REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

MINDANAO SANITARIUM AND HOSPITAL, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8700

Members:

CASTAÑEDA, JR., Chairperson, and
CASANOVA, *JJ.*

Promulgated:

DEC 16 2016

4:10 p.m.

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AMENDED DECISION

CASTAÑEDA, JR., *J.*:

For resolution of this Court is petitioner's **Motion for Reconsideration** filed on August 23, 2016, *sans* respondent's comment.

For easy reference, the dispositive portion of the assailed Decision reads:

> "**WHEREFORE**, in view thereof, the instant Petition for Review is **DENIED**, for lack of jurisdiction.
>
> **SO ORDERED.**"[1]

[1] See p. 28 of the assailed Decision dated August 8, 2016, Docket, Vol. II, p. 1122.

Petitioner asserts in the instant motion that the subject Warrant of Distraint and/or Levy stands as the Final Decision on Disputed Assessment (FDDA) denying its protest. Further, petitioner asserts that respondent failed to identify the BIR Records and as such, said evidence has no probative value.

The issues to be resolved by the Court are: (1) Whether the Warrant of Distraint and/or Levy stands as the FDDA denying petitioner's protest; and (2) Whether the Final Notice Before Seizure which forms part of the BIR Records should be given probative value.

The Court partially grants the instant Motion.

The Final Notice Before Seizure is the FDDA contemplated in this case

Petitioner argues that in *Bank of the Philippine Islands v. Commissioner of Internal Revenue* (BPI),[2] the Supreme Court held that "it may only be upon the service of the Warrant that the taxpayer is informed of the denial by the BIR of any pending protest of the said taxpayer, and the resolute intention of the BIR to collect the tax assessed." As such, petitioner asserts that the issuance of the said warrant constitutes the FDDA in the instant case.

The Court disagrees with petitioner.

An examination of the *BPI* case reveals that it is not on all fours with the present case. It is noteworthy that the issue involved in *BPI* is the prescription of the period to collect deficiency taxes while in the instant case, the issue involved is the timeliness of the instant Petition. This is evident in the pronouncement of the Supreme Court in *BPI*, as follows:

> "Under Section 223(c) of the Tax Code of 1977, as amended, it is not essential that the Warrant of Distraint and/or Levy be fully executed so that it can suspend the running of the statute of limitations on the collection of the tax. It is enough that the proceedings have validly began or commenced and that their execution has not been suspended by reason of the voluntary desistance of

[2] G.R. No. 139736, October 17, 2005.

the respondent BIR Commissioner. Existing jurisprudence establishes that distraint and levy proceedings are validly begun or commenced by the issuance of the Warrant ***and*** service thereof on the taxpayer. It is only logical to require that the Warrant of Distraint and/or Levy be, at the very least, served upon the taxpayer in order to suspend the running of the prescriptive period for collection of an assessed tax, because it may only be upon the service of the Warrant that the taxpayer is informed of the denial by the BIR of any pending protest of the said taxpayer, and the resolute intention of the BIR to collect the tax assessed."[3]

On the other hand, the case of *Isabela Cultural*, which reiterated the doctrines laid down in *Advertising Associates* and *Union Shipping*,[4] squarely addressed the issue of what is deemed to be an FDDA. As such, the Court finds no error in the assailed Decision when it pronounced that:

"Guided by the foregoing jurisprudence, the Court subscribes to the latest ruling in *Isabela Cultural*, which reiterated the doctrines laid down in *Advertising Associates* and *Union Shipping*. Apparently, the pertinent doctrine laid down in *Algue* abandoned the earlier ruling in *Advertising Associates*, but the *Algue* ruling was later on abandoned in *Union Shipping* and in *Isabela Cultural*. As it presently stands, the rule is that a warrant of distraint and levy, standing alone and without declaring that it is the BIR's final decision, cannot be considered as an FDDA. However, it appears that the exception in *Union Shipping* is that, although there is no categorical final decision by the BIR on a protest, the filing of a judicial action for collection is tantamount to a denial of the protest and is the final action of the BIR."[5]

Thus, the Court maintains that it is the Final Notice Before Seizure that constitutes the FDDA in the instant case. However, the peculiar attendant circumstances of this case deserve a re-examination of the assailed Decision, as will be discussed below.

[3] Id.
[4] See pp. 18-20 of the assailed Decision dated August 8, 2016, Docket, Vol. II, pp. 1112-1114.
[5] Id.

Respondent failed to identify Exhibit "R-8" which includes the Final Notice Before Seizure

Upon revisiting the records of the instant case, the Court found that respondent, indeed, failed to identify Exhibit "R-8" which refers to the BIR Records, as follows:

> "JUSTICE CASTAÑEDA:
> All right. Do you have any other witnesses?
>
> ATTY. VELASCO:
> Probably, this is the last, your Honors. Although we had one to identify the BIR Records, but I guess it is not contentious, it is not an issue anymore, your Honors."[6]

Meanwhile, during the hearing dated August 18, 2014, respondent's witness identified several documents, which were then sub-marked by respondent's counsel as Exhibits "R-8-1" and "R-8-A" to "R-8-E".[7] However, none of these documents pertain to the Final Notice Before Seizure.

Considering the failure of respondent to identify the BIR Records which particularly include the crucial Final Notice Before Seizure, the Court agrees with petitioner that such failure does not warrant the relaxation of the rules on formal offer of evidence as enunciated in the *Dizon* case.[8] Therefore, the Court cannot consider the Final Notice Before Seizure as evidence.

Absent the Final Notice Before Seizure, it is as if no FDDA was issued in the instant case

To proceed, the case of *Lascona Land Co., Inc. v. Commissioner of Internal Revenue*,[9] explained the remedies of a taxpayer, as follows:

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[6] Transcript of Stenographic Notes (TSN) dated October 15, 2014, p. 5.
[7] TSN dated August 18, 2014, pp. 12-17.
[8] See pp. 22-25 of the assailed Decision dated August 8, 2016, Docket, Vol. II, pp. 1116-1119.
[9] G.R. No. 171251, March 5, 2012.

> "In *RCBC v. CIR*, the Court has held that in case the Commissioner failed to act on the disputed assessment within the 180-day period from date of submission of documents, a taxpayer can either: (1) file a petition for review with the Court of Tax Appeals within 30 days after the expiration of the 180-day period; or (2) await the final decision of the Commissioner on the disputed assessments and appeal such final decision to the Court of Tax Appeals within 30 days after receipt of a copy of such decision."*(Citation omitted)*

Pursuant to *Lascona*, it is apparent that petitioner chose option (2) - to await the final decision of the Commissioner on the disputed assessments and appeal such final decision to the Court of Tax Appeals within 30 days after receipt of a copy of such decision.

However, due to respondent's failure to present the Final Notice Before Seizure as evidence which, as discussed earlier, constitutes the FDDA, it is as if no decision was rendered by respondent.

On this score, the Supreme Court held in *Commissioner of Internal Revenue v. Liquigaz Philippines Corporation*[10] that:

> "As established, an FDDA that does not inform the taxpayer in writing of the facts and law on which it is based renders the decision void. Therefore, it is as if there was no decision rendered by the CIR. It is tantamount to a denial by inaction by the CIR, which may still be appealed before the CTA and the assessment evaluated on the basis of the available evidence and documents. The merits of the EWT and FBT assessment should have been discussed and not merely brushed aside on account of the void FDDA."

Liquigaz involves a void FDDA, which the Supreme Court considered as if there was no decision rendered by the CIR.

The Court finds that *Liquigaz* applies to the instant case, where respondent failed to present evidence of the FDDA and therefore, it is as if no decision was rendered in relation to petitioner's request for

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[10] G.R. Nos. 215534 & 215557, April 18, 2016

reconsideration. Thus, the partial grant of petitioner's motion is in order.

Still following the pronouncement of the Supreme Court in *Liquigaz*, the Court shall proceed to evaluate the assessment on the basis of the available evidence and documents presented by the parties.

Respondent assessed petitioner of deficiency internal revenue taxes in the aggregate amount of ₱2,897,610.48, inclusive of surcharge and interest, broken down as follows:[11]

	Tax Due	Surcharge	Interest	Total
Income Tax	₱ 16,543.18		₱ 8,575.26	₱ 25,118.44
Value-Added Tax	19,851.82	₱ 4,962.96	11,160.53	35,975.31
Withholding Tax-Expanded	1,796,350.85		1,019,736.70	2,816,087.55
Withholding Tax-Compensation	13,031.55		7,397.64	20,429.19
Total	**₱1,845,777.40**	**₱4,962.96**	**₱1,046,870.13**	**₱2,897,610.48**

Deficiency Income Tax—₱16,543.18

Respondent's examiner found that the following should be subject to income taxes:[12]

Rental income from doctors	₱ 83,500.00
Rental income - Globe Telecom	59,351.80
Gain on sale of fixed asset	22,580.00
Total taxable income	₱165,431.80
Tax Rate	10%
Tax due	**₱16,543.18**

In its protest, petitioner asserts that it is exempt from income tax pursuant to BIR Ruling No. NSNP (S30E-157) 803-2009 dated December 21, 2009.[13] Petitioner also argues that if the adjustments to its revenue for the subject taxable year were in order, it should be allowed to claim deductions/expenses which are directly related to the said revenue.

[11] Exhibit "P-4", BIR Records pp. 453-455.
[12] Exhibit "P4-1", BIR Records p. 454.
[13] Exhibits "P7-2" and "P7-3", Docket Vol. I pp. 271-275.

Section 30 if the NIRC of 1997, as amended, pertinently provides:

> Notwithstanding the provisions in the preceding paragraphs, **the income of whatever kind and character of the foregoing organizations from any of their properties, real or personal, or from any of their activities conducted for profit regardless of the disposition made of such income, shall be subject to tax imposed under this Code**. *(Emphasis supplied.)*

In relation thereto, the BIR Ruling exempting petitioner from income tax states:

> Based on the foregoing, this Office is of the opinion and so holds that the MINDANAO SANITARIUM AND HOSPITAL, INC. **a corporation organized for charitable purposes as contemplated under Section 30(E) of the Tax Code of 1997**. Accordingly, **it is exempt from the payment of income tax on income received by it as such organization**, and therefore, need not file an income tax return concerning such income.
>
> ***However, it is subject to the corresponding internal revenue taxes imposed under the Tax Code of 1997 on its income derived from any of its properties, real or personal, or any activity conducted for profit regardless of the disposition thereof, which income should be returned for taxation.*** *(Emphasis supplied.)*

Based from the foregoing, petitioner is exempt from payment of income tax on income it received as such. However, petitioner's income of whatever kind and character from any of its properties or activities conducted for profit, regardless of its disposition, shall be subject to tax.

The subject assessment shows that petitioner derived income from other sources. Hence, petitioner's income derived from properties or activities conducted for profit should have been subjected to 30% tax rate based on Section 27 (A) of the NIRC of 1997, as amended.[14]

It appears, however, that instead of applying the 30% tax rate under Section 27 (A), respondent applied the 10% tax rate under Section 27 (B) of the NIRC of 1997, as amended, which imposes such tax rate on taxable income received by proprietary educational institutions and hospitals. In other words, instead of applying the 30% tax rate on income derived by petitioner from other sources under Section 27 (A), respondent erroneously applied the 10% tax rate under Section 27 (B), which is imposable on taxable income.

Despite this obvious error, the Court is not empowered to correct this mistake, as this would be tantamount to making a tax assessment. The court cannot be expected to perform the BIR's duties whenever it fails to do so either through neglect or oversight. Neither can court processes be used as a tool to circumvent laws protecting the rights of taxpayers.[15] Thus, the Court upholds the application of the 10% tax rate.

On the other hand, we agree with petitioner that it should be allowed to claim deductions/expenses from gross income. Section 34 of the NIRC of 1997, as amended, provides that in computing the taxable income subject to income tax under Sections 24(A), 25(A), 26, 27(A), (B) and (C) and 28(A)(1), there shall be allowed the following deductions from gross income:

(A) Expenses
(B) Interest
(C) Taxes
(D) Losses
(E) Bad debts
(F) Depreciation
(G) Depletion of oil and gas wells and mines
(H) Charitable and other contributions
(I) Research and development
(J) Pension trusts

However, an examination of the records shows that petitioner failed to present any evidence to prove its claim. As such, the Court

[14] SEC. 27. (A) *In General.* – xxx Provided, That effective January 9, 2009, the rate of income tax shall be thirty percent (30%).
[15] *SMI-ED Philippines Technology, Inc. v. Commissioner of Internal Revenue*, G.R. No. 175410, November 12, 2014.

is constrained to uphold respondent's assessment of deficiency income tax.

Deficiency Value-Added Tax—₱19,851.82

Respondent likewise subjected the foregoing income to value-added tax (VAT) and assessed petitioner of deficiency VAT, as follows:[16]

Total receipts subject to VAT	₱ 165,431.80
VAT rate	12%
VAT due	**₱ 19,851.82**

Petitioner counters that the gross receipts subjected to VAT is way below the threshold of ₱1.5 million, which is exempt from VAT per Section 109(1)(V) of the NIRC of 1997, as amended, and implemented by Sections 4.109.1(B)(2)(e)1 and 4.109.2 of Revenue Regulations (RR) No. 16-2005, *to wit:*

> "SEC. 109. *Exempt Transactions.*—(1) Subject to the provisions of Subsection (2) hereof, the following transactions shall be exempt from the value-added tax:
>
> xxx xxx xxx
>
> (V) Sale or lease of goods or properties of the performance of services other than the transactions mentioned in the preceding paragraphs, the gross annual sales and/or receipts do not exceed the amount of One million five hundred thousand pesos (P1,500,000); *Provided,* That not later than January 31, 2009 and every three (3) years thereafter, the amount herein stated shall be adjusted to its present value using the Consumer Price Index, as published by the National Statistics Office (NSO);
>
> (1) A VAT-registered person may elect that Subsection (1) not apply to its sale of goods or properties or services: *Provided,* That an election made under this Subsection shall be irrevocable for a period of three (3) years from the quarter the election is made." *je*

[16] Exhibit "P4-1", BIR Records p. 454.

"SEC. 4.109-1. *VAT-Exempt Transactions.*—

(A) In general. – xxx xxx xxx
(B) Exempt transactions. –

xxx xxx xxx

(2) Subject to the provisions of Subsection (2) hereof, the following transactions shall be exempt from VAT:

xxx xxx xxx

(e) Services subject to percentage tax under Title V of the Tax Code, as enumerated below:

(1) **Sale or lease of goods or properties or the performance of services of non-VAT registered persons**, other than the transactions mentioned in paragraphs (A) to (U) of Sec. 109(1) of the Tax Code, the gross annual sales and/or receipts of which does not exceed the amount of One Million Five Hundred Thousand Pesos (P1,500,000.00); *Provided,* That not later than January 31, 2009, and every three (3) years thereafter, the amount herein stated shall be adjusted to its present value using the Consumer Price Index, as published by the National Statistics Office (NSO) (Sec. 116 of the Tax Code);"

"SEC. 4.109-2. **A VAT-registered person may, in relation to Sec. 9.236-1(c) of these Regulations, elect that the exemption I Subsection (1) hereof shall not apply to his sales of goods or properties or services.** Once the election is made, it shall be irrevocable for a period of three (3) years counted from the quarter when the election was made." *(Emphasis supplied.)*

Based from the foregoing, gross sales or receipts not exceeding ₱1,500,000 are exempt from VAT but subject to percentage tax. However, due to petitioner's failure to present supporting documents, the Court cannot ascertain whether or not petitioner is a VAT-registered taxpayer or is subject to VAT. As such, the Court is constrained to uphold the deficiency VAT assessment. *gr*

It bears stressing that tax assessments by tax examiners are presumed correct and made in good faith, with the taxpayer having the burden of proving otherwise. Failure to present proof of error in the assessment will justify the judicial affirmance of said assessment.[17]

Deficiency Expanded Withholding Tax—₱1,796,350.85

Respondent's assessment of petitioner's deficiency expanded withholding tax is as follows:

	Amount	Rate	Tax Due
Purchases - Goods	₱ 87,279,615.00	1%	₱ 872,796.15
Purchases - Services	55,000.00	2%	410,645.84
Income payments to doctors	115,780.00	15%	5,389,052.54
Professional fees	139,555.50	10%	13,955.55
Total			₱ 6,686,450.08
Less: Withholding tax remittance per return			4,890,099.23
Deficiency Expanded Withholding Tax			**₱1,796,350.85**

Petitioner protests that the Formal Letter of Demand (FLD) and Details of Discrepancies on withholding tax failed to state the legal basis of the assessment of deficiency expanded withholding tax on its purchases of goods and services. Petitioner likewise questions the factual basis of the assessment.

An examination of the Details of Discrepancies shows that it actually cited Section 2.57.2(A) of Revenue Regulations No. 2-98, which pertains to income payments subject to creditable withholding tax, specifically professional fees, talent fees, etc., for services rendered by individuals.

Meanwhile, validation of the computation made by respondent's examiner showed the following:

	Income Payments	Tax Rate	Should be	Per assessment
Purchases - Goods	₱ 87,279,615.00	1%	₱ 872,796.15	₱ 872,796.15
Purchases - Services	55,000.00	2%	1,100.00	410,645.84
Income payments to doctors	115,780.00	15%	17,367.00	5,389,052.54
Professional fees	139,555.50	10%	13,955.55	13,955.55

[17] *Marcos II v. Court of Appeals, et al.*, G.R. No. 120880, June 5, 1997.

Total	₱ 87,589,950.5		₱ 905,218.70	₱ 6,686,450.08
Less: Withholding tax remittance per return			4,890,099.23	4,890,099.23
Deficiency Expanded Withholding Tax			**₱(3,984,880.53)**	**₱1,796,350.85**

In this regard, the examiner admitted the error in its computation.[18] Thus, even if the assessment had legal basis, petitioner would not be liable for any deficiency expanded withholding tax.

Deficiency Withholding Tax on Compensation—₱13,031.55

Finally, petitioner avers that respondent's assessment of deficiency withholding tax on compensation lacks legal basis.

A close scrutiny of the FLD and the Details of Discrepancies shows that no provision of law or revenue regulation was cited as basis for the subject assessment. Respondent's examiner simply compared the total tax withheld on compensation per petitioner's alphalist with the payment forms/remittance returns for the taxable year 2009 and attributed the difference as under remittance.

RR No. 12-99 provides:

> "3.1.4. *Formal Letter of Demand and Assessment Notice.*—The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. **The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, *otherwise, the formal letter of demand and assessment notice shall be void*** (see illustration in ANNEX B hereof). The same shall be sent to the taxpayer only by registered mail or by personal delivery. If sent by personal delivery, the taxpayer or his duly authorized representative shall acknowledge receipt thereof in the duplicate copy of the letter of demand, showing the following: (a) His name; (b) signature; (c) designation and authority to act for and in behalf of the taxpayer, if acknowledged received by a

[18] TSN, August 18, 2014, pp. 26-28.

person other than the taxpayer himself; and (d) date of receipt thereof." *(Emphasis supplied.)*

Considering that the FLD and Details of Discrepancies failed to provide the legal basis for the assessment, the cancellation of the assessment for deficiency withholding tax on compensation is in order.

WHEREFORE, in view thereof, petitioner's Motion for Reconsideration is **PARTIALLY GRANTED**. Accordingly, the dispositive portion of the assailed Decision dated August 8, 2016 is **AMENDED**, as follows:

"**WHEREFORE**, in view thereof, the instant Petition for Review is **PARTIALLY GRANTED**. Accordingly, petitioner is liable for deficiency income tax and value-added tax amounting to ₱45,493.75, inclusive of the 25% surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended, summarized as follows:

	Basic Tax Due	Surcharge (25%)	Total
Income Tax	₱ 16,543.18	₱ 4,135.80	₱ 20,678.98
VAT	19,851.82	4,962.96	24,814.78
Total	**₱ 36,395.00**	**₱ 9,098.75**	**₱ 45,493.75**

In addition, petitioner should be held liable to pay:

(a) Deficiency interest at the rate of 20% per annum pursuant to Section 249(B) of the NIRC of 1997, as amended, on the basic deficiency income tax and value-added tax, computed from April 15, 2010 and January 25, 2010, respectively, until full payment thereof; and

(b) Delinquency interest at the rate of 20% per annum on the total amount due of ₱45,493.75 and on the deficiency interest which have accrued as aforestated in (a), computed from December 5, 2012[19] until full payment thereof, pursuant to Section 249(C) of the NIRC of 1997, as amended."

[19] Exhibits "R-7-3" and "R-7-4" and Paragraph 4, Joint Stipulation of Facts and Issues, Docket Vol. I, p. 242.

SO ORDERED.

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

I CONCUR:

CAESAR A. CASANOVA
Associate Justice

ATTESTATION

I attest that the conclusions in the above Amended Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

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

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice