Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SECOND DIVISION

CARGILL PHILIPPINES, INC. Petitioner,	**CTA CASE NO. 7928** For: Cancellation of Assessment for Deficiency Value-Added Tax
-versus-	Present: **CASTAÑEDA, JR.**, Chairperson **CASANOVA**, and **MINDARO-GRULLA**, JJ.
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: AUG 2 3 2011 4:30 p.m.

x---x

DECISION

MINDARO-GRULLA, J.:

This is a Petition for Review filed by Cargill Philippines, Inc. as petitioner against the Commissioner of Internal Revenue (CIR) as respondent, for the Court in Division, pursuant to Rule 4, Section 3(a)(2) of the 2005 Revised Rules of the Court of Tax Appeals, as amended.

The said Petition is an appeal from respondent CIR's inaction on petitioner's request for reconsideration/protest filed on October 24, 2008, praying for the cancellation of the undated Final Assessment Notice(FAN) finding petitioner liable for deficiency value-added tax assessment (VAT) for the period covering September 1, 2004 to August 31, 2005 in the amount of P5,469,566.85.

The facts of the case, based on the Joint Stipulation of Facts and Issues as well as the evidence on record, are stated hereunder.

Petitioner Cargill Philippines, Inc. is a domestic corporation duly organized and existing under Philippine laws, with principal office located at the 29th Floor, Citibank Tower, 8741 Paseo de Roxas Street, Makati City.[1]

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) vested with authority to carry out the functions, duties and responsibilities of said office, including, *inter alia*, the power to resolve disputed assessments and cancel tax liabilities pursuant to the provisions of the National Internal Revenue Code (NIRC) of 1997 and other tax laws, rules and regulations.

On September 9, 2008, petitioner received a copy of the Preliminary Assessment Notice (PAN) dated August 1, 2008, assessing petitioner deficiency VAT and compromise penalty in the amount of P5,430,100.29 for the period covering September 1, 2004 to August 31, 2005.[2]

On September 24, 2008, petitioner filed with the BIR its Reply to the PAN.[3]

---

[1] Par. 1, Admitted Facts, Joint Stipulation of Facts and Issues (JSFI), Docket, p. 110
[2] Exhibit "J"
[3] Exhibit "A"

On September 25, 2008, petitioner received an undated Final Assessment Notice (FAN) together with an Audit Result/Assessment Notice (BIR Form No. 0401) dated September 22, 2008. Respondent found petitioner liable for deficiency VAT in the aggregate amount of P5,469,566.85.[4]

The alleged deficiency taxes and penalties were computed as follows:

Excess of Output over Input	P 5,786,901.64
Less: Allowable Input Tax for zero-rated sales	2,392,983.86
Deficiency VAT	P 3,393,917.78
Add: Interest up to September 30, 2008	2,045,649.07
Compromise	30,000.00
Total	**P 5,469,566.85**

Respondent explained his findings of tax deficiency in the Details of Discrepancies.

On September 25, 2008, petitioner received a letter of even date from the BIR addressing the matters raised in petitioner's Reply to the PAN.[5]

On October 24, 2008, petitioner filed its request for reconsideration/protest against the FAN issued by respondent.[6]

Respondent however failed to render a decision on the protest filed by petitioner; hence, petitioner filed the instant Petition for Review on May 15, 2009.

---

[4] Exhibits "G" and "H"; Par. 5, Admitted Facts, JSFI, Docket, p. 111
[5] Par. 6, Admitted Facts, JSFI, docket, p. 111
[6] Exhibit "9"

On July 7, 2009, respondent filed the Answer[7], interposing the following counter-arguments:

> "5. The assessment for the period 1 September 2004 to 31 August 2005 in the amount of P5,469,566.85 was issued in accordance with law and regulations. The factual and legal bases of the subject assessment are contained in the Final Assessment Notice.
>
> 6. The petitioner asserts that there is lack of due process, claiming that there was no compliance with Section 228 of the Tax Code, Sec 3.1.2 of Revenue Regulation 12-99 and RMO 37-94. They claim that the taxpayer has 15 days from the date of the receipt of the Preliminary Assessment Notice (PAN) to respond to the PAN. If the taxpayer fails to respond, he shall be considered in default and Final Assessment Notice (FAN) will be issued. Petitioner received a copy of the PAN dated August 1, 2008 on September 9, 2008. On September 23, 2008, petitioner filed its Reply to the PAN. There being nothing in the Reply to credibly refute the PAN respondent served his Final Assessment Notice (FAN) to petitioner on September 25, 2008. There was no violation of due process as respondent met the requirement provided by law and jurisprudence.
>
> 7. As stated in the Details of Discrepancy of the FAN:
>
>> Verification revealed that your TIN was not indicated in some invoices and official receipts issued to you by your suppliers. This is in violation of the invoicing requirements as provided in Section 237 of this Code which states that 'all persons subject to an internal revenue tax shall, for each sale or transfer for merchandise or for services rendered valued at Twenty five pesos (P25.00) or more, issue duly registered receipts or sales or commercial invoices, prepared at least in duplicate, showing the date of transaction, quantity, unit cost and description of merchandise or nature of service: Provided, however, That in the case of sales, receipts or

---

[7] Docket, pp. 77-81

> transfers in the amount of One hundred pesos (P100.00) or more, or regardless of the amount, where the sale or transfer is made by a person liable to value-added tax to another person also liable to value-added tax; or where the receipt is issued to cover payment made as rentals, commissions, compensations or fees, receipts or invoices shall be issued which shall allow the name, business style, if any, and address of the purchaser, customer or client: **Provided, further, That where the purchaser is a VAT-registered person, in addition to the information herein required, the invoice or receipt shall further show the Taxpayer Identification Number (TIN) of the purchasers**.'
>
> Also, you failed to secure authority from the Office to use loose leaf invoices for your Pulilan and Villasis branches. Compromise penalty is imposed in accordance with Revenue Memorandum Order 19-2007 dated August 10, 2007.

8. This Honorable Court has decided in Caltex Philippines, Inc. vs. CIR dated October 4, 2000, held that there was a violation of the petitioner's procedural due process when the BIR issued the assessment despite the lack of prior notice for an informal conference and the PAN. In its more recent decisions, however, it declared that the failure of the BIR to issue the PAN cannot be considered a violation of the taxpayer's right to due process. According to the CTA, a taxpayer is not obligated to protest a PAN since failure to do so will not result in the finality of the assessment. What the law demands is the issuance of a FAN which should be formally protested to by the taxpayer, otherwise, the assessment shall become final and executory. In considering the notice to the taxpayer of the legal and factual bases of the assessment issued as substantial compliance with the mandate of Section 228 of the Tax Code, the CTA held that so long as the parties are given the opportunity to explain their side, the requirements of due process are satisfactorily complied with.

> 9. Well-settled is the rule that tax assessments are entitled to the presumption of correctness and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments. (*Sy Po vs. Court of Tax Appeals, 164 SCRA 524*)."

During trial, both parties presented documentary and testimonial evidence in support of their respective claims and contentions.

On October 29, 2010, the case was submitted for decision after the submission of respondent's Memorandum on September 13, 2010 and petitioner's Memorandum on October 8, 2010.

The issues[8], as jointly stipulated by the parties, are the following:

> "14. Whether or not Petitioner is liable for the deficiency VAT assessment in the amount of P5,469,566.85 for the period 01 September 2004 to 31 August 2005 plus surcharges and interest thereto.
>
> 15. Whether or not Petitioner's right to due process was denied.
>
> 16. Whether or not the assessment for deficiency VAT is barred by prescription.
>
> 17. Whether or not there was a valid basis for the disallowance of Petitioner's input VAT in the amount of P17,452,126.14.
>
> 18. Whether or not Petitioner had sufficient input VAT carried over from previous quarters to offset its output VAT for the period 1 September 2004 to 31 August 2005.

---

[8] Docket, pp. 114-115

> 19. Whether or not there was a valid basis to impose a compromise penalty in the amount of Thirty Thousand Pesos (P30,000.00)."

This Court finds it appropriate to address first the issue of due process.

Petitioner argues that it was denied due process because respondent issued the Final Assessment Notice before reading its Reply to the Preliminary Assessment Notice, without determining first if it had sufficiently established that it had no output VAT liability. On the other hand, respondent contends that there was no violation of due process because, technically, the requirements provided for by law and jurisprudence were duly met.

Section 228 of the NIRC of 1997, as amended, Revenue Regulations Nos. 12-85 and 12-99, and Revenue Memorandum Order No. 37-94 provide for the procedural requirements that must be followed in order to sustain the validity and legality of an assessment, and the same are quoted hereunder, to wit:

> "SEC. 228. *Protesting of Assessment*. – When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however,* That a pre-assessment notice shall not be required in the following cases:
>
> xxx xxx xxx

The taxpayer shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.

Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.

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

xxx xxx xxx"

<u>Revenue Regulations No. 12-85:</u>

"SECTION 3. *Time to reply. – Venue for filing reply.* -

(a) Regional Office cases - The taxpayer shall reply within a period of fifteen (15) days from receipt of the pre-assessment notice. In meritorious cases and upon written request of the taxpayer an extension may be granted within which to respond, but in no case shall the extension exceed a total of ten (10) days.

xxx xxx xxx

SECTION 5. *Failure to reply to the pre-assessment notices; issuance of assessment.* – In the event the taxpayer fails to respond to the pre-assessment notice within the above prescribed period, or when the Commissioner or his duly authorized representative finds the response to be without merit, he should be informed of such fact and the report of investigation shall be given due course."

<u>Revenue Regulations No. 12-99</u>:

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

xxx xxx xxx

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

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

xxx xxx xxx

> 3.1.4 *Formal Letter of Demand and Assessment Notice.* – The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence, on which the assessment is based, *otherwise, the formal letter of demand and assessment notice shall be void* xxx. The same shall be sent to the taxpayer only by registered mail or by personal delivery. If sent by personal delivery, the taxpayer or his duly authorized representative shall acknowledge receipt thereof in the duplicate copy of the letter of demand, showing the following: xxx."
>
> Revenue Memorandum Order No. 37-94:
>
> "C. *Review of Reports of Investigation and Service of Pre-assessment Notices.* –
>
> xxx xxx xxx
>
> 2. The aforementioned reviewing offices, after having reviewed the report of investigation, shall send a pre-assessment notice to the taxpayer, indicating therein the basis of the assessment, and a definite time frame within which he may protest the same if he is not agreeable. If the taxpayer files his protest within the period prescribed in the aforementioned notice, the same reviewing offices shall likewise decide whether the protest conforms with existing requirements and whether or not to give due course to the protest. The reviewing office shall then inform the taxpayer in writing of the result of the resolution of his protest.
>
> If the pre-assessment notice is not protested within the prescribed period, the reviewing office shall then issue a letter of demand and assessment notice to the taxpayer."

The foregoing provisions of law and regulations clearly illustrate the process to be followed in assessment cases in order that the taxpayer will be afforded due process.

In summary, after the Revenue Officer conducts a re-investigation of the records of a taxpayer for alleged deficiency tax liability, the taxpayer shall be notified in writing of the findings for purposes of an Informal Conference. If there exists a sufficient basis to assess the taxpayer of deficiency tax, a Pre-Assessment Notice shall be issued and sent to the taxpayer. The taxpayer is then given fifteen days to make a Reply and he is also permitted to examine the records and present his arguments in writing. If the taxpayer fails to respond to the PAN, the taxpayer shall then be sent a Formal Letter of Demand and Assessment Notice, which shall state the facts and the law on which the assessment was based. The taxpayer may file a protest based on such assessment within thirty (30) days. After filing the protest, the taxpayer must submit the relevant supporting documents within sixty (60) days. Otherwise, the assessment shall become final and executory.

As mentioned earlier, petitioner received the PAN on September 9, 2008, then petitioner filed its protest on September 24, 2008. On September 25, 2008, petitioner received the FAN with Audit Result/Assessment Notice as well as a letter from respondent addressing the matters raised in petitioner's Reply to the PAN. Thereafter, on October 24, 2008, petitioner filed its Request of Reconsideration/Protest against the FAN, which according to petitioner, respondent failed to act upon.

Applying the above-quoted provisions of law and rules to the instant case, this Court finds that respondent has substantially complied with the requirements of due process, considering that not only was petitioner given the opportunity to refute the PAN issued but respondent likewise addressed and answered petitioner's Reply to the PAN. Petitioner was also able to exercise its option to file a Protest to the FAN issued by respondent although it was not acted upon within the period prescribed by law.

It has been held that the essence of due process is found in the reasonable opportunity to be heard and submit any evidence one may have in support of one's defense. What the law proscribes is the lack of opportunity to be heard. As long as the party is given the opportunity to defend his interests in due course, he would have no reason to complain, for it is this opportunity to be heard that makes up the essence of due process.[9]

Petitioner cannot claim therefore that it was denied due process. The fact that the proposed assessment was discussed by respondent with petitioner in detail prior to the issuance of notice of informal conference proves that petitioner was properly notified and given the opportunity to be heard which is the essence of due process.

[9] *Estares, et al. vs. Court of Appeals, et al.*, G.R. No. 144755, June 8, 2005

Thereafter, petitioner filed its Protest to the assailed FAN. Clearly, petitioner was accorded due process.

Proceeding to the other issues at hand, petitioner contends that the right of respondent to assess it of deficiency VAT for the second, third, and fourth quarters of the fiscal year 2005 had already lapsed pursuant to Section 203 of the NIRC of 1997, which states:

> "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."

Corollary thereto, Section 114(A) of the NIRC of 1997 provides that:

> "SEC. 114. *Return and Payment of Value-Added Tax*.-
>
> (A) *In General.* — Every person liable to pay the value-added tax imposed under this Title shall file a quarterly return of the amount of his gross sales or receipts within twenty-five (25) days following the close of each taxable quarter prescribed for each taxpayer: *Provided, however*, That VAT-registered persons shall pay the value-added tax on a monthly basis.
>
> xxx xxx xxx"

Based on the foregoing, the three-year period to assess commences from the date of actual filing of the return or from the last day prescribed by law for the filing of such return, whichever comes later. In case of VAT, the filing of Quarterly VAT Returns must be made within twenty-five (25) days after the close of each taxable quarter prescribed for each taxpayer. Hence, if the return was filed earlier than the last day allowed by law, the period to assess shall still be counted from the last day prescribed by law for filing of the return. However, if the return was filed beyond the period prescribed by law, the three-year period shall be counted from the day the return was filed.

Applying Section 114(A) of the NIRC of 1997, respondent, therefore, had until the following dates within which to assess petitioner for deficiency VAT:

Exh.	Period Covered	Quarter	Date of Filing of Return	Last Day to File Return	Last Day to Assess
C	Sept. 1 to Nov. 30, 2004	2nd Qtr FY 2005	Dec. 28, 2004	Dec. 25, 2004	Dec. 28, 2007
D	Dec. 1, 2004 to Feb. 28, 2005	3rd Qtr FY 2005	Mar. 28, 2005	March 25, 2005	March 28, 2008
E	Mar. 1 to May 31, 2005	4th Qtr FY 2005	Aug. 24, 2005	June 25, 2005	Aug. 24, 2008
F	Jun. 1 to Aug. 31, 2005	1st Qtr FY 2006	Sep. 28, 2005	Sep. 25, 2005	Sep. 28, 2008

It must be pointed out that contrary to respondent's argument, petitioner's amendment of its Quarterly VAT Return for the **second quarter of fiscal year 2007**[10] has **no bearing** on the prescription period to assess petitioner of deficiency VAT for the period covering September 1, 2004 to August 31, 2005.

[10] Exhibit "11"

Considering that the Preliminary Assessment Notice[11], and the Final Assessment Notice with Audit Result/Assessment Notice[12], and Final Decision on Disputed Assessment[13] for deficiency VAT covering the period September 1, 2004 to August 31, 2005 were issued only on September 9, 2008, September 25, 2008 and September 10, 2009, respectively, the deficiency VAT assessment for the second, third, and fourth quarters of fiscal year 2005 is already barred by prescription.

Petitioner further asserts that even if its valid input tax for the period covered by the assessment only amounts to P2,424,460.75, it has sufficient input tax carried over from previous quarters in the amount of P31,915,642.26 to cover its output tax liability for the same period. On the other hand, respondent states that in the Final Decision on Disputed Assessment it issued, petitioner's input taxes from previous quarters were not ignored but was in fact validated since the excess input tax amounting to P23,125,125.98 was carried over to the succeeding quarters (BIR Form 2550Q from September 1, 2005 to November 30, 2005).[14]

This Court finds merit in petitioner's arguments.

As may be inferred from respondent's statements, respondent admits that input taxes carried over from previous quarters amounting

[11] Exhibit "J" and Exhibit "4"
[12] Exhibits "G", "H", and Exhibit "7"
[13] Exhibit "12"
[14] Page 2, Exhibit "12"

to P31,915,642.26 were valid and that out of the said amount, only the amount of P23,125,125.98 was carried over to the succeeding quarters.

An examination of petitioner's Quarterly VAT Returns for the period from September 1, 2004 to August 31, 2005 shows that the input tax carried over to the succeeding quarters is computed as follows:

Input tax carried over from previous quarters		P	31,915,642.26
Add: Total input tax for the period			19,876,586.89
Total available input tax		P	51,792,229.15
Less: Output tax for the period	P 5,814,057.53		
VAT Refund/TCC Claimed	22,853,045.64		28,667,103.17
Input tax carried over to succeeding quarter		**P**	**23,125,125.98**

In fine, the amount of P23,125,125.98 carried over to the succeeding quarter represents excess unutilized input taxes. Thus, petitioner cannot be assessed of any deficiency output VAT for the period covering September 1, 2004 to August 31, 2005. On this basis alone, respondent's deficiency VAT assessment should be cancelled.

Finally, with respect to the issue of imposition of a compromise penalty in the amount of P30,000.00, respondent argues that such imposition was due to petitioner's failure to secure authority to use loose leaf invoices for its Pulilan and Villasis branches.[15]

Respondent's imposition of compromise penalty is not proper. This Court will not compel the taxpayer to pay the compromise penalty because by its very nature, it implies a mutual agreement between the

---

[15] Page 2, Exhibit "12"

parties in respect to the thing or subject matter which is so compromised, and the choice of paying or not paying it distinctly belongs to the taxpayer.[16] The imposition of the compromise penalty without the conformity of the taxpayer is illegal and unauthorized.[17] Since respondent failed to show that petitioner agreed to the imposition of the compromise penalty, the compromise penalty will be deleted.

WHEREFORE, the instant Petition for Review is hereby **GRANTED.** Accordingly, the deficiency VAT assessment in the amount of P5,469,566.85 is hereby **CANCELLED** or **WITHDRAWN** for being erroneous and without basis.

SO ORDERED.

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

WE CONCUR:

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

CAESAR A. CASANOVA
Associate Justice

---

[16] *The Philippines International Fair, Inc. vs. The Collector of Internal Revenue, et. al.*, G.R. Nos. L-12928 and L-12932, March 31, 1962

[17] *Commissioner of Internal Revenue vs. Lianga Bay Logging Co., Inc., et al.*, G.R. No. 35266, January 21, 1991

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 case was assigned to the writer of the opinion of the Court's Division.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice
Chairperson, 2nd Division