REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

GJM PHILIPPINES MANUFACTURING, INC.,
Respondent.

CTA EB CASE NO. 637
(CTA Case No. 6875)

Present:
Acosta, P.J.
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Palanca-Enriquez,
Fabon-Victorino,
Mindaro-Grulla, and
Cotangco-Manalastas, JJ.

Promulgated:

MAR 06 2012 Apolinario 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 18, 2010, pursuant to Section 18 of Republic Act ("RA") No. 1125, as amended by RA No. 9282 and RA No. 9503, praying that the Decision[2] promulgated on January 26, 2010, and the Resolution[3] dated May 4, 2010, both issued by the First Division of the Court ("Court in

[1] *Rollo*, CTA EB Case No. 637 (CTA Case No. 6875), pp. 10-49, with Annexes.
[2] Penned by Associate Justice Erlinda P. Uy, with Presiding Justice Ernesto D. Acosta, and Associate Justice Esperanza R. Fabon-Victorino, concurring; *Ibid.*, pp. 24-42; *Annex "A."*
[3] *Ibid.*, pp. 44-48; *Annex "B."*

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Division") be reversed and set aside, and a new one be rendered ordering respondent GJM Philippines Manufacturing, Inc., ("GJM") to pay the amount of ₱1,480,099.29, representing deficiency Income Tax for the taxable year 1999, plus twenty five per centum (25%) surcharge for late payment, and twenty per centum (20%) annual interest from April 14, 2003, until fully paid, pursuant to Sections 248 and 249 of the 1997 National Internal Revenue Code ("NIRC"), as amended.

Antecedent Facts

The relevant antecedents are succinctly recited by the Court in Division in its Decision dated January 26, 2010, as follows:

THE FACTS

> Petitioner[4] is a corporation, duly organized and existing under the laws of the Republic of the Philippines, and also duly registered as a Philippine Export Zone Authority (PEZA) investor/locator. Its principal place of business, at the time of the issuance of the assessment in dispute, was at Phase 2 Lot 9 Block 4, Rosario, Cavite. Petitioner was engaged in the manufacture and export of apparel and an exporter with secondary license from the PEZA with manufacturing facilities in Rosario, Cavite export processing zone.
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> Respondent,[5] on the other hand, is the duly appointed Commissioner of Internal Revenue vested by law to decide disputed assessment and to enforce the provisions of the National Internal Revenue Code (NIRC), and other tax laws, with office address at the Bureau of Internal Revenue (BIR), National Office Building, Diliman, Quezon City.
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> On April 12, 2000, petitioner filed its Annual Income Tax Return for taxable year 1999. Sometime in 2001, Warnaco (HK) Ltd., then petitioner's parent company, underwent bankruptcy proceedings, and this resulted in the conveyance of ownership of petitioner and its global affiliates to Luen Thai Overseas Limited in December 2001. Thereafter,

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[4] Herein respondent GJM.
[5] Herein petitioner CIR.

the present owner set in place streamlining efforts, among which was the transfer of petitioner's Makati Office to the facilities in Rosario, Cavite.

On August 26, 2002, petitioner filed a letter dated May 29, 2002 with Revenue District Office (RDO) No. 54-Trece Martirez, informing Atty. Ner Alfredo B. Plana, Revenue District Officer, that petitioner will be canceling its registered address from RDO No. 48, and transferring it to RDO No. 54. Petitioner further alleges that its Makati office, which was previously located in Barangay Pio del Pilar, Makati City, had been closed and transferred to its Cavite office/factory in PEZA, Rosario, Cavite, effective April 29, 2002. And on the same date, petitioner allegedly filed with the same RDO No. 48, an Application for Registration Information Update (BIR Form No. 1905), showing its transfer of home RDO from "048" (old RDO) to "058" (new RDO), and with an indication therein of its new registered address, *i.e.*, Phase II Lot 9 Blk. 4 PEZA Rosario, Cavite.

Petitioner's request for transfer of its tax registration from RDO [No.] 48 to RDO [No.] 54 was confirmed through Transfer Confirmation Notice No. OCN ITR 000018688 dated August 26, 2002, duly issued by the BIR RDO [No.] 054, Revenue Region No. 9.

On October 18, 2002, the BIR, through Revenue District Officer Ner Alfredo B. Plana, sent a letter of informal conference dated October 14, 2002, by facsimile transfer, informing petitioner that the report of investigation on its income and business tax liabilities for the calendar year ended December 31, 1999 had been submitted. The report reveals that petitioner is still liable for an income tax deficiency and corresponding 20% interest as well as compromise penalty in the total amount of ₱1,192,541.51. The said tax deficiency resulted from certain disallowances/understatements, to wit: (a) Loading and Shipment/Freight Out in the amount of ₱2,354,426.00; (b) Packing expense, ₱8,859,975.00; (c) Salaries and Wages, ₱2,717,910.32; (d) Staff Employee Benefits, ₱1,191,965.87, and (e) Fringe Benefits Tax, in the amount of ₱337,814.57.

In its letter dated October 24, 2002, petitioner refuted the foregoing findings through its Financial Controller, Ms. Erlinda G. Datu.

On February 12, 2003, respondent issued a Pre-Assessment Notice and Details of Discrepancies against petitioner sustaining the above-stated findings, and giving petitioner the opportunity to present in writing its side of the case within fifteen (15) days from receipt thereof.

On April 14, 2003, respondent issued the undated Assessment Notice No. IT-17316-99-03-282 against petitioner, indicating a deficiency income tax assessment in the amount of ₱1,480,099.29. Pursuant to an undated Details of Discrepancies, said amount was computed as follows:

Net taxable income per return		₱2,848,414.00
Add:	Discrepancies per investigation:	
	Disallowed loading and shipment expenses	2,354,426.00
	Non-deductible raw materials:	

Packing	***Local***	***Imported***	
Beg. Inventory	₱814,379.21	₱337,245.21	
Add: Purchase	6,216,716.00	1,842,555.00	
Total Available Use	₱7,031,095.21	₱2,179,800.21	
Less: Ending Inventory	340,509.03	10,410.55	
Packing Materials Used	₱6,690,586.16	₱2,169,389.66	8,859,975.84
Disallowed Salaries and Wages			2,717,910.32
Disallowed Staff Employees Benefits			1,191,965.87
Non-Deductible Fringe Benefit Tax			337,814.57
Taxable Income per Investigation			₱18,310,506.60
Income Tax Due thereon (5%)			₱915,525.33
Less: Payments			-
Deficiency Income Tax			₱915,525.33
Add: Interest 04-15-00 to 05-15-03			564,573.96
TOTAL AMOUNT DUE			₱1,480,099.29

On July 25, 2003, respondent issued a Preliminary Collection Letter addressed to petitioner, requesting the latter to pay the aforesaid income tax deficiency for the taxable year 1999. It is noted that said Letter was addressed to the President/General Manager of petitioner at its former address: 4700 4/E Goldrich Mansion, Cuenco Street, Pio del Pilar, Makati City.

On August 18, 2003, respondent issued a Final Notice Before Seizure addressed to petitioner informing the latter that it was being given a last opportunity to make the necessary settlement of the same deficiency income tax for taxable year 1999. Petitioner claims that although said notice indicated its new address at Phase 2 Lot 9 Blk. 4, PEZA, Rosario, Cavite, the same never reached it.

On December 8, 2003, petitioner received a Warrant of Distraint and/or Levy from the BIR RDO [No.] 48-West Makati, which stemmed from Assessment/Demand No. IT-17316-99-03-282 on April 14, 2003, involving the amount of ₱1,480,099.29, as deficiency income tax for taxable year 1999. Accompanying the said Warrant were the Preliminary Collection Letter dated July 25, 2003, and the Final Notice Before Seizure dated August 18, 2003

On January 7, 2004, petitioner filed its Letter Protest dated January 6, 2004 against the said Warrant of Distraint and/or Levy dated November 27, 2003. And on January 26, 2004, petitioner received respondent's letter dated January 15, 2003, supposedly constituting the respondent's final decision on the disputed assessment, denying petitioner's protest for lack of factual and legal bases.

In view of respondent's denial of petitioner's letter-protest dated January 6, 2004, petitioner filed the instant Petition for Review on February 24, 2004.

On May 28, 2004, respondent filed his Answer alleging the following special and affirmative defenses:

> "12. He reiterates and repleads the preceding paragraphs of this answer as part of his Special and Affirmative Defenses:
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> 13. The Petition for Review filed by petitioner states NO CAUSE OF ACTION, hence, dismissible under Rule 16 of the Rules of Civil Procedure, there being NO DISPUTED ASSESSMENT to speak of, in order that this Honorable Court may acquire jurisdiction over the case, considering the fact that the amount being collected by the BIR per Warrant of Distraint and/or Levy dated November 27, 2003 has long became final, executory and demandable;
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> 14. Pursuant to Section 218 of the 1997 Tax Code, it states that '*No Court shall have the authority to grant injunction to restrain the collection of any National Internal Revenue Tax, fee or charges imposed by this Code,*' this Honorable Court, in the instant case, has no authority to restrain the collection of taxes (*i.e.*, income) which has long become final, executory and demandable. The justification for the rule is found in several cases decided by the Supreme Court fact back in the case of ***Churchill and Tait vs. Rafferty, et al., 32 Phils. 580,*** which held that 'A provision in an internal revenue law prohibiting the court from enjoining the collection of an internal revenue tax is

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not invalid as opposed to the due process and equal protection clause of the constitution. It is upon taxation that the Government chiefly relies to obtain the means to carry on its operations and it is of the utmost importance that the means adopted to enforce the collection of taxes levied should be summary and interfered with as little as possible.'

15. Section 228 of the 1997 Tax Code, partly provides, *viz.*:

> 'Sec. 228. *Protesting of Assessment.* – 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.*'** **(Emphasis supplied)**

In relation thereto, Section 3.1.7 of Revenue Regulations No. 12-99, provides that:

> 'Section 3.1.7.*Constructive Service.* – If the notice to the taxpayer herein required is served by registered mail, and no response is received from the taxpayer within the prescribed period from the date of the posting thereof in the mail, the same shall be considered actually or constructively received by the taxpayer.'

In the instant case, the fact that the BIR received no response from petitioner within the prescribed period from the date the undated Formal Assessment Notice (FAN) No. IT-17316-99-03-282, was posted by registered mail, on April 14, 2003, sent to its new address located at Phase 2, Lot 9, Blk. 4, PEZA, Rosario, Cavite, assessing petitioner the deficiency income tax for taxable year 1999, said notice (*i.e.*, FAN) of assessment was considered to have been actually or constructively received by the petitioner.

Accordingly, the fact that petitioner filed its administrative protest with the Bureau of Internal Revenue only on **January 7, 2004**, when it was deemed to have **constructively received** the said undated Formal Assessment Notice No. IT-17316-99-03-282, which was posted by registered mail on April 14, 2003, said deficiency income tax assessment issued to petitioner have already become final and executory by operation of law, for failure of petitioner to file its administrative protest within the reglementary period of thirty (30) days.

16. Since the assessments have become final, this Honorable Court has no jurisdiction to act on the instant petition. Hence, the Warrant of Distraint and/or Levy issued to petitioner is valid and enforceable.

17. The Letter Protest dated January 6, 2004 of petitioner is not a protest contemplated under Section 228 of the 1997 Tax Code, to the undated Formal Assessment Notice No. IT-17316-99-03-282, but a protest to the Warrant of Distraint and/or Levy dated November 27, 2003, which shows that the 1999 deficiency income tax assessment issued to petitioner has long become final, executory and demandable.

18. Assuming, but without conceding that petitioner received the undated Formal Assessment Notice No. IT-17316-99-03-282 **only January 26, 2004**, said assessment is still valid since the same was served by the BIR to petitioner at its new address located at Phase 2, Lot 9, Blk. 4, PEZA, Rosario, Cavite, by registered mail on **April 14, 2003**, which is within the prescriptive period under Section 203 of the 1997 Tax Code.

It is a settled rule in taxation that an assessment is deemed made for the purpose of giving effect thereto if it is made within the prescribed period and is released, mailed, or sent to the taxpayer also within the same period. It is not required that the notice be received by the taxpayer within the prescribed period. But the sending of the notice must be duly proven. ***(Basilan Estate, Inc. vs. CIR, L-22429, Sept. 5, 1967)***

19. The fact that the Preliminary Assessment Notice and Formal Assessment Notice were served to petitioner, at its new address located at Phase 2, Lot 9, Blk. 4, PEZA, Rosario, Cavite, and the details of the proposed assessment of petitioner's income tax liability for taxable year 1999 were properly acknowledged by petitioner's representative,

ERLINDA G. DATU, Financial Controller, when she submitted a reply dated October 24, 2002, protesting the said assessment, it is, therefore clear that respondent has complied with the procedural due process under Section 228 of the 1997 Tax Code, as implemented by Revenue Regulations No. 12-99.

20. Assuming, without conceding that this Honorable Court has jurisdiction over the case, petitioner was assessed for deficiency income tax for taxable year 1999 for the reason that petitioner being a PEZA registered entity is subject to the 5% special tax rate based on gross income earned, hence, the audit investigation of the BIR was concentrated on the composition of the cost of goods manufactured which was deducted from its gross sales. Accordingly, taking in consideration the provisions of Section 4.1 of the PEZA Resolution No. 00-01, the claimed expense of petitioner which were included as part of the cost were disallowed. These should have been deducted as operating expense and not as a cost of goods manufactured.

21. Verification disclosed that the portion of Loading and Shipment Expense of petitioner deducted as part of the cost was composed of cost of freight of finished products from place of production to the place of shipment and expenses incurred before the goods are shipped out of the country, hence, considered as part of selling expense.

22. Verification disclosed that the packing materials w[ere] included in the raw materials account which petitioner claimed as deduction from its sales to arrive at gross taxable income. Since the product of the company are garments, the packing materials does not form part of the products, thus, cannot be considered as part of the cost.

23. As to the disallowance of Staff Employees benefits, verification showed that this account which petitioner included in the overhead account as part of cost are benefits given to officers and staff of the company in the form of wages of drivers and maids, house rental and staff uniforms who are not performing the job directly related to production of its garments product.

24. As to the disallowance of Salaries and Wages, verification disclosed that the same were disallowed since it

represent the salaries of officers and staff who are not directly involved in the production process, hence, cannot be considered as part of indirect labor and cannot be deducted from gross sales to arrive at gross income.

25. As to the non-deductibility of Fringe Benefit Tax, verification disclosed that the tax on fringe benefits given to petitioner's employees holding managerial and supervisory positions was deducted as part of the cost instead of deducting it as part of expense under RR 3-98 dated May 21, 1998.

26. Petitioner failed to comply with the requirements under Section 34(A)(1)(b) of the Tax Code which partly provides:

> '(b) *Substantiation Requirements.* – No deduction from gross income shall be allowed under Subsection (A) hereof unless the taxpayer shall substantiate with sufficient evidence, such as official receipts or other adequate records: (i) the amount of the expense being deducted, and (ii) the direct connection or relation of the expense being deducted to the development, management, operation and/or conduct of the trade, business or profession of the taxpayer.'

27. The assessments issued against petitioner for deficiency income tax, for taxable year 1999, covered under Formal Assessment Notice No. IT-17316-99-03-282 was made in accordance with law and regulations.

28. All presumptions are in favor of the correctness of tax assessments."

On June 6, 2004, the parties submitted their Joint Stipulation of Facts and Issues, which was approved by this Court in the Resolution dated June 20, 2005.

During trial, petitioner and respondent presented their respective oral and documentary evidence, and correspondingly, filed their respective formal offer of exhibits. Meanwhile, respondent forwarded the BIR Records (consisting of 756 pages) pertaining to this case on October 25, 2006.

Upon the filing of the parties' respective memorandum on January 12, 2009 by respondent, and on January 20, 2009 by petitioner, this case was deemed submitted for decision per this Court's Resolution dated February 3, 2009.[6]

The Ruling of the Court in Division

On January 26, 2010, the Court in Division issued the assailed Decision in favor of GJM, ruling that:

> **WHEREFORE,** the deficiency income tax assessment in the amount of ₱1,480,099.29, inclusive of interest, for taxable year 1999, covered by Formal Assessment Notice No. IT-17316-99-03-282 and the Warrant of Distraint and/or Levy dated November 27, 2003, both issued against petitioner by respondent, are hereby **CANCELLED** and **WITHDRAWN**.
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> Accordingly, respondent is hereby **ORDERED** to cease and desist from implementing the said assessment and Warrant.
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> **SO ORDERED.**[7]

Aggrieved, the CIR filed a Motion for Reconsideration on February 24, 2010, which was denied by the Court in Division in its Resolution promulgated on May 4, 2010.

The Issues

Hence, the present Petition for Review wherein the CIR assigns the following errors:

> I.
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> THE FIRST DIVISION OF THIS HONORABLE COURT ERRED IN HOLDING THAT PETITIONER FAILED TO ESTABLISH THE FACT THAT THE FORMAL ASSESSMENT NOTICE (FAN) FOR DEFICIENCY INCOME TAX FOR TAXABLE YEAR 1999 HAD BEEN RELEASED, MAILED OR SENT TO HEREIN RESPONDENT WITHIN

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[6] *Rollo*, pp. 24-34.
[7] *Ibid.*, p. 40.

THE 3-YEAR PRESCRIPTIVE PERIOD UNDER SECTION 203 OF THE NIRC OF 1997;

II.

THE FIRST DIVISION OF THIS HONORABLE COURT ERRED IN HOLDING THAT THE RIGHT OF THE BIR TO ASSESS HEREIN RESPONDENT FOR DEFICIENCY INCOME TAX FOR TAXABLE YEAR 1999 HAS ALREADY PRESCRIBED; and

III.

THE FIRST DIVISION OF THIS HONORABLE COURT ERRED IN HOLDING THAT THE FORMAL ASSESSMENT NOTICE (FAN) ISSUED BY THE BIR TO HEREIN RESPONDENT FOR DEFICIENCY INCOME TAX FOR TAXABLE YEAR 1999 HAS NOT YET BECOME FINAL, EXECUTORY AND DEMANDABLE.[8]

The Ruling of the Court En Banc

The Court *En Banc* finds the Petition for Review unmeritorious.

As determined by the Court in Division, Section 203 of the 1997 NIRC, as amended, expressly provides for the period upon which the CIR can make an assessment, 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 law day.

As stated from the above-quoted provision, the CIR has three (3) years, counted from the date of actual filing of the return, or from the last day prescribed

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[8] *Ibid.*, p. 13.

by law for the filing of the return, whichever comes later, to assess a national internal revenue tax, or to begin a court proceeding for the collection thereof without an assessment; except in cases falling within Section 222[9] of the same Code.

GJM's alleged deficiency assessments consist of Income Tax, the relevant provision of the 1997 NIRC, as amended, is hereby quoted:

> SEC. 77. *Place and Time of Filing and Payment of Quarterly Corporate Income Tax.* –
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> > (A) *Place of Filing.* – Except as the Commissioner otherwise permits, the quarterly income tax declaration required in Section 75 and the final adjustment return required in Section 76 shall be filed with the authorized agent banks or Revenue District Officer or Collection Agent or duly authorized Treasurer of the city or municipality having jurisdiction over the location of the principal office of the corporation filing the return or place where its main books of accounts and other data from which the return is prepared are kept.
> >
> > (B) *Time of Filing the Income Tax Return.* – The corporate quarterly declaration shall be filed within sixty (60) days following the close of each of the first three (3) quarters of the taxable year. **The final adjustment return shall be filed on**

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[9] 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.
(c) Any internal revenue tax which has been assessed within the period of limitation as prescribed in paragraph (a) hereof may be collected by distraint or levy or by a proceeding in court within five (5) years following the assessment of the tax.
(d) Any internal revenue tax, which has been assessed within the period agreed upon as provided in paragraph (b) hereinabove, may be collected by distraint or levy or by a proceeding in court within the period agreed upon in writing before the expiration of the five (5)-year period. The period so agreed upon may be extended by subsequent written agreements made before the expiration of the period previously agreed upon.
(e) *Provided, however,* That nothing in the immediately preceding Section and paragraph (a) hereof shall be construed to authorize the examination and investigation or inquiry into any tax return filed in accordance with the provisions of any tax amnesty law or decree.

> **or before the fifteenth (15th) day of April, or on or before the fifteenth (15th) day of the fourth (4th) month following the close of the fiscal year, as the case may be.**
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> (C) *Time of Payment of the Income Tax.* – The income tax due on the corporate quarterly returns and the final adjustment income tax returns computed in accordance with Sections 75 and 76 shall be paid at the time the declaration or return is filed in a manner prescribed by the Commissioner. (*Boldfacing supplied.*)

Thus, the three (3)-year period within which the CIR can validly issue an assessment is reckoned from: (a) the last day required by law for filing the final adjustment return, *i.e.*, on or before the fifteenth (15th) day of April, or on or before the fifteenth (15th) day of the fourth (4th) month following the close of the fiscal year, as the case may be; or (b) the date of actual filing of the return, whichever is later.

Based on the records of the case, GJM filed its Annual Income Tax Return for the taxable year 1999 on April 12, 2000, consequently, the three (3)-year period within which the CIR can validly issue assessment is until April 15, 2003. And records show that the FAN, with attached Details of Discrepancies, was released, mailed and sent through registered mail on April 14, 2003. Apparently, the FAN was made within the period provided under Section 203 of the 1997 NIRC, as amended. Thus, the Court in Division ruled as follows:

> The settled rule in our jurisprudence is that when mail matter is sent by registered mail, there may exist a presumption, set forth under Section 2(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 this presumption are: (a) that the letter was properly addressed with postage prepaid; and (b) that it was mailed. Once these facts are proved, 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 mails.[10] (*Citations omitted.*)

In the case of *Collector of Internal Revenue v. Bautista,*[11] the High Tribunal held that an assessment is made within the prescriptive period if notice to this effect is released, mailed or sent by the CIR to the taxpayer within said period. Receipt thereof by the taxpayer within the prescriptive period is not necessary. However, at this point, it should be clarified that the rule does not dispense with the requirement that the taxpayer should actually receive, even beyond the prescriptive period, the assessment notice which was timely released, mailed and sent.[12]

Thus, the Court in Division noted as follows:

> xxx While respondent[13] avers that it sent through registered mail the subject assessment notice on April 14, 2003, within the three (3)-year prescriptive period, petitioner[14] denies having received the said assessment notice from respondent. Petitioner alleges (*i*) that it came to know of the deficiency income tax assessment only on December 8, 2003 when it was served with the Warrant of Distraint and/or Levy; and (*ii*) that it was able to receive the Formal Assessment Notice and the Details of Discrepancies on January 26, 2004, when the same documents were attached to respondent's letter dated January 15, 2004.
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> xxx xxx xxx
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> Therefore, considering that petitioner denies receipt of the said mail, it behooves upon respondent to prove that it was indeed received by petitioner.[15]

In the case of *Commissioner of Internal Revenue v. Metro Star Superama, Inc.,*[16] the Supreme Court ruled in this wise:

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[10] *Rollo*, pp. 37-38.
[11] 105 Phil. 1326, 1327 (1959).
[12] Barcelon, Roxas Securities, Inc., (now known as UBP Securities, Inc.) *v.* Commissioner of Internal Revenue, G.R. No. 157064, August 7, 2006, *citing Collector of Internal Revenue v. Bautista, supra note 11.*
[13] Herein petitioner CIR.
[14] Herein respondent GJM.
[15] *Rollo*, pp. 37-39.

On the matter of service of a tax assessment, a further perusal of our ruling in *Barcelon* is instructive, *viz*:

> Jurisprudence is replete with cases holding that 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. The *onus probandi* was shifted to respondent to prove by contrary evidence that the Petitioner received the assessment in the due course of mail.** The Supreme Court has consistently held that while a mailed letter is deemed received by the addressee in the course of mail, this is merely a disputable presumption subject to controversion and a direct denial thereof shifts the burden to the party favored by the presumption to prove that the mailed letter was indeed received by the addressee *(Republic vs. Court of Appeals, 149 SCRA 351)*. Thus as held by the Supreme Court in *Gonzalo P. Nava vs. Commissioner of Internal Revenue, 13 SCRA 104, January 30, 1965*:
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> > "The facts to be proved to raise this presumption are (a) that the letter was properly addressed with postage prepaid, and (b) that it was mailed. Once these facts are proved, 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. But if one of the said facts fails to appear, the presumption does not lie. *(VI, Moran, Comments on the Rules of Court, 1963 ed, 56-57 citing Enriquez vs. Sunlife Assurance of Canada, 41 Phil 269).*"
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> xxx. **What is essential to prove the fact of mailing is the registry receipt issued by the Bureau of Posts or the Registry return card which would have been signed by the Petitioner or its authorized representative.** And if said documents cannot be located, Respondent at the very least, should have submitted to the Court **a certification issued by the Bureau of Posts** and **any other pertinent document which is executed with the intervention of the Bureau of Posts.** This Court does not put much credence to the self

[16] G.R. No. 185371, December 8, 2010, 637 SCRA 633.

serving documentations made by the BIR personnel especially if they are unsupported by substantial evidence establishing the fact of mailing. Thus:

> "While we have held that an assessment is made when sent within the prescribed period, even if received by the taxpayer after its expiration *(Coll. of Int. Rev. vs. Bautista, L-12250 and L-12259, May 27, 1959)*, this ruling makes it the more imperative that the release, mailing or sending of the notice be clearly and satisfactorily proved. Mere notations made without the taxpayer's intervention, notice or control, without adequate supporting evidence cannot suffice; otherwise, the taxpayer would be at the mercy of the revenue offices, without adequate protection or defense." *(Nava vs. CIR, 13 SCRA 104, January 30, 1965).*

xxx

The failure of the respondent to prove receipt of the assessment by the Petitioner leads to the conclusion that no assessment was issued. Consequently, the government's right to issue an assessment for the said period has already prescribed. *(Industrial Textile Manufacturing Co. of the Phils., Inc. vs. CIR CTA Case 4885, August 22, 1996).* (*Boldfacing supplied and citations omitted.*)

The Court *En Banc* accordingly agrees with the disquisition made by the Court in Division, to wit:

> To prove that the subject mail was served upon petitioner, respondent offered in evidence the Transmittal Letter No. 282 dated April 14, 2003 duly prepared and signed by Ms. Ma. Nieva A. Guerrero, as Chief of the Assessment Division of BIR Revenue Region No. 8-Makati. In the said Transmittal Letter, certain entries were made regarding petitioner, namely, its name, the assessment number, the tax year, the kind of tax, and the amount of the deficiency tax. A stamp mark of the Makati Central Post Office with date (*i.e.*, "April 14, 2003") also appears on the same Transmittal Letter.
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> xxx xxx xxx

Notably however, respondent did not present Ma. Nieva A. Guerrero to testify on the said Transmittal Letter dated April 14, 2003 which she supposedly prepared and signed, considering that petitioner has denied having received the subject Formal Assessment Notice and the Details of Discrepancies. Furthermore, independent evidence, such as the registry receipt of the assessment notice, or a certification from the Bureau of Posts, could have easily been obtained, and offered before this Court, yet respondent failed to do so.

xxx xxx xxx

Thus, for failure of respondent to establish that Formal Assessment Notice No. IT-17316-99-03-282 had been released, mailed or sent within the three (3)-year prescriptive period under Section 203 of the NIRC of 1997, the right of the Government to assess the subject tax has prescribed.[17]

With this, the Court *En Banc* cannot likewise impose the twenty five per centum (25%) surcharge for late payment, and twenty per centum (20%) annual interest from April 14, 2003, until full payment, pursuant to Sections 248[18] and 249[19] of the 1997 NIRC, as amended, as found by the Court in Division, to quote:

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[17] *Rollo*, pp. 38-40.

[18] SEC. 248. *Civil Penalties.* –

(A) There shall be imposed, in addition to the tax required to be paid, a penalty equivalent to twenty-five percent (25%) of the amount due, in the following cases:

(1) Failure to file any return and pay the tax due thereon as required under the provisions of this Code or rules and regulations on the date prescribed; or

(2) Unless otherwise authorized by the Commissioner, filing a return with an internal revenue officer other than those with whom the return is required to be filed; or

(3) Failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment; or

(4) Failure to pay the full or part of the amount of tax shown on any return required to be filed under the provisions of this Code or rules and regulations, or the full amount of tax due for which no return is required to be filed, on or before the date prescribed for its payment.

(B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud: *Provided,* That a substantial under declaration of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, shall constitute *prima facie* evidence of a false or fraudulent return: *Provided, further,* That failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding thirty percent (30%) of actual deductions, shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions, as mentioned herein.

[19] SEC. 249. *Interest.* –

> xxx, [T]he assailed Formal Assessment Notice could not have produced the legal effect of making petitioner a delinquent income taxpayer for taxable year 1999. There is, therefore, no delinquency income tax to speak of to justify the collection of any income tax delinquency from petitioner for such taxable year, through the issuance of a warrant of distraint and/or levy.[20]

With the foregoing discussions, the Court *En Banc* finds the order of cancellation and withdrawal of the Formal Assessment Notice No. IT-17316-99-03-282, and the Warrant of Distraint and/or Levy dated November 27, 2003 proper.

In sum, there is no compelling reason to warrant a reversal or even a modification of the assailed Decision and Resolution.

WHEREFORE, the Petition for Review is hereby **DENIED.** Accordingly, the impugned Decision dated January 26, 2010 and Resolution dated May 4, 2010 are hereby **AFFIRMED** in *toto*.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

(A) *In General.* – There shall be assessed and collected on any unpaid amount of tax, interest at the rate of twenty percent (20%) per annum, or such higher rate as may be prescribed by rules and regulations, from the date prescribed for payment until the amount is fully paid.
(B) *Deficiency Interest.* – Any deficiency in the tax due, as the term is defined in this Code, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof.
(C) *Delinquency Interest.* – In case of failure to pay:
(1) The amount of the tax due on any return required to be filed, or
(2) The amount of the tax due for which no return is required, or
(3) A deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner, there shall be assessed and collected on the unpaid amount, interest at the rate prescribed in Subsection (A) hereof until the amount is fully paid, which interest shall form part of the tax.
(D) *Interest on Extended Payment.* – If any person required to pay the tax is qualified and elects to pay the tax on installment under the provisions of this Code, but fails to pay the tax or any installment hereof, or any part of such amount or installment on or before the date prescribed for its payment, or where the Commissioner has authorized an extension of time within which to pay a tax or a deficiency tax or any part thereof, there shall be assessed and collected interest at the rate hereinabove prescribed on the tax or deficiency tax or any part thereof unpaid from the date of notice and demand until it is paid.
[20] *Rollo*, p. 40.

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
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.

ERNESTO D. ACOSTA
Presiding Justice