REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE Petitioner,	CTA EB No. 1285 (CTA Case No. 8333)
	Present:
-versus-	DEL ROSARIO, *PJ*; CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS and RINGPIS-LIBAN, JJ.
	Promulgated:
KENNETH C. PUNDANERA, Respondent.	JUL 14 2016 1:05 p.m.

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DECISION

FABON-VICTORINO, J.:

In this appeal via the instant Petition for Review[1] filed on April 1, 2015, petitioner Commissioner of Internal Revenue (CIR) assails the (1) Decision dated December 2, 2014, which nullified the assessments and cancelled the Warrant of Distraint and/or Levy (WDL) she issued against respondent Kenneth C. Pundanera, and the (2) Resolution dated February 20, 2015, which denied her motion for reconsideration.

THE FACTS AND THE PROCEEDINGS

[1] *En Banc* Docket, pp. 5-15.

The facts as found by the Court in Division are as follows:

Petitioner, as head of the Bureau of the Internal Revenue (BIR), has the authority to assess and collect all national internal revenue taxes, fees and charges, and to enforce all forfeitures, penalties and fines relative thereto, with office at the BIR National Office, Agham Road, Diliman, Quezon City.

On the other hand, respondent Kenneth C. Pundanera, is a Filipino, of legal age and doing business under the trade name/style Unioil Paco Service Station and Unioil Bagbag Service Center, with business address at 1881 Pres. Quirino Avenue, Paco, Manila.

On April 16, 2007, respondent filed his Annual Income Tax Return (ITR) for taxable year 2006.

On October 18, 2007, petitioner issued a Letter of Authority LOA 2007 00000746, for the examination of respondent's books of accounts and other accounting records for all internal revenue taxes for the period January 1, 2006 to December 31, 2006, and First Notice dated October 19, 2007.

On January 16, 2008, respondent received through Edmer Chavez, petitioner's Second Request for Presentation of Documents dated January 14, 2008. This was followed by a Final Request for Presentation of Records dated January 28, 2008 received on January 29, 2008.

On February 16, 2009, Revenue Officer (RO) Agatha Kristie G. Eugenio-Buizon recommended the issuance of Subpoena *Duces Tecum* to compel respondent to submit his books of accounts and other accounting records for examination. Consequently, Summons and/or Subpoena *Duces Tecum* were released on February 20, 2009.

In a Letter of Informal Conference dated May 7, 2009, petitioner informed respondent about the submitted revised report indicating his deficiency of P23,863,105.82 for taxable year 2006, and gave him the opportunity for an informal conference.

In a Memorandum dated June 2, 2009, the same RO Agatha Kristie G. Eugenio-Buizon recommended the issuance of the Preliminary Assessment Notice (PAN) against respondent.

On July 2, 2009, respondent sent a letter addressed to Renato J. Mina and Bob Dureza requesting for 15 days or until July 17, 2009, within which to formally contest the deficiency assessment with supporting documents.

In a letter dated July 17, 2009, respondent contested the assessment and requested for its re-evaluation.

In the PAN dated December 21, 2009, petitioner assessed respondent of deficiency Income Tax (IT) in the amount of P11,628,342.45, deficiency value-added tax (VAT) of P13,129,599.34, and deficiency expanded withholding tax (EWT) of P95,157.81[2]

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DEFICIENCY INCOME TAX
(Sec. 34-Sec. 6B, NIRC)

Taxable Income per Return		P 489,205.50	
Add: Adjustments per Audit —			
Disallowanced Expenses — unsupported			
Unsupported Purchases	P21,388,925.75		
50% Operating Expenses	838,970.81		
Salaries — no w/tax	1,335,591.08	23,563,487.64	
Net Income/Audits		24,052,693.14	
Tax Due			7,661,861.80
Less Tax Paid/Return			121,761.65
Deficiency Income tax due		7,540,100.15	
Add: Increments			
Interest up to 12/31/09		4,088,242.30	
Total Deficiency Income Tax		**P11,628,342.45**	

DEFICIENCY VALUE-ADDED TAX
Sec. 106 & 113, NIRC

Taxable Sales per Audit	P 171,204,932.23
Output Tax Due	26,148,342.75
Less: Creditable Input Tax	17,615,595.34
VAT Payable/Audit	8,532,747.41
Less VAT Payment	257,963.68
Deficiency VAT Due	8,274,783.73
Add: Increments	
Interest up to 12/31/09	4,854,815.61
Total Deficiency VAT DUE	**P 13,129,599.34**

DEFICIENCY EXPANDED WITHHOLDING TAX
Sec. 57, NIRC

Rent Expenses	P1,620,000.00 * 5%		P 81,000.00
Subcon/Services	1,535,474.15 * 2%	30,709.48	
EWT Due			111,709.48
Less: Payments/Remittance			52,049.41
Deficiency EWT Payable			59,660.07
Add: Increments			
Interest up to 12/31/09			35,497.74
Total Deficiency EWT Due			**P 95,157.81**

Subsequently, petitioner issued the Formal Letter of Demand (FLD) and Assessment Notices, all dated January 14, 2010, slightly increasing the amount of deficiency IT from P11,628,342.45 to P11,687,109.99, deficiency VAT from P13,129,599.34 to P13,193,613.07, deficiency EWT from 95,157.81 to P95,456.11.[3]

On April 8, 2011, respondent received petitioner's 1st Notice at 197 M.H. Del Pilar Street, Tinajeros, Malabon City.

On April 13, 2011, respondent filed his Annual ITR for taxable year 2010 at RDO No. 34.

On May 13, 2011, respondent filed with petitioner his Protest Letter against the FLD.

On July 19, 2011, the office of Attorney Marianne R. Palisoc was furnished with a copy of the BIR Letter dated July 12, 2011 containing respondent alleged deficiency IT,

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DEFICIENCY INCOME TAX
(Sec. 34-Sec. 6B, NIRC)

Taxable Income per Return			P 489,205.50
Add: Adjustments per Audit —			
Disallowanced Expenses — unsupported			
Unsupported Purchases	P21,388,925.75		
50% Operating Expenses	838,970.81		
Salaries — no w/tax	1,335,591.08	23,563,487.64	
Adjustable taxable income			P 24,052,693.14
Tax Due			7,661,861.80
Less: payments/credits			121,761.65
Deficiency Income tax due	P	7,540,100.15	
Add: 25% Surcharge (sec. 248)			
20% interest p.a. from _ to 01/15/2010 (sec. 249)		4,147,009.84	
Compromise Penalty (sec. 254 in relation to RMO 19-2007)			
TOTAL AMOUNT DUE & COLLECTIBLE			**P11,687,109.99**

DEFICIENCY VALUE-ADDED TAX
(pursuant to Sec. 108 & 113, NIRC)

Taxable Sales per Return		P 171,204,932.23
Output tax thereon		26,148,342.75
Less: Creditable Input Tax		17,615,595.34
VAT Due		8,532,747.41
Less: payments		257,963.68
Deficiency VAT Due		8,274,783.73
Add: 25% Surcharge (Sec. 248)		
20% interest p.a. from _ to 01/15/2010 (sec. 249)	4,918,829.34	
Compromise Penalty (sec. 254 in relation to RMO 19-2007)		
TOTAL AMOUNT DUE & COLLECTIBLE		**P 13,193,613.07**

DEFICIENCY EXPANDED WITHHOLDING TAX
(pursuant to Sec. 57, NIRC)

Rent Expenses	P1,620,000.00 * 5%		P 81,000.00
Subcon/Services	1,535,474.15 * 2%	30,709.48	
Total EWT Due			111,709.48
Less: Payment			52,049.41
Deficiency EWT			59,660.07
Add: 25% Surcharge (Sec. 248)			
20% interest p.a. from _ to 01/15/2010 (sec. 249)		35,796.04	
Compromise Penalty (sec. 254 in relation to RMO 19-2007)			
Total Deficiency EWT Due		**P 95,456.11**	

VAT and EWT for the taxable year 2006 in the amount of Twenty Four Million Nine Hundred Seventy Six Thousand One Hundred Seventy Nine and 17/100 (P24,976,179.17).

