REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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ISHIDA PHILIPPINES TUBE CO., INC., *Petitioner,*	**CTA Case No. 7633**
-versus-	Members: **ACOSTA,** ***Chairperson,*** **BAUTISTA, and CASANOVA,** ***JJ.***
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: FEB 06 2009, 3:18pm

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DECISION

ACOSTA, P.J.:

This is a Petition for Review filed before the Court of Tax Appeals on May 11, 2007, seeking the cancellation and setting aside of the Warrant of Distraint and/or Levy No. 0307-01 dated March 23, 2007[1] issued by respondent for the collection of alleged deficiency income tax, fringe benefit tax, final withholding tax, value-added tax, documentary stamp tax, expanded withholding tax, withholding tax on compensation, and final tax of petitioner covering taxable year 2003 totaling P31,676,634.65.

[1] *Exhibit "L".*

The facts of the case are as follows:

Petitioner is a wholly owned subsidiary of Ishida Co., Ltd. of Japan and is principally engaged in the business of manufacturing stainless and ordinary steel pipes and tubings, structural steel and other metallic goods. It is duly registered with the Bureau of Internal Revenue with Tax Identification Number 202-935-083-000.[2] Its principal place of business is at First Cavite Industrial Estate, Brgy. Langkaan, Damariñas, Cavite.

On the other hand, respondent is the duly appointed Commissioner of the Bureau of Internal Revenue, the government agency charged with the assessment and collection of all national internal revenue taxes, fees, and charges, as well as the enforcement of all forfeitures, penalties, and fines connected therewith. He holds office at the BIR National Office, Diliman, Quezon City.

Sometime during the fourth quarter of the year 2005, petitioner received a "Preliminary Fifteen (15) Day Letter" dated October 3, 2005 from respondent. It states that upon investigation, deficiency taxes were found against petitioner and that the latter had fifteen days from receipt thereof to submit a reply or arrange for a conference where its objections may be raised. The said letter further states that petitioner's failure to respond will result in the issuance of the corresponding assessment notice.[3]

On October 18, 2005, petitioner requested for an extension of time within which to file its position paper in relation to the preliminary findings of the respondent.[4] On October 27, 2005, petitioner was able to file the said position paper.[5]

[2] *Exhibit "D"*
[3] *Exhibit "E"*
[4] *Exhibit "F"*
[5] *Exhibit "G"*

In reply, respondent wrote petitioner on November 7, 2005, requesting for an informal conference on November 14, 2005.[6]

On May 22, 2006, a "Preliminary Assessment Notice" (PAN) was issued against petitioner. Among others, it informed petitioner that pursuant to Section 228 of the National Internal Revenue Code (NIRC) and its Implementing Rules and Regulations (IRR), petitioner is given the opportunity to present its side in writing and that failure to respond will result to the issuance of the formal letter of demand and assessment notice.[7]

Then, sometime the first quarter of 2007, petitioner received from respondent a "Final Notice Before Seizure" dated January 2, 2007.[8] And on April 11, 2007, respondent served upon petitioner a "Warrant of Distraint and/or Levy No. 0307-01 dated March 23, 2007, ordering seizure of its properties.[9] Thus, on May 11, 2007, the instant Petition for Review was filed seeking the cancellation of the Warrant of Distraint and/or Levy dated March 23, 2007.

The sole issue for this Court's resolution is whether the Warrant of Distraint and/or Levy is valid and enforceable, even if no formal assessment notice and preliminary collection letter were ever received by petitioner.

Petitioner denies receipt of the Final Assessment Notice and Preliminary Collection Letter allegedly issued by respondent on July 14, 2006 and November 22, 2006, respectively. It claims that it even went to Revenue District 54 after its receipt of the Warrant of Distraint and/or Levy to get a copy of the alleged Final

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[6] *Exhibit "H"*
[7] *Exhibit "I"*
[8] *Exhibit "K"*
[9] *Supra.*

Assessment Notice and Preliminary Collection Letter. Petitioner claims that it even attempted to obtain information from the Dasmariñas Postal Office on whether the Formal Letter of Demand was duly served and received by any duly authorized representative of petitioner. However, since respondent's District Office cannot locate its records on petitioner, the alleged Postal Registry Receipt Number cannot likewise be found.

Petitioner maintains that a mail matter is deemed received by the addressee in the ordinary course of mail is merely a disputable presumption. The moment the addressee-taxpayer denies having received the letter-assessment notice, the burden shifts to the sender-respondent to prove receipt thereof by the former.

Petitioner also argues that is was denied due process when respondent issued the Warrant of Distraint and/or Levy in question without first issuing a Formal Assessment Notice or at least serving the same to petitioner. Petitioner was therefore not given a chance to refute the allegations that it has unpaid deficiency taxes and was caught by surprise when the Final Notice Before Seizure and the Warrant of Distraint and/or Levy were served upon it.

Petitioner avers that the due process requirements in the issuance of a deficiency tax assessment are laid down in Section 3 of Revenue Regulations No. 12-99, which provides the need for (1) a notice of informal conference, (2) a preliminary assessment notice, (3) a formal letter of demand and assessment notice sent to the taxpayer. Evidently, respondent failed to comply with the third requirement. According to petitioner, this failure is fatal to the validity of the Warrant of Distraint and/or Levy, since it can only be issued upon the expiration of the time required to pay the delinquent tax, which in turn presupposes the existence of a formal letter of demand or assessment notice. Further, even assuming for the sake of argument that there is really a formal letter of demand (FAN), both the FAN and the warrant should remain invalid because of respondent's failure to comply with the requirement of serving them to the taxpayer.

Petitioner claims that it cannot be said to be a delinquent taxpayer when it was not informed of any tax liabilities due from it. When there is no FAN, there should also be no failure on the part of petitioner to pay the tax at the time required pursuant to Section 207 of the National Internal Revenue Code of 1997.

It also asserts that the final notice before seizure issued by respondent is not sufficient to be treated as the assessment notice to inform petitioner of the factual and legal bases of the internal revenue tax liabilities being assessed against it.

The Court finds merit in this Petition.

Section 228 of the National Internal Revenue Code (NIRC) does not only require that there must be an investigation and determination of taxpayer's liability; but also requires the Commissioner or his duly authorized representative to send a notice of assessment to the taxpayer, to give the latter the opportunity to file a protest.

An assessment is deemed made, only when the same is actually received by the taxpayer. In ***Commissioner of Internal Revenue vs. Azucena T. Reyes***,[10] the Supreme Court categorically ruled that if there is no valid notice sent, the assessment is void. The reason being: "[t]he law imposes a substantive, not merely a formal, requirement. To proceed heedlessly with tax collection without first establishing a valid assessment is evidently violative of the cardinal principle in administrative investigations: that taxpayers should be able to present their case and adduce supporting evidence."

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[10] *G.R. Nos. 159694 and 163581, January 27, 2006 (480 SCRA 382).*

upon petitioner on April 11, 2007, beyond the ten (10) day period within which the warrant must be served after its issuance. It also states that petitioner tried to obtain a copy of the alleged Final Assessment Notice (FAN) and the Preliminary Collection Letter, but the docket containing the FAN and the said letter, could not be found in BIR Revenue District Office No. 54. She also testified that petitioner could not even verify with the Postal Office whether there was indeed a Formal Letter Demand duly served and received by any duly authorized representative of petitioner, since it could not get hold of the Postal Registry Receipt Number covering the mailing of the FAN, as it was allegedly in the docket that could not be found. Further, she testified that petitioner did not execute any Waiver of the Defense of Prescription for its tax liabilities for the year 2003.[14]

On March 28, 2008, petitioner filed the Judicial Affidavit of Mamoru Hirabayashi its company president since 2003. He corroborated the above testimony of Annielee Tapawa regarding petitioner's non-receipt of the FAN. He stated that he is certain that no FAN or Preliminary Collection Letter was received by the company because all letters addressed to petitioner are given to its Head Accountant, who in turn is directly accountable to him. The Head Accountant, according to Mr. Hirabayashi, informs him of all urgent matters such that there is no possibility that the former received such letter and did not refer the same to him.[15]

On May 29, 2008, another Judicial Affidavit of Annielee Tapawan was filed by petitioner. In this affidavit, she stated that petitioner wrote to inform respondent that it was surprised to have received a Final Notice before Seizure because it has not received any Formal Letter of Demand or a Final Assessment Notice; even with the protest was filed against the Preliminary Assessment Notice.[16]

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[14] *Exhibits "M" and "N".*
[15] *Exhibit "O".*
[16] *Exhibit "Q".*

Under Sections 207 (A) and (B) of the National Internal Revenue Code (NIRC), distraint of personal property and levy on real property shall be done upon the failure of the person owing any delinquent tax or delinquent revenue to pay the same at the time required. And Section 228 of the NIRC provides for the procedure of assessing taxes which results in the taxpayer's delinquency. Section 228 provides:

> "SEC. 228. **Protesting of Assessment.** — When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however,* That a pre-assessment notice shall not be required in the following cases:
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> (a) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the face of the return; or
> (b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or
> (c) When a taxpayer who opted to claim a refund or tax credit of excess creditable withholding tax for a taxable period was determined to have carried over and automatically applied the same amount claimed against the estimated tax liabilities for the taxable quarter or quarters of the succeeding taxable year; or
> (d) When the excise tax due on excisable articles has not been paid; or
> (e) When an article locally purchased or imported by an exempt person, such as, but not limited to, vehicles, capital equipment, machineries and spare parts, has been sold, traded or transferred to non-exempt persons.
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> The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.
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> Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly

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authorized representative shall issue an assessment based on his findings.

Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable." *(Emphasis Supplied)*

From the language of the law, when the respondent or his duly authorized representative finds that proper taxes should be assessed, a written notice to the taxpayer informing him of the law and the facts upon which the assessment is based is necessary. The law imposes a substantive, not merely a formal, requirement. The essence of Section 228 is due process, that is, the taxpayer shall be accorded the opportunity to present his side and prove his defenses. Reading Section 228 with Sections 207(A) and (B), no taxpayer should be considered delinquent unless there has been a previous demand to pay taxes which remained unheeded. The taxpayer should be informed of its assessed deficiency taxes. This has been settled in ***Commissioner of Internal Revenue vs. PASCOR Realty and Dev't. Corp., et al.***[17], where the Supreme Court held that:

"An assessment contains not only a computation of tax liabilities, but also a demand for payment within a prescribed period. It also signals the time when penalties and interests begin to accrue against the taxpayer. To enable the taxpayer to determine

[17] *G.R. No. 128315, June 29, 1999.*

his remedies thereon, due process requires that it must be served on and received by the taxpayer. Xxx

To start with, assessment must be sent to and received by a taxpayer, and must demand payment of the taxes described therein within a specific period. Thus, the NIRC imposes a 25 percent penalty, in addition to the tax due, in case the taxpayer fails to pay the deficiency tax within the time prescribed for its payment in the notice of assessment. Likewise, an interest of 20 percent per annum, or such higher rate as may be prescribed by rules and regulations, is to be collected from the date prescribed for its payment until the full payment.

The issuance of an assessment is vital in determining the period of limitation regarding its proper issuance and the period within which to protest it. Section 203 of the NIRC provides that internal revenue taxes must be assessed within three years from the last day within which to file the return. Section 222, on the other hand, specifies a period of ten years in case a fraudulent return with intent to evade was submitted or in case of failure to file a return. Also, Section 228 of the same law states that said assessment may be protested only within thirty days from receipt thereof. Necessarily, the taxpayer must be certain that a specific document constitutes an assessment. Otherwise, confusion would arise regarding the period within which to make an assessment or to protest the same, or whether interest and penalty may accrue thereon.

It should also be stressed that the said document is a notice duly sent to the taxpayer. Indeed, an assessment is deemed made only when the collector of internal revenue releases, mails or sends such notice to the taxpayer." *(Emphasis Supplied)*

The above is further bolstered by the process of the assessment of taxes as set forth in Revenue Regulations 12-99[18]:

"SECTION 3. ***Due Process Requirement in the Issuance of a Deficiency Tax Assessment.*** —

[18] *Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extra-judicial Settlement of a Taxpayer's Criminal Violation of the Code Through Payment of a Suggested Compromise Penalty*

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3.1 Mode of procedures in the issuance of a deficiency tax assessment:

3.1.1 **Notice for informal conference.** — The Revenue Officer who audited the taxpayer's records shall, among others, state in his report whether or not the taxpayer agrees with his findings that the taxpayer is liable for deficiency tax or taxes. If the taxpayer is not amenable, based on the said Officer's submitted report of investigation, the taxpayer shall be informed, in writing, by the Revenue District Office or by the Special Investigation Division, as the case may be (in the case Revenue Regional Offices) or by the Chief of Division concerned (in the case of the BIR National Office) of the discrepancy or discrepancies in the taxpayer's payment of his internal revenue taxes, for the purpose of "Informal Conference," in order to afford the taxpayer with an opportunity to present his side of the case. If the taxpayer fails to respond within fifteen (15) days from date of receipt of the notice for informal conference, he shall be considered in default, in which case, the Revenue District Officer or the Chief of the Special Investigation Division of the Revenue Regional Office, or the Chief of Division in the National Office, as the case may be, shall endorse the case with the least possible delay to the Assessment Division of the Revenue Regional Office or to the Commissioner or his duly authorized representative, as the case may be, for appropriate review and issuance of a deficiency tax assessment, if warranted.

3.1.2 **Preliminary Assessment Notice (PAN).** — If after review and evaluation by the Assessment Division or by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing in detail, the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based (see illustration in ANNEX A hereof). If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN, he shall be considered in default, in which case, a formal letter of demand and assessment notice shall be caused to be issued by the said Office, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.

3.1.3 **Exceptions to Prior Notice of the Assessment.** — The notice for informal conference and the preliminary assessment

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> notice shall not be required in any of the following cases, in which case, issuance of the formal assessment notice for the payment of the taxpayer's deficiency tax liability shall be sufficient: xxx
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> 3.1.4 **Formal Letter of Demand and Assessment Notice.** — The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations,.or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void xxx. The same shall be sent to the taxpayer only by registered mail or by personal delivery. If sent by personal delivery, the taxpayer or his duly authorized representative shall acknowledge receipt thereof in the duplicate copy. of the letter of demand, showing the following: (a) His name; (b) signature; (c) designation and authority to act for and in behalf of the taxpayer, if acknowledged received by a person other than the taxpayer himself; and (d) date of receipt thereof."

The Commissioner or his duly authorized representative is required to send a notice of the assessment against the taxpayer in order to give the latter an opportunity to file a protest. And that an assessment is only deemed made when it has been actually received by the taxpayer. Clearly, there is a need to inform the taxpayers of the assessment against them. The receipt of the assessment against them will commence the entire process in Section 228 of the National Internal Revenue Code. Without the assessment, the taxpayer cannot be considered in default so as to serve basis for the issuance of a Warrant of Distraint and/or Levy. This assessment should be taken to mean the Final Assessment Notice and the Formal Letter of Demand which demands payment of the taxpayer's deficiency tax assessment. The PAN, which was issued against petitioner is only a proposed assessment, and even if the taxpayer failed to respond thereto, such failure will at most, only lead to the issuance of the Final Assessment Notice (FAN) together with the Formal Letter of Demand. It is the FAN or the Formal Letter of Demand which should be protested and which shall, absent any protest, attain

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finality, and which can serve as basis for the issuance of the Warrant of Distraint and/or Levy.

This Court finds merit in petitioner's argument that the meaning of procedural due process is that a party to a case must be given sufficient opportunity to be heard. Its very essence is to allow all parties the opportunity to present evidence.

In sum, having been declared in default, respondent failed to discharge its duty of proving receipt by petitioner of the Formal Letter of Demand and Assessment Notice. The Court holds that since there is no assessment to begin with, petitioner cannot be considered a delinquent taxpayer. Consequently, there is no basis for the issuance of the Warrant of Distraint and/or Levy.

ACCORDINGLY, the instant Petition for Review is hereby **GRANTED**. The Warrant of Distraint and/or Levy dated March 23, 2007 for the collection of the alleged internal revenue tax liabilities of petitioner for 2003 is hereby **CANCELLED** and **SET ASIDE.**

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

WE CONCUR:

LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ERNESTO D. ACOSTA
Presiding Justice