REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

CLARK WATER CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8572

Members:

CASTAÑEDA, JR., *Chairperson,*
CASANOVA, *and*
MANAHAN, *JJ.*

Promulgated:

FEB 16 2017
1:20 p.m.

x - x

DECISION

CASANOVA, *J.*:

Before this Court is a Petition for Review[1] filed by Clark Water Corporation on November 14, 2012, praying that judgment be rendered ordering the cancellation and withdrawal of respondent Commissioner of Internal Revenue's (CIR) assessment for alleged deficiency income tax, Value-Added Tax (VAT), Expanded Withholding Tax (EWT), and Fringe Benefits Tax (FBT) for taxable year 2008, including interest, surcharge and penalties, in the total amount of SEVEN MILLION ONE HUNDRED THIRTY-TWO THOUSAND FIVE HUNDRED FORTY AND 56/100 PESOS (P7,132,540.56).

Petitioner Clark Water Corporation is a domestic corporation duly organized and existing under Philippine laws, with registered principal office at Depot 1901, Bicentennial Hill, Clarkfield Freeport Zone, Clark Field, Pampanga.[2] It is authorized by the Securities and Exchange

[1] Docket (Vol. I), pp. 7-35.
[2] Par. 2, Admitted Facts, Joint Stipulation of Facts and Issues (JSFI), Ibid, p. 404.

Commission (SEC) to transact business in the Philippines under SEC Registration No. A199915674 dated October 1, 1999.[3]

Petitioner is, likewise, registered as a Clark Special Economic Zone (CSEZ) enterprise, engaged in the operation and maintenance of water and sewerage system within the CSEZ.[4] It is also a registered taxpayer at the Bureau of Internal Revenue (BIR) – Revenue District Office (RDO) No. 21A, with Tax Identification No. 205-334-965-000.[5]

On the other hand, respondent is the Commissioner of the Bureau of Internal Revenue (BIR), vested by law with authority to decide disputed assessments, cancel and abate tax liabilities, pursuant to the provisions of the National Internal Revenue Code (NIRC) of 1997, as amended. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On August 12, 2009, petitioner received a Letter of Authority (LOA) No. 2008-00036128 from the BIR RDO No. 21A, authorizing Revenue Officer Evelyn Gonzales and Revenue Supervisor Lope Tubera to examine petitioner's books of accounts and other accounting records for all internal revenue taxes for the period January 1, 2008 to December 31, 2008.[6]

On May 19, 2011, petitioner received a Notice of Informal Conference, stating that, based on the report of Revenue Officer Evelyn M. Gonzales and Revenue Supervisor Lope N. Tubera, petitioner is liable for deficiency income tax, Value-Added Tax (VAT), expanded withholding tax (EWT), fringe benefits tax (FBT), withholding tax on compensation, and miscellaneous tax, in the total amount of P8,457,396.63 for calendar year (CY) 2008, broken down as follows[7]:

Kind of Tax	Basic	Surcharge	Interest	Compromise	Total
Income Tax	₱ 1,299,910.68		₱ 512,503.78		1,742,414.46
Value Added Tax (VAT)	2,088,976.86	₱ 522,244.21	974,925.50	₱ 25,000.00	3,611,146.57
Expanded Withholding Tax (EWT)	1,524,281.34		711,382.10	9,000.00	2,244,663.45
Fringe Benefit Tax (FBT)	468,615.21	117,153.80	218,702.72	16,000.00	820,471.73
Withholding Tax on Compensation	31,700.42				

[3] Par. 3, Admitted Facts, JSFI, Id., p. 405
[4] Par. 5, Admitted Facts, JSFI, Id., p. 405.
[5] Par. 6, Admitted Facts, JSFI, Id., p. 405.
[6] Par. 7, Admitted Facts, JSFI, Id., p. 405.
[7] Par. 8, Admitted Facts, JSFI, Id., pp. 405-406.

Miscellaneous Tax					7,000.00
TOTAL					₱ 8,457,396.63

On April 30, 2012, petitioner received a Preliminary Collection Letter (PCL) dated April 11, 2012, demanding payment of alleged deficiency internal revenue taxes in the total amount of P7,132,540.56, broken down as follows[8]:

Kind of Tax	Basic	Surcharge	Interest	Compromise	Total
Income Tax	₱ 933,463.04		₱490,068.10		₱ 1,423,531.14
Value Added Tax (VAT)	1,425,806.57	₱ 356,451.64	815,769.70		2,598,027.91
Expanded Withholding Tax (EWT)	1,398,638.82		807,889.55		2,206,528.37
Fringe Benefit Tax (FBT)	468,615.21	117,153.80	270,684.13		856,453.14
Penalties				₱ 48,000.00	48,000.00
TOTAL	₱ 4,226,523,64	₱ 473,605.44	₱ 2,384,411.48	₱ 48,000.00	₱ 7,132,540.56

On May 24, 2012, petitioner objected to the issuance of PCL and protested the above-mentioned assessments with BIR RDO No. 21-A[9] on the ground that it did not allegedly receive any Preliminary Assessment Notice (PAN) and Final Assessment Notice (FAN), in violation of its right to due process.

On October 15, 2012, petitioner received a letter dated October 8, 2012 from Revenue Region No. 4, Pampanga, alleging therein that petitioner received the PAN and FAN on October 5, 2011 and December 8, 2011, respectively. Thus, there is no factual basis for claiming denial of due process. Petitioner was, likewise, advised to settle its tax liability for 2008 within ten (10) days from notice thereof.[10]

Petitioner filed the instant Petition for Review before this Court on November 14, 2012.[11] On December 6, 2012, a Warrant of Distraint and/or Levy[12] dated December 4, 2012 was served to petitioner. Thereafter, on December 11, 2012, petitioner filed an Urgent Motion to Quash Warrant of Distraint or Levy[13], assailing the validity of the deficiency tax assessments and praying for the suspension of the collection of petitioner's alleged tax deficiencies.

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[8] Par. 9, Admitted Facts, JSFI, Id., p. 406.
[9] Par. 10, Admitted Facts, JSFI, Id.
[10] Par. 11, Admitted Facts, JSFI, Id.
[11] See Footnote No. 1.
[12] Annex "C" to the Petition for Review, Id., p. 146.
[13] Id., pp. 130-140.

In a Resolution[14] dated January 17, 2013, the Court held in abeyance the resolution of petitioner's Motion to Quash Warrant of Distraint or Levy, pending determination of the main issue, as the resolution of the same would determine the necessity of addressing the other legal and factual issues raised by both parties. Furthermore, the Court treated petitioner's prayer to suspend the collection of its deficiency taxes, as a Motion for the Suspension of Collection Tax under Section 9 of RA No. 9282, in relation to Rule 10 of the 2005 Revised Rules of the Court of Tax Appeals. Hence, the hearing of said motion was set on January 31, 2013.

In his Answer[15] filed on February 6, 2013, respondent raised the following Special and Affirmative Defenses, to wit:

> "6. Respondent hereby reiterates and re-pleads the preceding paragraphs of this Answer as part of her Special and Affirmative Defenses.
>
> **ARGUMENTS AND DISCUSSIONS**
>
> ***Due Process was observed in assessing the petitioner of its tax liabilities.***
>
> 7. At the outset, petitioner has been afforded the rudimentary requirements of fair play. This is verified by the categorical statements made by petitioner in its Petition and subsequent Motion, that it received the issued Letter of Authority and a Notice of Informal Conference by respondent.
>
> 8. Conversely, petitioner assails the validity of procedural due process afforded to it by denying receipt of the Preliminary Assessment Notice (PAN) and subsequently, the Final Assessment Notice (FAN).
>
> 9. It must be pointed out however, that on 26 September 2011, BIR Revenue Region 4 sent the PAN, similarly addressed, to the petitioner through registered mail on 05 October 2011 covered by Post Office Registry

[14] Id., pp. 217-220
[15] Id., pp. 232-242.

Receipt No. 455 with no indication that the PAN was 'Returned to Sender'.

10. Thus, it is safe to theorize that for all legal intent and purposes, it was deemed received in the ordinary course of mail.

11. It is well settled that when sent by registered mail, an assessment letter is presumably received in the regular course of the mail if it is proved (a) that the letter was properly addressed with postage paid; 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.

12. On 16 November 2011, Final Assessment Notices (FAN) Numbered 021A-R-0905009636 were issued and served through registered mail. Post Office records reveal that the notices were received by petitioner's employee, Jason Torres, on 08 December 2011 as certified by Alvin L. Palo, Postman In-charge, Clark Freeport Zone Post Office. Notably, petitioner's protest was filed only on 24 May 2012, clearly beyond the period prescribed for an administrative protest, as herein-after be discussed.

9. *(sic)* Accordingly, the FAN was issued within the three-year period to assess pursuant to Section 203 of the National Internal Revenue *(sic)* (NIRC) of 1997. By all indications, the Notice of Informal Conference, Preliminary Assessment Notice, and Final Assessment Notice were issued in accordance with law, rules and jurisprudence.

