REPUBLIC OF THE PHILIPPINES
**Court of Tax Appeals**
QUEZON CITY

***SECOND DIVISION***

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| **SOUTH ENTERTAINMENT GALLERY, INC.,**<br>Petitioner, | **CTA CASE NO. 8257**<br>Members: |
| - versus - | **CASTAÑEDA, JR.,** *Chairperson*<br>**CASANOVA,** *and*<br>**COTANGCO-MANALASTAS,** *JJ.* |
| **COMMISSIONER OF INTERNAL REVENUE,**<br>Respondent. | **Promulgated:**<br>JUL 09 2014<br>2:40 p.m. |

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# DECISION

**CASANOVA, J.:**

Before the Court is a Petition for Review[1] filed on March 31, 2011 by South Entertainment Gallery, Inc. ("Petitioner"), principally seeking that judgment be rendered in its favor: a.) ordering the withdrawal and cancellation of the Warrant of Distraint and Levy ("WDL") dated June 22, 2010; and b) declaring it not liable for the alleged deficiency Income Tax and Value-Added Tax ("VAT") for taxable year 2005. Likewise, petitioner seeks the issuance of a temporary restraining order against the Commissioner of Internal Revenue ("Respondent") with regard to the latter's act of alleged unlawful collection of the former's alleged deficiency taxes and enforcement of the Warrant of Distraint and Levy.

The undisputed facts are as follows:

Petitioner is a corporation organized and existing under the laws of the Philippines, with office address at 3/F SM City Pampanga, Brgy. San Jose, San Fernando City, Pampanga and Brgy. Lagundi, Mexico City, Pampanga. It is engaged in the

[1] Docket (Vol. I), pp. 1-28.

business of operating and conducting Bingo games and other games of chance, among others, pursuant to its contractual relationship with the Philippine Amusement and Gaming Corporation ("PAGCOR"), having been issued the Grant of Authority to conduct bingo games and variants thereof pursuant to Presidential Decree ("PD") 1869.[2]

Respondent is the duly appointed Commissioner of Internal Revenue (CIR) who holds office at the BIR National Office Building, Diliman, Quezon City.[3]

On February 21, 2008, petitioner received a Preliminary Assessment Notice dated February 4, 2008 informing petitioner of its alleged tax deficiencies.[4] 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*: [5]

| Kind of Tax | Tax Due | Surcharge | Interest | Compromise | Total Amount Due |
|---|---|---|---|---|---|
| | | | | | |
| Income Tax | 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** |

Petitioner replied to the Preliminary Collection Letter in a letter dated June 19, 2008 informing respondent that it already paid the withholding tax deficiency 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.[6] 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.[7]

On March 25, 2011, petitioner received a letter of even date from OIC-RDO Amador P. Ducut, reiterating the collection of the alleged deficiency Income Tax in the amount of P326,737.15 and

[2] Pars. 1, 3 & 4, Stipulated Facts, Pre-Trial Order, Docket (Vol. I), pp. 356-356.
[3] Par. 2, Stipulated Facts, Pre-Trial Order, Docket (Vol. I), p. 357.
[4] Exhibit "C".
[5] Exhibit "D".
[6] Exhibit "J".
[7] Pars.6-8, Stipulated Facts, Pre-Trial Order, Docket (Vol. I), p. 357.

deficiency VAT in the amount of P3,697,656.36 for taxable year 2005.[8]

Hence, petitioner filed the instant *Petition for Review [With Prayer for Issuance of Temporary Restraining Order and/or Writ of Preliminary Injunction]*.

For her part, respondent filed her Answer[9] on May 16, 2011.

A hearing was conducted on petitioner's application for the issuance of a Temporary Restraining Order ("TRO") and/or Writ of Preliminary Injunction. The same was treated by this Court as a prayer for the issuance of a Suspension Order on collection of taxes considering that preliminary injunction is *akin* to suspension of collection of taxes. Thereafter, the Court finds merit in petitioner's application and its application was granted subject to the submission of documentary requirements under A.M. 04-7-02-SC, dated July 20, 2004.[10] After petitioner submitted the required documents, the Court restrained respondent or any of her officers or employees from issuing, executing and enforcing, implementing or otherwise giving effect to any Warrant of Distraint, Levy and Garnishment; and from collecting or attempting to collect on the basis of the subject Assessment Notice/s, until further orders from the Court.[11]

On the other hand, during trial on the merits, petitioner presented testimonial and pieces of documentary evidence, Exhibits "A" to "K-1". They were all admitted in the Resolution dated January 20, 2012[12].

For respondent, she presented Exhibits "17" to 30-a".[13] Among respondent's exhibits, the Court only denied the admission of Exhibit "18" for respondent's failure to present the original document for comparison and to have said exhibit identified; and Exhibit "24-b" for respondent's failure to have the exhibit identified.[14]

Upon the filing of the *"Memorandum for Petitioner"*[15] on February 24, 2014 and respondent's *"Memorandum"*[16] on March 24,

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[8] Par. 9, *Id.*; Exhibit "E".
[9] Docket (Vol. I), pp. 238-260.
[10] Resolution dated September 1, 2011, Docket (Vol. I), pp. 363-368.
[11] Resolution dated December 2, 2011, Docket (Vol. I), pp. 419-420.
[12] Docket (Vol. I), pp. 554-555.
[13] Docket (Vol. II), pp. 688-694.
[14] Resolution dated July 10, 2013, Docket (Vol. II), pp. 722-723.
[15] Docket (Vol. II), pp. 835-866.

2014, this case was considered submitted for decision on March 26, 2014.

The parties stipulated on the following issues: [17]

1. **Whether or not a valid Formal Assessment Notice was issued to, and duly received by petitioner or his duly authorized representative, and if the same was received, whether or not it has become final, executory and demandable and beyond the jurisdiction of this Court.**

2. **Whether or not this Honorable Court has jurisdiction to determine the validity of the WDL.**

3. **Whether or not the WDL is premature and, thus, invalid.**

4. **Whether or not the period to assess petitioner's internal revenue taxes for taxable year 2005 has already prescribed.**

5. **Whether or not petitioner is liable for alleged deficiency income tax and VAT for taxable year 2005 in the aggregate amount of P4,024,393.51.**

Foremost, the core of contention here is whether or not a valid Formal Assessment Notice had been issued by respondent.

Petitioner emphasizes that Section 228 of the National Internal Revenue Code ("NIRC") of 1997, as implemented by Revenue Regulations (RR) 12-99, prescribes the basic procedure in assessment and protest thereof. According to petitioner, Section 228 benefits both taxpayers and the government for it guarantees taxpayers "due process" in assessment and an opportunity for the government to assess and collect internal revenue taxes, interests, and penalties within the prescriptive periods.[18]

Petitioner further contends that due process in the issuance of assessments requires that taxpayers must actually receive the

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[16] Docket (Vol. II), pp.872-902.
[17] Stipulated Issues, Pre-Trial Order, Docket (Vol. I), pp. 357-358.
[18] Par. 33, Discussion, Petitioner's Memorandum, Docket (Vol. II), p. 844

Preliminary Assessment Notice ("PAN") and Formal Assessment Notice ("FAN"). Petitioner claims that respondent failed to comply the due process requirement in issuing a FAN. Considering so, no valid assessment was deemed made against petitioner.[19]

Respondent opposes petitioner's assertions and claims that her pieces of evidence prove that a Formal Letter of Demand ("FLD") with Assessment Notice No. 021-R-0604112007 dated April 2, 2008 was sent through registered mail to petitioner on April 10, 2008. Since the assessment notice was sent, released and mailed by the Bureau of Internal Revenue ("BIR") to the taxpayer and the original was not returned to the BIR, the presumption is that the taxpayer received it.[20]

Respondent further posits that petitioner failed to administratively protest the aforementioned FLD with Assessment Notice No. 021-R-0604112007 within thirty (30) days from the date of receipt as mandated by Section 228 of the NIRC of 1997, as amended; hence, it became final and executory. Consequently, her administrative remedy for collection of taxes thru the issuance of WDL is inevitably warranted.[21]

The Court is persuaded by the fundamental arguments raised by petitioner.

Section 228 of the National Internal Revenue Code ("NIRC") of 1997, as amended, clearly sets down the procedure for protesting an assessment. Thus:

> "**SECTION 228**. *Protesting of Assessment.* — When the Commissioner or **his duly authorized representative finds that proper taxes should be assessed**, he shall first notify the taxpayer of his findings: *Provided, however*, That a preassessment notice shall not be required in the following cases:
>
> xxx xxx xxx
>
> **The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.**

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[19] *Id.*, Docket (Vol. II), pp. 844 & 848.
[20] Par. 9, Answer, Docket (Vol. I), p. 245.
[21] *Id.*, Docket (Vol. I), p. 248.

Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an **assessment based on his findings.**

Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, **the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable**." *Emphases supplied.*)

On the other hand, Revenue Regulations ("RR") 12-99 implements Section 228, to wit:

"REVENUE REGULATIONS NO. 12-99

SUBJECT : Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extra-Judicial Settlement of a Taxpayer's Criminal Violation of the Code Through Payment of a Suggested Compromise Penalty

TO : All Internal Revenue Officers and Others Concerned

SECTION 1. Scope. — Pursuant to the provisions of Section 244, in relation to Section 245 of the National Internal Revenue Code of 1997, these Regulations are hereby promulgated to implement the provisions of Sections 6, 7, 204, 228, 247, 248 and 249 on assessment of national internal revenue taxes, fees and charges and to provide the rules governing the extra-judicial settlement of a taxpayer's criminal violation of the said Code or any of its implementing Regulations through payment of a suggested compromise penalty.

xxx xxx xxx

SECTION 3. Due Process Requirement in the Issuance of a Deficiency Tax Assessment. —

3.1 Mode of procedures in the issuance of a deficiency tax assessment:

3.1.1 Notice for informal conference. — The Revenue Officer who audited the taxpayer's records shall, among others, state in his report whether or not the taxpayer agrees with his findings that the taxpayer is liable for deficiency tax or taxes. If the taxpayer is not amenable, based on the said Officer's submitted report of investigation, the taxpayer shall be informed, in writing, by the Revenue District Office or by the Special Investigation Division, as the case may be (in the case Revenue Regional Offices) or by the Chief of Division concerned (in the case of the BIR National Office) of the discrepancy or discrepancies in the taxpayer's payment of his internal revenue taxes, for the purpose of 'Informal Conference,' in order to afford the taxpayer with an opportunity to present his side of the case. If the taxpayer fails to respond within fifteen (15) days from date of receipt of the notice for informal conference, he shall be considered in default, in which case, the Revenue District Officer xxx, shall endorse the case xxx to the Assessment Division of the Revenue Regional Office or to the Commissioner or his duly authorized representative, as the case may be, for appropriate review and issuance of a deficiency tax assessment, if warranted.

3.1.2 **Preliminary Assessment Notice (PAN).** — If after review and evaluation by the Assessment Division or by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing in detail, the facts and the law, rules and regulations, or

> jurisprudence on which the proposed assessment is based (see illustration in ANNEX A hereof). If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN, he shall be considered in default, in which case, a formal letter of demand and assessment notice shall be caused to be issued by the said Office, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.
>
> xxx xxx xxx
>
> 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**. xxx" (*Emphases supplied.*)

As can be gleaned from the foregoing, the issuance of a valid formal assessment is a substantive prerequisite to tax collection. It contains not only a computation of tax liabilities but also a demand for payment within a prescribed period, thereby signaling the time when penalties and interests begin to accrue against the taxpayer and enabling the latter to determine his remedies therefor. Due process requires that it must be served on and received by the taxpayer.[22]

Here, respondent insists that the FLD with Assessment Notice No. 021-R-0604112007 was sent through registered mail. However, petitioner denies the receipt. With this, a scrutiny of the pieces of evidence presented by respondent is vital.

In particular, respondent presented the following to prove her point:

| Exhibit | Description |
|---|---|
| "17" | Registry Return Card addressed to petitioner, received by Brian David on 4/14 |
| "24" | Delivery Book |
| "24-4" | Receipt by Brian David 4/14 |

[22] Commissioner of Internal Revenue vs. Menguito, G.R. No. 167560, September 17, 2008.

| | |
|---|---|
| "25", "25-a" | Certification dated February 7, 2012 issued by the letter carrier, PMN. II Emelito Victoria |
| "26" | Registry Receipt No. 853 |
| "27" | Return Card |
| "28", "28-a" | Records of Registered Mail dated April 10, 2008 |
| "29", "29-a" | Judicial Affidavit of Ronnie SJ Ocampo |
| "30", "30-a" | Judicial Affidavit of Brian David |

Section 7 of Rule 13 of the Revised Rules of Court provides that if service is made through registered mail, the **proof of service** is the registry receipt issued by the mailing office and an affidavit of the person mailing.

Respondent presented "Registry Return Card addressed to petitioner, received by Brian David on 4/14"; Registry Receipt No. 853; Affidavit of Ronnie SJ Ocampo, the person who mailed the FLD with Assessment Notice No. 021-R-0604112007; and Certification dated February 7, 2012 issued by the letter carrier, Emelito Victoria. She now claims that pursuant to Section 3(v), Rule 131 of the Revised Rules of Court, "a letter duly directed and mailed" is presumed to have been received by the addressee thereof in "the regular course of the mail."

Without doubt the evidence presented by respondent may have led to the presumption that the FLD with the assessment notice was received by petitioner in the regular course of mail. Be that as it may, said presumption is merely a disputable presumption. In the case of *Barcelon, Roxas Securities, Inc. vs. Commissioner of Internal Revenue*[23], the Supreme Court held that a direct denial of the receipt of the mail shifts the burden of proof on the other party favored by the presumption to prove that the mailed letter **was indeed received by the addressee**, *viz*:

> "(W)hen a mail matter is sent by registered mail, there exists a presumption, set forth under Section 3(v), Rule 131 of the Rules of Court, that it was received in the regular course of mail. The facts to be proved in order to raise the presumption are: (a) that the letter was properly addressed with postage prepaid; and (b) that it was mailed. While a mailed letter is deemed received by the addressee in the ordinary course of mail, there is still merely a disputable presumption subject to controversion, and a direct denial of the receipt thereof shifts the burden

[23] G.R. No. 157064, August 7, 2006

upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee."

In addition, the Supreme Court in the case of *Estate of the Late Juliana Diez Vda. De Gabriel vs. Commissioner of Internal Revenue*[24] vividly pronounced that it is a requirement of due process that the taxpayer must actually receive the assessment. Relevant portion of said Supreme Court Decision is quoted:

> "xxx **the notice be sent to the taxpayer, and not merely to a disinterested party**. Although there is no specific requirement that the taxpayer should receive the notice within the said period, **due process requires at the very least that such notice actually be received**. In Commissioner of Internal Revenue v. Pascor Realty and Development Corporation, we had occasion to say:
>
> > An assessment contains not only a computation of tax liabilities, but also a demand for payment within a prescribed period. It also signals the time when penalties and interests begin to accrue against the taxpayer. **To enable the taxpayer to determine his remedies thereon, due process requires that it must be served on and received by the taxpayer.**" (*Emphases supplied.*)

As already mentioned, petitioner denies the receipt of the FLD with Assessment Notice No. 021-R-0604112007. It thus becomes incumbent for respondent to overcome such denial. Respondent presented Brian David, the alleged recipient of the subject FLD with Assessment Notice No. 021-R-0604112007. In his Judicial Affidavit, Brian David attested that he received mail matters from the postman for distribution to the addressee-tenants of SM City Pampanga. He gives them to contractor personnel of SM City Pampanga who, in turn, delivers the same to the addressee-tenants. Let it be noted that petitioner is among the tenants of SM City Pampanga. Pertinent portion of his Judicial Affidavit is quoted as follows:

> "3. Q: As a Warehouse Assistant assigned at SM City Pampanga, what are your duties and functions?

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[24] G.R. No. 155541, January 27, 2004.

A: As part of my functions, receiving mail matters and other documents which our local postman requested us to distribute to the tenants in SM City Pampanga in April 2008. In turn, **I gave these mail matters and documents to a contractor personnel who delivers these mail matters to their respective addressees-tenants, the acknowledgement of receipt of which is evidence by the signature on a logbook**;" (*Emphasis supplied.*)

As can be gleaned from the above, Brian David actually has no hand on the personal delivery of mails to the addressee-tenants of SM City Pampanga. A fact significantly admitted by him when he was asked clarificatory questions by the Court during his testimony[25]. Simply stated, his testimony is limited only to the fact that he received a mail matter meant for petitioner on April 14, 2008. However, whether or not petitioner, indeed, received the subject assessment notice is a fact, which the testimony of Brian David failed to show when he admitted these glaring facts during his cross-examination:

a.) that as part of his functions, he receives mail matters from the postman **only if requested** by the latter but there is **no prohibition** for the postman to deliver the mail matters himself to the addressee-tenants;

b.) he instructed the contractor personnel of SM City Pampanga to deliver the mails to the postman in case the addressee-tenants are no longer available to receive the mail matter but he has no knowledge of what mail matters are actually returned to the postman or may be misplaced by the contractor personnel;

c.) that he has neither personal knowledge nor a way of verifying if the mail matters are indeed delivered to the addressees-tenants; and

d.) that the logbook where allegedly the receipts of mail matters by the addressee-tenants were sometimes recorded had been lost, making it difficult to verify if petitioner, as addressee-tenant, received the subject mail matter.

The testimony of Brian David collectively eroded the presumption that petitioner received the subject FLD with the assessment notice. Aside from the bare testimony of Brian David,

[25] Transcript of Stenographic Notes (TSN) of January 31, 2013 hearing, pp. 10-11.

there is not an iota of proof to show the actual receipt of petitioner that will consequently overcome its denial. In addition, it bears to stress that Brian David was not even proven as the person authorized to receive letters on behalf of petitioner and he cannot even at least affirm or acknowledge that, indeed, petitioner received the subject FLD with the assessment notice. Accordingly, petitioner's right to due process in the issuance of the subject assessment was deemed violated. Stated otherwise, there is no assessment to deal with. Consequently, there is no basis for the issuance of a WDL.

It is said that taxes are what we pay for civilized society. Without taxes, the government would be paralyzed for the lack of the motive power to activate and operate it. Hence, despite the natural reluctance to surrender part of one's hard-earned income to taxing authorities, every person who is able to must contribute his share in the running of the government. The government for its part is expected to respond in the form of tangible and intangible benefits intended to improve the lives of the people and enhance their moral and material values. This symbiotic relationship is the rationale of taxation and should dispel the erroneous notion that it is an arbitrary method of exaction by those in the seat of power.[26]

However, fair dealing on both sides of this symbiotic relationship is of paramount importance in order to maintain its harmonious character[27] and well enshrined is the constitutional mandate that no person shall be deprived of his property without due process of law. Thus, the respondent or her duly authorized representatives are expected to give accord to procedures laid down in law or regulations in assessing or collecting taxes. Taxpayers owe honesty to government just as government owes fairness to taxpayers.[28]

Considering that the assessment of respondent is rendered nugatory for its failure to send the required final assessment notice, the Court need not belabor on the other issues raised herein for it is well-settled that a void assessment bears no fruit.

**WHEREFORE**, premises considered, the instant Petition for Review is **GRANTED**. Accordingly, the assessment issued by respondent against petitioner for deficiency Income Tax and VAT for

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[26] Commissioner of Internal Revenue vs. Algue, Inc., *et. al.*, L-28896, February 17, 1988.
[27] Benjamin Aban, Law of Basic Taxation in the Philippines (Revised Edition)(First Printing), p. 1.
[28] Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd, *et. al.*, G.R. No. L-68252, May 26, 1995.

taxable year 2005 is **CANCELLED and SET ASIDE** and respondent is ordered to withdraw the Warrant of Distraint and Levy dated June 22, 2010.

**SO ORDERED.**

**CAESAR A. CASANOVA**
Associate Justice

WE CONCUR:

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

**(On Leave)**
**AMELIA R. COTANGCO-MANALASTAS**
Associate Justice

## ATTESTATION

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

**ROMAN G. DEL ROSARIO**
Presiding Justice