REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

COMMISSIONER OF INTERNAL REVENUE
Petitioner,

- *versus* -

PHILIPPINE DAILY INQUIRER,
Respondent.

CTA EB CASE NO. 905
(CTA Case No. 7853)

Present:
Del Rosario, P.J.
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas, and
Ringpis-Liban, JJ.

Promulgated:

NOV 04 2013 ArApolinario 9:00 a.m.

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DECISION

BAUTISTA, J.:

The Case

Before the Court *En Banc* is a Petition for Review,[1] filed by petitioner, Commissioner of Internal Revenue ("CIR"), on June 13, 2012, pursuant to Section 18[2] of Republic Act ("RA") No. 1125, as amended by RA No. 9282, and RA No. 9503, praying for the reversal of the Decision,[3] promulgated by the First Division of the Court ("Court in

[1] *Rollo*, CTA EB Case No. 905 (CTA Case No. 7853), pp. 7- 72, with Annexes.

[2] Sec. 18. *Appeal to the Court of Tax Appeals En Banc.* – No civil proceeding involving matters arising under the National Internal Revenue Code, the Tariff and Customs Code or the Local Government Code shall be maintained, except as herein provided, until and unless an appeal has been previously filed with the CTA and disposed of in accordance with the provisions of this Act.

A party adversely affected by a resolution of a Division of the CTA on a motion for reconsideration or new trial, may file a petition for review with the CTA en banc.

[3] *Rollo*, CTA EB Case No. 905 (CTA Case No. 7853), pp. 35-62; penned by Associate Justice Erlinda P. Uy, with Presiding Justice Ernesto D. Acosta, and Associate Justice Esperanza R. Fabon-Victorino, concurring.

Division") on February 16, 2012, and Resolution dated May 8, 2012,[4] and accordingly, for respondent, Philippine Daily Inquirer, Inc., ("PDII") to pay the aggregate amount of Four Million Six Hundred Seventy Nine Thousand and Five Pesos and 55/100 (Php4,679,005.55) representing Income and Value Added Tax ("VAT") including deficiency and delinquency interest and compromise penalty from April 30, 2008 until fully paid pursuant to the provisions of Sections 248 and 249 of the Tax Code.

Antecedent Facts

The relevant antecedents are succinctly recited by the Court in Division in its Decision dated February 16, 2012, as follows:[5]

> "Petitioner (herein Respondent) Philippine Daily Inquirer, Inc. is a corporation duly registered with the Philippine Securities and Exchange Commission, with principal office address at Chino Roces Ave. corner Mascardo and Yague Streets, Makati City. It is engaged in the business of newspaper publication.
>
> Respondent (herein Petitioner) is the duly appointed Commissioner of Internal Revenue, empowered to perform the duties of said office, including, among others, the power to cancel disputed internal revenue assessments, with office address at the BIR National Office Building, BIR Road, Diliman, Quezon City.
>
> Petitioner filed its Annual Income Tax Return for taxable year 2004 on April 15, 2005, and its Quarterly Value-Added Tax (VAT) Returns for the same year as follows:

	Date of Filing
For the First Quarter	April 20, 2004
For the Second Quarter	July 16, 2004
For the Third Quarter	October 18, 2004
For the Fourth Quarter	January 21, 2005

[4] *Ibid.*, pp. 63-69.
[5] *Ibid.*, pp. 35-46.

Admittedly on August 10, 2006, petitioner received the letter dated June 30, 2006 from Region 020 Large Taxpayers' Service of the BIR under L.N. No. 116-AS-04-00-00038, wherein the BIR alleged that based on the computerized matching conducted by their office on the information/data provided by third party sources against petitioner's declaration in its Value-Added Tax (VAT) Returns for calendar/fiscal year ended 2004, there was an alleged underdeclaration on domestic purchases from its suppliers in the amount of P317,705,610.52. In the same letter, the BIR invited petitioner to reconcile the said discrepancies with the Large Taxpayer's Audit & Investigation Division I of the BIR (BIR-LTAID).

In response, petitioner submitted to the BIR-LTAID reconciliation reports attached to its letters dated August 22, 2006 and December 19, 2006.

On March 21, 2007, petitioner executed a 'Waiver of the Statute of Limitation' (hereinafter referred to as the 'First Waiver'), whereby petitioner consented to the assessment and/or collection of tax or taxes for the year 2004 which may be found due after the investigation at any time before or after the lapse of the period of limitations fixed by Sections 203 and 222 of the National Internal Revenue Code (NIRC), but not later than June 30, 2007. The First Waiver was accepted on March 23, 2007 by the OIC-ACIR for the Large Taxpayers Service of the BIR, Mr. Nestor S. Valeroso.

Subsequently, through the letter dated May 7, 2007, petitioner sent respondent additional partial reconciliation and explanations on the supposed discrepancies found by the BIR. On May 30, 2007, petitioner received the letter dated May 28, 2007 from Mr. Gerardo R. Florendo, the Chief of the BIR-LTAID, informing petitioner that the result of evaluation relative to the matching of sales of its suppliers against its purchases for calendar year 2004 has been submitted by Revenue Officer Narciso Laguerta under Group Supervisor Fe Caling. In the same letter, petitioner was invited to an informal conference to present any objections it may have on the findings of the BIR.

On June 5, 2007, petitioner executed, once again, a 'Waiver of the Statute of Limitation' (hereinafter referred to as the 'Second Waiver') giving respondent until December 31, 2007, within which to assess, and/or collect from, petitioner of tax or taxes, if warranted under the premises. This Second Waiver was likewise accepted by Mr. Valeroso on June 8, 2007.

The BIR-LTAID subsequently issued the Preliminary Assessment Notice (PAN) dated October 15, 2007, wherein the BIR-LTAID assessed petitioner, for alleged deficiency income tax and VAT, for calendar year 2004 on the basis of LN# 116-AS-04-00-00038-000526, as follows:

COMPUTATION OF DEFICIENCY VAT

Undeclared Income		P 1,007,565.03
Add: Overdeclared input VAT		1,601,652.43
Total Undeclared Income per Investigation		P 2,609,217.46
Less: Attributable input tax		715,371.17
VAT still payable per investigation		P 1,893,846.29
Add: Increments-		
Interest from 1/26/05 to 11/15/07	P 1,062,629.37	
Compromise penalty	25,000.00	1,087,629.37
Amount Due and Collectible		**P 2,981,475.66**

COMPUTATION OF DEFICIENCY INCOME TAX

Undeclared Gross Income		P 10,075,650.28
Less: Cost of Sales		7,153,711.70
Undeclared Net Income		P 2,921,938.58
Multiply by income tax rate		32%
Income tax still due per investigation		P 935,020.35
Add: Increments-		
Interest from 4/16/05 to 11/15/07	P 483,648.88	
Compromise penalty	20,000.00	503,648.88
Amount Due and Collectible		**P 1,438,669.23**

The PAN was received by petitioner on December 4, 2007.

Petitioner sought reconsideration of the PAN in the letter dated December 12, 2007 and also expressed its willingness to execute another Waiver. Accordingly, a Waiver was executed by petitioner on December 12, 2007 (hereinafter referred to as the 'Third Waiver'), extending respondent's right to assess, and/or collect from, petitioner until April 30, 2008. This time, the Third Waiver was accepted by Mr. Romulo L. Aguila, Jr., the OIC-Head Revenue Executive Assistant for the Large

Taxpayers Service-Regular of the BIR, on December 20, 2007.

On April 17, 2008, petitioner received the Formal Letter of Demand dated March 11, 2008 and an Audit Result/Assessment Notices from the BIR, demanding for the payment of P3,154,775.57 and P1,525,230.00 for alleged deficiency VAT and income tax, respectively, computed as follows:

1. COMPUTATION OF (DEFICIENCY) VAT

Undeclared Income		P 1,007,565.03
Add: Overdeclared input VAT		1,601,652.43
Total Undeclared Income per Investigation		P 2,609,217.46
Less: Attributable input tax		715,371.17
VAT still payable per investigation		P 1,893,846.29
Add: Increments-		
Interest from 1/26/05 to 11/15/07	P 1,235,929.28	
Compromise penalty	25,000.00	1,260,929.28
Amount Due and Collectible		**P 3,154,775.56**

2. COMPUTATION OF INCOME TAX DEFICIENCY

Undeclared Gross Income		P 10,075,650.28
Less: Cost of Sales		7,153,711.70
Undeclared Net Income		P 2,921,938.58
Multiply by income tax rate		32%
Income tax still due per investigation		P 935,020.35
Add: Increments-		
Interest from 4/16/05 to 11/15/07	P 569,209.65	
Compromise penalty	20,000.00	589,209.65
Amount Due and Collectible		**P 1,524,229.99**

Petitioner filed its protest on May 16, 2008.

Alleging the lapse of the 180-day period within which the BIR should act on its protest, petitioner filed the instant Petition for Review on December 12, 2008.

Respondent filed her Answer on March 9, 2009, raising the following special and affirmative defenses, *viz.*:

'Petitioner Philippine Daily Inquirer is liable to pay the amount of Three Million One Hundred Fifty Four Thousand Seven Hundred Seventy Five Pesos and 56/100 (P3,154,775.56) and One Million Five Hundred Twenty Four Thousand Two Hundred Twenty Nine Pesos and 99/100 (P1,524,229.99) representing deficiency Value-

Added Tax (VAT) and Income Tax, respectively, for the taxable year 2004.

1. The VAT and income tax liabilities of petitioner in the aggregate amount of Four Million Six Hundred Seventy Nine Thousand and Five Pesos and 55/100 (P4,679,005.55) arose on account of the issuance to petitioner of Letter Notice No. 116-AS-04-00-00038 dated June 30, 2006. Computerized matching conducted by respondent on information/data provided by third party sources against its declaration per VAT returns revealed the aforesaid discrepancies for taxable year 2004. The income and value-added tax liabilities were generated through the Reconciliation of Listing for Enforcement (RELIEF) system-Summary List of Sales and Purchases (SLSP) and Third Party Matching. Through the system, respondent was able to detect tax leaks through the matching of data available in the Integrated Tax Systems (ITS) with the information gathered from third party sources.

On the basis of the consolidation and cross-referencing of third party information, discrepancy reports on sales and purchases were generated to uncover under-declared income and over-claimed purchases (goods and services).

As explicitly provided under Revenue Memorandum Order (RMO) No. 42-2003:

'**II. POLICIES**

2. In order to intensify enforcement, the power of the Commissioner to authorize the examination of the taxpayer and the assessment of the correct amount of tax is hereby ordered done through the so called '*no contact-audit-approach*.'

3. The '*no contact-audit-approach*' includes the process of computerized matching of sales and purchases data

contained in the Schedules of Sales and Domestic Purchases, and Schedule of Importation submitted by VAT taxpayer under the RELIEF system pursuant to RR NO. 7-95 as amended by RR Nos. 13-97, 7-99 and 8-2002. This may also include the matching of data from other information or returns filed by the taxpayers with the BIR such as Alphalist of Payees subject to Final or Creditable Withholding Taxes.

4. Even without conducting a detailed examination of taxpayer's books and records, the computerized/manual matching of sales and purchases/expenses will reveal discrepancies which shall be communicated to the concerned taxpayer through the issuance of a Letter Notice (LN) by the Commissioner.

5. LNs being served by the Bureau upon the taxpayer found to have understated their sales or over claimed their purchases/expenses <u>can be considered notice of audit or investigation</u> insofar as the amendment of any return is concerned which is the subject of such LN. A taxpayer is therefore disqualified from amending his return once an LN is served upon him.

III. GUIDELINES

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5. The LN shall serve as a discrepancy notice to taxpayer similar to a Notice of Informal Conference, thus, the procedures defined in RR 12-99 should likewise be observed.

Furthermore, in CTA Case No. 7093 entitled '<u>*BIG AA Corporation represented by Erlinda L. Stohner vs. Bureau of Internal Revenue*</u>' dated February 22, 2006, the Honorable Court had the opportunity to say:

'Letter Notices issued against a taxpayer in connection with the information of under declaration of sales and purchases gathered through Third Party Information Program may be considered as a '**notice of audit or investigation'** in the absence of evident error or clear abuse of discretion.'

2. On the basis of the abovementioned LN and after a careful and extensive scrutiny of petitioner's documents, resulting deficiency in income and Value-added taxes led to the issuance of the Preliminary Assessment Notice (PAN) dated October 15, 2007 together with the Details of Discrepancies and subsequently, a Formal Letter of Demand (FLD) dated March 11, 2008.

Relative thereto, Section 203 of the National Internal Revenue Code (NIRC) explicitly provides:

> **'Section 203. Period of Limitation Upon Assessment and Collection of Taxes. –**
>
> **Except as provided in Section 222**, internal revenue taxes shall be assessed **within three (3) years after the last day prescribed by law for 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 in filed beyond the period prescribed by law, the three (3) year period shall be counted from the day he 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 filed on such day.'

However, Section 222 of the NIRC provides the exceptions as regards to the provisions laid down under Section 203. In particular, as shown under Section (a) thereof, the three (3) period of limitation in making assessment shall **not** apply in cases where it involves **false or fraudulent return** or in cases where there is failure to file a return on the person obliged to file such return. Section 222(a) of the National Internal Revenue Code provides:

> **'Section 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes.**
>
> (a) In the case of a **false or fraudulent return** with intent to evade tax or **failure to file a return**, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at anytime **within ten (10) years** after the discovery of the falsity, fraud or omission; *Provided*, That in a fraud assessment which has become final and executor, the fact of fraud shall be judicially taken cognizance of in the civil and criminal action for the collection thereof.' (Emphasis and underscoring supplied)

Such being the case, the three (3) period of limitation for the assessment of internal revenue tax liabilities reckoned from the last day prescribed by law for the filing of the return shall not apply in the case at hand for the simple reason that petitioner ***falsely*** filed the return for taxable year 2004. Such being the case, the applicable provision shall be Section 222(a) where the period of limitation provides that the assessment may be made within ten (10) years after the discovery of falsity, fraud or omission. In the case at hand, the reckoning period was from the time during which the LN dated June 30, 2006 was issued to petitioner. Indubitably, the Formal Letter of Demand dated March 11, 2008 was issued within the prescriptive period provided by law. Such being the case, the FLD is considered valid and has the force and effect of law.

3. On the basis of the investigation conducted by respondent through the RELIEF

system, respondent, through the FLD, outlined how the tax liabilities in the aggregate amount of P4,679,005.55 representing income and VAT liabilities were arrived at. Upon matching the data gathered from respondent's Integrated Tax System (ITS) against the Summary of List of Purchases (SLP) attached to the Quarterly VAT returns filed with respondent, the following discrepancies remain unsettled despite petitioner's submission of supporting documents:

(a) An excess of SLP over the Letter Notices (LN) in the amount P1,601,652.43 from the following suppliers:

xxx xxx xxx

(b) On the other hand, it is likewise evident that an excess of LN over the SLP also occurred in the total amount of Seven Hundred Fifteen Thousand Three Hundred Seventy One Pesos and 17/100 (P715,371.17). The details of which are shown hereunder:

xxx xxx xxx

On the basis of the aforesaid investigation, it can be observed that the SLP which petitioner attached as supporting documents upon filing the quarterly VAT return revealed the declared amount of P109,462,842.94 as its input VAT for purchases incurred. However, on the basis of the LN, its suppliers recorded in its books of account the aggregate amount of P107,861,190.51 as its corresponding VAT. Suffice it to say, the over-declared VAT input tax on the part of petitioner led to the under declaration of VAT payable in the amount of P1,601,652.43 for the taxable year 2004. Therefore, petitioner is liable to pay said outstanding VAT. In addition, the amount of P10,075,650.28 which resulted from the excess of the LN over the SLP amounting to P715,371.17 must be likewise be added to arrive at the total VAT liability of P3,154,775.56 (*including increments up to April 30,* *2008*). Details of the computation are shown in the FLD.

As stated earlier, the excess of LN over the SLP in the amount of P715,371.17 resulted to under-declared input tax on the part of petitioner which led to an under declared purchases of P7,153,711.70, arrived at by dividing P715,371.17 by the VAT rate of 10%. As can be gleaned from the LN, suppliers declared in its books of accounts output VAT for sales made to petitioner. However, in petitioner's SLP, no declaration of such amount incurred for the taxable year 2004 was shown. Such being the case, petitioner under-declared its purchases that resulted to the under-declared amount of Input VAT. If petitioner has under declared its purchases, it would likewise have under-declared its Gross Income which will be worked back by using the ratio of Cost of Sales against its Gross Income per Income Tax Return. In the case at hand, the ratio of Cost of Sales against its Gross Income per Income Tax Return filed for taxable year 2004 is 71%. If petitioner divides the amount of P7,153,711.70 by the cost ratio of 71%, the under-declared Gross Income of P10,075,650.28 will be arrived at. Such being the case, petitioner would then be liable to pay the corresponding income tax for the under-declared Net income at the rate of 32%. Net Income was arrived at by deducting from the Gross Income of P10,075,650.28 the corresponding Cost of Sales of P7,153,711.70. Hence, the amount of income tax still to be paid is P1,524,229.99 (*including additional increments until April 30, 2008*). For ready reference of this Honorable Court, the full detail of the aforesaid computation are shown in the Formal Letter of Demand issued to petitioner.

4. Petitioner emphasized that it is a service company deriving its main source of income from newspaper and ***advertising sales***, thus any understatement of expenses or purchases (also mostly from services) does not mean it understated its sales. It goes further by saying that its transactions pertaining mostly to services and

goods must be reflected as Operating Expenses and not as part of the Cost of Sales. It revealed that Harrison Communications, Inc., McCann Erikson, Inc., WPP Marketing Corporation are some of the advertising agencies which rendered direct professional services to petitioner in the form of marketing or promotional purposes. To bolster its claim, it likewise stated that the transactions with aforesaid three (3) main entities should not be treated as cost of sales since what these entities provided were '*not materials*' in order for petitioner to gain income that can be both taxable under the income tax and VAT provisions.

Corollary thereto, Section 27 E(4) of the NIRC specifically provides:

> (4) *Gross Income Defined*. For purposes of applying the minimum corporate income tax provided under Section (E) hereof, the term '**gross income**' shall mean gross sales less sales returns, discounts and allowances and cost of goods sold. **'Cost of goods sold'** shall include business expenses **directly incurred** to produce the merchandise to bring them to their present location and use.
>
> xxx xxx xxx
>
> In the case of taxpayers engaged in the sale of service, **'gross income**' means gross receipts less sales returns, allowances, discounts and cost of services. '**Cost of services**' shall mean **direct costs and expenses necessarily incurred to provide the services required by the customers and clients** including (a) salaries and employee benefits of personnel, consultants and specialists directly rendering the service and (b) cost of facilities directly utilized in providing the service such as depreciation or rental of equipment used and cost of supplies.' (Emphasis and underscoring supplied).

> Petitioner, by its own admission, is a service-oriented company which derives its income from sale of newspaper and advertisement. It is without doubt that in selling newspapers to public, it necessarily incurs direct costs to bring about the merchandise it sells to its present state and/or condition. In the same vein, in selling advertisements to clients/customers, it likewise incurs direct costs for the rendition of services in the process. On the basis of the aforesaid provision of the NIRC, 'cost of services' include **direct costs and expenses** necessarily incurred to provide the services required by its customers or clients. Applying the same at hand, in order for petitioner to boost its sales on advertisement, it would actually employ services of companies which would handle the promotion and marketing of the services it is offering. The direct and professional services rendered by the three (3) advertising companies namely Harrison Communications, Inc., McCann Erikson, Inc. and WPP Marketing Corporation should be considered as part of the cost of advertisement sales/services by petitioner.
>
> In view of the foregoing, the amount of discrepancy that resulted on account of the under-declared input tax of P715,371.17 should be treated as Cost of Sales of services and not just an ordinary operating expenses because the services provided by the aforementioned three (3) advertising agencies are direct costs and expenses necessary to bring about the advertisement sales of petitioner.'

During trial, both parties presented their respective oral and documentary evidence. Petitioner presented three (3) witnesses, namely, Margarita de Vera Viray, Jose H. Villareal, and court commissioned independent certified public accountant, Jerome Antonio B. Constantino, to prove its case. For her part, respondent presented one witness, Revenue Officer III, Narciso T. Laguerta to counter petitioner's claim.

As directed by the Court, petitioner and respondent filed their respective Memorandum on June 28, 2011 and July 11, 2011, respectively. Thereafter, this case was submitted for decision in the Resolution dated July 22, 2011."

The Ruling of the Court in Division

On February 16, 2012, the Court in Division promulgated a Decision granting PDII's Petition for Review by ruling that:

> **WHEREFORE**, premises considered, the instant Petition for Review is hereby **GRANTED**. The Formal Letter of Demand dated March 11, 2008 and Assessment No. LN # 116-AS-04-00-00038-00528 for calendar year 2004 issued by the BIR against petitioner are hereby **CANCELLED** and **SET ASIDE**.
>
> **SO ORDERED.**[6]

On March 9, 2012, the CIR filed her Motion for Reconsideration (Re: Decision promulgated on February 16, 2012). On May 8, 2012, the Court in Division issued a Resolution denying the CIR's claim, the dispositive portion is as follows:

> **WHEREFORE,** premises considered, the instant Motion for Reconsideration is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**[7]

The Issues

Hence, the present Petition for Review where the CIR proffers the following grounds:

> ***1. PDII IS LIABLE TO PAY DEFICIENCY VAT AND INCOME TAX ASSESSMENT FOR TAXABLE YEAR 2004;***

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[6] *Ibid.*, p. 61.
[7] *Ibid.*, p. 69.

> *2. FEES PAID TO THE THREE (3) ADVERTISING AGENCIES ARE CONSIDERED PART OF THE COST OF SALES MADE BY PDII FOR TAXABLE YEAR 2004;*
>
> *3. DISCREPANCIES ON DOMESTIC PURCHASES THAT ALLEGEDLY AROSE DUE TO TIMING DIFFERENCE DO NOT HAVE AN EFFECT ON THE DEFICIENCY TAX ASSESSMENT;*
>
> *4. PDII IS ESTOPPED FROM ASSAILING THE VALIDITY OF WAIVERS WHICH IT HAS EXECUTED OUT OF ITS OWN VOLITION AND FREE WILL;*
>
> *5. THE FINAL ASSESSMENT NOTICE WAS VALID AND BINDING AND ISSUED WITHIN THE PRESCRIPTIVE PERIOD; and*
>
> *6. ISSUE ON PRESCRIPTION CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.*[8]

The CIR's Arguments

The CIR argues in the following manner:

1. That in the absence of any irregularities in the performance of official duties, the assessments made are presumed correct and issued in accordance with laws and regulations. Thus, the findings of the CIR on the deficiency of the income and VAT are presumed correct;

2. That the marketing and promotional fees paid to the three advertising agencies should be treated as part of cost of sales and not as ordinary expenses as these pertain to direct costs and expenses as prescribed in Section 27(E)(4) of the 1997 National Internal Revenue Code ("NIRC"), as amended;

3. That PDII is estopped in questioning the validity of the waiver for it failed to contest the same in the administrative level;

[8] *Ibid.*, pp. 13-31.

4. That the Final Assessment Notice was not issued beyond the prescriptive period as the return was fraudulently filed, pursuant to Section 222(a) of the 1997 NIRC, as amended; and

5. That the issue of prescription cannot be raised for the first time on appeal as it was not raised in the administrative level.

PDII's Counter Arguments

PDII argues that it is not estopped from questioning the validity of the waivers for the assessment was issued beyond the prescriptive period; that ten year period under Section 222(a) of the 1997 NIRC, as amended, is inapplicable as there was no false return filed; that the issue on prescription can be raised for the first time on appeal; that it is not liable to pay the alleged deficiency VAT and income taxes assessed as the basis are the fees paid to the three advertising agencies and the discrepancies on domestic purchases.

The Ruling of the Court En Banc

The Court *En Banc* finds the Petition for Review bereft of merit.

In the Decision dated February 16, 2012, the Court in Division unanimously ruled as follows:

> **"Periods of limitation upon the assessment of taxes.**
>
> The general rule pertaining to the period of limitation in the assessment and collection of taxes is provided under Section 203 of the NIRC of 1997, to wit:
>
> > *'SEC. 203. Period of Limitation Upon Assessment and Collection.* — Except as 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.'

Based on Section 203, internal revenue taxes must be assessed within three (3) years counted from the last day of the period fixed by law for the filing of the tax return or the actual date of filing, whichever is later. This mandate governs the question of prescription of the government's right to assess internal revenue taxes primarily to safeguard the interests of taxpayers from unreasonable investigation.

Necessarily therefore, the government must assess internal revenue taxes on time so as not to extend indefinitely the period of assessment and deprive the taxpayer of the assurance that it will no longer be subjected to further investigation for taxes after the expiration of reasonable period of time.

It must be pointed out however, that the three-year prescriptive period for the BIR to assess tax liabilities under Section 203 of the NIRC of 1997 is applicable to returns that are regularly filed pursuant to legal requirements.

But when the government is placed at a disadvantage so as to prevent its lawful agents from proper assessment of tax liabilities due to a false return, fraudulent return intended to evade payment of tax or failure to file returns, the prescriptive period is ten (10) years after the discovery of the falsity, fraud or omission. Upon the other hand, in the absence of a false or fraudulent return with intent to evade tax, and where a return has been filed, the period of limitation may be extended, where the taxpayer and the Commissioner have agreed in writing to its assessment prior to the expiration of the time prescribed in Section 203 for the assessment of the tax, and after such time, the tax may still be assessed within the period agreed upon. These scenarios are governed by Section 222 of the NIRC of 1997, to wit:

> *'SEC. 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* —
>
> (a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.
>
> (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.'

In the instant case, respondent points to the ten-year period as the one enforceable because petitioner allegedly filed a false return for taxable year 2004, while petitioner denies any falsity in its return, and insists that the three-year prescriptive period should be applied.

The alleged falsity in the tax returns is not present. Thus, the 10-year prescriptive period does not apply.

In resolving the issue as to whether or not the right of the Commissioner of Internal Revenue to assess deficiency tax has prescribed, it is necessary to determine whether or not petitioner's tax return is false or fraudulent. If in the affirmative, then the Commissioner's right has not prescribed. If in the negative, then the assessment issued is void because of prescription.

For easy reference, the following computations of the subject assessments are hereby reiterated, *viz.*:

xxx xxx xxx

The deficiency income tax assessment arose from the alleged undeclared income of P10,075,650.28, while the deficiency VAT assessment sprung from the same undeclared income and over-declared input tax of P1,601,652.43. The said undeclared income of P10,075,650.28 in turn came about when respondent's examiner found that petitioner allegedly had undeclared input taxes amounting to P715,371.17, thus:

xxx xxx xxx

> Respondent explained the foregoing determinations as follows:
>
> '3. On the basis of the investigation conducted by respondent through the RELIEF system, respondent, through the FLD, outlined how the tax liabilities in the aggregate amount of P4,679,005.55 representing income and VAT liabilities were arrived at. Upon matching the data gathered from respondent's Integrated Tax System (ITS) against the Summary of List of Purchases (SLP) attached to the Quarterly VAT returns filed with respondent, the following discrepancies remain unsettled despite petitioner's submission of supporting documents:
>
> (a) An excess of SLP over the Letter Notices (LN) in the amount P1,601,652.43 from the following suppliers:
>
> xxx xxx xxx
>
> (b) On the other hand, it is likewise evident that an excess of LN over the SLP also occurred in the total amount of Seven Hundred Fifteen

Thousand Three Hundred Seventy One Pesos and 17/100 (P715,371.17). The details of which are shown hereunder:

xxx xxx xxx

On the basis of the aforesaid investigation, it can be observed that the SLP which petitioner attached as supporting documents upon filing the quarterly VAT return revealed the declared amount of P109,462,842.94 as its input VAT for purchases incurred. However, on the basis of the LN, its suppliers recorded in its books of account the aggregate amount of P107,861,190.51 as its corresponding VAT. Suffice it to say, the over-declared VAT input tax on the part of petitioner led to the under declaration of VAT payable in the amount of P1,601,652.43 for the taxable year 2004. Therefore, petitioner is liable to pay said outstanding VAT. In addition, the amount of P10,075,650.28 which resulted from the excess of the LN over the SLP amounting to P715,371.17 must be likewise be added to arrive at the total VAT liability of P3,154,775.56 (*including increments up to April 30, 2008*). Details of the computation are shown in the FLD.

As stated earlier, the excess of LN over the SLP in the amount of P715,371.17 resulted to under-declared input tax on the part of petitioner which led to an under declared purchases of P7,153,711.70, arrived at by dividing P715,371.17 by the VAT rate of 10%. As can be gleaned from the LN, suppliers declared in its books of accounts output VAT for sales made to petitioner. However, in petitioner's SLP, no declaration of such amount incurred for the taxable year 2004 was shown. Such being the case, petitioner under-declared its purchases that resulted to the under-declared amount of Input VAT. If petitioner has under declared its purchases, it would likewise have under-declared its Gross Income which will be worked back by using the ratio of Cost of Sales against its Gross Income per Income Tax Return. In the case at hand, the ratio of Cost of Sales against its Gross Income per Income

> Tax Return filed for taxable year 2004 is 71%. If petitioner divides the amount of P7,153,711.70 by the cost ratio of 71%, the under-declared Gross Income of P10,075,650.28 will be arrived at. Such being the case, petitioner would then be liable to pay the corresponding income tax for the under-declared Net income at the rate of 32%. Net Income was arrived at by deducting from the Gross Income of P10,075,650.28 the corresponding Cost of Sales of P7,153,711.70. Hence, the amount of income tax still to be paid is P1,524,229.99 (*including additional increments until April 30, 2008*). For ready reference of this Honorable Court, the full detail of the aforesaid computation are shown in the Formal Letter of Demand issued to petitioner.'

Undoubtedly, in ascertaining the correctness of any return, or in determining the liability of any person for any internal revenue tax, the Commissioner of Internal Revenue is authorized to obtain, on a regular basis, from **any person** other than the person whose internal revenue tax liability is subject to audit or investigation.

Correspondingly, respondent may rely on the information obtained from said third party in issuing assessments to taxpayers, and in obtaining such information, respondent enjoys the presumption of regularity.

As a corollary, We are reminded that the determinations and assessments of the BIR are presumed correct and made in good faith, and that the taxpayer has the duty of proving otherwise.

In this case, petitioner introduced proof, *inter alia*, to the effect that the determination of the BIR upon the aspect relating to the discrepancy in the amount of P1,601,652.43 is incorrect. Particularly, petitioner presented the final report of the ICPA on the purchases by petitioner from Alliance Media Printing, Inc. as follows:

xxx xxx xxx

Furthermore, the rest of the input taxes on purchases from Diamond Motors Corp., Western Marketing Corp., and Citimotors, Inc., amounting to P389,467.36, are supported by accounts payable and check vouchers, invoices and official receipts, and credit memoranda.

We see no reason not to rely on the foregoing findings of the ICPA, especially so that respondent never presented proof to disprove the same. Thus, petitioner has sufficiently discharged its burden in proving that the VAT assessment relating to the supposed over-declared input tax of P1,601,652.43 is not correct.

In order to stand judicial scrutiny, the assessment must be based on facts. The presumption of correctness of an assessment, being a mere presumption, cannot be made to rest on another presumption, such as the presumption of regularity in the performance of duties by BIR personnel in obtaining the third-party information. Hence, respondent should have presented and offered evidence to disprove the findings of the ICPA.

As shown earlier, the whole income tax assessment and part of the VAT assessment rest on the finding that there is underdeclared input tax in the amount of P715,371.17. Simply put, respondent's theory is that since there is an underdeclaration of input tax and correspondingly, of purchases, the same should translate to taxable income for income tax purposes, and taxable gross receipts, for VAT purposes.

We disagree with respondent.

The three (3) elements on the imposition of income tax are: (1) there must be gain or profit, (2) that the gain or profit is realized or received, actually or constructively, and (3) it is not exempted by law or treaty from income tax. Income tax is assessed on income received from any property, activity or service. Such being the case, in the imposition or assessment of income tax, it must be clear that there was an income, and such income was received by the taxpayer, not when there is an underdeclaration of purchases.

Furthermore, it must be emphasized that for income tax purposes, a taxpayer is free to deduct from its gross income a lesser amount, or not claim any deduction at all. What is prohibited by the income tax law is to claim a deduction beyond the amount authorized therein. Hence, even when there is underdeclaration of input tax, which means that there is also a corresponding underdeclaration of purchases or expenses, the same is not prohibited by law. Consequently, respondent's imposition or assessment of the subject income tax does not hold water, for it simply relies on the fact that there is underdeclared input tax.

The same holds true in the case of the subject VAT assessment.

It must be remembered that the 10% VAT is assessed on the 'gross receipts derived from the sale or exchange of services.' Parenthetically, the law defines 'gross receipts' as:

> '. . . the total amount of money or its equivalent representing the contract price, compensation, service fee, rental or royalty, including the amount charged for materials supplied with the services and deposits and advanced payments **actually or constructively received during the taxable quarter for the services performed or to be performed for another person**, excluding value-added tax.' (Emphasis supplied)

Thus, in the imposition or assessment of VAT, what is critical to be shown is that the taxpayer received an amount of money or its equivalent, and not when there are underdeclared input taxes on purchases. Since it was error for respondent to impose a deficiency income tax on the basis of an under-declared input tax in the amount of P715,371.17, the income tax return cannot be treated as false. Such being the case, the prescriptive period to be applied is the three-year period.

Consequently, the deficiency income tax assessment issued by the BIR beyond the three-year period is void.

The Waivers are defective and thus, failed to extend the three-year prescriptive period under Section 203 of the NIRC of 1997.

As mentioned earlier, Section 222(b) of the NIRC of 1997 authorizes the extension of the original three-year prescriptive period by the execution of a valid waiver, where the taxpayer and the BIR agrees in writing that the period to issue an assessment and collect the taxes due is extended to an agreed upon date. In other words, the period agreed upon by the parties shall constitute the time within which to effect the assessment/collection of the tax in addition to the ordinary prescriptive period of three (3) years, provided the agreement is made prior to the expiration of such three-year prescriptive period, and in case of subsequent agreements, the same was made before the lapse of the period previously agreed upon.

In the case of *Commissioner of Internal Revenue vs. Kudos Metal Corporation*, the Supreme Court laid down the guidelines in the proper execution of a waiver, to wit:

> 'Section 222(b) of the NIRC provides that the period to assess and collect taxes may only be extended upon a written agreement between the CIR and the taxpayer executed before the expiration of the three-year period. RMO 20-90 issued on April 4, 1990 and RDAO 05-01 issued on August 2, 2001 lay down the procedure for the proper execution of the waiver, to wit:
>
> 1. The waiver must be in the proper form prescribed by RMO 20-90. The phrase 'but not after _____ 19__,' which indicates the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription, should be filled up.
>
> 2. The waiver must 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. In case the authority is delegated by the taxpayer

to a representative, such delegation should be in writing and duly notarized.

3. The waiver should be duly notarized.

4. The CIR or the revenue official authorized by him must sign the waiver indicating that the BIR has accepted and agreed to the waiver. The date of such acceptance by the BIR or the revenue official authorized by him must make sure that the waiver is in the prescribed form duly notarized, and executed by the taxpayer or his duly authorized representative.

5. 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.

6. The waiver must be executed in three 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 must be indicated in the original copy to show that the taxpayer was notified of the acceptance of the BIR and the perfection of the agreement.'

The foregoing procedures should be **strictly** followed; otherwise, the waiver shall be rendered defective and shall not extend the period to assess the tax.

Petitioner argues that respondent failed to offer proof that the First, Second and Third Waivers were executed in three (3) copies. Furthermore, petitioner is of the view that the Third Waiver is defective because there is no indication in the said Waiver of the fact of receipt by the taxpayer of its file copy, and since the same Waiver was accepted by a mere OIC-Head Revenue Executive Assistant, Large Taxpayers Service-Regular, a revenue official who is not among those authorized to sign under RDAO No. 05-01.

A perusal of the First and Second Waivers would reveal that they were executed in three (3) copies. However, the infirmity rests on respondent's failure to provide 'the Office accepting the [said W]aiver[s]' the respective third copy thereof, since they are still attached to the docket of the case.

Anent the Third Waiver, respondent indeed failed to show proof that the same was executed in three (3) copies. Another defect thereon, as correctly pointed out by petitioner, is that the revenue official who accepted the same is not authorized to do so. It must be emphasized that RDAO No. 05-01 states in part:

> 'The following revenue officials are authorized to sign and accept the Waiver of the Defense of Prescription under the Statute of Limitations (Annex A) prescribed in Sections 203, 222 and other related provisions of the National Internal Revenue Code of 1997:
>
> A. For National Office cases
>
> xxx xxx xxx
>
> 2. **ACIR, Large Taxpayers Service — For large taxpayers cases other than those cases falling under Subsection B hereof**.
>
> xxx xxx xxx
>
> **In order to prevent undue delay in the execution and acceptance of the waiver**, the assistant heads of the concerned offices are likewise authorized to sign the same **under meritorious circumstances in the absence of the abovementioned officials**.' (Emphases supplied)

Thus, while it may be true that the signatory of the Third Waiver is Romulo L. Aguila, Jr., the OIC-Head Revenue Executive Assistant for the Large Taxpayers

Service-Regular, is deemed the assistant head of the ACIR of the Large Taxpayers Service, respondent however failed to show that he was made the authorized signatory to prevent undue delay in the execution and acceptance of the waiver.

It is noted that the Second Waiver (assuming that it was not defective as above noted) should have expired on December 31, 2007, and yet the Third Waiver was accepted by Romulo Aguila, Jr. as early as December 20, 2007. Thus, the BIR has ample time to have such Third Waiver signed by the ACIR of the Large Taxpayers Service himself. Furthermore, it was likewise not shown by respondent that the acceptance by Romulo Aguila, Jr. was made *under meritorious the circumstances in the absence of the abovementioned officials*.

Such being the case, due to the defects in the Waivers, the three-year period to assess the subject deficiency taxes were not extended. Thus, counting from the dates of the filing of petitioner's tax returns for taxable year 2004, *i.e.*, on April 15, 2005, for its Annual ITR; and on April 20, 2004, July 16, 2004, October 18, 2004, and January 21, 2005, for its First, Second, Third, and Fourth Quarterly VAT Returns, respectively, vis-à-vis the date of receipt of the Formal Letter of Demand dated March 11, 2008 and an Audit Result/Assessment Notices from the BIR on April 17, 2008, the assessment of the subject taxes were done beyond the said three-year period.

Compromise penalties should not be assessed.

Anent the imposition of compromise penalties on the deficiency VAT and income tax in the amounts of P25,000.00 and P20,000.00, respectively, the same should be cancelled. This must be so because compromise penalties are only amounts suggested in settlement of criminal liability, and may not be imposed or exacted on the taxpayer in the event that a taxpayer refuses to pay the same. In other words, compromise penalties imply mutual agreement between the taxpayer, on one hand, and the Commissioner of Internal Revenue, on the other. Thus, since in this case, there is no indication that petitioner is willing to pay the said amount, the same should not be imposed."[9]

After a careful consideration of the factual milieu of the case at bench, the Court sitting *En Banc* finds no reason to depart from the Court in Division's ruling.

As found by the Court in Division, PDII has sufficiently discharged its burden in proving that the VAT assessment and Income tax assessment were not correct. While, the CIR is correct in saying that the assessment made is presumed correct in the absence of irregularities, she failed to consider that this holds true only when there is an absence of evidence to the contrary. Based on Section 3(m), Rule 131 of the Rules of Court,[10] official duty is presumed to be regularly performed if not contradicted.

In the instant case, however, the presumption of correctness of the assessment made by the CIR was contradicted when PDII presented proof such as the Independent Certified Public Account's ("ICPA") final report, accounts payable, check vouchers, invoices, official receipts, and credit memoranda. All of these pieces of evidence show that PDII reported its VAT and Income tax due correctly. And this was not contradicted by the CIR as she did not present any evidence to the contrary.

Furthermore, in the case of *Commissioner of Internal Revenue vs. Hantex Trading Co., Inc.*,[11] the Supreme Court has held that an assessment must be based on facts. The presumption of correctness of an assessment, being a mere presumption, cannot be made to rest on another presumption such as the Bureau of Internal Revenue had regularly performed their duties.

In the instant case, CIR failed to substantiate her claim that her assessment was correct. But rather, she based the correctness of her assessment on the presumption of regularity of performance of her duties when she made the assessment. Thus, for failing to present proof, We cannot subscribe to the CIR's view that the assessment was valid and correct when CIR relied on another presumption.

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[9] *Rollo*, pp. 49-61.
[10] Sec. 3. Disputable presumptions. - The following presumptions are satisfactory if uncontradicted, but may be contradicted and overcome by other evidence:
xxx xxx xxx
(m) That official duty has been regularly performed;
[11] G.R. No. 136975, March 31, 2005, 454 SCRA 301.

Moreover, We cannot agree on CIR's view that PDII made a false return just because there was a discrepancy on the VAT return filed by PDII, and the reports made by third party sources, when CIR conducted a computerized matching,[12] for PDII was able to rebut the alleged discrepancies by presenting proof.

Hence, as there was no proof that PDII filed a false return, the prescriptive period to be applied is the three-year period based on Section 203 in relation to Section 222(a) of the 1997 NIRC, as amended. Hence, counting from the dates of the filing of petitioner's tax returns for taxable year 2004, *i.e.*, on April 15, 2005, for its Annual ITR; and on April 20, 2004, July 16, 2004, October 18, 2004, and January 21, 2005, for its First, Second, Third, and Fourth Quarterly VAT Returns, respectively, vis-à-vis the date of receipt of the Formal Letter of Demand dated March 11, 2008 and an Audit Result/Assessment Notices from the BIR on April 17, 2008, the assessment of the subject taxes were made beyond the said three-year period.

Moreover, as correctly found by the Court in Division, the CIR caused the defects on the waiver upon the failure of her official to observe the detailed procedure for the proper execution of the same in accordance with Revenue Memorandum Order ("RMO") No. 20-90,[13] and Revenue Delegation Authority ("RDA") Order No. 05-01,[14] therefore the doctrine of estoppel will not apply. As held by the Supreme Court in the case of *Commissioner of Internal Revenue vs. Kudos Metal Corporation,*[15] 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. Having caused the defects in the waivers, the BIR must bear the consequence. It cannot shift the blame to the taxpayer.[16]

Finally, as resolved by the Court in Division, the Court is not precluded from resolving the issue on prescription, as this was not contested to by CIR when this was raised as an issue by PDII. Thus, the defense of prescription can be waived as prescribed in Section 1, Rule 9 of the Rules of Court.[17]

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[12] *Rollo*, Petition for Review, p. 16.
[13] SUBJECT: Proper Execution of the Waiver of the Statute of Limitations under the National Internal Revenue Code.
[14] SUBJECT: Delegation of Authority to Sign and Accept the Waiver of the Defense of Prescription Under the Statute of Limitations.
[15] G.R. No. 178087, May 5, 2010, 620 SCRA 232.
[16] *Ibid.*
[17] Sec. 1. *Defenses and objections not pleaded.*—Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. xxx

In sum, the Court *En Banc* finds no cogent reason to rule in the contrary from the Court in Division's Decision and Resolution dated February 16, 2012 and May 8, 2012, respectively.

WHEREFORE, premises considered, the Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the Decision and Resolution dated February 16, 2012 and May 8, 2012, respectively, are hereby **AFFIRMED** in *toto*.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

– with concurring opinion

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13 of Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of this Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

PHILIPPINE DAILY INQUIRER,
Respondent.

CTA EB NO. 905
(CTA Case No. 7853)

Present:

Del Rosario, *PJ*,
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas, *and*
Ringpis-Liban, *JJ.*

Promulgated:
NOV 04 2013 9:08 a.m.

x- -x

CONCURRING OPINION

DEL ROSARIO, PJ:

I concur in the *ponencia* of my esteemed colleague, the Honorable Associate Justice Lovell R. Bautista. I would like to amplify some points in support of the denial of the Petition for Review.

Petitioner insists that respondent is liable to pay the deficiency value added tax (VAT) and income tax for taxable year 2004, primarily relying on the presumption in favor of the correctness of a tax assessment. Petitioner argues that there was falsity in respondent's quarterly VAT returns and income tax return on the basis of the outcome of the computerized matching of data between the Bureau of Internal Revenue's (BIR) Integrated Tax System *vis-a-vis* the declarations made in respondent's VAT returns. In view of the alleged falsity of respondent's returns, petitioner posits that the ten (10) year prescriptive period to assess respondent for deficiency VAT and income tax applies pursuant to Section 222(a) of the National Internal Revenue Code (NIRC). Allegedly, based on computerized matching, there were under-declared input VAT, which led to the presumption that petitioner had undeclared purchases which ultimately resulted in undeclared income and/or gross receipts, the amount of which was derived by petitioner by using the ratio of cost of sales against gross income per income tax return.

As clearly discussed in the *ponencia*, the Court in Division correctly rejected the allegation of petitioner that the returns filed by respondent were false. Respondent was able to substantiate and rebut the discrepancies noted by the petitioner through pieces of evidence which were duly considered by the Court in Division.

In the case of **Commissioner of Internal Revenue v. Hantex Trading Co., Inc.,** [1] the Supreme Court reiterated the well-settled rule that the presumption of the correctness of an assessment, being a mere presumption, cannot be made to rest on another presumption, and that in order to stand judicial scrutiny, the assessment must be based on facts and not on mere presumption. Pertinent pronouncements of the Supreme Court in *Hantex* are quoted hereunder:

> "The rule is that in the absence of the accounting records of a taxpayer, his tax liability may be determined by estimation. The petitioner is not required to compute such tax liabilities with mathematical exactness. Approximation in the calculation of the taxes due is justified. To hold otherwise would be tantamount to holding that skillful concealment is an invincible barrier to proof. However, the rule does not apply where the estimation is arrived at arbitrarily and capriciously.
>
> We agree with the contention of the petitioner that, as a general rule, tax assessments by tax examiners are presumed correct and made in good faith. All presumptions are in favor of the correctness of a tax assessment. It is to be presumed, however, that such assessment was based on sufficient evidence. **Upon the introduction of the assessment in evidence, a prima facie case of liability on the part of the taxpayer is made. If a taxpayer files a petition for review in the CTA and assails the assessment, the prima facie presumption is that the assessment made by the BIR is correct, and that in preparing the same, the BIR personnel regularly performed their duties.** This rule for tax initiated suits is premised on several factors other than the normal evidentiary rule imposing proof obligation on the petitioner-taxpayer: the presumption of administrative regularity; the likelihood that the taxpayer will have access to the relevant information; and the desirability of bolstering the record-keeping requirements of the NIRC.
>
> **However, the prima facie correctness of a tax assessment does not apply upon proof that an assessment is utterly without foundation, meaning it is arbitrary and capricious.** Where the BIR has come out with a "naked assessment," i.e., without any foundation character, the determination of the tax due is without rational basis. In

[1] G.R. No. 136975, March 31, 2005.

> such a situation, the U.S. Court of Appeals ruled that the determination of the Commissioner contained in a deficiency notice disappears. Hence, the determination by the CTA must rest on all the evidence introduced and its ultimate determination must find support in credible evidence." (Emphases supplied)

While it is true that the presumption is in favor of the correctness of an assessment, said presumption no longer applies when the taxpayer has introduced credible evidence to disprove the correctness of the assessment. In such case, the burden is shifted on the BIR to submit evidence to prove that its assessment is correct.

Here, respondent introduced evidence to disprove the assessments. On the other hand, petitioner failed to submit evidence to support the conclusion that respondent has undeclared income and/or gross receipts which make it liable for deficiency VAT and income tax. Considering the evidence presented by respondent, petitioner's presumptions and mere mathematical computations are not sufficient to hold respondent liable for deficiency VAT and income tax. The prima facie correctness of petitioner's assessments no longer applies because respondent has already submitted evidence to prove that the assessments are without basis.

Anent petitioner's claim that the ten-year prescriptive period to assess should be applied in view of the alleged falsity of respondent's returns, the same is *belied* by her assertions that the waivers executed by respondent are valid and that they extended the three-year prescriptive period to assess respondent for deficiency VAT and income tax. If petitioner truly believed that respondent's returns are false and that the ten-year prescriptive period to assess should apply, then there is no need for petitioner to insist on the validity of the waivers *vis-a-vis* the waivers' apparent defects on account of their failure to strictly comply with the guidelines laid down in Revenue Memorandum Order No. 20-90 and Revenue Delegation Authority Order No. 05-01.

In view of the foregoing, I vote to deny the petition for review for lack of merit.

ROMAN G. DEL ROSARIO
Presiding Justice