REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

LAURENCE LEE V. LUANG, Petitioner,	**CTA CASE NO. 7967**
	Members:
- versus -	**CASTAÑEDA, JR.,** *Chairperson* **CASANOVA,** *and* **MINDARO-GRULLA,** *JJ.*
HON. SIXTO S. ESQUIVIAS IV, in his capacity as COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** JAN 05 2012 4:10 p.m.

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DECISION

CASTAÑEDA, JR., *J*.:

This case involves a Petition for Review filed to appeal the inaction of the Commissioner of Internal Revenue on the protest filed by Laurence Lee V. Luang against the Final Assessment Notice (FAN) issued against him for alleged deficiency value-added tax (VAT), deficiency income tax, and compromise penalties, covering the taxable year ending December 31, 2005.

Petitioner Laurence Lee V. Luang is a Filipino businessman who owned a refilling station of Unioil Petroleum Philippines, Inc. He may be served with pleadings, notices, orders and other processes of the Court through the law firm of Britanico Sarmiento & Franco, with office address at 7th Floor, Banco de Oro Plaza, 8737 Paseo de Roxas, Makati City.[1]

Respondent is the Commissioner of the Bureau of Internal Revenue (BIR). She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Petitioner sent a letter dated June 21, 2005 to the BIR to inform said office that his business operations would cease by the middle of the year 2005 and that taxes were to be incurred only up to June 30, 2005.[2] Said letter was also meant to inform the BIR of the cessation of reportorial requirements that must be complied with by the taxpayer pursuant to the operation of a business entity.[3] Petitioner filed his second (2nd) quarter VAT return on July 26, 2005.[4]

Petitioner received a copy of a Formal Letter of Demand and a FAN on November 5, 2008 for alleged deficiency VAT, deficiency income tax, and compromise penalties for the year 2005.[5] The Formal Letter of Demand in part states:

> "Please be informed that there has been found due from you, deficiency value added tax and income tax per **Letter Notice No. 028-AS-05-00-00022** dated April 30, 2007 for the **CY 2005**, as shown hereunder."[6]

Based on the FAN, the BIR is assessing petitioner of the following alleged deficiency taxes, inclusive of interest and surcharge:[7] gc

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[1] Par. 3.2, Joint Stipulation of Facts, docket, p. 105; Exhibit "E", docket, p. 230
[2] Exhibit "E", docket, p. 230
[3] Par. 3.11, Joint Stipulation of Facts, docket, p. 106
[4] Exhibit "I", docket, p. 247
[5] Par. 3.4, Joint Stipulation of Facts, docket, p. 105
[6] Exhibit "10", docket, p. 377
[7] Exhibits "7", "8", and "9"

DEMAND NO.	TAX TYPE	AMOUNT	PERIOD
28-05-0011	VAT	P7,286,048.42	2005
28-05-0011	Income Tax	401,197.62	2005
28-05-0011	Compromise Penalties	50,000.00	2005

Petitioner then filed a Protest to the FAN on December 5, 2008 or thirty (30) days after receipt of the FAN, arguing that the findings therein are devoid of any legal and factual bases, and moving that the same be cancelled and withdrawn.[8]

On February 3, 2009, within sixty (60) days after the filing of the protest, petitioner submitted his supporting documents. Thus, respondent has one hundred eighty (180) days or until July 31, 2009, within which to resolve petitioner's protest.[9]

The 180-day period lapsed on July 31, 2009 without respondent acting on the protest; hence, petitioner has thirty (30) days or until August 28, 2009 to file a Petition for Review.[10]

Petitioner filed the present Petition for Review with this Court on August 28, 2009.

In her Answer[11] filed on October 19, 2009, respondent raised the following arguments:

> "4. The assessments for calendar year 2005 in the amounts of P401,197.62 and P7,286,048.42 for deficiency income and value added taxes, respectively, were issued in accordance with law and regulations. The factual and legal bases of the assessments are contained in the Final Assessment Notices.

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[8] Exhibit "A", docket, pp. 215-218
[9] Exhibit "B", docket, pp. 219-223
[10] Par. 3.9, Joint Stipulation of Facts, docket, p. 106
[11] Docket, pp. 65-68

> 5. Finally, well-settled is the rule that tax assessments by tax examiners are presumed correct and made in good faith *(Cagayan Robina Sugar Milling Co. vs. Court of Appeals, 342 SCRA 671)*. It is the taxpayer and not the Bureau of Internal Revenue who has the duty of proving otherwise. Equally settled is the rule that in the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed. All presumptions are in favor of tax assessments. Dereliction on the part of petitioner to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notices."

During trial, the parties presented and formally offered their respective witnesses and documentary evidence.

The case was submitted for decision on November 29, 2011[12], taking into consideration petitioner's Memorandum filed on September 30, 2011 and respondent's Memorandum filed on November 22, 2011.

The following issues were submitted for the Court's resolution:

> 1. Whether respondent complied with the due process requirement as provided under the National Internal Revenue Code (NIRC) of 1997, as amended, and Revenue Regulations (RR) No. 12-99, with regard to the issuance of a deficiency tax assessment;
>
> 2. Whether or not petitioner is liable for deficiency VAT for the year 2005;
>
> 3. Whether or not petitioner is liable for deficiency income tax for the year 2005;
>
> 4. Whether or not petitioner is liable for compromise penalties for the year 2005; and
>
> 5. Whether or not the subject assessments have factual and legal bases.

Before addressing the other issues raised by the parties, the Court shall resolve first the issue pertaining to respondent's compliance with the due

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[12] Resolution dated November 29, 2011, docket, p. 458

process requirement as provided under the NIRC of 1997 and RR No. 12-99 with regard to the issuance of a deficiency tax assessment.

Petitioner contends that certain procedural lapses were committed by the BIR in issuing the assessment. Petitioner claims that after the issuance of the Letter Notice (LN) dated April 30, 2007, there is no evidence that a Preliminary Assessment Notice (PAN) was served upon petitioner pursuant to RR No. 12-99 and as such, petitioner believes that the deficiency VAT and income tax assessments issued against him must be considered void for being violative of the due process clause of the Constitution pursuant to the ruling of the Supreme Court in the case of *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.*[13].

On the other hand, respondent argues that the absence of a PAN may not invalidate the assessment, and that what is essential is that petitioner was able to file his protest to the FAN/Formal Letter of Demand within thirty (30) days from receipt of the same.

After a thorough review of the evidence on record, arguments of the parties, applicable laws and existing jurisprudence, this Court finds for petitioner.

The deficiency tax assessments issued against petitioner originated from the computerized matching conducted by the BIR on information or data provided by petitioner's suppliers against petitioner's declarations per VAT returns filed covering taxable year 2005. Said computerized matching supposedly disclosed that petitioner did not declare his purchases in the total amount of P40,048,304.72 and as such, petitioner had under-declared his

[13] G.R. No. 185371, December 8, 2010

purchases by 99.60%. As a result, the BIR issued Letter Notice No. 028-AS-05-00-00022 dated April 30, 2007 against petitioner.[14]

Revenue Memorandum Order (RMO) No. 42-2003 provides guidelines governing assessment of the national internal revenue taxes covered by Letter Notice, the pertinent parts of which are quoted for easy reference, to wit:

> "5. The LN shall serve as a discrepancy notice to taxpayer similar to a Notice for Informal Conference to the concerned taxpayer, thus, the procedures defined in RR 12-99 should likewise be observed.
>
> 6. The concerned taxpayer will be given an opportunity to reconcile the discrepancy. If the taxpayer fails to respond within fifteen (15) days from date of receipt of the LN, the RDO/LTDO/LTAID shall issue a follow-up letter giving the taxpayer ten (10) days to response. If despite the additional ten (10) days, taxpayer fails to respond, the RDO/LTDO/LTAID shall indorse the case with least possible delay to the Assessment Division of the region or the appropriate office authorized to review report of investigation, for the issuance of a Preliminary Assessment Notice and Final Assessment Notice, as the case may be, following the guidelines and procedures provided by RR 12-99."

On the other hand, Section 3.1.1 of RR No. 12-99 provides that "(I)f 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 the 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

[14] Exhibit "1", docket, p. 365

warranted." Moreover, Section 3.1.2 of RR No. 12-99 provides that "(I)f 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 xxx."

Respondent's witness, Mr. Alberto E. Pengson, testified that after issuing and sending subject LN to petitioner, he also sent a Post-Reporting Notice (PRN) dated January 23, 2008 through registered mail.[15] Mr. Pengson also testified that since the result of his investigation revealed that petitioner is liable for deficiency income tax and VAT for taxable year 2005, he prepared and submitted a Memorandum Report[16] dated May 15, 2008, with attached Audit Reports[17] on VAT and income tax, recommending the issuance of a PAN against petitioner. Furthermore, Mr. Pengson confirmed that after he prepared and submitted his Memorandum Report, a PAN with Details of Discrepancies[18] was issued against petitioner.[19]

During Mr. Pengson's cross-examinations, conducted by counsel for petitioner on May 11, 2011 and June 29, 2011, Mr. Pengson, however, confirmed that he has no document or evidence to prove that the PAN was actually received by petitioner, to wit:

[15] Exhibit "2", docket, p. 367; Exhibit "2-A", docket, p. 368
[16] Exhibit "3", docket, p. 369
[17] Exhibits "4" and "5", docket, pp. 370-371
[18] Exhibit "6", docket, pp. 372-373
[19] Par. 8 to 15, Exhibit "12", docket, pp. 381-382

<u>Hearing Date: May 11, 2011</u>

"ATTY. BRITANICO:
Anyway, I will start, your Honor.

CROSS-EXAMINATION OF PETITIONER'S WITNESS, MR. ALBERTO E. PENGZON BY ATTY. RODOLF CV. BRITANICO

Q: Mr. Pengzon, you have identified your Affidavit as well as you have also inquired to this Honorable Court which are attached to these Affidavit, one of which is Exhibit '6' which is preliminary assessment notice, that is *(sic)* relation to your question nos. 15, and 16 of your Judicial Affidavit my question to you Mr. Pengzon is that, do you agree with me that you do not have any evidence to show that this preliminary assessment notice, Exhibit 6, was duly received by the petitioner?

A: We have the registered mail and we will submit duly received *(sic)*.

Q: Mr. Pengzon, do you agree with me that in your Judicial Affidavit, you have not attach *(sic)* a copy of the registered return card of the preliminary assessment notice purportedly undated?

A: The preliminary assessment notice was not sent by the administrative division in our office.

Q: My question, Mr. Pengzon, **you do not have any evidence if you speak now that this preliminary assessment notice was received by the petitioner**?

A: **Yes. I don't know if the assessment division have *(sic)* as far as am concerned**. That document is from our office. We do not have evidence to assessment notice or Regional Office *(sic)*.

Q: I am asking you, Mr. Witness, during last hearing I have to repeat my question please answer my question as you speak now, **you as a witness does not have any evidence to show that this preliminary assessment notice was duly received by the petitioner**?

A: No but I will qualify my answer but that document did not came *(sic)* from our office that document came from our assessment division or regional office so we did not sent *(sic)* by our regional office. **I don't have evidence**.

xxx xxx xxx

ATTY. BRITANICO:
My question is very simple, please don't make it complicated for all of us. I am not talking about your report. I am talking about the preliminary assessment notice which is Exhibit '6' of your Judicial Affidavit.

WITNESS:
I understand.

Q: Since you stated that this document did not emanate from your office, **do you agree with me that you do not have knowledge of this preliminary assessment notice**?

A: **Yes**."[20] (*Emphasis supplied*)

Hearing Date: June 29, 2011

"ATTY. BRITANICO:
Q: During the last hearing, I have asked questions about the Exhibit '6'?

MR. PENGSON:
A: Yes.

ATTY. BRITANICO:
Q: This is the Preliminary Assessment Notice. And if you remember, **I have asked you if you have any proof of service for your service to the petitioner**, Mr. Laurence Lee Luang.

MR. PENGSON:
A: Yes.

ATTY. BRITANICO:
Q: And **you have admitted to us, to this Court that you did not have any. Is that correct**?

MR. PENGSON:
A: **Yes, Sir. But I qualified my answer because that document does not come from our office, Sir**.

ATTY. BRITANICO:
Q: I am just asking you?

[20] Transcript of Stenographic Notes (TSN), May 11, 2011, pp. 11-14

MR. PENGSON:
A: Yes.

ATTY. BRITANICO:
Q: So, if this document, **I have to ask you if this document did not emanate from your office, it only means that you did not have any personal knowledge with regard to the Preliminary Assessment Notice**. Isn't it?

MR. PENGSON:
A: **Yes**."[21] (*Emphasis supplied*)

Under Section 3(v) of Rule 131 of the Rules on Evidence, there is a disputable presumption that a letter duly directed and mailed was received in the regular course of the mail. Corollary thereto, Section 10 of Rule 13 of the Revised Rules of Court provides that "(s)ervice by registered mail is complete upon actual receipt by the addressee, or after five (5) days from the date he received the first notice of the postmaster, whichever date is earlier."

While there is a disputable presumption that a mailed letter is deemed received by the addressee in the ordinary course of mail, a direct denial of the receipt of mail shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee.[22] Jurisprudence is replete with cases holding that if the taxpayer denied receiving an assessment from the BIR, it is incumbent upon the latter to prove by competent evidence that such notice was indeed received by the addressee. The *onus probandi* is therefore shifted to respondent to prove by contrary evidence that petitioner received the assessment notice in the due

[21] TSN, June 29, 2011, pp. 6-8
[22] *Republic of the Philippines vs. The Court of Appeals and Nielson & Company, Inc.*, G.R. No. L-38540, April 30, 1987

course of mail.[23] In other words, an assessment notice is not considered validly issued if the taxpayer denied receipt thereof.[24]

In the present case, petitioner categorically denied receiving the PAN in his Petition for Review. While respondent's witness, Mr. Pengson, identified a copy of an undated PAN during trial, Mr. Pengson failed to establish during his cross-examination by the counsel for petitioner that said PAN was received by petitioner. Respondent failed to prove that the PAN was delivered to petitioner by registered mail since no copy of the registry return receipt was presented as evidence. Likewise, respondent failed to prove that the PAN was personally received by petitioner. Since it was not clearly established by respondent that petitioner actually received the PAN, either personally or by registered mail, the Court cannot uphold respondent's position that due process was observed in this case.

In the case of *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.*[25], the High Tribunal declared that failure to strictly comply with notice requirements prescribed under Section 228 of the NIRC of 1997 and RR No. 12-99 is tantamount to a denial of due process, to wit:

> "The Court agrees with the CTA that the CIR failed to discharge its duty and present any evidence to show that Metro Star indeed received the PAN dated January 16, 2002. It could have simply presented the registry receipt or the certification from the postmaster that it mailed the PAN, but failed. Neither did it offer any explanation on why it failed to comply with the requirement of service of the PAN. It merely accepted the letter of Metro Star's chairman dated April 29, 2002, that stated that he had received the *FAN* dated April 3,

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[23] *Arnoldus Woodworks International, Inc. vs. The Commissioner of Internal Revenue, et al.*, CTA Case No. 4269, March 18, 1994

[24] *The Commissioner of Internal Revenue vs. Obayashi Philippines Corporation*, CTA EB No. 42 (CTA Case No. 6222), June 10, 2005

[25] G.R. No. 185371, December 8, 2010

2002, but not the *PAN*; that he was willing to pay the tax as computed by the CIR; and that he just wanted to clarify some matters with the hope of lessening its tax liability.

This now leads to the question: Is the failure to strictly comply with notice requirements prescribed under Section 228 of the National Internal Revenue Code of 1997 and Revenue Regulations (R.R.) No. 12-99 tantamount to a denial of due process? Specifically, are the requirements of due process satisfied if only the FAN stating the computation of tax liabilities and a demand to pay within the prescribed period was sent to the taxpayer?

The answer to these questions require an examination of Section 228 of the Tax Code which reads:

xxx xxx xxx

Indeed, **Section 228 of the Tax Code clearly requires that the taxpayer must first be informed that he is liable for deficiency taxes through the sending of a PAN. He must be informed of the facts and the law upon which the assessment is made. The law imposes a substantive, not merely a formal, requirement**. 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.

This is confirmed under the provisions R.R. No. 12-99 of the BIR which pertinently provide:

xxx xxx xxx

From the provision quoted above, **it is clear that the sending of a PAN to taxpayer to inform him of the assessment made is but part of the 'due process requirement in the issuance of a deficiency tax assessment,' the absence of which renders nugatory any assessment made by the tax authorities. The use of the word '*shall*' in subsection 3.1.2 describes the mandatory nature of the service of a PAN. The persuasiveness of the right to due process reaches both substantial and procedural rights and the failure of the CIR to strictly comply with the requirements laid down by law and its own rules is a denial of Metro Star's right to due process.** Thus, for its failure to send the PAN stating the facts and the law on which the assessment was made as required by

> Section 228 of R.A. No. 8424, the assessment made by the CIR is void." (*Emphasis supplied*)

Accordingly, in the absence of proof of actual receipt by petitioner of the undated PAN in violation of Section 228 of the NIRC of 1997 and RR No. 12-99, the Court finds that petitioner was not accorded due process. Hence, both the undated PAN and the FAN dated October 30, 2008 are void.

In view thereof, the Court will no longer discuss the remaining issues.

WHEREFORE, the instant Petition for Review is hereby **GRANTED**. Accordingly, Formal Letter of Demand dated October 30, 2008 and Assessment Notice/Demand No. 28-05-2001 dated October 30, 2008 for deficiency VAT, deficiency income tax and compromise penalties are hereby **CANCELLED**.

SO ORDERED.

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

WE CONCUR:

CAESAR A. CASANOVA
Associate Justice

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

JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice