REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC
****

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB No. 1612** (CTA Case No. 8478)
- versus -	
HERBALIFE INTERNATIONAL PHILIPPINES, INC. Respondent.	

x---x

HERBALIFE INTERNATIONAL PHILIPPINES, INC., Petitioner,	**CTA EB No. 1631** (CTA Case No. 8478)
	Present:
- versus -	**DEL ROSARIO,** P.J., **CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** and **MANAHAN,** JJ.
COMMISSIONER OF INTERNAL REVENUE, Respondent.	***Promulgated:*** NOV 15 2018 3:50 p.m.

x - x

DECISION

UY, J.:

Before the Court *En Banc* are two (2) consolidated *Petitions for Review* namely: CTA EB No. 1612,[1] entitled "*Commissioner of Internal Revenue, Petitioner, versus Herbalife International Philippines, Inc., Respondent*" filed within the extension period on April 17, 2017; and

[1] EB Docket (CTA EB No. 1612), pp. 6 to 19.

CTA EB No. 1631,[2] entitled *"Herbalife International Philippines, Inc., versus Commissioner of Internal Revenue, Respondent"* filed within the extension period on May 2, 2017. Both *Petitions* assail the Decision dated November 3, 2016[3] and Resolution dated March 14, 2017[4], rendered by the Third Division of this Court (Court in Division) in CTA Case No. 8478 entitled *"Herbalife International Philippines, Inc., Petitioner, vs. Commissioner of Internal Revenue, Respondent"*, the dispositive portions of which respectively reads:

Decision dated November 3, 2016:

> "**WHEREFORE,** premises considered, the instant Petition for Review is **PARTIALLY GRANTED.** The assessment issued by respondent for CY 2007 covering deficiency IT, VAT, EWT, WTC, FWT, FWT-VAT, DST and penalties is hereby **UPHELD WITH MODIFICATIONS.**
>
> Accordingly, petitioner is hereby **ORDERED TO PAY** the total amount of **Eleven Million Two Hundred Seventy Five Thousand Two Hundred Eighty-Eight and 19/100 Pesos (Php11,275,288.19)**, inclusive of the 25% surcharge imposed under *Section 248(A)(3) of the 1997 NIRC*, as amended, broken down as follows:

TAX TYPE	BASIC TAX	25% SURCHARGE	TOTAL
Income Tax	Php 3,957,558.71	Php 989,389.68	Php 4,946,948.39
Value Added Tax	84,338.10	21,084.53	105,422.63
Expanded Withholding Tax	47,605.95	11,901.49	59,507.44
Withholding Tax on Compensation	60,789.04	15,197.26	75,986.30
Final Withholding Tax	1,570,668.71	392,667.18	1,963,335.89
Final Withholding VAT	3,286,658.04	821,664.51	4,108,322.55
Documentary Stamp Tax	10,212.00	2,553.00	12,765.00
Total	**Php 9,017,830.56**	**Php 2,254,457.64**	**Php 11,272,288.19**
Penalty			3,000.00
GRAND TOTAL			**Php 11,275,288.19**

[2] EB Docket (CTA EB No. 1631), pp. 9 to 34.

[3] Penned by Associate Justice Lovell R. Bautista concurred by Associate Justice Esperanza R. Fabon-Victorino. Associate Justice Ma. Belen M. Ringpis-Liban was on leave when the Decision was promulgated. EB Docket (CTA EB No. 1612), pp. 22 to 76; and EB Docket (CTA EB No. 1631), pp. 311 to 365.

[4] Penned by Associate Justice Lovell R. Bautista concurred by Associate Justice Esperanza R. Fabon-Victorino and Associate Justice Ma. Belen M. Ringpis-Liban. EB Docket (CTA EB No. 1612), pp. 78 to 83; and EB Docket (CTA EB No. 1631, pp. 395 to 400.

In addition, petitioner is also **ORDERED TO PAY:**

1. Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency IT, VAT, EWT, WTC, FWT, FWT-VAT, DST, computed from dates indicated below until full payment thereof pursuant to *Section 249(B) of the 1997 NIRC*, as amended:

TAX TYPE	BASIC TAX	DEFICIENCY INTEREST COMPUTED FROM
Income Tax	Php 3,957,558.71	April 16, 2008
Value Added Tax	84,338.10	January 26, 2008
Expanded Withholding Tax	47,605.95	January 16, 2008
Withholding Tax on Compensation	60,789.04	January 16, 2008
Final Withholding Tax	1,570,668.71	January 16, 2008
Final Withholding VAT	3,286,658.04	January 11, 2008
Documentary Stamp Tax	10,212.00	January 06, 2008

2. Delinquency interest at the rate of twenty percent (20%) *per* annum on the amount of **Php11,272,288.19**, representing the basic deficiency IT, VAT, EWT, WTC, FWT, FWT-VAT, DST, and the corresponding twenty five percent (25%) surcharge; and the twenty (20%) deficiency interest which have accrued as aforestated in Item (1), computed from August 27, 2011 until full payment thereof pursuant to *Section 249(C) of the 1997 NIRC*, as amended.

SO ORDERED."

Resolution dated March 14, 2017:

"**WHEREFORE,** premises considered, Petitioner's Motion for Partial Reconsideration (To: Decision dated November 3, 2016) and Respondent's Motion for Partial Reconsideration are hereby **DENIED** for lack of merit. Accordingly, the Assailed Decision dated November 3, 2016 is hereby **AFFIRMED** and **UPHELD**.

SO ORDERED."

THE FACTS

The Commissioner of Internal Revenue (CIR) is with office address at the Bureau of Internal Revenue (BIR) National Office, Agham Road, Diliman, Quezon City.

Herbalife International Philippines, Inc. (or Herbalife), a wholly-owned subsidiary of Herbalife International, Inc., United States of America, is engaged in the business of marketing and distributing nutrition, weight management, and personal care products, mainly through direct selling via its authorized distributors. Its business address is at G/F Goodland Bldg., 377 Gil Puyat Extension, Makati City.

Herbalife filed on February 27, 2008, its *Annual Information of Return of Creditable Income Taxes Withheld (Expanded)/Income Payments Exempt from Withholding Tax.* Thereafter on April 14, 2008, Herbalife filed its *Annual Income Tax Return* for calendar year (CY) ended 2007.

On June 4, 2008, the CIR issued the *Letter of Authority* (LOA) No. 2001 00069261, which was received by Herbalife on June 5, 2008, covering all internal revenue taxes from January 1, 2007.

Subsequently, Herbalife received on January 4, 2010, the *Revalidation Notice* dated December 22, 2009, revalidating the LOA to replace the previously-assigned Revenue Officer. On September 28, 2010, Herbalife received a *Notice of Informal Conference* dated September 27, 2010.

On December 23, 2010, the CIR issued a *Preliminary Assessment Notice* (PAN), which was received by Herbalife on December 28, 2010. After asking for an extension, Herbalife filed its reply to the PAN on January 31, 2011 and June 10, 2011, asking for a reinvestigation of the assessment. On September 1, 2011, Herbalife received the *Final Assessment Notice* (FAN) dated August 26, 2011.

The CIR then received, on September 29, 2011, Herbalife's *Protest Letter* to the FAN dated September 28, 2011, refuting the findings of the assessment. On March 8, 2012, Herbalife filed its *Documentary Stamp Tax Declaration/Return*, covering a lease transaction dated February 8, 2007 with Goodland Company, Inc. as lessor.

Due to the inaction of the CIR on the protest of Herbalife, the latter filed a *Petition for Review with Motion for Suspension of Collection of Tax* on April 26, 2012, docketed as CTA Case No. 8478. The case was initially raffled to the First Division of this Court (or First Division).

On May 9, 2012, the First Division issued *Summons* to the CIR, ordering him to file an *Answer* to Herbalife's *Petition for Review* within fifteen (15) days from receipt thereof. On the same date, the First Division issued a *Notice of Hearing* for the *Motion for Suspension of Collection of Tax*, setting the hearing on May 15, 2012.

During the scheduled hearing, only counsel for Herbalife appeared. In the Resolution dated May 29, 2012, the First Division denied the *Motion for Suspension of Collection of Tax* for failure of Herbalife to substantiate its motion with legal or factual bases.

The CIR filed his *Answer* within the extension period on June 13, 2012. The CIR alleged that Herbalife failed to submit the required documents in support of its protest against the FAN and *Letter of Demand* dated August 26, 2011, within the sixty (60) day period from filing of its protest. And because of this, the assessed deficiency income tax (IT), value-added tax (VAT), expanded withholding tax (EWT), withholding tax on compensation (WTC), final withholding tax (FWT) – VAT, documentary stamp tax (DST) and compromise penalty for CY 2007, have already become final, executory and demandable, thus depriving the First Division of jurisdiction to act on Herbalife's *Petition for Review*.

Assuming that the First Division had jurisdiction to act on the *Petition for Review* of Herbalife, the CIR claims that Herbalife failed to substantiate or controvert by substantial evidence the BIR factual findings, as shown under the *Details of Discrepancies*, attached to the FAN and *Letter of Demand* dated August 26, 2011, as well as the BIR Letter dated August 26, 2011, bearing the assessed compromise penalty for CY 2007.

Lastly, the CIR asserted that he had fully complied with the due process requirement mandated under *Section 228 of the 1997 National Internal Revenue Code* (1997 NIRC), as amended, as implemented by Revenue Regulations No. (RR) 12-99, when the disputed PAN dated December 23, 2010 and FAN and *Letter of Demand* dated August 26, 2011 were issued. Allegedly, the records clearly show that Herbalife was duly afforded an opportunity to controvert the factual findings of the CIR on its deficiency taxes for CY 2007 through the issuance of a *Notice for Informal Conference* and PAN dated August 26, 2011; that it was also duly appraised of the factual and legal bases of the deficiencies; and that all presumptions are in favor of the correctness of tax assessments issued by the CIR to Herbalife for CY 2007.

On June 25, 2012, Herbalife filed a *Reply* alleging, among others, that the CIR is grossly mistaken about its alleged non-submission of documentary evidence in support of its protest within 60 days from the date of filing of its letter of protest, because in fact, it made reservation to provide additional documentary evidence. And such reservation only meant that it had already submitted to the BIR. Moreover, Herbalife claims that it timely filed its Petition for Review with the Court in Division on April 26, 2012 which thereby precluded the subject BIR assessment from attaining finality.

After the Pre-trial Conference held on August 3, 2012, the parties filed through their *Joint Stipulation of Facts and Issues* (JSFI) on September 5, 2012. The First Division approved the JSFI in the Resolution dated September 11, 2012. Thereafter, a Pre-Trial Order was issued on October 2, 2012.

On October 15, 2012, Herbalife filed a *Motion to Amend Pre-Trial Order* which was granted during the October 18, 2012 hearing without any objection from the CIR's counsel. The amendment pertained to the replacement of its witness; its reservation of the right to avail modes of discovery; and the changes in the trial dates. This was later confirmed in the Resolution dated November 13, 2012 issued by the First Division.

Subsequently, in the Order dated April 4, 2013[5], CTA Case No. 8478 was transferred to the Court in Division, in view of CTA Administrative Circular No. 01-2013[6].

During trial, Herbalife presented the following witnesses: (1) Ms. Margie B. Alabastro, Finance Manager and authorized representative of Herbalife; (2) Mary Ann Capuchino, the court-commissioned Independent Certified Public Accountant; and (3) Lina E. Jacob,

---

[5] Division Docket (CTA Case No. 8478) – Vol. 2, p. 707.
[6] Reorganization of the Three (3) Divisions of the Court of Tax Appeals.

Herbalife's General Manager.

On May 30, 2013, Herbalife filed a *Motion for Leave to Take Deposition* of its witnesses who are based in Herbalife London, namely, Mani Manivannan and Victoria Palmer. The said *Motion* was granted by the Court in Division in the Resolution dated July 1, 2013.

During the hearing held on July 11, 2013, counsel for Herbalife manifested that they have no more witnesses to present other than the witnesses subject to deposition. The Court in Division granted the CIR fifteen (15) days or until July 26, 2013, to file a motion for reconsideration of its Reolution dated July 1, 2013, while counsel for Herbalife was granted ten (10) days from receipt thereof to file its comment. This was confirmed in the Resolution dated July 17, 2013 issued by the Court in Division.

On July 18, 2013, the CIR filed his *Motion for Reconsideration*, with Herbalife's filing a *Comment/Opposition with Urgent* Ex Parte *Motion to Resolve (To Respondent's Motion for Reconsideration Dated 19 July 2013)* on July 31, 2013.

Herbalife filed a *Compliance (To Order Made in Open Court on 11 July 2013)*, submitting a copy of questions addressed to Mr. Manivannan and Ms. Palmer, which was noted by the Court in Division. In response thereto, the CIR filed a *Comment/Opposition (With Motion to Strike-Off the Record the alleged Compliance filed by* [Herbalife]*)* on August 1, 2013.

On August 13, 2013, Herbalife received, through Margie B. Alabastro, the *Final Decision on Disputed Asessment* (FDDA), denying the protest to the FAN due to its failure to present books and other records, supposedly in violation of Section 3.1.5 of RR No. 12-99.

Thereafter, on August 16, 2013, Herbalife filed an *Omnibus Motion to Resolve and Urgent Ex-Parte Motion for the Issuance of an Amended 1 July 2013 Resolution Granting Leave to Take Deposition*, which was granted by the Court in Division in the Resolution dated August 23, 2013.

At the hearing held on August 29, 2013, counsel for the CIR manifested that he would file the appropriate pleading relative to the

Resolution of the Court dated August 23, 2013, insofar as the filing of the CIR's cross written interrogatories. As regards Herbalife's *Omnibus Motion*, the same was granted insofar as the prayer herein to amend the July 1, 2013 Resolution to specifically indicate that Herbalife was granted leave to take the testimony of Mr. Manivannan and Ms. Palmer by oral deposition on September 3 and 4, 2013, at the Philippine Embassy in London, United Kingdom. These were confirmed in the Court in Division's Resolution dated September 3, 2013.

On September 10, 2013, Herbalife's General Manager Ms. Jacob filed a letter to the BIR Revenue Region No. 8 Makati, informing the latter that it already commenced judicial action. This was reiterated by Herbalife's counsel, through the letter dated September 12, 2013, informing the CIR that Herbalife had already instituted an appeal before the Court.

Subsequently, the Court in Division issued the Resolution dated September 13, 2013, amending the July 1, 2013 Resolution to specifically indicate that Herbalife was granted leave to take the testimony of its witnesses, with the required additional details.

During the hearing held on November 25, 2013, Herbalife's counsel manifested that they were able to depose their last two (2) witnesses on September 3, 2013, but have not yet received the consularized copy of the transcript from the Department of Foreign Affairs (DFA). On March 10, 2014, the DFA – Office of Legal Affairs filed with the Court in Division its Endorsement, with attached transcripts of the depositions of Mr. Manivannan and Ms. Palmer taken on September 3 and 4, 2013, together with the requisite Certifications executed by Consul Voltaire O.C. Mauricio of the Embassy of the Philippines in London.

In its Resolution dated April 16, 2014, the Court in Division resolved to admit the depositions of Mr. Manivannan and Ms. Palmer.

Thereafter Herbalife filed its *Formal Offer of Evidence* (FOE) on June 6, 2014. The Court in Division admitted all the other evidence of Herbalife's exhibits, except Exhibits "C", "E" and "G" for failure to present the originals for comparison with the machine copies, in the Resolution dated July 14, 2014.[7]

---

[7] Division Docket (CTA Case No. 8478) – Vol. 2, pp. 1008 to 1009.

ﬂ

On August 1, 2014, Herbalife filed a *Motion for Reconsideration (To: Resolution dated 14 July 2014)* on the ground that it had allegedly complied with the requirements for the presentation of secondary evidence. The Court in Division denied the said *Motion for Reconsideration*, in the Resolution dated October 22, 2014.

On August 11, 2014, respondent filed an *Urgent Omnibus Motion [a. To Reset Trial Hearing (Motion to Reset)]; b. To Conduct a Hearing before a Commissioner [[Motion to Conduct Commissioner's Hearing)]; and c. To issue a Subpoena Ad Testificandum to* [the CIR]*'s Witness [(Motion to Issue Subpoena)]*. The *Motion to Reset* was considered moot, while the *Motion to Conduct Commissioner's Hearing* was granted by the Court in the Resolution dated August 18, 2014. The *Motion to Issue Subpoena* was granted in the Resolution dated December 5, 2014, and thereafter, *a Subpoena Ad Testificandum* was issued for Revenue Officer (RO) Fatima B. Pre.

The presentation of evidence for the CIR then ensued. The CIR presented the following witnesses: 1) RO Fatima B. Pre, the RO who handled the continuance of the investigation and immediate report of the internal revenue tax case of Herbalife; and 2) RO Emilio O. Romero, the RO who conducted a re-investigation relative to the *Letter Protest* to the FAN.

On August 5, 2015, the CIR filed his FOE and the Court in Division admitted all his Exhibits in the Resolution dated September 4, 2015.[8]

On October 7, 2015, Herbalife filed a *Motion for Extension to File its Memorandum*, which was granted by the Court in Division on October 19, 2015. On November 10, 2015, Herbalife filed a *Memorandum Ad Cautelam*, while the CIR failed to file his *Memorandum* per Records Verification Reports dated October 20, 2015, November 23, 2015 and December 2, 2015 issued by the Court's Judicial Records Division. Thereafter, the Court in Division resolved to submit the case for decision on December 4, 2015.

On November 3, 2016, the Court in Division rendered the

---

[8] Division Docket (CTA Case No. 8478) – Vol. 3, pp. 1234 to 1235.

assailed Decision.[9] Consequently, on November 23, 2016, Herbalife filed a *Motion for Partial Reconsideration (To: Decision dated 03 November 2016)*,[10] while on December 6, 2016, the CIR filed his *Motion for Partial Reconsideration.*[11] On March 14, 2017, the Court in Division promulgated the assailed Resolution.[12]

Subsequently, on April 17, 2017, the CIR filed a *Petition for Review*, which was docketed as CTA EB Case No. 1612,[13] while on May 2, 2017, Herbalife filed its its *Petition for Review with Ex Parte Motion for Consolidation*, which was docketed as CTA EB No. 1631.[14] On May 5, 2017, the Court *En Banc* ordered the consolidation of CTA EB No. 1612 and CTA EB No. 1631.[15]

Thereafter, in the Resolution dated May 17, 2017,[16] the parties were ordered by the Court *En Banc* to file a comment on the *Petiton for Review* of the other. Thus, Herbalife filed its *Comment (To: Petition for Review dated 06 April 2017)* on June 23, 2017.[17] The CIR, however, failed to file his *Comment.*[18]

In the Resolution dated July 24, 2017,[19] the Court *En Banc* ordered the parties to submit their memorandum within thirty (30) days from receipt of the said Resolution. Herbalife filed its *Consolidated Memorandum* on September 8, 2017,[20] while the CIR failed to file his memorandum.[21] On November 23, 2017, the instant consolidated cases were deemed submitted for decision on November 23, 2017.[22]

---

[9] EB Docket (CTA EB No. 1612), pp. 22 to 76; EB Docket (CTA EB No. 1631), pp. 311 to 365; and Division Docket (CTA Case No. 8478) – Vol. 3, pp. 1304 to 1358.
[10] Division Docket (CTA Case No. 8478) – Vol. 3, pp. 1360 to 1370.
[11] Division Docket (CTA Case No. 8478) – Vol. 3, pp. 1374 to 1383.
[12] EB Docket (CTA EB No. 1612), pp. 78 to 83; EB Docket (CTA EB No. 1631), pp. 395 to 400; and Division Docket (CTA Case No. 8478) – Vol. 3, pp. 1409 to 1414.
[13] EB Docket (CTA EB No. 1612), pp. 6 to 19.
[14] EB Docket (CTA EB No. 1631), pp. 9 to 34.
[15] Minute Resolution dated May 5, 2017, EB Docket (CTA EB No. 1612), p. 85-A.
[16] EB Docket (CTA EB No. 1612), p. 87 to 88.
[17] EB Docket (CTA EB No. 1612), pp. 89 to 117.
[18] Records Verification dated July 10, 2017 issued by the Judicial Records Division of this Court, EB Docket (CTA EB No. 1612), p. 128.
[19] EB Docket (CTA EB No. 1612), pp. 130 to 132.
[20] EB Docket (CTA EB No. 1612), pp. 133 to 168.
[21] Records Verification dated October 25, 2017 issued by the Judicial Records Division of this Court, EB Docket (CTA EB No. 1612), p. 171.
[22] Resolution dated November 23, 2017, EB Docket (CTA EB No. 1612), pp. 173 to 174.

Hence, this Decision.

THE ISSUE

In **<u>CTA EB No. 1612</u>**, the CIR presents the sole issue for resolution, to wit:

> "WHETHER OR NOT THE THIRD DIVISION OF THIS HONORABLE COURT BLATANTLY ERRED IN PARTIALLY GRANTING THE PETITION FOR REVIEW OF HEREIN RESPONDENT IN CTA CASE NO. 8478, AND ORDERED TO CANCEL AND SET ASIDE PARTLY CERTAIN ASSESSMENTS ISSUED BY THE PETITIONER CIR TO HEREIN RESPONDENT FOR CY 2007 COVERING ITS DEFICIENCY IT, VAT, EWT, WTC, FWT and FWT-VAT, FOR LACK OF MERIT."[23]

The CIR's arguments:

In support of the foregoing issue, the CIR raises the following grounds for each deficiency tax, for the partial reversal of the assailed Decision and Resolution, to wit:

<u>Deficiency IT</u>:

The CIR contends that Herbalife clearly failed to withhold and remit in full the corresponding EWT, WTC, and FWT on certain expenses in violation of RR No. 2-98, as amended, hence, the said expenses were disallowed as deduction from gross income pursuant to Section 34(K) of the National Internal Revenue Code (NIRC), as amended.

<u>Deficiency VAT</u>:

The CIR argues that Herbalife clearly failed to refute the BIR findings that there was an under-declaration of commission expenses after reconciling the amount per its Income Tax Return/Financial Statement for CY 2007 as against per BIR forms 1601E. According to the CIR, the said amount was considered as unaccounted source of

---

[23] EB Docket (CTA EB No. 1612), p. 11.

cash which led to the inference that part of Herbalife's income have not been declared as enunciated by the Supreme Court in the case of *Perez vs. Court of Tax Appeals and Collector of Internal Revenue*[24]. Thus, the amount has been assessed pursuant to Sections 27 and 32 of the 1997 Tax Code.

As to the adjustments for over/under accruals, Herbalife presented only print-outs of its general ledger entries to support its claim, but still it failed to submit substantial proof that the same were not yet subjected to EWT in the previous years (considering that the obligation of the payor to deduct and withhold the tax arises at the time an income is paid or payable, whichever comes first, pursuant to Section 2.57.4 of RR No. 2-98) or that the said items were actually included in the list of transactions per alphalist of payees which were subjected to expanded withholding tax during the year. Hence, according to the CIR, his original assessment should be upheld.

Deficiency EWT:

The CIR alleges that Herbalife clearly failed to withhold and remit to the BIR the corresponding withholding tax on certain income payments, which were previously disallowed under Schedule 1 (FDDA/FAN) as deductions from gross income. Hence, according to the CIR, his original assessment should be upheld, pursuant to Section 2.57 of RR No. 2-98, as amended.

Deficiency WTC:

The CIR claims that Herbalife failed to withhold and remit to the BIR the corresponding withholding tax on the salaries and wages in the amount of ₱727,797.05, previously disallowed as deductions from its gross income. It was allegedly disclosed that the account "Temporary Pay" pertains to reimbursement of employee expenses and uniform allowance, and hence, may be considered as employee benefits, which should be considered in the analysis of withholding tax on compensation. Moreover, Herbalife still failed to support with source documents the retirement fund and amortization of PSC. Hence, the original assessment of the CIR should be upheld, pursuant to Section 2.78.1 of RR No. 2-98.

---

[24] G.R. No. L-10507, May 30, 1958.

Deficiency FWT:

The CIR contends that Herbalife failed to subject to FWT the royalties and other income payments paid to resident and non-resident foreign corporation in violation of Sections 28(B)(1)(a) and 28(B)(5)(a) of the 1997 Tax Code. Thus, it was disclosed that the ₱12,116,340.00 total production cost was attributable to Herbalife's payments made to resident and non-resident foreign corporations, hence, such amount should be subjected to final tax, pursuant to Sections 28(b)(1)(a) and 28(B)(5)(a) of the 1997 Tax Code. In addition, Herbalife allegedly failed to present substantial proof to support its claim that the production bonus and royalty payments made to resident and non-foreign foreign corporations are not subject to withholding tax.

Deficiency FWT – VAT:

Lastly, the CIR argues that the interest payments of Herbalife were made to non-resident foreign corporations, and pursuant to Section 28(B)(1)(a) of the 1997 Tax Code, it should be charged with a 20% final tax. However, according to the CIR, Herbalife clearly failed to submit the corresponding invoices and official receipts to support its claim against the assessed interest expense.

