REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

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TEKTITE INSURANCE BROKERS, INC., Petitioner,	**CTA CASE NO. 8693**
	Members:
- versus -	**CASTAÑEDA, JR.,** *Chairperson, and* **CASANOVA,** ***JJ.***
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** OCT 13 2016 3:30 pm

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RESOLUTION

CASANOVA, *J.*:

Before this Court is respondent's **Motion for Reconsideration** filed on September 15, 2016, with petitioner's **Comment/Opposition (To Respondent's Motion for Reconsideration dated September 14, 2016)** filed on September 23, 2016.

On August 26, 2016, this Court promulgated a Decision finding the respondent's deficiency assessments void due to prescription and violation of petitioner's right to due process. The dispositive portion of the Decision being assailed reads as follows:

> "**WHEREFORE**, premises considered, the instant Petition for Review is **GRANTED**. Accordingly, the assessments covering income tax, value added tax, expanded withholding tax, and compromise penalty in the total amount of ₱2,271,476.65, inclusive of interest, for taxable year 2008 are hereby **CANCELLED** and **WITHDRAWN**.

SO ORDERED."

In his Motion, respondent prays that the above Decision be set aside and that petitioner be ordered to pay the deficiency tax assessments, including 25% surcharge and 20% annual interest for late payment. In support, respondent asserts that, contrary to the findings by this Court, the Waiver of the Defense of Prescription under the Statute of Limitations of the National Internal Revenue Code ("Waiver") dated November 11, 2011 substantially complied with the requirements set by law. He asserts that the date of notarization of the Waiver may be reasonably deemed as the date of acceptance by the Revenue District Officer concerned since it is presumed that the parties appeared, signed and swore before the presence of the notary public. Moreover, respondent claims that by voluntarily executing the Waiver, petitioner is estopped from questioning its validity thereof. He cites Article 6[1] of the New Civil Code, as amended, and the case of *Spouses Roberto and Natividad Valderama vs. Salvacion Macalde, et al.*[2] to bolster his claim with regard to the elements of a valid waiver. Lastly, respondent alleges that petitioner was not deprived of its right to due process considering that the Preliminary Assessment Notice (PAN) was issued on September 11, 2012 while the Formal Letter of Demand with Assessment Notices (FLD-AN) was issued on September 28, 2012, or after a period of seventeen (17) days from issuance of PAN. Hence, respondent claims that, as far as the Bureau of Internal Revenue (BIR) is concerned, relying on the regularity in the performance of official business, the FAN/FLD was issued in compliance with the fifteen-day period requirement.

On the other hand, petitioner in its Comment/Opposition, strongly opposes respondent's Motion for Reconsideration on the following grounds, *to wit*: respondent failed to set his Motion for hearing; the Waiver did not substantially comply with the requirements of Revenue Memorandum Order (RMO) No. 20-90[3] and Revenue Delegation Authority Order (RDAO) No. 05-01[4]; and respondent failed to observe the requirements of due process decreed under Revenue Regulations (RR) No. 12-99[5].

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[1] Art. 6. Rights may be waived, unless the waiver is contrary to law, public order, public policy, morals, or good customs, or prejudicial to a third person with a right recognized by law.
[2] G.R. No. 165005, September 16, 2005
[3] "PROPER EXECUTION OF THE WAIVER OF THE STATUTE OF LIMITATIONS UNDER THE NATIONAL INTERNAL REVENUE CODE", dated April 4, 1990
[4] "DELEGATION OF AUTHORITY TO SIGN AND ACCEPT THE WAIVER OF THE DEFENSE OF PRESCRIPTION UNDER THE STATUTE OF LIMITATIONS", dated August 2, 2001
[5] "IMPLEMENTING THE PROVISIONS OF THE NATIONAL INTERNAL REVENUE CODE OF 1997 GOVERNING THE RULES ON ASSESSMENT OF NATIONAL INTERNAL REVENUE

After due consideration of the arguments proffered by the parties, this Court finds no merit in the instant Motion.

For emphasis, a written motion, except those which are *ex parte*, shall be set for hearing by the applicant.[6] It has indeed been held time and again that, under Sections 4 and 5 of Rule 15 of the Rules of Court, mandatory is the notice requirement in a motion, which is rendered defective by failure to comply with the requirement. As a rule, a motion without a notice of hearing is considered *pro forma* and does not affect the reglementary period for the appeal or the filing of the requisite pleading.[7]

However, in the case of *Douglas F. Anama vs. Philippine Savings Bank, et al.*[8], the Supreme Court adopted a liberal interpretation on the rule on notice of hearing, thus:

> "Likewise, in *Jehan Shipping Corporation v. National Food Authority*, the Court held that despite the lack of notice of hearing in a Motion for Reconsideration, there was substantial compliance with the requirements of due process where the adverse party actually had the opportunity to be heard and had filed pleadings in opposition to the motion. The Court held:
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> *x x x*
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> As an integral component of the procedural due process, the three-day notice required by the Rules is not intended for the benefit of the movant. Rather, the requirement is for the purpose of avoiding surprises that may be sprung upon the adverse party, who must be given time to study and meet the arguments in the motion before a resolution of the court. Principles of natural justice demand that the right of a party should not be affected without giving it an opportunity to be heard.

TAXES, CIVIL PENALTIES AND INTEREST AND THE EXTRA-JUDICIAL SETTLEMENT OF A TAXPAYER'S CRIMINAL VIOLATION OF THE CODE THROUGH PAYMENT OF A SUGGESTED COMPROMISE PENALTY", dated September 6, 1999

[6] Sections 2 and 4, Rule 15, Rules of Court, as amended

[7] Jehan Shipping Corporation vs. National Food Authority, G.R. No. 159750, December 14, 2005

[8] G.R. No. 187021, January 25, 2012; *citing* Jehan Shipping Corporation vs. National Food Authority, G.R. No. 159750, December 14, 2005 and Fausto R. Preysler, Jr. vs. Manila South Coast Development Corporation, G.R. No. 171872, June 28, 2010

> **The test is the presence of opportunity to be heard, as well as to have time to study the motion and meaningfully oppose or controvert the grounds upon which it is based**."

Furthermore, in the case of *KKK Foundation, Inc. v. Hon. Adelina Calderon-Bargas, et al.*[9], the Supreme Court held that:

> "Service of a copy of a motion containing a notice of the time and the place of hearing of that motion is a mandatory requirement, and the failure of movants to comply with these requirements renders their motions fatally defective. However, there are exceptions to the strict application of this rule. These exceptions are: (1) where a rigid application will result in a manifest failure or miscarriage of justice especially if a party successfully shows that the alleged defect in the questioned final and executory judgment is not apparent on its face or from the recitals contained therein; (2) where the interest of substantial justice will be served; (3) where the resolution of the motion is addressed solely to the sound and judicious discretion of the court; and (4) where the injustice to the adverse party is not commensurate with the degree of his thoughtlessness in not complying with the procedure prescribed."

The notice requirement is not a ritual to be followed blindly. Procedural due process is not based solely on a mechanical and literal application that renders any deviation inexorably fatal. Instead, procedural rules are liberally construed to promote their objective and to assist in obtaining a just, speedy and inexpensive determination of any action and proceeding.[10]

In the present case, after receiving the copy of the instant Motion, this Court issued a Resolution dated September 20, 2016, ordering petitioner to comment thereon. Petitioner was, therefore, given the opportunity to study the Motion and oppose the arguments laid down by respondent, the very purpose of a notice of hearing had been achieved. Thus, this Court can properly take cognizance of respondent's Motion for Reconsideration.

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[9] G.R. No. 163785, December 27, 2007
[10] *Ibid.*

That having been settled, this Court shall now proceed to discuss the instant Motion on the merits.

Noticeably, respondent insists that the subject Waiver should not be invalidated considering that it substantially complied with the provisions of RMO No. 20-90 and RDAO No. 05-01. Unfortunately, however, our jurisprudence is replete with cases[11] where the Supreme Court consistently emphasized the need for strict, not merely substantial, compliance with the requirements of RMO No. 20-90. In fact, RMO No. 20-90 itself mandates that the procedure for execution of the waiver shall be strictly followed, and that any revenue official who fails to comply therewith, resulting in the prescription of the right to assess and collect, shall be administratively dealt with.[12] Even former CIR Kim Jacinto-Henares decreed in a memorandum circular that "the provisions of RMO No. 20-90 should be strictly complied with in order for a Waiver to be valid."[13] Being, therefore, mandatory in nature, strict adherence with the provisions of RMO No. 20-90 and RDAO No. 05-01 is necessitated.

With regard to respondent's theory that the date of notarization of the Waiver may also be reasonably deemed as the date of acceptance, this Court is not convinced. The case of *Commissioner of Internal Revenue vs. East Asia Power Resources Corporation*[14] is instructive on the matter, *viz*:

> "The date of notarization cannot be regarded as the date of acceptance for the same refers to different aspects, as the notary public is distinct from the Commissioner of BIR who is authorized by law to accept Waivers of the Statute of Limitations.
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> Moreover, there is no indication that the Revenue District Officer was present during the notarization of the waivers. A

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[11] Commissioner of Internal Revenue vs. Standard Chartered Bank, G.R. No. 192173, July 29, 2015; Commissioner of Internal Revenue vs. Kudos Metal Corporation, G.R. No. 178087, May 5, 2010; Commissioner of Internal Revenue vs. FMF Development Corporation, G.R. No. 167765, June 30, 2008; Philippine Journalist, Inc. vs. CIR, G.R. No. 162852, December 16, 2004; Commissioner of Internal Revenue vs. Court of Appeals, et al., G.R. No. 115712, February 25, 1999; Commissioner of Internal Revenue vs. Alcon Laboratories, Inc., CTA EB Case No. 1087, September 30, 2014; Commissioner of Internal Revenue vs. Intel Technology Philippines, Inc., CTA EB Case No. 379, November 18, 2008

[12] Bank of the Philippine Islands vs. Commissioner of Internal Revenue, G.R. No. 139736, October 17, 2005

[13] Revenue Memorandum Circular No. 029-12, June 29, 2012

[14] CTA EB Case No. 879, June 17, 2013

> plain reading of the 'Acknowledgement' portion reveals that only one person appeared before the notary public as shown by the use of the singular pronoun 'he/she' and such person is the representative of respondent. Pertinent portions of the acknowledgement are quoted below:
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> > '*x x x* personally appeared before me ______ *x x x* known to me and to me known to be the same person who executed the foregoing waiver for and in behalf of the said taxpayer *x x x*.'
>
> Clearly, the person who appeared before the notary public is the one who 'executed the foregoing waiver for and in behalf of the said taxpayer', which can only be taken to mean as referring to the representative of respondent and not the Revenue District Officer.
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> Furthermore, the Revenue District Officer could not have appeared before the notary public because the acceptance of the BIR, as a matter of procedure, cannot be had unless and until the same has been earlier notarized as manifested in Revenue Delegation Authority Order No. 05-01, to wit:
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> > 'The authorized revenue official shall ensure that the waiver is duly accomplished and signed by the taxpayer or his authorized representative before affixing his signature to signify acceptance of the same. In case the authority is delegated by the taxpayer to a representative, the concerned revenue official shall see to it that such delegation is in writing and duly notarized. The 'WAIVER' should not be accepted by the concerned BIR office and official unless duly notarized.'" *(Citations Omitted)*

Respondent also argues that petitioner is estopped from impugning the validity of the waiver which petitioner itself has voluntarily executed. Unfortunately, this Court is not persuaded.

In the case of *Commissioner of Internal Revenue vs. Kudos Metal Corporation*[15], the Supreme Court already ruled that estoppel does not apply in this kind of case, *viz:*

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

> "The doctrine of estoppel cannot be applied in this case as an exception to the statute of limitations on the assessment of taxes considering that there is a detailed procedure for the proper execution of the waiver, which the BIR must strictly follow. As we have often said, the doctrine of estoppel is predicated on, and has its origin in, equity which, broadly defined, is justice according to natural law and right. As such, the doctrine of estoppel cannot give validity to an act that is prohibited by law or one that is against public policy. It should be resorted to solely as a means of preventing injustice and should not be permitted to defeat the administration of the law, or to accomplish a wrong or secure an undue advantage, or to extend beyond them requirements of the transactions in which they originate. Simply put, the doctrine of estoppel must be sparingly applied.
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> Moreover, the BIR cannot hide behind the doctrine of estoppel to cover its failure to comply with RMO 20-90 and RDAO 05-01, which the BIR itself issued. As stated earlier, the BIR failed to verify whether a notarized written authority was given by the respondent to its accountant, and to indicate the date of acceptance and the receipt by the respondent of the waivers. Having caused the defects in the waivers, the BIR must bear the consequence. It cannot shift the blame to the taxpayer. To stress, a waiver of the statute of limitations, being a derogation of the taxpayer's right to security against prolonged and unscrupulous investigations, must be carefully and strictly construed."

Anent respondent's argument that the elements of a valid waiver should conform to Article 6 of the New Civil Code, as amended, this Court is not swayed.

It has already been well-settled that "a waiver of the statute of limitations under the NIRC, is not an ordinary agreement, according to the Supreme Court, it is 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. It is governed not by the general provisions of the New Civil Code but by the National Internal Revenue Code following the basic principle in statutory construction that a special law prevails over a general law."[16]

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[16] Commissioner of Internal Revenue vs. Intel Technology Philippines, Inc., CTA EB Case No. 379, November 18, 2008

Henceforth, having defects, no valid agreement between petitioner and respondent can be construed to have taken place. A waiver is not a unilateral act by the taxpayer or the BIR, but is a bilateral agreement between two parties to extend the period to a date certain. The conformity of the BIR must be made by either the Commissioner or the Revenue District Officer.[17]

Lastly, respondent claims that petitioner was not deprived of its right to due process since the FLD-AN was issued after a period of seventeen (17) days from issuance of PAN thereby complying with RR No. 12-99. Regrettably, however, this Court finds respondent's interpretation of the said Revenue Regulations untenable.

As was held by this Court in the assailed Decision, *viz*:

> "Section 228 of the NIRC of 1997, as amended, in relation to Section 2 of Revenue Regulations (RR) No. 18-2013, which amended certain sections of RR No. 12-99, provides for the due process requirement that should be observed both by the CIR, or her duly authorized representative, and the taxpayer concerned. The said section provides:
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> *x x x*
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> '**SECTION 3. Due Process Requirement in the Issuance of a Deficiency Tax Assessment. —**
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> 3.1 Mode of procedure in the issuance of a deficiency tax assessment:
>
> **<u>3.1.1 Preliminary Assessment Notice (PAN). —</u>** <u>If after review and evaluation 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 a Preliminary Assessment Notice (PAN) for the proposed assessment. It shall show in detail the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based *x x x*.</u>

[17] *See* Philippine Journalist, Inc. vs. CIR, G.R. No. 162852, December 16, 2004

> 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 Final Assessment Notice (FLD/FAN) shall be issued calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.
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> If the taxpayer, **within fifteen (15) days from date of receipt of the PAN**, responds that he/it disagrees with the findings of deficiency tax or taxes, an FLD/FAN shall be issued within fifteen (15) days from filing/submission of the taxpayer's response, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.
>
> *x x x.' (Emphases Ours)*

It is with much emphasis that the mandatory character of the foregoing provisions cannot be gainsaid; they are substantive prerequisites to tax collection. The general rule of requiring adherence to the letter in construing statutes applies with particular strictness to tax laws and provisions of a taxing act are not to be extended by implication. To rule otherwise would not just prevent the Commissioner from reconsidering the protested assessment but will practically render nugatory the intention of Congress.

In the instant case, respondent issued the PAN on September 11, 2012, which was received by petitioner only on September 26, 2012. Applying the above-quoted provisions, petitioner has fifteen (15) days **from date of receipt of the PAN** or until October 11, 2012 within which to respond to the PAN. By prematurely issuing a FLD-AN on September 28, 2012, without awaiting the lapse of the fifteen (15) days, respondent acted with grave abuse of discretion by violating petitioner's right to due process.

It is a cardinal rule in administrative law that the taxpayer be accorded due process. A void assessment bears no valid fruit. Following the pronouncement by the Supreme Court in *COMMISSIONER OF INTERNAL REVENUE vs. AZUCENA T. REYES,* '[t]he 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. *x x x*'" *(Citations Omitted)*

Having thus concluded, this Court finds no cogent reason to disturb the conclusions reached in the Decision dated August 26, 2016.

WHEREFORE, respondent's Motion for Reconsideration is hereby **DENIED** for lack of merit.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

I Concur:

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