REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
Quezon City

Third Division

iSCALE SOLUTIONS, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE, REGIONAL DIRECTOR GLEN A. GERALDINO & REVENUE DISTRICT OFFICER MAHINARDO G. MAILIG,
Respondents.

CTA CASE NO. 9845

Members:
UY, *Chairperson,*
RINGPIS-LIBAN, *and*
MODESTO-SAN PEDRO, *JJ.*

Promulgated:
JUN 30 2021
3:42 p.m.

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DECISION

RINGPIS-LIBAN, J.

STATEMENT OF THE CASE

On June 4, 2018, petitioner iScale Solutions, Inc. filed a *Petition for Review* praying that the Court:

1. Issue a Temporary Restraining Order against respondents from issuing a *Closure Order* under *Oplan Kandado* against petitioner;

2. Grant the petition for *Writ of Preliminary Prohibitory Injunction* enjoining respondents from issuing a *Closure Order* under *Oplan Kandado* against petitioner;

3. Declare as null and void the issuance of the *48-Hour Notice* and *Five (5)-Day VAT Compliance Notice*; and

4. Nullify the VAT assessment sought to be collected from petitioner under the *Five (5)-Day VAT Compliance Notice.*[1]

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[1] Statement of the Case, Pre-Trial Order dated January 23, 2019, Docket – Vol. 1, p. 342.

THE PARTIES

Petitioner is a corporation duly organized and existing under the laws of the Philippines, with principal business address at 7th Floor, Salustiana D. Ty Tower, 104 Paseo de Roxas, Makati City.[2] According to its General Information Sheet submitted to the Bureau of Internal Revenue (BIR), the primary purpose of petitioner is to engage in the business of creating, designing, inventing and developing software and other computer applications, and supplying, transferring, assigning, selling and/or exporting to foreign clients such software and other computer applications created, designed, invented and developed by the corporation.[3]

It is a registered taxpayer under Certificate of Registration No. OCN 9RC0000706339E dated October 12, 2016, with Taxpayer's Identification Number (TIN) 008-106-923-00000.[4]

Respondent Commissioner of Internal Revenue has the power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, and other matter arising under the National Internal Revenue Code (NIRC) or other laws or portions thereof administered by the BIR.[5]

Respondent Glen A. Geraldino is the Regional Director (RD) of Revenue Region No. 8 – Makati City, and respondent Mahinardo G. Mailig is the Revenue District Officer (RDO) of Revenue District No. 47-East Makati, both of whom may be served with copies of all pleadings, motions, orders, notices and other court processes at BIR Building, 313 Sen. Gil J. Puyat Avenue, Makati City.[6]

THE FACTS OF THE CASE

A tax audit and investigation for taxable year 2016 against petitioner for the year 2016 covering all internal revenue taxes was conducted by Revenue Officer (RO) Melissa Baes and Group Supervisor (GS) Rebecca Pandapatan, pursuant to *Letter of Authority* (LOA) SN: eLA201500049326 dated June 28, 2017.[7]

During the conduct of tax audit and investigation against petitioner for the year 2016 covering all internal revenue taxes, RO Baes and GS Pandapatan

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[2] Par. 8, Summary of Admitted Facts, *Joint Stipulation of Facts and Issues* (JSFI), Docket – Vol. 1, p. 236; Exhibit "P-6", Docket – Vol. 1, p. 29.
[3] Par. 19, Summary of Admitted Facts, JSFI, Docket – Vol. 1, p. 238.
[4] Exhibit "P-7", Docket – Vol. 1, p. 474; Exhibit "P-15-G".
[5] Par. 9, Summary of Admitted Facts, JSFI, Docket – Vol. 1, p. 236.
[6] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. 1, p. 236.
[7] Pars. 1, 2, and 11, Summary of Admitted Facts, JSFI, Docket – Vol. 1, pp. 234 to 236; Exhibit "P-8", Docket – Vol. 1, p. 475; Exhibit "R-1", Docket – Vol. 2, p. 567.

discovered that petitioner failed to issue official receipts.[8] With the regular tax audit conducted against petitioner, however, only an unofficial *Preliminary Summary of Tax Deficiencies* was issued against petitioner.[9] Furthermore, there was no *Mission Order* issued for the conduct of *Oplan Kandado* against petitioner.[10]

On February 21, 2018, petitioner received a *48 Hour Notice* dated February 9, 2018 signed by respondent RD Geraldino, informing the former of its alleged failure to comply with value-added tax (VAT) registration requirements, by failing to issue sales invoices or receipts, and to reflect the correct taxable sales/receipts for the period January 1, 2016 to December 31, 2016.[11] The said *48-Hour Notice* further specifically informed petitioner that closure of its business could result, pursuant to Section 115 of the 1997 Tax Code, as implemented by Revenue Memorandum Order (RMO) No. 3-2009 dated January 15, 2009, otherwise known as *Oplan Kandado*.[12]

Through its letter dated February 22, 2018, petitioner admitted its violation of Sections 113 and 237 of the NIRC of 1997, as amended, and informed the Bureau that it had corrected its VAT Returns to reflect the proper discrepancy in revenue.[13] Attached to petitioner's letter and also submitted therewith is a *Schedule of ORs issued for 2016*.[14]

Petitioner's explanation, however, was rejected through the BIR's letter dated March 12, 2018 signed by then RDO Florante R. Aninag, Revenue District No. 47 – East Makati, pursuant to paragraph 3 of Section 6(A) of the NIRC of 1997, as amended, in relation to Revenue Regulations (RR) No. 12-99. The said letter further warned petitioner that failure to pay the deficiency VAT would lead to the issuance of a *Five (5)-Day VAT Compliance Notice* pursuant to the *Oplan Kandado* program.[15] However, the same letter did not specify what amount of VAT was payable, nor how the amount was arrived at.[16]

In reply to the said BIR letter, petitioner, via the letter dated March 19, 2018, explained that it misunderstood the *48 Hour Notice* dated February 20, 2018, believing that the compliance with the notice would be the amendment of its VAT Returns for the period which it had done so.[17]

[8] Par. 5, Summary of Admitted Facts, JSFI, Docket – Vol. 1, p. 235.

[9] Pars. 4 and 22, Summary of Admitted Facts, JSFI, Docket – Vol. 1, pp. 235, and 239 to 240. respectively; Exhibit "P-9", Docket – Vol. 1, pp. 477 to 478; Exhibit "R-5", Docket – Vol. 2, pp. 569 to 570.

[10] Par. 21, Summary of Admitted Facts, JSFI, Docket – Vol. 1, p. 239.

[11] Pars. 7 and 12, Summary of Admitted Facts, JSFI, Docket – Vol. 1, pp. 235 and 236 to 237, respectively; Exhibit "P-4", Docket – Vol. 1, p. 471; Exhibit "R-8", Docket – Vol. 2, p. 574.

[12] Par. 12, Summary of Admitted Facts, JSFI, Docket – Vol. 1, pp. 236 to 237.

[13] Par. 13, Summary of Admitted Facts, JSFI, Docket – Vol. 1, p. 237; Exhibit "P-10", Docket – Vol. 1, p. 479; Exhibit "R-9", Docket – Vol. 2, p. 575.

[14] Par. 24, Summary of Admitted Facts, JSFI, Docket – Vol. 1, p. 242.

