REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

THE COMMISSIONER OF INTERNAL REVENUE, ***Petitioner,***	**C.T.A. E.B. NO. 42 (C.T.A. CASE NO. 6222)**
	Present:
-versus-	ACOSTA, Presiding Justice, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, and PALANCA-ENRIQUEZ, JJ.
OBAYASHI PHILIPPINES CORPORATION, ***Respondent.***	**Promulgated:** JUN 10 2005

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DECISION

PALANCA-ENRIQUEZ, J.:

THE CASE

This is a Petition For Review filed by the Commissioner of Internal Revenue (hereafter "petitioner") under *Section 11 of Republic Act No. 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals)*, in relation to *Rule 43 of the 1997 Rules of Civil Procedure*, which seeks the reversal of the Decision dated July 22, 2004 cancelling and setting aside the

Assessment Notices numbered 34-1-000032-95, all dated December 9, 1998, issued against Obayashi Philippines Corporation (hereafter "respondent") for deficiency income, expanded withholding and value-added taxes covering the year 1995, and the Resolution dated October 11, 2004 issued by the Division of this Court in C.T.A. Case No. 6222. The respective dispositive portions of the Decision and Resolution read as follows:

> "**WHEREFORE**, the Assessment Notices numbered 34-1-000032-95, all dated December 9, 1998, issued against petitioner for deficiency income, expanded withholding and value-added taxes covering the year 1995 are hereby **CANCELLED** and **SET ASIDE**.
>
> **SO ORDERED.**"
>
> "**IN VIEW OF THE FOREGOING**, the instant motion is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

<u>THE FACTS</u>

On January 15, 2001, respondent filed a Petition For Review which seeks to cancel and withdraw the deficiency income, expanded withholding tax (EWT) and value-added tax (VAT) assessments issued

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by petitioner against respondent for the taxable year ended 1995, in the total amount of P10,643,221.64.

In his answer, filed on February 21, 2001, herein petitioner alleged the following special and affirmative defenses:

> "4. The assessment is valid and correct and the taxpayer has the burden of proof to impugn its validity (Behn Meyer & Co., vs. Collector of Internal Revenue; 27 Phil. 647). Thus, similarly held, tax assessments by tax examiner are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise (Commissioner of Internal Revenue vs. Construction Resources of Asia, Inc. 145 SCRA 671); and assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed (Gutierrez vs. Villegas, 8 SCRA 527);
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> 5. The burden of proof is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the Commissioner of Internal Revenue is wrong but that the taxpayer is right (Tan Guan vs. Court of Appeals et al., 19 SCRA 902); otherwise, the presumption in favor of the correctness of the assessments stand (Inter-provincial Bus Co., vs. Collector of Internal Revenue, 98 Phil. 290; Collector of Internal Revenue vs. Bohol Land Transportation Co., 107 Phil. 967);
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> 6. In accordance with Section 237 of the Tax Code, as amended, a formal notice of change of address is required in order that the running of the statute of limitations to assess will not be suspended and for prescription to get in. An application for the cancellation of registration duly

approved by the Revenue District Officer concerned is not sufficient compliance with Section 237 of the Tax Code.

7. The assessments have already become final, executory and unappealable (Section 228, Tax Code of 1997), hence, petitioner has no cause of action against respondent."

After trial on the merits, the Division of this Court rendered the assailed decision on July 22, 2004.

Not satisfied, petitioner moved for a reconsideration of the same, which the Division denied in a Resolution dated October 11, 2004.

THE ISSUES

Hence, this Petition For Review raising the following error committed by the Division of this Court:

THE FORMER COURT OF TAX APPEALS GRAVELY ERRED IN DECLARING THE SUBJECT ASSESSMENT NOTICES NUMBERED 34-1-000032-95, ALL DATED DECEMBER 9, 1998 ISSUED AGAINST RESPONDENT CANCELLED AND SET ASIDE.

On November 18, 2004, herein respondent filed its "Opposition To Petitioner's Petition For Review".

On November 19, 2004, We required respondent to file its Comment, within ten (10) days from receipt thereof.

On December 6, 2004, respondent filed its "Comment (To Petitioner's Petition For Review)".

On December 21, 2004, We gave due course to the petition and ordered both parties to file their respective memoranda within thirty (30) days from notice thereof.

Both parties having filed their respective memoranda, the instant appeal was deemed submitted for decision.

<u>THE COURT EN BANC'S RULING</u>

Petitioner claims that the assessment notices are valid, as, these were issued within the three-year period from the filing of respondent's return, pursuant to *Section 203 of the Tax Code*. As such, the right to assess respondent deficiency tax has not prescribed. It maintains that the fact of receipt of the assessment notices is not material in the determination of whether or not the right to assess and collect tax has already prescribed, but only whether the assessment was made, sent and released to the taxpayer. In fact, the afore-cited provision does not require the receipt of the assessment notices by the respondent as long as the assessment was issued, sent or released within the three-year period.

Petitioner further points out that the failure of the respondent to receive the assessment notices does not deprive the latter of its right to protest, since, the respondent can always protest any proceedings for the collection of the tax liability against it. And in fact, if the prescriptive period to collect has elapsed without the respondent receiving said assessments, there is no need to protest the same in the first place.

Alternatively, petitioner claims, for the first time in this appeal, that its right to assess respondent for deficiency tax is in fact, ten (10) years, instead of three (3) years, since, herein respondent allegedly filed a false return. *Section 222* of the Tax Code provides for such rationalization, pertinent part thereof reads:

> "(a) In the case of false or fraudulent return with intent to evade tax or of failure to file return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission… XXX"

On the other hand, the respondent maintains that since it is apparent that the said assessment notices were never sent to its new address, the date of issuance of the assessment notices in this case would be reckoned from the date when it was actually informed of the existence

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of the deficiency assessments, which was on March 20, 2000. From the filing of respondent's return in 1996 to the time respondent was informed of the deficiency in 2000, it is unmistakably beyond the three-year period mandate of Section 203 of the Tax Code, for the petitioner to assess respondent of deficiency tax, hence, the disputed deficiency tax assessments for taxable year 1995 are invalid.

Respondent likewise asserts that the ten-year period will never apply, as this was never raised as an issue before by the petitioner in its pre-assessment, assessment and even at the very least, in its Answer, Pre-trial Brief, Joint Stipulation of Facts and Issues that it filed before this Court.

Petitioner's contentions are devoid of merit.

A perusal of the subject three (3) formal assessment notices dated December 9, 1998 shows that said notices were sent to petitioner's old address at 1881 Pres. Quirino Avenue Extension, Pandacan, Manila (Exhibits "A", "A-1" and "A-2").

Records would show, however, that respondent filed an Application For Cancellation of Registration for the following reason:

> "Place of business transferred from RDO Pandacan to RDO Makati." (*Exhibit "E"*);

and the same was approved on February 14, 1996 by Revenue District Officer Lucien E. Sayuno(*Exhibit "E"*).

On April 16, 1996, respondent filed with the BIR its Application For Registration, stating therein its new business address at 7/F Corinthian Plaza Condominium, 121 Paseo de Roxas, Legaspi Village, Makati City (*Exhibit "F"*). And on even date, respondent was issued a Certificate of Registration confirming therein that as of April 16, 1996 respondent's new business address is at 7/F Corinthian Plaza Condominium, 121 Paseo de Roxas, Makati City (*Exhibit "G"*).

On December 9, 1998, notwithstanding the cancellation of respondent's registration with BIR RDO No. 34 and the issuance of latter's new Certificate of Registration from BIR RDO No. 47, petitioner through the Chief of the Assessment Division of Revenue Region No. 6 still issued and sent the subject Formal Assessment Notices for deficiency income, EWT and VAT to respondent at its old address at 1881 Pres. Quirino Avenue Extension, Pandacan, Manila.

Respondent maintains that it never received said assessment notices and only learned of the same on March 20, 2000 when a certain Ms. Malou Castro from the Division of BIR Region No. 6, Manila, called up the office through its Finance Manager, Ms. Frances Grace Mercado, making inquiries regarding the formal assessment notices sent earlier.

We agree with respondent's argument. As correctly observed by the Division of this Court in its appealed decision, while the contention of the petitioner is correct that a mailed letter is deemed received by the addressee in the ordinary course of mail, still this is merely a disputable presumption subject to controversion, and a direct denial of the receipt thereof, shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee (***Republic*** *vs. Court of Appeals, 149 SCRA 355*).

Petitioner failed to present either the registry return receipt card or the postmaster's certification to prove that respondent, in fact, received said Formal Assessment Notices. And since petitioner did not adduce evidence to the contrary, it cannot be assumed that the respondent received the same.

Considering the foregoing, this Court finds that all the assessment notices sent on December 9, 1998 at the old address of respondent are null and void. As such, petitioner has lost its right to assess respondent for deficiency income, expanded withholding and value added taxes, since, at this point, it is now beyond the three-year prescriptive period.

As aptly ruled by the Division of this Court:

> "This case involves deficiency assessments for the taxable year 1995. Petitioner filed its Corporate Annual Income Tax Return on April 15, 1996 for the taxable year ended 1995 (*Exhibit B*) so respondent had only until April 15, 1999 within which to assess petitioner for deficiency income taxes for the year 1995. The assessment notices (*Exhibits A, A-1 and A-2*) all dated December 9, 1998 issued by respondent, as revealed by the records in this case, came to the knowledge of petitioner only on March 20, 2000 as it never received the said notices allegedly mailed by the respondent to petitioner's former address. Clearly then, the right of the respondent to issue a deficiency income tax assessment against the petitioner for the year 1995 has already prescribed.
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> As regards the deficiency expanded withholding taxes, the reckoning date of the three-year period to assess is ten days from the filing of petitioner's monthly remittance return. Based on the evidence submitted by petitioner (*Exhibits GG to RR*), for respondent to validly issue deficiency withholding tax assessment for all the months of 1995, he had to do so by February 9, 1998. The assessment notice therefor was dated December 9, 1998, so even assuming that the subject assessment notice was received by

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petitioner as soon as it was issued, nevertheless, the right of the respondent to issue the same for the months of January to November of 1995, would have already prescribed.

Likewise, the right of the respondent to issue the deficiency value-added tax assessment for the year 1995 has already prescribed.

The counting of the three-year period to assess any deficiency VAT begins on the date of filing of each of the quarterly VAT returns which under the applicable law should be made not later than the 25th day of the month following the close of the VAT taxable quarter. In the present case, the three-year periods for the respondent to validly issue the deficiency VAT assessments for the four quarters of 1995 are as follows:

Exhibit Marking	Period Covered	Date of Filing	End of 13-year Period
CC	1st Quarter	April 20, 1995	April 19, 1998
DD	2nd Quarter	July 1995	July 1998
EE	3rd Quarter	October 20, 1995	October 19, 1998
FF	4TH Quarter	January 26, 1996	January 25, 1999

In order for the respondent to issue a valid VAT deficiency assessment against petitioner for all the four quarters of 1995, he should have issued the same before April 19, 1998. Thus, assuming *arguendo* that the deficiency VAT assessment was received by the petitioner as soon as it was issued, the assessment for the first three quarters of 1995 would still be void for being issued out of time.

However, as already discussed, respondent failed to prove that petitioner received the assessment notices for

> deficiency income, expanded withholding and value-added taxes covering the year 1995, and that petitioner only learned of such assessments on March 20, 2000. Undoubtedly, all the assessment notices including the VAT assessment allegedly issued on December 9, 1998, are void for being issued beyond the three-year period allowed by law."

Petitioner raised another issue before this Court, averring anew, that its right to assess respondent of deficiency tax falls under *Section 222* of the Tax Code, which provides for a prescriptive period of ten (10) years, instead of only three (3) year period as mandated under *Section 203* of the same code. However, this issue was never raised by petitioner in his Answer and Pre-Trial Brief or other pleadings filed before the Division of this Court. It is settled that an issue which was not raised during the trial in the court below could not be raised for the first time on appeal as to do so would be offensive to the basic rules of fair play, justice, and due process (*Victorias Milling Co., Inc. vs. Court of Appeals, 333 SCRA 663; Jimenez vs. Patricia, Inc., 340 SCRA 525*). This is a basic rule in this jurisdiction.

Thus, the Division of this Court correctly ruled:

> "The allegation that petitioner filed false returns has never been raised by the respondent in his Answer, memorandum or any other pleadings. Indeed, if respondent

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really believes petitioner committed such falsity, that he should have done so long ago and not only after the case has been decided in favor of the petitioner.

False or fraudulent return as an exception to the period of limitation and to collect taxes provided in Section 222 of the National Internal Revenue Code of 1997 [formerly Section 223], must be actual not constructive. It must be intentional, consisting of deception willfully and deliberately done or resorted to. Fraud must be proven by clear and convincing evidence amounting to more than mere preponderance. It cannot be justified by mere speculation. This is because fraud is never lightly to be presumed (*Yutivo Sons Hardware Company v. Court of Tax Appeals and Collector of Internal Revenue, 1 SCRA 160*). In order to render a return made by a taxpayer a 'false return' within the meaning of Section 222 of the Tax Code, there must appear a design to mislead or deceive on the part of the taxpayer, or at least culpable negligence. A mistake, not culpable in respect of its value would not constitute a false return (*Commissioner of Internal Revenue vs. Ayala Hotels, Inc., CA-G.R. SP No. 70025, April 19, 2004*).

Again, there was never an imputation of filing of false returns on the part of the petitioner made by the respondent in this case. Nor did he present evidence to prove such falsity. Assuming there was, the Supreme Court held that 'mere falsity of a return does not merit the application of the ten-year prescriptive period. The element of fraud as in the case of taxpayer's intent to evade the payment of the correct amount of tax, must be clearly established'. (*Commissioner of Internal Revenue, BF Goodrich Phils., Inc., 303 SCRA 546*). This, respondent failed to do."

For all the foregoing, We see no reason to reverse the assailed Decision dated July 22, 2004 and Resolution dated October 11, 2004 of the Division of this Court.

WHEREFORE, premises considered, the instant petition is hereby **DENIED DUE COURSE** and, accordingly, **DISMISSED** for lack of merit.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

(on leave)
ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

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

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