Herbalife's counter-arguments:

Herbalife points out that a perusal of the *Petition for Review* shows that the arguments raised therein are exactly the same arguments raised in its *Motion for Partial Reconsideration* of the Court in Division's Decision dated November 3, 2016. In the assailed Resolution dated March 14, 2017, the Court in Division pointed out that these very arguments are the same reasons given in the *Details of Discrepancies* attached to the FAN dated August 26, 2011. According to Herbalife, the Court in Division had already found that the CIR failed to point out specific findings or conclusions in the Decisions, which were not supported by evidence or contrary to law.

ASSIGNMENT OF ERRORS

On the other hand, **in CTA EB No. 1631**, Herbalife assigns the following errors supposedly committed by the Court in Division, to wit:

M

"I.

THE HONORABLE THIRD DIVISION ERRED IN DENYING THE PETITIONER'S MOTION FOR PARTIAL RECONSIDERATION ON THE SOLE BASIS OF LACK OF NOTICE OF HEARING.

II.

THE HONORABLE THIRD DIVISION ERRED IN ASSESSING FINAL WITHHOLDING TAX ON THE PETITIONER'S PAYMENT TO AFFILIATES (MANAGEMENT FEES), AND IN THE DISALLOWING THE SAME AS A DEDUCTION FOR INCOME TAX PURPOSES.

III.

THE HONORABLE THIRD DIVISION ERRED IN APPLYING THE TWENTY PERCENT (20%) FINAL WITHHOLDING TAX ON THE PETITIONER'S INTEREST EXPENSE, AND DISALLOWING THE SAME AS AN EXPENSE FOR INCOME TAX PURPOSES.

IV.

THE HONORABLE THIRD DIVISION ERRED IN HOLDING THAT THE PETITIONER'S EVIDENCE IS INSUFFICIENT TO SHOW THAT THE PRODUCTION BONUSES AND ROYALTY OVERRIDES WERE RECEIVED BY NON-RESIDENT FOREIGN DISTRIBUTORS OUTSIDE THE PHILIPPINES IN THE IMPOSITION OF FINAL WITHHOLDING VALUE ADDED TAXES."[25]

A summation of all the foregoing assignments of errors will boil down to the same issues raised by the CIR in CTA EB No. 1612 with slight modification on the parties' respective stand, to wit:

"WHETHER OR NOT THE THIRD DIVISION OF THIS COURT ERRED IN PARTIALLY DENYING THE CASE PETITION FOR REVIEW OF HERBALIFE IN CTA CASE NO. 8478, WHEREIN IT ORDERED TO ONLY PARTIALLY CANCEL AND SET ASIDE CERTAIN ASSESSMENTS ISSUED BY THE CIR AGAINST HERBALIFE FOR CY 2007 COVERING ITS DEFICIENCY IT, VAT, EWT, WTC,

---

[25] EB Docket (CTA EB No. 1631), pp. 14 to 15.

FWT AND FWT-VAT."

Herbalife's arguments:

Herbalife argues that the Court in Division erred in denying its *Motion for Partial Reconsideration* on the sole basis of lack of notice of hearing. the lack of a notice of hearing alone is allegedly not a sufficient ground for the denial of the said *Motion for Partial Reconsideration*, especially in light of the opportunity accorded to the CIR to comment thereon.

Moreover, the Court in Division also erred in assessing FWT FWT on Herbalife's payment to affiliates (management fees), and in the disallowing the same as a deduction for income tax purposes. Allegedly, the payments for management services to Herbalife Singapore Pte. Ltd. were properly substantiated.

According to Herbalife, the Court in Division also erred in applying the 20% FWT on Herbalife's interest expense, and disallowing the same as an expense for income tax purposes.

Finally, Herbalife stresses that its evidence is sufficient to show that the production bonuses and royalty overrides were received outside the Philippines contrary to the ruling of the Court in Division that Herbalife's evidence is insufficient to show that the production bonuses and royalty overrides were received by non-resident foreign distributors outside the Philippines in the imposition of FWT-VAT.

THE COURT *EN BANC*'S RULING

Before resolving the issues raised in the instant consolidated *Petitions for Review*, the Court *En Banc* finds it necessary to resolve an antecedent and vital issue which is necessary in the orderly disposition of the instant cases, to wit:

> "Whether or not the revenue officer(s) who examined Herbalife was authorized by the CIR or his duly authorized representative, through an LOA."

The inclusion of the foregoing additional issue is in accordance with Section 1, Rule 14 of the 2005 Revised Rules of the Court of Tax

M

Appeals (RRCTA) which reads as follows:

"RULE 14
JUDGMENT, ITS ENTRY AND EXECUTION

SECTION 1. – *Rendition of judgment* – xxx

> **In deciding a case, the Court may not limit itself to the issues stipulated by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case.**" *(Emphasis supplied)*

Based on the said provision, this Court is not limited to resolve only the issues specifically raised by the parties, but may also rule upon related issues necessary to achieve an orderly disposition of the case. Such power of this Court is confirmed and recognized by the Supreme Court in the case of *Commissioner of Internal Revenue vs. Lancaster Philippines, Inc.,*[26] *viz*:

> "**On whether the CTA can resolve an issue which was not raised by the parties, we rule in the affirmative.**
>
> Under Section 1, Rule 14 of A.M. No. 05-11-07-CTA, or the Revised Rules of the Court of Tax Appeals, the CTA is not bound by the issues specifically raised by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case. The text of the provision reads:
>
> SECTION 1. *Rendition of judgment.* – xxx
>
> In deciding the case, the Court may not limit itself to the issues stipulated by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case.
>
> **The above section is clearly worded. On the basis thereof, the CTA Division was, therefore, well within its authority to consider in its decision the question on the scope of authority of the revenue officers who were named in the LOA even though the parties had not raised the same in their pleadings or memoranda.** The CTA En Banc was likewise correct in

---

[26] G.R. No. 183408, July 12, 2017.

> sustaining the CTA Division's view concerning such matter." *(Emphasis and underscoring supplied)*

Thus, the above-stated issue raised by this Court *En Banc* may be resolved by the latter.

RO Fatima B. Pre was not authorized through a Letter Of Authority (LOA) to conduct the examination of Herbalife's books and accounts and accounting records for taxable year 2007.

In *Medicard Philippines, Inc. vs. Commissioner of Internal Revenue, (Medicard case)*[27], the Supreme Court elucidated on the importance and significance of an LOA in examining the books of accounts and other accounting records of taxpayers and in assessing internal revenue taxes, to wit:

> "An LOA is the authority given to the appropriate revenue officer assigned to perform assessment functions. It empowers or enables said revenue officer to examine the books of account and other accounting records of a taxpayer for the purpose of collecting the correct amount of tax. An LOA is premised on the fact that the examination of a taxpayer who has already filed his tax returns is a power that statutorily belongs only to the CIR himself or his duly authorized representatives. Section 6 of the NIRC clearly provides as follows:
>
> > SEC. 6. *Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement. –*
> >
> > (A) Examination of Return and Determination of Tax Due. – After a return has been filed as required under the provisions of this Code, **<u>the Commissioner or his duly authorized representative may authorize the examination of any taxpayer</u>** and the

---

[27] G.R. No. 222743, April 5, 2017.

> assessment of the correct amount of tax: Provided, however, That failure to file a return shall not prevent the Commissioner from authorizing the examination of any taxpayer.
>
> x x x x (Emphasis and underlining Ours)

Based on the afore-quoted provision, it is clear that **unless authorized by the CIR himself or by his duly authorized representative, through an LOA, an examination of the taxpayer cannot ordinarily be undertaken.** The circumstances contemplated under Section 6 where the taxpayer may be assessed through best-evidence obtainable, inventory-taking, or surveillance among others has nothing to do with the LOA. These are simply methods of examining the taxpayer in order to arrive at the correct amount of taxes. **Hence, unless undertaken by the CIR himself or his duly authorized representatives, other tax agents may not validly conduct any of these kinds of examinations without prior authority.**

xxx xxx xxx

In the case of *Commissioner of Internal Revenue v. Sony Philippines, Inc.*,[28] the Court said that:

> Clearly, there must be a grant of authority before any revenue officer can conduct an examination or assessment. Equally important is that the revenue officer so authorized must not go beyond the authority given. **In the absence of such an authority, the assessment or examination is a nullity**. (Emphasis and underlining ours)

xxx xxx xxx

Contrary to the ruling of the CTA *en banc*, an LOA cannot be dispensed with just because none of the financial books or records being physicially kept by MEDICARD was examined. **To begin with, Section 6 of the NIRC requires an authority from the CIR or from his**

---

[28] 649 Phil. 519 (2010).

M

> **duly authorized representatives before an examination 'of a taxpayer' may be made. The requirement of authorization is therefore not dependent on whether the taxpayer may be required to physically open his books and financial records but only on whether a taxpayer is being subject to examination.**
>
> xxx xxx xxx
>
> **That the BIR officials herein were not shown to have acted unreasonably is beside the point because the issue of their lack of authority was only brought up during the trial of the case. What is crucial is whether the proceedings that led to the issuance of VAT deficiency assessment against MEDICARD had the prior approval and authorization from the CIR or her duly authorized representatives. Not having authority to examine MEDICARD in the first place, the assessment issued by the CIR is inescapably void.**" *(Emphases and underscoring supplied)*

Based on the foregoing jurisprudential pronouncements, revenue officers must be authorized by an LOA in order for them to validly examine the books of accounts and other accounting records of a taxpayer. In the absence thereof, the tax assessments issued by the BIR against such taxpayer shall be void.

Relative thereto, Section 13 of the NIRC of 1997 provides as follows, to wit:

> "SEC. 13. *Authority of a Revenue Officer.* – Subject to the rules and regulations to be prescribed by the Secretry of Finance, upon recommendation of the Commissioner, **a Revenue Officer assigned to perform assessment functions in any district, may pursuant to a Letter of Authority issued by the Revenue Regional Director, examine taxpayers within the jurisdiction of the district in order to collect the correct amount of tax, or to recommend the assessment of any deficiency tax due** in the same manner that the said acts could have been performed by the Revenue Regional Director." *(Emphasis and underscoring supplied)*

On the basis thereof, it is clear that a Letter of Authority must have been issued in favor of an RO, in order for such officer to examine taxpayers and to perform tax assessment and collection functions.

In the instant cases, records show that it was RO Ma. Antonietta Suarez and Group Supervisor (GS) Efren Clement, who were authorized to examine the books of account and other accounting records of Herbalife for all internal revenue taxes for taxable year 2007 under LOA No. 2001 00069261 dated June 4, 2008.[29] In the Memorandum dated May 26, 2009 issued by Roberto A. Baquiran, the Revenue District Officer of Revenue District Office (RDO) No. 49, RO Romeo D.C. Santos and GS Nasraili B. Conding were directed to continue the investigation of Herbalife for 2007 pursuant to LOA No. 0006921 previously assigned to RO Suarez.[30]

RO Fatima B. Pre, the person who recommended the issuance of a PAN against Herbalife,[31] was not named in LOA No. 2001 00069261. Her supposed authority emanated only through the following: 1) **Memorandum Referral No. LA-049-12-07-09-009** dated December 7, 2009 issued by Teodoro G. Galicia, Revenue District Officer of RDO No. 49, addressed to RO Pre, thru GS Ricardo J. Santiago, referring the docket of Herbalife for continuance of investigation under LOA 00069261;[32] and 2) **Revalidation Notice** issued on December 22, 2009 by Alfredo V. Misajon, Regional Director of Revenue Region No. 8, addressed to Herbalife, informing the latter of the replacement of the previously assigned RO Santos, and authorizing RO Pre, under GS Santiago, to continue the investigation, pursuant to LOA No. 00069261.[33] The issuance of the said Memorandum Referral was even validated in the statements of RO Pre in her Judicial Affidavit,[34] to wit:

> "8. Q: How did you come to know the internal revenue tax case of [Herbalife] for taxable year 2007?
>
> A: I came to know the internal revenue tax case of [Herbalife] for taxable year 2007, when I received a **<u>Memorandum Referral No. LA-049-12-0709-009 dated December 7, 2009</u>, duly signed by Teodoro**

---

[29] BIR Records, p. 44.
[30] BIR Records, p. 36.
[31] Exhibit "R-4", BIR Records, pp. 277 to 279.
[32] Exhibit "R-2", BIR Records, p. 39.
[33] BIR Records, p. 35.
[34] Exhibit "R-15", Docket (CTA Case No. 8478) - Vol. 3, pp. 1198 to 1207, at p. 1199.

> **G. Galicia, Revenue District Officer of RDO No. 49-North Makati, re-assigning to me for continuance of investigation and immediate report the internal revenue tax case of [Herbalife] for taxable year 2007, subject of Letter of Authority No. 00069261 dated 4 June 2008,** which authorized the examination of the books of accounts and other accounting records of [Herbalife], to determine all its internal revenue taxes, for taxable year 2007." *(Emphasis & underscoring supplied)*

Notably, there is no mention in the records that a new LOA was issued specifically designating RO Pre to examine and audit the books of accounts and other accounting records of Herbalife for taxable year 2007. Thus, RO Pre cannot be considered as validly authorized to conduct an examination and audit of the same. To reiterate, RO Pre's supposed authority to examine and audit came about only through the said Revalidation Notice dated December 22, 2009 and Memorandum Referral Letter dated December 7, 2009, and did not arose from, or was not made pursuant to, an LOA as required by law and jurisprudence.

Furthermore, the issuance of the said Memorandum Referral Letter and Revalidation Notice issued in favor of RO Pre are a clear violation of Revenue Memorandum Order No. 43-1990,[35] which provides the guideline for the audit/investigation and issuance of letters of authority (L/A) to audit, pertinent portions of which states, to wit:

> "C. Other policies for issuance of L/As.
>
> **1. All audit/investigations, whether field audit or office audit, shoud be conducted under a Letter of Authority.**
>
> xxx xxx xxx
>
> 5. **Any re-assignment/transfer of cases to another RO(s), and revalidation of L/As which have already expired, shall require the issuance of a new L/A, with the corresponding notation thereto, including the previous L/A number and date of issue of said L/A.**"

---

[35] SUBJECT: Amendment of Revenue Memorandum Order No. 37-90 Prescribing Revised Policy Guidelines for Examination of Returns and Issuance of Letters of Authority to Audit.

nb

(Emphases and underscoring supplied)

Pursuant thereto, all audit investigations must be conducted by a **duly designated** RO authorized to perform audit and examination of taxpayer's books and accounting records, pursuant to an LOA. In case of re-assignment or transfer of cases to another RO, it is mandatory that a new LOA shall be issued with the corresponding notation thereto.

Accordingly, since RO Pre was not duly authorized by a new LOA, the subject tax assessments, which came about as a result of her examination of Herbalife's books of accounts and accounting records for taxable year 2007, are void.

Lack of notice of hearing of Herbalife's Motion for Partial Reconsideration is not fatal.

Anent the procedural issue raised in the instant *Petition for Review* in CTA EB No. 1631, Herbalife avers that the lack of a notice of hearing alone is not sufficient ground for the denial of the *Motion for Partial Reconsideration* especially in light of the opportunity accorded to the CIR to comment on the said motion.

The Court *En Banc* finds merit in Herbalife's contention.

Section 4 and 5, Rule 15 of the Rules of Court provide that:

> "Section 4. *Hearing of motion.* – Except for motions which the court may act upon without prejudicing the rights of the adverse party, every written motion shall be set for hearing by the applicant.
>
> Every written motion required to be heard and the notice of the hearing thereof shall be served in such a manner as to ensure its receipt by the other party at least three (3) days before the date of hearing, unless the court for good cause sets the hearing on shorter notice.
>
> Section 5. *Notice of hearing.* – The notice of hearing shall be addressed to all parties concerned, and shall specify the time and date of the hearing which must not be later than ten (10) days after the filing of the motion."

NH

Jurisprudence provides that a motion which does not meet the requirements of Sections 4 and 5 of Rule 15 of the Rules of Court is considered a worthless piece of paper which the clerk has no right to receive and the court has no authority to act upon.[36] The service of a copy of a motion containing notice of the time and place of hearing of said motion is a mandatory requirement and the failure of the movant to comply with said requirements renders his motion fatally defective.[37]

However, this is not an absolute rule and admits various exceptions. In the case of *Vlason Enterprises Corporation vs. Court of Appeals et al.,*[38] the Supreme Court enumerated these exceptions as follows:

> "... Liberal construction of this rule has been allowed by this Court in cases (1) where a rigid application will result in a manifest failure or miscarriage of justice; especially if a party successfully shows that the alleged defect in the questioned final and executory judgment is not apparent on its face or from the recitals contained therein; (2) where the interest of substantial justice will be served; (3) where the resolution of the motion is addressed solely to the sound and judicious discretion of the court; and (4) where the injustice to the adverse party is not commensurate to the degree of his thoughtlessness in not complying with the procedure prescribed."

Relative thereto, in *Jehan Shipping Corporation vs. National Food Authority*,[39] the Supreme Court ruled that despite the lack of notice of hearing in a *Motion for Reconsideration*, there was substantial compliance therein with the requirements of due process where the adverse party actually had the opportunity to be heard and had filed pleadings in opposition to the *Motion*, to wit:

> "This Court has indeed held time and again, that under Sections 4 and 5 of Rule 15 of Rules of Court, mandatory is the notice requirement in a motion, which is rendered defective by failure to comply with the requirement. As a rule, a motion without notice of hearing is considered *pro forma* and does not affect the

---

[36] *Tan vs. Court of Appeals, et al.,* G.R. No. 130314, September 22, 1998.
[37] *Ibid.*
[38] G.R. Nos. 121662-64, July 6, 1999.
[39] G.R. No. 159750, December 14, 2005.

NO

> reglementary period for the appeal of the requisite pleading.
>
> As an integral component of procedural due process, the three-day notice required by the Rules is not intended for the benefit of the movant. Rather, the requirement is for the purpose of avoiding suprises that may be sprung upon the adverse party, who must be given time to study and meet the arguments in the motion before a resolution by the court. Principles of natural justice demand that the right of a party should not be affected without giving it an opportunity to be heard.
>
> **The test is the presence of opportunity to be heard as well as to have time to study the motion and meaningfully oppose or controvert the grounds upon which it is based**." *(Emphasis supplied)*

Likewise, in *National Commercial Bank of Saudi Arabia vs. Court of Appeals and Philippine Banking Corporation,*[40] the Supreme Court allowed the liberal application of the rule on notice of hearing taking into account the fact that the parties involved therein belong to the banking industry over which the government has a vital interest as well as the fact that the prejudice likely to be suffered by the private respondent in the said case is not commensurate to its negligence in not complying with the notice of hearing requirement.

Based on the foregoing jurisprudence, the requirements of Sections 4 and 5 of Rule 15 of the Rules of Court may be liberally applied when any of the exceptions abovementioned is present and that the adverse party actually had the opportunity to be heard and had filed pleadings in opposition to the motion.

A perusal of the records reveals that the CIR was furnished with a copy of Herbalife's *Motion for Partial Reconsideration*, through registered mail on November 23, 2016, on the same date that Herbalife filed its *Motion for Partial Reconsideration* in court.[41] Moreover, the Court in Division gave the CIR ten (10) days within which to file his *Comment* thereon, in the Resolution dated December 20, 2016.[42]

---

[40] G.R. No. 124267, August 18, 2004.

[41] Refer to the Registry Receipt attached to Herbalife's *Motion for Partial Reconsideration*, Division Docket (CTA Case No. 8478) – Vol. 3, p. 1369.

[42] Division Docket (CTA Case No. 8478) – Vol. 3, pp. 1384 to 1385.

Considering that the CIR's was not denied procedural due process as he was apprised of the filing as well as the contents of the said *Motion*, the Court *En Banc* holds that the strict application of Sections 4 and 5 of Rule 15 may be relaxed in the present case.

It is noteworthy to mention that the Supreme Court has pronounced in *KKK Foundation, Inc. vs. Hon. Adelina Calderon-Bargas, et. al*,[43] the following statements, to wit:

> "The notice requirement is not a ritual to be followed blindly. Procedural due process is not based solely on a mechanical and literal application that renders any deviation inexorably fatal. Instead, procedural rules are liberally construed to promote their objective and to assist in obtaining a just, speedy and inexpensive determination of any action and proceeding."

Correspondingly, the lack of notice of hearing of Herbalife's *Motion for Partial Reconsideration* is not fatal.

In sum, the subject tax assessments are void, for being issued for lack of authority of the concerned RO to conduct an examination of Herbalife's books of account and other accounting records for taxable year 2007. Consequently, the same bears no valid fruit.[44]

With the foregoing resolution, it becomes unnecessary to address the issues raised by the CIR and Herbalife in their respective *Petition for Review*.

However, the assailed decision and resolution could not be reversed and set aside in the instant Petitions for Review in light of the provisions of Section 2 of Republic Act No. 1125, as amended by Republic Act No. 9503, which provides:

> "SEC. 2. *Sitting En Banc or Division; Quorum; Proceedings.* –
>
> xxx xxx xxx

---

[43] G.R. No. 163785, November 27, 2007.

[44] *Commissioner of Internal Revenue vs. Reyes, etseq.*, G.R. Nos. 159694 and 163581, January 27, 2006; *Commissioner of Internal Revenue vs. BASF Coating+Inks Phils., Inc.*, G.R. No. 198677, November 26, 2014; and *Samar-I Electric Cooperative vs. Commissioner of Internal Revenue*, G.R. No. 193100, December 10, 2014.

> <u>**The affirmative votes of five (5) members of the Court *en banc* shall be necessary to reverse a decision of a Division**</u> but a simple majority of the Justices present necessary to promulgate a resolution or decision in all other cases or two (2) members of a Division, as the case may be, shall be necessary for the rendition of a decision or resolution in the Division level." (Emphasis and Underscoring Supplied)

Similarly, Section 3, Rule 2 of the Revised Rules of the Court of Tax Appeals states, to wit:

> "SEC. 3. *Court en banc; quorum and voting.* – xxx **The presence at the deliberation and affirmative vote of five (5) members of the Court *en banc* shall be necessary to reverse a decision of a Division** but only a simple majority of the justices present to promulgate a resolution or decision in all other cases. **Where the necessary majority vote cannot be had, the petition shall be dismissed; in appealed cases, the judgment or oder appealed from shall stand affirmed; and on all incidental matters, the petition or motion shall be denied.**" (Emphases Supplied)

During the deliberation of the instant Petitions for Review, four (4)[45] voted and concurred with the *ponencia* that the Petition for Review in CTA EB No. 1621 filed by the CIR should be denied for lack of merit while the Petition for Review in CTA EB No. 1631 by Herbalife should be granted. On the other hand, Associate Justice Ma. Belen M. Ringpis-Liban voted to affirm the assailed Decision and Resolution of the Court in Division; Associate Justice Esperanza R. Fabon-Victorino maintained her stance as the ponente of the assailed Decision and Resolution of the Court in Division; while Associate Justice Juanito C. Castañeda, Jr., was on Wellness Leave.

WHEREFORE, considering that the required affirmative votes of five (5) members of the Court *En Banc* was not obtained in the instant case pursuant to Section 2 of Republic Act No. 1125, as amended by Republic Act No. 9503 in relation to Section 3 of Rule 2 of the Revised Rules of the Court of Tax Appeals, the *Petition for Review* in CTA EB

---

[45] The Presiding Justice Roman G. Del Rosario, Associate Justices Cielito N. Mindaro-Grulla, and Catherine T. Manahan concurred with the ponente.

ᴺʸ

No. 1612 filed by the CIR and the *Petition for Review* in CTA EB No. 1631 filed by Herbalife are hereby **DISMISSED.**

The assailed Decision dated November 3, 2016 and Resolution dated March 14, 2017 issued by the Court in Division in CTA Case No. 8478 are hereby **AFFIRMED**.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

(With Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

(On Wellness Leave)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

(I maintain my stance in the assailed Decision & Resolution)
ESPERANZA R. FABON-VICTORINO
Associate Justice

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

(With Dissenting Opinion)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
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 before the cases were assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- *versus* -

HERBALIFE INTERNATIONAL PHILIPPINES, INC.,
Respondent.

CTA EB NO. 1612
(CTA Case No. 8478)

x- x

HERBALIFE INTERNATIONAL PHILIPPINES, INC.,
Petitioner,

- *versus* -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1631
(CTA Case No. 8478)

Present:

Del Rosario, *P.J.*,
Castañeda, Jr.,
Uy,
Fabon-Victorino,
Mindaro-Grulla,
Ringpis-Liban, *and*
Manahan, *JJ.*

Promulgated:

NOV 15 2018 3:50 p.m.

x- x

CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the ponencia in denying the Petition for Review filed by the Commissioner of Internal Revenue (CIR) in CTA EB No. 1612; and in granting the Petition for Review filed by Herbalife International Philippines, Inc. (Herbalife) in CTA EB No. 1631.

I wish to expound on the issue of the lack of authority of the Revenue Officers who continued and concluded the audit and investigation of Herbalife.

Section 6 of the National Internal Revenue Code (NIRC) of 1997, as amended, is clear and categorical in requiring an authority from the **CIR or from his duly authorized representatives** before an examination of a taxpayer may be made.

The *"authorized representative"* contemplated by law who may issue an LOA is no other than a Revenue Regional Director pursuant to Section 13 of the NIRC of 1997, as amended.

The power to issue an LOA may not be delegated by the CIR or the Revenue Regional Director to any other officer - - much less to a Revenue District Officer (RDO). On this point, the pronouncement in *NPC Drivers and Mechanics Association, (NPC DAMA) vs. The National Power Corporation*[1] is instructive, *viz.*:

> "We agree with petitioners. In enumerating under Section 48 those who shall compose the National Power Board of Directors, the legislature has vested upon these persons the power to exercise their judgment and discretion in running the affairs of the NPC. Xxx xxx xxx. It is to be presumed that in naming the respective department heads as members of the board of directors, the legislature chose these secretaries of the various executive departments on the basis of their personal qualifications and acumen which made them eligible to occupy their present positions as department heads. **Thus, the department secretaries cannot delegate their duties as members of the NPB, much less their power to vote and approve board resolutions, because it is their personal judgment that must be exercised in the fulfillment of such responsibility**.
>
> Xxx, the rule enunciated in the case of *Binamira v. Garrucho* is relevant in the present controversy, to wit:
>
> > **An officer to whom a discretion is entrusted cannot delegate it to another, the presumption being that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and unless the power to substitute another in his place has been given to him, he cannot delegate his duties to another**.
>
> Xxx." *(Citations omitted; Boldfacing supplied)*

Records disclosed that the Revenue Officers (ROs) named in the original LOA did not actually conclude the audit of Herbalife. Instead, by virtue of two (2) Memoranda of Assignment issued by two (2) RDOs, (eventually "revalidated" by the Revenue Regional Director through a

---

[1] G.R. No. 156208, September 26, 2006.

Revalidation Notice), the audit of Herbalife was continued and concluded by ROs whose names do not appear in the original LOA. As afore-discussed, the Memoranda of Assignment cannot be considered as LOAs since they were only issued by the RDOs. In the same vein, the "Revalidation Notice" issued by the Revenue Regional Director does not partake the nature of an LOA. RMO No. 43-90 is explicit, *viz.*:

> "C. Other policies for issuance of L/As.
>
> 1. **All audits/investigations, whether field or office audit, should be conducted under a Letter of Authority**.
>
> xxx
>
> 5. **Any re-assignment/transfer of cases to another RO(s)**, and **<u>revalidation of L/As</u>** which have already expired, **shall require the <u>issuance of a new L/A</u>, with the corresponding notation thereto, including the previous L/A number and date of issue of said L/As**." *(Boldfacing and underscoring supplied)*

Had "revalidation" of an LOA been accorded the same legal effect as an LOA itself, then RMO No. 43-90 would not have categorically stated that *"revalidation of L/As ... shall require the issuance of a new L/A."* The use of the phrase "*shall require the issuance of new L/A*" emphasizes the mandatory nature of the said requirement. Needless to say, the Bureau of Internal Revenue (BIR) has the duty of exacting compliance therewith as it has the burden of ensuring that the right of the government to assess and collect tax deficiencies would not be defeated by its failure to comply with its own rules.

All told, I CONCUR with the *ponencia*.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

HERBALIFE INTERNATIONAL PHILIPPINES, INC.,
Respondent.

CTA EB NO. 1612
(CTA Case No. 8478)

x - x

HERBALIFE INTERNATIONAL PHILIPPINES, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1631
(CTA Case No. 8478)

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

Promulgated: NOV 15 2018 3:50 p.m.

x- x

DISSENTING OPINION

RINGPIS-LIBAN, *J.*:

With all due respect, I dissent from the majority decision which reversed the Decision and Resolution of the Third Division upholding in part the assessments for deficiency income tax, VAT, EWT, FWT and DST for CY 2007 amounting to Php11,275,288.19, subject to 20% deficiency interest and 20% delinquency interest.

I do not agree that the disputed assessment is void for lack of a valid Letter of Authority ("LOA"); and that a new LOA is needed specifically designating Revenue Officer ("RO") Fatima B. Pre ("RO Pre") to conduct the audit of Herbalife's books and accounting records for taxable year 2007, when the case was re-assigned to her.

It is my humble belief that RO Pre, the actual RO who continued the audit investigation and concluded the same, had the authority to do so. For this, I believe that a brief discussion of the factual antecedents of the case is in order.

Records reveal that RO Ma. Antonietta Suarez ("RO Suarez") and Group Supervisor ("GS") Efren Clement were originally authorized to conduct the audit of Herbalife's books for taxable year 2007. The LOA[1] reads as follows:

> LOA 00069261
>
> JUN 04 2008
>
> LETTER OF AUTHORITY
>
> HERBALIFE INTERNATIONAL PHILIPPINES, INC.
> G/F Goodland Bldg., 377 Sen. Gil Puyat Ave. Extension,
> Makati City
>
> SIR/ MADAM/ GENTLEMEN:
>
> The bearer(s) hereof, RO MA, ANTONIETTA SUAREZ / GS EFREN CLEMENT Group Supervisor: A. PUNO of the Revenue District Office No. 049, North Makati is/ are authorized to examine your books of accounts and other accounting records for ALL INTERNAL REVENUE TAXES for the period from January 1, 2007 to December 31, 2007. He is/They are provided with the necessary identification card(s) which shall be presented to you upon request.
>
> xxx
>
> Very truly yours,
> (Original Sgd.)
> MA. NIEVA A. GUERRERO
> SIGNATURE OF AUTHORIZED OFFICER
> OIC Regional Director
> TITLE/POSITION

[1] Letter of Authority, BIR Records, page 44.

The above LOA has a stamp reading "revalidated", signed by Regional Director Alfredo V. Misajon ("RD Misajon").

On May 26, 2009, Revenue District Officer Roberto A. Baquiran issued a Memorandum[2] addressed to RO Romeo D.C. Santos ("RO Santos") and GS Nasraili B. Conding, directing them to continue the investigation of Herbalife for 2007, pursuant to LOA No. 00069261 dated June 04, 2008, previously assigned to RO Suarez.

Consequently, on December 22, 2009, a Revalidation Notice[3] was issued by RD Misajon pertaining to LOA No. 00069261 dated June 04, 2008, authorizing RO Pre and GS Santiago to replace the previously assigned RO, RO Santos, and to continue the audit of Herbalife's books for taxable year 2007. The Revalidation Notice provides, *viz*:

REVALIDATION NOTICE

Name of Taxpayer:	**HERBALIFE INTERNATIONAL PHILIPPINES, INC.**
Address:	G/F Goodland Bldg., 377 Sen. Gil Puyat Extension, Makati City
Subject :	**LOA 00069261 dated June 4, 2008** Formerly Assigned to Revenue Officer **Romeo D.C. Santos**

Gentlemen:

With reference to the subject Letter of Authority / Audit notice for the examination of your All Internal Revenue Taxes for the period from **January 1, 2007 to December 31 2007**, which remains pending to date, please be informed that the afore stated Letter of Authority/Audit Notice has been revalidated on DEC 22 2009due to the following:

(x) To replace the previously assigned Revenue Officer

xxx

In view thereof, the bearer Revenue Officer **FATIMA B. PRE** under the supervision of Group Supervisor **RICARDO J. SANTIAGO** is now authorized to continue the investigation of your books and other accounting records.

xxx

---

2 Memorandum, BIR Records, page 36.

3 Revalidation Notice, BIR Records, page 35.

Very truly yours,
(Sgd.)
ALFREDO V. MISAJON
Regional Director

A Memorandum of Assignment[4] was also issued by Revenue District Officer Teodoro G. Galicia, referring the audit of Herbalife for taxable year 2007 to RO Pre, pursuant to LOA No. 00069261 dated June 4, 2008.

From the foregoing, it is clear that notwithstanding the absence of a new LOA issued in her favor, RO Pre was given the authority to continue the audit and examination of Herbalife's books of accounts and other accounting records by way of a Revalidation Notice, upon the reassignment of RO Suarez who was named in the LOA, and RO Santos who was named in the Memorandum dated May 26, 2009. This could be validly done under the National Internal Revenue Code of 1997 ("1997 NIRC") and the laws on agency under the Civil Code.

On this score, I adopt my Concurring Opinion in *R.A. Oben Holdings, Inc. v. Commissioner of Internal Revenue*[5], whose facts are similar in the case at bar. The relevant portions are quoted below:

> "The power of the Commissioner of Internal Revenue (CIR) to conduct assessments is granted to him by virtue of Section 6 of the 1997 NIRC:
>
> > 'SEC. 6. **Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement. –**
> >
> > (A) *Examination of Returns and Determination of Tax Due.* – After a return has been filed as required under the provisions of this Code, **<u>the Commissioner or his duly authorized representative may authorize the examination</u> of any taxpayer and the assessment of the correct amount of tax**: *Provided, however,* That failure to file a return shall not prevent the Commissioner from authorizing the examination of any taxpayer.'
>
> Section 7 of the 1997 NIRC likewise sets limits on which powers of the CIR may be delegated by him and which powers are

[4] Memorandum of Assignment, BIR Records, page 39.
[5] CTA EB NO. 1454, September 18, 2017.

to be exercised exclusively by him. The issuance of an LOA is not one of the non-delegable powers of the CIR, *viz:*

> 'SEC. 7. **Authority of the Commissioner to Delegate Power.** – The Commissioner may delegate the powers vested in him under the pertinent provisions of this Code to any or such subordinate officials with the rank equivalent to a division chief or higher, subject to such limitations and restrictions as may be imposed under rules and regulations to be promulgated by the Secretary of Finance, upon recommendation of the Commissioner: Provided, however, That the following powers of the Commissioner shall not be delegated:
>
> (a) The power to recommend the promulgation of rules and regulations by the Secretary of Finance;
>
> (b) The power to issue rulings of first impression or to reverse, revoke or modify any existing ruling of the Bureau;
>
> (c) The power to compromise or abate, under Sec. 204 (A) and (B) of this Code, any tax liability: Provided, however, That assessments issued by the regional offices involving basic deficiency taxes of Five hundred thousand pesos (P500,000) or less, and minor criminal violations, as may be determined by rules and regulations to be promulgated by the Secretary of finance, upon recommendation of the Commissioner, discovered by regional and district officials, may be compromised by a regional evaluation board which shall be composed of the Regional Director as Chairman, the Assistant Regional Director, the heads of the Legal, Assessment and Collection Divisions and the Revenue District Officer having jurisdiction over the taxpayer, as members; and
>
> (d) The power to assign or reassign internal revenue officers to establishments where articles subject to excise tax are produced or kept.'

On the contrary, issuing LOAs is a delegable power which the CIR may devolve to Revenue Regional Directors, as expounded on in Section 10 of the 1997 NIRC:

> 'SEC. 10. **Revenue Regional Director.** – Under rules and regulations, policies and standards formulated by the Commissioner, with the approval of the Secretary of Finance, the Revenue Regional director shall, within the region and district offices under his jurisdiction, among others:
>
> xxx
>
> (c) **Issue Letters of authority for the examination of taxpayers within the region;**
>
> xxx
>
> (h) **Perform such other functions as may be provided by law and as may be delegated by the Commissioner.**'

An LOA is, in essence, a contract of agency. Article 1868 of the Civil Code defines agency as a contract where 'a person binds himself to render some service or to do something in representation or on behalf of another, with the consent or authority of the latter.'

In the case of *Spouses Fernando and Lourdes Viloria v. Continental Airlines, Inc.*, the Supreme Court had the occasion to expound on the elements of agency, to wit:

> 'The elements of agency are: (1) consent, express or implied, of the parties to establish the relationship; (2) the object is the execution of a juridical act in relation to a third person; (3) the agent acts as a representative and not for him/herself; and (4) the agent acts within the scope of his/her authority. **As the basis of agency is representation, there must be, on the part of the principal, an actual intention to appoint, an intention naturally inferable from the principal's words or actions. In the same manner, there must be an intention on the part of the agent to accept the appointment and act upon it.** Absent such mutual intent, there is generally no agency. It is likewise a settled rule that persons dealing with an assumed agent are bound at their peril, if they would hold the principal liable, to ascertain not only the fact of agency but also the nature and extent of authority, and in case either is

> controverted, the burden of proof is upon them to establish it.'

In an LOA, the CIR is the principal -- as he is the one mandated by the law to make assessments -- and the Revenue Regional Director ("RRD"), his agent.

Now, may the RRD, the CIR's agent, appoint a sub-agent, in this case, the RO/s named in the LOA? Article 1892 of the Civil Code says that he can. The said provision states:

> 'Art. 1892. **The agent may appoint a substitute if the principal has not prohibited him from doing so**; but he shall be responsible for the acts of the substitute:
>
> a) When he was not given the power to appoint one;
> b) When he was given such power, but without designating the person, and the person appointed was notoriously incompetent or insolvent.
>
> All acts of the substitute appointed against the prohibition of the principal shall be void. (1721)'

This power to appoint a sub-agent necessarily includes the power to revoke the same. This is what happened in the instant case. The authority given to RO Ferry who was originally named in the LOA was revoked, transferred and reassigned to RO Cayago, for continuance of audit by way of a Revalidation Notice.

Said Revalidation Notice is equivalent to an LOA. Several reasons support this. *First*, the only directive under Section 13 of the 1997 NIRC, which requires that assessment be done by ROs pursuant to an LOA, is that the grant of authority be done ***in writing***. In fact, an '[a]gency may be oral, unless the law requires a specific form.'

Second, although the Revalidation Notice was not entitled 'Letter of Authority', it contains all the elements necessary to establish a contract of agency between the CIR and RO Cayago. The testimony of RO Cayago points to her acceptance and carrying out of the agency...

xxx

Note that under the provisions on agency, acceptance by the agent may be express or implied from his acts which carry out the agency. Moreover, considering that, given the facts of the case, RO Cayago did not exceed the authority given to her and the audit was limited to examining books of account or accounting records within the period indicated in the LOA in coming up with the assessment, all the elements for a contract of agency are present.

Third, that the document granting authority to RO Cayago to continue the audit under the LOA is referred to as a Revalidation Notice is of no moment. The primary consideration in determining the true nature of a contract is the intention of the parties. If the words of a contract appear to contravene the evident intention of the parties, the latter shall prevail. Such intention is determined not only from the express terms of their agreement, but also from the contemporaneous and subsequent acts of the parties. The title of the contract does not necessarily determine its true nature. In fact, this Court has, time and again, declared certain documents emanating from the CIR as his 'Final Decision' on a Disputed Assessment based on the tenor of the words therein despite the absence of the words 'Final Decision' in the title of the document.

Lastly, is the glaring fact that the principal, the CIR, has acknowledged, if not ratified, the agency granted to RO Cayago to conduct the audit through the act of championing this very case.

In interpreting what a 'Letter of Authority' is, as mentioned in Section 13 of the 1997 NIRC, the laws on contracts and agency embodied in the Civil Code simply cannot be ignored. Every effort must be exerted to avoid a conflict between statutes; so that if reasonable construction is possible, the laws must be reconciled in that manner. Similarly, every new statute should be construed in connection with those already existing and all should be made to harmonize and stand together, if they can be done by any fair and reasonable interpretation. *Interpretare et concordare leges legibus, est optimus interpretandi modus*, which means that the best method of interpretation is that which makes laws consistent with other laws. Tax laws do not exist in a vacuum, and must be appreciated and applied with other laws such as the Civil Code.

xxx

Finally, I believe that the case of *Medicard Philippines, Inc. v. Commissioner of Internal Revenue, G.R. No. 222743, April 5, 2017* is not

> on all fours with the instant case and should not be applied to the same. *Medicard* involved a **total absence of an LOA** which the Court concluded could not be supplanted by a mere Letter Notice as it violated Medicard's right to due process. In contrast, a LOA was issued in the case at bar, and the issue herein is whether there was authority granted to RO Cayago, the RO who continued the audit in replacement of the RO named in the LOA."

Following *R.A. Oben Holdings, Inc.*, the authority given to RO Suarez who was originally named in the LOA was revoked, transferred and reassigned to RO Santos, by way of a Memorandum dated May 26, 2009 which was subsequently ratified by no less than RD Misajon in the Revalidation Notice dated December 22, 2009. In turn, the authority given to RO Santos was revoked, transferred and reassigned to RO Pre for continuance of audit by way of the same Revalidation Notice.

Said Revalidation Notice as equivalent to an LOA, RO Pre's authority to conduct the audit of Herbalife is valid.

All told, I vote to **AFFIRM** the November 03, 2016 Decision and March 14, 2017 Resolution of the Third Division, insofar as it sustained with modification the disputed deficiency taxes. I also vote for the **DENIAL** of the Petitions for Review filed by both Herbalife and the CIR.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice