Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

COMMISIONER OF INTERNAL REVENUE, Petitioner,	C.T.A. EN BANC No.33 (C.T.A. Case No. 6360)
-versus-	Members: ACOSTA, P.J. CASTAÑEDA, Jr. BAUTISTA, UY, CASANOVA, and PALANCA-ENRIQUEZ, JJ.
AKITSU SHIPPING CO. LTD., Respondent.	Promulgated: MAR 3 1 2005

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DECISION

CASANOVA, J.:

This is a Petition for Review before the Court of Tax Appeals En Banc filed under Republic Act # 9282 seeking to set aside the Decision dated May 26, 2004 of the then Court of Tax Appeals which, under RA # 9282, is now a division of the current Court of Tax Appeals. The assailed Decision is hereunder reproduced as follows:

DECISION

"Before this court is a Petition for Review seeking the cancellation and withdrawal of the tax assessments of petitioner's alleged deficiency income and common carrier's tax for the year 1987.

Petitioner is a foreign corporation organized under the laws of Japan doing business through its Philippine agent, Mindanao Fruit Company, with address at c/o Pelaez Gregorio Sipin Bala & Robles, 6th Floor, Padilla Building, Emerald Avenue, Ortigas Center, Pasig City. It is engaged in the business of affreightment and undertook the activity of transporting, conveying or removing cargo from one place to another. (*pars. 1&3, Joint Stipulation of Facts*)

Sometime in November 1986, a Japanese shipping company, Kyokuyo Shipping Co. Ltd., entered into shipping and affreightment contracts with United Brands, also a foreign company, for the shipment of bananas from the Philippines to Middle East and Hongkong. (*Exhs. D-1,*

D-2, D-3, D-4, D-5, D-6, D-7, D-8, E, E-1, E-2, E-3, E-4, E-5, E-6, E-7, and E-8)

In a letter dated April 2, 1987, Kyokuyo Co., Ltd. declared that its contract with the United Brands Co. in connection with the transportation business between the Philippines and PG, Japan and Hongkong will be transferred to herein petitioner "Akitsu Shipping Co., Ltd." on May 1, 1987. (*Exh. C*) Consequently, petitioner appointed Mindanao Fruit Company, a domestic corporation to be its shipping agent in the Pilippines. (*Exh. B*)

For the taxable year 1987, petitioner allegedly paid taxes based on sixty (60%) percent of its gross income derived from the performance of its obligations under the shipping and affreightment contracts with United Brands, in accordance with RP-Japan Tax Treaty. It further alleged that only sixty (60%) of its gross income was derived from Philippine sources because the ship allegedly spent sixty (60%) of its voyage in Philippine territory, based on the nautical miles traveled from the Philippines to Middle East and Hongkong. Based on the shipping and affreightment contract, the total round trip distance from the loading port, Davao, to discharging port, Hongkong, is approximately 2,600 miles, of which 1,600 miles are within the territorial waters of the Philippines (*Exh. D-8-a*) while the total round trip distance from the loading port, Davao, to discharging ports in the Arabian Gulf is approximately 10,793 nautical miles, of which 1,560 miles are within the territorial waters of the Philippines.(*Exhs. E-8-a; pp. 28-31. TSN, January 20, 2003*)

A letter dated December 14, 1990 (*Exh. F*) was allegedly sent by the BIR to petitioner's counsel with a request that a Waiver of the Statute of Limitations under the National Internal Revenue Code (*Exh. F-1*) be signed, in order to extend the period of assessment to April 14, 1993. The waiver was allegedly not signed by Atty. Vicente G. Gregorio, resident agent of Mindanao Fruit Company (*Exh. A-2-a*) and acting on behalf of petitioner.

On June 1, 1991 petitioner received a letter dated May 22, 1991, from the Chief, Accounts Receivable, Billing Division of the BIR (*Annex A, Petitioner's protest letter*), demanding payment of the amount of P8,517,270.81 representing Deficiency Gross Philippine Billings and Common Carrier's Tax for the year 1987, with a warning that in case of failure to pay, the BIR has "no other recourse but enforce collection through the issuance of Warrants of Distraint and Levy" and/or through "judicial action". (*par. 4, Joint Stipulation of Facts*)

Thereafter, petitioner filed a demurrer on June 17, 1991 alleging therein that presciption had already set in because the subject assessments covered the tax return filed on April 1988. (*p.331 BIR Records*)

On July 3, 1991, petitioner filed a protest letter dated July 1, 1991 (p. 337, BIR Records) and declared therein that no formal assessment notices of petitioner's alleged tax liabilities were sent either through its counsel or its agent, Mindanao Fruit Co. Instead, it merely received the letter dated May, 22, 1991 from the Chief, Accounts Receivable, Billing Division of the BIR.

The following grounds were raised by petitioner in the aforementioned protest letter:

1. The assessment and collection of AKITSU's alleged deficiency tax liability is barred by prescription.
2. In any event, the alleged tax liability is contrary to law.

On the first issue raised, petitioner asserted that the assessment and collection of petitioner's alleged deficiency tax liability was barred by prescription because the tax liability in question was reported in the return filed on April 1988. Respondent's right to assess within the three-year prescriptive period provided under Section 203 of the Tax Code expired on April 1991.

On the second issue, petitioner argued that only sixty (60%) of its receipts for the year 1987 may legally be subjected to income (Gross Philippine Billings) and business (Common Carrier's) taxes as it is liable to income or business tax only to the extent of receipts from sources within the Philippines.

On October 15, 2001, petitioner received respondent's decision dated October 3, 2001 demanding payment of the aggregate amount of P8,517,270.81 as deficiency common carrier's and gross Philippine billings taxes for the year 1997. (*par. No. 5, Joint Stipulation of Facts*)
Unable to obtain a favorable resolution from respondent, petitioner filed, though registered mail, the instant petition for review with this court on November 15, 2001.

In his Answer, respondent raised the following Special and Affirmative Defenses:

> 4. Petitioner is taxable upon its total gross Philippine billings or gross earnings on the loading of cargoes from Philippine ports. The law applicable to the case is not Section 37 (e) but Section 24(B)(2)(i) of the Tax Code of 1977, as amended, in relation to Article 8 of the RP-Japan Tax Convention which took effect on January 1, 1981. The total gross Philippine billings or gross earnings on the loading of cargoes from Philippine ports is subject to the normal tax of 2 ½% under Section 24(B)(2) of the Tax Code, but considering that petitioner is a Japanese international carrier, it is only subject to the preferential rate of 1 ½% of the gross billings on the cargoes loaded (or 60% of the 2 ½% tax chargeable on the same gross billings under Philippine laws) pursuant to Art. 8(1) of the RP-Japan Tax Convention (*Meishin Shipping Co., Ltd., YS Nearseas Co., Ltd, Kyosei Steamship Co., Ltd., and Sunritzy Shipping Co., Ltd., represented by Soriamont Steamship Agencies, Inc. vs. CIR, CTA Case No. 3531, June 29, 1987; BIR Ruling No. 174-840*)
>
> 5. Respondent's right to assess deficiency taxes for taxable year 1987 has not prescribed contrary to petitioner's allegations.

Petitioner waived its right to invoke prescription. On January 5, 1990, which is well within the three (3) year prescriptive period, a "Waiver of the Statute of Limitations under the National Internal Revenue Code" was executed by Ma. Theresa G. Paclibar, Chief Accountant of Mindanao Fruit Company, the taxpayer's agent and representative here in the Philippines and duly accepted by the then Deputy Commissioner Eufracio D. Santos. Where a taxpayer has signed a waiver as to the running of prescriptive period, said waiver is not just an extension of the period of limitation, but a RENUNCIATION of his right to invoke the defense of prescription which was then available to him. Just like any right, the right to avail of the defense of prescription is waivable. (*Sinfrosa vs Court of Tax Appeals, 26 SCRA 137*)

Further, the three (3) year prescriptive period within which to assess the 1987 deficiency tax liabilities of petitioner expired last April 14, 1991, while the deficiency assessments which were dated April 5, 1991 were actually mailed on April 12, 1991 which was two days prior to the expiration of the 3-year reglementary period.

6. The filing of petitioner's protest against the assessments interrupted the prescriptive period to collect the tax (*Commissioner of Internal Revenue vs Wyeth Suaco Laboratories, Inc. 202 SCRA 125*)

7. The assessments were issued in accordance with law and regulations.

8. All presumptions are in favor of the correctness of tax assessments.

The following issues have been jointly stipulated by the parties:

1. Whether or not the income (Gross Philippine Billings) and business (Common Carrier's) taxes should be based on 60% of petitioner's receipts for the year 1987 or on 100% as respondent contend.

2. Whether or not respondent's assessment for deficiency taxes for the year 1987 has already prescribed.

3. Whether or not the filing of petitioner's protest against the assessments interrupted the prescriptive period to collect the tax.

On the issue that respondent's right to assess has already prescribed, we rule in the affirmative.

Petitioner claimed that the right to assess its 1987 deficiency Gross Philippine Billings and Common Carrier's Tax has prescribed. It alleged that the assessment was dated May 22, 1991 while the return where the amounts subject of the tax assessments was filed on April 1988.

Respondent, on the other hand, asserted that its right to assess petitioner's deficiency taxes for taxable year 1987 has not yet prescribed. He alleged that on January 5, 1990, which is well within the three-year prescriptive period, petitioner executed a "Waiver of the Statute of Limitations" through Ma. Theresa G. Paclibar, Chief Accountant of Mindanao Fruit Company, petitioner's agent and representative here in the Philippines which was duly accepted by Deputy Commissioner Eufracio D. Santos. Furthermore, the execution of the waiver is not just an extension of the period of limitation, but a renunciation of his right to invoke the defense of prescription, which was then available to him.

While petitioner claimed that its representative, Atty. Vicente G. Gregorio, did not sign the waiver, records show that a waiver was signed by a certain Ma. Theresa G. Paclibar on January 5, 1990 and accepted by Deputy Commissioner Eufracio D. Santos (*p.358, BIR Records*)

We must then first determine whether the waiver was validly executed in accordance with Revenue Memorandum Order (RMO) No. 20-90, which provides as follows:

> "In the execution of said waiver, the following procedures should be followed:
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> 1. The waiver must be in the form identified hereof. This form may be reproduces by the Office concerned but there should be no deviation from such form. The phrase "but not after _____ 19_____" should be filled up. This indicates the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription. <u>The period agreed upon shall constitute the time within which to effect the assessment/collection of the tax in addition to the ordinary prescriptive period.</u>
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> 2. The waiver shall be signed by the taxpayer himself or his duly authorized representative. **<u>In the case of a corporation, the waiver must be signed by any of its responsible officials.</u>**
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> 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 the 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.
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> 4. The following revenue officials are authorized to sign the waiver.
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> A. In The National Office
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> 1. ACIRs for Collection, Special
> Operations, National Assessment,
> Excise and Legal on tax cases

pending before their respective offices.
In the absence of the ACIR, the Head
Executive Assistant may sign the waiver – For tax cases involving not more than P500,000.00

2. Deputy Commissioner – For tax cases involving more than P500,000.00 but not more than P1M

3.Commissioner – For taxes involving more than P1M.

B. In the Regional Offices

1. The Revenue District Officer with respect to tax cases still pending investigation and the period to assess is about to prescribed regardless of the amount.

2. The Regional Director, the Assistant Regional, the Chief Assessment Branch or the Chief, Legal Branch with respect to cases still pending review and the period to assess/collect is about to prescribe, regardless of amount.

3. The Regional Director, the Assistant Regional Director, the Chief Collection Branch or the Chief, Legal Branch with respect to cases still pending collection and the period to assess/collect is about to prescribe regardless of amount.

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 shall be indicated in the original copy.

5. The foregoing procedures shall be strictly followed. Any revenue official found not to have complied with this Order resulting in prescription of the right to assess/collect shall be administratively dealt with."(*Underscoring supplied*)

As perused from the records, the waiver was, indeed, signed by a certain Ma. Theresa G. Paclibar. While respondent alleged that she was the Chief Accountant of petitioner's agent, Mindanao Fruit Company, there was, however, no evidence presented to prove that she was a responsible official as contemplated in RMO No. 20-90.

Secondly, assuming *arguendo* that Ma. Theresa G. Paclibar was considered as a responsible official under RMO No. 20-90, the waiver still suffers from infirmity. The waiver is an unlimited waiver as it did not mention a definite expiration date within which respondent will effect the assessment/collection, rather, it merely mentioned "indefinite" on the space provided for the expiration date. Such waiver was invalid and did not extend respondent's right to assess petitioner's 1987 tax liabilities.

Respondent further averred that its right to assess petitioner's 1987 deficiency tax liabilities expired on April 14, 1991, while the deficiency tax assessments dated April 5, 1991 were actually mailed on April 12, 1991, or two days prior to the expiration of the three-year reglementary period.

During the hearing held on July 23, 2003, respondent presented his witness, Cesar Bumatay, Sr. in order to prove that the subject assessment notices were sent by registered mail to the petitioner on April 12, 1991. Respondent's witness was detailed at the General Services Division as receiving clerk, having the function, among others, of recording all incoming and outgoing letters especially printed matters particularly Demand Letters and Assessment Notices. (*p. 6, TSN, July 23, 2003*) In the same hearing, the Record Book where such entries were recorded was presented by respondent's counsel. The particular entry where the alleged assessment notice and demand letter sent to petitioner was entered is shown on page 458 of the said record book.(*Exh. 1*) Specifically, entered as Registry Receipt No. 1044-A (*Exh. 2*) which was mailed to petitioner on April 12, 1991 (*p. 455, Record Book, Exh.1-b-1*)

It is a settled rule that "where an assessment notice is sent by mail (for example by ordinary mail), it is presumed that the taxpayer received the mailed notice within the period of time when mail of such kind are ordinarily received so that if such presumed receipt is still within the prescriptive period, the taxpayer's contention that the Government's right to assess the tax has already prescribed cannot be given credit" (***Republic vs Tan Kim En, CA-GR –28743-R, Feb. 29, 1964****; cited in Law of Basic Taxation, Aban*)

However, the Supreme Court ruled in the case of ***Republic of Court of Appeals and Nielson & CO. (149 SCRA 351; L38540, April 30, 1987)***, and we quote:

> "We do not agree with petitioner's above contentions. As correctly observed by the respondent court in its appealed decision, while the contention of petitioner is correct that a mailed letter is deemed received by the addressee in the ordinary course of mail, still, this is merely a disputable presumption, subject to controversion, and a direct denial of the receipt thereof shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee. Thus:
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> > "Appellee contends that per Exhibit A, the notice was released and mailed to the appellant by the BIR on August 4, 1955 under the signature of the chief, Records Section Office; that since the original thereof was not returned to the appellee, the presumption is that the appellant received the mailed notice. This is correct, but this is being merely a mere disputable presumption, the same is subject to controversion, and a direct denial of the receipt thereof shift the burden upon the party favored by the presumption to prove that the mailed letter was received

by the addressee. The appellee, however, argues that since notice was released and mailed and the fact of its release was admitted by the appellant the admission is proof that he received the mailed notice of assessment. We do not think so. It is true the Court a *quo* made such a finding of fact, but as pointed out by the appellant in its brief, and as borne out by the records, no such admission was ever made by the appellant in the answer or in any other pleading, or in any declaration, oral or documentary before the trail court. We note that the appellee has not met this challenge, and after a review of the records, we find appellant's assertion well-taken."

Since petitioner has not adduced proof that private respondent had in fact received the demand letter of 16 July 1955, it can not be assumed that private respondent received said letter."

This court has likewise adopted the foregoing ruling in the case of ***Arnoldus Woodworks Inc. vs CIR, CTA case No. 4269, March 18, 1994***, and is hereby quoted as follows:

"Although the evidence pertaining to the case at bar reveals that the assessment notices were sent by registered mail on July 31, 1986, in the plant of petitioner in Marilao, Bulacan there is complete absence of proof to establish that the petitioner actually received them. The respondent clings to the presumption of the law that "a letter duly directed and mailed was received in the regular course of the mail," [Sec. 3(v), Rule 131 of the Revised Rule of Court]

While it may be true that a letter would likely be received after more than one year from the time it was duly mailed, the respondent failed to realize that such contention is merely a disputable presumption. It is put on inference provided for by law to be conveniently used in appreciation of evidence. As such it is subject to rebuttal which will shift the burden of proof to the party alleging the same.

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It was therefore incumbent upon the respondent to prove by contrary evidence that the petitioner indeed received the assessment in the due course of mail for Us to consider that present action as having been filed out of time. The *onus probandi* was shifted to respondent."

The ruling in the aforesaid decision was likewise adopted in the case of ***Industrial Textile Manufacturing Company of the Philippines, Inc. vs Commissioner of Internal Revenue, CTA Case No. 4885, August 22, 1996***, where this court ruled, thus:

"In this case, respondent's failure to prove that the assessment letter for 1983 was received by the petitioner plus the enforceability of such assessment in jeopardy. It appearing that the person liable for the payment of the tax did not receive the assessment, the assessment could not become final and executory (***Republic vs. Dela Ram, 18 SCRA 861***). The failure of the respondent to prove receipt of the assessment, by the petitioner leads to the conclusion that no assessment was issued for petitioner's 1983 alleged tax deficiencies. Consequently, the government's right to issue an assessment for the said period has already prescribed. Section 318 of the 1983 Tax Code provides, thus:

> Section 318. Period of Limitation Upon Assessment and Collection – Except as provided in the succeeding section, internal revenue taxes shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. For the purpose of this section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day: Provided, that the limitation shall not apply
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> to cases already investigated prior to the approval of this Code.

This Court believes that the 1983 tax assessment allegedly issued by respondent has no force and effect and hence must be cancelled as it was not duly proven by respondent that the petitioner received the same in the face of an outright denial made by the latter."(*Underscoring supplied*)

The case at bar is in all fours with the foregoing cases insofar as the issue of receipt of assessment notice is concerned. Petitioner strongly claims that it did not receive any assessment notice relative to its 1987 Gross Philippine Billings and Common Carrier's Tax Respondent, however, alleged that he sent the subject assessment notices through registered mail as evidenced by registry receipt no. 1044-A. Significantly, while respondent has adduced proof that the subject assessment notices were duly issued and sent to petitioner on April 12, 1991, or prior to the expiration of his right to assess, he nevertheless failed to prove that the same was actually received by the petitioner or by his duly authorized representative. Respondent's failure to establish the fact of receipt by the petitioner of the subject assessment notices rendered the same invalid and without force and effect.

Finding the assessment notices to be invalid and without force and effect, it is no longer necessary to tackle the remaining issues.

WHEREFORE, the instant Petition for Review is hereby **GRANTED**. Accordingly, the tax assessments against petitioner for its deficiency Gross Philippine Billings and Common Carrier's Tax for the year 1987 are hereby **CANCELLED** and **WITHDRAWN** and respondent is **ORDERED** to **DESIST** from collecting the deficiency taxes enumerated therein.

SO ORDERED."

Petitioner filed a "Motion for Reconsideration" on June 16, 2004. In a Resolution dated September 14, 2004, the then Court of Tax Appeals denied the said motion on the ground of lack of merit. Hence, petitioner filed the instant Petition for Review raising the following grounds:

1. THE TAX COURT ERRED IN HOLDING THAT RESPONDENT DID NOT RECEIVE THE ASSESSMENT.

2. THE TAX COURT ERRED IN HOLDING THAT THE WAIVER OF THE STATUTE OF LIMITATIONS EXECUTED BY RESPONDENT WAS NOT VALID.

3. THE TAX COURT ERRED IN HOLDING THAT THE RIGHT TO ASSESS HAS PRESCRIBED.

After a careful and thorough perusal, evaluation and consideration of the instant Petition for Review, the Court En Banc finds no cogent justification to disturb its previous conclusion as spelled out in the Decision of this Court promulgated on May 26, 2004 and the Resolution dated September 14, 2004, canceling and withdrawing the tax assessments against herein respondent for its deficiency Gross Philippine Billings and Common Carrier's Tax for the year 1997 and ordering petitioner to desist from collecting the said deficiency taxes. What the instant petition asks is for the Court En Banc to view and appreciate the evidence in their perspective of things, which unfortunately had been considered and passed upon. The Court En Banc adopts by reference the findings of facts and conclusions of laws contained in the above-mentioned Decision and Resolution of this Court.

WHEREFORE, the instant Petition for Review is hereby **DISMISSED** for being patently without merit.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice