REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB NO. 972
(CTA CASE NO. 7281)

-versus-

Present:

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

FIRST GAS POWER CORPORATION,
Respondent.

Promulgated:
MAY 12 2014 ar Apolinario 9:00 a.m.

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DECISION

RINGPIS-LIBAN, J.

Before the Court En Banc is a Petition for Review under Section 3(b), Rule 8 of the Revised Rules of the Court of Tax Appeals seeking the nullification of the Decision of the Third Division of the Court promulgated on 24 September 2012, the dispositive portion of which reads:

> "WHEREFORE, the instant Petition for Review is hereby GRANTED. Accordingly, the following are hereby CANCELLED and WITHDRAWN:
>
> 1. Final Assessment Notice and Formal Letter of Demand for deficiency income tax for Calendar Year ended December 31, 2000 in the total amount of Php37,099,915.29 inclusive of surcharge, interest and compromise penalties;
> 2. Final Assessment Notice and Formal Letter of Demand for deficiency income tax for Calendar Year ended December 31, 2001 in the total amount of Php82,365,799.90 inclusive of surcharge, interest and compromise penalties; and
> 3. Final Assessment Notice and Formal Letter of Demand for penalties assessment for Calendar Year ended December 31, 2001 in the total amount of Php4,670,630.18 inclusive of surcharge, interest and compromise penalties.
>
> SO ORDERED."

and the Resolution of the same Third Division promulgated on 13 December 2012 denying the Commissioner of Internal Revenue's ("CIR") Motion for Reconsideration.

THE FACTS

The facts as narrated in the Decision[1] are as follows:

> "Based on the Joint Stipulation of Facts and issues dated September 1, 2006, petitioner[2] was registered with the Board of Investments in accordance with the provisions of Executive Order No. 226, otherwise known as the Omnibus Investment Code of 1987, and was given an income tax holiday incentive for six (6) years from commencement of actual operations, or until May 2006. Petitioner applied for a change of accounting period from June 30 to December 31 was (sic) approved by the BIR on February 7, 2001.
>
> With regards to the assessment in question, the Joint Stipulation of Facts and Issues dated September 1, 2006 provided that:
>
> "4. On October 24, 2002, [p]etitioner received a Letter of Authority ("LA") from the [r]espondent[3] authorizing the BIR's representative to examine the books of accounts and other accounting records of [p]etitioner for all revenue taxes for the taxable years 2000 and 2001.

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[1] *Rollo*, CTA EB CASE NO. 972, pp. 44 to 56
[2] Respondent First Gas Power Corporation in this Petition for Review.
[3] Petitioner in this Petition for Review.

5. On 30 September 2003, [p]etitioner received a Notice to taxpayer from the BIR requesting [p]etitioner for an informal conference on October 15, 2003.

6. On 11 March 2004, [p]etitioner received Preliminary Assessment Notices ("PAN") dated 15 December 2003 and 28 January 2004, wherein [p]etitioner was assessed the following alleged deficiency taxes and penalties for the years 2000 and 2001:

a) Deficiency Income Tax for 2000	PhP85,571,959.65
b) Deficiency Income Tax for 2001	PhP97,999,363.41
c) Late Payment Penalties for 2001	PhP4,670,630.18

7. On 06 April 2004, [p]etitioner filed its Preliminary Reply to the PAN issued by the [r]espondent.

8. On 06 September 2004, [p]etitioner filed another set of Assessments all dated 19 July 2004.

8.1 Under the Assessments, [p]etitioner is being assessed the following alleged deficiency taxes and penalties for the years 2000 and 2001:

a) Deficiency Income Tax for 2000	PhP37,099,915.29
b) Deficiency Income Tax for 2001	PhP82,365,799.90
c) Late Payment Penalties for 2001	PhP4,670,630.18

8.2 Petitioner is being assessed deficiency income tax for the calendar year ending 31 December 2000 due to its alleged unreported income on pre-income tax holiday sale of electricity to Meralco and Siemens, as well as for its alleged unreported interest income from foreign investments and dollar loan proceeds realized prior to commercial operations.

8.3 On the other hand, [p]etitioner is being assessed deficiency income tax for the calendar year ending 31 December 2001 due to its disallowed interest expense from dollar deposits in foreign banks and its disallowed compensation expense.

8.4 Finally, [p]etitioner is being assessed penalties for the calendar year ending 31 December 2001 due to the late payment of withholding tax on foreign loans and late payment of excise tax on natural gas.

9. On 5 October 2004, [p]etitioner filed a Letter of Protest before [r]espondent Commissioner of Internal Revenue, Honorable Guillermo L. Parayno. Jr., which has not yet been acted upon up to this date.

x xx xxx xxx

3. Petitioner submitted its documentary evidence in support of its Protest on 02 December 2004, or fifty eight (58) days from

> filing of its Protest, well within the sixty (60) day period required by Section 228 of the NIRC, as implemented by Section 3 of Revenue Regulations No. 12-99.
>
> 4. Petitioner filed its Petition for Review on 30 June 2005, thirty (30) days after the lapse of the 180 days within which respondent has to act upon the Letter of Protest."

On September 24, 2012 and December 13, 2013, the Third Division rendered the questioned Decision and Resolution.

Aggrieved, the CIR filed before the Court *En Banc* the subject Petition for Review[4].

First Gas Power Corporation ("First Gas") was directed by the Court *En Banc* to file its Comment in this case[5]. On March 19, 2013, First Gas filed its Comment[6], and sought for this Court *En Banc* to dismiss CIR's Petition for Review for utter lack of merit and affirm the Decision and Resolution of the Third Division.

Thereafter, both parties were ordered to file their respective Memoranda[7]. Petitioner CIR filed a "Manifestation"[8] stating that she is adopting the arguments raised in her Petition for Review filed on December 28, 2012 as her Memorandum. First Gas filed its Memorandum[9] on July 8, 2013.

This case was deemed submitted for decision on August 14, 2013[10].

ISSUES

The principal issue in this case is whether or not the Third Division erred in cancelling and setting aside the assessments for deficiency income tax issued against First Gas for Taxable Years 2000 and 2001 and the penalties assessment for Calendar Year ended December 31, 2001.

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[4] *Ibid,* pp. 1.
[5] Resolution dated January 28, 2013.
[6] *Ibid,*pp. 73.
[7] *Ibid,*pp. 1167-1168.
[8] *Ibid,*pp. 1180-1183.
[9] *Ibid,*pp. 1225-1260.
[10] *Ibid,*pp. 1263-1264.

PETITIONER'S ARGUMENTS

The CIR argues that the deficiency tax assessment made against First Gas for taxable years 2000 and 2001 as well as the late payment penalties for 2001 were issued within the prescriptive period allowed by law in view of the series of waivers executed by its duly authorized representatives; that the defences of prescription and defects in waivers were not raised in the administrative level.

RESPONDENT'S ARGUMENTS

First Gas argues that it timely filed its Income Tax Returns for taxable years 2000 and 2001; the defences of prescription and defects in the waivers were raised at the administrative level; and that it has sufficiently proven that petitioner's assessments are erroneous.

RULINGS OF THE COURT

The Court *En Banc* finds no reversible error in the assailed Decision of the Third Division.

A perusal of the records show that the assessments for taxable year 2000 were issued beyond the prescriptive period.

In the Decision dated September 24, 2012, the Third Division correctly ruled as follows:

> "*Taxable Year 2000*
>
> Petitioner asserts that respondent's right to assess deficiency taxes for the year 2000 has prescribed considering that it received the Final Assessment Notice ("FAN") with accompanying Formal Letter of Demand only on September 6, 2004.
>
> From the records, it has been shown that petitioner changed its accounting period from fiscal to calendar.[11] As its original fiscal year ended June 30, 2000, petitioner filed its Annual Income Tax Return on October 16, 2000.[12] For the period covering July to December 2000, petitioner filed another Annual Income Tax Return on April 16, 2001.[13] Counting from the foregoing dates of filing, respondent has three (3) years, or until October 16, 2003 and April 16,

[11] Exhibit "O".
[12] Exhibit "N".
[13] Exhibit "P".

2004, respectively, to assess petitioner, pursuant to Section 203 of the 1997 NIRC.

Respondent, on the other hand, counters that petitioner executed a waiver[14] of the Statute of Limitations on April 12, 2004 thereby suspending the running of the three (3)-year prescriptive period.

However, petitioner questions the validity of the said waiver, pointing out that the said waiver did not indicate the date of receipt and acceptance by respondent, a violation of pertinent provisions of Revenue Memorandum Order (RMO) No. 20-90, which states that:

> "xxx xxx xxx
>
> In the execution of said waiver, the following procedures should be followed:
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> xxx xxx xxx
>
> 2. The waiver shall 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.
>
> Soon after the waiver is signed by the taxpayer, the Commissioner of Internal Revenue or the revenue official authorized by him, as hereinafter provided, shall sign the waiver indicating that the Bureau has accepted and agreed to the waiver. The date of such acceptance by the Bureau should be indicated. 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."

Respondent explains that the dates of execution and notarization are identical, indicating that the same were executed and accepted by both petitioner and respondent on the same date. However, upon scrutiny of the waiver executed on April 12, 2004, it reveals that only petitioner's Vice President Mr. Nestor H. Vasay appeared before the Notary Public.[15]

Further, the original copies of the same waiver likewise lack the signature showing receipt by the taxpayer of his/her files (sic) copy as provided in RMO No. 20-90:

> '4. The waiver must be executed in three (3) 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 shall be indicated in the original copy.'** *(emphasis supplied)*

In *Commissioner of Internal Revenue v. Kudos Metal Corporation*[16], the Supreme Court enunciated the requirements of a properly executed waiver:

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[14] Exhibit "Q".
[15] Exhibit "22".
[16] G.R. No. 178087, May 5, 2010, [620 SCRA 232].

> '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 05-01issued 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 should be indicated. However, before signing the waiver, the CIR 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.'

In the same case, the Supreme Court came to the conclusion that the waivers were executed without the notarized written authority to sign the waiver in behalf of respondent as well as failing to indicate the date of acceptance and the fact of receipt by respondent of its file copy was not indicated in the original copies of the waivers. Thus, due to the defects in the waivers, the period to assess or collect taxes was not extended. Consequently, the assessments were issued by the BIR beyond the three-year period and are void.[17]

In *Philippine Journalist, Inc. v. Commissioner of Internal Revenue,*[18] the Supreme Court held that:

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[17] *Id.*
[18] G.R. No. 162852, December 16, 2004, [447 SCRA 214, 224].

> "A waiver of the statute of limitations under the NIRC, to a certain extent, is a derogation of the taxpayers' right to security against prolonged and unscrupulous investigations and must therefore be carefully and strictly construed. The waiver of the statute of limitations is not a waiver of the right to invoke the defense of prescription as erroneously held by the Court of Appeals. It is an agreement between the taxpayer and the BIR that the period to issue an assessment and collect the taxes due is extended to a date certain. The waiver does not mean that the taxpayer relinquishes the right to invoke prescription unequivocally particularly where the language of the document is equivocal. For the purpose of safeguarding taxpayers from any unreasonable examination, investigation or assessment, our tax law provides a statute of limitations in the collection of taxes. Thus, the law on prescription, being a remedial measure, should be liberally construed in order to afford such protection. As a corollary, the exceptions to the law on prescription should perforce be strictly construed."

Thus, it does not surprise Us that the Supreme Court has upheld decisions of this Court wherein strict compliance of the provisions of RMO No. 20-90 and RDAO No. 05-01 when executing waivers of the Statute of Limitations were required of the parties.[19]

xxx xxx xxx

For taxable year 2000, the period to assess was not suspended or tolled. It is therefore unnecessary to discuss the validity of the subsequent waivers executed. Consequently, the deficiency income tax assessment issued by respondent for taxable year 2000 amounting to 37,099,915.29 is barred by prescription.[20]"

The Court likewise finds no merit in the CIR's argument that the absence of the date of acceptance in the waiver is not a fatal error because it can be presumed that the date of acceptance by the BIR of the waivers is at the time of notarization.

In *Commissioner of Internal Revenue vs. Kudos Marketing Corporation*[21], this Court ruled that "the date of notarization cannot be regarded as the date of acceptance for the same refers to different aspects, as the notary public is distinct from the Commissioner of BIR who is authorized by law to accept Waivers of the Statute of Limitations".

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[19] *Rollo*, CTA EB Case No. 972, pp. 49-53.
[20] *Ibid*, p. 54.
[21] CTA EB No. 176, September 25, 2006.

Moreover, there is no indication that the Revenue Official was present during the notarization of the waivers. The Acknowledgement of the waiver[22] reads:

> "In Quezon City on this Apr 12, 2004 day of April 2004 personally appeared before me Mr. Nestor H. Vasay, with Community Tax Certificate No. 22302371 issued at Quezon City on February 18, 2004 in his capacity as Vice President of First Gas Power Corp., known to me to be the same person who executed the foregoing waiver for and in behalf of the said taxpayer, and he acknowledged to me that the same is voluntary act and deed of Mr. Nestor H. Vasay, and that he is duly authorized to sign the same."

CIR's stance that a waiver is a unilateral act, is likewise misplaced. A waiver required under the Tax Code and RMO No. 20-90 is in the nature of a contract.

As provided in Section 222 (b) of the NIRC:

> *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.*
>
> xxx
>
> 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.** xxx

As previously stated in the case of *Philippine Journalists Inc. vs. CIR,*[23] a waiver of the statute of limitations is "an agreement between the taxpayer and the BIR that the period to issue an assessment and collect the taxes due is extended to a date certain."

CIR next argues that should the Court apply RMO No. 20-90, the same should be applied in its entirety and that RMO No. 20-90 does not provide for invalidity should there be omission in the waiver. Moreover, RMOs are merely directives which are intended only for the guidance of revenue officers and that RMO No. 20-90 was not published in the Official Gazette or in a newspaper of general circulation. Hence, failure to strictly comply with its directives will neither invalidate the waiver nor will it affect or modify the assessment validly issued. The only sanction therein is that the revenue officer would be subject to disciplinary action but would not affect the substance of the waivers executed by the parties concerned.

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[22] Exhibit "Q".
[23] G.R. No. 162852, December 16, 2004.

RMO No. 20-90 provides for the detailed guidelines in relation to the issuance of the waiver described in Section 222 of the NIRC. As ruled by the Supreme Court in *Kudos*, RMO No. 20-90 must be strictly followed.

First Gas is correct when it claims that said RMO is in the nature of an administrative rule that does not require publication for its validity. In the case of *La Suerte Cigar and Cigarette Factory, et al. vs. Court of Tax Appeals, et al.*,[24] the Supreme Court ruled that administrative issuances that interpret a pre-existing law need not be published in order to be valid. Thus, the Supreme Court held:

> "As admitted by counsel for petitioners, the latter were each furnished with a copy of the Revenue Memorandum Circular in question and the purpose of the law, that is to inform or notify those who may be affected, has been substantially complied with. Since it was further admitted by petitioners that said Memorandum is but a "Memorandum Circular for purposes of the internal administration of the BIR and not a regulation within the contemplation of Sections 4 and 338 of the NIRC and Section 79(b) of the Revised Administrative Code", said circular needs no publication in the Official Gazette as erroneously argued by petitioners.
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> Section 79(b) of the Revised Administrative Code so provides:
>
> > "Chiefs, of bureaus or offices, may, however, be authorized to promulgate circulars or information or instructions for the government of the officers and employees in the interior administration of the business of each bureau or office, and in such case said circular shall not be required to be published."
>
> When an administrative agency renders an opinion by means of a circular or Memorandum, it merely interprets a pre-existing law, and no publication is necessary for its validity. Construction by an executive branch of government of a particular law although not binding upon courts must be given weight as the construction come from the branch of the government called upon to implement the law. "

Lastly, CIR contends that assessments on deficiency income taxes for taxable year 2001 were issued in accordance with law, rules and jurisprudence and were fully substantiated by concrete and convincing evidence and that the Third Division committed reversible error when it said in its decision that the FANs and related Assessments issued by petitioner against herein respondent for taxable year 2001 cannot be legally considered as valid assessment notices since the BIR did not

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[24] G.R. No. L-36130, January 17, 1985.

indicate therein a specific date or period within which the alleged tax liabilities shall be paid by First Gas.

CIR's contention is untenable. The Final Assessment Notices and Formal Letters of Demand for taxable year 2001[25] are indeed defective.

The date within which the taxes shall be paid is material in an assessment notice. Otherwise, it will be at the liberality of the taxpayer when the taxes will be paid. If no specific period were indicated in the Final Assessment Notice and Formal Letter of Demand then it would no longer be a demand to pay. The importance of setting a deadline within which the taxpayer must pay cannot be stressed enough. Without it, the prescriptive periods set forth in the Tax Code would not be determined with any certainty, rendering it nugatory.

As correctly found by the Third Division in its Decision, the FAN in this case cannot be construedas the "demand to pay" contemplated by the law, but are merely requests for payment. Thus:

> "*<u>Taxable Year 2001</u>*
>
> In the last paragraph of the Assessments, it was stated that:
>
> In view thereof, you are requested to pay your aforesaid deficiency income tax liability/penalties through the duly authorized agent bank in which you are enrolled within the time shown in the enclosed assessment notice.
>
> However, the due date in each of the FANs referred to in the Assessments was left blank. Thus, the FANs in this case are not demands but mere requests for payment.
>
> In the case of Commissioner of Internal Revenue v. Pascor Realty and Development[26], the Supreme Court ruled that:
>
>> 'True, as pointed out by the private respondents, an assessment informs the taxpayer that he or she has tax liabilities. But not all documents coming from the BIR containing a computation of the tax liability can be deemed assessments.
>>
>> To start with, an assessment must be sent to and received by a taxpayer, and **must demand payment of the taxes described therein within a specific period.** Thus, the NIRC imposes a 25 percent penalty, in addition to the tax due, in case the taxpayer fails to pay the deficiency tax within the time prescribed for its payment in the notice of assessment. Likewise, an interest of 20 percent per annum, or such higher rate as may be prescribed by rules and regulations, is to be collected from the date prescribed for its payment until the full payment.'" *(emphasis supplied)*
>
> Applying the aforecited jurisprudence to the present case, the FANs and related Assessments issued by respondent against petitioner for taxable year 2001 cannot be legally considered as valid assessment notices since respondent did not

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[25] Exhibits "I" and "J".
[26] G.R. No. 128315, June 29, 1999, [309 SCRA 402].

> indicate therein a specific date or period within which the alleged tax liabilities shall be paid by petitioner.
>
> xxx xxx xxx
>
> As for deficiency income tax assessment and the late payment penalties for taxable year 2001, there being no valid Final Assessment Notice, the Court has no choice but to cancel and withdraw the said assessment.[27]

In view of the foregoing, this Court finds that there is no longer need to resolve the other issues raised in the petition.

WHEREFORE, premises considered, the Petition for Review is hereby **DISMISSED** for lack of merit. The Decision and Resolution of the Third Division of this Court in CTA Case No. 7281 dated September 24, 2012 and December 13, 2012, respectively, are hereby **AFFIRMED**. No pronouncement as to costs.

SO ORDERED.

Ma. Belen M. Ringpis-Liban
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

(On Leave)
ERLINDA P. UY
Associate Justice

(On Leave)
CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

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[27] *Rollo*, CTA EB CASE NO. 972, pp. 53-54.

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 the Court.

ROMAN G. DEL ROSARIO
Presiding Justice