On August 25, 2011, respondent received the assailed WDL for the amount of Twenty Four Million Nine Hundred Seventy Six Thousand One Hundred Seventy Nine and 17/100 Pesos (P24,976,179.17) issued by petitioner.

On September 9, 2011, respondent filed with the Court in Division a Petition for Review in which respondent also prayed for suspension of collection of taxes.

On October 26, 2011, petitioner filed her Answer raising the following special and affirmative defenses: 1) that the Court in Division has no jurisdiction to entertain the Petition for Review having been filed out of time; 2) that respondent failed to timely protest the assailed assessment, thus, it became final, executory and demandable pursuant to Section 228 of the NIRC of 1997, as amended; 3) that the subject WDL was duly issued and served upon respondent; and 4) that the assessment was valid and correct and it is upon respondent to prove the contrary[4].

On April 12, 2012, upon approval of respondent's surety bond, the Court in Division enjoined petitioner from collecting or attempting to collect the amount subject of the Assessment Notices, until further orders from the Court.

On December 2, 2014, the Court in Division rendered the assailed Decision[5], the dispositive portion of which reads as follows:

> "**WHEREFORE**, in view of the foregoing, this instant Petition for Review is **GRANTED**. Accordingly, the subject Preliminary Assessment Notice dated December 21, 2009, Formal Letter of Demand No. 34-2006 dated 14 January 2010 and Assessment Notices No. 34-2006 for Income, VAT, EWT,

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[4] Behn Meyer & Co. v. Collector of Internal Revenue, 27 Phil. 647.
[5] *En Banc* Docket, pp. 19-35.

all dated January 14, 2010 are declared **NULL and VOID**, and the Warrant of Distraint and/or Levy for the amount of Twenty Four Million Nine Hundred Seventy Six Thousand One Hundred Seventy Nine and 17/100 (Php24,976,179.17) is **CANCELLED and deemed WITHDRAWN**.

SO ORDERED."

Petitioner moved for reconsideration of the foregoing Decision, but it was denied for lack of merit in the similarly assailed Resolution of February 20, 2015[6].

Hence, this appeal before the Court *En Banc* filed by petitioner CIR raising the following issues:

THE ISSUES

"1. Whether or not the assessment and the warrant of distraint and levy are void;

2. Whether or not the collection of alleged deficiency taxes must be suspended; and,

3. Whether or not the BIR's right to issue an assessment for alleged deficiency taxes has already prescribed."

In her appeal, petitioner maintains that the subject PAN dated December 21, 2009, Assessment Notice No. 34-2006 and FLD No. 34-2006, both dated January 14, 2010, and the WDL dated August 25, 2011 were all validly issued and sent to respondent by registered mail at his registered business address at 1881 Pres. Quirino Avenue, Paco, Manila. That being the case, there exist a presumption that they were received in the regular course of mail pursuant to Section 3(v) of Rule 131 of the Rules of Court.

[6] *Ibid*, pp. 37-39.

The presumption is strengthened by the fact that both the PAN and FLD with assessment notices were properly addressed at 1881 Pres. Quirino Avenue, Paco, Manila, the same address indicated in respondent's 2010 Annual ITR. Moreover, respondent cannot claim that he already changed his business address for he failed to present any evidence to prove it. Under Section 236 of the NIRC of 1997, as amended, respondent is duty bound to update his registration status by filing an application for registration update (BIR Form No. 1905) with RDO No. 34, BIR Manila.

In addition, the "shifting of burden" principle enunciated in the case of Commissioner of Internal Revenue v. Metro Star Superama, Inc. finds no application in the instant case since respondent's non-receipt of the documents was due to his failure to notify petitioner of his new business address.

More importantly, respondent failed to timely protest the subject assessment, says petitioner. Even assuming that respondent learned about the subject assessment only when he received the 1st Notice demanding payment of the deficiency taxes for 2006 in the total amount of P24,976,179.17 on April 8, 2011, he had until May 8, 2011, to file his protest which he belatedly filed four (4) days later or on May 13, 2011 rendering the questioned assessment final, executory and demandable pursuant to Section 228 of the NIRC of 1997, as amended. In the same way, since respondent received petitioner's letter dated July 12, 2011 on July 19, 2011, he had until August 18, 2011, within which to file a Petition for Review. Thus, respondent filed his Petition for Review before the Court in Division out of time on September 9, 2011 thereby depriving the Court of jurisdiction to entertain the same.

Finally, since tax assessments by examiners are presumed correct and made in good faith and the taxpayer has the duty to prove otherwise,[7] the questioned assessment must be deemed valid and correct given that respondent, who had the burden to prove the contrary[8] failed.

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[7] Commissioner of Internal Revenue v. Construction Resources of Asia, Inc., 145 SCRA 671.
[8] *Supra,* at Note 2.

Despite directive, respondent did not file his comment.

<u>THE RULING OF THE COURT *EN BANC*</u>

Truth to tell, there is no compelling reason for the Court En B*anc* to deviate from the finding of the Court in Division. Petitioner virtually sticks to her arguments set forth in her Answer and Motion for Partial Reconsideration filed with the Court in Division, which have been exhaustively considered and discussed in the assailed Decision of December 2, 2014 and Resolution of February 20, 2015.

Notwithstanding the foregoing observation, and if only to ease petitioner's mind, let it be stressed that the Court in Division did not err in ruling that the assessments for deficiency IT, VAT and EWT for taxable year 2006 issued by petitioner are null and void for lack of due process in the issuance thereof rendering the WDL invalid and unenforceable.

Section 228 of the NIRC of 1997, as amended, expressly provides that when the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings in writing stating the law and the facts upon which it was based, otherwise, the assessment shall be void. Thirty days from receipt of such assessment, the taxpayer may file a protest with petitioner praying for a reconsideration or reinvestigation of the assailed assessment. All relevant supporting documents as determined by the taxpayer must be submitted within sixty (60) days from filing of the protest. However, if the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable.

To shore up the import of the foregoing mandate, Revenue Regulations (RR) No. 12-99[9] was issued expressly

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[9] "SECTION 3. Due Process Requirement in the Issuance of a Deficiency Tax Assessment. —

3.1 Mode of procedures in the issuance of a deficiency tax assessment:

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3.1.2 Preliminary Assessment Notice (PAN). — If after review and evaluation by 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 (see illustration in ANNEX A hereof). 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.

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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 (see illustration in ANNEX B hereof). **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: (a) His name; (b) signature; (c) designation and authority to act for and in behalf of the taxpayer, if acknowledged received by a person other than the taxpayer himself; and (d) date of receipt thereof.**

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3.1.7 Constructive Service. — **If the notice to the taxpayer herein required is served by registered mail, and no response is received from the taxpayer within the prescribed period from date of the posting thereof in the mail, the same shall be considered actually or constructively received by the taxpayer. If the same is personally served on the taxpayer or his duly authorized representative who, however, refused to acknowledge receipt thereof, the same shall be constructively served** providing that the notices relative to tax assessment must be served on and received by the taxpayer.

As wisely quipped by the Court in Division, the taxpayer must be afforded due process of law in assessing tax liability. A valid assessment is a substantive prerequisite to tax collection. Due process requires that the assessment notice must be properly sent to and actually received by the taxpayer.

On the service of tax notices through registered mail, Section 13, Rule 13 of the Rules of Court pertinently provides, thus:

> "Sec. 13. Proof of service. — Proof of personal service shall consist of a written admission of the party served, or the official return of the server, or the affidavit of the party serving, containing a full statement of the date, place and manner of service. If the service is by ordinary mail, proof thereof shall consist of an affidavit of the person mailing of facts showing compliance with section 7 of this Rule. **If service is made by registered mail, proof shall be made by such affidavit and the registry receipt issued by the mailing office. The registry return card shall be filed immediately upon its receipt by the sender, or in lieu thereof the unclaimed letter together with the certified or sworn copy of the notice given by the postmaster to the addressee.**" (emphasis supplied)

Contrary to petitioner's claim, there is nothing in the record that shows that the PAN and Assessment Notice No.

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on the taxpayer. Constructive service thereof shall be considered effected by leaving the same in the premises of the taxpayer and this fact of constructive service is attested to, witnessed and signed by at least two (2) revenue officers other than the revenue officer who constructively served the same. The revenue officer who constructively served the same shall make a written report of this matter which shall form part of the docket of this case." (Emphases supplied)

34-2006 and FLD No. 34-2006 were duly sent by registered mail to respondent at his registered business address at 1881 Pres. Quirino Avenue, Paco, Manila. As found by the Court in Division, petitioner was not able to present any proof showing that the PAN, FLD and the assessment notices were indeed served to respondent by registered mail. Aside from the self-serving testimonies of petitioner's witnesses that the PAN and the FLD with assessment notices were mailed through registered mail, no other evidence of such mailing was introduced such as the testimony of the person who actually mailed the named notices or the Registry Return Receipts issued by the post office pertaining to such mailing. Indeed, respondent failed to meet the requirements to establish petitioner's actual receipt of the PAN and Assessment Notice No. 34-2006 and FLD No. 34-2006 to justify the subsequent issuance of WDL. The validity of the WDL rests upon the validity of tax assessment. And to proceed heedlessly with tax collection without first establishing a valid assessment is evidently violative of the cardinal principle in administrative investigations: that taxpayers should be able to present their case and adduce supporting evidence.[10]

Basic is the rule that a taxpayer must actually receive any assessment issued by petitioner for it to be valid. The presumption that a mail matter properly addressed with postage prepaid is actually mailed and received by the taxpayer in the ordinary course of mail is merely a disputable presumption, which can be directly denied by the taxpayer. In the present case, respondent denied receipt of the PAN and the FLD with assessment notices, in which case, the burden of proof was shifted to petitioner to present and offer evidence to prove that the said documents were duly mailed, delivered and actually received by respondent.[11]

The failure of the petitioner to prove receipt of the assessment by respondent leads to a conclusion that no

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[10] Commissioner of Internal Revenue v. BASF Coating + Inks Phils., Inc., G.R. No. 198677, November 26, 2014.

[11] CIR v. Metro Star Superama, Inc., G.R. No. 185371, December 8, 2010, 637 SCRA 633; Barcelon, Roxas Securities, Inc. v. CIR, G.R. No. 157064, August 7, 2006, 498 SCRA 126; Estate of the Late Juliana Diez Vda. De Gabriel v. CIR, G.R. No. 155541, January 27, 2004, 421 SCRA 266; CIR v. United International Pictures AB, CA-G.R. SP No. 73200, June 22, 2006; Pundanera v. CIR, CTA Case No. 8333, December 2, 2014; Palaganas v. CIR, CTA Case No. 8394, September 17, 2014; Coolmate Corporation v. CIR, CTA Case No. 8264, May 19, 2014.

assessment was issued. Consequently, the right of the government to issue an assessment against respondent for the pertinent period had already prescribed.[12]

Finding the ruling of the Court in Division, within the ambit of what law and jurisprudence provide, the same must be sustained and not disturbed.

WHEREFORE, the Petition for Review filed by the Commissioner of Internal Revenue on April 1, 2015, is hereby **DENIED**, for lack of merit. Accordingly, the assailed Decision and Resolution promulgated on December 2, 2014 and February 20, 2015, respectively, are **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

ON LEAVE
CAESAR A. CASANOVA
Associate Justice

[12] Industrial Textile Manufacturing Co. of the Phils., Inc. v. CIR, CTA Case 4885, August 22, 1996.

ON LEAVE
CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
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 case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice