Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

COMMISSIONER OF INTERNAL REVENUE
Petitioner,

-versus-

NIKKEN PHILIPPINES INC.,
Respondent.

CTA EB CASE No. 1058
(CTA CASE No. 8205)

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

Promulgated:
OCT 2 3 2014
11:35 a.m.

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a Petition for Review for the Court en banc under *Section 2(a)(1), Rule 4,* in relation to *Section 4(b), Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA),*[1] *as amended,* of the Decision dated

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[1] RULE 4
JURISDICTION OF THE COURT

SEC. 2. *Cases within the jurisdiction of the Court en banc.* – The Court *en banc* shall exercise exclusive appellate jurisdiction to review by appeal the following:

(a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Divisions in the exercise of its exclusive appellate jurisdiction over:

(1) Cases arising from administrative agencies – Bureau of Internal Revenue, Bureau of Customs, Department of Finance, Department of Trade and Industry, Department of Agriculture;

May 24, 2013[2] and the Resolution dated August 12, 2013[3] rendered by the Special Third Division of this Court, the dispositive portions of which, respectively read as follows:

Decision dated May 24, 2013:

"**WHEREFORE,** premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, the Formal Letter of Demand with assessment Notices issued on October 30, 2009, the Final Decision on Disputed Assessment for the payment of Deficiency Expanded Withholding Tax of ₱1,923,951.59 and Deficiency Final Withholding Tax of ₱47,078.74 including surcharges, interest and compromise penalty for taxable year 2005 are hereby **CANCELLED** and **WITHDRAWN**.

SO ORDERED."

Resolution dated August 12, 2013:

"**WHEREFORE,** respondent's Motion for Reconsideration is hereby **DENIED** for lack of merit.

SO ORDERED."

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RULE 8
PROCEDURE IN CIVIL CASES

SEC. 4. *Where to appeal; mode of appeal.* –
x x x x x x x x x

(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court *en banc* shall act on the appeal.

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[2] Penned by Associate Justice Amelia R. Cotangco-Manalastas, concurred in by Associate Justice Lovell R. Bautista. Associate Justice Olga Palanca-Enriquez had already retired on the date of promulgation, en banc Docket, pp. 27-44.
[3] Penned by Associate Justice Amelia R. Cotangco-Manalastas, concurred in by Associate Justice Lovell R. Bautista. Associate Justice Olga Palanca-Enriquez had already retired on the date of promulgation, en banc Docket, pp. 23-25.

The facts of the case as recited by the Special Third Division in its Decision[4] read as follows:

> "Petitioner Nikken Philippines, Inc. (respondent herein) is a domestic corporation organized and existing under Philippine laws. It is engaged in the business of buying, selling, distributing, and marketing at wholesale various kinds of health support products and accessories, including entering into contracts for the acquisition and sale and importation and exportation of these products.
>
> On the other hand, respondent (petitioner herein) is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) tasked with the assessment and collection of internal revenue taxes. She holds office at the BIR National Office Building, Diliman, Quezon City.
>
> On January 7, 2009, Ms. Concepcion Turingan, the Comptroller of petitioner, executed a waiver of the statute of limitations in connection with the reinvestigation of petitioner's tax deficiency liabilities. Petitioner thereafter received on October 14, 2009 from respondent the Preliminary Assessment Notice (PAN) dated September 28, 2009 with findings of deficiency expanded withholding tax and final withholding tax for the calendar year ending December 31, 2005. Petitioner submitted its Position Paper to protest respondent's PAN on October 29, 2009.
>
> Subsequently, on October 30, 2009, respondent issued a Formal Letter of Demand and Assessment Notice (FAN). This was received by petitioner on November 16, 2009.
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> Aggrieved by the FAN issued by respondent, petitioner submitted its protest to respondent's FAN on December 14, 2009. All supporting documents were likewise submitted by petitioner on the same date.

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[4] *Supra* note 2.

On November 25, 2010, petitioner received the Final Decision on Disputed Assessment denying petitioner's protest and ordering the collection of the assessed deficiency expanded and final withholding taxes as indicated therein.

Petitioner appealed the said Final Decision with this Court by filing the instant Petition for Review on December 22, 2010."

The issues submitted before the Division are the following:

1. Whether or not Respondent's right to assess Petitioner's deficiency expanded withholding taxes and deficiency final withholding taxes have prescribed, thus, barring the right of the Respondent to collect taxes from the Petitioner.

2. Whether or not the waiver of the statute of limitations agreed upon by Petitioner and Respondent, is valid and effective.

3. Whether or not the assessment issued by Respondent is void and lacked legal and factual bases since certain income payments made by Petitioner should not be subjected to withholding tax.

The Special Third Division ruled in favor of Nikken Philippines Inc. (Nikken) and held that for the calendar year 2005, the period for assessment of deficiency expanded and final withholding taxes for the periods of January to November of the said year already expired at the time the subject waiver was executed, thus, there is no period to extend. Consequently, only the period of assessment for the final and expanded withholding taxes for December 2005 may be extended, considering that the subject waiver, executed on January 7, 2009, was executed before the expiration of the ordinary prescriptive period for its assessment, the last day of which is January 19, 2009.[5]

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[5] *Supra* note 2, p. 39.

However, the Court in Division ruled that the waiver is defective considering that it was executed without the notarized written authority of Ms. Turingan to sign on behalf of Nikken, and the fact of receipt by Nikken of its file copy of the waiver was not indicated in the original copy and no other evidence was presented to prove the fact of receipt of the waiver accepted by CIR. These defects in the waiver are in violation of the provisions of Revenue Memorandum Order (RMO) No. 20-90 and Revenue Delegation Authority Order (RDAO) No. 05-01.

In view of the infirmities of the waiver, the Court in Division held that the period to assess was not extended. Thus, the assessments for deficiency expanded withholding tax and deficiency final withholding tax against Nikken for taxable year 2005 were issued beyond the three year period provided by law.

CIR's Motion for Reconsideration was denied for lack of merit, hence, this Petition.

A cursory reading of the Petition for Review readily reveals that no new matters or issues have been raised and that it deals with the very same issue which was thoroughly passed upon by the Court in Division and clearly discussed in the assailed Decision promulgated on May 24, 2013 and sustained in the Resolution dated August 12, 2013.

Suffice it to say that CIR does not question the inapplicability of the subject waiver for the periods of January to November of the calendar year 2005 and that the assessment notices were issued beyond the three-year prescriptive period,[6] but claims that the period to assess

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[6] **SEC. 203. Period of Limitation Upon Assessment and Collection.** - 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 (3)-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 as filed on such last day.

deficiency taxes was extended by a waiver, which Nikken is now estopped to question the validity of such.

Petitioner's sole argument in her Petition for Review is that Nikken is estopped from denying the authority of the officer who signed the waiver, reiterating its contention before the Court in Division. As stated in her Petition, the issue of the validity of the waiver was only raised when Nikken protested the FAN. If Ms. Turingan's act was unauthorized by Nikken as it claimed, it could have raised it as early as possible, hence, Nikken is now estopped to deny the representations made by Ms. Turingan.

After carefully examining the questioned Waiver of the Statute of Limitations, this Court has no reason to deviate from the findings in the assailed Decision and considers the said waiver to be without any binding effect for the reasons stated that it was executed without the notarized written authority of Ms. Turingan to sign on behalf of Nikken, and even so, the fact of receipt by Nikken of its file copy of the waiver was not indicated in the original copy and no other evidence was presented to prove the fact of receipt of the waiver accepted by CIR. The Court in Division found applicable the case of *Commissioner of Internal Revenue vs. Kudos Metal Corporation*[7] *(the "Kudos Metal Case"),* which laid down the procedure for the proper execution of a waiver, 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

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SEC. 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes. -

(a) xxx

(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.

(c) xxx

[7] G.R. No. 178087, May 5, 2010.

of the period agreed upon to assess/collect the tax after the regular three-year period of prescription, should be filled up.

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.**

3. The waiver should be duly notarized.

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.**

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.

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)

In addition, as stated in the case of *Commissioner of Internal Revenue vs. East Asia Power Resources Corporation*:[8]

[8] CTA EB Case No. 887, June 19, 2013.

> "The mandatory nature of the requisites in the RMO requiring strict compliance is clear. In fact, it is no less than the BIR which emphasized strict compliance of RMO No. 20-90 when it issued RMC No. 06-05, to circularize the salient features of the decision of the Supreme Court in the case of *Philippine Journalists, Inc. v. Commissioner of Internal Revenue*, to wit:
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> 1. **A waiver of the statute of limitations under the Tax Code must conform strictly with the provisions of Revenue Memorandum Order No. 20-90 in order to be valid and binding.**
>
> 1.1. The waiver must specify a definite agreed date between the BIR and the taxpayer within which the former may assess and collect revenue taxes.
>
> 1.2. The waiver must be accepted by the Commissioner of Internal Revenue or his duly authorized representative, and the date of acceptance must be indicated.
>
> 1.3. **The taxpayer must be furnished a copy of the waiver accepted by the BIR**." (Emphases supplied)

For a waiver of the defense of prescription to be valid, it must strictly comply with the requirements under RMO No. 20-1990 and RDAO No. 05-2001. Hence, the absence of one of the requirements invalidates the said waiver.[9] Consequently, an invalid waiver does not toll the running of the prescriptive period.[10] The subject waiver therefore

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[9] Commissioner of Internal Revenue vs. Union Cement Corporation, CTA EB Case No. 895, August 27, 2013.
[10] Commissioner of Internal Revenue vs. Court of Appeals, G.R. No. 115712, February 25, 1999.

cannot suspend the running of the prescriptive period for assessment of the deficiency expanded and final withholding taxes as said waiver was not made in accordance with the requirements of RMO No. 20-90 and RDAO No. 05-2001, applying the procedures laid down in *Kudos Metal Case*. The waiver cannot operate to suspend the running of the prescriptive period.

As to the sole argument of CIR that Nikken is already estopped from questioning the validity of the waiver, the Court likewise finds the same bereft of merit. A plethora of cases[11] has already been discussed by this Court as to the effect of the doctrine of estoppel in waiver of statute of limitations, citing the *Kudos Metal Case*, thus:

> "**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**

[11] Republic Cement Corporation (as surviving corporation in a merger involving FR Cement Corporation vs. Commissioner of Internal Revenue, CTA Case No. 7131, January 25, 2013; Commissioner of Internal Revenue vs. Union Cement Corporation, CTA EB Case No. 895, March 22, 2013; Commissioner of Internal Revenue vs. East Asia Power Resources Corporation, CTA EB Case No. 879, June 17, 2013; Commissioner of Internal Revenue vs. East Asia Power Resources Corporation, CTA EB Case No. 887, June 19, 2013; Commissioner of Internal Revenue vs. Belle Corporation, CTA EB Case No. 962, August 15, 2013; Commissioner of Internal Revenue vs. Union Cement Corporation, *supra* note 9.

> **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." (Emphasis supplied, citations omitted)

Since the waiver executed suffers from the above-mentioned infirmities, it is invalid and ineffective. Thus, this Court finds the Formal Letter of Demand with assessment Notices issued on October 30, 2009 and Final Decision on Disputed Assessment for the payment of Deficiency Expanded Withholding Tax of ₱1,923,951.59 and Deficiency Final Withholding Tax of ₱47,078.74 including surcharges, interest and compromise penalty for the taxable year 2005 are considered null and void. We find no reason not to uphold the ruling of the Court in Division.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED**. Accordingly, the Decision and the Resolution, dated May 24, 2013 and August 12, 2013, respectively, are hereby **AFFIRMED**.

SO ORDERED.

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

WE CONCUR:

(on Wellness Leave)
ROMAN G. DEL ROSARIO
Presiding Justice

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation among the members of the Court *En Banc* before the case was assigned to the writer for the opinion of the Court *En Banc.*

JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice