REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, ***Petitioner,***	**C.T.A. E.B. NO. 176** **(C.T.A. CASE NO. 7045)**
	Present:
-versus-	ACOSTA, Presiding Justice, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, and PALANCA-ENRIQUEZ, JJ.
KUDOS MARKETING CORPORATION, ***Respondent.***	**Promulgated:** SEP 25 2006

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DECISION

PALANCA-ENRIQUEZ, J.:

THE CASE

This is a Petition for Review filed by the Commissioner of Internal Revenue (hereafter "petitioner Commissioner") under *Section 11* of *Republic Act No. 9282* (An Act Expanding the Jurisdiction of the Court of Tax Appeals), in relation to *Rule 43 of the 1997 Rules of Civil Procedure, as amended*, which seeks the review and reversal of the

Resolution promulgated on November 14, 2005 granting the Motion for Preferential Resolution on the Issue of Prescription rendered by the First Division of this Court in C.T.A. Case No. 7045, the dispositive portion of which reads as follows:

> "**WHEREFORE**, in view of all the foregoing, motion is hereby **GRANTED**. Accordingly, respondent's Final Decision on Disputed Assessment dated June 22, 2004 is **SET ASIDE** and the corresponding assessment notices for deficiency income tax, value-added tax and expanded withholding tax, withholding tax on compensation assessments and other penalties issued against the petitioner are hereby declared **CANCELLED AND WITHDRAWN**.
>
> **SO ORDERED**."

The Motion for Reconsideration was denied by the First Division in the assailed Resolution, promulgated on March 20, 2006, the dispositive portion of which reads as follows:

> "In view of this, respondent's Motion for Reconsideration is hereby **DENIED** for lack of merit. Accordingly, the Resolution of this Court dated November 14, 2005 **REMAINS**.
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> **SO ORDERED**."

<u>THE FACTS</u>

The antecedent facts are uncontroverted.

Petitioner is the Commissioner of the Bureau of Internal Revenue tasked with the assessment and collection of internal revenue taxes. He holds office at the Bureau of Internal Revenue, BIR-National Office Building, Agham Road, Diliman, Quezon City.

Respondent Kudos Marketing Corporation (hereafter "respondent corporation") is a corporation organized and existing under the laws of the Republic of the Philippines, with principal office address at 414 Lavesares Street, Tondo, Manila.

On April 15, 1999, respondent corporation filed its annual income tax return for the calendar year 1998. Thereafter, on November 5, 2003, respondent received a Formal Letter of Demand with accompanying Assessment Notices dated September 26, 2003.

Respondent corporation filed a "Protest on Various Tax Assessments" on December 3, 2003 and on February 2, 2004 it submitted its "Legal Arguments & Documents in Support of Protests Against Various Assessments."

On July 29, 2004, respondent corporation received a "Final Decision on Disputed Assessment" dated June 22, 2004 and signed by Hon. Jose Mario C. Buñag, Deputy Commissioner for the Legal and

Inspection Group, seeking to collect from respondent the amount of P9,542,116.65 for deficiency of various taxes, to wit:

Kind of Tax	Amount
Income Tax	P7,301,850.60
Value Added Tax	2,207,677.21
Expanded Withholding Tax	13,557.23
Withholding Tax-Compensation	10,031.62
Other Penalties	9,000.00
TOTAL	P9,542,116.65

In a letter dated December 22, 2003, the Bureau claimed that Ms. Nelia Yulo Pasco executed a waiver of the defense of prescription for and in behalf of the corporation.

On August 27, 2004, respondent corporation filed the Petition for Review in CTA Case No. 7045, pursuant to *Section 11* of *Republic Act No. 9282,* and petitioner filed his Answer thereto on October 18, 2004. The parties were then required to submit their respective Pre-Trial Briefs and after compliance thereto, the Court scheduled the Pre-Trial Conference. Subsequently, after the conference, they submitted their Joint Stipulation of Facts and Issues on April 6, 2005. On the same date, however, respondent corporation filed a Motion for Preferential Resolution on the Issue of Prescription on the ground that petitioner

Commissioner's right to assess had already prescribed. The parties were then ordered to file their respective memoranda. Both parties complied thereto.

The First Division of this Court, in its Resolution dated November 14, 2005, ratiocinated:

> "The Court finds the petitioner's motion with merit.
>
> Sections 203 and 222 (b) of the National Internal Revenue Code of 1997, provides for a period of limitations on the assessment and collection of internal revenue taxes. We quote:
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>> SECTION 203. ***Period of Limitation Upon Assessment and Collection.*** – Except as otherwise 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.
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>> SECTION 222. ***Exceptions as to period of Limitation of Assessment and Collection of Taxes.*** –
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(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.

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The above provisions aims to safeguard the interest of the taxpayer against unreasonable investigation. (*J.C. Vitug and E.D. Acosta,* ***Tax Law and Jurisprudence, 2nd Ed., p. 295***) Unreasonable investigation contemplates such cases where the period for assessment are extended indefinitely depriving the taxpayer of the assurance that it will no longer be subjected to further investigation for taxes after the expiration of a reasonable period of time.

In the case at bar, the taxable year involved in the assessment is calendar year 1998 wherein petitioner filed on April 15, 1999 its Annual Income Tax Return for the period. Thus, the government has until April 14, 2002 (2000 being a leap year) within which to assess the petitioner.

On December 10, 2001, petitioner executed a 'Waiver of the Defense of Prescription under the Statute of Limitation of the National Internal Revenue Code'. The said waiver, however, is not valid.

Revenue Memorandum Order No. 20-90, dated April 4, 1990, gives Us the proper execution of the waiver, to wit:

'1. The waiver **must be** in the form identified as Annex 'A' hereof. This form may be reproduced by the Office concerned **but there should be no deviation from such form. The phrase 'but not after** ________

19__' should be filled up. This indicates the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription. The period agreed upon shall constitute the time within which to effect the assessment/collection of the tax in addition to the ordinary prescriptive period.

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 before the expiration of the period of prescription or before 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. In the National Office

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

B. In the Regional Offices

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.

2. The Regional Director, the Assistant Regional Director, the Chief, Assessment Branch or the Chief, Legal Branch with respect to cases still pending review and the period to assess/collect is about to prescribe, regardless of the amount.

3. The Regional Director, the Assistant Regional Director, the Chief, Collection Branch or the Chief, Legal Branch with respect to cases still pending collection and the period to assess/collect is about to prescribe, regardless of the amount.

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 should be administratively dealt with.'** (Emphasis supplied)

A scrutiny of the first waiver reveals the following: (1) it does not appear on the face of the waiver that the person who executed the same is petitioner's responsible official; (2) it is not signed by the respondent; (3) the date of acceptance by the Bureau is not indicated; and (4) there is no indication of the fact of petitioner's receipt of its own copy.

> Respondent's right to assess and collect deficiency taxes from petitioner has already prescribed as there was no valid waiver at the first instance. Consequently, the second waiver is without force and effect as there is no longer a period to extend.
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> Thus, when respondent issued its Formal Letter of Demand with Assessment Notices for the taxable year 1998 on September 26, 2003, the three-year prescriptive period within which the respondent may assess the petitioner has already set in. Respondent's right to assess petitioner already prescribed."

Dissatisfied, herein petitioner moved for reconsideration of the said Resolution. On March 20, 2006, the First Division denied petitioner Commissioner's "Motion for Reconsideration".

Hence, the present Petition for Review.

THE ISSUE

The sole issue raised by petitioner is:

> WHETHER OR NOT PETITIONER'S RIGHT TO ASSESS RESPONDENT HAS ALREADY BEEN BARRED BY PRESCRIPTION.

On July 11, 2006, We required respondent corporation to file its Comment on the petition, within ten (10) days from receipt thereof.

Respondent filed its Comment on August 8, 2006.

The principal issue for this Court *En Banc*'s resolution is whether or not the First Division correctly granted the Motion for Preferential Resolution on the Issue of Prescription filed by respondent corporation.

THE COURT'S RULING

The Petition has no merit.

After a careful examination of the arguments raised in the instant petition, the Court *En Banc* finds that the issue raised by petitioner Commissioner is a mere rehash of his Memorandum and Motion for Reconsideration filed with the First Division of this Court in C.T.A. Case No. 7045 and presents no new arguments nor new matters which have not been considered and passed upon by the First Division in the assailed Resolutions. Nevertheless, the Court *En Banc* will discuss the same.

The issue of the instant petition stems from the first waiver that was executed by Nelia Pasco and was signed and accepted for petitioner Commissioner by Percival T. Salazar, Assistant Commissioner-Enforcement Service.

Petitioner's Contention

Petitioner Commissioner of Internal Revenue contends that by virtue of the said first waiver the period to assess has not yet prescribed. In maintaining that the first waiver is valid, the petitioner asserts the following: that the signatory Nelia Pasco was the duly authorized representative of the respondent corporation, as evidenced by her personal appearance before the notary public when the first waiver was executed; the first waiver extending the period to assess was duly signed by the petitioner, pursuant to *Revenue Delegation Authority Order No. 5-2001* dated August 2, 2001 which delegated to the Assistant Commissioner-Enforcement Service the authority to sign and accept Waivers of the Defense of Prescription; that the date of acceptance of the first waiver is the date of notarization of the same, which was on January 22, 2002; and lastly, that the respondent corporation was aware of the acceptance of the first waiver as shown on the acknowledgement by the notary public.

Respondent Corporation's Contention

On the other hand, respondent corporation in its Comment argues that the right of the petitioner to assess taxes is already barred by prescription as the alleged Waivers of the Statute of Limitations did not validly extend the period within which the assessment can be made. In support of its arguments, respondent enumerates the following defects of the said waiver, to wit: that Nelia Pasco who signed the first waiver is not the duly authorized representative of the respondent as she has no written authority from its Board of Directors to waive the corporation's right under the *Tax Code*; the waivers as ruled by the First Division of this Court failed to comply with the requirements of a valid waiver under *Revenue Memorandum Order No. 20-90* which provides for the said requirements and under *Revenue Delegation Authority Order No. 5-2001* which requires the notarized authority of the signatory and the notarization of the said waiver; and that the second waiver is also null and void for two reasons, that it was also executed by Nelia Pasco without the written and notarized authority and that it was executed after the lapse of the alleged period agreed upon in the first waiver on the assumption that the first waiver is valid.

We agree with respondent corporation.

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It is primordial to pass upon the validity of the first waiver which was executed on December 10, 2001 to determine the propriety of the second waiver.

Infirmities of the Waivers of the Statute of Limitations

The First Division pertinently pointed out the defects of the first waiver in its Resolution dated November 14, 2005, to wit:

> "A scrutiny of the first waiver reveals the following: (1) it does not appear on the face of the waiver that the person who executed the same is petitioner's responsible official; (2) it is not signed by the respondent; (3) the date of acceptance by the Bureau is not indicated; and (4) there is no indication of the fact of petitioner's receipt of its own copy."

The First Division aptly ruled in its Resolution dated March 20, 2006 denying petitioner's Motion for Reconsideration:

> "Section 1 of RMO No. 20-90 requires that the waiver must be in the form identified therein and that there should be NO deviation from such form. Section 2 thereof requires that soon after the waiver is signed by the taxpayer, the Commissioner of Internal Revenue or the revenue official authorized by him 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 before the expiration of the period of prescription. And that 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. Likewise, the fact of receipt by the taxpayer of his/her file copy shall be indicated in the original copy (*Section 4 of RMO No. 20-90*).

A scrutiny of the assailed waiver revealed the following defects:

a. The Waiver of Statute of Limitations was not signed by the Commissioner of Internal Revenue as required by RMO No. 20-90;
b. The date of acceptance by the Assistant Commissioner-Enforcement Services, Percival T. Salazar, CESO IV, was not indicated therein;
c. Petitioner was not provided with a copy of the subject Waiver of Statute of Limitations as shown by the lack of an acknowledgment receipt on the original copy attached to the BIR docket of the case; and
d. The subject Waiver of Statute of Limitations did not specify the kind of tax and the amount of the tax due.

The Court does not agree with respondent's contention that Revenue Delegation Authority Order (RDAO) No. 5-2001 should apply in this case and, therefore, there was a valid representation in the signing and accepting of the subject first waiver.

The RDAO provides, in general terms, the delegation of the authority to sign and accept the waivers to certain officials of the Bureau of Internal Revenue (BIR). This can be construed as merely to inform those concerned as to who among the officials of the BIR can sign and accept the waivers in behalf of the Commissioner of Internal Revenue. The specific details present in RMO 20-90, such as the Commissioner having the authority to sign and accept waivers for tax deficiencies over one (1) million pesos, however, are not apparent in the said RDAO.

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In the recent case of ***PHILIPPINE JOURNALISTS, INC. VS. COMMISSIONER OF INTERNAL REVENUE (447 SCRA 214, December 16, 2004)***, the Supreme Court discussed the nature and laid down the requisites of a valid Waiver of the Statute of Limitations. Aside from stating that RMO No. 20-90 must be strictly followed, the Supreme Court ruled, and We reiterate:

> '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 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. xxx
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> The waiver is also defective from the government side because it was signed only by a revenue district officer, not the Commissioner, as

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> mandated by the NIRC and RMO No. 20-90. The 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. This case involves taxes amounting to more than One Million Pesos (P1,000,000.00) and executed almost seven months before the expiration of the three-year prescription period. For this, RMO No. 20-90 requires the Commissioner of Internal Revenue to sign for the BIR.'
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> xxx xxx."

Anent the issue on the signatories of the waiver, assuming arguendo that the signature of Assistant Commissioner-Enforcement Services, Percival T. Salazar is acceptable pursuant to *Revenue Delegation Authority Order (RDAO) No. 5-2001*, still We cannot sustain petitioner's assertion that Nelia Yulo Pasco's signature on behalf of respondent corporation on the said waiver is valid for the reason that such act was not accompanied by a written authority from the Board of Directors of respondent corporation. Petitioner, in fact, repeatedly refers to the said *Revenue Delegation Authority Order (RDAO) No. 5-2001*, but fails to consider the paragraph requiring him to ensure the presentation of a written and notarized authority from the taxpayer if such authority was delegated to a representative, to wit:

> "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."

Further, the absence of the date of acceptance of the waiver is fatal to its validity. The First Division clarified that 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. It was also shown that in the acknowledgment of the notarized waiver *(BIR Records p.118)*, there is nothing indicated to evidence who appeared before the notary public, as there was only a Community Tax Certificate Number presented, but the names were not mentioned therein.

In concluding that the failure of petitioner to furnish the respondent with a copy of the Waiver is also fatal, We quote the Supreme Court, in the *Philippine Journalists, Inc.* case *(447 SCRA 230)* which ruled on the importance of furnishing the taxpayer a copy of such document:

> "Finally, the records show that petitioner was not furnished a copy of the waiver. Under RMO No. 20-90, the waiver must be executed in three copies with the second copy for the taxpayer. The Court of Appeals did not think this was important because the petitioner need not have a copy of the document it knowingly executed. It stated that the reason copies are furnished is for a party to be notified of the existence of a document, event or proceeding.
>
> The flaw in the appellate court's reasoning stems from its assumption that the waiver is a unilateral act of the taxpayer when it is in fact and in law an agreement between the taxpayer and the BIR. When the petitioner's comptroller signed the waiver on September 22, 1997, it was not yet complete and final because the BIR had not assented. There is compliance with the provision of RMO No. 20-90 only after the taxpayer received a copy of the waiver accepted by the BIR. 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."

It is clear from the above ruling that the requirement of RMO No. 20-90 is actual receipt of the document, not mere knowledge of the existence of the waiver. The agreement of the taxpayer and the BIR with regard to the Waiver of the Statute of Limitations is perfected only upon receipt of the copy of the document by the taxpayer. Therefore, personal knowledge of the notarial acknowledgement cannot be said to be tantamount to actual receipt even considering that the parties were both present during the notarization of the waiver because the process does not end there.

In view of the foregoing infirmities of the first waiver, it necessarily follows that the second waiver is without force and effect for having been executed based on the invalid first waiver. There was nothing to extend when the second waiver was executed on February 18, 2003, as the period for assessment expired on April 14, 2002.

The waiver documents are incomplete and defective, and thus the three (3) year prescriptive period was not tolled or extended and continue to run until April 14, 2002. Consequently, the assessment notice issued on September 26, 2003 was invalid because it was issued beyond the three (3) year prescriptive period. For the same reason, the Final Decision on Disputed Assessment, which respondent received on July 29, 2004, is also null and void for having been issued pursuant to an invalid assessment.

For all the foregoing, We see no reason to reverse the assailed Resolutions dated November 14, 2005 and March 20, 2006 of the First Division.

WHEREFORE, premises considered, the instant petition is hereby **DENIED DUE COURSE**, and accordingly, **DISMISSED** for lack of merit.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice