Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

AJINOMOTO PHILIPPINES CORPORATION,
Respondent.

CTA EB CASE NO. 1010
(CTA Case No. 7877)

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AJINOMOTO PHILIPPINES CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 1015
(CTA Case No. 7877)

Present:
DEL ROSARIO, P.J.,
CASTAÑEDA, JR.
BAUTISTA
UY
CASANOVA
FABON-VICTORINO
MINDARO-GRULLA
COTANGCO-MANALASTAS
RINGPIS-LIBAN, JJ.

Promulgated:

MAY 26 2015
3:10 p.m.

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RESOLUTION

MINDARO-GRULLA, J.:

This resolves Commissioner of Internal Revenue (CIR) and Ajinomoto's respective "Motion for Partial Reconsideration" of the Decision dated November 3, 2014 of this Court en banc, the dispositive portion of which states:

> "***WHEREFORE,*** *the consolidated Petitions for Review, CTA EB No. 1010 filed on May 21, 2013 and CTA EB No. 2015 filed in May 20, 2013, are both* ***DENIED*** *for lack of merit. Accordingly, the assailed Decision dated December 11, 2012 and Resolution dated April 16, 2013 are hereby* ***AFFIRMED****.*
>
> ***SO ORDERED.***"

In her Motion, CIR maintains that the right to assess Ajinomoto of its internal revenue tax liabilities has not prescribed and that Ajinomoto is estopped from assailing the validity of the waiver with respect to the assessment of its deficiency internal revenue tax liabilities for fiscal year ending 31 March 2005 . In sum, CIR asserts the previous issues and arguments raised before the Court in the Division and En Banc.

On the other hand, Ajinomoto maintains that there was a denial of due process due to violation of Section 228 of the Tax Code and Revenue Regulation No. 12-99. Ajinomoto claims that the issuance of PAN, FAN and Final Decision was tainted with procedural infirmities that caused prejudice. Likewise, Ajinomoto argued for the cancellation of the assessment for lack of factual and legal bases.

Both Ajinomoto and CIR filed their "Comment/Opposition" to their respective "Motion for Partial Reconsideration". Both claim that the arguments raised in their motions were a rehash of the arguments raised in their respective petitions. In the comment/opposition, the CIR insists that Ajinomoto was never deprived of its procedural due process and that the assessment was based on legal and factual basis while Ajinomoto oppose the motion as follows:

1. The supposed executed waiver by Ajinomoto was void and did not extend the prescriptive period within which to assess.

2. Ajinomoto filed the pertinent tax returns for the fiscal year ending 31 March 2005 but no deficiency tax assessment was issued from the date of filing of the said returns;

3. Ajinomoto is not estopped from assailing the validity of the waiver.

We resolve to deny the motions.c

After a careful examination of the CIR and Ajinomoto's respective "Motions for Partial Reconsideration", the Court find that the issues and arguments raised in both motions have already been sufficiently passed upon and fully discussed not only by the Third Division's Decision dated December 11, 2012 and Resolution dated April 16, 2013 but also by this Court en banc's Decision dated November 3, 2014. To reiterate:

"In several cases[1] the Supreme Court consistently held that "a waiver of the statute of limitations under the NIRC, to a certain extent being a derogation of the taxpayer's right to security against prolonged and unscrupulous investigations, must be carefully and strictly construed." Under the principle of stare decisis, CIR's petition must be denied. We find that this Court's division correctly applied the case of Commissioner of Internal Revenue vs. Kudos Metal Corporation[2], xxx:

xxx xxx xxx

Based on the foregoing, defects in the waiver of the defense of prescription such as unauthorized signatory, failure to indicate the acceptance of CIR and the non indication of receipt by the respondent of its file copy in the original copies of the waivers will not extend the period to assess. Similarly, CIR failed to prove that the signatory in Ajinomoto's waiver was authorized. In the instant case the following defects of the waiver as found by this Court's division were as follows:

"First, the waiver was executed by Mr. Perez without any written notarized authority from the board of directors of petitioner. Petitioner, being a juridical entity, it acts only through its duly authorized representative, either through its Board of Directors, or through its officers duly authorized by the board. Considering that Mr. Perez is petitioner's Section Manager (Exhibits "F" and "Y") and there is no proof that Mr. Perez was duly authorized by the board to sign the waiver for the petitioner, and considering further that petitioner is denying to have authorized Mr. Perez to sign the waiver (Exhibit "Y"); then, it is evident that the waiver was indeed executed without written authority from the Board.

[1] Philippine Journalist, Inc. v. Commissioner of Internal Revenue, G.R. No. 162852, December 16, 2004, 488 Phil. 218, 235; Commissioner of Internal Revenue vs. FMF Development Corporation, G.R. No. 167765, June 30, 2008, Commissioner of Internal Rvenue vs. Kudos Metal Corporation, G.R. No. 178087, May 5, 2010.
[2] G.R. No. 178087, May 5, 2010.

Second, the waiver failed to indicate the date of acceptance by the BIR. The need to indicate the date of acceptance is to fix with certainty if the waiver was actually agreed upon before the expiration of the three-year prescriptive period (Philippine Journalists, Inc. vs. Commissioner of Internal Revenue, 447 SCRA 230). Since a waiver is not a unilateral act of the taxpayer, but in fact and in law an agreement between the taxpayer and the BIR, the agreement by the BIR should be made prior to the expiration of the three-year prescriptive period. Accordingly, the date of acceptance is a requisite for determining whether the waiver was validly perfected before the expiration of the original three-year period (Commissioner of Internal Revenue vs. FMF Development Corporation, 556 SCRA 709).

Third, petitioner was furnished a copy of the waiver only on December 11, 2008, beyond the three-year prescriptive period to assess under the NIRC. The requirement to furnish the taxpayer with a copy of the waiver is not only to give notice of the existence of the document but of the acceptance by the BIR and the perfection of the agreement (Philippine Journalists, Inc. vs. Commissioner of Internal Revenue, 447 SCRA 231). A waiver is an agreement executed for the purpose of extending the period to assess. Section 222 (b) of the NIRC of 1997, as amended, provides that both the Commissioner and the taxpayer should have agreed in writing to the assessment after the period prescribed in Section 203. Hence, the perfection of an agreement depends upon the concurrence of the offer and the acceptance. Settled is the rule that no contract shall arise unless the acceptance of the contract is communicated to the offeror (The Insular Life Assurance Company, Ltd. vs. Asset Builders Corporation, 442 SCRA 162).

Finally, the waiver was not signed by the duly authorized representative of the BIR. The aforequoted fourth requisite provides that the CIR or the revenue official authorized by him must sign the waiver indicating that the BIR has accepted and agreed to the waiver. Revenue Memorandum Order 20-90 provides that for tax cases involving more than P1,000,000.00, the revenue officer authorized to sign the waiver is only the Commissioner of Internal Revenue. While Revenue Delegation Authority Order No. 05-01 ("RDAO 05-01") delegates the authority to sign and accept the Waiver of the Defense of Prescription under the Statute of Limitations; however, for large taxpayers cases, it is the Assistant Commissioner of Internal Revenue ("ACIR") of *the large taxpayers service who is authorized to sign and accept the waiver.*

A perusal of the waiver shows that the waiver was accepted by Romulo Aguila, Jr., OIC — Head Revenue Executive Assistant of the Large Taxpayers Service — Regular. The OIC — Head of Revenue Executive Assistant of the Large Taxpayers Service is definitely not the ACIR of the Large Taxpayers Service; but, a rank lower than the ACIR. Since RDAO 05-01 is a delegation of the authority of the Commissioner to sign and accept the waiver, then only the named revenue officers duly authorized thereof must act in behalf of the Commissioner. The OIC — Head of Revenue Executive Assistant of the Large Taxpayers Service being not the duly authorized representative named in RDAO 05-01 to sign and accept the waiver, then said waiver cannot be considered to have been validly accepted by the BIR."[3]

Thus, we find that this Court's division correctly declare that the waiver executed between the CIR and Ajinomoto to be defective and the assessment notices of deficiency income tax, value-added tax, expanded creditable withholding tax and income taxes withheld on compensation as null and void. xxx:

xxx xxx xxx.

In addition, the June 17, 2008 waiver was executed after CIR's right to assess has prescribed. CIR has until July 15, 2008 within which to assess petitioner of deficiency income tax.[4] *As to deficiency VAT, CIR had three (3) years, or until the following dates to assess petitioner of deficiency Value-Added Tax*[5]*:*

Quarter	*Deadline to Assess deficiency VAT*
First Quarter	*July 25, 2007*
Second Quarter	*October 25, 2007*
Third Quarter	*January 25, 2008*
Fourth Quarter	*April 25, 2008*

For expanded creditable withholding tax and Withholding Tax on Compensation, CIR has three (3) years or until the following dates to assess[6]*:*

Month	*Deadline to Assess*
April 2004	*May 15, 2007*
May 2004	*June 15, 2007*
June 2004	*July 15, 2007*

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[3] En banc Docket, pp.39-99.
[4] Ibid.
[5] Ibid.
[6] Ibid.

July 2004	*August 15, 2007*
August 2004	*September 15, 2007*
September 2004	*October 15, 2007*
October 2004	*November 15, 2007*
November 2004	*December 15, 2007*
December 2004	*January 20, 2008*
January 2005	*December 15, 2004*
February 2005	*February 15, 2008*
March 2005	*April 15, 2008*

Evidently, the waiver executed on June 17, 2008 was made after the period to assess has prescribed which was contrary to CIR's claim that the waiver was made before the period to assess deficiency income tax, value-added tax, expanded withholding tax and withholding tax on compensation has prescribed, a clear violation of the requirements that both the date of execution of the waiver by the taxpayer and date of acceptance by the CIR should be before the expiration of the period of prescription.[7]

Furthermore, CIR should not benefit in the doctrine of estoppel for failure to assess Ajinomoto within the prescriptive period. CIR was remiss on its duty. Due to numerous defects[8] *found in the waiver of the defense of prescription, which CIR ought to have exercise due diligence, CIR therefore must bear the consequence. The Supreme Court in the case of Commissioner of Internal Revenue vs. Kudos Metal Corporation*[9] *ruled as follows:*

> *"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*

7 Commissioner of Internal Revenue vs. Kudos Metal Corporation, G.R. No. 178087, May 5, 2010.
8 The waiver of the defense of prescription had several defects: (1) the waiver was executed without any written authority from petitioner's board of directors; (2) the waiver failed to indicate the date of acceptance by the BIR; (3) petitioner was furnished a copy of the waiver beyond the three-year prescriptive period to assess under the NIRC; and, (4) the waiver was not signed by the duly authorized representative of the BIR. Considering all the foregoing defects, the waiver did not serve to extend the prescriptive period to assess. CEASaT
9 Commissioner of Internal Revenue vs. Kudos Metal Corporation, G.R. No. 178087, May 5, 2010.

which they originate. Simply put, the doctrine of estoppel must be sparingly applied.

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."

As to Ajinomoto's petition docketed as CTA EB Case No. 1015, praying the cancellation of the deficiency fringe benefit tax assessment, it lacks merit.

Ajinomoto received the Preliminary Assessment Notice (PAN) on December 16, 2008 giving Ajinomoto 15 days from receipt thereof to response and thereafter on December 22, 2008, received the Final Assessment Notice (FAN). Thus, Ajinomoto assert that the absence of its opportunity to contest and reply to the PAN before the FAN was issued was an infirmity that effectively deprive Ajinomoto of its right to procedural due process. We are not persuaded

The case of Commissioner of Internal Revenue vs. Metro Star Superama, Inc.[10] *(Metrostar) and Pilipinas Shell Petroleum Corp. vs. Commissioner of Internal Revenue* [11] *(Shell) relied upon by Ajinomoto were not in all fours. In both Metro Star and Shell, the failure to send or non-issuance of PAN stating the facts and the law on which the assessment was made as required by Section 228 of R.A. No. 8424, renders the assessment made by the CIR void. In this case, there was no failure to send or non-issuance of PAN rather Ajinomoto received the PAN and FAN. This court agrees with the findings of this Court's division, to wit:*

"Though respondent successively issued the Notice of Informal Conference, the Preliminary Assessment Notice and the Formal Letter of Demand, together with the Details of Discrepancies and Assessment Notices, one after another, the fact remains that petitioner has been duly notified of the procedures prescribed under Section 228 and has been informed of the factual and legal bases of the assessments. In fact, petitioner was able to exhaustively protest respondent's assessments in a Letter

[10] G.R. No. 185371, December 8, 2010.
[11] G.R. no. 172598, December 21, 2007.

> *dated December 23, 2008. Even the Court-commissioned ICPA in his Final and Consolidated Report made mention of the basis of the BIR's computation of the deficiency tax assessments. Had the assessment no factual and legal bases and had petitioner not been properly informed of the said factual and legal bases of the assessment, then the Court-commissioned ICPA and this Court would not have been able to compute the deficiency FBT assessment against the petitioner. "*

Concomitantly, there is no violation of the cardinal principle in administrative investigations - that taxpayers should be able to present their case and adduce supporting evidence[12]*. While the FAN was issued before the period to response to PAN has expired, Ajinomoto nevertheless received the PAN and FAN, was informed of the factual and legal bases of the assessments, and was able to intelligently response to the PAN and FAN in a Letter dated December 23, 2008.*

It is basic that as long as a party is given the opportunity to defend his interests in due course, he would have no reason to complain, for it is this opportunity to be heard that makes up the essence of due process.[13] *It has been held that the essence of due process is found in the reasonable opportunity to be heard and submit any evidence one may have in support of one's defense. What the law proscribes is the lack of opportunity to be heard.*[14]

It cannot be denied that Ajinomoto had been given the opportunity to refute the charges against it, was able to timely file its administrative protest and was able to discuss its position on the deficiencies being assessed against it. Apparently, there was substantial compliance in the procedure in protesting the assessments and petitioner's right to due process was adequately observed and protected. Thus, we find the Court's division correctly ruled as follows:

> *"xxx due process in our jurisdiction refers to the right of the taxpayer to be informed of the legal and factual findings of the BIR as regards its deficiency taxes, and the opportunity to be heard through protest. Section 228 of the NIRC of 1997 clearly refers to the Final Assessment Notice that should be formally protested. In the instant case, there is no doubt that petitioner was able to file its protest to the FAN."*

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

[13] Rizal Commercial Banking Corporation vs Commissioner of Internal Revenue, G.R. No. 168498, June 16, 2006

[14] Estares, et al. vs. Court of Appeals, et al., G.R. No. 144755, June 8, 2005.

In sum, We find no valid justification to compel a modification or reversal of our Decision promulgated on November 3, 2014.

WHEREFORE, premises considered, Commissioner of Internal Revenue (CIR) and Ajinomoto's respective "Motion for Partial Reconsideration" of the Decision dated November 3, 2014, is hereby **DENIED** for lack of merit.

SO ORDERED.

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

WE CONCUR:

With Separate Concurring and Dissenting Opinion
ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

(On Leave)
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

Ma. Belen S. L.
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

FIRST DIVISION

COMMISSIONER OF INTERNAL REVENUE *Petitioner,* -versus- **AJINOMOTO PHILIPPINES CORPORATION,** *Respondent.*	**CTA EB CASE N0. 1010** (CTA Case No. 7877)

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AJINOMOTO PHILIPPINES CORPORATION, *Petitioner,* -versus- **COMMISSIONER OF INTERNAL REVENUE,** *Respondent.*	**CTA EB CASE NO. 1015** (CTA Case No. 7877) Present: **DEL ROSARIO,** *PJ,* **CASTAÑEDA, JR.,** **BAUTISTA,** **UY,** **CASANOVA,** **FABON-VICTORINO,** **MINDARO-GRULLA,** **COTANGCO-MANALASTAS,** *and* **RINGPIS-LIBAN,** *JJ.* Promulgated: MAY 26 2015 3:10 p.m.

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SEPARATE CONCURRING AND DISSENTING OPINION

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DEL ROSARIO, P.J.:

I maintain my concurring and dissenting opinion in the above captioned case. Let me, however, emphasize that pursuant to Section 228 of the National Internal Revenue Code (NIRC) of 1997, as amended, and Section 3.1.2 of Revenue Regulations No. 12-99[1], the procedure for the issuance of an assessment is as follows:

> First – The Commissioner of Internal Revenue (CIR) or his duly authorized representative makes an initial determination that "there exists sufficient basis to assess the taxpayer";
>
> Second – The Bureau of Internal Revenue (BIR) issues a PAN, giving the taxpayer fifteen (15) days within which to respond; and,
>
> Third – If no response is made, the taxpayer is "considered in default" in which case, a formal letter of demand and assessment notice (FAN) is caused to be issued against the taxpayer.

The right of the taxpayer to respond to a PAN carries with it the correlative duty on the part of the BIR to consider the response. The procedure is intrinsic in the taxpayer's right to be heard. To be sure, the issuance of a FAN without even hearing the side of the taxpayer is anathema to the cardinal principles of due process.

Otherwise stated, to sustain the validity of FAN despite glaring violation of the procedure mandated by law would render meaningless the clear and categorical requirement of "hearing" a taxpayer before he is subjected to an assessment – the recall or cancellation of which, entails long, tedious and expensive process.

Worse, any precedent that upholds the validity of a FAN as long as the taxpayer is able to file a protest is fraught with mischievous consequences. Parenthetically, it would in essence encourage the unscrupulous practice of issuing a FAN even without prior compliance with

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[1] Dated September 6, 1999.

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the procedure no less prescribed by law, first – in requiring the issuance of a PAN; and, second in considering the taxpayer's response thereto. There is nothing more devious than the scenario where government ignores as much its own rules as the taxpayer's constitutional right to due process.

In addition to the cases previously cited, in the recent case of *Polymer Products (Phil.), Inc. vs. Commissioner of Internal Revenue*[2] the Court ruled that:

> "As earlier quoted, Section 228 of the NIRC of 1997, as implemented by RR No. 12-99, specifically Section 3.1.2 thereof, prescribes a fifteen (15)-day period from receipt of a PAN within which a taxpayer may respond thereto. Indubitably, **the right of the taxpayer to respond to the PAN is an important part of the due process requirement in the issuance of a deficiency tax assessment.** In wantonly disregarding petitioner's right to be heard with regard to its positions or arguments against the PAN, the BIR clearly violated petitioner's right to due process as enshrined in Section 228 of the Tax Code and RR No. 12-99. **To be sure, procedural due process is not satisfied with the mere issuance of a PAN, *sans* giving the taxpayer an opportunity to respond thereto.**"

In closing, the admonition of the Supreme Court as early as 1962 to an agency of government similar to the BIR is apropos:

> "The Public Service Commission is an agency of the government, and should at all times, maintain a due regard for the constitutional rights of parties litigant. Also, the Commissioners (who are not judges in the true sense) would do well to ponder the implications of Article 32, No. 6, of the New Civil Code on the individual responsibility of public officers and employees who impair a person's right against deprivation of property without due process of law."[3]

For the reasons afore-stated, I VOTE to DENY the Motion for Partial Reconsideration filed by the Commissioner of Internal Revenue and GRANT the Motion for Partial Reconsideration filed by Ajinomoto Philippines, Inc..

ROMAN G. DEL ROSARIO
Presiding Justice

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[2] CTA Case No. 8299, January 30, 2015, penned by Presiding Justice Roman G. Del Rosario and concurred by Associate Justice Erlinda P. Uy.

[3] *Danan vs. Aspillera,* G.R. No. L-17305, November 28, 1962.