REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	CTA EB CASE No. 1246 (CTA CASE No. 8257)
-versus-	*Present*: DEL ROSARIO, P.J., CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS, and RINGPIS-LIBAN, *JJ.*
SOUTH ENTERTAINMENT GALLERY, INC., *Respondent.*	Promulgated: JUL 22 2016 3:50 p.m.

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RESOLUTION

MINDARO-GRULLA, J.:

Before the Court *En Banc* is a Motion for Reconsideration[1] filed by the Commissioner of Internal Revenue (CIR) seeking to set aside this Court's Decision promulgated on January 4, 2016,[2] the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, the instant Petition for Review is hereby **DENIED**. Accordingly, the Decision and the Resolution, dated July 09, 2014 and October 22, 2014, respectively, are hereby **AFFIRMED**.

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[1] Filed on January 28, 2016, *En Banc* Docket, pp. 109-123.
[2] *En Banc* Docket, pp. 80-98.

SO ORDERED."

In her motion, CIR insists that South Entertainment Gallery Inc. (SEGI)'s mere denial of receipt of Final Assessment Notice (FAN) cannot be given weight as the receipt by Mr. Brian David is sufficient proof to establish receipt of FAN. Moreover, CIR contends that SEGI failed to file its Petition for Review on time as the 30-day period to file such before this Court has already lapsed and should be counted from the time of receipt of the Warrant of Distraint and Levy (WDL), and not from the date of receipt of the letter reiterating the collection of the tax deficiency. Lastly, CIR claims presumption of the assessment's validity.

In its Comment/Opposition,[3] SEGI points out that CIR's arguments are mere rehash and already asserted during trial before the Division and this Court *En Banc*, which were considered and already extensively passed upon. In addition, SEGI upholds its same arguments that CIR failed to prove by competent evidence receipt of FAN, and without the FAN, there can be no valid collection against it and that this Court has jurisdiction over the case, as it involves the validity of the issuance of WDL.

The motion is bereft of merit.

The arguments proffered by CIR in her Motion are mere rehash of the arguments raised before the Court in Division and *En Banc*, which were thoroughly and exhaustively passed upon. These are the very same arguments invoked in her previous pleadings filed in this case, all of which have already been comprehensively addressed and rejected by the Court in Division and *En Banc*.

To reiterate the issue of Jurisdiction, the case of *Commissioner of Internal Revenue vs. Transfield Philippines, Inc.,*[4] is binding, thus:

> "[T]he finality of the assessment against Transfield does not preclude them from questioning the validity

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[3] Filed on April 29, 2016, *En Banc* Docket, pp. 133-143.
[4] CTA EB No. 907 (CTA Case No. 7842), August 05, 2013.

> of the right of the CIR to exact payment of the alleged tax liabilities for the taxable year 2002, by way of the issuance and implementation of the WDAL dated September 8, 2008.
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> In the instant case, the Court has jurisdiction to rule on the petition when the CIR issues WDAL's on erroneous and void determinations. This is based on the fact that the instant case is not an appeal of the disputed assessment which is subject to a reglementary period, but it is a case to determine whether the issuance of the WDAL's are proper.
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> Further, the issue to be addressed is not the timeliness of the protest of the assessment issued against it, but rather, whether the CIR may validly collect taxes from Transfield by way of the WDAL despite of Transfield having availed of the tax amnesty under RA 9480." (Underlining Supplied.)

Also, it must be emphasized that the WDL was not the last response SEGI received from the CIR. After SEGI requested a withdrawal and cancellation of the WDL, SEGI received a letter from OIC-RDO Amador P. Ducut reiterating the collection. Receipt of this letter is the reckoning point to file judicial claim before this Court, thus:

> "[I]n the present case the Final Notice Before Seizure xxx was not the last response received by petitioner from the respondent. After petitioner submitted a letter response to the Final Notice Before Seizure xxx, petitioner received xxx a Collection Letter xxx from the BIR, to which petitioner submitted a letter response to the BIR xxx
>
> xxx [I]t is clear that in the instant case, the Final Notice Before Seizure cannot be considered the final act of respondent, from which the counting of the statutory period to appeal to this Court must be reckoned. While it is true that as a rule the warrant of distraint and levy is proof of the finality of the assessment and renders hopeless a request for reconsideration, being tantamount to an outright denial thereof and makes the said request deemed

rejected, the special circumstance in this case prevents the application of this accepted doctrine."[5]

Note that upon reply of SEGI to the Preliminary Collection Letter, SEGI was not able to receive an FLD/FAN but instead a WDL was issued. In view of the above-cited cases, the WDL cannot be considered the final act of CIR from which the counting of the statutory period to appeal to this Court must be reckoned.

To further justify the counting of the prescriptive period to file the judicial claim before this Court, the Supreme Court ruled in this manner:

> There appears to be no dispute that petitioner did not rule on private respondent's motion for reconsideration but contrary to the above ruling of this Court, left private respondent in the dark as to which action of the Commissioner is the decision appealable to the Court of Tax Appeals.[6] xxx" (Underlining Supplied.)

It should always be indicated in clear and unequivocal language that the Commissioner's action on an assessment questioned by a taxpayer constitutes his final determination on the disputed assessment.[7] On that basis, a taxpayer would not grope in the dark and speculate as to when to seek refuge before this Court.[8]

Moreover, the fact still remains that the FAN was not received by SEGI, hence, there is nothing for SEGI to protest for reconsideration or reinvestigation. Suffice it to say that there can be no final, executory and demandable assessment where there is no showing that the subject FAN was properly and duly served upon the taxpayer concerned.[9]

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[5] *Pacific Plans, Inc. vs. Commissioner of Internal Revenue,* CTA Case No. 7537, February 09, 2009, citing *Commissioner of Internal Revenue vs. Algue, Inc.*, 158 SCRA 12-13.
[6] *Commissioner of Internal Revenue vs. Union Shipping Corporation and the Court of Tax Appeals,* G.R. No. L-66160, May 21, 1990.
[7] *Surigao Electric Co., Inc. v. Court of Tax Appeals*, 57 SCRA 523, *Intertrod Maritime Inc., vs. Commissioner of Internal Revenue,* CTA CASE NO. 4772, 1993.
[8] Ibid.
[9] *People of the Philippines v. Joseph Typingco*, CTA EB Criminal Case No. 021 (CTA Criminal Case No. O-114), September 27, 2013.

Lastly, if the taxpayer denies ever having received an assessment from the BIR, it is incumbent upon the latter to prove by competent evidence that such notice was indeed received by the addressee.[10] The *onus probandi* was shifted to CIR to prove by contrary evidence that the taxpayer received the assessment in the due course of mail.[11] Again, CIR failed to prove that the FLD/FAN was received by SEGI.

There being no compelling argument to warrant modification, much more reversal of the questioned Decision, the Court is left without any option but to deny petitioner's plea for reconsideration.

WHEREFORE, premises considered, the Motion for Reconsideration is hereby **DENIED** for lack of merit.

SO ORDERED.

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

WE CONCUR:

(with Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

Juanito C. Castañeda, Jr.
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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[10] *Barcelon Roxas Securities, Inc. (now known as UBP Securities, Inc.) v. Commissioner of Internal Revenue, G.R. No. 150764, August 7, 2006.*
[11] Ibid.

ESPERANZA R. FABON-VICTORINO
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

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DISSENTING OPINION

DEL ROSARIO, P.J.:

With due respect, I maintain my dissenting opinion on the Court *En Banc*'s Decision dated January 4, 2016. I reiterate my position that the **Petition for Review filed by the Commissioner of Internal Revenue (CIR) should be granted and the issuance of the Warrant of Distraint and/or Levy (WDL) should be upheld as the original Petition for Review filed by South Entertainment Gallery, Inc. (SEGI) with the Court in Division was filed beyond the reglementary period. For failure of SEGI to appeal the WDL within the period provided by law, said WDL has already attained finality.**

It is the opinion of the majority that the WDL is void since there can be no final, executory and demandable assessment in this case as the subject Final Assessment Notice (FAN) was not duly served upon SEGI.

Under Section 3.1.4 of Revenue Regulations (RR) No. 12-99, service of the FAN to the taxpayer may be made by registered mail or by personal delivery. If the FAN is served by registered mail, and the original was not returned to sender, the presumption is that the taxpayer received the said assessment in the regular course of the mail pursuant to Section 3 (v), Rule 131 of the Rules of Court.[1]

Thus, the facts to be proven in order to raise this disputable presumption are: (a) that the letter was properly addressed with postage prepaid; and (b) that it was mailed. Once these facts are established, the presumption is that the letter was received by the addressee as soon as it could have been transmitted to him in the ordinary course of the mail.[2]

In *Barcelon, Roxas Securities, Inc. (now known as UBP Securities, Inc.) vs. Commissioner of Internal Revenue*,[3] the Supreme Court made a pronouncement that while a mailed letter is deemed received by the addressee in the ordinary course of mail, this is still merely a disputable presumption subject to controversion, and a direct denial of the receipt thereof shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee.

Here, SEGI vehemently denies receipt of the FAN which the CIR served by registered mail. Thus, the burden was shifted upon the CIR to prove that the FAN was mailed and received by SEGI.

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[1] "Sec. 3. Disputable presumptions. — The following presumptions are satisfactory if uncontradicted, but may be contradicted and overcome by other evidence:

xxx xxx xxx

(v) That a letter duly directed and mailed was received in the regular course of the mail;" (Section 3 (v), Rule 131 of the Rules of Court).

[2] Gonzalo P. Nava vs. Commissioner of Internal Revenue, G.R. No. L-19470, January 30, 1965; Protector's Services, Inc. vs. Court of Appeals, et al., G.R. No. 118176, April 12, 2000.

[3] G.R. No. 157064, August 7, 2006, citing *Protector's Services, Inc. vs. Court of Appeals*, 386 Phil. 611, 623 (2000).

To overcome said burden, the CIR presented (i) BIR Administrative Aide VI, Ronnie SJ Ocampo, who testified that the FAN was issued and sent through registered mail under Registered Mail No. 853, addressed to SEGI, on April 10, 2008;[4] (ii) Postman II Emelito M. Victoria who confirmed that all mail matters addressed to tenants of SM Pampanga are received through SM Warehouse and only Mr. Brian David, a Warehouse Assistant in SM Pampanga, receives such mail matters for said tenants; (iii) Mr. Brian David, who testified that as part of his functions, he receives mail matters and other documents for distribution to tenants of SM Pampanga, and who confirmed that the handwriting in the Registry Return Card[5] is his own handwriting;[6]

The CIR also presented the following documentary evidence to prove that the FAN was duly mailed and received by SEGI, *viz.*: (i) Registry Return Card addressed to SEGI, which was received by Brian David on 4/14";[7] (ii) Delivery Book;[8] (iii) Receipt by Brian David on 4/14;[9] (iv) Certification dated February 7, 2012 issued by the letter carrier, Postman II, Emelito Victoria;[10] (v) Registry Receipt No. 853;[11] (vi) Return Card;[12] (vii) Records of Registered Mail dated April 10, 2008.[13]

There is no denying that SEGI's office address is located at 3/F SM City Pampanga, Brgy. San Jose, San Fernando City, Pampanga and Brgy. Lagundi, Mexico City, Pampanga.[14] The Certification[15] issued by the letter carrier, Postman II, Emelito Victoria, is categorical in showing that Registered Mail No. 853, posted on April 10, 2008, was addressed to SEGI, which he delivered on April 14, 2008, and which was received by Mr. Brian David on the same date.

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[4] Exhibit 29.
[5] Exhibit 17.
[6] Exhibit 30.
[7] *Supra*, Note 5.
[8] Exhibit 24.
[9] Exhibit 24-A.
[10] Exhibits 25, 25-A.
[11] Exhibit 26.
[12] Exhibit 27.
[13] Exhibits 28, 28-A.
[14] Pre-Trial Order, II, Stipulated Facts, (A)(2), CTA Division Docket, Volume I, p. 356.
[15] *Supra*, Note 10.

Clearly, unlike in *Barcelon case* where the Supreme Court did not sustain the presumption that the assessment notice was received in the regular course of the mail in view of the CIR's failure to present convincing evidence showing that such notice was actually mailed, in the present case, the foregoing testimonial and documentary evidence presented by the CIR overwhelmingly prove that the FAN was duly served upon SEGI in the regular course of the mail. Stated differently, the evidence presented by the CIR was sufficient to discharge the burden of proof which was shifted upon the CIR when SEGI denied the receipt of the FAN.

Truth to tell, other than its self-serving and blanket denial of receipt of the FAN, there is nothing on record which will show that SEGI presented rebutting evidence to prove that it did not actually receive the FAN. **In fact, what is telling here is despite SEGI's insistence that it did not receive the FAN, and consequently, it could not have become valid, final, executory and demandable, SEGI actually paid the deficiency withholding tax assessment after receiving the Preliminary Collection Letter from the CIR in 2008.** Pertinent portion of the Court in Division's Decision dated July 9, 2014, stating this significant fact, is quoted hereunder:

> "On February 21, 2008, petitioner (SEGI) received a Preliminary Assessment Notice dated February 4, 2008 informing petitioner of its alleged tax deficiencies. Subsequently, it received a Preliminary Collection Letter dated June 10, 2008 collecting the said alleged internal revenue tax liabilities in the total amount of P4,067,264.18, to *wit*:
>
> xxx xxx xxx
>
> **Petitioner replied to the Preliminary Collection Letter in a letter dated June 19, 2008 informing respondent that <u>it already paid the withholding tax deficiency</u> but, with regard to the Income Tax and VAT deficiencies, it maintained its exemption from the payment of any kind and form of taxes pursuant to PAGCOR's exemption under PD 1869.** Nevertheless, respondent issued a Warrant of Distraint and/or Levy (WDL) through OIC-Revenue District Officer of South Pampanga on June 22, 2010. This prompted petitioner to request for a withdrawal and cancellation of the WDL in a letter dated September 24, 2010."[16] (Emphasis supplied)

[16] CTA *En Banc* Docket, p. 38; Exhibit J.

From the foregoing, it is evident that SEGI impliedly admitted the existence as well as its receipt of the FAN when it voluntarily paid the deficiency withholding tax assessment (one of the items assessed in the FAN) upon its receipt of the Preliminary Collection Letter[17] dated June 10, 2008. Notably, the Preliminary Collection Letter made reference to the FAN as the CIR's basis in collecting from SEGI the internal revenue tax liabilities in the total amount of P4,067,264.18, *viz.*:

"PRELIMINARY COLLECTION LETTER

June 10, 2008

SOUTH ENTERTAINMENT GALLERY, INC.
3/F SM City Pampanga, San Jose,
City of San Fernando, Pampanga

Sir:

Our records show that we sent you an **Assessment Notice** for collection of your internal revenue tax liability/ies described hereunder which remains unpaid to date:

Kind of Tax	Tax Due	Surcharge	Interest	Compromise	Total Amount Due
IT	247,216.00	-	79,521.15	4,000.00	330,737.15
VAT	2,046,399.96	511,735.00	1,119,521.40	20,000.00	3,697,656.36
Withholding	25,077.32	-	13,793.35	-	38,870.67
Total	**P2,318,693.28**	**P511,735.00**	**P1,212,835.90**	**P24,000.00**	**P4,067,264.18**

Ass./Demand No.:021R-0604112007 Year Involved 2005 Date Issued: April 2, 2008"[18]
(Emphasis supplied).

In *Rizal Commercial Banking Corporation v. Commissioner of Internal Revenue*,[19] the Supreme Court held that:

"Estoppel is clearly applicable to the case at bench. RCBC, **through its partial payment of the revised assessments issued within the extended period as provided for in the questioned waivers, impliedly admitted the validity of those waivers. Had petitioner truly believed that the waivers were invalid and that the assessments were issued beyond the prescriptive period,**

[17] Exhibit D.
[18] *Id.*
[19] G.R. No. 170257, September 7, 2011.

> **then it should not have paid the reduced amount of taxes in the revised assessment**. RCBC's subsequent action effectively belies its insistence that the waivers are invalid. The records show that on December 6, 2000, upon receipt of the revised assessment, RCBC immediately made payment on the uncontested taxes. Thus, RCBC is estopped from questioning the validity of the waivers. To hold otherwise and allow a party to gainsay its own act or deny rights which it had previously recognized would run counter to the principle of equity which this institution holds dear." (Emphasis supplied)

If SEGI did not receive the FAN, it could have raised such issue with the CIR after receiving said Preliminary Collection Letter, instead of willingly paying the deficiency withholding tax assessment. Applying the principle laid down in *RCBC case*, by its own positive act of paying the deficiency withholding tax assessment, SEGI is estopped from denying the existence as well as its receipt of the FAN.

On the basis of the above disquisition, I VOTE to GRANT petitioner's Motion for Reconsideration (Re: Decision dated January 4, 2016) filed on January 28, 2016; **REVERSE** and **SET ASIDE** the Decision of the Court *En Banc* dated January 4, 2016, the Decision and Resolution of the Court in Division dated July 9, 2014 and October 22, 2014, respectively, and **UPHOLD** the issuance of the Warrant of Distraint and/or Levy for the collection of deficiency income tax, deficiency expanded withholding tax, and deficiency value-added tax for taxable year 2005.

ROMAN G. DEL ROSARIO
Presiding Justice