REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

LA FRUTERA, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 7988

Members:

ACOSTA, *Chairperson*
UY, *and*
FABON-VICTORINO, *JJ.*

Promulgated:
DEC 20 2012 ; 2:00 pm

x- x

DECISION

***Fabon-Victorino, J.*:**

Petitioner La Frutera, Inc. filed the instant Petition for Review[1] praying for the annulment and cancellation of the assessment issued by respondent Commissioner of Internal Revenue (CIR) for deficiency withholding tax in the amount of Php7,240,220.77, inclusive of surcharge, interest and compromise penalties for the taxable year 2004.

[1] Docket, pp. 5-14.

Petitioner is a duly organized domestic corporation, with principal office at Datu Paglas, Buluan, Maguindanao.[2] It is engaged in the production and exportation of Cavendish bananas and classified as one of the Top 10,000 Corporations by the Bureau of Internal Revenue (BIR).

Respondent, on the other hand, is the Commissioner of the BIR, with the power to assess and collect all national internal revenue taxes, fees and charges, and to enforce all forfeitures, penalties, and fines connected therewith. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Petitioner alleges that for its labor requirements in connection with its business activities for the year 2004, it employed laborers through Paglas Employment Agency, Inc. ("Agency"). The service fees paid to the agency were subjected to appropriate withholding tax.

w

[2] Par. 1, Stipulation of Facts, Joint Stipulation of Facts and Issues (JSFI), docket, p. 115.

For the same taxable year 2004, petitioner allegedly imported materials and supplies for its operational requirements.[3]

For the months of January to December of 2004, petitioner filed its Monthly Remittance Returns of Creditable Income Taxes Withheld (Expanded) on the following dates:

EXHIBIT	PERIOD	DATE FILED
"R" and "S"	January	February 10, 2004
"T" and "U"	February	March 10, 2004
"V" and "W"	March	April 12, 2004
"X" and "Y"	April	May 5, 2004
"Z" and "AA"	May	June 10, 2004
"BB" and "CC"	June	July 8, 2004
"DD" and "EE"	July	August 10, 2004
"FF" and "GG"	August	September 10, 2004
"HH" and "II"	September	October 11, 2004
"JJ"	October	October 11, 2004
"KK"	October	November 10, 2004
"LL"	November	November 10, 2004
"MM"	November	December 10, 2004
"NN"	December	December 10, 2004
"OO"	December	January 17, 2005
"PP"	December	January 17, 2005

On December 28, 2007, petitioner received from respondent two Formal Letters of Demand (FLDs)[4] both dated December 10, 2007. One FLD was for Audit Results/Assessment

[3] Pars. 4.1, 4.2, and 4.3, Statement of Facts, Petition for Review, docket, p. 7; Exhibits "M", "N", and "O".
[4] Exhibits "E" and "E-2", docket, pp. 234-235.

Notice No. L/D#0417-04/2007(WHT),[5] and the other, for Audit Results/Assessment Notice No. L/D#0417(A)-04/2007(WHT).[6] Petitioner was assessed for deficiency withholding tax inclusive of surcharge, interest, and compromise penalty for taxable year 2004, in the aggregate amount of Php9,971,741.27.

Quoted below is the Formal Letter of Demand for Assessment No. L/D#0417-04/2007(WHT):

FORMAL LETTER OF DEMAND

December 10, 2007
Date

The President/Manager
La Frutera, Inc.
Datu Paglas, Maguindanao, ARMM
TIN: 004-397-647

Gentlemen:

Please be informed that after investigation, there has been found due from you deficiency withholding tax for calendar year 2004, as shown hereunder:

Assessment No: **L/D#0417-04/2007 (WHT)**
Withholding Tax 2004

Cost of Sales		PER ITR	WHT RATE		WHT DUE
Fieldwork Costs:					
1. Pest and Disease Control	₱	110,346,145.00	1%		1,103,461.45
2. Plant and Fruit Care	₱	87,524,063.00	1%	₱	875,240.63
3. Farm Overhead	₱	52,115,884.00	2%	₱	1,042,317.68
4. Maintenance and Repairs	₱	35,140,059.00	2%	₱	702,801.18
5. Cutting	₱	10,286,071.00	2%	₱	205,721.42

[5] Exhibits "E-3" and "E-4", docket, pp. 236-237.
[6] Exhibits "E-6" and "E-7", docket, pp. 239-240.

6. Propping	₱	9,862,032.00	2%			₱	197,240.64
Harvesting and Packing Costs:							
1. Packing and Stacking	₱	20,054,017.00	2%			₱	401,080.34
2. Overhead	₱	13,224,408.00	2%			₱	264,488.16
3. Fruit Preparation	₱	8,013,397.00	2%			₱	160,267.94
4. Hauling to Packing House	₱	5,202,204.00	2%			₱	104,044.08
Banana Sales Costs:							
1. Loading and Hauling to Pier	₱	43,602,763.00	2%			₱	872,055.26
2. Stevedoring and Arrastre	₱	14,099,129.00	2%			₱	281,982.58
Operating Expenses							
1. Travel and Transportation	₱	7,824,273.00	2%			₱	156,485.46
2. Maintenance and Repairs	₱	5,226,045.00	2%			₱	104,520.90
3. Communication, Light & Water	₱	5,187,772.00	2%			₱	103,755.44
4. Maintenance and Repairs	₱	1,818,898.00	1%			₱	18,188.98
5. Stationery and Office Supplies	₱	1,664,308.00	15%			₱	249,646.20
6. Outside Services/Professional Fees	₱	891,412.00	2%			₱	17,828.24
7. Entertainment, Amusement & Receation	₱	755,329.00	2%			₱	15,106.58
8. Miscellaneous	₱	1,124,494.00	2%			₱	22,489.88
Total Deficiency Withholding Tax						₱	6,898,723.04
Less: Income Tax Withheld/Paid Per Return						₱	1,505,799.95
Balance						₱	5,392,923.09
Add: 25% Surcharge				₱	1,348,230.77		
20% Interest per annum from 01-16-05 to 01-01-08				₱	3,205,587.41	₱	4,553,818.18
TOTAL AMOUNT DUE AND COLLECTIBLE						**₱**	**9,946,741.27**

*Please note that the interest and the total amount due will have to be adjusted if paid beyond 01-10-2008.

