REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

TRANSITIONS OPTICAL PHILIPPINES, INC.,
Respondent.

CTA EB NO. 1251
(CTA Case No. 8442)

Present:

Del Rosario, *P.J.,*
Castañeda, Jr.
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas,
Ringpis-Liban, *JJ.*

Promulgated:

JUN 07 2016 11:28 a.m.

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DECISION

RINGPIS-LIBAN, J.

Before the Court *En Banc* is a Petition for Review filed by petitioner Commissioner of Internal Revenue (CIR) under Sec. 3(b), Rule 8 of the Revised Rules of the Court of Tax Appeals seeking the nullification of the Decision[1] dated September 1, 2014, the dispositive portion of which reads:

> "**WHEREFORE,** in light of the foregoing considerations, the instant Petition for Review is hereby GRANTED.

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[1] Rollo, CTA EB Case No. 1251, pp. 35-59.

> Accordingly, the Final Assessment Notice, Formal Letter of Demand and Final Decision on Disputed Assessment finding petitioner Transitions Optical Philippines, Inc. liable for deficiency income tax, deficiency expanded withholding tax, deficiency value-added tax and deficiency final tax for taxable year 2004 in the total amount of **P19,701,849.68** are hereby **CANCELLED** and **SET ASIDE**.
>
> **SO ORDERED.**"

and the Resolution[2] dated November 7, 2014 of the same First Division of the Court (Court in Division) denying for lack of merit the CIR's Motion for Reconsideration.

THE FACTS

The relevant antecedents stated in the assailed Decision[3] are as follows:

> On April 28, 2006, petitioner[4] received from Revenue Region No. 9, San Pablo City, of the Bureau of Internal Revenue (BIR), a Letter of Authority No. 00098746 dated March 23, 2006 signed by then OIC- Regional Director Corazon C. Pangcog, authorizing Revenue Officer Jocelyn Santos and Levi Visaya, to examine petitioner's books of accounts and other accounting records for all internal revenue taxes for the period from January 2004 to December 31, 2004.
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> On October 9, 2007, a purported Waiver of the Defense of Prescription was executed by the parties, followed by another purported Waiver of the Defense of Prescription executed on June 3, 2008.
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> Thereafter, respondent,[5] through Regional Director Jaime B. Santiago, issued a Preliminary Assessment Notice (PAN) dated November 11, 2008, assessing petitioner for deficiency income tax, value-added tax (VAT), expanded withholding tax (EWT) and final tax for taxable year 2004. Relative thereto, petitioner filed a written protest to the PAN on November 26, 2008 arguing that it is not liable for the assessed deficiency taxes.

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[2] Rollo pp. 60-64.
[3] Ibid pp. 35-59.
[4] Respondent in this Petition for Review.
[5] Petitioner in this Petition for Review.

> Respondent, again through Regional Director Jaime B. Santiago, subsequently issued a Final Assessment Notice (FAN) and a Formal Letter of Demand (FLD) dated November 28, 2008, assessing petitioner for deficiency income tax, VAT, EWT and final tax for taxable year 2004 in the total amount of P19,701,849.68.
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> Petitioner filed its Protest Letter dated December 8, 2008 against the FAN, alleging that the year being audited in the FAN has already prescribed at the time that the FAN was mailed on December 2, 2008. In its Supplemental Protest, petitioner further pointed out that the FAN is deemed void because the return period indicated in the FAN is 2006, which is a mistake as the assessment covers calendar year 2004.
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> Thereafter, respondent, through Regional Director Jose N. Tan, issued a Final Decision on Disputed Assessment dated January 24, 2012, holding that petitioner remains liable for deficiency taxes in the total amount of P19,614,438.97, broken down as follows: income tax (P3,153,371.04), VAT (P1,231, 393.47), EWT (P175,339.51), final tax on royalty (P14,026,247.90) and final tax on interest income (P1,115,497.76) for taxable year 2004.

On May 7, 2012, the CIR filed her Answer[6] raising the following defenses: that the Preliminary Assessment Notice, Final Assessment Notice, Formal Letter of Demand and Final Decision on Disputed Assessment were issued in accordance with law, rules and jurisprudence; that the contention of prescription by Transitions Optical Philippines, Inc. (TOPI) is inappropriate since a "Waiver of the Defense of Prescription" was executed extending the period of assessment; that TOPI's claim that its Finance Manager is unauthorized to execute the waiver is just a mere afterthought; TOPI executed the first waiver through its Finance Manager Pamela Theresa D. Abad, and executed another waiver through its Finance Director Suzanne B. Mondonedo; that the waiver of Statute of Limitations can never be used as an instrument of malice; that the contention of TOPI that the FAN and FLD were served outside the prescriptive period is untenable; that an assessment is deemed made when the notice is released, mailed or sent by the CIR to the taxpayer; the posting is within the exclusive control of San Pablo City Post Office; that the mail matters were processed by the post office on December 2, 2008 since November 28, 2008 fell on a Friday and the next working day which is December 2008 was declared a Special Holiday; that the CIR cannot be faulted if the same were posted for mailing only on December 2, 2008; that the indication of the year 2006 in the FAN instead of year 2004 does not render

[6] Docket, CTA Case No. 8442, p. 307-317.

the FAN null and void; that even if the year 2006 was written in the FAN instead of 2004, it is clear in the assessment that it is referring to taxable year 2004.

After trial on the merits wherein both parties presented their respective evidence, and upon submission of the parties' memoranda, the case was submitted for decision on March 12, 2014.

On September 1, 2014 and November 7, 2014, the Court in Division rendered the questioned Decision and Resolution.

Aggrieved, the CIR filed before the Court *En Banc* this Petition for Review on December 17, 2014.

In the Resolution[7] dated February 6, 2015, TOPI was directed by the Court *En Banc* to file its Comment in this case. On March 20, 2015, respondent filed its Comment[8], and sought for this Court *En Banc* to deny this Petition for Review.

Thereafter, both parties were ordered to file their respective Memoranda[9]. On May 5, 2015,[10] the CIR filed her "Manifestation" stating that she is adopting the arguments raised in the Petition for Review. On June 6, 2015,[11] TOPI filed its "Manifestation" stating that it is adopting the facts, arguments and discussion raised in its Comment dated March 20, 2015 as its Memorandum.

This case was deemed submitted for decision on June 30, 2015.[12]

ISSUE

The principal issue in this case is whether the Court in Division erred in cancelling and setting aside the Formal Assessment Notice, Formal Letter of Demand and Final Decision on Disputed Assessment finding respondent Transitions Optical Philippines, Inc. liable for deficiency income tax, deficiency expanded withholding tax, deficiency value-added tax and deficiency final tax for Taxable Year 2004.

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[7] Rollo, pp. 69-70.
[8] Ibid pp. 71-95 with Annexes.
[9] Ibid pp. 135- 136. Resolution dated April 22, 2015.
[10] Ibid. pp. 137-139.
[11] Ibid. pp. 141-143.
[12] Ibid pp. 146-147.

PETITIONER'S ARGUMENTS

The CIR argues that TOPI is estopped from assailing the validity of the waivers; that TOPI raised the issue of validity of waivers in its Petition for Review only after a period of less than two (2) years of actively participating in the assessment process; that the first and second waivers of the defense of prescription are valid; that TOPI's argument that its Finance Manager and/or Finance Director is unauthorized to execute the waiver is just a mere afterthought since it is explicit in the job title that it includes tax matters concerning TOPI; that the FAN and FLD were served before the expiration of either or both waivers; that since the FAN and FLD were delivered to the post office for mailing, the BIR already complied with the proper service requirements of FAN and FLD within the prescriptive period; and that the burden of proof is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the CIR is wrong, but also that the taxpayer is right.

RESPONDENT'S ARGUMENTS

In its Comment, TOPI argues the assessment has prescribed since it was served beyond the three-year prescriptive period; that the FAN and FLD for the year 2004 was served on TOPI on December 4, 2008 more than three years from the last day for the filing of return; that the first and second waivers are defective since there are no written authority to empower TOPI's supposed representatives to enter into such waivers; the waivers failed to indicate the date of acceptance by the CIR or her representative; and that the original copies of the waivers do not indicate the fact of receipt by TOPI as taxpayer of its file copy of the waivers; that the doctrine of laches cannot apply in this case; that TOPI did not come to court with unclean hands rather it is the petitioner who came to court with unclean hands because the omissions or fault regarding the invalidity of the waivers are attributable to the CIR or her representative revenue officials.

RULINGS THE COURT EN BANC

Timeliness of the Petition

Records show that on December 2, 2014,[13] petitioner CIR filed a Motion for Extension of Time to File Petition for Review, stating that she received the Court in Division's Resolution denying the Motion for Reconsideration on November 17, 2014. The CIR prayed that she be given an extension of fifteen (15) days until December 17, 2014 within which to file the Petition for Review.

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[13] Rollo, pp. 1-4.

On December 9, 2014,[14] the Court *En Banc* has resolved to grant the CIR's Motion for Extension of Time to File Petition for Review.

On December 17, 2014,[15] the CIR filed the instant Petition for Review. Hence, this Petition for Review was filed within the reglementary period.

After a careful review of petitioner's arguments and the records of the case, the Court *En Banc* finds no reason to reverse or modify the Decision and Resolution of the Court in Division. The records of the case show that the Court in Division had fully and exhaustively resolved the issues raised in the petition, which this Court notes that the same are mere rehash of the arguments presented by petitioner in its Motion for Reconsideration.

Whether the assessments dated November 28, 2008 issued by CIR against TOPI are valid

Section 203 of the 1997 National Internal Revenue Code (NIRC), as amended, provides for a three year period for the BIR to assess and collect any deficiency internal revenue tax from a taxpayer, thus:

> SEC. 203. – *Period of limitation upon assessment and collection.* – Except as provided in the 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 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 the purposes of this section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day. *(Emphasis supplied)*

The rationale for this three-year prescriptive period is to safeguard the interest of the taxpayer against unreasonable investigation.[16]

[14] Rollo, p. 6.
[15] Rollo, pp. 7- 32, with Annexes.
[16] Phil. Journalists Inc. v. Commissioner of Internal Revenue, G.R. No. 162852, December 16, 2004 citing J.C. Vitug and E.D. Acosta, TAX LAW AND JURISPRUDENCE 295 (2nd ed. 2002), citing Report of the Tax Commission, Vol. I, p. 98

The rule however, is not without exception. The exception is provided under Section 222(b) and (d) of the 1997 NIRC, as amended, viz:

> SEC. 222. – *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* –
>
> xxx
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> (b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.
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> xxx
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> (d) Any internal revenue tax which has been assessed within the period agreed upon as provided in paragraph (b) hereinabove may be collected by distraint or levy or by a proceeding in court within the period agreed upon in writing before the expiration of the five (5) year period. The period so agreed upon may be extended by subsequent written agreements made before the expiration of the period previously agreed upon.
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Petitioner CIR argues that the subject assessments are validly issued since the waivers executed by respondent TOPI are valid. However, this Court finds CIR's argument unmeritorious. The waivers did not extend the CIR's right to assess TOPI. The waivers executed are defective since they were issued without the requisite authority from respondent TOPI and there is no date when the waiver was accepted by TOPI's representative. Moreover, the original copies of the waivers do not show proof of receipt by TOPI of the file copy of the waivers.

As correctly ruled by the Court in Division in the Assailed Decision:[17]

> "In her Answer, respondent stresses that petitioner's contention of prescription is inapplicable considering that a "Waiver of the Defense of Prescription" was executed extending the period of assessment. Respondent claims that the first Waiver executed on October 9, 2007, extended the period to assess to June 20, 2008, and the second Waiver on June 2, 2008, extended the period to assess to November 30, 2008.

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[17] Citations omitted.

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In this case, while there appears to be Waivers executed by petitioner which may have extended the prescriptive period provided under Section 203 of the NIRC of 1997, as amended, We agree with petitioner that the said Waivers are defective.

In determining the two Waivers were validly executed by herein parties, the pronouncement of the Supreme Court in the case of Commissioner of Internal Revenue vs. Kudos Metal Corporation (Kudos Case) is instructive. Said case provides the requirements or the procedure for the proper execution of waivers in accordance with Revenue Memorandum Order (RMO) No. 20-90 issued on April 4, 1990 and Revenue Delegation Authority Order (RDAO) No. 05-01 issued on August 2, 2001, to wit:

> 1. The waiver must be in the proper form prescribed by RMO 20-90. The phrase "but not after ______ 19 ___", which indicates the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription, should be filled up.
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> 2. The waiver must be signed by the taxpayer himself or his duly authorized representative. In the case of a corporation, the waiver must be signed by any of its responsible officials. **In case the authority is delegated by the taxpayer to a representative, such delegation should be in writing and duly notarized.**
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> 3. The waiver should be duly notarized.
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> **4.** The CIR or the revenue official authorized by him must sign the waiver indicating that the BIR has accepted and agreed to the waiver. The date of such acceptance by the BIR should be indicated. **However, before signing the waiver, the CIR or the revenue official authorized by him must make sure that the waiver is in the prescribed form, duly notarized, and executed by the taxpayer or his duly authorized representative.**
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> **5. Both the date of execution by the taxpayer and date of acceptance by the Bureau should be before the expiration of the period of prescription or before the lapse of the period**

> **agreed upon in case a subsequent agreement is executed.**
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> 6. The waiver must be executed in three copies, the original copy to be attached to the docket of the case, the second copy for the taxpayer and the third copy for the Office accepting the waiver. **The fact of receipt by the taxpayer of his/her file copy must be indicated in the original copy to show that the taxpayer was notified of the acceptance of the BIR and the perfection of the agreement.**" *(Emphasis supplied)*

Taking into consideration the requisites provided under the afore-quoted jurisprudence, the Court hereby noted the following infirmities in the execution of the subject Waivers:

1. The written and notarized authorities of petitioner's representatives, to sign for and on its behalf, namely: the first waiver by Pamela Theresa D. Abad, and the second waiver by Suzanne B. Mondoñedo, were not secured by respondent's revenue officers concerned, and the same were not presented in court;
2. The subject Waivers failed to indicate the date of acceptance by respondent's authorized representative, Myrna S. Leonida; The original copies of the Waivers do not indicate the fact of receipt by the taxpayer of its file copy of the Waivers.

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As regards the first infirmity observed by the Court pertaining to the authority of the persons who signed the subject Waivers, the Court cannot sustain respondent's assertion that petitioner is estopped from raising the absence of written and notarized authorities of Ms. Abad and Ms. Mondoñedo's to sign the subject Waivers to assail the validity of said waivers considering that the duty to secure the submission of the required written notarized authority from petitioner rests upon respondent or her authorized revenue officer.

Specifically, Revenue Delegation Authority Order (RDAO) No. 05-01 requires respondent to ensure the presentation of a written and notarized authority from the taxpayer if such authority was delegated to a representative, to wit:

"The authorized revenue official shall ensure that the waiver is duly accomplished and signed by the taxpayer of his authorized representative before affixing his signature to signify acceptance of the same. **In case the authority is delegated by the taxpayer to a representative, the concerned revenue official shall see to it that such delegation is in writing and duly notarized. The 'WAIVER' should not be accepted by the concerned BIR office and official unless duly notarized.**" *(Emphasis supplied)*

Going to the second observed infirmity by the Court, as previously mentioned, another requirement for the proper execution of waivers is that both the date of execution by the taxpayer and the date of prescription or before the lapse of the period agreed upon in case a subsequent agreement is executed.

In this case, the dates of acceptance by the BIR of the two (2) waivers were not indicated. Thus, the Court is unable to make definite determination as to whether or not the date of acceptance of the first Waiver was before the expiration of the period of prescription, or whether the date of acceptance of the second waiver was before the lapse of the period agreed upon the first Waiver.

Lastly, with regard to the third observed infirmity, the fact of receipt by the taxpayer of his/her filed copy of the subject Waivers, paragraph 4 of RMO No. 20-90 specifically provides that the waiver must be executed in three copies, the original copy to be attached to the docket of the case, the second copy for the taxpayer, and the third copy for the office accepting the waiver. It is further provided that the fact of receipt by the taxpayer of his/her copy must be indicated in the original copy.

A perusal of the original copies of the two (2) copies Waivers found in the BIR records of this case, specifically Exhibits "3" and "6", fail to show therein the fact of receipt by petitioner of its file copy of the subject Waivers.

It must be emphasized that there is compliance with the provision of RMO No. 20-90 only after the taxpayer received a copy of the Waiver accepted by the BIR. The requirement to furnish the taxpayer with a copy of the Waiver is not only to give notice of the existence of the document but of the acceptance by the BIR and the perfection of the agreement.

As regards respondent's allegation that the doctrine of estoppel is applicable in this case, it must be stressed out that in the Kudos Case, the High Court ruled that the doctrine of estoppel cannot be applied as an exception to the statute of limitations on the assessment of taxes considering that there is a detailed procedure for the proper execution of the waiver, which the BIR must strictly follow.

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Furthermore, this Court cannot sustain respondent's application of the *RCBC case* to the case at bar.

It must be clarified that in the *RCBC case*, the Supreme Court found that RCBC, through its partial payment of the revised assessments issued within the extended period as provided for in the questioned waivers, impliedly admitted the validity of those waivers. The pertinent portion of the *RCBC case* reads:

> "Estoppel is clearly applicable to the case at bench. In RCBC, through its partial payment of the revised assessments issued within the extended period as provided for in the questioned waivers, impliedly admitted the validity of those waivers. Had petitioner truly believed that the waivers were invalid and that the assessments were issued beyond the prescriptive period, then it should not have paid the reduced amount of taxes in the revised assessment. RCBC's subsequent action effectively belies its insistence that the waivers are invalid. The records show that on December 6, 2000, upon receipt of the revised assessment, RCBC immediately made payment on the uncontested taxes. Thus, RCBC is stopped from questioning the validity of the waivers. To hold otherwise and allow a party to gainsay its own act or deny rights within it has previously recognized would run counter to the principle of equity which this institution holds clear."

From the foregoing, the subsequent action of RCBC, specifically, its immediate payment of the revised assessment that was issued within the extended period in the waivers, was considered by the High Court as an implied admission of the validity of the waivers.

On the other hand, records show that there was no reduced assessment issued by respondent within the extended period provided in the assailed Waivers. There is likewise no payment made by petitioner of any reduced assessment in this case. Considering that respondent failed to establish any subsequent action on the part of petitioner similar to the factual circumstances in the RCBC case which would have prove that petitioner impliedly admitted the validity of the subject waivers and that petitioner impliedly admitted the validity if the subject waivers and that petitioner actually benefited from the extended period, the doctrine of estoppels clearly finds no application in the instant case.

Whether the FAN and FLD were served before the expiration of either or both waivers

The CIR avers that the FAN and FLD were delivered to the post office for mailing on November 28, 2008 (Friday) and were actually processed by the post office on December 2, 2008 (Tuesday) since December 1, 2008 was declared a Special Holiday – the subject assessment for deficiency taxes was made before the expiry of the second Waiver on November 30, 2008 (Sunday).

Section 3 of Rule 13 of the Rules of Court provides:

> Manner of filing. – The filing of pleadings, appearances, motions, notices, or orders, judgments and all other papers shall be made by presenting the original copies thereof, plainly indicated as such, personally to the clerk of court or by sending them by registered mail. In the first case, the clerk of court shall endorse on the pleading the date and hour of filing. In the second case, the date of the mailing of motions, pleadings, or any other papers or payments or deposits, as shown by the post office stamp on the envelope or the registry receipt, shall be considered as the date of their filing, payment, or deposit in court. The envelope shall be attached to the record of the case.

After evaluation of the records, this Court finds the CIR's arguments unmeritorious.

As correctly ruled by the Court in Division in its Assailed Decision:[18]

> "The testimony of respondent's witness, Dario A. Consignado, Jr., that he brought the mail matter containing the FAN/FLD to the post office on November 28, 2008 is self-serving, and the same is not corroborated by any other evidence to prove that the FAN and the FLD were indeed mailed on November 28, 2008. The Certification marked as Exhibit 22 for respondent merely certified that the FAN issued to petitioner was

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[18] Citations omitted.

delivered to its Administrative Division for mailing on November 28, 2008. To the mind of the Court, this Certification is not sufficient evidence to prove that the actual date of mailing was November 28, 2008.

It is imperative for respondent to satisfactorily prove the release, mailing or sending of the FAN and the FLD as held by the Supreme Court in the case of *Barcelon, Roxas Securities, Inc. (now known as UBP Securities, Inc.) vs. Commissioner of Internal Revenue*, The pertinent portion of which reads:

> 'While we have held that an assessment is made when sent within the prescriptive period, even if received by the taxpayer after its expiration, (Coll. of Int. Rev. vs. Bautista, L-12250 and L-122569, May 27, 1959) **this ruling makes it more imperative that the release, mailing or sending of the notice be clearly and satisfactorily proved. Mere notations made without the taxpayer's intervention, notice or control, without adequate supporting evidence cannot suffice;** otherwise, the taxpayer would be at the mercy of the revenue offices, without adequate protection of defense.' *(Emphasis supplied)"*

An assessment that was given beyond the statute of limitations can never become final and executory, hence, the assessments would not be binding on the taxpayer[19] ***except*** if there is a valid waiver for the extension of the assessment and collection of the taxes due. In this case, the CIR failed to prove that the waivers dated October 9, 2007 and June 3, 2008 were validly executed.

Hence, this Court finds no cogent reason to reverse the findings of the Court in Division.

WHEREFORE, premises considered, the Petition for Review is hereby **DENIED for lack of merit.** Accordingly, the Decision dated September 1, 2014 and Resolution dated November 7, 2014 are hereby affirmed.

SO ORDERED.

Ma. Belen M. R. L.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

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[19] Commissioner of Internal Revenue vs. Ayala Securities Corporation, 70 SCRA 204.

WE CONCUR:

ROMAN G. DEL ROSARIO - with separate concurring opinion
Presiding Justice

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO – MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Section 13 of Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court En Banc before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

TRANSITIONS OPTICAL PHILIPPINES, INC.,
Respondent.

CTA EB No. 1251
(CTA CASE No. 8442)

Present:

DEL ROSARIO, *PJ,*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS, and
RINGPIS-LIBAN, *JJ.*

Promulgated:

JUN 07 2016 11:28 a.m.

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SEPARATE CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* of my esteemed colleague in denying the Petition for Review but solely on the ground that there is no sufficient evidence to prove that the actual mailing of the mail matter containing the Final Assessment Notice (FAN) and Formal Letter of Demand (FLD) was made on **November 28, 2008** or before the expiration of period of extension to make assessment as specified in the Waivers of the Defense of Prescription (Waivers) executed by Pamela Theresa D. Abad and Suzanne B. Mondoñedo.

The *ponencia* affirmed the Court in Division's Decision declaring that the periods to assess the taxes were not extended in view of the failure of the Waivers to comply with the requirements and procedures laid down in Revenue Memorandum Order (RMO) No. 20-90 and Revenue Delegation Authority Order (RDAO) No. 05-01, which are highlighted in *Commissioner of Internal Revenue vs. Kudos*

Metal Corporation ("Kudos").[1] The *ponencia* noted that the Waivers were issued without the requisite authority from respondent; that there is no date of acceptance; and that the original copies of the Waivers do not show proof of receipt by respondent of the file copy of said waivers.

Although cognizant of my position in the Court in Division level, I am constrained to reconsider my opinion in view of the **recent** pronouncement in *Commissioner of Internal Revenue vs. Next Mobile, Inc. (formerly Nextel Communications Phils., Inc.) ("Next Mobile")*[2] that recognizes the doctrine of estoppel and upholds as valid the waivers when both the taxpayer and the BIR are in *pari delicto*.

On this point, I quote the relevant discussion in my Dissenting Opinion in *Commissioner of Internal Revenue vs. DOLE Philippines, Inc.*:[3]

> "While it may be true that the waivers of the statute of limitations issued by respondent failed to comply with the requirements and procedures specified in RMO No. 20-90, it is my humble view that by reason of respondent's positive acts prior and subsequent to the issuance of the deficiency income tax and sales tax assessments, respondent is estopped from claiming that the waivers were invalid and that the deficiency income tax and sales tax assessments for the year 1986 were issued beyond the prescriptive period.
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> True, in *Commissioner of Internal Revenue vs. Kudos Metal Corporation ("Kudos")*,[4] the Supreme Court held that the doctrine of estoppel may not be applied against a taxpayer, as an exception to the statute of limitations on the assessment of taxes, where the taxpayer's waiver of the prescriptive period to assess is fatally defective for non-compliance with appropriate guidelines thereon, as set forth by the Bureau of Internal Revenue (BIR) itself. *Kudos* even made a pronouncement on the inapplicability of the ruling in *Collector of Internal Revenue vs. Suyoc Consolidated Mining*

[1] G.R. No. 178087, May 5, 2010.
[2] G.R. No. 212825, December 7, 2015.
[3] CTA EB No. 1190, February 4, 2016.
[4] G.R. No. 178087, May 5, 2010.

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Company ("Suyoc")[5] for the reason that the controversy in *Suyoc* involved collection and not assessment of taxes, viz.:

> **The doctrine of estoppel cannot be applied in this case as an exception to the statute of limitations on the assessment of taxes considering that there is a detailed procedure for the proper execution of the waiver, which the BIR must strictly follow**. As we have often said, the doctrine of estoppel is predicated on, and has its origin in, equity which, broadly defined, is justice according to natural law and right. As such, the doctrine of estoppel cannot give validity to an act that is prohibited by law or one that is against public policy. It should be resorted to solely as a means of preventing injustice and should not be permitted to defeat the administration of the law, or to accomplish a wrong or secure an undue advantage, or to extend beyond them requirements of the transactions in which they originate. Simply put, the doctrine of estoppel must be sparingly applied.
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> Moreover, **the BIR cannot hide behind the doctrine of estoppel to cover its failure to comply with RMO 20-90 and RDAO 05-01, which the BIR itself issued**. As stated earlier, the BIR failed to verify whether a notarized written authority was given by the respondent to its accountant, and to indicate the date of acceptance and the receipt by the respondent of the waivers. Having caused the defects in the waivers, the BIR must bear the consequence. It cannot shift the blame to the taxpayer. To stress, a waiver of the statute of limitations, being a derogation of the taxpayer's right to security against prolonged and unscrupulous investigations, must be carefully and strictly construed.
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> xxx xxx xxx
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> In *Collector of Internal Revenue v. Suyoc Consolidated Mining Company*, the doctrine of estoppel prevented the taxpayer from raising the defense of prescription against the efforts of the government to collect the assessed tax. However, it must be stressed that in the said case, estoppel was applied as an exception to the statute of limitations on

[5] G.R. No. L-11527, November 25, 1958.

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> *collection* of taxes and not on the *assessment* of taxes, as the BIR was able to make an assessment within the prescribed period. More important, there was a finding that the taxpayer made several requests or positive acts to convince the government to postpone the collection of taxes xxx.
>
> Conversely, in this case, the assessments were issued beyond the prescribed period. Also, **there is no showing that respondent made any request to persuade the BIR to postpone the issuance of the assessments**." (Emphases supplied)

The foregoing pronouncement in *Kudos*, however, should not in any way be construed as a doctrine that proscribes absolutely the application against a taxpayer of the concept of estoppel as an exception to the statute of limitations on the assessment of taxes. For:

> One. In rejecting the application of estoppel against the taxpayer, **the Supreme Court noted in *Kudos* that there was no positive act on record to show that the said taxpayer persuaded the BIR to postpone the issuance of an assessment**. Conversely, had such positive act been shown on record, the conclusion upon which the ruling was based would not have any factual moorings and *Suyoc* would have been applicable.
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> In other words, it can be inferred from *Kudos* that when there is a showing that the taxpayer performed acts that persuaded the BIR to delay the issuance of the deficiency tax assessments, **the doctrine of estoppel may still be applicable and may thus operate to prevent the taxpayer from raising the defense of prescription against the government's right to assess**. Stated differently, the non-application of the doctrine of estoppel, as an exception to the statute of limitations on the assessment of taxes, is not absolute as it depends on the special factual circumstances of each case.
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> Two. No less than the Supreme Court applied the doctrine of estoppel against a taxpayer **on an assessment case** after elucidating the concept of estoppel. On this point, I find the case of *Rizal*

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Commercial Banking Corporation vs. Commissioner of Internal Revenue ("RCBC")[6] most enlightening, viz.:

> "Under Article 1431 of the Civil Code, **the doctrine of estoppel is anchored on the rule that an admission or representation is rendered conclusive upon the person making it, and cannot be denied or disapproved as against the person relying thereon**. A party is precluded from denying his own acts, admissions or representations to the prejudice of the other party in order to prevent fraud and falsehood.
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> Estoppel is **clearly** applicable to the case at bench. **RCBC, through its partial payment of the revised assessments issued within the extended period as provided for in the questioned waivers, impliedly admitted the validity of those waivers**. Had petitioner truly believed that the waivers were invalid and that the assessments were issued beyond the prescriptive period, then it should not have paid the reduced amount of taxes in the revised assessment. RCBC's subsequent action effectively belies its insistence that the waivers are invalid. The records show that on December 6, 2000, upon receipt of the revised assessment, RCBC immediately made payment on the uncontested taxes. Thus, RCBC is estopped from questioning the validity of the waivers. To hold otherwise and allow a party to gainsay its own act or deny rights which it had previously recognized would run counter to the principle of equity which this institution holds dear." (Emphases supplied)

In *RCBC*, the partial payment of the revised assessment by RCBC was regarded by the Supreme Court as an action that belies its position that the waivers it issued are invalid and did not extend the prescriptive period to assess. There is nothing, however, in *RCBC* which holds that it is only the payment of the assessed amount, albeit partial, which would constitute as an overt or positive act that could put the taxpayer in estoppel. **Thus, as earlier interpreted, I submit that whether or not the**

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[6] G.R. No. 170257, September 7, 2011.

doctrine of estoppel will be applied as an exception to the statute of limitations on the assessment of taxes must depend upon the facts of the case. In this case, I am of the humble view that the positive acts of respondent rightfully calls for its application.

Moreover, in the recent case of *Commissioner of Internal Revenue vs. Next Mobile Inc. (formerly Nextel Communications Phils., Inc.) ("Next Mobile")*[7] the Supreme Court applied the doctrine of estoppel as an exception to the statute of limitations on the assessment of taxes, viz.:

> "Third, respondent is estopped from questioning the validity of its Waivers. While it is true that the Court has repeatedly held that the doctrine of estoppel must be sparingly applied as an exception to the statute of limitations for assessment of taxes, the Court finds that the application of the doctrine is justified in this case. Verily, **the application of estoppel in this case would promote the administration of the law, prevent injustice and avert the accomplishment of a wrong and undue advantage. Respondent executed five Waivers and delivered them to petitioner, one after the other. It allowed petitioner to rely on them and did not raise any objection against their validity until petitioner assessed taxes and penalties against it**. Moreover, the application of estoppel is necessary to prevent the undue injury that the government would suffer because of the cancellation of petitioner's assessment of respondent's tax liabilities." (Emphases supplied)

In the case at bar, respondent performed acts that induced the BIR to defer the issuance of the assessment. Records reveal that to extend the BIR's prescriptive period to assess respondent for deficiency taxes for taxable year 2004, respondent executed two (2) waivers. The first Waiver dated October 2007 extended the period to assess until June 20, 2008,[8] while the second Waiver, which was

[7] G.R. No. 212825, December 7, 2015.
[8] Exhibit "C"; CTA Division Docket, p. 636.

executed on June 2, 2008, extended the period to assess the taxes until November 30, 2008.[9] As a consequence of the issuance of said waivers, petitioner delayed the issuance of the assessment.

Notably, when respondent filed its protest on November 26, 2008 against the Preliminary Assessment Notice dated November 11, 2008, it merely argued that it is not liable for the assessed deficiency taxes and did not raise as an issue the invalidity of the waiver and the prescription of petitioner's right to assess the deficiency taxes.[10] In its protest dated December 8, 2008 against the FAN, respondent argued that the year being audited in the FAN has already prescribed at the time such FAN was mailed on December 2, 2008.[11] Respondent even stated in that protest that it received the letter *(referring to the FAN dated November 28, 2008)* on December 5, 2008, which accordingly is five (5) days after the waiver it issued had prescribed.[12] The foregoing narration plainly does not suggest that respondent has any objection to its previously executed waivers. By the principle of estoppel, respondent should not be allowed to question the validity of the waivers. Impugning the validity of the waivers after benefiting therefrom and allowing respondent to rely on the same is simply too abhorrent, to say the least. In the language of *Next Mobile, supra:*

> "**. . . the Court has repeatedly pronounced that parties must come to court with clean hands**. Parties who do not come to court with clean hands cannot be allowed to benefit from their own wrongdoing. Following the foregoing principle, respondent should not be allowed to benefit from the flaws in its own Waivers and successfully insist on their invalidity in order to evade its responsibility to pay taxes.
>
> xxx xxx xxx
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> **Finally, the Court cannot tolerate this highly suspicious situation. In this case, the taxpayer, on the one hand, after voluntarily executing waivers, insisted on their invalidity by raising the very same defects it caused**. . . . Such a situation is dangerous and open to abuse by unscrupulous taxpayers who intend to escape their responsibility to pay taxes by mere expedient of hiding behind technicalities." (Emphases supplied)

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[9] Exhibit "D"; CTA Division Docket, p. 638.
[10] Exhibit "F"; CTA Division Docket, p. 643.
[11] Exhibit "J"; CTA Division Docket, p. 731.
[12] Id.

By virtue of respondent's own actions, the government has been persuaded to postpone the issuance of the assessment. But this notwithstanding, I note that since the FAN was mailed only after the validity period of the second Waiver has expired, the same is accordingly tainted with fatal infirmity. **As found in the assailed Decision, the date indicated in the envelope/mail matter containing the FAN and the FLD is December 4, 2008, which is considered as the date of their mailing.[13] Since the validity period of the second Waiver is only until November 30, 2008, prescription had already set in at the time the FAN and FLD was actually mailed on December 4, 2008.**

For all the foregoing, I VOTE to DENY the Petition for Review and to AFFIRM the Court in Division's cancellation of the FAN, FLD and the Final Decision on Disputed Assessment against respondent.

ROMAN G. DEL ROSARIO
Presiding Justice

[13] CTA En Banc Rollo, p. 56.