REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL THIRD DIVISION

YUSEN LOGISTICS CENTER, INC. Petitioner,	CTA Case No. 9109
	Members:
-versus-	FABON-VICTORINO, and RINGPIS LIBAN, JJ.
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: OCT 02 2018 10:44 a.m.

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RESOLUTION

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

Impugned in respondent's *Motion for Reconsideration Ad Cautelam*[1] dated May 16, 2018 is the Court's Decision[2] dated April 26, 2018, which disposed the case as follows:

> **WHEREFORE**, premises considered, the Petition for Review is **GRANTED**. Accordingly, the FLD/FAN dated April 14, 2014, the FNBS dated March 4, 2015, and the Warrant of Distraint and/or Levy dated June 8, 2015 are hereby **CANCELLED** and **SET ASIDE**.
>
> **SO ORDERED**.

Respondent states that under Section 228 of the National Internal Revenue Code (NIRC), as amended, a taxpayer must filed a protest against an assessment within thirty (30) days from receipt thereof, lest the Final Assessment Notice/Final Letter of Demand (FAN/FLD) shall become final and executory. Since the FAN/FLD with Details

[1] Docket, pp. 1639-1662.
[2] Ibid. at pp. 1611-1638.

of Discrepancies issued in the instant case was served upon petitioner through registered mail on April 24, 2014, it had until May 26,[3] 2014 to register its protest to such assessment which it failed to do rendering the FAN/FLD immutable. That being the case, the Court erred in taking cognizance of the instant petition which should have been denied outright.

Save for denying receipt of the assessment, petitioner acknowledged that several BIR correspondences[4] were sent to its registered address. Moreover, the fact of mailing of the subject FAN/FLD is evidenced by a registry return card and the Certification[5] issued by the Philippine Postal Corporation. In other words, he was able to demonstrate compliance with all the conditions set forth by jurisprudence,[6] and Section 3(v), Rule 131 of the Rules of Court. In view thereof, it can be presumed that petitioner received the FAN/FLD in the ordinary course of mail. For him, failure of petitioner to present controverting proof to rebut it equates to actual receipt of the FAN/FLD.

Neither is the subject assessment barred by prescription, respondent posits. He explains that the significant disparity[7] between the sales per BIR audit vis-à-vis petitioner's declared sales per Income Tax (IT) and Value Added Tax (VAT) Returns simply means that the filing thereof is tainted with falsity/fraud, citing Section 222(b), in relation to Section 248(B) of the NIRC, as amended, as bases. In fine, the FAN/FLD dated April 14, 2014 was seasonably issued against petitioner within the ten (10)-year prescriptive period.

Respondent insists that the Waiver executed by the parties is valid, extending his period to assess petitioner. He equates the sending of a copy of the Waiver to petitioner's accountant Ms. Marilyn Derno, to implied acceptance on his

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[3] May 24 and 25, 2014 fell on a Saturday and Sunday respectively.
[4] Various Request for Presentation of Record, Notice of Informal Conference (NIC), Preliminary Assessment Notice (PAN), Preliminary Collection Letter (PCL), Final Notice Before Seizure (FNBS)
[5] Exhibit R-12.
[6] The twin requisites to establish presumption of receipt of a mailed assessment are: 1) That the letter was properly addressed with postage prepaid; and 2) that it was mailed. See *Protector's Services, Inc. vs. Court of Appeals,* G.R. No. 118176, April 12, 2000.
[7] 94.95%.

part of such waiver. The subsequent transmittal of supporting documents indicates that petitioner benefited from such Waiver, barring it from challenging its validity, citing the *Next Mobile*[8] case as his authority. With all the foregoing, petitioner should be held totally accountable for deficiency IT, VAT, and EWT in the aggregate amount of ₱2,915,372.11, exclusive of increments for TY 2010.

In its *Comment/Opposition* dated July 16, 2018, petitioner counters that the issue of validity of the Final Notice Before Seizure (FNBS) and Warrant of Distraint and Levy (WDL) falls under "other matters" arising under the NIRC cognizable by the Court per Section 7(1) of Republic Act (R.A.) No. 1125, as amended. Further, the alleged FAN/FLD which it did not receive is void and cannot attain finality.[9] Petitioner admits receipt of pertinent BIR documents[10] which were personally served upon it, but denies receipt of the subject assessment which was allegedly sent through registered mail.

Also pursuant to Section 203 of the NIRC, as amended, the subject FAN/FLD has already prescribed. In the absence of falsity/fraud, the three (3)-year prescriptive period is inapplicable. In the first place, respondent did not raise the issue of fraud during the trial of the case. Raising the same at this point is allegedly offensive to the basic rules of fair play, justice and due process[11]. Moreover, the discrepancy between its sales per its book and the sales per its VAT return is only 1.3%, effectively negating any presumption of fraud/falsity in its filing. Further, the doctrine enunciated in *Next Mobile* case is inapplicable due to the difference in the factual milieu of the two cases.

THE RULING OF THE COURT

Contrary to respondent's protestation, the Court has the competence to hear and determine the present case.

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[8] *Commissioner of Internal Revenue vs. Next Mobile, Inc. (formerly Nextel Communications Phils. Inc.)*, G.R. No. 212825, December 7, 2015.
[9] *Commissioner of Internal Revenue vs. BASF Coating + Inks Phils., Inc.*, G.R. No. 198677, November 26, 2014.
[10] See Note 4.
[11] See *Macaslang vs. Zamora*, G.R. No. 156375, May 30, 2011 and *Citibank vs. NLRC*, G.R. No. 159302, August 17, 2005.

Section 7(1)[12] of the Republic Act (R.A.) No. 1125, as amended confers upon the Court of Tax Appeals (CTA) the jurisdiction to decide not only cases pertaining to disputed assessments and refunds of internal revenue taxes, but also other matters arising under the NIRC, as amended.

In this case, the instant petition is assailing among others, the validity of the WDL dated June 8, 2015 issued by respondent, which is a remedial measure to implement collection of the taxes due which is certainly within the province of this Court.

Anent the receipt of the subject assessment, ordinarily it is *presumed* that petitioner received the subject assessment in the ordinary course of mail.[13] But since petitioner denied the same, it was incumbent upon respondent to establish proof *actual* receipt of the said assessment.[14] While it may appear through the pertinent Registry Receipt and Certification adduced by respondent that they were respectively received by a certain "S/G Javier" and "S/G Jadiel," there is nothing in the record that indicates that they were duly authorized to receive important correspondences in behalf of petitioner. The fact of mailing must be proved by the registry receipt issued by the Bureau of Posts or Registry return receipt signed by petitioner or its authorized representative.[15] Failure on the part of respondent to establish that the FAN/FLD was actually received by petitioner is fatal and amounts to no

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[12] SEC. 7. *Jurisdiction*. The Court of Tax Appeals shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided:

(1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or **other matters arising under the National Internal Revenue Code or other laws or part of law administered by the Bureau of Internal Revenue**. xxx

[13] The facts to be proved to raise this presumption under Section 3(v), Rule 131 of the Rules of Court are (a) that the letter was *properly addressed* with postage prepaid, and (b) that it was *mailed*. Once these facts are proved, the presumption is that the letter was received by the addressee as soon as it could have been transmitted to him in the ordinary course of the mail. See *Nava vs. Commissioner of Internal Revenue,* G.R. No. L-19470, January 30, 1965.

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

[15] See *Barcelon Roxas Securities, Inc. (now known as UBP Securities, Inc.) vs. Commissioner of Internal Revenue,* G.R. No. 150764, August 7, 2006.

assessment at all.[16] As such, it cannot bind petitioner and may not be utilized as a foundation of a valid collection against it.

On the issue of prescription, Section 248(B)[17] of the NIRC, as amended, treats a taxpayer's failure to report among others, sales in an amount exceeding 30% of that declared per return as *prima facie* evidence that the filing of a tax return was tainted with falsity/fraud.[18] Conversely, the presumption cannot be made to apply where the taxpayer's unreported sales are 30% or less than that of its reported sales in its tax return/s.

In the Details of Discrepancies accompanying the subject FAN/FLD for TY 2010,[19] respondent found that petitioner's recorded sales per book is ₱71,235,608.88 whereas in its ITR, it declared sales in the amount of ₱70,454,539.80, leaving a difference of ₱781,069.08. The alleged unreported sales represent a trifling 1%[20] of its declared sales per ITR. With such result, which did not breach the benchmark of undeclared sales under Section 248(B) of the NIRC, as amended, it cannot be presumed that petitioner's filing of ITR is false/fraudulent.

By the same token, the Details of Discrepancies[21] appended to the assessment likewise show that petitioner's

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[16] See *Commissioner of Internal Revenue vs. Bank of the Philippine Islands,* G.R. No. 224327, June 11, 2018.

[17] **SEC. 248. Civil Penalties. –** xxx

(B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case, any payment has been made on the basis of such return before the discovery of the falsity or fraud: Provided, That a substantial under-declaration of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the ruies and regulations to be promulgated by the Secretary of Finance, shall constitute prima facie evidence of a false or fraudulent return: Provided, further, That failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding (30%) of actual deductions, shall render the taxpayer liable for substantial under-declaration of sales, receipts or income or for overstatement of deductions, as mentioned herein.

[18] See *Bureau of Internal Revenue vs. Court of Appeals,* G.R. No. 197590, November 24, 2014.

[19] Exhibit R-11.

[20] Resulting quotient after dividing undeclared sales over sales per ITR (₱781,069.08 divide by ₱70,454,539.80 = 0.01 or 1%)

[21] See Note 20.

reported sales per book is ₱71,235,608.88, while sales amounting to ₱70,289,072.13[22] was declared in its VAT Returns, the difference of which was treated as unaccounted sales in the sum of ₱946,546.75 or 1%[23] of its reported sales per its VAT Returns. On this account, the presumption of falsity/fraud in petitioner's filing of its VAT Returns will not apply.

Respondent's posture that the waiver executed by petitioner validly stretched the prescriptive period to assess is also incorrect. As found by the Court, he wantonly disregarded the mandatory provisions of Section 222(b) of the NIRC, as amended, as implemented by RMO No. 20-90 as he failed to indicate the date of his acquiescence of the subject waiver. Note that petitioner is not estopped from challenging the validity of the subject waiver considering that it is the BIR and not the former who caused such defect, and must ultimately bear the consequences.[24] Such legal infirmity therefore, gave rise to non-extension of the period to assess and collect taxes, and made the assessments issued by the BIR beyond the three-year prescriptive period void.[25]

Finally, even granting that the FAN/FLD was seasonably issued and was indeed received by petitioner, the assessment must still be struck down for it is not the assessment contemplated under Tax Code.

Section 6(A)[26] of the NIRC, as amended, decrees *inter alia*, that a taxpayer shall be held answerable for a valid

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[22] Composed of: a) ₱16,857,910.31 as taxable sales; and b) ₱53,431,161.82 as zero-rated sales.

[23] Resulting quotient after dividing undeclared sales over sales per VAT Returns (₱946,546.75 divide by ₱71,235,608.88 = 0.01 or 1%)

[24] In questioning the waiver's validity, the BIR cannot implore the equitable doctrine of estoppel against the taxpayer just to compensate its failure to adhere to the prescribed procedure in the execution thereof. See *Commissioner of Internal Revenue vs. Bank of the Philippine Islands,* G.R. No. 224327, June 11, 2018.

[25] See *Commissioner of Internal Revenue vs. Philippines Daily Inquirer, Inc.,* G.R. No. 213943, March 22, 2017.

[26] **SEC. 6. Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.** -

(A) Examination of Return and Determination of Tax Due. - xxx

The tax or any deficiency tax so assessed shall be paid upon notice and demand from the Commissioner or from his duly authorized representative. xxx assessment only upon notice and demand for payment from respondent or his authorized representative.

Jurisprudence defines assessment as a written notice and demand made by the BIR on the taxpayer for the settlement of a due tax liability that is there *definitely set and fixed*.[27] Its primary purpose is to determine the amount that a taxpayer is liable to pay.[28] Hence, any FAN/FLD which is still subject to modification or adjustment is not an assessment contemplated by the Tax Code and settled case-law on the matter.

While the FLD dated April 14, 2014[29] states for the computation of petitioner's purported tax liabilities, the amount remains indefinite as the tax due and interest thereon is still subject to adjustment depending on actual date of payment, thus:

> *Please take note that the interest and the total amount due will have to be *adjusted* if paid beyond the due date.[30]

Respondent's assessment is virtually hinged upon the period when petitioner decides to account for its alleged tax obligation in favor of the government. The FLD dated April 14, 2014 therefore does not contain a fixed and definite amount of tax to be paid, rendering it legally infirm. Consequently, the Court is left with no other recourse but to invalidate the same.

WHEREFORE, respondent's *Motion for Reconsideration Ad Cautelam* dated May 16, 2018 is **DENIED**. The Decision dated April 26, 2018 is **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

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[27] See *Adamson vs. Court of Appeals,* G.R. No. 120935, May 21, 2009.
[28] See *Tupaz vs. Hon. Ulep,* G.R. No. 127777, October 1, 1999.
[29] Exhibit R-11.
[30] Ibid. at p. 972.

I Concur:

MA. BELEN M. RINGPIS-LIBAN
Associate Justice