The complete details covering the aforementioned discrepancies established during the investigation of this case are shown in the accompanying SCHEDULE 1 of this letter of demand.

The 25% surcharge has been imposed pursuant to the provisions of Section 248(B) of the National Internal Revenue Code, as amended by R.A. No. 8424, which took effect on January 1, 1998.

In view thereof, you are requested to pay your aforesaid deficiency withholding tax liability through the duly authorized agent bank in which you are enrolled within the time shown in the enclosed assessment notice.

Very truly yours,

ESMERALDA M. TABULE, CEO VI
Regional Director

The other Formal Letter of Demand for Assessment No. L/D#0417(A)-04/2007(WHT) is reproduced below:

FORMAL LETTER OF DEMAND

December 10, 2007
Date

The President/Manager
La Frutera, Inc.
Datu Paglas, Maguindanao, ARMM
TIN: 004-397-647

Gentlemen:

Please be informed that after investigation, there has been found due from you deficiency withholding tax for calendar year 2004, as shown hereunder:

Assessment No: **L/D#0417(A)-04/2007 (WHT)**
Withholding Tax 2004

Compromise Penalty for Failure to Pay Expanded WHT at the Time/s Required by law ₱ 5,000.00
GRAND TOTAL AMOUNT DUE AND COLLECTIBLE ₱ 25,000.00

The complete details covering the aforementioned discrepancies established during the investigation of this case are shown in the accompanying SCHEDULE 1 of this letter of demand.

In view thereof, you are requested to pay your aforesaid deficiency withholding tax liability through the duly authorized agent bank in which you are enrolled within the time shown in the enclosed assessment notice.

Very truly yours,

ESMERALDA M. TABULE, CEO VI
Regional Director

The Details of Discrepancies[7] attached to the said FLD demanded immediately payment of the alleged tax liability, in this wise:

> It is requested that your aforesaid deficiency withholding tax liability be paid immediately upon receipt hereof, inclusive of penalties incident to delinquency. This is our final decision. If you disagree, you may appeal this final decision with the Court of Tax Appeals within thirty (30) days from the date of receipt hereof, otherwise, our said deficiency withholding tax assessment shall become final, executory and demandable.

On January 2, 2008, petitioner protested the two FLDs, asserting that the cost of sales as reflected in their 2004 Audited Financial Statements did not entirely constitute cost and expenses attributable to local purchase of goods and services that were subjected to the corresponding expanded withholding tax (EWT).[8] In connection thereto and in consideration for the approval of its request for re-investigation, petitioner, through its Controller, Mr. Edwin S. Ledesma, executed a "Waiver of the Statute of Limitations under the National Internal Revenue Code"[9] dated December 28, 2007, but notarized exactly a year after or on December 28, 2008.

---

[7] Exhibits "E-5" and "E-8", docket, pp. 238 and 241.
[8] Exhibit "F", docket, p. 242.
[9] Exhibit "Q", docket, p. 259; Exhibit "2", BIR Records, p. 172.

On February 27, 2009, petitioner received from respondent, through Revenue District Officer Muslimen L. Maca-agir, Al Hadj, a Notice for Informal Conference dated February 24, 2009.[10]

On August 28, 2009, petitioner received a Preliminary Assessment Notice (PAN)[11] dated August 11, 2009 from respondent through Assistant Regional Director Alberto S. Olasiman of BIR Revenue Region No. 18, assessing it for deficiency withholding tax inclusive of interest and compromise penalty for taxable year 2004, in the total amount of Php7,240,220.77.

On September 1, 2009, petitioner protested the PAN through a letter[12] dated August 28, 2009.

On October 5, 2009, petitioner received an undated letter[13] from respondent, through Regional Director Atty. Marcelinda Omila-Yap of BIR Revenue Region No. 18, together with two FLDs[14] both dated September 1, 2009. One of the FLDs was for

---

[10] Exhibit "16", docket, p. 382.
[11] Exhibit "C", docket, pp. 230-231; Exhibit "3", BIR Records, pp. 248-249.
[12] Exhibit "D", docket, p. 233.
[13] Exhibits "G", docket, pp. 243-244.
[14] Exhibits "H" and "H-3", docket, pp. 245 and 248; Exhibits "7" and "10", BIR Records, pp. 263 and 267.

Assessment Nos. L/D# 0130-04/2009(WHT) and the other, for L/D#0130(A)-04/2009(WHT).

The FLD for Assessment No. L/D#0130-04/2009(WHT)[15] is hereby quoted for easy reference:

FORMAL LETTER OF DEMAND

September 1, 2009
Date

The President/Manager
La Frutera, Inc.
Datu Paglas, Maguindanao, ARMM
TIN: 004-397-647-000

Gentlemen:

Please be informed that after re-investigation, there has been found due from you deficiency withholding tax for calendar year 2004, as shown hereunder:

Assessment No: **L/D#0130-04/2009 (WHT)**
Withholding Tax 2004

Cost of Sales		PER ITR	WHT RATE		WHT DUE
Fieldwork Costs:					
1. Pest and Disease Control	₱	110,346,145.00	1%	₱	1,103,461.45
2. Plant and Fruit Care	₱	87,524,063.00	1%	₱	875,240.63
3. Farm Overhead	₱	52,115,884.00	2%	₱	1,042,317.68
4. Maintenance and Repairs	₱	35,140,059.00	2%	₱	702,801.18
5. Cutting	₱	10,286,071.00	2%	₱	205,721.42
6. Propping	₱	9,862,032.00	2%	₱	197,240.64
Harvesting and Packing Costs:					
1. Packing and Stacking	₱	20,054,017.00	2%	₱	401,080.34
2. Overhead	₱	13,224,408.00	2%	₱	264,488.16
3. Fruit Preparation	₱	8,013,397.00	2%	₱	160,267.94
4. Hauling to Packing House	₱	5,202,204.00	2%	₱	104,044.08
Banana Sales Costs:					
1. Loading and Hauling to Pier	₱	43,602,763.00	2%	₱	872,055.26
2. Stevedoring and Arrastre	₱	14,099,129.00	2%	₱	281,982.58
Operating Expenses:					

[15] Exhibit "H".

1.	Travel and Transportation	₱	7,824,273.00	2%	₱	156,485.46
2.	Maintenance and Repairs	₱	5,226,045.00	2%	₱	104,520.90
3.	Communication, Light & Water	₱	5,187,772.00	2%	₱	103,755.44
4.	Stationery and Office Supplies	₱	1,818,898.00	1%	₱	18,188.98
5.	Outside Services/Professional Fees	₱	1,664,308.00	15%	₱	249,646.20
6.	Insurance	₱	891,412.00	2%	₱	17,828.24
7.	Entertainment, Amusement & Recreation	₱	755,329.00	2%	₱	15,106.58
8.	Miscellaneous	₱	1,124,494.00	2%	₱	22,489.88
Total Deficiency Withholding Tax					₱	6,898,723.04
Less: Income Tax Withheld/Paid Per Return				₱ 1,505,799.95		
Payments Considered per Re-investigation on Purchase of Materials				₱ 1,108,549.72		
Additional Voluntary Payment on EWT				₱ 562,262.20	₱	3,176,611.87
Balance					₱	3,722,111.17
Add: 20% Interest per annum from 01-16-05 to 09-30-09					₱	3,493,109.60
TOTAL AMOUNT DUE AND COLLECTIBLE					**₱**	**7,215,220.77**

*Please note that the interest and the total amount due will have to be adjusted if paid beyond 09-30-2009.

The complete details covering the aforementioned discrepancies established during the investigation of this case are shown in the accompanying SCHEDULE 1 of this letter of demand.

In view thereof, you are requested to pay your aforesaid deficiency withholding tax liability through the duly authorized agent bank in which you are enrolled within the time shown in the enclosed assessment notice.

Very truly yours,

ATTY. MARCELINDA OMILA-YAP
Regional Director

The FLD of September 1, 2009 for Assessment No. L/D#0130(A)-04/2009(WHT), on the other hand, stated as follows:[16]

FORMAL LETTER OF DEMAND

September 1, 2009
Date

The President/Manager
La Frutera, Inc.
Datu Paglas, Maguindanao, ARMM
TIN: 004-397-647-000

Gentlemen:

Please be informed that after re-investigation, there has been found due from you deficiency withholding tax for calendar year 2004, as shown hereunder:

Assessment No: **L/D#0130(A)-04/2009 (WHT)**
Withholding Tax 2004

Compromise Penalty for Failure to Pay Expanded WHT at the Time/s Required by law	₱ 25,000.00
GRAND TOTAL AMOUNT DUE AND COLLECTIBLE	**₱ 25,000.00**

The complete details covering the aforementioned discrepancies established during the investigation of this case are shown in the accompanying SCHEDULE 1 of this letter of demand.

In view thereof, you are requested to pay your aforesaid deficiency withholding tax liability through the duly authorized agent bank in which you are enrolled within the time shown in the enclosed assessment notice.

Very truly yours,

ATTY. MARCELINDA OMILA-YAP
Regional Director

[16] Exhibit "H-3".

Together with the foregoing FLDs was respondent's undated letter denying petitioner's request for further reinvestigation, thus:

> In view of the foregoing, your request for further reinvestigation cannot be given due course and the assessment still stands as it is.
>
> Please pay the said deficiency tax assessment not later than thirty (30) days from receipt of the Formal Assessment Notice so that this case shall be considered closed and to avoid the possibility by this office to enforce collection by warrants of distraint and levy and garnishment. You may visit Revenue District Office No. 107, Cotabato City for the issuance of BIR Form No. 0605 for presentation to any of our Authorized Agent Banks for payment. After payment, please furnish us photocopies of the duly validated BIR Form No. 0605 and deposit slips for immediate crediting of payment in our records.

Attached to the said undated letter was the Details of Discrepancies[17], wherein respondent wrote:

> It is requested that your aforesaid deficiency withholding tax liability be paid immediately upon receipt hereof, inclusive of penalties incident to delinquency. This is our final decision. If you disagree, you may appeal this final decision with the Court of Tax Appeals within thirty (30) days from the date of receipt hereof, otherwise, our said deficiency withholding tax assessment shall become final, executory and demandable.

---

[17] Exhibits "H-1" and "H-4", docket, pp. 246 and 249; Exhibits "8" and "11", BIR Records, pp. 264 and 266.

On November 4, 2009, petitioner filed the instant Petition for Review.

In her Answer[18] to the Petition for Review, respondent interposed the following defenses:

> 9. Petitioner La Frutera, Inc., is liable to pay its deficiency expanded withholding tax for calendar year 2004 in the total amount of Seven Million Two Hundred Forty Thousand Two Hundred Twenty Pesos and 77/100 (P7,240,220.77) including penalties, surcharges and interest for the following reasons:
>
> 9.1 Petitioner is regarded as one of the Top 10,000 corporations and as such, it is subject to mandatory withholding of the tax on its purchases of goods and services from its regular local supplier. Further, top 10,000 corporation are assessed pursuant to Revenue Regulation No. 17-2003 in relation to Revenue Memorandum Circular No. 72-2004. Pertinent portions of Revenue Regulations No. 17-2003 is hereunder quoted for ready reference:
>
> '***Income Payments made by top ten thousand (10,000) private corporations to their local/resident supplier of goods and local/resident supplier of services other than those covered by other rates of withholding tax.*** *- Income Payments made by any of the top ten thousand (10,000) private corporations, as determined by the Commissioner, to their local/resident supplier of goods and local/resident*

[18] Docket, pp. 62-69.

supplier of services, including non-resident alien engaged in trade or business in the Philippines.

Supplier of Goods -	*One percent (1%)*
Supplier of Services -	*Two percent (2%)'*

9.2 In the course of reinvestigation, petitioner submitted documents comprising receipts issued by Paglas Employment Agency, Inc. Scrutiny of the receipts reveal that the labor works on farm overhead were performed not by the employees of petitioner but instead by employees of Paglas Employment Agency, Inc. In other words, the labor works were outsourced and income payment was made to the employment agency, a local supplier of services. Such income payment is subject to expanded withholding tax which petitioner failed to do.

9.3 During the period 2004, petitioner imported materials and supplies which were used in the operation of the plantation. As provided in the above-quoted provision of Revenue Regulations No. 17-2003, these expenses are subject to 1% expanded withholding tax.

9.4 The documents submitted by petitioner during investigation were not considered by respondent for two reasons. First, petitioner submitted only photocopied documents which cannot be verified as to its veracity; second, petitioner submitted the said documents beyond the time required to submit the same, despite various notices given by respondent.

9.5 It is a well-settled rule in taxation that the burden of proof is on the taxpayer to present evidence to show the incorrectness of the assessment. Despite re-investigation, petitioner failed to submit all pertinent papers, records and documents which could evidently prove the incorrectness of the assessment made by respondent.

10. The assessment for taxable year 2004 in the amount of 7,240,220.77 was issued in accordance with law and regulations.

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

On April 16, 2010, the parties submitted their Joint Stipulation of Facts and Issues,[19] which was approved on April 21, 2010.[20]

During the trial on the merits, petitioner presented its Accounting Superintendent, Ms. Liza M. Cabarlo followed by its Controller, Mr. Edwin S. Ledesma.

[19] Docket, pp. 115-118.
[20] Docket, p. 125.

Witness Liza M. Cabarlo, by way of Judicial Affidavit[21], testified that she prepared the documents pertaining to the case like the documents on petitioner's importation of materials during the taxable year 2004. Petitioner sourced a chemical called Vondozeb from Cerex Agri S.A., in France, and Potassium Chloride from Dead Sea Works Limited, in Israel, as indicated in the sample BOC Import Entry & Internal Revenue Declarations on which the addresses of the said suppliers were indicated.

On cross examination, the witness however clarified that she is not the custodian of the documents presented, but as a member of the accounting staff she retains a file copy of the said documents.

Petitioner's Controller, Mr. Edwin S. Ledesma, also executed a Judicial Affidavit[22] in which he declared that he handles petitioner's financial affairs including the subject deficiency assessments issued by respondent against it. He is familiar with the instant case as he was authorized to file it in court.

---

[21] Exhibit "O", pp. 255-257.
[22] Exhibit "QQ", docket, pp. 285-302.

He further intimated that on December 28, 2007, petitioner received from respondent FLD dated December 10, 2007, for deficiency withholding taxes for the taxable year 2004. The said FLD was based on the Annual Income Tax Return filed by petitioner. It was merely a table assessment, based on petitioner's Cost of Sales as reflected in the financial statements attached to its Annual Income Tax Return for the taxable year 2004. Respondent merely used as basis thereof the Cost of Sales without taking into account petitioner's transactions which were not subject to withholding, or which were subject to withholding but of a different tax rate.

Further, petitioner filed a letter requesting for a re-investigation of the assailed assessment on the ground that the cost of sales as reflected in petitioner's 2004 Audited Financial Statements, did not entirely consist of cost and expenses attributable to local purchases of goods and materials. With the filing of the said request for re-investigation, petitioner was requested to execute a Waiver of Statute of Limitations. However, the Waiver did not specify the kind of tax involved, the acceptance date by the representative of respondent and the position of the signatory for respondent. Neither was there any indication of petitioner's receipt of a copy thereof. And while he executed the Waiver on December 18, 2007, it was notarized only on December 28, 2008.

He also testified that petitioner submitted documents in support of its request for re-investigation or protest letter. Thereafter, respondent issued the PAN dated August 11, 2009 to which petitioner also protested in a letter dated August 28, 2009. Respondent denied petitioner's protest, attaching thereto a new FLD.

In the Resolution dated March 18, 2011[23] and May 12, 2011[24], the Court admitted the exhibits formally offered in evidence by petitioner. [25]

For her part, respondent presented (1) Hannah Thea M. Tulio, Revenue Officer II of the Large Taxpayers Regular Audit Division II; (2) Irene L. Ansao-Balleque, Revenue Officer at the Assessment Unit of RDO No. 110; and (3) Phoebe Felipe, Revenue Officer at the Assessment Unit of RDO No. 110.

[23] Docket, pp. 308-309.
[24] Docket, p. 327.
[25] Docket, pp. 200-207.

Through her Judicial Affidavit,[26] Hannah Thea M. Tulio testified that she examined petitioner's books of account and other accounting records for all internal revenue taxes for taxable year 2004. She however failed to terminate the investigation due to her transfer to Revenue District Office No. 43 in Pasig City. The task was re-assigned to another revenue officer.

In her Judicial Affidavit,[27] witness Irene L. Ansao-Balleque testified that she conducted the re-investigation of petitioner's books of account and other accounting records for withholding taxes for taxable year 2004 by virtue of Tax Verification Notice No. 2002-002242543 dated January 11, 2008.

She noted that petitioner requested for a re-investigation which was granted on January 7, 2008. With the execution of a Waiver of Statute of Limitations by petitioner's representative, the period of assessment was extended to December 29, 2009.

Her reinvestigation revealed that petitioner had deficiency withholding taxes in the aggregate amount of Php7,240,220.77 for taxable year 2004. She called petitioner's representative, Mr.

---

[26] Exhibit "13", docket, pp. 340-342.
[27] Exhibit "15", docket, pp. 355-359.

Edwin S. Ledesma regarding the result of her reinvestigation. Petitioner, however, simply ignored it prompting her to recommend the issuance of a PAN. A FLD was issued after the lapse of the 15-day period granted in the PAN. In a letter dated November 5, 2009, petitioner's request for further re-investigation was denied.

Respondent's last witness Phoebe Felipe also executed a Judicial Affidavit[28] in which she declared that she examined petitioner's books of accounts and other accounting records for withholding tax on fringe benefits by virtue of Revenue Memorandum Order No. 23-2005 for the taxable year 2004. Her investigation showed that petitioner was liable for deficiency withholding taxes for taxable year 2004 in the aggregate amount of Php9,000,000.00. She forwarded the case docket to Revenue Region No. 18 for review and possible issuance of assessment notice.

In the Resolution[29] dated January 6, 2012O, the Court admitted the documents formally offered by respondent on November 25, 2011.[30]

[28] Exhibit "14", docket, pp. 363-365.
[29] Docket, pp. 396-397.
[30] Docket, pp. 370-381.

On March 20, 2012, the case was submitted for decision, taking into consideration petitioner's Memorandum filed on February 15, 2012, and that of respondent's filed on March 16, 2012.[31]

THE ISSUES

The parties stipulated on the following issues[32] for the resolution of the Court, thus:

1. Whether the Respondent Commissioner complied with the procedural due process requirements of Revenue Regulation No. 12-99;

2. Whether the Respondent Commissioner's assessment against La Frutera has prescribed;

3. Whether the Respondent Commissioner's assessment is void for failing to state the factual basis thereof;

4. Whether the Respondent Commissioner erred in assessing La Frutera for income payments not subject to withholding tax.

5. Whether La Frutera is liable for the deficiency withholding tax assessment in the amount of P7,240,220.77

[31] Docket, p. 442.
[32] Docket, p. 116.

> inclusive of interest and penalty for the calendar year 2004.

All the foregoing may however be reduced into only one issue, to wit:

> WHETHER OR NOT PETITIONER IS LIABLE FOR DEFICIENCY WITHHOLDING TAX IN THE AGGREGATE AMOUNT OF Php7,240,220.77, INCLUSIVE OF INTEREST AND COMPROMISE PENALTY, FOR THE TAXABLE YEAR 2004.

THE RULING OF THE COURT

The provision in point is Section 228 of the National Internal Revenue Code (NIRC) of 1997, as amended, which reads as follows:

> SEC. 228. *Protesting of Assessment*. — When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided*, *however*, That a pre-assessment notice shall not be required in the following cases:
>
> (a) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the face of the return; or
>
> (b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or

(c) When a taxpayer who opted to claim a refund or tax credit of excess creditable withholding tax for a taxable period was determined to have carried over and automatically applied the same amount claimed against the estimated tax liabilities for the taxable quarter or quarters of the succeeding taxable year; or

(d) When the excise tax due on excisable articles has not been paid; or

(e) When an article locally purchased or imported by an exempt person, such as, but not limited to, vehicles, capital equipment, machineries and spare parts, has been sold, traded or transferred to non-exempt persons.

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

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

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

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.*(Emphasis supplied)*

The above provision mandates that the taxpayer must be informed of his tax liability through a duly served Preliminary Assessment Notice (PAN) before any action for collection is made. He is legally entitled to know the facts and the law upon which the assessment was made for him to present his side of the case. This is a substantive, not merely a formal requirement of the law. 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.[33]

To implement Section 228 of the NIRC of 1997, Revenue Regulations (RR) No. 12-99 was issued, enumerating sequentially the procedures to be followed to give the taxpayer concerned ample opportunity to be heard on his alleged tax liability, thus:

> SECTION 3. *Due Process Requirement in the Issuance of a Deficiency Tax Assessment.* —
>
> xxx xxx xxx
>
> 3.1.1 *Notice for informal conference.* — The Revenue Officer who audited the

---

[33] *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.*, G.R. No. 185371, December 8, 2010.

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

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.**
>
> xxx xxx xxx
>
> 3.1.4 *Formal Letter of Demand and Assessment Notice*. — The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, *otherwise, the formal letter of demand and assessment notice shall be void* (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. *(Emphases supplied)*

Revenue Memorandum Order No. 37-94, which governs the "procedures on the preparation, approval and release of assessment notices and demand letters" further provides, viz.,:

> C. *Review of Reports of Investigation and Service of Pre-assessment Notices.* —
>
> xxx xxx xxx
>
> 2. The aforementioned reviewing offices, after having reviewed the report of investigation, shall send a pre-assessment notice to the taxpayer, indicating therein the basis of the assessment, and a definite time frame within which he may protest the same if he is not agreeable. If the taxpayer files his protest within the period prescribed in the aforesaid notice, the same reviewing offices shall likewise decide whether the protest conforms with existing requirements and whether or not to give due course to the protest. The reviewing office shall then inform the taxpayer in writing of the result of the resolution of his protest.
>
> **If the pre-assessment notice is not protested within the prescribed period, the reviewing office shall then issue a letter of demand and assessment notice to the taxpayer.** *(Emphasis supplied)*

The record shows that it was on December 28, 2007[34] that petitioner received the two (2) FLDs[35] both dated December 10, 2007. One was for the Audit Results/Assessment Notice No. L/D#0417-04/2007(WHT)[36] demanding payment of deficiency withholding tax liability for 2004 in the total amount of P9,946,741.27, and the other FLD[37] was for Audit

---

[34] Exhibit "QQ", docket, p. 295.
[35] Exhibit "E".
[36] Exhibits "E-3" and "E-4".
[37] Exhibit "E-2".

Results/Assessment Notice No. L/D#0417-(A)-04/2007(WHT),[38] requesting payment of compromise penalty for 2004 in the amount of P25,000.00.

Clear from the evidence adduced that the two (2) FLDs with their corresponding Audit Results/Assessment Notices, all dated December 10, 2007, were sent by respondent without a PAN having been priorly issued to petitioner. Neither was there any indication that an informal conference was conducted for the alleged 2004 withholding tax liability and compromise penalties before the issuance of two (2) FLDs and final assessment notices.

The Details of Discrepancies, which formed part of the December 10, 2007 assessments is evident that respondent had reached a final determination of petitioner's tax liability even in the absence of a PAN.

The sending of a PAN to a taxpayer to inform him of the assessment made is 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.

---

[38] Exhibits "E-6" and "E-7".

The use of the word "shall" in subsection 3.1.2 of RR No. 12-99 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 the right to due process.[39]

Undoubtedly, the requirement that assessments should state the facts and the law on which said assessments were made was not complied with by respondent rendering the assessment and the FLDs dated December 10, 2007 null and void.

Respondent's arguments that petitioner was afforded the required due process when it received the assessment notice and the Notice for Informal Conference[40] dated February 24, 2009 on February 27, 2009, is untenable.

The FLDs dated September 1, 2009, which proceeded from the issuance of respondent's PAN dated August 11, 2009 and the Notice for Informal Conference dated February 24, 2009, discloses that the call for payment pertained to the alleged

[39] *Commissioner of Internal Revenue vs. Metro Star Superama, Inc., supra.*
[40] Exhibit "16", docket, p. 382.

deficiency withholding tax of petitioner for taxable year 2004, which was also the subject matter of the FLDs dated December 10, 2007. Except for the assessment numbers, total amount due/collectible, and the signatories, the total deficiency withholding taxes assessed in the FLDs dated December 10, 2007 and September 1, 2009, are essentially the same. In fine, they both pertained to deficiency withholding tax for 2004, with the same principal amounts, type of tax, and taxable year. To say the least, the issuance of the FLDs dated September 1, 2009 was an afterthought obviously to cure the flaws committed, namely, the failure to priorly issue a PAN and call for informal conference to thresh out any discrepancies before the FLDs dated December 10, 2007 was issued.

In any event, the subsequent assessments covered by the FLDs dated September 1, 2009 had already prescribed. The Notice for Informal Conference dated February 24, 2009, received by petitioner on February 27, 2009; the Preliminary Assessment Notice dated August 11, 2009 and received by petitioner on August 28, 2009; and the second letter of demand together with the Formal Letters of Demand dated September 1, 2009, the Details of Discrepancies, and the Audit Results/Assessment Notices all dated September 1, 2009 received by petitioner on October 5, 2009 were **all issued beyond the three-year period for respondent to assess** petitioner for the subject deficiency withholding tax and compromise penalty covering the year 2004. Section 203 of the NIRC of 1997 is clear on the matter, thus:

> SEC. 203. *Period of Limitation Upon Assessment and Collection.* – Except as provided in Section 222, **internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed**. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day. *(Emphasis supplied)*

Based on the afore-quoted provision, the three-year period to assess commences from the date of actual filing of the return or from the last day prescribed by law for the filing of such return, whichever comes later.

Corollarily, Section 58(A) of the NIRC of 1997, as amended, and Section 5 of RR No. 17-2003 provide:

SEC. 58. *Returns and Payment of Taxes Withheld at Source.* –

(A) *Quarterly Returns and Payments of Taxes Withheld.* – Taxes deducted and withheld under Section 57 by withholding agents shall be covered by a return and paid to, except in cases where the Commissioner otherwise permits, an authorized agent bank, Revenue District Officer, Collection Agent, or duly authorized Treasurer of the city or municipality where the withholding agent has his legal residence or principal place of business, or where the withholding agent is a corporation, where the principal office is located.

The taxes deducted and withheld by the withholding agent shall be held as a special fund in trust for the government until paid to the collecting officers.

The return for final withholding tax shall be filed and the payment made within twenty-five (25) days from the close of each calendar quarter, while the return for creditable withholding taxes shall be filed and the payment made not later than the last day of the month following the close of the quarter during which withholding was made: *Provided*, That the Commissioner, with the approval of the Secretary of Finance, may require these withholding agents to pay or deposit the taxes deducted or withheld at more frequent intervals when necessary to protect the interest of the government. *(Emphasis supplied)*

SECTION 5. *Returns And Payments Of Taxes Withheld At Source.* - Section 2.58 of Revenue Regulations No. 2-98, as amended, is hereby further amended to read as follows:

'Sec. 2.58. *Returns and Payments of Taxes Withheld at Source.* -

(A) *Monthly return and payment of taxes withheld at source.* -

(1) xxx

(2) WHEN TO FILE –

(a) For both large and non-large taxpayers, the withholding tax return,

> whether creditable or final (including final withholding taxes on interest from any currency bank deposit and yield or any other monetary benefit from deposit substitutes and from trust funds and similar arrangements) **shall be filed and payments should be made, within ten (10) days after the end of each month, except for taxes withheld for the month of December of each year, which shall be filed on or before January 15 of the following year**; xxx *(Emphasis supplied)*

Therefore, respondent had until the following dates within which to assess petitioner for the subject deficiency EWT for taxable year 2004:

PERIOD	DATE FILED	DATE OF FILING AS PRESCRIBED BY LAW	LAST DAY TO ASSESS
January	February 10, 2004	February 10, 2004	February 10, 2007
February	March 10, 2004	March 10, 2004	March 10, 2007
March	April 12, 2004	April 10, 2004	April 12, 2007
April	May 5, 2004	May 10, 2004	May 10, 2007
May	June 10, 2004	June 10, 2004	June 10, 2007
June	July 8, 2004	July 10, 2004	July 10, 2007
July	August 10, 2004	August 10, 2004	August 10, 2007
August	September 10, 2004	September 10, 2004	September 10, 2007
September	October 11, 2004	October 10, 2004	October 11, 2007
October	October 11, 2004	November 10, 2004	November 10, 2007
October	November 10, 2004	November 10, 2004	November 10, 2007
November	November 10, 2004	December 10, 2004	December 10, 2007
November	December 10, 2004	December 10, 2004	December 10, 2007
December	December 10, 2004	January 15, 2005	January 15, 2008
December	January 17, 2005	January 15, 2005	January 17, 2008
December	January 17, 2005	January 15, 2005	January 17, 2008

It was sufficiently established that petitioner filed its 2004 Monthly Remittance Returns of Creditable Income Taxes Withheld (Expanded) from February 10, 2004 to January 17, 2005. Hence, as detailed in the table above, respondent had until February 10, 2007 to January 17, 2008, within which to assess petitioner for any deficiency withholding tax for taxable year 2004.

A fortiori, the Preliminary Assessment Notice dated August 11, 2009 and received by petitioner on August 28, 2009; and the second letter of demand together with the Formal Letters of Demand dated September 1, 2009, the Details of Discrepancies, and the Audit Results/Assessment Notices all dated September 1, 2009 and received by petitioner on October 5, 2009, were **issued more than three (3) years from the time petitioner filed its January to December 2004 returns**. In other words, the assessments for the taxable year 2004 were already barred by prescription.

In *Commissioner of Internal Revenue vs. FMF Development Corporation*[41], the Supreme Court held that:

[41] G.R. No. 167765, June 30, 2008.

> Under Section 203 of the NIRC, internal revenue taxes must be assessed within three years counted from the period fixed by law for the filing of the tax return or the actual date of filing, whichever is later. This mandate governs the question of prescription of the government's right to assess internal revenue taxes primarily to safeguard the interests of taxpayers from unreasonable investigation. **Accordingly, the government must assess internal revenue taxes on time so as not to extend indefinitely the period of assessment and deprive the taxpayer of the assurance that it will no longer be subjected to further investigation for taxes after the expiration of reasonable period of time**.
>
> An exception to the three-year prescriptive period on the assessment of taxes is Section 222(b) of the NIRC, which provides:
>
> xxx xxx xxx
>
> > (b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.
>
> xxx xxx xxx
>
> The above provision authorizes the extension of the original three-year period by the execution of a valid waiver, where the taxpayer and the BIR agreed in writing that the period to issue an assessment and collect the taxes due is extended to an agreed upon date. xxx *(Emphasis supplied)*

In *Republic of the Philippines vs. Ablaza*[42], the High Court explained that the statute of limitation of actions for the

[42] G.R. No. L-14519, July 26, 1960.

collection of taxes is justified by the need to protect law-abiding citizens from possible harassment, to wit:

> The law prescribing a limitation of actions for the collection of the income tax is beneficial both to the Government and to its citizens; to the Government because tax officers would be obliged to act promptly in the making of assessment, and to citizens because after the lapse of the period of prescription citizens would have a feeling of security against unscrupulous tax agents who will always find an excuse to inspect the books of taxpayers, not to determine the latter's real liability, but to take advantage of every opportunity to molest peaceful, law-abiding citizens. Without such legal defense taxpayers would furthermore be under obligation to always keep their books and keep them open for inspection subject to harassment by unscrupulous tax agents. The law on prescription being a remedial measure should be interpreted in a way conducive to bringing about the beneficient purpose of affording protection to the taxpayer within the contemplation of the Commission which recommend the approval of the law.

Respondent, however, countered that petitioner executed a Waiver of the Statute of Limitations under the National Internal Revenue Code; hence, the period of assessment was extended.[43]

The Court is not convinced.

---

[43] Exhibit "15".

While petitioner, through its controller, Edwin S. Ledesma, executed a Waiver of the Statute of Limitations under the National Internal Revenue Code[44] on December 28, 2007, the same did not toll the running of the three (3)-prescriptive period provided under Section 203 of the NIRC of 1997, as amended.

Section 222(b) of the NIRC of 1997, as amended, provides that the three-year prescriptive period may be waived upon written agreement of the Commissioner of Internal Revenue and the taxpayer. On this regard, the BIR issued Revenue Memorandum Order (RMO) No. 20-90 dated April 4, 1990 (Re: Proper Execution of the Waiver of the Statute of Limitations under the National Internal Revenue Code). This was followed by Revenue Memorandum Circular (RMC) No. 6-2005 dated February 2, 2005 (Re: Salient Features of Supreme Court Decision on Waiver of the Statute of Limitations under the Tax Code) emphasizing the strict conformity with the provisions of RMO No. 20-90 for a waiver of the statute of limitations under the Tax Code to be valid and binding, as held by the Supreme Court in the case of *Philippine Journalist, Inc. vs. Commissioner of Internal Revenue*[45].

---

[44] Exhibit "Q"; Exhibit "2".
[45] G.R. No. 162852, December 16, 2004.

In the case of *Commissioner of Internal Revenue vs. FMF Development Corporation,*[46] the Supreme Court, applying RMO No. 20-90, enumerated the requirements for a valid waiver, in this wise:

> Under Section 203 of the NIRC, internal revenue taxes must be assessed within three years counted from the period fixed by law for the filing of the tax return or the actual date of filing, whichever is later. This mandate governs the question of prescription of the government's right to assess internal revenue taxes primarily to safeguard the interests of taxpayers from unreasonable investigation. Accordingly, the government must assess internal revenue taxes on time so as not to extend indefinitely the period of assessment and deprive the taxpayer of the assurance that it will no longer be subjected to further investigation for taxes after the expiration of reasonable period of time.
>
> An exception to the three-year prescriptive period on the assessment of taxes is Section 222 (b) of the NIRC, which provides:
>
> xxx xxx xxx
>
>> (b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.
>
> xxx xxx xxx
>
> The above provision authorizes the extension of the original three-year period by the execution of a valid waiver, where the taxpayer and the BIR agreed in writing that the period to issue an assessment and collect the

w/

[46] G.R. No. 167765, June 30, 2008.

taxes due is extended to an agreed upon date. Under RMO No. 20-90, which implements Sections 203 and 222 (b), the following procedures should be followed:

1. The waiver must be in the form identified as Annex 'A' hereof. . .

2. The waiver shall be signed by the taxpayer himself or his duly authorized representative. In the case of a corporation, the waiver must be signed by any of its responsible officials.

Soon after the waiver is signed by the taxpayer, the Commissioner of Internal Revenue or the revenue official authorized by him, as hereinafter provided, shall sign the waiver indicating that the Bureau has accepted and agreed to the waiver. **The date of such acceptance by the Bureau should be indicated. Both the date of execution by the taxpayer and date of acceptance by the Bureau should be <u>before</u> the expiration of the period of prescription or <u>before</u> the lapse of the period agreed upon in case a subsequent agreement is executed.**

3. The following revenue officials are authorized to sign the waiver.

A. <u>In the National Office</u>

xxx xxx xxx

3. **Commissioner** **For tax cases involving more than P1M**

B. <u>In the Regional Offices</u>

1. The Revenue District Officer with respect to tax cases still pending investigation and the period to assess is about to prescribe regardless of amount.

xxx xxx xxx

4. **The waiver must be executed in three (3) copies, the original copy to be attached to the docket of the case, the second copy for the taxpayer and the third copy for the Office accepting the waiver. The fact of receipt by the taxpayer of his/her file**

> **copy shall be indicated in the original copy.**
>
> 5. **The foregoing procedures shall be strictly followed.** Any revenue official found not to have complied with this Order resulting in prescription of the right to assess/collect shall be administratively dealt with. (Emphasis supplied.)
>
> Applying RMO No. 20-90, the waiver in question here was defective and did not validly extend the original three-year prescriptive period. Firstly, it was not proven that respondent was furnished a copy of the BIR-accepted waiver. Secondly, the waiver was signed only by a revenue district officer, when it should have been signed by the Commissioner as mandated by the NIRC and RMO No. 20-90, considering that the case involves an amount of more than P1 million, and the period to assess is not yet about to prescribe. Lastly, it did not contain the date of acceptance by the Commissioner of Internal Revenue, a requisite necessary to determine whether the waiver was validly accepted before the expiration of the original three-year period. Bear in mind that the waiver in question is a bilateral agreement, thus necessitating the very signatures of both the Commissioner and the taxpayer to give birth to a valid agreement. *(Emphasis supplied)*

In *Commissioner of Internal Revenue vs. Kudos Metal Corporation*[47] (*Kudos case*), the High Tribunal again laid down the procedure for the proper execution of a waiver, thus:

> "Section 222 (b) of the NIRC provides that the period to assess and collect taxes may only be extended upon a written agreement between the CIR and the taxpayer executed before the expiration of the three-year period. **RMO 20-90 issued on April 4, 1990 and RDAO 05-01 issued on August 2, 2001 lay down the**

---

[47] G.R. No. 178087, May 5, 2010.

procedure for the proper execution of the waiver, to wit:

1. The waiver must be in the proper form prescribed by RMO 20-90. The phrase 'but not after ______ 19 ___', which indicates the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription, should be filled up.

2. **The waiver must be signed by the taxpayer himself or his duly authorized representative. In the case of a corporation, the waiver must be signed by any of its responsible officials. In case the authority is delegated by the taxpayer to a representative, such delegation should be in writing and duly notarized.**

3. The waiver should be duly notarized.

4. The CIR or the revenue official authorized by him must sign the waiver indicating that the BIR has accepted and agreed to the waiver. The date of such acceptance by the BIR should be indicated. However, before signing the waiver, the CIR or the revenue official authorized by him must make sure that the waiver is in the prescribed form, duly notarized, and executed by the taxpayer or his duly authorized representative.

5. Both the date of execution by the taxpayer and date of acceptance by the Bureau should be before the expiration of the period of prescription or before the lapse of the period agreed upon in case a subsequent agreement is executed.

6. The waiver must be executed in three copies, the original copy to be attached to the docket of the case, the second copy for the taxpayer and the third copy for the Office accepting the

> waiver. The fact of receipt by the taxpayer of his/her file copy must be indicated in the original copy to show that the taxpayer was notified of the acceptance of the BIR and the perfection of the agreement.
>
> A perusal of the waivers executed by respondent's accountant reveals the following infirmities:
>
> 1. **The waivers were executed without the notarized written authority of Pasco to sign the waiver in behalf of respondent.**
>
> 2. The waivers failed to indicate the date of acceptance.
>
> 3. The fact of receipt by the respondent of its file copy was not indicated in the original copies of the waivers.
>
> Due to the defects in the waivers, the period to assess or collect taxes was not extended. Consequently, the assessments were issued by the BIR beyond the three-year period and are void. *(Emphases supplied)*

A serious look at the waiver executed by Mr. Edwin S. Ledesma will readily show that it is defective and cannot validly extend the original three (3)-year prescriptive period for respondent to assess. The said waiver failed to strictly comply with the requisites under RMO No. 20-90 and the *Kudos case*, to wit:

(a) The waiver has no date of acceptance by Muslimen L. Maca-agir, Al Hadj, Revenue District Officer of RDO No. 107;
(b) It was notarized only on December 28, 2008, or a year after it was executed

on December 28, 2007. The jurat is also infirm for it failed to indicate the person or persons who actually appeared for petitioner and the proper identification presented. Hence, the date of execution of said waiver by petitioner's representative cannot be considered as the date the parties agreed on the waiver before the notary public;

(c) Nothing in the waiver shows that petitioner was furnished with a copy of said waiver after acceptance;

(d) The type of tax due was also not indicated in the waiver; and

(e) There was also no indication that Mr. Edwin S. Ledesma was duly authorized by petitioner to sign the waiver on its behalf.

In the landmark case of *Philippine Journalists, Inc. vs. Commissioner of Internal Revenue*[48], the Supreme Court ruled that a defective waiver does not suspend the running of the prescriptive period. It further made a categorical pronouncement on the strict interpretation of the waiver of the statute of limitations, in the following manner:

> **A waiver of the statute of limitations under the NIRC, to a certain extent, is a derogation of the taxpayers' right to security against prolonged and unscrupulous investigations and must therefore be carefully and strictly construed. The waiver of the statute of limitations is not a waiver of the right to invoke the defense of prescription as**

---

[48] G.R. No. 162852, December 16, 2004.

> **erroneously held by the Court of Appeals. It is an agreement between the taxpayer and the BIR that the period to issue an assessment and collect the taxes due is extended to a date certain. The waiver does not mean that the taxpayer relinquishes the right to invoke prescription unequivocally particularly where the language of the document is equivocal.** For the purpose of safeguarding taxpayers from any unreasonable examination, investigation or assessment, our tax law provides a statute of limitations in the collection of taxes. Thus, the law on prescription, being a remedial measure, should be liberally construed in order to afford such protection. As a corollary, the exceptions to the law on prescription should perforce be strictly construed. xxx (*Emphasis supplied*)

Consequently, the waiver is deemed incomplete, infirm and defective and as such did not toll the running of prescriptive period to assess. The three (3)-period to assess continued to run until it expired on January 17, 2008, reckoned from January 17, 2005, when petitioner filed its December 2004 withholding tax return.

WHEREFORE, the Petition for Review is hereby **GRANTED**. Accordingly, the assessment for deficiency withholding tax issued against petitioner for taxable year 2004 in the aggregate amount of Php7,240,220.77, inclusive of surcharge, interest, and compromise penalty, is **CANCELLED** and **SET ASIDE**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We concur:

ON LEAVE
ERNESTO D. ACOSTA
Presiding Justice

ERLINDA P. UY
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
Acting Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice