REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

FIRST DIVISION

AEROTECH INDUSTRIES PHILIPPINES, INC., Petitioner,	**CTA Case No. 7964**
	Members:
- versus -	**ACOSTA,** *Chairperson* **UY,** *and* **FABON-VICTORINO,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** OCT 20 2011 ; 3:39 pm

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DECISION

UY, J.:

Before this Court is a Petition for Review filed by petitioner, Aerotech Industries Philippines, Inc., seeking for the cancellation and setting aside of the questioned assessment issued by respondent, Commissioner of Internal Revenue, against petitioner for deficiency internal revenue taxes for taxable year 2002.

THE FACTS

Petitioner, Aerotech Industries Philippines, Inc. was duly registered with the Bureau of Internal Revenue (BIR), Revenue District Office (RDO) No. 44 of

Revenue Region No. 8, Makati City, Philippines, under Tax Identification Number 000-431-432-000.[1]

Respondent Commissioner of Internal Revenue is the chief of the Bureau of Internal Revenue, the government agency officially responsible for the assessment and collection of all national internal revenue taxes, fees and charges and the enforcement of all forfeitures, penalties and fines connected with such taxes.[2]

On November 27, 2003, petitioner received Letter of Authority No. 2000-00043011 dated November 18, 2003 issued by Regional Director Anselmo G. Adriano, authorizing Revenue Officer Edwin Montealegre under the supervision of Group Supervisor Edgardo Domanog of RDO No. 44 – Revenue Region No. 8 to examine/audit petitioner's internal revenue taxes for the period from January 1, 2002 to December 31, 2002.[3] After the investigation, petitioner received on December 1, 2005 a Preliminary Assessment Notice (PAN) dated November 29, 2005, assessing petitioner the following deficiency internal revenue taxes for the taxable year 2002, in the total amount of ₱ 4,493,398.27, inclusive of interest and compromise penalties,[4] to wit:

	Basic Tax Due	Surcharge/ Compromise	Interest	TOTAL
Income Tax	₱ 2,611,004.80	-	₱ 1,394,920.37	₱ 4,005,925.17
Expanded Withholding Tax	64,108.74	-	37,411.40	101,520.14
Withholding Tax on Compensation	243,724.62	-	142,228.34	385,952.96
TOTAL				₱ 4,493,398.27

[1] Petition for Review, 2nd Par., The Parties, Docket, p. 2; Answer, Par. 2(a), Docket, p. 64.
[2] Petition for Review, 3rd Par., The Parties, Docket, p. 2; Answer, Par. 2(b), Docket, p. 65.
[3] Joint Stipulation of Facts/Issues (JSFI), Par. 1, Docket, p. 103. Exhibit "10" (BIR Records), p. 1.
[4] JSFI, Par. 2, Docket, p. 103. Exhibit "A", Docket, pp. 120 to 123. Exhibit "2", BIR Records, pp. 276 to 279.

Petitioner, through counsel, filed its letter-protest dated December 15, 2005, disputing the said PAN.[5] Subsequently, respondent issued Assessment Notices: (a) No. IT-43011-02-06-022 for ₱ 4,086,043.67; (b) No. WE-43011-02-06-022 for ₱ 103,487.31, and (c) No. WC-43011-02-06-0023 for ₱ 393,431.63, all dated January 10, 2006, with the corresponding Formal Assessment Notice and Details of Discrepancies both dated January 10, 2006.[6] These documents were all received by petitioner's Finance Manager, Lourdes R. De Luna, on January 11, 2006.[7]

Thus, petitioner, through counsel, filed another protest through a letter dated February 9, 2006.[8] Relative thereto, respondent sent a letter dated March 3, 2006, informing petitioner that the entire tax docket together with the letter of protest had been forwarded to the RDO No. 44, Taguig-Pateros, for the resolution of the factual issues raised in the administrative protest.[9]

On May 9, 2006, petitioner received Tax Verification Notice No. 2002-00122672 dated March 13, 2006, informing that Revenue Officer Rene Tabtab under the supervision of Group Supervisor Enrique de Jesus had been authorized to verify the supporting documents and/or pertinent records relative to the request for reinvestigation of petitioner.[10]

Thereafter, petitioner received on December 16, 2008, a Post-Reporting Notice from Revenue District Officer Leida G. Buscaino, informing petitioner that Revenue Officer Margiely P. Belgera under Group Supervisor Melba N. Gador has already submitted a report on the result of reinvestigation of petitioner's internal

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[5] JSFI, Par. 3, Docket, p. 103. Exhibit "B", Docket, pp. 124 to 129. Exhibit "5", BIR Records, pp. 286 to 291.
[6] JSFI, Par. 4, Docket, pp. 103 to 104. Exhibit "C", Docket, pp. 130 to 133.
[7] Exhibit "10" (BIR Records), pp. 298 to 300. Exhibit "3", BIR Records, pp. 294 to 297, @ p. 297.
[8] JSFI, Par. 5, Docket, p. 104. Exhibit "D", Docket, pp. 134 to 145. Exhibit "6", BIR Records, pp. 323 to 334.
[9] JSFI, Par. 6, Docket, p. 104. Petition for Review, 7th Par., Statement of Facts, Docket, p. 4; Answer, Par. 3(a), Docket, p. 65.
[10] Petition for Review, 8th Par., Statement of Facts, Docket, pp. 4 to 5; Answer, Par. 3(a), Docket, p. 65.

revenue tax liabilities for taxable year ending December 31, 2002. In the same Notice, Ms. Buscaino invited petitioner for an informal conference, and stated that should petitioner fail to attend the same, such failure will be construed as a waiver of its right to present its side of the case, hence, the tax assessment of the Revenue Officers concerned will be submitted to the higher authority for the issuance of a formal notice of assessment.[11] Attached to said Notice is a computation of petitioner's deficiency tax, the details of which are as follows:

WITHHOLDING TAX DUE ON INCOME PAYMENTS MADE

Payments to NRAETB[12] [Sec. 25(B)]	₱ 35,500.00 x 25%	₱ 9,375.00
Less: Remittance		5,625.00
Deficiency Tax		₱ 3,750.00
Payment to NRFC[13] [Sec. 28(B)(1)]	₱ 3,918,582.44 x 32%	₱ 1,253,946.38
Less: Remittance		587,786.36
Deficiency Tax		₱ 666,160.02
Total Deficiency Tax excluding penalties		₱ 669,910.02
Add: Interest	₱ 893,191.02	
Compromise	25,000.00	918,191.02
Total amount due and collectible		₱ 1,588,101.04

Apparently, the foregoing withholding tax impositions sprung from the pertinent explanations of petitioner in its protest letter dated February 9, 2006[14], to wit:

> "**2. That the alleged underdeclared sources of funds amount to P3,918,582.44 represents the deductible expenses in 2001, the corresponding withholding taxes had been withheld and remitted in 2002;**
>
> Evidently, the records of our client revealed that the above refers to the technical assistance of Aerotech to NRFC-Pampanga in the total amount of P3,918,582.44 deducted in the 2001 financial statements and paid in 2001 and 2002 but whose withholding taxes were filed and remitted in 2002 to the

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[11] Exhibit "G", Docket, pp. 152 to 153. Exhibit "7", BIR Records, pp. 355 to 356.
[12] Nonresident Alien Engaged in Trade or Business.
[13] Nonresident Foreign Corporation.
[14] Exhibit "D", Docket, at pp. 137 to 138, and 142. Exhibit "6", BIR Records, pp. 331 to 332, and 326.

