed by the taxpayer.

Secondly, imposing the three-year period upon the time to discover would technically reduce the period of ten years to a mere three years. To graphically illustrate:

ILLUSTRATION 7



If the BIR fails to discover the fraud in 2003, it may no longer institute assessment or collection proceedings against the tax evader. In effect, the extraordinary ten-year period is reduced to merely three years and unless the BIR discovers the fraud employed within three years from the return, it is forever barred from assessing or collecting the taxes. This could not have possibly been the intention of the legislature in granting BIR an extraordinary ten-year period to assess or collect in the event of fraud, falsity, or omission. Section 222(a) was intended to be an exception. To make it dependent upon the period under Section 203 will render this exception ineffectual.

Thirdly, the fact that an indefinite interval exists between the time the fraudulent or false return is filed and the time the fraud, falsity or omission is discovered does not render nugatory the purpose of the prescriptive period. In fact, this enhances the purpose of the prescriptive period which is to provide the Government ample time to determine and ascertain the true amount of taxes due, the task of which is made more difficult by the fraud perpetrated by the taxpayer.

Because there is falsity, fraud or omission, the problem of determining the correct amount of taxes due is the fault of the taxpayer. Essentially therefore, the justification for delay is imputable to him. Consequently, the Government should not be placed at a disadvantage but rather must be allowed enough time to determine and effectively collect the proper amount of taxes due. It should not be burdened with a time limit for discovering the taxpayer's craftiness. To do so will encourage the taxpayer to devise better and more complicated means to delay the discovery of the fraud.

Lastly, the prescriptive periods for assessment and collection in taxation are not like prescription of offenses, and hence, generally demand a different construction. This is because of the essential role of taxes in the administration and operation of Government. It has been said and reiterated many times that taxes are the lifeblood of the government and their prompt and certain availability an imperious need.[113] Consequently, periods of prescription barring the assessment and collection of taxes justly due and unpaid should receive a strict construction in favor of the government and limitations in such cases will not be presumed in the absence of clear legislation.[114] This strict construction in favor of the Government supports the justification for a limited imprescriptible period in cases where falsity, fraud, or omission taints the return.

113. CIR v. Pineda, 21 SCRA 105, 110 (1967) (citing Bull v. U.S., 295 U.S. 247 (1935)); Vera v. Fernandez, 89 SCRA 199, 204 (1979); Sison, Jr. v. Ancheta, 130 SCRA 655, 660 (1984).

114. CIR v. Ayala Securities Corp., 101 SCRA 231, 235 (1980).

B. Section 281

Under Section 281 of the Tax Code, prescriptibility depends upon whether or not the offense is known or unknown. Where the offense is known, prescription commences immediately at the time of commission. This is because the Government already has knowledge that an offense has been committed to its detriment and thus there is no valid reason for it to delay prosecution of the offense. At the same time, it is aware that it must act with haste to punish the wrongdoer and rectify the wrong committed against it. As explained earlier, there is no imprescriptibility in this case – the prescriptive period is prescriptible.

On the other hand, where the offense is unknown, prescription commences only upon discovery in conjunction with the institution of judicial proceedings. This time, the period of prescription is considered imprescriptible for two reasons: first, the interval from discovery up to the institution of judicial proceedings is indefinite — until and unless Government institutes judicial proceedings, prescription does not even begin, and second, the institution of judicial proceedings marks the point of commencement as well as the time prescription is deemed interrupted. In the second instance, prescription does not run at all, the period being simultaneously commenced and halted.

The first reason adduced is to some extent similar to the argument of imprescriptibility under Section 222(a). Both cases possess intervals said to result in perpetuity. Under Section 222(a), the perpetual interval alluded to is the time from the filing of the return up to discovery, whereas under Section 281, the interval is the time from discovery up to the institution of judicial proceedings.

Nevertheless, the conclusion reached in Section 222(a) finding the said period prescriptible cannot apply to Section 281 for the following reasons:

First, the constructions ascribed to the two periods must necessarily differ. Statutes of limitation on the assessment and collection of taxes should receive a strict construction in favor of Government. This is because of the essential role of taxes in the administration and operation of Government. Statutes fixing the prescriptive periods of crimes, on the other hand, are in the nature of an amnesty granted by the state, declaring that after a certain time, oblivion shall be cast over the offense. These kinds of statutes of limitations must be liberally construed in favor of the accused and strictly against the Government. Section 281 is one such statute. It applies to all criminal violations of the Tax Code. Notice must be given to the fact that Section 281 is included in Chapter IV, Title X of the Tax Code which is instructively titled *Other Penal Provisions*. Therefore, inasmuch as Section 281 must be construed in favor of the accused-taxpayer, all interpretations of said section must incline towards prescriptibility. Obviously, to interpret such period as running perpetually violates the aforementioned statutory construction rule as well as the rights of the so-called taxpayer-accused. The proper interpretation, therefore, must be to construe prescription under Section 281 as running from the discovery of the fraud alone, without conjunction to the institution of judicial proceedings for the punishment and investigation of the crime.

Secondly, and more importantly, the institution of judicial proceedings marks the beginning and halting of the prescriptive period. In other words, the prescriptive period under Section 281 will both begin and be interrupted by the same occurrence – the institution of judicial proceedings or the filing of the complaint for preliminary investigation. The net effect of this is that the prescriptive period will never begin, having been rendered academic by the simultaneous interruption of that same period. What is ironic about this is that the purpose of establishing a prescriptive period is to bar the Government's right to punish the tax offender insofar as the grace period granted by the legislature for the proper exercise of such right has expired. Making the prescriptive period commence from the moment the Government files a complaint with the Department of Justice, which is precisely the very object sought to be barred, practically defeats the very purpose of fixing said period.

Congress could not possibly have intended this. Neither could Congress have intended for a taxpayer criminally charged for a violation of the Tax Code to stand at the mercy of the Government, who may choose to exercise its right to prosecute at a time most favorable to it.

For these reasons, it is proposed that the phrase "from the discovery thereof and the institution of judicial proceedings for its investigation and punishment" should be amended to read as from discovery only, without the need of instituting judicial proceedings. The particular portion of Section 281 would then read as:

> Prescription shall begin to run from the day of the commission of the violation of the law; and if the same be not known at the time, from the discovery thereof;

This is in consonance with the essence and purpose for which the prescriptive period is established, that is, as an act of grace granted by the State, relinquishing its power to prosecute the criminal act. This also promotes the objective of preventing the litigation of stale claims which work prejudice to the taxpayer-accused. And finally, this interpretation harmonizes the Tax Code with the well-established principle that penal laws must be construed liberally in favor of the accused.

CONCLUSION

This Note has argued that the prescriptive periods for the assessment and collection of taxes on one hand, and the prescriptive period for criminal tax actions on the other, are both imprescriptible. Hence, the *Theory of Imprescriptibility*. The *Theory* posits that the period of prescription is imprescriptible because it either possessed an indefinite character such that the period can run perpetually, or that the law was improperly construed. This Note anchors the *Theory* upon the position of Professor De Leon, an authority in taxation echoed in the dissenting opinion of Judge Saga in the Court of Tax Appeals case of *Menguito*, and upon the decision rendered by the Supreme Court in the case of *Lim, Sr.*

However, the manifestation that prescription could run endlessly does not immediately signify a clamor to reinterpret or amend the law. This Note delved deeper and analyzed the components of each prescriptive period, determining the point of commencement and interruption, and taking it with the pretext of fixing the particular period.

Thus, the conclusion was arrived at that the imprescriptibility of the period for assessment and collection of taxes, if fraud is present, was justified on the ground that it was necessary in order to give the Government, placed at a disadvantage due to said fraud, ample time to ascertain the correct amount of taxes. Though seemingly prejudicial to the taxpayer, since Government may then allege any date as the point of discovery, this is justified by the fact that the fraud was caused by the taxpayer himself.

On the other hand, the prescription of offenses under the Tax Code was found not only to be imprescriptible but also in contravention with the purpose for which it was established. The period proved itself incapable of ever running. Such a period is therefore equivalent to no period at all. Thus the law needs to be amended in order for it to function as a true safeguard for taxpayers against stale claims and abusive conduct on the part of the Government's agents. Furthermore, an amendment of the period of prescription for tax offenses is necessary in order to fulfill the essence of such statute as an act of repose and amnesty by the Government in favor of the taxpayer. It must be remembered that the statute in this case pertains to the prescription of criminal offenses of the Code. It cannot be overly emphasized that the taxpayer stands to be criminally punished for an offense that could have been committed 40, 50, or 60 years ago. Indeed, without an effective statute of limitations, tax offenses are veritable *Swords of Damocles* endlessly hanging over the heads of unfortunate taxpayers.

The aforequoted excerpt from the case of *Commissioner v. Algue* leads one to the proper direction — *but even as we concede the inevitability and indispensability of taxation, it is a requirement in all democratic regimes that it be exercised reasonably and in accordance with the prescribed procedure. If it is not, then the taxpayer has a right to complain and the courts will come to his succor.*[115] The law fixing the prescriptive period for tax offenses is without a doubt, an empty law, more imaginary than real. Thus, the problem of imprescriptibility must be addressed through amendment by Congress. In the meantime, the taxpayers should seek relief from the courts of justice.

115. CIR v. Algue, 158 SCRA 9, 17 (1988) (*emphasis supplied*).