The Honorable Court does not have jurisdiction over the instant petition for failure to file a timely protest over the Final Assessment Notice.

10. From the foregoing, it is most courteously advanced that the instant petition for review should be denied because the Honorable Court has no jurisdiction over the instant petition for review.

11. Section 228 of the National Internal Revenue Code of 1997, as amended, provides:

> *Section 228. Protesting of Assessment. – xxx*
>
> ***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.*

12. The FAN not having been protested within thirty (30) days from receipt on 08 December 2011 has become final, executory and demandable.

13. On this point, petitioner assails the validity of a supposed decision received by its counsel on 15 October 2012 treating it as a Final Decision on the Disputed Assessment (FDDA).

14. However, the 15 October 2012 letter is not a decision on the disputed assessment but merely a reply to the supposed protest filed by petitioner on 24 May 2012. Quoted verbatim is a portion of the said letter are the following:

> *'The FAN not having been protested within thirty (30) days from receipt on December 8, 2011, the same have become final, executory and demandable.* ***Accordingly, the protest filed on May 24, 2012 is pro forma as we are no longer at liberty to inquire into the merit of the assessments.***
>
> *Inasmuch as the other issues raised were predicated on non-receipt of PAN or FAN, these issues have become moot and academic and we deem it proper not to pass upon them'*

15. Therefore, since petitioner failed to protest the FAN, the assessment has become final, executory and

demandable. As held in Commissioner of Internal Revenue vs. Bank of the Philippine Islands:

'The inevitable conclusion is ***BPI's failure to protest the assessments within the 30-day period provided in the former Section 270 meant that they became final and unappealable****. Thus, the CTA correctly dismissed BPI's appeal for lack of jurisdiction.* ***BPI was, from then on, barred from disputing the correctness of the assessments or invoking any defense that would reopen the question of its liability on the merits****. Not only that. There arose a presumption of correctness when BPI failed to present the assessments:*

Tax assessments by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, as assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments.'

16. There being no decision by the CIR on the disputed assessment, the Honorable Court of Tax Appeals cannot exercise its exclusive appellate jurisdiction under Section 7 of RA 9282 to review by appeal decision of the CIR.

'SEC. 7. Jurisdiction. – The CTA shall exercise:

(a) Exclusive appellate jurisdiction to review by appeal, as herein provided:

(1) ***Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments****, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue.*

> *(2)* ***Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments****, refunds of internal revenue taxes fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code provides a specific period for action, in which case the inaction shall be deemed a denial.'*

17. Settled is the rule that jurisdiction over the subject matter in a judicial proceeding is conferred by the sovereign authority, which organizes the court; it is given only by law and in the manner prescribed by law.

18. Jurisdiction is the court's authority to hear and determine a case. The conferment of jurisdiction upon courts or judicial tribunals is derived exclusively from the constitution and statutes of the forum. In this jurisdiction, it is a power granted by the Constitution to the Supreme Court and conferred by law to other lower courts to hear and decide cases involving a justiciable controversy. A primary example of jurisdiction conferred by statute is that the Honorable Court of Tax Appeals.

No jurisdiction over the instant petition is acquired even if the supposed Protest is admitted by the Honorable Court as a Protest on the FAN and subsequently the October 15, 2012 Letter as the Decision of the respondent on the disputed assessment for failure to submit supporting documents within the 60-day period after petitioner's supposed protest.

19. In the alternative, if indeed, as petitioner alleged, the supposed Protest were treated by the Honorable Court as a Protest to the FAN, supporting documents to support their claim should have been submitted within 60 days after filing thereof.

20. However, it must be noted that nowhere in the petition or in its motion did the petitioner mention of complying with the said requirement. This can only mean that the assessment has long become final, executory and demandable and not subject to review by any court or tribunal. To wit:

> ***'Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.'***

21. It is well settled rule in taxation that the burden of proof is on the taxpayer to present evidence to show the incorrectness of the assessment. The taxpayer, in case of disputed assessments, is duty bound to establish the fact that it is indeed not liable for any deficiency taxes subject of assessment. The failure to show documents that would substantiate a claim that no deficiency taxes are due, would result to upholding the validity of the assessment.

22. Verily, the assessment has become final, executory and demandable for failure of petitioner to submit all relevant supporting documents as required under Section 228 of the NIRC of 1997. Thus, the petition for review filed by petitioner before this Honorable Court was filed out of time. Hence, respondent respectfully submits that this Honorable Court has no jurisdiction over the instant petition.

23. Here, petitioner's lack of diligence in not submitting documents in support of its claim rendered the disputed assessment final.

As it is apparent from the face of the petition that the Honorable Court does not have jurisdiction over the main action, then such should be dismissed.

24. Respondent respectfully moves that the instant petition be dismissed.

25. It is apparent from the admissions in the petition as cited and discussed in the previous arguments that the assessment subject of this case has long become final, executory, and demandable. Being such, the assessments are not subject to judicial scrutiny and beyond the jurisdiction of the Honorable Court. As held by the Honorable Supreme Court, 'when a court has no jurisdiction over the subject-matter, the only power it has, is to dismiss the action'.

Petitioner was properly apprised of its Income Tax deficiencies for taxable year 2008.

26. Granting without admitting, that the Honorable Court has jurisdiction to hear the instant petition, petitioner is still liable for the disputed assessments.

On Income Tax

27. Petitioner's foreign exchange gain amounting to P208,266.00 should be included in the computation of taxable gross income as prescribed in Section 12 of Republic Act No. 7227 and implemented by Revenue Regulation No. 13-2005.

28. Creditable withholding tax at source per BIR Forms 2307 that were dated *2007* were disallowed pursuant to Section 57(B) of the Tax Code. Accordingly, creditable withholding tax for the year it was withheld shall be credited against the income tax liability of the petitioner for taxable year 2008.

29. On the other hand, the net income from sales outside the Clark Freeport Zone amounting to P2,724,241.45 was subjected to the normal income tax rate of 35% in consonance with Section 27(A) of the Tax Code.

30. Section 8(A) of DOF Order No. 3-08 states that 'if the Ecozone or Freeport Enterprise wants to avail of the incentives under the 5% special tax regimen, it may generate income from sources outside the Ecozone or Freeport Zone or within the customs territory of up to thirty

percent (30%) of its total income from all sources. Provided however that ***if the income of an Ecozone or Freeport Enterprise exceeds said 30% threshold, then all of its income, whether from the Zone or the Customs Territory shall be subject to relevant internal revenue taxes under the National Internal Revenue Code*** (NIRC) of 1997, as amended.

31. Since petitioner's sales/receipts within the customs territory amounts to P11,881,721.43 or 6.05% of petitioner's total sales/receipts, it did not exceed the threshold of 30%. Therefore, only the afore-mentioned amount was subjected to the normal income tax rate of 35%. Petitioner's contention that the 5% tax on gross income was severely misplaced as the above-cited laws and regulations were clear.

On Expanded Withholding Tax (EWT)

32. Consistent with the above-discussion, sales/receipts within the customs territory of P11,881,721.43 was properly subjected to value-added tax in accordance with Section 3 of Revenue Memorandum Circular No. 50-2007.

33. In the absence of an affidavit of Gross Income as required under Revenue Regulations No. 30-2003, professional fees should be subjected to the 15% EWT rate.

34. Hence, professional fees amounting to P1,379,128.90 which was erroneously subjected to 10% EWT rate are taxed under the 15% EWT rate.

35. On the other hand, management fees paid to Veolia Water Phils., Inc. (VWPI) were correctly subjected to the 15% EWT since VWPI was regularly receiving said fees from petitioner during taxable year 2008.

36. Said management fees cannot be considered salaries and wages since no withholding taxes on compensation were made and no employer-employee relationship was established for the taxable year 2008.

37. Compromise penalties were imposed for non-filing of Monthly Alphalist of Payees for the months of February, March, August and November as required under Revenue Regulations No. 2-2006.

On Fringe Benefit Tax (FBT)

38. Petitioner failed to pay the FBT due on expenses incurred by the corporate officers in violation of Section 33(A)(B) of the NIRC of 1997.

On Miscellaneous Tax

39. Compromise penalties were imposed for non-filing of BIR Forms 1601-F for January and September 2008 in violation of Revenue Regulation No. 2-2006.

***The presumption under the law is in favor of the correctness of tax assessments*.**

40. Well settled is the rule that tax assessments are entitled to the presumption of correctness and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner, and approved by his superior officers will not be disturbed. All presumptions are in favor the correctness of tax assessments *(Sy Po vs. Court of tax Appeals, 164 SCRA 524)*. Dereliction on the part of petitioner to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notices.

41. Worthy of note, are the words of the Supreme Court in the case of *Commissioner of Internal Revenue vs. Bank of Philippine Islands:*

> '*Tax assessments by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal*

> *Revenue examiner and approved by his superior officers will not be disturbed. All presumption are in favor of the correctness of tax assessments."*

Respondent argues that due process was observed in assessing petitioner of its tax liabilities. Moreover, he claims that the Court does not have jurisdiction over the instant Petition for failure of petitioner to file a timely protest over the FAN. He further posits that even if the protest is admitted by the Court as a protest on the FAN, the Court still has no jurisdiction over the instant case because petitioner failed to submit supporting documents within the required 60-day period.

Furthermore, respondent asserts that petitioner was properly apprised of its income tax deficiencies for taxable year 2008 and, likewise, insists that tax assessments are presumed correct.[16]

On March 8, 2013, the parties filed their Joint Stipulation of Facts and Issues[17], which was approved by the Court on March 13, 2013.[18] Accordingly, the Pre-Trial was deemed terminated and the initial presentation of evidence for petitioner was set on April 17, 2013.

In a Resolution[19] dated May 31, 2013, the Court granted petitioner's motion for suspension of collection of taxes and required petitioner to file a bond in an amount equivalent to one and one-half times the amount being collected. Upon petitioner's compliance with the requirements set forth in the Guidelines on Corporate Surety Bonds issued by the Supreme Court, denominated as A.M. No. 04-7-02-SC dated July 20, 2004, the Court issued a Resolution[20] dated July 3, 2013 restraining respondent from enforcing any Warrant of Distraint and Garnishment and/or Levy against petitioner and suspending the collection of the disputed VAT, EWT, FBT, and income tax assessments until further orders from the Court.

During trial, petitioner presented the following witnesses: (1) Ms. Daisy A. Lacap[21] – petitioner's Finance Officer; and (2) Mr. Christopher Petronio R. Marin[22] – petitioner's Finance and Administration Manager.

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[16] Answer, Id., pp. 238-241.
[17] Id., pp. 404-410.
[18] Resolution, Id., p. 412.
[19] Id. (Vol. II), pp. 928-931.
[20] Resolution, Ibid, p. 1101.
[21] Minutes of the Hearing dated May 22, 2013, Id., p. 927.
[22] Minutes of the Hearing dated June 19, 2013, Id., p. 1041.

It, likewise, formally offered its documentary evidence on August 22, 2013.[23]

The Court issued a Resolution[24] on October 4, 2013, admitting, as petitioner's evidence, Exhibits **"A" to "T", "U" to "Y", "Z" to "KK-1", "LL" to "III-1", "III-3" to "LLL-1", "MMM" to "PPP-1", "PPP-3" to "QQQ-1", "RRR" to "SSS-1", "SSS-3" to "VVV-3", "VVV-5" to "EEEE-2", "EEEE-4" to "HHHH-7", "IIII" to "RRRR-10", "SSSS-2" to "SSSS-5", "SSSS-7" to "SSSS-12", and "UUUU" to "XXXX"**. Upon petitioner's motion[25], the Court also admitted **Exhibits "KK-2", "KK-3", and "SSSS-6"** on November 26, 2013.

Meanwhile, respondent presented the following as his witnesses: (1) Ms. Evelyn Gonzales[26] – Revenue Officer II; (2) Ms. Virginia D. David[27] – Revenue Officer III; (3) Mr. Ronnie S.J. Ocampo[28] – Administrative Aid VI; (4) Ms. Leah L. Ayson[29] – Postmaster; and (5) Mr. Sergio D. Pineda, Jr.[30] – Revenue Seizure Officer. Moreover, respondent formally offered his evidence on July 6, 2015.[31]

The Court admitted Exhibits "1", "2", "3", "3-a", "4", "5", "5-a", "5-b", "6", "7", "7-a", "8", "8-a", "9", "10", "11", "12", "12-a", "13", "13-a", "14", "20", "20-a", "21", "21-a", "22", "23", "24", "24-a", "25", "25-a", "26", "27", "28", and "29" in a Resolution[32] dated November 6, 2015. However, it denied Exhibit "15" for not being found in the records of the case.

Petitioner filed its Memorandum[33] on February 4, 2016. On the other hand, respondent filed his Tender of Excluded Evidence[34] on February 1, 2016 and manifested that he is adopting the arguments raised in his Answer as his Memorandum.

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[23] Formal Offer of Evidence, docket, pp. 1118-1145.
[24] Ibid (Vol. III), pp. 1549-1551.
[25] Motion for Reconsideration (Re: Resolution dated October 4, 2013), Id., pp. 1553-1559.
[26] Minutes of the Hearing dated October 23, 2013, Id., p. 1552; dated November 27, 2013, Id., p. 1581.
[27] Minutes of the Hearing dated February 5, 2014, Id., p. 1584.
[28] *Id.*
[29] Minutes of the Hearing dated June 18, 2014, Id., p. 1606.
[30] Minutes of the Hearing dated August 18, 2014, Id., p. 1628.
[31] Motion for Leave to Admit Attached Formal Offer of Evidence, Docket (Vol. IV), pp. 1739-1756.
[32] Ibid, pp. 1781-1782.
[33] Id., p. 1843-1880.
[34] Manifestation with Tender of Excluded Evidence, Id., p. 1796-1799.

In a Resolution[35] dated February 26, 2016, the Court noted respondent's Tender of Excluded Evidence, and submitted the instant case for decision.

The parties submitted the following issues[36] for this Court's disposition:

> "WHETHER OR NOT THE HONORABLE COURT ACQUIRED JURISDICTION OVER THE PRESENT CASE.
>
> a) Whether or not Petitioner received the PAN and the FAN, in accordance with the requirements of the law and relevant regulations.
>
> b) Whether or not Respondent's right to assess Petitioner deficiency income tax, VAT, EWT, FBT for CY 2008 has prescribed.
>
> c) In the alternative, should the October 15, 2012 be treated as Respondent's final decision over the disputed assessment, whether or not Petitioner submitted relevant supporting documents from filing of the protest letter dated May 23, 2012.
>
> **WHETHER OR NOT PETITIONER IS LIABLE TO THE ALLEGED DEFICIENCY INCOME TAX, VAT, EWT AND FBT ASSESSMENTS FOR CY 2008 IN THE TOTAL AMOUNT OF PHP7,132,540.56, INCLUSIVE OF INTERESTS AND PENALTIES.**
>
> a) Whether or not the alleged deficiency income tax, VAT, EWT and FBT should be cancelled and withdrawn for they are devoid of any legal and/or factual basis.
>
> b) Whether or not Petitioner is liable to the alleged deficiency income tax, VAT, EWT and FBT assessments for CY 2008 in the total amount of Php7,132,540.56, inclusive of interests and penalties."

The above-enumerated issues can be summarized into one main issue:

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[35] Id., p. 1890.
[36] II. Stipulated Issues, JSFI, Docket (Vol.), pp. 408-409.

Whether or not petitioner is liable for deficiency income tax, VAT, EWT, and FBT assessments for CY 2008, in the total amount of P7,132,540.56, inclusive of interests and penalties.

Petitioner insists that it did not receive from respondent any PAN or FAN in accordance with the procedure required under the law and relevant regulations, which is in violation of its right to due process.[37] It further contends that respondent's right to assess had already prescribed, based on Section 203 of the NIRC of 1997, as amended.[38] Moreover, it argues that, contrary to respondent's assertion, it submitted complete supporting documents when it filed its protest letter dated May 23, 2012.[39]

Petitioner also avers that the assessments should be cancelled and withdrawn for they are devoid of any legal and/or factual basis,[40] that contrary to respondent's finding that its alleged foreign exchange gain amounting to ₱208,766.00 should be included in the computation of its taxable gross income as prescribed by Section 12 of Republic Act (RA) No. 7227 and implemented by Revenue Regulations (RR) No. 13-2005, this amount represents unrealized foreign exchange gain which should not be subject to tax,[41] and that there is no factual basis for respondent's disallowance of the creditable withholding taxes relating to the BIR Forms No. 2307 with typographical errors already corrected by its customers and confirmed.[42]

Moreover, petitioner claims that, it is not subject to regular income tax on its sales to enterprises outside the Clark territory as it is a duly-registered CSEZ Enterprise as evidenced by its Certificate of Registration and Tax Exemption with Certificate No. C2012-031 issued by the CDC, and is thus exempt from all local and national taxes. Petitioner further claims that in line with Department of Finance (DOF) Order No. 30-08, its entire revenue from the CFZ is subject to 5% tax on gross income earned, in lieu of all other taxes.[43]

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[37] Par. 34, Memorandum, Docket (Vol. IV), p. 1852.
[38] Par. 55, Memorandum, Ibid, p. 1860.
[39] Par. 63, Memorandum, Id., p. 1863.
[40] Par, 67, Memorandum, Id., p. 1864.
[41] Pars. 70 to 72, Memorandum, Id., p. 1865.
[42] Pars. 75 to 77, Memorandum, Id., p. 1867.
[43] Par. 80, Memorandum, Id., pp. 1868 and 1872.

Jurisdiction of the Court of Tax Appeals

This Court shall first rule on the issue of jurisdiction. Pertinent to this issue is Section 228 of the NIRC of 1997, as amended, which provides:

> "SEC. 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.
>
> 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.
>
> xxx xxx xxx"

In relation thereto, Section 3.1.2 of RR 12-99[44] provides:

> "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

[44] Dated September 6, 1999.

> 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 law, rules and regulations, or jurisprudence on which the proposed assessment is based ..... 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"

From the foregoing provisions, it can be seen that the taxpayer must be informed in writing of the facts and the law on which the assessment is made through the issuance and receipt of the PAN.

In the case at bar, petitioner denied receiving the PAN and FAN. It follows that it is incumbent upon respondent to prove the receipt of the said notices by contrary evidence following the ruling of the Supreme Court in the case of *Barcelon Roxas Securities, Inc., (now known as UBP Securities, Inc.) vs. Commissioner of Internal Revenue*[45], to wit:

> "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).*

[45] G.R. No. 157064, August 7, 2006. Citations omitted.

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.** xxx.

xxx

In *Protector's Services, Inc. v. Court of Appeals,* this Court ruled that **when 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 this 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, this is still merely a disputable presumption subject to controversion, and a direct denial of the receipt thereof shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee.** xxx (Emphasis supplied)

xxx

In the present case, petitioner denies receiving the assessment notice, and the respondent was unable to present substantial evidence that such notice was, indeed, mailed or sent by the respondent before the BIR's right to assess had prescribed and that said notice was received by the petitioner. **The respondent presented the BIR record book where the name of the taxpayer, the kind of tax assessed, the registry receipt number and the date of mailing were noted.**

xxx

> **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. Yet respondent failed to present such evidence.**
>
> In the case of *Nava v. Commissioner of Internal Revenue,* this Court stressed on the importance of proving the release, mailing or sending of the notice.
>
> > "While we have held that an assessment is made when sent within the prescribed period, even if received by the taxpayer after its expiration (Coil. 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." (Emphasis supplied)

In the instant case, to prove that petitioner indeed received the required PAN on October 5, 2011, respondent presented the following documents: 1) copy of PAN[46]; 2) transmittal sheet forwarded by the BIR-Assessment Division to the BIR-Administrative Division showing the endorsement of PAN for mailing[47]; and, 3) Registry Receipt No. 455[48] showing that the PAN was served to petitioner, *via* registered mail, on October 5, 2011.

Further, respondent's witness, Mr. Ronnie S.J. Ocampo, testified by way of Judicial Affidavit, that he was not able to obtain a certification from the post office confirming the service of PAN to petitioner on the ground that Mr. Alvin Palo, Postman in-charge, lost

[46] Exhibit 10.
[47] Par. 14 of Exhibit "22".
[48] Exhibit "12-a".

his logbook for October 2011. Thus, he caused him to execute an Affidavit of Loss to that effect.[49]

However, the Court noted that respondent failed to present Mr. Palo or any competent witness from the post office who can categorically testify that petitioner indeed received the subject PAN. Also, petitioner was able substantiate its non-receipt of PAN through its document logbook[50], which shows that no letters or correspondences from respondent were received by petitioner from October 1, 2011 to December 31, 2011. This fact was corroborated by Mr. Christopher Petronio R. Marin, petitioner's Finance and Administration Manager, in this wise:

> "Q16: In your Sworn Statement dated January 30, 2013, you mentioned that the Company did not receive a preliminary assessment notice (PAN) and final assessment notice (FAN) in connection with the deficiency tax assessments for calendar year 2008. What is your basis in making such statement?
>
> A16: It is the practice of the Company to record all incoming correspondence in a logbook which is in the custody of our receiving clerk. Each time a document is received, the date and time of receipt, the nature or description of the document as well as the sender are recorded. The pertinent pages of the Document Logbook, particularly for the period of October 1, 2011 to December 31, 2011 will show that no PAN or FAN was received by the Company during the said period."

The foregoing leads to the conclusion that no PAN was really served to petitioner.

The Supreme Court has upheld the importance of issuing a PAN in complying with the due process requirement, to wit:

> "Indeed Section 228 of the Tax Code clearly requires that the taxpayer must first be informed that he is liable for deficiency taxes through the sending of a PAN. He must be informed of the facts and the law upon which the assessment is made. The law imposes a substantive, not

[49] Par. 20 of Exhibit "22".
[50] Exhibit "K".

merely a formal, requirement. To proceed heedlessly with tax collection without first establishing a valid assessment is evidently violative of the cardinal principle in administrative investigations — that taxpayers should be able to present their case and adduce supporting evidence.

xxx xxx xxx

From the provision quoted above, **it is clear that the sending of a PAN to taxpayer to inform him of the assessment made is but part of the 'due process requirement in the issuance of a deficiency tax assessment,' the absence of which renders nugatory any assessment made by the tax authorities.** The use of the word 'shall' in subsection 3.1.2 describes the mandatory nature of the service of a PAN. The persuasiveness of the right to due process reaches both substantial and procedural rights and the failure of the CIR to strictly comply with the requirements laid down by law and its own rules is a denial of Metro Star's right to due process. **Thus, for its failure to send the PAN stating the facts and the law on which the assessment was made as required by Section 228 of R.A. No. 8424, the assessment made by the CIR is void.**"[51]

In the absence of a valid PAN, petitioner's right to due process was violated, thus, rendering the assessment null and void. Consequently, there is no factual and legal basis for respondent to formally demand the payment or to collect the deficiency taxes which are not covered by a valid PAN.

Lastly, *We* also reject the allegation of respondent that a certain "Jayson Torres" received the FAN on behalf of petitioner. Petitioner was able to substantiate and rebut such fact through pieces of evidence, such as its BIR Form No. 1604 CF-Schedule 7.3 (Alphalist of Employees)[52] and Certification[53] issued by its security service provider, Royal Security Agency, Inc., showing that neither petitioner nor its security service provider has an employee by the name of "Jason

[51] Commissioner of Internal Revenue vs. Metro Star Superama, Inc., G.R. No. 185371, December 8, 2010.
[52] Exhibit "M".
[53] Exhibit "P".

Torres". Further, the postman who certified that the FAN was served to petitioner did not take the witness stand to testify on such matter.

In view thereof, We find the CTA Court *En Banc's* Decision in *People of the Philippines v. Joseph Typingco*[54], instructive:

> "[S]uffice it to say that **there can be no final, executory and demandable assessment where there is no showing that the subject PAN and the FAN were properly and duly served upon the taxpayer concerned.**
>
> As earlier discussed, petitioner was not able to prove that the PAN and the FAN were sent and actually received by Fiesta Pack and/or respondent Typingco. Thus, respondent is correct in arguing that the assessments issued by the BIR cannot be considered as final, executory and demandable.
>
> In *Estate of the Late Juliana Diez Vda. De Gabriel vs. Commissioner of Internal Revenue*, the Supreme Court emphasized that although there is no specific requirement that the taxpayer should receive the notice within the prescriptive period, **due process requires at the very least that such notice actually be received. If it appears that the person liable for the payment did not receive the assessment, the assessment could not become final and executory**. To quote:
>
>> 'Respondent argues that an assessment is deemed made for the purpose of giving effect to such assessment when the notice is released, mailed or sent to the taxpayer to effectuate the assessment, and there is no legal requirement that the taxpayer actually receive said notice within the five-year period. It must be noted, however, that the foregoing rule requires that 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

[54] CTA EB Criminal Case No. 021 (CTA Criminal Case No. O-114), September 27, 2013.

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.

In *Republic v. De le Rama*, we clarified that, when an estate is under administration, notice must be sent to the administrator of the estate, since it is the said administrator, as representative of the estate, who has the legal obligation to pay and discharge all debts of the estate and to perform all orders of the court. In that case, legal notice of the assessment was sent to two heirs, neither one of whom had any authority to represent the estate. We said:

> **The notice was not sent to the taxpayer for the purpose of giving effect to the assessment**, and said notice could not produce any effect. In the case of Bautista and Corrales Tan v. Collector of Internal Revenue . . . this Court had occasion to state that 'the assessment is deemed made when the notice to this effect is released, mailed or sent to the taxpayer for the purpose of giving effect to said assessment.' **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.**'

xxx xxx xxx"

In sum, respondent's failure to strictly comply with the notice requirements as laid down in Section 228 of the NIRC of 1997, as amended, and Revenue Regulations No. 12-99 amounts to the denial of petitioner's right to due process, effectively voiding the assessments issued.

Having reached the foregoing conclusion, the Court need not delve into the other issues which are premised upon the validity of the assessment.

WHEREFORE, premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, the Final Assessment Notice for deficiency income tax, value-added tax, expanded withholding tax, and fringe benefits tax, inclusive of interest, surcharge and penalties, amounting to P7,132,540. 56 for taxable year 2008, are hereby **CANCELLED** and **WITHDRAWN**.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

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

Catherine T. Manahan
CATHERINE T. MANAHAN
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, Second Division

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