Bureau of Internal Revenue through its authorized agent banks. As a matter of proof we attached herewith the following documents and made an integral part hereof, to wit:

- Invoice No. CF40194 dated November 27, 2001 **'Annex A'**
- BIR Form No. 1601-F dated January 2002 **'Annex B'**

From the above documents it is very clear that our client had paid such technical assistance to **AERMACCHI S.P.A.**. a nonresident foreign corporation in 2001 in accordance with the contractual services rendered by the former to our client, and the proper withholding taxes of which had been withheld and remitted to your good office in 2002.

xxx xxx xxx

- **Director's Fees**

Records of our client revealed that the amount of P56,250.00 assessed by your office as not being subjected to withholding tax refers to payments to Italian and Filipino directors broken down as follows:

• Italian Directors	P 37,500.00
• Filipino Directors	18,750.00
Total	56,250.00

These Italian directors are provided with legal papers to permit them to visit the country and stays in the country for not more than 180 days throughout the taxable year. Upon payments to such Italian Directors amounting to P37,500 in total, out of the P56,250.00 claimed by your office as not allowable expense for non-withholding, the same were subjected to final withholding taxes at 15% in relation to the provision of RP-Italy Tax Treaty. Thus, there is no basis for your good office to assess the same.

xxx xxx xxx."

The informal conference was held on January 8, 2009 between Ms. Gador and petitioner's Finance Manager, Ms. Lourdes R. De Luna. On January 15, 2009, the BIR received a letter dated January 15, 2009 from Ms. De Luna, formally contesting the above computation.[15]

On July 29, 2009, petitioner received the questioned Final Decision on Disputed Assessment (FDDA) and Details of Discrepancies, both dated July 22,

[15] Exhibit "1", BIR Records, pp. 357 to 358.

2009,[16] informing petitioner that its request for reinvestigation has been given favorable action. Particularly, the assessments in the amounts of ₱ 4,086,043.67 for Income Tax, ₱ 103,487.31 for Expanded Withholding Tax, and ₱ 393,431.63 for Withholding Tax on Compensation, were all deleted.

However, petitioner was still held liable to pay deficiency Final Withholding Tax for taxable year 2002, to wit:

Final Withholding Tax	
Payments to Non-resident alien engaged in Trade or Business	
Basic Tax Due	₱ 3,750.00
Add: Interest (1.16.03 to 8.25.09)	4,958.22
Total Amount Due	₱ 8,708.22
Payments to Non-resident foreign corporation	
Basic Tax Due	₱ 666,160.02
Add: Interest (1.16.03 to 8.25.09)	880,791.30
Total Amount Due	₱ 1,546,951.32

The foregoing basic tax dues were determined as follows:

	Nonresident Alien engaged in trade/business	*Nonresident foreign corporation*
Income Payments	₱ 37,500.00	₱ 3,918,582.44
Multiply by Rate	25%	32%
Tax Due	9,375.00	1,253,946.38
Less: Amount Remitted	5,625.00	587,786.36
Basic Tax still due	₱ 3,750.00	₱ 666,160.02

The above deficiency Final Withholding Tax were assessed because of petitioner's failure to a submit a copy of the Application for Tax Treaty duly stamped by the International Tax Affairs Division (ITAD), pursuant to Revenue Memorandum Order No. (RMO) 1-2000[17]. Parenthetically, the income payment in the amount of

[16] JSFI, Par. 7, Docket, p. 104. Exhibit "E", Docket, pp. 146 to 148. Exhibit "9", BIR Records, pp. 384 to 386.
[17] SUBJECT: Procedures for Processing Tax Treaty Relief Application

₱ 37,500.00 was for the month of December 2002;[18] while the income payment in the amount of ₱ 3,918,582.44 was for the month of January 2002.[19] The FDDA[20] expressly states that the BIR was giving petitioner until August 25, 2009 to settle the above liabilities and that the same is the final decision of respondent.

Hence, petitioner filed the instant Petition for Review on August 25, 2009.

In the Answer[21] filed on October 19, 2009, respondent raises the following Special and Affirmative Defenses:

> "6) At the outset, it should be clarified that the Final Decision on Disputed Assessment (FDDA) and its Details of Discrepancies dated 22 July 2009 on income payments to Non-Resident Alien engaged in Trade or Business in the amount of P37,500 with a Final Withholding Tax Assessment of P8,708.22, inclusive of interest and Income payment to Non-Resident Foreign Corporation in the amount of P3,918,582.44 with a Final Withholding Tax Assessment of P1,546,951.32, inclusive of interest are not a (sic) new assessments, as claimed by Petitioner, considering that the same were reflected in the Formal Assessment Notice (FAN) and its Details of Discrepancies dated 10 January 2006;
>
> 7) The P37,500 is part of the Director's Fee not subject to Expanded Withholding Tax in the total amount of P56,250 as stated in the aforesaid FAN and its Details of Discrepancies;
>
> 8) During the reinvestigation of FAN, Petitioner's Protest Letter dated 9 February 2006 stated that the Director's Fee of P56,250 consists of payment made to the following:
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> | | |
> |---|---|
> | Italian Directors | P37,500.00 |
> | Filipino Directors | 18,750.00 |
> | Total | P56,250.00 |
>
> 9) Considering that the payment to the Filipino Directors was subjected to withholding tax on compensation, the assessment thereon was dropped. However, with regard to payment made to the Italian Directors, Petitioner failed to submit an Application for Tax Treaty Relief duly stamped by the International Tax Affairs Division (ITAD) pursuant to RMO 1-2000, hence, subject to 25% Final Withholding Tax

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[18] Exhibit "10" (the entire BIR Records), p. 74.
[19] Exhibit "4", BIR Records, p. 391.
[20] JSFI, par. 7, Docket, p. 104. Final Decision on Disputed Assessment, Common Exhibit : petitioner's Exhibit"E", Docket pp. 146 to 148, and respondent's Exhibit "9", BIR Records, pp. 384 to 386.
[21] Docket, pp. 64 to 73.

instead of the 15% rate under the Phil-Italian Treaty being claimed by the Petitioner;

10) With regard to the P3,918,582.44, it is part of the income payment to non-resident foreign corporation in the amount of P3,956,082.44 (upon reinvestigation, this amount was determined to be P3,918,582.44 taking into consideration the Protest Letter dated 9 February 2006 of the Petitioner), which is part of the undeclared income from unaccounted source of funds in the total amount of [₱]5,878,223.48 subject to Income Tax under the FAN;

11) As already stated, the income payment to non-resident foreign corporation was determined, upon reinvestigation of the FAN, to be P3,918,582.44 instead of P3,956,082.44. However, Petitioner likewise failed to submit an Application for Tax Treaty Relief duly stamped by the International Tax Affairs Division (ITAD) pursuant to RMO 1-2000, hence, subject to 32% Final Withholding Tax instead of the 15% rate under the Phil-Italian Treaty being claimed by the Petitioner;

12) Having duly objected to the foregoing in their Protest Letter dated 9 February 2006 to the FAN, Petitioner cannot now claim that the assessments are new even based on the ground that they are being represented in this present petition by a new/different counsel from the ones that represented them during their protest at the administrative level;

13) Further, before the issuance of the FDDA, Petitioner was invited for an informal conference by representative of the Respondent in a Letter dated 9 December 2009, which was received by the former on 16 December 2009. Consequently, in a Letter dated 15 January 2009, Petitioner formally presented their objection. Respondent's representative replied in a Letter dated 26 May 2009 and received by Petitioner on 3 June 2009. Hence, Petitioner's claim that they were not accorded due process has no legal and factual basis;

14) Contrary to Petitioner's claim, the assessment has not become final. Section 223 of the 1997 Tax Code provides that the running of the statute of limitation provided in Section 203 and 222 on the making of an assessment shall be suspended for the period when the taxpayer requests for a reinvestigation which is granted by the Commissioner;

15) In this case, Petitioner filed a protest letter to the FAN on 9 February 2006, which was given due course by the Respondent. Hence, from that date, the prescriptive period to assess was suspended. Further, Petitioner did not raise the issue of prescription on the administrative level, therefore, it cannot be raised for the first time on appeal;

16) Revenue Memorandum Order (RMO) No. 1-2000 dated 25 November 1999, which requires that the availment of a tax treaty provision must be preceded by an application for tax treaty relief with the International Tax Affairs Division, is not an administrative legislation in the sense that it expanded the provision of the law;

17) In the case of *Mirant (Philippine) Operation Corp. vs. the Commissioner of Internal Revenue, Court of Tax Appeals En Banc Case No. 40 (C.T.A. Case No. 6382)*, this Court held:

> *The implementation of the said Revenue Memorandum Order (RMO 1-2000) is* ***in harmony*** *with the objectives of the contracting state to ensure that the granting of the benefits under the tax treaties are enjoyed by the persons or corporations duly entitled to the same. (Emphasis supplied)*

18) A revenue regulation, the issuance of which is authorized by statute, has the force and effect of law (*Vitug & Acosta, Tax Law and Jurisprudence, 3rd Edition, p. 55*);

19) Contrary to the contention of the Petitioner, the Mirant Case was not retroactively applied to its case as it merely confirmed the validity and legality of an (sic) existing requirements for tax treaty relief of RMO 1-2000, which took effect immediately upon its issuance on 25 November 1999;

20) Considering that the assessment of Petitioner involves taxable year 2002, RMO 1-2000 is unquestionably applicable to it;

21) Petitioner's insistence in the case of JMI Holdings V vs. Commissioner of Internal Revenue (CTA Case No. 5140 dated 19 March 1997) is misplaced considering that what is involved there is RMO 10-92, which is not even cited as a basis by the Respondent in his assessment;

22) Assessment (sic) are *prima facie* presumed correct and made in good faith. The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed. (*Aban, Law of Basic Taxation in the Philippines, 1st Edition, p. 109*);

23) Finally, Petitioner should be reminded that taxes are important because it is the lifeblood of the government and so should be calculated without unnecessary hindrance (*Commissioner vs. Algue, Inc. L-28896, 17 February 1988*). Taxes are enforced proportional contribution from persons and property levied by the state, thus, no one is considered entitled to recover that which he must give up to another-*Non videtur quisquam id capere quod ei necesse est alii restitutere*."

During trial, both parties presented their respective evidence.

Thereafter, this case was considered submitted for decision on March 23, 2011, taking into consideration petitioner's Memorandum filed on March 4, 2011, *sans* respondent's Memorandum.[22]

Hence, this Decision.

THE ISSUES

The parties submitted the following issues[23] for this Court's resolution:

"1. Whether or not petitioner incurred a deficiency final withholding tax in the total amount of P1,555,650.54 (inclusive of interest from January 16, 2003 to August 25, 2009);

2. Whether or not petitioner was deprived of its right to due process on the above deficiency final withholding tax;

3. Whether or not the above deficiency final withholding tax assessment has prescribed;

4. Whether or not petitioner can raise the issue of prescription of the assessment for the first time on appeal;

5. Whether or not petitioner is entitled to the tax relief provided for under the RP-Italian Tax Treaty."

Petitioner's arguments

Petitioner argues that the deficiency final withholding tax assessment, being a new assessment, should have been the subject of a new preliminary assessment notice in accordance with Revenue Regulations No. 12-99 dated September 6, 1999 so that petitioner will be given a chance to explain faithfully and religiously its position and disagreement on the new findings, and to adduce accordingly such documents and papers to rebut the alleged deficiency. According to petitioner, a

[22] Resolution dated March 23, 2011, Docket, p. 223.
[23] Joint Stipulation of Facts/Issues, Docket, pp. 103 to 105, at pp. 104-105.

procedural shortcut was committed by the respondent wherein the new assessment was allegedly embodied in a Final Decision on Disputed Assessment which clearly deprived petitioner the opportunity to question it at the level of respondent, in violation of the Section 228 of the National Internal Revenue Code (NIRC) of 1997 and Section 3.1.2 of said Revenue Regulations.

Petitioner further asserts that the questioned assessment is null and void on the ground of prescription. And finally, petitioner contends that it validly availed of the tax treaty relief under the RP-Italy Tax Treaty.

Respondent's counter-arguments

Respondent contends, in her Answer, that the subject Final Withholding Tax assessments are not new assessments, considering that the same were reflected in the FAN and Details of Discrepancies dated January 10, 2006; that petitioner failed to submit Applications for Tax Treaty Relief duly stamped by the International Tax Affairs Division of the BIR, pursuant to RMO 1-2000; and that assessments are *prima facie* presumed correct and made in good faith.

THE COURT'S RULING

In resolving the five stipulated (5) issues raised in this petition, it becomes necessary to first resolve the second and fourth issues to determine: whether petitioner's right to due process was violated; and whether the subject assessments have prescribed. The resolution of the remaining issues will depend on how these two (2) issues are resolved.

While the subject deficiency final withholding tax assessments are new, petitioner was not deprived of its right to due process.

Petitioner asserts that the subject deficiency final withholding tax assessments, being new assessments, should have been the subject of a new PAN in accordance with RR No. 12-99 dated September 6, 1999. And since there was allegedly no "new" PAN, petitioner invokes its right to due process.

The Court finds petitioner's assertion unmeritorious.

Prior to the issuance of the subject deficiency final withholding tax assessments embodied in the FDDA, petitioner was given a chance to contest respondent's finding. Particularly, as borne out by the facts of this case, petitioner received on December 16, 2008, a Post-Reporting Notice from Revenue District Officer Leida G. Buscaino, wherein the latter invited petitioner for an informal conference. Attached to the Notice is a computation of the amount still due and collectible from petitioner.[24] Said Notice practically served as the PAN required to be furnished to taxpayers under Revenue Regulations No. 12-99[25].

The informal conference was held on January 8, 2009 between Ms. Gador and petitioner's Finance Manager, Ms. Lourdes R. De Luna. Subsequently, on January 15, 2009, the BIR received a letter dated January 15, 2009 from Ms. De Luna, formally presenting petitioner's side to contest the above computation.[26] Said letter is reproduced as follows:

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[24] Exhibit "G", Docket, pp. 152 to 153. Exhibit "7", BIR Records, pp. 355 to 356.
[25] SUBJECT: 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
[26] Exhibit "1", BIR Records, pp. 357 to 358.

"15 January 2009

MS. LEIDA G. BUSCAINO
Revenue District Officer
BUREAU OF INTERNAL REVENUE
Revenue District Office No. 44
Taguig City

ATTN: **MS. MELBA N. GADOR**
Group Supervisor

SUBJECT: DEFICIENCY TAX ASSESSMENT AS OF 09 DECEMBER 2008.
Reference: Informal Conference held on 08 January 2009 between Ms. Gador and our Ms. De Luna as per Post Reporting Notice dated 09 December 2008 received on 16 December 2008, replied on 17 December 2008..

Dear Ms. Gador:

This is to formally present our side to contest the Computation of Deficiency Tax Assessment for CY 2002 to AEROTECH INDUSTRIES PHILIPPINES, INC. (AIPI) in the total amount of PhP1,588,101.04, as per above reference.

Based on the computation, AIPI's remittance of final withholding tax on payments to NRAETB and NRFC were under remittance but which we explained/argued/protest on the contrary because we applied the Phil-Italian Treaty Rate of 15%, instead of your computing at 25% and at 32%, respectively.

We, further, reiterate that we referred to the tax Code as amended and the Tax Treaty both of which we understand did not require a ruling for the BIR—ITAD as a pre-requisite in availing the Tax Treaty Relief at the time of our submission of our FS 2002

We also gathered that RMO# 01-2000 was a mere order to streamline/improve the processing of the tax treaty relief application in order to improve efficiency and service to the taxpayer and that it was a court decision dated 07 June 2005 (CTA EB No. 40) that confirmed the necessity/mandatory ruling from ITAD.

With the above explanation/justifications we therefore request that the assessment to AIPI for the tax deficiency be reversed and appropriate CY 2002 tax clearance be issued in our favor.

Very truly yours,
AEROTECH INDUSTRIES PHILIPPINES, INC.

(signed)
LOURDES R. DE LUNA
Finance Manager

Noted by:

(signed)
TERESA C. PARIAN
Chief Operating Officer"

Thus, what clearly appears on record is contrary to petitioner's claim that it was denied administrative due process. It is settled that there is no denial of due process where petitioner was afforded an opportunity to present his case.[27] What the fundamental law abhors is not the absence of previous notice but rather the absolute lack of opportunity to ventilate a party's side.[28]

Additionally, the Court takes special note that the FDDA expressly states:

> "This is our final decision. If you are not agreeable, you may appeal this final decision with the Court of Tax Appeals (CTA) or to the Office of the Commissioner of Internal Revenue within thirty (30) days from date of receipt hereof, otherwise this decision shall become final, executory and demandable.[29]"

Clearly from the foregoing, petitioner was given 2 options: either to appeal said final decision with the Court of Tax Appeals (CTA) or to the Office of the Commissioner of Internal Revenue within thirty (30) days from date of receipt thereof, otherwise, the decision shall become final, executory and demandable. Clearly, based on the foregoing options given to petitioner, its right to procedural due process was not violated considering that it was also given the opportunity to pursue an administrative remedy before the Commissioner of Internal Revenue. However, petitioner opted to come to this Court directly.

And having voluntarily chosen to come to this Court directly instead of seeking further administrative recourse before the respondent Commissioner, it cannot validly invoke that its right to due process was violated.

The issue on prescription may be raised for the first time on appeal. However, the subject assessment was issued outside the prescriptive period.

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[27] *Divine Word High School, et al. vs. National Labor Relations Commission, et al.*, G.R. No. 72207, August 6, 1986.
[28] *PNOC-Energy Development Corporation vs. National Labor Relations Commission, et al.*, G.R. No. 79182, September 11, 1991.
[29] FDDA, Docket, p. 146.

The Court notes that indeed, petitioner learned about the subject assessments for the first time when it received the FDDA (dated July 22, 2009) on July 29, 2009, stating that it is the final decision of respondent. Considering that petitioner opted to appeal said FDDA before this Court within the thirty (30) day period that it was given by respondent, this Court became the only forum for it to raise the issue of prescription. And such being the case, petitioner should not be prevented from invoking prescription in this appeal.

As regards the period of limitation upon assessment and collection, Section 203 of the NIRC of 1997 provides:

> "**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."

The foregoing provision obligates respondent to issue an assessment within a three-year period after the last day prescribed by law for the filing of the return, or from the date of actual filing of the return, whichever comes later.

As a corollary to said Section 203, Section 2.58(A)(2)(a) of Revenue Regulations (RR) No. 2-98[30], as amended by RR No. 6-01, requires that withholding taxes be deducted and remitted on a monthly basis, *viz*:

"**SECTION 2.58. *Returns and Payment of Taxes Withheld at Source*.**

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[30] SUBJECT: Implementing Republic Act No. 8424, "An Act Amending The National Internal Revenue Code, as Amended" Relative to the Withholding on Income Subject to the Expanded Withholding Tax and Final Withholding Tax, Withholding on Income Tax on Compensation, Withholding of Creditable Value-Added Tax and Other Percentage Taxes.

(A) *Monthly return and payment of taxes withheld at source —*

(1) WHERE TO FILE — Creditable and final withholding taxes deducted and withheld by the withholding agent shall be paid upon filing a return in duplicate with the authorized agent banks located within the Revenue District Office (RDO) having jurisdiction over the residence or principal place of business of the withholding agent. In places where there is no authorized agent banks, the return shall be filed directly with the Revenue District Officer, Collection Officer or the duly authorized Treasurer of the city or municipality where the withholding agent's residence or principal place of business is located, or where the withholding agent is a corporation, where the principal office is located except in cases where the Commissioner otherwise permits.

(2) WHEN TO FILE —

(a) For both large and non-large taxpayers, the withholding tax return, whether creditable or final (including final withholding taxes on interest from any currency bank deposit and yield or any other monetary benefit from deposit substitutes and from trust funds and similar arrangements) shall be filed and payments should be made, within ten (10) days after the end of each month, except for taxes withheld for the month of December of each year, which shall be filed on or before January 15 of the following year.

(b) With respect, however, to taxpayers, whether large or non-large, who availed of the electronic filing and payment system (EFPS), the deadline for electronically filing the applicable withholding tax returns and paying the taxes due thereon via the EFPS shall be five (5) days later than the deadlines set above."

In the present case, the reckoning of the three-year prescriptive period is the actual date petitioner filed the corresponding monthly remittance return, or the last day required by law for the filing of the monthly remittance return as above-stated, whichever comes later.

The withholding tax assessments herein involve the following returns, to wit: (1) the Monthly Remittance Return for January 2002, which was filed on February 11, 2002, reflecting the withholding tax on the income payment to AERMACCHI

S.P.A.;[31] and (2) the Monthly Remittance Return for December 2002, which was filed on January 15, 2003, reflecting the withholding tax the income payment to petitioner's Italian Directors.[32]

Thus, in the former Return, the last day prescribed by law to file the same is February 10, 2002; whereas in the latter Return, the last day is January 15, 2003. Correspondingly, the period for the assessment of the withholding tax on the income payment to AERMACCHI S.P.A. started on February 11, 2002 and ended on February 11, 2005; while the period for the assessment of the withholding tax on the income payment to petitioner's Italian Directors commenced from January 15, 2003 and expired on January 15, 2006.

Clearly, considering that it was only on July 29, 2009 that petitioner received the questioned FDDA and its Details of Discrepancy[33], respondent's right to assess petitioner for any form of deficiency tax had long expired.

We find no merit in respondent's contention that pursuant Section 223 of the NIRC of 1997, the period to assess was suspended when the taxpayer's request for reconsideration was granted by the Commissioner. [34] Section 223 reads:

> "SEC. 223. *Suspension of Running of Statute of Limitations.—* **The running of the Statute of Limitations provided in Sections 203 and 222 on the making of assessment** and beginning of distraint or levy or a proceeding in court for collection, in respect of any deficiency, **shall be suspended for the period** during which the Commissioner is prohibited from making the assessment or beginning distraint or levy or a proceeding in court and for sixty (60) days thereafter; **when the taxpayer requests for a reinvestigation which is granted by the Commissioner**; when the taxpayer cannot be located in the address given by him in the return filed upon which a tax is being assessed or collected: *Provided*, That, if the taxpayer informs the Commissioner of any change in address, the running of the Statute of Limitations will not

[31] Exhibit "4", BIR Records, p. 391.
[32] Exhibit "10" (The entire BIR Record), p. 74.
[33] JSFI, Par. 7, Docket, p. 104. Exhibit "E", Docket, pp. 146 to 148. Exhibit "9", BIR Records, pp. 384 to 386.
[34] See Par. 14, Answer, p. 70.

> be suspended; when the warrant of distraint or levy is duly served upon the taxpayer, his authorized representative, or a member of his household with sufficient discretion, and no property could be located; and when the taxpayer is out of the Philippines. *(Emphases supplied)*

As borne by the records of this case, the circumstances mentioned in Section 223 are not herein present.

This is what transpired in the instant case. Pursuant to the Tax Verification Notice dated March 13, 2006[35], respondent informed petitioner that its request for reinvestigation was granted (or at the very least, have been given due course) only on May 9, 2006—which date is already way beyond the legal period to issue a valid assessment. Plainly, there is no period to suspend when the same has already expired. Therefore, the subject final withholding tax assessments must perforce be cancelled and set aside on the ground of prescription.

Consequently, it becomes unnecessary to resolve the remaining issues assailing the validity of the subject assessments.

WHEREFORE, premises considered, the instant Petition for Review is hereby **GRANTED**.

Accordingly, the assessment for final withholding tax in the total amount of ₱ 1,555,659.54, inclusive of interests, for taxable year 2002, is hereby **CANCELLED** and **SET ASIDE** on the ground of prescription.

SO ORDERED.

ERLINDA P. UY
Associate Justice

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[35] Exhibit "10) (The entire BIR Record), p. 335. See also Petition for Review, 8th Par., Statement of Facts, Docket, pp. 4 to 5; Answer, Par. 3(a), Docket, p. 65.

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CERTIFICATION

I hereby certify that the decision was reached after due consultation with the members of the division of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Justice