[15] Par. 14, Summary of Admitted Facts, JSFI, Docket – Vol. 1, p. 237; Exhibit "P-11", Docket – Vol. 1, pp. 480 to 481; Exhibit "R-10", Docket – Vol. 2, pp. 576 to 577.

[16] *Id.*

[17] Par. 15, Summary of Admitted Facts, *JSFI*, Docket – Vol. 1, p. 237; Exhibit "P-12", Docket – Vol. 1, p. 482.

Nonetheless, the BIR's response thereto came in the form of the *Five (5)-Day VAT Compliance Notice* dated March 18, 2018, which was received by petitioner on April 2, 2018.[18]

Through its letter dated April 5, 2018 addressed to respondent RD Geraldino, as Chairman of the Review Board under *Oplan Kandado*, petitioner, through counsel, submitted photocopies of the official receipts issued to its non-resident clients in compliance with the BIR letter dated March 12, 2018.[19] Petitioner also set forth its argument, contesting what it presumed to be the deficiency VAT assessment, arguing, in gist, that the non-issuance of official receipts on payments received from VAT zero-rated transactions, does not result in the treatment of such sales as VAT-taxable.[20]

The BIR replied through its letter dated April 18, 2018 signed by respondent RDO Mailig which was received by petitioner on May 3, 2018. The said letter, in gist, denied the arguments presented in petitioner's letter dated April 5, 2018, reiterating the demand to pay the deficiency VAT, and warning with the issuance of a Closure Order.[21] Still, no detail was ever shown as to how the said deficiency arose or computed.[22]

Parenthetically, as of the time of filing of the instant *Petition for Review*, the BIR has yet to issue a formal and final demand for the payment of tax deficiency for the year 2016 covering all internal revenue taxes.[23]

On June 4, 2018, petitioner filed this *Petition for Review with Petition for Writ of Preliminary Prohibitory Injunction*.[24] This case was originally raffled to the Court's First Division.

Thereafter, the Court set and held a hearing for the *Petition for Writ of Preliminary Prohibitory Injunction* on June 21, 2018, which was treated as a *Motion for Suspension of Collection of Taxes*.[25] At the said hearing, petitioner: (1) presented Ms. Lunar Rosario,[26] petitioner's Financial Controller, and (2) Mr. Ibarra F. Miranda,[27] Paralegal of CMB/P Law, in support of the said *Motion*; and formally offered Exhibits "P-1" and "P-2", to which respondents did not

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[18] Pars. 7 and 16, Summary of Admitted Facts, JSFI, Docket – Vol. 1, pp. 235 and 237, respectively; Exhibit "P-5", Docket – Vol. 1, p. 472.

[19] Par. 17, Summary of Admitted Facts, JSFI, Docket – Vol. 1, p. 238; Exhibit "P-13", Docket – Vol. 1, pp. 483 to 484; Exhibit "R-13", Docket – Vol. 2, pp. 581 to 582.

[20] *Id.*

[21] Pars. 6 and 18, Summary of Admitted Facts, JSFI, Docket – Vol. 1, pp. 235 and 238, respectively; Exhibit "P-3", Docket – Vol. 1, pp. 469 to 470; Exhibit "R-14", Docket – Vol. 2, pp. 583 to 584.

[22] *Id.*

[23] Par. 3, Summary of Admitted Facts, JSFI, Docket – Vol. 1, p. 235.

[24] Docket – Vol. 1, pp. 10 to 24.

[25] *Notice of Hearing* dated June 19, 2018, Docket- Vol. 1, p. 52; Minutes of the hearing held on, and Order dated, June 21, 2018, Docket – Vol. 1, pp. 54 to 59.

[26] Exhibit "P-1", Docket – Vol. 1, pp. 43 to 47; Minutes of the hearing held on, and Order dated, June 21, 2018, Docket – Vol. 1, pp. 54 to 59.

[27] Exhibit "P-2", Docket – Vol. 1, pp. 48 to 51; Minutes of the hearing held on, and Order dated, June 21, 2018, Docket – Vol. 1, pp. 54 to 59.

interpose any objection thereto. In the same hearing, the Court admitted the said Exhibits.

Respondent's *Comment/Opposition to the Petition for the Issuance of Writ of Preliminary Injunction* was posted on June 26, 2018;[28] while petitioner's *Reply to Opposition to the Petition for the Issuance of Writ of Preliminary Injunction* was filed on July 6, 2018.[29]

On July 10, 2018,[30] respondent filed his Answer.

In the Resolution dated August 6, 2018,[31] petitioner's *Petition for Writ of Preliminary Prohibitory Injunction,* which was treated as a *Motion for Suspension of Collection of Taxes*, was granted, subject to the posting of the required cash or surety bond.

On August 20, 2018, petitioner subsequently filed its *Omnibus Motion for: 1) Extension of Time to Comply with the Submission of a Surety Bond 2) Reduction of the Amount to be Co*[n]*vered by a Bond.*[32] Thereafter, on September 10, 2018, petitioner also filed its *Motion for Additional Extension of Time to Comply with the Submission of Surety Bond,*[33] which the Court granted in the interest of justice, via the Order dated September 17, 2018.[34]

Respondent filed his *Manifestation* as regards petitioner's motion for extension,[35] but did not comment on the motion for reduction of the amount to be conveyed by a bond.[36]

Pursuant to the Court's Order dated September 27, 2018, the instant case was transferred to this Court's Third Division.[37]

The pre-trial conference of this case was set and held on October 16, 2018.[38] Prior thereto, *Petitioner's Pre-Trial Brief* was submitted on October 3, 2018;[39] while *Respondent's Pre-Trial Brief* was filed on October 12, 2018.[40]

The *BIR Records* were submitted on October 19, 2018.[41]

[28] Docket – Vol. 1, pp. 61 to 65.
[29] Docket – Vol. 1, pp. 72 to 77.
[30] Docket – Vol. 1, pp. 96 to 106.
[31] Resolution dated August 6, 2018, Docket – Vol. 1, pp. 109 to 117.
[32] Docket – Vol. 1, pp. 120 to 123.
[33] Docket – Vol. 1, pp. 126 to 128.
[34] Docket – Vol. 1, p. 131.
[35] Docket – Vol. 1, pp. 132 to 134.
[36] Refer to Records Verification Report dated October 9, 2018 issued by the Judicial Records Division of this Court, Docket – Vol. 1, p. 204.
[37] Order dated September 27, 2018, Docket – Vol. 1, pp. 135.
[38] Resolution dated August 9, 2018, Docket – Vol. 1, p. 119; Minutes of the hearing held on, and Order dated, October 16, 2018, Docket – Vol. 1, pp. 219, and 221 to 223, respectively.
[39] Docket – Vol. 1, pp. 140 to 152.
[40] Docket – Vol. 1, pp. 208 to 218.
[41] *Compliance* dated October 19, 2018, Docket – Vol. 1, pp. 224 to 225.

Subsequently, the parties submitted their *Joint Stipulation of Facts and Issues* (JSFI) on November 15, 2018.[42] The said JSFI was admitted and approved by the Court in the Resolution dated December 6, 2018,[43] deeming the termination of the Pre-Trial. Subsequently, the Court issued the Pre-Trial Order dated January 23, 2019.[44]

In the Resolution dated January 24, 2019,[45] the Court, *inter alia*, (1) set the preliminary hearing to determine whether the posting of a cash bond or surety bond provided under Section 11 of Republic Act (RA) No. 1125, as amended by RA Nos. 9282 and 9503, can be reduced to restrain the collection of deficiency VAT against petitioner; and (2) held in abeyance the resolution of petitioner's *Motion for Reduction of the Amount to be Covered by a Bond.*

In support of its *Motion for Reduction*, petitioner presented Mr. Edward C. Santos, petitioner's External Auditor.[46] Respondent's counsel manifested that he would no longer file a comment/opposition to the said motion.[47]

In the Resolution dated May 14, 2019,[48] petitioner's *Motion for Reduction of the Amount to be Covered by a Bond* was denied by the Court for lack of merit.

Anent the main case, petitioner also presented its documentary and testimonial evidence. Relative thereto, petitioner offered the testimonies of the following individuals, namely: (1) Mr. Lunar Rosario,[49] petitioner's Financial Controller; (2) Mr. Neil U. Sison,[50] the Court's duly commissioned Independent Certified Public Accountant (ICPA);[51] and (3) Mr. Efren Lumapag, Jr.,[52] Business Manager of the Bank of the Philippine Islands.

In the interim, the Court received the *Report* of the ICPA on March 14, 2019.[53]

Petitioner's Formal Offer of Evidence was filed on August 29, 2019.[54] Respondent posted his *Comment (to Petitioner's Formal Offer of Evidence dated August*

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[42] Docket – Vol. 1, pp. 234 to 255.
[43] Docket – Vol. 1, p. 284.
[44] Docket – Vol. 1, pp. 342 to 353.
[45] Resolution dated January 24, 2019, Docket – Vol. 1, pp. 355 to 360.
[46] *Judicial Affidavit of Edward C. Santos*, Docket – Vol. 1, pp. 367 to 370; Minutes of the hearing held on, and Order dated, March 12, 2019, Docket – Vol. 1, pp. 393 to 395.
[47] Minutes of the hearing held on, and Order dated, March 12, 2019, Docket – Vol. 1, pp. 393 to 395.
[48] Docket – Vol. 1, pp. 435 to 440.
[49] Exhibit "P-17", Docket – Vol. 1, pp. 515 to 526; Minutes of the hearing held on, and Order dated, March 12, 2019, Docket – Vol. 1, pp. 393 to 395.
[50] Exhibit "P-19", Docket – Vol. 1, pp. 536 to 545; Minutes of the hearing held on, and Order dated, May 14, 2019, Docket – Vol. 1, pp. 441 to 443; Minutes of the hearing held on, and Order dated, July 30, 2019, Docket – Vol. 1, pp. 444 to 446.
[51] *Oath of Commission* dated February 12, 2019, Docket – Vol. 1, p. 362; Minutes of the hearing held on, and Order dated, February 12, 2019, Docket – Vol. 1, pp. 361, and 363 to 364, respectively.
[52] Exhibit "P-18", Docket – Vol. 1, pp. 527 to 531; Minutes of the hearing held on, and Order dated, July 30, 2019, Docket – Vol. 1, pp. 444 to 446.
[53] Docket – Vol. 1, pp. 396 to 404.
[54] Docket – Vol. 1, pp. 450 to 459.

27, 2019 received by Respondent on August 28, 2019) on September 12, 2019.[55] In the Resolution dated October 9, 2019,[56] petitioner's Exhibits were admitted.

For his part, respondent likewise presented his documentary and testimonial evidence. He proffered the testimony of Ms. Melissa S. Baes,[57] a Revenue Officer of the BIR.

Respondent's Formal Offer of Evidence (With Attached Respondent's Documentary Exhibits) was filed on December 5, 2019.[58] Petitioner submitted its *Comment/Opposition to Respondent's Formal Offer of Evidence* on December 13, 2019.[59] In the Resolution dated March 3, 2020,[60] respondent's Exhibits were admitted, *except* for the following:

1) Exhibits "R-2-A", "R-3", and "R-4", for not being found in the records; and
2) Exhibits "R-12" and "R-12-A" for failure of the same to correspond with the documents actually marked.

The *Memorandum for Respondent* was posted on July 1, 2020,[61] while *Memorandum for Petitioner* was filed on July 10, 2020.[62]

On July 16, 2020, this case was deemed submitted for decision.[63]

THE ISSUES RAISED BY THE PARTIES

The parties stipulated the following issues for this Court's resolution, to wit:

> "1. Whether or not the conduct of Oplan Kandado against Petitioner is procedurally correct.
>
> 2. Whether or not Petitioner is liable to pay the VAT deficiency.
>
> 3. Whether or not this Honorable Court has jurisdiction over the instant petition."[64]

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[55] Docket – Vol. 2, pp. 549 to 550.
[56] Docket – Vol. 2, pp. 555 to 556.
[57] Exhibit "R-16", Docket – Vol. 1, pp. 259 to 281; Minutes of the hearing held on, and Order dated, November 26, 2019, Docket – Vol. 2, pp. 557 and 558 to 558-A.
[58] Docket – Vol. 2, pp. 559 to 566.
[59] Docket – Vol. 2, pp. 591 to 594.
[60] Docket – Vol. 2, pp. 599 to 601.
[61] Docket – Vol. 2, pp. 608 to 628.
[62] Docket – Vol. 2, pp. 631 to 649.
[63] Resolution dated July 16, 2020, Docket – Vol. 2, p. 654.
[64] Stipulation of Issues, JSFI, Docket – Vol. 1, p. 243.

Petitioner's arguments:

Petitioner argues that the conduct of *Oplan Kandado* against it is procedurally infirmed and the issuance of the *48-Hour Notice* and *Five (5)-Day VAT Compliance Notice* are null and void; that petitioner is not liable for deficiency VAT, for failure to issue official receipts and invoices on its zero-rated transactions; that respondents have not been able to adduce evidence in support of its computation of deficiency VAT, and thus, any assessment thereon has no basis; and that this Court has exclusive appellate jurisdiction to review the decision of respondent in cases involving disputed assessments, as well as other matters arising under the Tax Code.

Respondents' counter-arguments:

Respondents aver that this Court has no jurisdiction over this case for lack of cause of action; that petitioner failed to exhaust administrative remedy; that the recommendation for *Oplan Kandado* has factual and legal bases; that the *48-Hour Notice* and *Five (5)-Day VAT Compliance Notice* are valid; that covert surveillance is not necessary in this case; and that petitioner is liable for deficiency VAT for failure to issue official receipts and invoices.

THE RULING OF THE COURT

The instant *Petition for Review* is meritorious.

This Court has jurisdiction to entertain the present appeal.

The jurisdiction of this Court is not limited to cases involving decisions or inactions of the CIR on disputed assessments but also decisions or inactions over "other matters arising under the Tax Code, as amended." Section 7(a)(1) of Republic Act (RA) No. 1125,[65] as amended by RA No. 9282,[66] provides as follows:

> "SEC. 7. *Jurisdiction.* – **The CTA shall exercise**:
>
> (a) **Exclusive appellate jurisdiction to review by appeal, as herein provided:**

[65] AN ACT CREATING THE COURT OF TAX APPEALS.
[66] AN ACT EXPANDING THE JURISDICTION OF THE COURT OF TAX APPEALS (CTA), ELEVATING ITS RANK TO THE LEVEL OF A COLLEGIATE COURT WITH SPECIAL JURISDICTION AND ENLARGING ITS MEMBERSHIP, AMENDING FOR THE PURPOSE CERTAIN SECTIONS OR REPUBLIC ACT NO. 1125, AS AMENDED, OTHERWISE KNOWN AS THE LAW CREATING THE COURT OF TAX APPEALS, AND FOR OTHER PURPOSES.

(1) **Decisions of the Commissioner of Internal Revenue in cases involving** disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or **other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;**" *(Emphases and underscoring supplied)*

In *Philippine Journalists, Inc. vs. Commissioner of Internal Revenue,*[67] the Supreme Court held as follows, to wit:

"**The appellate jurisdiction of the CTA is not limited to cases which involve decisions of the Commissioner of Internal Revenue on matters relating to assessments or refunds. The second part of the provision covers other cases that arise out of the NIRC or related laws administered by the Bureau of Internal Revenue. The wording of the provision is clear and simple.** It gives the CTA the jurisdiction to determine if the warrant of distraint and levy issued by the BIR is valid and to rule if the Waiver of Statute of Limitations was validly effected.

This is not the first case where the CTA validly ruled on issues that did not relate directly to a disputed assessment or a claim for refund. In *Pantoja v. David,*[68] we upheld the jurisdiction of the CTA to act on a petition to invalidate and annul the distraint orders of the Commissioner of Internal Revenue. Also, in *Commissioner of Internal Revenue v. Court of Appeals,*[69] the decision of the CTA declaring several waivers executed by the taxpayer as null and void, thus invalidating the assessments issued by the BIR, was upheld by this Court." *(Emphasis supplied)*

Based on the foregoing provision and jurisprudence, this Court has jurisdiction over the decisions of respondent in cases, not only those *"involving disputed assessments, and refunds of internal revenue taxes, fees or other charges, penalties in relation thereto"*, but also regarding *"other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue."*

In this case, it is apparent that the issuance of the subject *48-Hour Notice* and *5-day VAT Compliance Notice*, arose out of respondents' implementation of Sections 113, 237, and 114 of the NIRC of 1997, as amended. As such, this Court has jurisdiction over the said issuances.

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[67] G.R. No. 162852, December 16, 2004.
[68] 111 Phil. 197 (1961).
[69] G.R. No. 115712, February 25, 1999.

Respondent Commissioner claims that this Court has no jurisdiction over the case because there is no Closure Order yet that can be the subject of review by this Court; that the the BIR Letter dated April 18, 2018 is not the respondent's final decision on petitioner's Letter dated April 5, 2018 since the respondent is still open to the possibility of the case being elevated to the Office of the Regional Director for review of the said BIR Letter.

A reading of RMO No. 3-2009,[70] however, does not provide any remedies of appeal to the CIR should the response of the Regional Director be adverse to the taxpayer. The next step would be the issuance of a Closure Order.

To quote the pertinent provisions of RMO No. 3-2009 *viz*:

"V. GUIDELINES AND PROCEDURES

A. Surveillance Activities

xxx xxx xxx

B. Suspension or Temporary Closure of Business

xxx xxx xxx

3. Confrontational Requirements

3.1. Consistent with the requirements of due process, the report of the handling Revenue Officer shall be concurred in by the Head of the investigating office. The findings of the investigating office shall be reviewed by a Review Board composed of the following:

3.1.1 *For Regional Cases. – The Regional Review Board shall be composed of the following revenue officials:*

Chairman : Regional Director
Members : Chief, Assessment Division
Chief, Legal Division
RDO having jurisdiction over the taxpayer

xxx xxx xxx

The Review Boards must act on reports within five (5) days from receipt thereof. The Review Board shall convene, upon the initiative of the chairperson, whenever necessary.

If a report is approved by *a* Review Board, the concerned Regional Director or the ACIR, Enforcement Service/LT, as the case may be, ***shall in his capacity as Chair of the***

[70] Amendment and Consolidation of the Guidelines in the Conduct of Surveillance and Stock-Taking Activities, and the Implementation of the Administrative Sanction of Suspension and Temporary Closure of Business.

Review Board, sign and issue to the taxpayer concerned a Forty-Eight (48) Hour Notice, requiring him to explain under oath within forty eight (48) hours why he should not be dealt with administratively, by suspension of business or temporary closure of his establishment, and/or criminally, for violation of pertinent provisions of the Tax Code.

xxx xxx xxx

3.3 If a Review Board deems it necessary pursuant to administrative or criminal action against a non-compliant taxpayer, it shall cause the preparation of a 5-Day VAT Compliance Notice (VCN) [Annex "D"], which shall be issued in lieu of the 10-Day VCN, to expedite the resolution of the case at hand. The 5-day VCN shall be signed by the Chair of the Review Board concerned.

3.3.1. The 5-Day VCN, with details of the findings of the investigating office as approved by the Review Board, shall be served immediately to the taxpayer by the Regional Director/ACIR-LTS/ACIR-Enforcement Service, as the case may be.

3.3.2 The 5-Day VCN shall likewise state the particular provision(s) of the NIRC that was/were violated by the taxpayer, for which rectification must be done, including payment of the required deficiency taxes and penalties due therefor.

3.3.3 The taxpayer may again refute the findings of the BIR within two (2) days from receipt of the VCN, and submit his response to the Review Board.

3.3.4 The Review Board shall, in turn immediately transmit the taxpayer's response to the Investigating Office concerned, for evaluation.

3.3.5 The Investigating Office concerned shall, within three (3) days from receipt thereof, evaluate, a taxpayer's response to a 5-Day VCN, and prepare the corresponding response thereto. The response letter shall then be signed by the Chair of the Review Board.

> *3.3.6 Upon receipt by the BIR of the protest, the running of the five (5)- day compliance period is deemed suspended, and shall resume only upon receipt by the taxpayer of the BIR's resolution on the protest.*

C. Enforcement and Execution

> *1. In the event that a taxpayer –*
>
> - *Refuses, neglects or fails to submit within the prescribed period, a response letter to a VCN;*
> - *Submitted a response that was later found to be insufficient; or*
> - *Refuses, neglects or fails to comply with the terms of the 5-Day VCN,*

The Review Board concerned shall prepare a memorandum report recommending the closure of the establishment, for the approval of the Commissioner. Said report shall include the proposed Closure Order (Annex "E"), supported by the necessary documentation, for the approval and signature of the Commissioner.

The Closure Order shall be prepared in quintuplicate (five[5] copies), to be distributed as follows:

xxx xxx xxx

> *2. The signed Closure Order shall be returned by the Office of the Commissioner, together will all supporting documents, to the Review Board concerned, for immediate service to the non-compliant taxpayer.*
>
> *3. The service of the Closure Order shall be accompanied by a copy of the memorandum report of the Review Board concerned, duly approved by the Commissioner, indicating therein the basis for the Closure."*

The BIR Letter dated April 18, 2018 is unequivocal. The failure of the taxpayer to pay will lead to the issuance of a Closure Order. To quote the letter:

> "xxx xxx xxx
>
> Applying the foregoing provisions of the law and the corresponding court rulings in your case, we are unfortunately precluded from accepting and/or recognizing your dispute. Please be further informed that failure on your part to pay the deficiency Value Added Tax will lead us to the recommendation of the issuance of the CLOSURE ORDER, pursuant to Section 115 of the National Internal Revenue Code, as implemented by Revenue Memorandum Order No. 3-2009 dated January 15, 2009, otherwise known as "OPLAN KANDADO".

Petitioner should not have to wait for the issuance of a Closure Order before elevating the case to this Court. As previously stated, since the "Oplan Kandado" is an implementation of Sections 113, 237 and 114 of the NIRC of 1997, as amended, this Court has jurisdiction over the same.

Anent the timeliness of the Petition, a taxpayer adversely affected by a decision or inaction of the CIR should appeal to this Court within thirty (30) days from receipt of the decision or after the expiration fixed by law for action as referred to in Section 7(a)(1) of the Tax Code, as amended.[71] Notably, RMO No. 3-09 requires the Review Board to immediately transmit the taxpayer's response to the 5-Day VCN to the Investigating Office concerned and said office shall, within three (3) days from receipt thereof, evaluate the taxpayer's response and prepare the response letter to be signed by the Chair of the Review Board.[72] RMO No. 3-09 further provides that upon receipt by the BIR of the protest, the running of the five (5)-day compliance period is deemed suspended and shall resume only upon receipt by the taxpayer of the BIR's resolution on the protest. An RMO, as it has the force and effect of law, has been equated by jurisprudence with laws in general and tax laws in particular.[73] Thus, the period fixed in RMO No. 3-09 has the force and effect of law.

In this case, petitioner filed a Protest Letter to respondent on April 5, 2018, in response to the 5-Day VCN received on April 2, 2018. The BIR's Reply Letter dated April 8, 2018 was received by petitioner on May 3, 2018. The present Petition was filed on June 4, 2018,[74] thus, the Petition for Review was filed on time.

The issuance of the subject 48-Hour Notice and 5-Day VAT Compliance Notice violated petitioner's constitutional right to due process.

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[71] Republic Act No. 1125, as amended.
[72] RNO No. 3-09 dated 15 January 2009.
[73] *Nanox Philippines, Inc. v. CIR*, CTA EB Case No. 1629 (CTA Case No. 8433), 15 April 2019, citing *CIR v. Ariete*, G.R. No. 164152, 21 January 2010.
[74] The last day to file the Petition for Review was on June 3, 2018, a Sunday.

It is an elementary rule enshrined in the 1987 Constitution that no person shall be deprived of property without due process of law. In balancing the scales between the power of the State to tax and its inherent right to prosecute perceived transgressors of the law on one side, and the constitutional rights of a citizen to due process of law and the equal protection of the laws on the other, the scales must tilt in favor of the individual, for a citizen's right is amply protected by the Bill of Rights under the Constitution.[75] Thus, while taxes are the lifeblood of the government, the power to tax has its limits, in spite of all its plenitude. Even as We concede the inevitability and indispensability of taxation, it is a requirement in all democratic regimes that it be exercised reasonably and in accordance with the prescribed procedure.[76]

The BIR's power to collect taxes must yield to the fundamental rule that no person shall be deprived of his/her property without due process of law. **The rule is that taxes must be collected reasonably and in accordance with the prescribed procedure.**[77]

In this case, however, respondents failed to observe the prescribed procedure in the issuance of the subject *48-Hour Notice* and *5-day VAT Compliance Notice*. Respondents did not fully comply with the procedure prescribed under RMO No. 3-2009 in the issuance of the said notices.

This Court cannot subscribe to respondent Commissioner's contention that *"RMO No. 3-2009 is a mere guideline and directory in nature."* This must be so because administrative issuances, such as the said RMO, have the force and effect of law; and that they benefit from the same presumption of validity and constitutionality enjoyed by statutes.[78] Thus, any provision in any administrative issuance must be accorded with the same level as any statute, so long as they are not contrary to the laws or the Constitution.[79] Pertinently, since there is no showing that RMO No. 3-2009 is contrary to law or the Constitution, the same must be given legal effect.

The prerequisite conduct and conclusion of surveillance by certain BIR personnel before the issuance of the Notices is axiomatic under the following pertinent provisions of RMO No. 3-2009, to wit:

"V. GUIDELINES AND PROCEDURES

A. Surveillance Activities

xxx xxx xxx

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[75] *Commissioner of Internal Revenue vs. BASF Coating + Inks Phils., Inc.*, G.R. No. 198677, November 26, 2014.
[76] *Commissioner of Internal Revenue vs. United Salvage and Towage (Phils.), Inc.*, G.R. No. 197515, July 2, 2014.
[77] *Commissioner of Internal Revenue vs. Pilipinas Shell Petroleum Corporation, etseq.*, G.R. Nos. 197945 and 204119-20, July 9, 2018.
[78] *Chevron Philippines, Inc. vs. Bases Conversion and Development Authority, et al.*, G.R. No. 173863, September 15, 2010.
[79] Article 7, Civil Code of the Philippines (Republic Act No. 386).

2. Conduct of Surveillance

2.1. Revenue Officer Authorized to Conduct Surveillance Activities on Business establishments for Possible Violations of Sections 113, 114, 236, 237 and 238 of the NIRC, as amended. – **At least two (2) implementing officers comprised of Revenue Officers (ROs) (Assessment/Excise), Intelligence Officers (IOs) and special Investigators (SIs) assigned in the following investigating offices/ divisions shall be authorized to conduct surveillance activities on identified business establishment <u>based on validly issued mission order</u> signed by the concerned authorized revenue official:**

xxx xxx xxx

2.2. **<u>Mandatory Requirement</u> for the Conduct of Surveillance and Apprehension of Business Establishments for Non-Compliance with the Provisions of Section 113, 114, 236, 237 and 238 of the NIRC, as amended. – No surveillance activities shall be conducted nor apprehension effected <u>unless the same has been authorized by a mission order issued in accordance with the provisions of this Order</u>.**

xxx xxx xxx

4. Action on Surveillance Results

If after the conclusion of the surveillance, there is a sufficient ground for the closure of the establishment as provided under Section 115 of the NIRC, as amended, **a recommendation shall be made to effect such closure.**

xxx xxx xxx

B. Suspension or Temporary Closure of Business

xxx xxx xxx

3. Confrontational Requirements

1.1. **Consistent with the requirements of due process, the report of the handling Revenue Officer shall be concurred in by the Head of the investigating office.** The findings of the investigating office shall be reviewed by a Review Board composed of the following:

xxx xxx xxx

If a report is approved by a Review Board, the concerned Regional Director or the ACIR, Enforcement Service/LTS, as the case may be, shall, in his capacity as Chair of the Review Board, sign and issue to the taxpayer concerned a Forty-Eight (48) Hour Notice, requiring him to explain under oath within forty eight (48) hours why he should not be dealt with administratively, by suspension of business or temporary closure of his establishment, and/or criminally, for violation of pertinent provisions of the Tax Code.

xxx xxx xxx

3.3. **If a Review Board deems it necessary to pursue administrative or criminal action against a <u>non-compliant taxpayer</u>, it shall cause the preparation of a 5-Day VAT Compliance Notice (VCN)** [Annex 'D'], which shall be issued in lieu of the 10-Day VCN, to expedite the resolution of the case at hand. The 5-Day VCN shall be signed by the Chair of the Review Board concerned.

xxx xxx xxx

C. Execution and Enforcement

xxx xxx xxx

2. **The signed Closure Order** shall be returned by the Office of the Commissioner, together with all supporting documents, to the Review Board concerned, **for immediate service to the <u>non-</u>**

> **<u>compliant taxpayer</u>**." *(Emphases and underscoring ours)*

Based on the foregoing provisions, it is clear that a surveillance by certain officers is necessary before the BIR can issue a *48-Hour Notice*, *5-day VAT Compliance Notice*, and *Closure Order*, to a *"non-compliant taxpayer"*. The surveillance, in turn, must be covered by, or authorized through, a Mission Order duly issued under RMO No. 3-2009.

In this case, no Mission Order was shown to petitioner at the onset of the BIR's overt surveillance. In fact, respondent admitted that no Mission Order was issued against petitioner, as shown in Paragraph 21 of the Pre-Trial Order dated January 23, 2019.[80]

Petitioner's witness Lunar Rosario testified as follows:[81]

6. "Q: You mean to say that there were two tax audits conducted by the BIR against your company for the same year?

   A: Yes, one under "Oplan Kandado" and the other, an earlier one, under what I understand as a regular tax audit of the company.

7. Q: Were these tax audits initiated by proper authorizations from the BIR?

   A: For the regular audit covering all taxes for the year 2016, a Letter of Authority was issued by RDO No. 47-East Makati, together with a checklist of documents we have to submit to the examining revenue officers. But for the "Oplan Kandado," which followed the regular audit, there was no authorization letter at all.

xxx xxx xxx

9. Q: Under pertinent BIR regulations, a Mission Order is supposed to be issued authorizing revenue officers to conduct an investigation of a taxpayer under "Oplan Kandado." Was such a Mission Order shown and presented to the company before the conduct of audit procedures under "Oplan Kandado"?

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[80] Page 3 of the Pre-Trial Order.
[81] Second Judicial Affidavit of Lunar Rosario (In Lieu of Direct Testimony), pp. 3-4.

A: No. We did not receive any Mission Order under "Oplan Kandado."

10. Q: Prior to any investigation under "Oplan Kandado," have you been informed by any revenue officer as to the purpose of "Oplan Kandado" as it applies against your company, the duties of the implementing revenue officers and the procedures they will conduct?

A: We have not been informed of any of these, nor has any revenue officer explained to us the purpose and procedures under "Oplan Kandado" as it applies to our company.

11. Q: How was "Oplan Kandado" conducted then against your company?

A: We simply received, on February 20, 2018, a 48-Hour Notice from BIR Revenue Region No. 8- Makati, signed by Regional Director Glen A. Geraldino. The notice says that we have failed to comply with the requirements of a VAT-registered person by failing to issue sales receipts or invoices and to reflect the correct taxable sales/receipts for the period January 1, 2016 to December 31, 2016."

This fact was not controverted by respondent's witness, Revenue Officer Melissa Baes in her Judicial Affidavit. Moreover, no Mission Order was presented as documentary evidence for the respondent.

Also, this Court finds that the *48-Hour Notice* and *5-day VAT Compliance Notice* have no factual bases. The *48-Hour Notice*[82] states as follows:

"<u>48 HOUR NOTICE</u>

February 9, 2018

THE PRESIDENT
ISCALE SOLUTIONS, INC.
TIN NO: 008-106-923-00000
7F Salustiana D. Ty Tower
Paseo de Roxas, Legaspi Village, Makati City

Sir/Madam:

As shown in the report of our investigating office, you/you company have/has failed to:

[82] Exhibit "P-4", Exhibit "R-8."

[ ] (A) Register as Value-Added Taxpayer in violation of Section 105 of the National Internal Revenue Code of 1997, as amended;

[x] (B) Comply with the following requirements as a VAT-registered person:

[X] (1) Issue sales invoices or receipts pursuant to Section 113 and 237 of the National Internal Revenue Code of 1997, as amended.

[ ] (2) Pay your Value- Added Tax pursuant to Section 114 of the National Internal revenue Code of 1997, as amended.

[X] (3) Reflect your correct taxable sales/receipts for the Taxable Period January 1, 2016 to December 31, 2016.

[ ] (4) Understatement of taxable sales or receipts by thirty percent (30%) or more of the correct taxable sales or receipts for the taxable quarter.

In order to give you the opportunity to refute the above findings, you are hereby given a period of 48 hours from receipt hereof to explain your side under oath regarding the abovementioned findings. Failure on your part to do will constrain the Office to recommend the imposition of administrative sanctions against you thru suspension of business operations and temporary closure of your business establishment pursuant to Section 115 of the National Internal Revenue Code as implemented by revenue Memorandum Order No. 3-2009 dated January 15, 2009, otherwise known as "**OPLAN KANDADO**", and/or filing of criminal action for your aforesaid violations of the provisions of the Tax Code, **WITHOUT FURTHER NOTICE**.

Very truly yours,

Sgd. **GLEN V. GERALDINO**
Regional Director"

The *5-day VAT Compliance Notice*[83] reads as follows:

"<u>**Five (5)- DAY VAT COMPLIANCE NOTICE**</u>

ISCALE SOLUTIONS, INC.
7F Salustiana D. Ty Tower
Paseo de Roxas, Legaspi Village, Makati City
TIN NO: 008-106-923-00000

Sir/Madam:

The Revenue District Office No, 47-East Makati where your Office is located reported that you have failed to:

[ ] A. Register as a Value- Added Taxpayer, in violation of Section 236 of the National Internal Revenue Code of 1997 (as amended).

[X] B. Comply with the following requirements as a VAT-Registered person:

[X] 1. Issue sales invoices or receipts in your transactions for the taxable year ending December 31, 2016 with non-resident foreign customers, violation of Sections 113 and 237 of the National Internal Revenue Code of 1997 (as amended);

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[83] Exhibit "P-5", Exhibit "R-12."

[ ] 2. File your Value-added Tax Return, in violation of Section 114 of the National Internal Revenue Code of 1997, as amended.

[ ]3. Reflect your correct taxable sales/receipts for the taxable year ending December 31, 2016;

[X] 4. Pay the correct VAT deficiency including increments.

Notice is therefore hereby given, and demand made upon you, to rectify within five (5) days from receipt hereof the above-stated violations committed, by

[ ] A. Complying with the registration requirements set forth in Sections 236 and 238 of the National Internal Revenue Code of 1997 (as amended), in case of failure to register;

[X] B. Complying with the invoicing requirements set forth in Sections 113 and 237, in case of failure to issue receipts/invoices;

[ ] C. Filing of VAT Returns which have not been filed, and paying taxes due thereon; and

[X] D. Declaring the correct taxable sales/receipts which were previously understated due to <u>failure to issue sales invoices/receipts</u> due to under-declaration of sales/receipts <u>and pay the correct VAT deficiency including increments</u>.

Issued this 18th day of March 2018 in Makati City.

Sgd. **GLEN A. GERALDINO**
Regional Director"

The said Notices did not state the details of the findings of the investigating officers and the computation and legal bases of the alleged deficiency VAT deficiency.

Notably, no Preliminary Assessment Notice and Final Assessment Notice were issued in this case. In fact, during the pendency of the instant case, the tax audit of petitioner pursuant to LOA No. SN: eLA201500049326 dated June 28, 2017 was still on-going.

Thus, respondents violated petitioner's right to due process when they failed to act in accordance with the prescribed procedure before issuing the subject Notices.

It must be emphasized that the issuance of a valid formal assessment is a substantive prerequisite for collection of taxes.[84] Considering that there are no assessment notices issued yet, the collection of the alleged deficiency VAT as stated in the *5-day VAT Compliance Notice* must fail.

WHEREFORE, in light of the foregoing considerations, the instant *Petition for Review* is **GRANTED**.

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[84] *Commissioner of Internal Revenue vs. Fitness By Design, Inc.*, G.R. No. 215957, November 9, 2016.

Accordingly, respondent Geraldino's *48-Hour Notice* dated February 9, 2018 and *5-day VAT Compliance Notice* dated March 18, 2018 issued against petitioner, are hereby **DECLARED NULL** and **VOID**.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ERLINDA P. UY
Associate Justice

(With Concurring Opinion)
MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

ATTESTATION

I attest 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.

ERLINDA P. UY
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, is it 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.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

Third Division

iSCALE SOLUTIONS, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE, REGIONAL DIRECTOR GLEN A. GERALDINO & REVENUE DISTRICT OFFICER MAHINARDO G. MAILIG,
Respondents.

CTA CASE NO. 9845

Members:
UY, *Chairperson,*
RINGPIS-LIBAN, *and*
MODESTO-SAN PEDRO, *JJ.*

Promulgated:
JUN 30 2021
3:4[illegible] p.m.

x --- x

CONCURRING OPINION

MODESTO-SAN PEDRO, J.:

I concur with the *ponencia* granting jurisdiction over the instant Petition for Review and declaring null and void respondents' 48-Hour Notice dated 9 February 2018 and 5-day VAT Compliance Notice dated 18 March 2018 issued against petitioner.

In addition to the *ponente's* findings in the above-captioned case, I submit this Opinion to further clarify my position as to this Court's jurisdiction in *Oplan Kandado* Cases.

Here, respondents argue that this Court has no jurisdiction over the above-captioned case for petitioner's alleged failure to exhaust all administrative remedies available to it.

They explain that the basis of the Petition for Review which is the letter issued by the Bureau of Internal Revenue ("BIR"), dated 18 April 2018 (hereinafter referred to as the "Response Letter"), does not constitute the final Decision appealable to the Court of Tax Appeals ("CTA") under ***Section 7(a)(1) of Republic Act ("RA") No. 1125, as amended by RA No. 9282.***[1]

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[1] An Act Expanding the Jurisdiction of the Court of Tax Appeals ("CTA"), Elevating its Rank to the Level of a Collegiate Court with Special Jurisdiction and Enlarging its Membership, Amending for the Purpose

They posit that the appealable decision in *Oplan Kandado* cases is the Closure Order which is yet to be issued by the Commissioner of Internal Revenue ("CIR").

However, contrary to the position of respondents, the *Oplan Kandado* program is not a single continuous process to which the end result is the Closure Order.

Revenue Memorandum Order ("RMO") No. 3-2009,[2] or the rules implementing the *Oplan Kandado*, is clear that the program is divided into two (2) stages: the ***Surveillance and Confrontational Stage*** and the ***Execution and Enforcement Stage***.

The ***Surveillance and Confrontational Stage*** starts with the issuance of the Mission Order granting authority to the revenue officer who will conduct the surveillance operations. The stage will end with the taxpayer's receipt of the BIR's Response Letter recommending the issuance of the Closure Order. This is akin to the audit and assessment functions of the CIR.

Meanwhile, the ***Execution and Enforcement Stage*** is initiated through the issuance of the Closure Order. The Order has the effect of physically closing the business establishment of the taxpayer. This resembles what occurs during the collection function of the CIR.

Considering the similarities noted, I am of the view that the rules pertaining to the audit and assessment and collection powers of the CIR should be made applicable, by analogy, to *Oplan Kandado* cases. This includes the interpretation of what constitutes a final Decision appealable to the CTA.

In ***Oceanic Wireless Network Inc., v. CIR ("Oceanic Case")***,[3] the Supreme Court pronounced that a Decision is considered appealable to the CTA when its language is clear and unequivocal that the same constitutes the BIR's final determination of the disputed assessment. The pertinent portion of the Decision is quoted, to wit:

> "We laid down the rule that the Commissioner of Internal Revenue should always **indicate to the taxpayer in clear and unequivocal language what constitutes his final determination of the disputed assessment**, thus:
>
> . . . we deem it appropriate to state that the Commissioner of Internal Revenue should always indicate to the taxpayer in clear and unequivocal

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Certain Sections or Republic Act No. 1125, As Amended, Otherwise Known as the Law Creating the Court of Tax Appeals, and for Other Purposes, 30 March 2004.

[2] Amendment and Consolidation of the Guidelines in the Conduct of Surveillance and Stock-Taking Activities, and the Implementation of the Administrative Sanction of Suspension and Temporary Closure of Business, 15 January 2009.

[3] G.R. No. 148380, 9 December 2005.

> language whenever his action on an assessment questioned by a taxpayer constitutes his final determination on the disputed assessment, as contemplated by Sections 7 and 11 of Republic Act No. 1125, as amended. **On the basis of his statement indubitably showing that the Commissioner's communicated action is his final decision on the contested assessment, the aggrieved taxpayer would then be able to take recourse to the tax court at the opportune time. Without needless difficulty, the taxpayer would be able to determine when his right to appeal to the tax court accrues.**
>
> xxx xxx xxx
>
> **In this case, the letter of demand dated January 24, 1991, unquestionably constitutes the final action taken by the Bureau of Internal Revenue on petitioner's request for reconsideration when it <u>reiterated the tax deficiency assessments due from petitioner, and requested its payment. Failure to do so would result in the "issuance of a warrant of distraint and levy to enforce its collection without further notice."</u> In addition, the <u>letter contained a notation indicating that petitioner's request for reconsideration had been denied for lack of supporting documents</u>.**"[4]

Based on the above-quoted provision, the Supreme Court construed the BIR's act of <u>reiterating the tax deficiency assessment</u>; <u>demanding the payment of the tax due</u>; <u>warning the taxpayer that its failure to pay the assessed tax will lead to the enforcement of the assessment through the issuance of the Warrant of Distraint and Levy</u>; and <u>stating that the taxpayer's protest had been denied</u> as clear and unequivocal proof that the Letter of Demand issued to the taxpayer constitutes the BIR's final Decision appealable to the CTA.

It must be stated that ***Revenue Regulation ("RR") No. 18-13***[5] mandates that the final Decision of the BIR appealable to the CTA should indicate the "<u>facts, the applicable law, rules and regulations, or jurisprudence on which such decision is based</u>".[6] Without the said information, the Decision is considered void. The reason for this rule was explained by the High Court in the case of ***Commissioner of Internal Revenue v. Liquigaz Philippines Corp.***,[7] to wit:

> "The use of the word "shall" in Section 228 of the NIRC and in RR No. 12-99 indicates that the **requirement of informing the taxpayer of the legal and factual bases of the assessment and the decision made against him is mandatory**. The requirement of providing the taxpayer with written notice of the factual and legal bases applies both to the FLD/FAN and the FDDA.
>
> Section 228 of the NIRC should not be read restrictively as to limit the written notice only to the assessment itself. As implemented by RR No. 12-99, **the written notice requirement for both the FLD and the FAN is in**

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[4] Emphasis Supplied.

[5] Amending Certain Sections of Revenue Regulations No. 12-99 Relative to the Due Process Requirement in the Issuance of a Deficiency Tax Assessment, 28 November 2013.

[6] *Id.*

[7] G.R. Nos. 215534 & 215557, 18 April 2016.

> **observance of due process — to afford the taxpayer adequate opportunity to file a protest on the assessment and thereafter file an appeal in case of an adverse decision.**
>
> **To rule otherwise would tolerate abuse and prejudice. Taxpayers will be unable to file an intelligent appeal before the CTA as they would be unaware on how the CIR or his authorized representative appreciated the defense raised in connection with the assessment. On the other hand, it raises the possibility that the amounts reflected in the FDDA were arbitrarily made if the factual and legal bases thereof are not shown.**"[8]

Guided by the foregoing legal pronouncements, I am of the opinion that the final Decision appealable to the CTA in *Oplan Kandado* cases is not the Closure Order but the Response Letter. To better elucidate, the relevant portion of the Response Letter is quoted, as follows:

> "This is to acknowledge receipt of your letter dated April 5, 2018, wherein the Company is refuting its violations of Sections 113 and 237 of the National Internal Revenue Code (NIRC), as amended, for the taxable year 2016.
>
> As stated in your letter, your objection is based on the nature of the Company's sale of service to non-resident foreign corporation as being zero-rated, which you state is not lost on the mere fact that no official receipt was issued. It was also specified in your letter that the Company complies with all the requisites for a sale to be considered as zero-rated.
>
> However, you have failed to recognize the stipulations covered by Section 113 of the said Code, which is one of the underlying basis of OPLAN KANDADO (RMO 3-2009), which provides:
>
> xxx xxx xxx
>
> In a decision of the Court of Tax Appeals (CTA) (Case No. 8134 dated August 22, 2012), wherein the issue is the non-issuance of VAT official receipts, it was pertinently stated by the said ruling that, "without proper VAT official receipts issued to its clients, petitioner cannot claim such sales as zero-rated VAT not subject to output tax.". This is precisely the basis for the denial of the petitioner-taxpayer on its claim for VAT refund in the aforesaid decision. Thus, if the taxpayer was denied of VAT refund due to its failure to substantiate its zero-rated sales with VAT official receipts or invoices, it is tantamount that the sales are considered vatable.
>
> In relation thereto, the Supreme Court has consistently held that failure to print the word "zero-rated" in its claim for VAT refund or credit of input VAT on zero-rated sales (Northern Mindanao Power Corporation vs. CIR, G.R. No. 185115 dated February 18, 2015) results to denial of said refund.
>
> Please also justify the submitted copies of the issued official receipts to non-resident customers, where it was noted, marked and established by the concerned Revenue Officers, that said official receipts has not yet been issued during the conduct of the audit. Submission of the copies of said official

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[8] Emphasis Supplied.

receipts could only be revalidated upon submission of original booklets of said official receipts.

Applying the foregoing provisions of the law and the corresponding court rulings in your case, we are unfortunately precluded from accepting and/or recognizing your dispute. Please be further informed that failure on your part to pay the deficiency Value Added Tax will lead us to the recommendation of the issuance of the **CLOSURE ORDER**, pursuant to Section 115 of the National Internal Revenue Code, as implemented by Revenue Memorandum Order No. 3-2009 dated January 15, 2009, otherwise known as "**OPLAN KANDAD**

For your information and guidance."

Meanwhile, the prescribed template of a Closure Order under ***RMO No. 3-2009*** is here quoted:

"CLOSURE ORDER

KNOW ALL MEN BY THESE PRESENTS:

By virtue of the power vested in me under Section 115 of the National Internal Revenue code of 1997 (as amended), and upon failure, refusal and / or neglect of the Taxpayer, ___________________, with Taxpayer Identification No. ___________________, to comply with the requirements specified in the Five (5) – Day VAT Compliance Notice No. ___________________, dated ___________________, Order is hereby given this _____ day of ______________, 2009, for the closure of the business establishment(s) of the above-named Taxpayer at _________________, based on the enclosed recommendatory report of the Investigating Office, as reviewed by the Regional / National Review Board.

This Order shall remain in effect until it is lifted.

Issued this _____ day of _____________, 2009 in Quezon City, Philippines."

A comparison of the two issuances underscores the point that the final Decision appealable to the CTA, as contemplated in the foregoing discussions, is not the Closure Order but the Response Letter.

Evidently, it is in the Response Letter and not in the Closure Order where the BIR explained to petitioner the facts, the applicable law, rules and regulations, and jurisprudence on which its decision was based. It is also where the BIR reiterated its denial of petitioner's protest, echoed its demand for payment of the deficiency taxes, and recommended the issuance of the Closure Order.

That the Closure Order cannot be considered the final Decision appealable to the CTA may be gleaned from its contents. A close reading of the same proves that its tenor does not resemble a Decision but an enforcement issuance akin to a Warrant of Distraint and Levy.

In fact, the effect of the Closure Order, unlike Decisions, is immediate. Hence, once issued, the BIR will already close the business establishment of the taxpayer without any opportunity for the latter to rectify its errors or to test its veracity in court. This is clear under ***Section V.C.5. of RMO No. 3-2009*** which states:

> "The execution of the Closure Order shall consist in the physical closing of the doors or other means of ingress of the establishment, and the sealing thereof, with the appropriate security devices (padlocks, etc.) and the BIR's official seal."

As can be deduced from the aforementioned, the effect of the Closure Order is not only instantaneous but also highly confiscatory in nature. Hence, to consider respondents' argument on the matter will render the Court's actions futile because the consequence that the taxpayer is trying to prevent, which is the closure of its business, would have already taken place.

Moreover, denying the grant of jurisdiction will deprive the taxpayer a timely relief. Hence, it will be forced to settle the BIR's assessment in order to avoid the closure of its business establishment. This will ultimately tie down the hands of the taxpayer, depriving it of the opportunity to challenge the validity of the BIR's findings in *Oplan Kandado* cases.

Lastly, the issue on jurisdiction has already been addressed by the Court *En Banc* in ***Commissioner of Internal Revenue v. Elric Auxiliary Services Corp./Sacred Heart Gas Station***[9] where it treated the Response Letter as the BIR's final Decision appealable to the CTA. While I admit that CTA Decisions are not binding precedents as compared to Supreme Court Decisions, it cannot be denied that these Decisions are persuasive in disposing of tax cases and, therefore, are worthy of consideration.

All told, it is my opinion that the appealable Decision in *Oplan Kandado* cases is not the Closure Order but the Response Letter of the BIR. Given the same, I agree with the *ponencia*.

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

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[9] C.T.A. EB Case No. 1174 (C.T.A. Case No. 8315), 3 March 2016.