Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB No. 1214** (CTA Case No. 8286)
	Present:
- versus -	**DEL ROSARIO,** *PJ,* **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS,** *and* **RINGPIS-LIBAN,** *JJ.*
SOUTH ENTERTAINMENT GALLERY, INC., Respondent.	**Promulgated:** MAR 22 2016 9:35 a.m.

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RESOLUTION

CASANOVA, *J.*:

Before *Us* is petitioner's **Motion for Reconsideration (Re: Decision promulgated on October 28, 2015)** filed, through registered mail, on November 27, 2015, with respondent's **Comment/Opposition [To Petitioner's Motion for Reconsideration (Re: Decision promulgated on October 28, 2015)]** filed on February 1, 2016.

In her Motion, petitioner seeks that the Court *En Banc* reconsider and set aside the Decision[1] dated October 28, 2015, and that a new one be rendered dismissing the original petition before the court *a quo* for lack of jurisdiction; or, in the alternative, uphold the deficiency tax

[1] CTA *En Banc* Rollo, pp. 213-242

assessment for taxable year 2007 against herein respondent along with the imposition of surcharges and interests. The dispositive portion of the said Decision reads as follows:

> "**WHEREFORE,** the instant Petition for Review is hereby **DENIED** for lack of merit. The Amended Decision dated July 7, 2014 and Resolution dated August 29, 2014 of the CTA Third Division in CTA Case No. 8286 are both **AFFIRMED.**
>
> **SO ORDERED.**"

In assailing the Decision, petitioner reiterates her previous arguments that the Court *En Banc*, and that of the court *a quo*, failed to consider that the original Petition for Review was filed out of time. The said Petition was filed only on May 11, 2011 or approximately a year after receipt of the Final Notice Before Seizure and approximately eight (8) months after receipt of the Warrant of Distraint and/or Levy (WDL). Petitioner stipulates that assuming the Formal Letter of Demand (FLD) was not received by respondent, its right of action against petitioner, nonetheless, had already commenced upon receipt of the Final Notice Before Seizure dated May 28, 2010. As such, respondent's long delayed action in assailing the WDL is fatal to its cause of action as laches has already set in. Lastly, petitioner alleges that the Court *En Banc* erred in giving full faith and credence to the hearsay testimony of respondent's witness, Mr. Ruben Q. Ong, for being self-serving.

On the other hand, in its Comment/Opposition, respondent asserts that the issues raised in the instant Motion for Reconsideration are mere reiterations of those already addressed and settled by the Court *En Banc* in the Decision dated October 28, 2015. Respondent maintains that by having a void assessment against it, petitioner's collection of the alleged deficiency income tax for taxable year 2007 is invalid.

After due consideration of the arguments advanced by the parties, *We* find no merit in the instant Motion for Reconsideration.

The original Petition for Review was not filed out of time.

Petitioner insists that the original Petition for Review was filed out of time. She believes that the same could not be given due course since it was filed a year after receipt of the Final Notice Before Seizure and about eight (8) months after receipt of the WDL, thus, the court *a quo* should have dismissed it *motu propio.*

Anent this issue, *We* maintain our findings in the assailed *En Banc* Decision dated October 28, 2015. Thus:

> "Time and again, *We* have consistently held the importance of issuing a Final Assessment Notice (FAN), not only for the purpose of informing the taxpayer concerned of its deficiency taxes but, more importantly, to enable the filing of protest. It is the act of timely filing a protest that makes an assessment a disputed assessment, which in turn qualifies it to fall under the exclusive appellate jurisdiction of the CTA. Stated differently, there can be no final, executory and demandable assessment where there is no showing that the subject FAN was properly and duly served upon the taxpayer concerned.
>
> *x x x*
>
> To recapitulate, the timely issuance of a FLD and FAN is a substantive prerequisite to tax collection. This Court cannot turn a blind eye on the importance of such notices. The use of the word *"shall"* in subsection 3.1.3 describes the mandatory nature of the service of FLD/FAN, and the absence of which renders nugatory any assessment made by the tax authorities. *x x x*" *(Citations Omitted)*

In the instant case, considering that the issuance and receipt of a FAN and FLD was questioned and was found to be irregular, the subsequent issuance of a Final Notice Before Seizure or WDL was deemed invalid for petitioner's failure to properly observe due process as required by law. In the case of *Samar-I Electric Cooperative vs. Commissioner of Internal Revenue*[2], the Supreme Court held that:

> "A void assessment bears no valid fruit.

[2] G.R. No. 193100, December 10, 2014; *citing* Commissioner of Internal Revenue vs. Azucena T. Reyes, G.R. No. 159694 and G.R. No. 163581, January 27, 2006

> 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. *x x x*"

Clearly then, by failing to comply with the mandatory requirement of due process, it was erroneous for petitioner to assume that respondent's right to judicially appeal the deficiency tax assessment for 2007 is reckoned from receipt of the Final Notice Before Seizure or the WDL. Hence, considering the above-mentioned case, the original Petition for Review filed with the court *a quo* was not filed out of time.

Laches has not set in.

Laches is the failure or negligence to assert a right within a reasonable time, giving rise to a presumption that a party has abandoned it or declined to assert it. It is not a mere question of lapse or passage of time but is principally a question of the inequity or unfairness of permitting a right or claim to be asserted.[3] In invoking the doctrine of estoppel by laches, the party must show not only unjustified inaction but also some unfair injury that might result unless the action is barred.[4]

Quite the contrary in the instant case, examination of the records reveal that up until the questioned FLD with attached Details of Discrepancies dated December 9, 2009, respondent was never remiss in communicating with petitioner's revenue officers in explaining its "tax exemption status" and in pursuing the reconsideration of petitioner's alleged deficiency tax assessments for taxable year 2007. A table of the parties' respective correspondences is provided hereafter for ease of reference, thus:

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[3] Republic of the Philippines, represented by the Commissioner of Customs, vs. Unimex Micro-Electronics GmBH, G.R. Nos. 166309-10, March 9, 2007

[4] *See* La Flor Dela Isabela, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 8132, September 25, 2012; *citing* Republic of the Philippines vs. Honorable Sandiganbayan, et al., G.R. No. 152154, July 15, 2003

Petitioner's Letter-Issuances		Respondent's Letter-Reply	
June 8, 2009	Petitioner received a Notice of Informal Conference dated May 8, 2009	June 9, 2009	Petitioner issued a Letter-Reply, addressed to OIC-Revenue District Officer Ducut
August 20, 2009	Revenue Officer II Miclat issued a Letter answering the Letter-Reply dated June 9, 2009	October 8, 2009,	Petitioner sent a Letter to OIC-Revenue District Officer Ducut
October 16, 2009	Petitioner received a Preliminary Assessment Notice dated September 16, 2009	October 19, 2009	Petitioner sent another Letter addressed to Regional Director Aguila, Jr.
October 27, 2009	Regional Director Aguila, Jr. issued a Letter, denying petitioner's October 8 and 19, 2009 Letters	December 4, 2009	PAGCOR issued a Letter of Reconsideration addressed to Regional Director Aguila, Jr. on behalf of petitioner

Clearly, there was no negligence or inaction on the part of respondent in asserting its right to warrant the application of laches. The doctrine of laches is based upon grounds of public policy and equity. Since it is an equitable doctrine, its application is likewise controlled by reasonable considerations. Thus, the better rule is that courts, under the principle of equity, should not be bound by the doctrine of laches if wrong or injustice will result.[5] As such, laches does not exist in the instant case.

The Court *En Banc* did not err in giving faith and credence to the testimony of respondent's witness.

It would seem that petitioner is under the impression that her deficiency tax assessments were nullified based solely on the testimony of respondent's Vice President for Finance, Mr. Ruben Q. Ong. However, such is not the case.

[5] *Ibid.*

A careful perusal of the assailed *En Banc* Decision would reveal the connection of the testimony of respondent's witness to petitioner's allegations. Thus:

> "The Supreme Court has consistently held that while a mailed letter is deemed received by the addressee in the course of mail, this is merely a disputable presumption subject to controversion and a direct denial thereof shifts the burden to the party favored by the presumption to prove that the mailed letter was indeed received by the addressee.
>
> Thus, to refute petitioner's allegations, respondent presented its Vice President for Finance, **Mr. Ruben Q. Ong**, as witness. In his Judicial Affidavit[6] dated January 26, 2012, he firmly denied receiving any FAN from petitioner. During his cross -examination, Mr. Ong testified that:
>
> *x x x*
>
> By directly denying receiving the assessment, petitioner is now burdened to present factual evidence necessary to establish her claim.[7] Our jurisprudence is replete with cases holding that if the taxpayer denies ever having received 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.
>
> *x x x*
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> Ordinarily, the evidence presented by petitioner, coupled with the presumption of regularity, would have been sufficient to prove the fact of mailing and its receipt thereof. However, again, at the risk of being repetitive, by directly disputing the receipt thereof, petitioner is now tasked with the burden to prove respondent's **actual receipt** of the mailed assessment in accordance with the due process requirement.
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> *x x x*

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[6] Exhibit "R"

[7] Section 1, Rule 131 of the Rules of Court

> Categorically, the subject FLD-DDAN was delivered to the administration office of SM Pampanga and not to respondent. The law is clear, petitioner or her duly authorized representative must inform the taxpayer of the assessment made against it. The due process requirement necessitates that service to a person appointed by the taxpayer, under circumstances prescribed in the pertinent regulations on accreditation of tax agents, shall then only it be deemed service to the taxpayer concerned." *(Citations Omitted)*

On a final note, as to petitioner's allegation that the testimony of respondent's witness was self-serving, *We* find the case of *Commissioner of Internal Revenue vs. Fax N Parcel, Incorporated*[8], instructive on the matter at hand:

> "The common objection known as 'self-serving' is not correct because almost all testimonies are self-serving. The proper basis for objection is 'hearsay' (Wenke, Making and Meeting Objections, 69).
>
> Petitioner fails to take into account the distinction between self-serving statements and testimonies made in court. Self-serving statements are those made by a party out of court advocating his own interest; they do not include a party's testimony as a witness in court (National Development Co. v. Workmen's Compensation Commission, 19 SCRA 861 [1967]).
>
> Self-serving statements are inadmissible because the adverse party is not given the opportunity for cross-examination, and their admission would encourage fabrication of testimony. This cannot be said of a party's testimony in court made under oath, with full opportunity on the part of the opposing party for cross-examination.'
>
> Thus, a self-serving declaration is one that is made by a party, out of court and in his favor. **It does not include the testimony he gives as a witness in**

[8] CTA EB NO. 883, February 14, 2013 (CTA Case No. 7415); *citing* Danilo Hernandez vs. Court of Appeals, et al., G.R. No. 104874, December 14, 1993

> **Court**. [9] Tested against these standards, the testimonies of the eleven (11) witnesses are not self-serving and are admissible in evidence."

Accordingly, in view of the foregoing, *We* find no cogent justification to disturb the findings and conclusions reached by Court *En Banc* in the Decision dated October 28, 2015.

WHEREFORE, the instant Motion for Reconsideration is hereby **DENIED** for lack of merit.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

(With Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

(On Leave)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

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[9] People vs. Villarama, G.R. No. 139211, February 12, 2003

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA EB No. 1214** (CTA CASE No. 8286)
	Present:
-versus-	**DEL ROSARIO,** *P.J.,* **CASTANEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS,** and **RINGPIS-LIBAN,** *JJ.*
SOUTH ENTERTAINMENT GALLERY, INC., *Respondent.*	Promulgated:
	MAR 22 2016 9:25 a.m.

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DISSENTING OPINION

DEL ROSARIO, P.J.:

With all due respect, I am constrained to withhold my assent on the majority opinion denying petitioner's Motion for Reconsideration. The motion should be granted and the issuance of the Warrant of Distraint and Levy (WDL) be accordingly upheld as the respondent's original Petition for Review filed with the Court in Division was filed out of time.

I am aware of my concurrence with the assailed Decision dated October 28, 2015, however, after a careful examination of the pertinent facts of the case, in relation to applicable laws and jurisprudence, I am of the opinion that respondent failed to timely file its Petition for Review with the Court in Division. I quote pertinent portions of the position I have taken in *Commissioner of Internal Revenue v. South Entertainment Gallery, Inc.*[1], a case involving the same parties and similar issues, albeit different taxable year, *to wit*:

> "It is settled that the Court of Tax Appeals (CTA) has jurisdiction to rule upon the validity of a WDL as its issuance by the Commissioner of Internal Revenue (CIR) falls under the second part of Section 7(1) (a) and (b) of RA 1125, as amended, which states:
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> xxx xxx xxx
>
> **In *Philippine Journalist, Inc. vs. Commissioner of Internal Revenue* ("*Philippine Journalist*"), the Supreme Court categorically ruled that the CTA has jurisdiction to resolve controversies involving the validity of the issuance of a WDL** as it is among the "other matters" arising under the National Internal Revenue Code (NIRC) of 1997, as amended, viz:
>
> > "The appellate jurisdiction of the CTA is not limited to cases which involve decisions of the Commissioner of Internal Revenue on matters relating to assessments or refunds. The second part of the provision covers other cases that arise out of the NIRC or related laws administered by the Bureau of Internal Revenue. The wording of the provision is clear and simple. It **gives the CTA the jurisdiction to determine if the warrant of distraint and levy issued by the BIR is valid** and to rule if the Waiver of Statute of Limitations was validly effected." (*Emphasis supplied*)
>
> **From the foregoing, it is evident that while this Court has jurisdiction to pass upon the validity of a WDL, the corresponding petition assailing such WDL should be filed within the period provided by law.**
>
> The period for filing an appeal before the CTA is provided under Section 11 of the Republic Act No. 1125, as amended which states:
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> > "Section 11. *Who may appeal; effect of appeal.* - Any person association or corporation adversely affected by a decision or ruling of the Collector of Internal Revenue, the Collector of Customs or any provincial or city Board of Assessment Appeals may file an appeal in the Court of Tax Appeals **within thirty (30) days after the receipt of such decision or ruling** or after the expiration of the period fixed by law for action as referred to in Section 7(a)(2) herein. xxx" (*Emphasis supplied*)
>
> Corollary thereto, Section 3 (a) of Rule 8 of the Revised Rules of the Court of Tax Appeals reads:
>
> > **"RULE 8**
> > **PROCEDURE IN CIVIL CASES**
> >
> > Sec. 3. *Who may appeal; period to file petition.*-
> >
> > (a) A party adversely affected by a decision, ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claims for refund of internal revenue taxes, or by a decision or ruling of the Commissioners of Customs, the Secretary of

[1] CTA EB No. 1246, CTA Case No. 8257, January 4, 2016

> Finance, the Secretary of Trade and Industry, the Secretary of Agriculture, or a Regional Trial Court in the exercise of its original jurisdiction **may appeal to the Court by petition for review filed within thirty days after receipt of a copy of such decision or ruling**, or expiration of the period fixed by law for the Commissioner of Internal revenue to act on the disputed assessments. In case of inaction of the Commissioner of Internal revenue on claims for refund of internal revenue taxes erroneously or illegally collected, the taxpayer must file a petition for review within the two-year period prescribed by law from payment or collection of the taxes. xxx" (*Emphasis supplied*)
>
> In this case, the following are the pertinent dates in determining the timeliness of the Petition for Review:
>
> xxx xxx xxx
>
> From the foregoing, I disagree with the *ponencia* that the thirty (30)-day period within which to file a Petition for Review with the CTA should be reckoned from March 25, 2011 or the date when respondent received a Letter from OIC-RDO Amador P. Ducut reiterating the collection of deficiency income tax and deficiency VAT for the taxable year 2005. **Instead, the aforestated 30-day period should be reckoned from its receipt of the WDL on June 22, 2010 or until July 22, 2011 as the WDL constitutes an act of the CIR on "other matters" arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue which, pursuant to the doctrine laid down in *Philippine Journalist, supra*, may be the subject of an appropriate appeal with the CTA.** Yet, it took respondent a period of 99 days to question the issuance of the WDL before the BIR and 282 days before it appealed to this Court. As the Petition for Review before the Second Division Court was unquestionably filed out of time, this Court has no jurisdiction to act upon the case." (*Emphasis added and citations omitted*)

In the case at bar, respondent received the WDL on September 1, 2010.[2] Reckoning the thirty (30)-day period within which to file a Petition for Review with the CTA from respondent's receipt of the WDL, respondent had until October 1, 2010 to file its appeal before the Court in Division. **In this case, however, it took respondent a period of 252 days before it questioned and appealed the WDL to this Court** by way of a Petition for Review filed on **May 11, 2011**. Unquestionably, the petition was filed out of time and this Court has no jurisdiction to act upon the case.

Further, assuming *arguendo* that the WDL was not properly received by respondent or its authorized representative on September 1, 2010, it undoubtedly received the same on or before September 24, 2010 when it requested for the withdrawal or cancellation of the WDL.[3] Yet again, reckoning from September 24, 2010 the 30-day period within which to file a Petition for Review with the CTA, respondent had at the latest until October 24, 2010 to file its

[2] Warrant of Distraint and/or Levy dated September 1, 2010, BIR Records pp. 523-525; Exhibit "M," CTA Docket Vol. II, CTA Case No. 8286, p 527.
[3] Letter dated September 24, 2010, Exhibit "N," CTA Docket Vol. II, CTA Case No. 8286, p. 528.

appeal before the Court in Division. **Again, it took respondent a period of 229 days before it questioned and appealed the WDL to this Court**. The Petition for Review before the Court in Division was still unquestionably filed out of time; hence, depriving the Court of jurisdiction to act upon the case.

All told I vote to **GRANT** petitioner's Motion for Reconsideration (Re: Decision promulgated on October 28, 2015) in CTA EB No. 1214, **REVERSE** and **SET ASIDE** the Amended Decision and Resolution of the CTA Third Division dated July 7, 2014 and August 29, 2014, respectively, and **UPHOLD** the issuance of the Warrant of Distraint and Levy for the collection of deficiency income taxes and deficiency value-added tax for taxable year 2007.

ROMAN G. DEL ROSARIO
Presiding Justice