REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

MACINTEL, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 9252

Members:

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

Promulgated:

APR 17 2018
2:40 p.m.

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DECISION

CASTAÑEDA, JR., ***J.:***

THE CASE

This is a Petition for Review[1] filed by Macintel, Inc. pursuant to Section 228 of the National Internal Revenue Code of 1997, as amended (1997 NIRC), in relation to Rule 42 of the Revised Rules of Court, Section 3(a)(1), Rule 4 of the Revised Rules of the Court of Tax Appeals (RRCTA), and Revenue Regulations (RR) No. 12-99, as amended, praying that judgment be rendered ordering the cancellation and setting aside of respondent Commissioner of Internal Revenue's

[1] Docket, pp. 10-23.

(CIR) deficiency income tax and value-added tax (VAT) assessments for taxable year 2009 in the aggregate amount of SEVENTY-SEVEN MILLION FOUR HUNDRED NINETEEN THOUSAND FIVE HUNDRED FIFTY-NINE PESOS AND 76/100 (₱77,419,559.76), inclusive of surcharges, interests, and penalties. Petitioner likewise prayed for an order enjoining respondent from enforcing the Warrant of Distraint and/or Levy (WDL) No. 2016-01-0002 dated January 5, 2016 issued against it.

THE FACTS

Petitioner Macintel, Inc. is a domestic corporation duly organized and registered under the laws of the Philippines and duly registered with the Securities and Exchange Commission (SEC) with SEC Registration No. CS200604737, and with address at 4th Floor, 174 Salcedo Street, Legaspi Village, Makati City.[2] Pursuant to its Articles of Incorporation, petitioner was established primarily to engage in the business of selling computer hardware, peripherals and software and providing after sales service and support.[3] Petitioner is also registered with the Bureau of Internal Revenue (BIR) as shown in its Certificate of Registration No. 9RC0000179 and with Tax Identification Number (TIN) 245-002-536-000.[4]

Respondent Commissioner of Internal Revenue (CIR) is the head of the BIR, vested under the appropriate laws with the authority to carry out the functions, duties and responsibilities of said office including, *inter alia*, the power to decide disputed assessments and to cancel and abate tax liabilities, pursuant to the pertinent provisions of the National Internal Revenue Code (NIRC) of 1997, as amended, and other tax laws, rules and regulations. He holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

On September 15, 2010, Electronic Letter of Authority No. eLA201000005304 authorizing Revenue Officer Michelle Dela Cruz and Group Supervisor Elizabeth Arias to examine petitioner's books of account and other accounting records for all internal revenue taxes for taxable year 2009.[5]

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[2] Par. 1, Admitted Facts, Joint Stipulation of Facts and Issues (JSFI), Docket, p. 121.
[3] Par. 6, Admitted Facts, JSFI, Docket, p. 122.
[4] Par. 5, Admitted Facts, JSFI, Docket, p. 122.
[5] Exhibit "R-2".

Pursuant to Letter Notice (LN) No. 047-TRS-09-00-00061 dated May 20, 2011, petitioner was subjected to a tax audit or investigation for alleged deficiency internal revenue taxes for the taxable year 2009.[6]

On November 28, 2012, petitioner received the Formal Assessment Notice (FAN), Assessment Notices No. IT-LA5271/ELA5304-09-12-0870 and VT-LA5271/ELA5304-09-12-0870, which are all dated November 28, 2012, assessing and demanding from petitioner the payment for the alleged deficiency income tax in the amount of ₱47,046,011.65 and deficiency VAT in the amount of ₱19,241,465.61, for the taxable year 2009.[7]

On December 27, 2012, petitioner filed its protest to the said Assessment Notices with the Regional Director of Revenue Region No. 8 in Makati City wherein petitioner requested for reconsideration of the alleged deficiency taxes.[8]

On August 20, 2014, petitioner received a Final Decision on Disputed Assessment (FDDA) on its protest.[9]

On January 6, 2016, petitioner received WDL No. 2016-01-0002 dated January 5, 2016 which states it is due from petitioner the sum of Seventy-Seven Million Four Hundred Nineteen Thousand Five Hundred Fifty-Nine Pesos and 76/100 (₱77,419,559.76) as alleged deficiency income tax and VAT plus all increments incident to delinquency.[10]

On February 5, 2016, petitioner filed the present Petition for Review.

Within the extended time granted by the Court,[11] respondent filed via registered mail his Answer[12] on April 4, 2016 interposing the following special and affirmative defenses: *gz*

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[6] Par. 7, Admitted Facts, JSFI, Docket, p. 122.
[7] Par. 8, Admitted Facts, JSFI, Docket, p. 122.
[8] Par. 9, Admitted Facts, JSFI, Docket, p. 122.
[9] Exhibits "R-18" to "R-18-c".
[10] Par. 10, Admitted Facts, JSFI, Docket. p. 122.
[11] Order dated March 21, 2016, Docket, p. 62.
[12] Docket, pp. 63-69.

"**<u>SPECIAL AND AFFIRMATIVE DEFENSES</u>**

5. She reiterates and repleads the preceding paragraphs of this Answer as part of her Special and Affirmative Defenses;

6. Petitioner was assessed for deficiency income tax and value-added tax for taxable year 2009, for the reason that during the administrative investigation of its tax case by the respondent CIR, petitioner failed to substantiate or controvert by substantial evidence the BIR factual findings, stated under the Details of Discrepancies attached to the Preliminary Assessment Notice (PAN) dated 12 October 2012, Formal Assessment Notice (FAN) and Letter of Demand dated 28 November 2012, as well as, the Details of Discrepancies attached to the Final Decision on Disputed Assessment (FDDA) dated 19 August 2014 which were duly received by petitioner and briefly discussed hereunder, viz:

<u>On Income Tax:</u>

a.) Petitioner was found to have an undeclared sales (sic) in the amount of Php512,327.03 for taxable year 2009, since after comparison of its purchases per submitted summary list of purchases with the amount reported in its income tax return, it was disclosed that petitioner have an unaccounted purchases (sic) amounting to Php403,685.01, hence, its undeclared income amounting to Php512,327.03, pursuant to Sections 27 and 32 of the 1997 Tax Code.

b.) Petitioner was found to have an undeclared income amounting to Php74,642,028.01, since it was disclosed after investigation per Letter Notice (LN) No. 047-TRS-09-00-00061 dated 10 May 2011, that there was discrepancy between its sales and the alphalist of suppliers subjected to withholding tax submitted by its customers. It was revealed that petitioner's sales to Crown Supply Corporation amounts to Php73,247,159.58 and its sale to other customers amounts to Php1,394,868.43, hence, it was assessed pursuant to Sections 27 and 32 of the 1997 Tax Code, in relation to RMO 13-2012.

c.) Petitioner was found to have an unaccounted Salaries and Wages (sic) amounting to Php1,583,965.39, since it was disclosed after investigation that there was material discrepancy noted after comparing the amount of its income payments per financial statement of petitioner as against the aplhalist (sic) of its employees submitted. The discrepancy was considered as undeclared revenue of petitioner pursuant to the doctrine enunciated by the Supreme Court in the case of CTA vs. Perez and CIR, G.R. No. L-10507 dated May 30, 1958, which states that unreflected sources of funds not accounted for in the taxpayer's returns led to the inference that part of his income has not been reported. Hence, it was assessed pursuant to Sections 27 and 32 of the 1997 Tax Code.

d.) Petitioner was found to have an excess tax credit carried over to the succeeding period in the amount of Php1,534.60 which was deducted from the total allowable tax credit considering that the said amount has been credited against the estimated quarterly income tax liabilities for the taxable quarter of the succeeding taxable years, pursuant to Section 76 of the 1997 Tax Code.

On Value-Added Tax:

a.) Petitioner was found to have an undeclared income amounting to Php108,642.02, with corresponding undeclared sales amounting to Php512,327.03 for taxable year 2009. Hence, it was assessed for VAT pursuant to Section 106 of the 1997 Tax Code.

b.) Petitioner was found to have an undeclared income amounting to Php15,828,289.89 arising from the investigation per Letter Notice (LN) No. 047-TRS-09-00-00061 dated 10 May 2011, with corresponding undeclared sales amounting to Php74,642,028.01 for taxable year 2009. Hence, it was assessed for VAT pursuant to Section 106 of the 1997 Tax Code.

c.) Petitioner was found to have an unaccounted Salaries and Wages (sic) amounting to Php1,583,965.39 for taxable year 2009. Hence, it was assessed for VAT pursuant to Section 106 of the 1997 Tax Code.

7. Respondent fully complied with the due process requirements mandated under Section 228 of the 1997 Tax Code, as implemented by Revenue Regulations No. 12-99, and further amended by Revenue Regulations No. 18-2013, when the subject Preliminary Assessment Notice (PAN) dated 12 October 2012, Formal Assessment Notice (FAN) and Letter of Demand dated 28 November 2012, and Final Decision on Disputed Assessment (FDDA) dated 19 August 2014 were issued and received by herein petitioner. The BIR records clearly show that petitioner were (sic) fully appraised of the legal and factual bases on how and why the BIR has arrived [at] such a findings (sic) and conclusions assessing petitioner a (sic) deficiency income tax and value-added tax for taxable year 2009, and was duly afforded an opportunity to controvert such findings of the respondent when petitioner was able to file a letter protests (sic) against the subject PAN and FAN of the BIR.

8. Settled is the rule that <u>the essence of due process in taxation is the reasonable opportunity to be</u>

heard and submit any evidence one may have in support of one's defense. Thus, in the case of ***Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue, G.R. No. 168498, June 16, 2006, citing Estares v. Court of Appeals, G.R. No. 144755, June 8, 2005, 459 SCRA 601***, the Supreme Court aptly stated that:

'It is basic that as long as a party is given the opportunity to defend his interests in due course, he would have no reason to complain, for it is this opportunity to be heard that makes up the essence of due process. In ***Batongbakal v. Zafra, G.R. No. 141806, January 17, 2005, 448 SCRA 399, 410,*** the Court held that:

There is no question that the "essence of due process is a hearing before conviction and before an impartial and disinterested tribunal" but due process as a constitutional precept does not, always and in all situations, require a trial-type proceeding. The essence of due process is to be found in the reasonable opportunity to be heard and submit any evidence one may have in support of one's defense. "To be heard" does not only mean verbal arguments in court; one may be heard also through pleadings. Where opportunity to be heard, either through oral arguments or pleadings, is accorded, there is no denial of procedural due process.' (Emphasis supplied)

9. Likewise, in the case of ***IDS LOGISTICS (PHILS.), INC., vs. CIR, C.T.A. CASE NO. 7540, May 20, 2010***, citing the ruling in **Bank of the Philippine Islands vs. Commissioner of Internal Revenue, C.T.A. CASE NO. 7397, April 9, 2008,** the Court of Tax Appeals thoroughly discussed **the due process rule in taxation**, as follows:

'Revenue Regulations No. 12-85 provides for the procedure covering the Administrative Protests on Assessments of the BIR. Under the said Revenue Regulation, a post-reporting notice is sent to the taxpayer for an informal conference when there are findings of deficiency taxes. Subsequent to this notice is the issuance of the pre-assessment notice upon findings of the Commissioner that an assessment for deficiency taxes should be issued. However, such pre-assessment notice may or may not be protested by the taxpayer. In fact, Section 5 of the same Revenue Regulation provides that 'In the event that the taxpayer fails to respond to the pre-assessment notice within the prescribed period. . . he should be informed of such fact and the report of investigation shall be given due course.'

The essential elements of due process are notice and opportunity to present one's side. To begin with, petitioner had knowledge of the investigation being conducted by the BIR on its tax liabilities for the taxable years 1982-1986, as evidenced by the letter of respondent addressed to petitioner dated September 25, 1986 and received by petitioner on September 26, 1986. The said letter, in fact, requested for an informal conference on the matter and requested further that petitioner submits documentary evidence to support its stand.

As the facts would demonstrate, **petitioner was never deprived of due process as it was fully appraised of the legal and factual bases of the assessment issued against it; which enabled petitioner to substantially protest the arguments and issues raised. It is sufficient that there is notice to the taxpayer of the legal and factual bases of the assessment; and to the Court, this is substantial compliance of what is mandated by Section 228 of the NIRC. Thus, so long as the parties are given the opportunity to explain their side, the requirements of due process are satisfactorily complied with**.'

Although a pre-assessment notice is required to be issued to petitioner, however, failure on the part of respondent to issue the same cannot be considered as a violation of petitioner's right to due process. It may be required but the issuance of a pre-assessment notice is not indispensable. This finds support in the fact that a taxpayer is not obligated to protest a pre-assessment notice. And even the failure of the taxpayer to protest a pre-assessment notice does not result in the finality of the assessment against it. This Court in the case of ***Security Bank Corporation vs. Commissioner of Internal Revenue*** corroborates the foregoing and explained the significance and effects of a preliminary assessment notice (PAN) vis-a-vis a final assessment notice (FAN), in the following manner:

> 'It must be emphasized that a protest to the preliminary assessment notice is not the same as the protest required to be filed as an answer to the final assessment notice. In fact, a preliminary assessment notice may or may not even be protested to by the taxpayer, and the fact of non-protest shall not in any way make the preliminary assessment notice final and unappealable. What is clear from Section 319-A of the Tax Code of 1977, as amended, is that failure on the part of the taxpayer to protest or reply to a preliminary assessment notice paves the way for the issuance of a final assessment notice. However, evident under the said Section is that failure on the part of the taxpayer to file a valid administrative protest through a request for reconsideration or reinvestigation on the final assessment notice, shall result in the finality of the said FAN.'
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> What the law demands is the issuance of a final assessment notice which should be formally protested to by petitioner; otherwise, the same becomes final and executory. Hence,

when petitioner received the final assessment notice and duly protested the same, petitioner's right to due process was properly protected and observed." (emphasis supplied)

Based on the foregoing, **what the law demands is the issuance of a Final Assessment Notice which should be formally protested to by petitioner; otherwise, the same becomes final and executory**.' (Emphasis supplied)

10. Pursuant to Section 222 (a) of the 1997 Tax Code, it is clearly provided that in case of a false or fraudulent return with intent to evade tax or failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax maybe begun without assessment at any time within ten (10) years after the discovery of the falsity, fraud, or omission.

In the instant case, granting without admitting that petitioner indeed filed the required tax returns for income and VAT returns with the BIR, however, it is evident that petitioner failed to report its sales/receipts in the amounts of Php512,327.03, Php74,642,028.01 and Php1,583,965.39 which exceeded 30% of that declared in such tax returns. Hence, such tax returns of petitioner were deficient and did not disclose the truth regarding the correct amount of income subject to tax, thus, it rendered the subject returns as 'false' within the contemplation of Section 222 of the 1997 Tax Code. As such, petitioner may be assessed for deficiency income and VAT for taxable year 2009 within ten (10) years from the discovery of the said falsity. Hence, such deficiency income and VAT assessments of petitioner for taxable year 2009 has not yet prescribed.

A return is considered **'false'**, where the falsity or 'deviation' from the truth would place the government at a disadvantage so as to prevent the assessment and collection of the correct amount of taxes by its lawful agents. ***(Aznar vs. Court of Tax Appeals, 56 SCRA 519).***

11. A 50% surcharge was imposed on petitioner's deficiency income tax and value-added tax for taxable year 2009 for its failure to report sales, receipts or income in the amount exceeding 30% of that declared in its tax returns which is prima facie evidence of a false or fraudulent returns (sic).

12. In the case of Commissioner of Internal Revenue vs. Algue, Inc., (158 SCRA 9 [1988]) the Supreme Court held that as a rule, a warrant of distraint and levy is 'proof of the finality of the assessment' (Phil. Planters Investment Co. Inc. v. Acting Comm. of Internal Revenue, CTA Case No. 1266, Nov. 11, 1962) and 'renders hopeless a request for reconsideration, (Vicente Hilado v. Comm. of Internal Revenue, CTA Case No. 1256, Oct. 22, 1962) being 'tantamount to an outright denial thereof and makes the said request deemed rejected' (Vicente Hilado v. Comm. of Internal Revenue, CTA Case No. 1256, Oct. 22, 1962).

13. The assessments issued against petitioner for deficiency income tax and value-added tax for taxable year 2009 were made in accordance with law and revenue regulations and that petitioner failed to comply with the provisions under Section 228 of the 1997 Tax Code.

14. The deficiency income tax and value-added tax assessments issued by the respondent CIR to herein petitioner for taxable year 2009 are *prima facie* presumed correct and made in good faith. Petitioner has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties, the said deficiency income tax and VAT assessment will not be disturbed. Hence, all presumptions are in favor of the correctness of the subject tax assessment issued by the respondent. *(Interprovincial Autobus Co., Inc. vs. Collector of Internal Revenue, 98 Phil. 290; Sy Po vs. CTA, G.R. No. 81446, August 18, 1988; Dayrit, vs. Cruz, L-39910,*

> *September 26, 1988; Cagayan Robina Sugar Milling Co., vs. CA, G.R. No. 122451, October 12, 2000). Failure to present proof of error in the assessment will justify judicial affirmation of said assessment (Delta Motors Co., vs. CIR, CAT (sic) Case No. 3782, May 21, 1986; CIR vs. CA, G.R. Nos. 104151 and 105563, March 10, 1995)."*

Pre-trial conference for the case was held on June 23, 2016.[13] Respondent filed his Pre-Trial Brief[14] on June 14, 2016 while petitioner filed its Pre-Trial Brief[15] on June 20, 2016.

On July 13, 2016, the parties filed their Joint Stipulation of Facts and Issues[16], which this Court approved and adopted in the Pre-Trial Order[17] dated August 3, 2016.

During trial, petitioner presented its sole witness, Mr. Anthony J. Ong, petitioner's President.[18] On September 23, 2016, petitioner filed its Formal Offer of Evidence.[19]

On November 3, 2016, the Court issued a Resolution[20] admitting, as petitioner's evidence, Exhibits "P-1", "P-1-A", "P-1-B", "P-2", and "P-3", subject to the Court's final evaluation and/or appreciation of their purposes, materiality, relevancy, and probative value to the issues involved in this case.

On the other hand, respondent presented as his witnesses: (1) Mr. Albert M. Camba, Revenue Officer of the BIR Revenue District Office No. 44-Taguig/Pateros; [21] and (2) Ms. Michelle V. Dela Cruz, Revenue Officer of the BIR Large Taxpayers – Excise Audit Division II.[22] *Ju*

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[13] Minutes of the Hearing dated June 23, 2016, Docket, p. 109.
[14] Docket, pp. 78-81.
[15] *Id.*, pp. 103-108.
[16] *Id.*, pp. 121-124.
[17] *Id.*, pp. 130-132.
[18] Minutes of the Hearing dated September 19, 2016, Docket, p. 136.
[19] Docket, pp. 140-143.
[20] *Id.*, p. 147.
[21] Minutes of the Hearing dated November 16, 2016, Docket, p. 148.
[22] Minutes of the Hearing dated February 13, 2017, Docket, p. 161.

Within the extended period granted by this Court, respondent filed his Formal Offer of Evidence on March 6, 2017 via registered mail.[23] In a Resolution[24] dated August 7, 2017, the Court admitted Exhibits "R-1", "R-2", "R-3", "R-3-a", "R-4", "R-4-a", "R-5", "R-5-a", "R-6", "R-6-a", "R-7", "R-7-a", "R-7-b", "R-8", "R-8-a", "R-9", "R-9-a", "R-9-b", "R-9-c", "R-10", "R-10-a", "R-11", "R-11-a", "R-12", "R-12-a", "R-13", "R-13-a", "R-14", "R-14-a", "R-14-b", "R-15", "R-16", "R-16-a", "R-16-b", "R-17", "R-17-a", "R-18", "R-18-a", "R-18-b", "R-18-c", "R-19", "R-19-a", "R-20", and "R-20-a". In the same Resolution, the Court granted the parties a period of thirty (30) days within which to file their memoranda.

In a Resolution[25] dated October 10, 2017, this Court, taking into consideration the report of this Court's Records Division to the effect that both parties failed to file their memoranda, submitted the present case for decision.

On October 30, 2017, respondent filed a Manifestation with Motion to Admit[26] in which he seeks reconsideration of this Court's Resolution dated October 10, 2017 and also manifests and moves to adopt all his arguments in his Answer dated April 4, 2016 as part of his Memorandum in the present case. Thus, in a Resolution[27] dated November 16, 2017, this Court required petitioner to file its comment on respondent's Manifestation and Motion to Admit within ten (10) from notice.

As per Records Verification dated December 20, 2017[28] issued by this Court's Judicial Records Division, petitioner failed to file Comment on respondent's Manifestation and Motion to Admit.

Thus, in a Resolution[29] dated January 24, 2018, this Court noted respondent's Manifestation and granted respondent's Motion to Admit all of his arguments in his Answer dated April 4, 2016 as his Memorandum in the present case. In the same Resolution, this Court submitted anew the present case for decision.

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[23] Docket, pp. 199-208.
[24] *Id.*, pp. 212-213.
[25] *Id.*, p. 216.
[26] *Id.*, pp. 218-221.
[27] *Id.*, pp. 223-224.
[28] *Id.*, p. 225.
[29] *Id.*, pp. 226-227.

THE ISSUES

The parties agreed that the main issues to be resolved by this Court are the following:[30]

a. Whether or not the Assessment Notices are arbitrary, illegal and null and void for failure to comply with the requirements under Revenue Memorandum Order (RMO) No. 46-2004 dated September 2, 2004;

b. Whether or not respondent duly observed the due process requirement in the conduct of examination and the issuance of an assessment;

c. Whether or not the Petitioner is liable for 50% surcharge on the alleged basic deficiency income tax and value[-]added tax;

d. Whether or not the right of Respondent to issue the Assessment Notice for the alleged deficiency VAT has already prescribed; and

e. Whether or not Petitioner is liable to pay the assessed deficiency income tax and value[-]added tax in the total amount of Php77,419,559.76 (inclusive of surcharges and interest), for taxable year 2009.

THE COURT'S RULING

The Petition for Review shall be dismissed for lack of jurisdiction.

Jurisdiction

Jurisdiction over the subject matter or nature of an action is fundamental for a court to act on a given controversy.[31] It is conferred only by law and not by the consent or waiver upon a court which,

[30] Stipulated Issues, JSFI, Docket, p. 123.
[31] *Nippon Express (Philippines) Corp. v. Commissioner of Internal Revenue*, G.R. No. 185666, February 4, 2015, 749 SCRA 570.

otherwise, would have no jurisdiction over the subject matter of an action.[32] Lack of jurisdiction of the court over an action or the subject matter of an action cannot be cured by the silence, acquiescence, or even by express consent of the parties.[33] If the court has no jurisdiction over the nature of an action, its only jurisdiction is to dismiss the case. The court could not decide the case on the merits.[34]

The Court of Tax Appeals (CTA) is a court of special and limited jurisdiction. As such, the CTA can only take cognizance of matters which are clearly within its jurisdiction. Section 7(a)(1) of Republic Act (RA) No. 1125, as amended, provides:

> "Sec. 7. *Jurisdiction.* — The CTA shall exercise:
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> (a) Exclusive appellate jurisdiction to review by appeal, as herein provided:
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> (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;" *(Emphasis supplied)*

In the exercise of its appellate jurisdiction over tax assessment cases, the CTA is guided by Section 228 of the 1997 NIRC which prescribes the rules to be observed for the issuance of a deficiency tax assessment and of protesting the same. The said provision, in part, reads as follows:

> "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

[32] *Commissioner of Internal Revenue v. Silicon Philippines, Inc. (Formerly Intel Philippines Manufacturing, Inc.)*, G.R. No. 169778, March 12, 2014, 718 SCRA 533 citing *Commissioner of Internal Revenue v. Villa*, 130 Phil. 3, 4 (1968).
[33] *Id.*, citing *Laresma v. Abellana*, G.R. No. 140973, November 11, 2004, 442 SCRA 156, 169.
[34] *Id.*

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

Corollarily, Section 3 of RR No. 12-99, as amended,[35] implements Section 228 of the 1997 NIRC as it lays down a more detailed procedure relative to the issuance and protest of deficiency tax assessments.

Sections 3.1.4 of RR No. 12-99, as amended, in part, provides as follows:

> 3.1.4 *Disputed Assessment.* — The taxpayer or its authorized representative or tax agent may protest administratively against the aforesaid FLD/FAN within thirty (30) days from date of receipt thereof.
>
> xxx xxx xxx
>
> **If the protest is denied, in whole or in part, by the Commissioner's duly authorized representative, the taxpayer may either: (i) appeal to the Court of Tax Appeals (CTA) within thirty (30) days from date of receipt of the said decision; or (ii) elevate his protest through request for reconsideration to the Commissioner within thirty (30) days from date of receipt of the said decision.** No request for

[35] As amended by Revenue Regulations No. 18-2013.

> reinvestigation shall be allowed in administrative appeal and only issues raised in the decision of the Commissioner's duly authorized representative shall be entertained by the Commissioner. *(Emphasis supplied)*

Applying the foregoing rules in the present case, this Court finds that petitioner failed to file its Petition for Review on time. Evidence shows that a Final Decision on Disputed Assessment (FDDA)[36] was issued on August 19, 2014 which denied petitioner's protest dated December 27, 2012 and called for the payment of petitioner's deficiency income tax and value-added tax (VAT) for taxable year 2009 in the aggregate amount of ₱77,419,559.76, inclusive of surcharges, interests, and penalties. The said FDDA was received by petitioner on August 20, 2014.[37] Petitioner never contradicted this. It merely alleged in its Petition for Review as follows:

> "9. On December 27, 2012, Petitioner filed its Protest to the said Assessment Notices with the Regional Director of Revenue Region No. 8 in Makati City, stated therein the reconsideration of the alleged deficiency taxes.
>
> 10. To its astonishment, on January 6, 2016, Petitioner received a Warrant of Distraint and/or Levy (WDL) No. 2016-01-0002, dated January 5, 2016, stating that there is due from the Petitioner the sum of Seventy Seven Million Four Hundred Nineteen Thousand Five Hundred Fifty Nine Pesos and Seventy Six Centavos (Php77,419,559.76) as alleged deficiency income tax and value-added tax plus all increments incident to delinquency."[38]

Considering that petitioner received the FDDA on August 20, 2014, it has thirty (30) days from said date or until September 19, 2014 within which to either file an appeal before this Court or to file a request for reconsideration before the Commissioner himself. Apparently, petitioner failed to do any of these as it filed its Petition for Review only on February 5, 2016. Clearly, the FDDA already

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[36] Exhibit "R-18".
[37] Exhibit "R-18-c".
[38] Docket, p. 12.

became final and executory. As such, this Court has no jurisdiction to take cognizance of the present case.

At any rate, even on the assumption that the present Petition for Review is timely filed, the same shall still be denied for reasons discussed below.

Compliance with the requirements of Revenue Memorandum Order (RMO) No. 46-2004

In its Petition, petitioner claims that the Assessment Notices are arbitrary, illegal and invalid for failure to comply with the requirements of RMO No. 46-2004.[39] Citing certain provisions of RMO No. 46-2004[40] as well as this Court's ruling in *Fort Bonifacio Development Corp. v. Commissioner of Internal Revenue*[41] as legal bases, petitioner maintains that the revenue officers failed to show in any of the Assessment Notices, Final Assessment Notices or Formal Letter of Demand that the required Confirmation Requests were sent to the Third Party Information (TPI) sources to establish the veracity of petitioner's alleged sales.[42] Petitioner also avers that no Sworn Statements were obtained from the TPI sources allowing the Revenue District Officer to build a case against it.[43] As such, petitioner postulates that in the absence of the Confirmation Requests and Sworn Statements coming from the TPI sources, the alleged Third Party Information which was the basis in determining the alleged undeclared sales are unverified and unreliable information that cannot be made as basis of an assessment.

Petitioner's postulation fails to persuade.

At the outset, it must be noted that the assessment in the present case arose from the conduct by the BIR of computerized data

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[39] Docket, p. 13.
[40] Additional Supplement and Guidelines in Handling Letter Notices with Discrepancies Arising from Data Matching Processes as defined in Revenue Memorandum Order (RMO) Nos. 34-2004 and 30-2003, as amended by RMO Nos. 42-2003 and 24-2004, which remain Unserved, have been Served but are Without Response, or are Under Protest by Taxpayers (Dated September 2, 2004).
[41] CTA Case No. 7531, February 4, 2009.
[42] Docket, pp. 13-16.
[43] *Id.*

matching process using third party information (TPI). It must be noted that the BIR implements three (3) different TPI data matching processes or programs, namely: (1) Reconciliation of Listing for Enforcement System – Summary List of Sales and Purchases (RELIEF); (2) Bureau of Customs Data Program (BOC); and (3) Tax Reconciliation System (TRS).[44]

In *Commissioner of Internal Revenue v. Philippine Daily Inquirer, Inc.*,[45] the Supreme Court briefly explained the BIR's RELIEF System as follows:

> "Reconciliation of Listing for Enforcement (RELIEF) System is an information technology tool used by the BIR to improve tax administration. The system was created –
>
> > x x x to support third party information program and voluntary assessment program of the Bureau through the cross-referencing of third party information from the taxpayers' Summary Lists of Sales and Purchases prescribed to be submitted on a quarterly basis pursuant to Revenue Regulations Nos. 7-95, as amended by RR 13-97, RR 7-99 and RR 8-2002.
>
> > In addition –
>
> > [RELIEF] can detect tax leaks by matching the data available under the Bureau's Integrated Tax System (ITS) with data gathered from third party sources (i.e., Schedules of Sales and Domestic Purchases, and Schedule of Importations submitted by VAT taxpayers pursuant to RR No. 7-95, as amended by RR Nos. 13-97, 7-99 and 8-2002).

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[44] See RMO No. 013-12 dated March 29, 2012 (Revised Guidelines and Procedures in Handling Letter Notices Generated Through Third-Party Information Data Matching with Tax Returns).
[45] G.R. No. 213943, March 22, 2017.

> Through the consolidation and cross-referencing of third party information, discrepancy reports on sales and purchases can be generated to uncover under declared income and over claimed purchases (goods and services). Timely recognition and accurate reporting of unregistered taxpayers and non-filers can be made possible."

Similar to the RELIEF System, the Bureau of Customs Data Program is a TPI data matching program created under RMO No. 34-04[46] to promote the sound administration of the internal revenue laws through prevention and detection of fraud.[47] It uses the tool of a BOC Data Warehouse Facility (DWF) to allow the system to handle the data transmitted by the Bureau of Customs and to fully automate the matching of said data with the return information in the Limited Returns Processing System (LRPS).[48]

On the other hand, the Tax Reconciliation System (TRS) is defined under RMO No. 28-07[49] as follows:

> "The Tax Reconciliation System (TRS) using the tool of a Centralized Data Warehouse (DW) is geared towards enhancing revenue collection by computerized matching of data available under the Bureau's Integrated Tax System (ITS) (i.e., tax returns of income recipients such as BIR Form Nos. 1701, 1702, 2550Q, 2551M, 2551Q, etc.) with data gathered from withholding agents such as the Alphalist of Payees/Income Recipient/Employees attached

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[46] Prescribing Guidelines and Procedures in the Processing, Matching, Dissemination, Utilization and Monitoring of Importation Data from the Bureau of Customs for Audit and Enforcement Purposes (Dated July 12, 2004)

[47] Item I, RMO No. 34-04.

[48] *Id.*

[49] Prescribing Guidelines and Procedures in the Transmittal and Processing of the Annual Information Return on Income Taxes Withheld on Compensation and Final Withholding Taxes (BIR Form No. 1604-CF), Annual Information Return of Creditable Taxes Withheld – Expanded/Income Payments Exempt from Withholding Tax (BIR Form No. 1604-E) and Monthly/Quarterly/Transactional Remittance Returns (BIR Forms Nos. 1601C, 1601E, 1601F, 1600, 1606, 1602, 1603) with the Monthly Alphalist of Payees (MAP) and Returns Required to have Summary Alphalist of Withholding Agents of Income Payments Subjected to Tax Withheld at Source (SAWT) (1701, 1702, 2550Q, 2551M, 2551Q, etc.) under Revenue Regulations No. 2-2006 and Procedures in the Extraction, Matching, Analysis, Dissemination, Utilization of payor/payees data including Monitoring the Extent of Compliance of Withholding Agents and Income Recipients subject to Withholding Tax through the Tax Reconciliation System (Dated September 17, 2007).

> to various withholding tax forms like the Annual Information Return on Income Taxes Withheld on Compensation and Final Withholding Taxes (BIR Form No. 1604-CF); Annual Information Return of Creditable Taxes Withheld – Expanded/Income Payments Exempt from Withholding Tax (BIR Form No. 1604-E) and Monthly/Quarterly/Transactional Remittance Returns of Withholding Taxes (BIR Forms Nos. 1601C, 1601E, 1601F, 1600, 1602, 1603, 1606).
>
> Through the consolidation and cross-referencing of data from withholding agents (WAs) and declaration of income recipients, discrepancy reports can be generated to uncover violations on tax rules and regulations such as under declaration of income, non-declaration of income, under remittance and/or non-remittance of taxes withheld, over withholding, under withholding, over declaration of credits to name of few. Timely recognition and accurate reporting of unregistered taxpayers and non-filers will also be possible."

As stated earlier, petitioner alleged that respondent failed to faithfully comply with the requirements of RMO No. 46-2004, particularly the procedures to be observed for LNs protested by taxpayers due to TPI discrepancy thus making the assessment based thereon illegal and void.

However, a careful perusal of the aforesaid revenue issuance revealed that the particular provisions of RMO No. 46-04 invoked by petitioner do not apply to its case for two reasons. First, a careful examination of the documentary evidence showed that LN No. 047-TRS-09-00061 dated May 20, 2011 was issued against petitioner in accordance with the TRS System. In contrast, RMO NO. 46-04 provides for guidelines in handling Letter Notices with discrepancies arising from data matching processes as defined in RMO Nos. 34-2004 and 30-2003, *i.e.*, the BOC Data Program and the RELIEF System. Evidently, RMO No. 46-04 does not cover the TRS System as the same was implemented only later by RMO No. 28-07 in 2007. Second, the provisions of RMO No. 46-04 invoked by petitioner contemplate a situation wherein the taxpayer duly protested the issuance of the LN and submitted the necessary schedules and supporting documents for the reconciliation of the discrepancy findings indicated in the LN. In the present case, however, petitioner failed to submit its protest to the LN. As borne by the evidence on record, petitioner merely filed letters[50] requesting for extension of time within which to respond to the LN but failed to actually file any protest to the LN.

Parenthetically, RMO No. 28-07 relevantly provides that:

> "AA. If the taxpayer received the TRS-LN but fails to respond within fifteen (15) days from receipt of the TRS-LN, the LTDO/investigating office shall issue a follow-up letter (Annex 'R'). If despite the follow-up letter received by the TP, still no response within fifteen (15) days is received from the taxpayer, prepare issue-based Letter of Authority, 'Notice for Informal Conference' and if no response within fifteen (15) days from receipt, transmit the docket to the Assessment Division or equivalent office for PAN/FAN preparation."

LN No. 047-TRS-09-00061 was issued on May 20, 2011 and received by petitioner on May 26, 2011. On July 6, 2011, petitioner sent a letter to Revenue District Officer Gerry O. Dumayas (RDO Dumayas) of Revenue District Office (RDO) No. 47 – Makati City requesting for a 60-day extension period within which to respond to LN No. 047-TRS-09-00061.[51] On August 22, 2011, another letter was also subsequently sent by petitioner to RDO Dumayas likewise requesting for an extension until December 31, 2011 within which to respond to LN No. 047-TRS-09-00061 as allegedly they are still in the process of checking/verifying the said LN. [52] Thereafter, on April 19, 2012, a Notice of Informal Conference was issued to petitioner informing it of the result of the investigation conducted by the BIR regarding its deficiency tax liabilities for taxable year 2009.[53] Given these facts, this Court holds that respondent had complied with the aforequoted provision of RMO No. 28-07 which laid down the procedure to be observed in the issuance of LN, contrary to petitioner's assertion. While there is no record that respondent ever sent a follow-up letter to petitioner as prescribed by RMO No. 28-07, nonetheless, as the petitioner itself had requested an extended period of time to

[50] Exhibits "R-5", "R-5-a", "R-6" and "R-6-a".
[51] Exhibits "R-5" and "R-5-a".
[52] Exhibits "R-6" and "R-6-a".
[53] Exhibits "R-7" to "R-7-b".

respond to LN upon receipt of the latter, there appears no need for respondent to perfunctorily issue a follow-up letter.

Issuance and receipt of the Preliminary Assessment Notice

Petitioner contends that a Preliminary Assessment Notice (PAN) was not issued to and received by petitioner or any of its representatives, either personally or by registered mail.[54] Thus, petitioner argues that respondent failed to observe the due process requirements in the conduct of examination and the issuance of an assessment. Accordingly, petitioner posits that the Assessment Notices are illegal and null and void.[55]

Petitioner's contention does not inspire belief.

It is a settled rule 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.[56]

In the present case, however, respondent successfully discharged such burden. Respondent presented as evidence an original copy of the PAN dated October 12, 2012 stamped received and signed by one Yolanda De Guzman with the designation of Finance Officer on October 18, 2012.[57] Respondent likewise presented as evidence the letter[58] issued by petitioner, through its President, Mr. Anthony Ong dated October 23, 2012 and addressed to Regional Director Nestor Valeroso wherein petitioner had acknowledged its receipt of the PAN, among others. For proper reference, the relevant contents of the said letter are reproduced below:

"October 23, 2012

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[54] Docket, pp. 16-20.
[55] *Id.*
[56] *Commissioner of Internal Revenue v. GJM Manufacturing, Inc.,* G.R. No. 202695, February 29, 2016, 785 SCRA 253, 258-259; *Commissioner of Internal Revenue v. Metro Star Superama, Inc.*, G.R. No. 185371, December 8, 2010, 637 SCRA 633, 641; *Barcelon, Roxas Securities, Inc. (now known as UBP Securities, Inc.) v. Commissioner of Internal Revenue*, G.R. No. 157064, August 7, 2006, 498 SCRA 126, 134.
[57] Exhibits "R-9" to "R-9-c".
[58] Exhibits "R-10" and "R-10-a".

Director Nestor Valeroso
Regional Director
RR8 – Makati
RDO 47 – East Makati

Dear Sir,

We are writing you this letter concerning the Preliminary Assessment Notice we received from your office. We would like to request from your good office if our LN 047-TRS-0900-00061 and LOA 0472010-00000273 docket can be send back to the assigned Group, since we would like to be given a chance to show and submit documents to support these LN and LOA.

We were not able to do it properly since the examiner assigned to this case was transferred and thus prevented us from going forward.

We look forward for your favorable reply and hoping that this request will be considered.

Very truly yours,

(Sgd.)
Anthony Ong
President"[59]

In fact, even without the presentation of the aforesaid documents, there is enough basis to sustain the view that petitioner duly received the PAN.

During the hearing dated September 19, 2016, petitioner's President categorically admitted, upon cross-examination, that petitioner actually received the PAN. Quoted below are the relevant

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[59] Emphasis supplied.

portions of the testimony of petitioner's President on this matter, to wit:[60]

> **"ATTY. ARPON:**
> **Q. Prior to your receipt of the Formal Assessment Notice, did your company received (sic) any preliminary assessment?**
>
> **MR. ONG:**
> **A. Yes, we received. Yeah, we received.**
>
> **ATTY. ARPON:**
> **Q. Who received that Preliminary Assessment Notice?**
>
> **MR. ONG:**
> **A. My office staff gave it to me.**
>
> ATTY. ARPON:
> Q. Is that office staff named Yolanda De Guzman?
>
> MR. ONG:
> A. Yes.
>
> ATTY. ARPON:
> Q. Is Yoland[a] De Guzman your employee?
>
> MR. ONG:
> A. Yes.
>
> ATTY. ARPON:
> Q. He is the Finance Operation (sic) of the Company?
>
> MR. ONG:
> A. Yes."[61] gr

[60] Transcript of Stenographic Notes (TSN) dated September 19, 2016, pp. 9-10.
[61] Emphasis supplied.

Considering that said statements were made by petitioner's President in open court, in his official capacity, they therefore bind petitioner and are more than enough to refute petitioner's denial of receipt of the PAN. The said statements partake of the nature of judicial admission[62] thus dispensing with the need to present any evidence.

Imposition of the fifty percent (50%) surcharge

Petitioner also maintains that the imposition of the 50% surcharge is without legal and factual bases.[63] Citing the case of *Aznar v. Court of Tax Appeals*[64] as its legal basis, petitioner claims that other than the alleged discrepancy in the declared sales of petitioner, respondent failed to allege and prove specific acts showing that petitioner willfully or deliberately underdeclared its sales or income in 2009 for the purpose of evading the tax.[65] Petitioner faults respondent for merely relying on the presumption provided under Section 248(B) of the National Internal Revenue Code of 1997, as amended (1997 NIRC) in imposing the 50% surcharge.[66]

Petitioner's argument does not induce assent.

Section 248 (B) of the NIRC of 1997, as amended provides:

"Section 248. Civil Penalties. —

xxx xxx xxx

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[62] Section 4, Rule 129 of the Rules of Court states:

"SEC. 4. *Judicial Admissions.* — An admission, verbal or written, made by a party in the course of the proceedings in the same case, does not require proof. The admission may be contradicted only by showing that it was made through palpable mistake or that no such admission was made."

[63] Docket, pp. 20-21.
[64] G.R. No. L-20569, August 23, 1974, 58 SCRA 519.
[65] Docket, pp. 20-21.
[66] *Id.*

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

In *Commissioner of Internal Revenue v. Asalus Corporation,*[67] the Supreme Court aptly explained the application of the above-highlighted provisos, to wit:

> "Under Section 248(B) of the NIRC, there is a *prima facie* evidence of a false return if there is a substantial underdeclaration of taxable sales, receipt or income. The failure to report sales, receipts or income in an amount exceeding 30% [of] what is declared in the returns constitute substantial underdeclaration. A *prima facie* evidence is one which that will establish a fact or sustain a judgment unless contradictory evidence is produced.
>
> In other words, **when there is a showing that a taxpayer has substantially underdeclared its sales, receipt or income, there is a presumption that it has filed a false return. As such, the CIR need not**

[67] G.R. No. 221590, February 22, 2017 ("*Asalus*").

> **immediately present evidence to support the falsity of the return, unless the taxpayer fails to overcome the presumption against it.**" *(Emphasis supplied)*

As indicated in the FAN and the Details of Discrepancies attached to it, the audit investigation revealed that there were undeclared sales, receipts and income in the total amount exceeding 30% of that declared in petitioner's tax returns. Accordingly, the same raises the presumption that petitioner has filed a false return. In such case, petitioner has the burden to present sufficient evidence to overcome this presumption and to prove that it has filed accurate returns. This, however, petitioner failed to do. On the other hand, respondent need not present further evidence as the presumption of falsity was not overcome. Consistent with the Supreme Court's holding in *Asalus*, petitioner was bound to refute the presumption of falsity of the returns and to prove that the returns it filed were accurate. Accordingly, petitioner's failure to overcome the presumption of falsity warranted the application of the ten (10) year prescriptive period under Section 222 of the 1997 NIRC. Indeed, to require the respondent to present further evidence to prove the falsity of the returns in spite of the presumption provided in Section 248(B) of the 1997 NIRC would render the said provision inutile.

Prescription

Given the applicability of the 10-year prescriptive period in the present case due to the falsity of the returns as discussed above, this Court holds that the assessment issued in the present case has not prescribed.

WHEREFORE, the present Petition for Review is **DISMISSED** for lack of jurisdiction.

SO ORDERED.

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

WE CONCUR:

(On Leave)	
CAESAR A. CASANOVA	**CATHERINE T. MANAHAN**
Associate Justice	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.
Associate Justice
Chairperson

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice