REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

First Division

TEKTITE INSURANCE BROKERS, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8903

Members:

DEL ROSARIO, *P.J., Chairperson*,
UY, *and*
MINDARO-GRULLA, *JJ.*

Promulgated:

APR 12 2018 2:00 pm

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AMENDED DECISION

DEL ROSARIO, P.J.:

For resolution is petitioner's "**Motion for Reconsideration with Motion to Present Evidence in Support of the Motion for Reconsideration**" posted on November 22, 2017, without respondent's comment thereon despite due notice as per Records Verification dated January 17, 2018.

Petitioner assails the Court's November 3, 2017 Decision which denied its Petition for Review and affirmed the Assessment Notices and Formal Letters of Demand No. 043A-B020-10, with Details of Discrepancies, assessing petitioner for deficiency income tax, interest and compromise penalty for taxable year ending December 31, 2010 and the Letter dated August 29, 2014 (Final Decision), signed by Regional Director Alfredo Y. Misajon.

Petitioner raises the following grounds in support of its motion for reconsideration:

i) The Court gravely erred in ruling that petitioner is estopped from questioning the validity of the waiver under the principle of *in pari delicto*;

ii) The Court gravely erred in holding that the waiver extended the right of the Bureau of Internal Revenue (BIR) to assess petitioner for the taxable year 2010;

iii) The Court gravely erred in not considering that petitioner is not liable for deficiency income tax in the amount of P408,988.65 for the taxable year ending December 31, 2010; and,

iv) The Court gravely erred in not considering that petitioner is not liable for compromise penalties in the amount of P12,000.00 for the taxable year ending December 31, 2010.[1]

In support thereof, petitioner claims that the Court erred in ruling that petitioner is estopped form questioning the validity of the subject waiver under the principle of *in pari delicto*. It avows that neither the principle of *in pari delicto* nor estoppel can sustain the validity of the waiver as the same was executed at the instance and for the sole benefit of respondent. Due to the BIR's inordinate delay in the conduct of the tax audit, the BIR had to request petitioner to issue the waiver to extend the period to issue the assessment. Since the delay in the conduct of the audit could not be attributed to petitioner, it could not be declared *in pari delicto* and should not bear the adverse consequence of the defective waiver.

Petitioner further contends that that *Commissioner of Internal Revenue vs. Next Mobile, Inc. (formerly Nextel Communications Phils., Inc.)*[2] (*Next Mobile case*) is not applicable to the present case as there are five waivers involved in the *Next Mobile case*, contrary to the present case, which involves only one waiver. Petitioner posits that the doctrine laid down in *Commissioner of Internal Revenue vs. Philippine Daily Inquirer, Inc.*[3] (*PDI case*) should have been applied in resolving the case.

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[1] Pages 1-2 of Petitioner's Motion for Reconsideration (with Motion to Present Evidence in Support of the Motion for Reconsideration).
[2] G.R. 212825, December 7, 2015.
[3] G.R. No. 213943, March 22, 2017.

In addition, petitioner reiterates its previous arguments in support of its claim on the invalidity of the waiver, *viz.*: (i) its President, Antonio Reyes-Cuerva, was not authorized to sign the subject waiver; (ii) the subject waiver was not signed by the authorized BIR Revenue Officer, which is the Regional Director; (iii) the waiver does not indicate the specific taxes covered by the waiver as, in truth, the phrase "[it's] all internal revenue taxes liabilities" was presented to petitioner on a take it or leave it basis.

On the matter of the Court's pronouncement in the assailed Decision that the assessment became final and executory, petitioner posits that the BIR should have considered the arguments it raised in its *Reply* (to the Notice of Informal Conference) dated December 18, 2013 as the basis of petitioner's protest against the Preliminary Assessment Notice (PAN) and the Formal Letters of Demand (FLD) and Assessment Notices (FAN). It argues that since it was able to file its Protest within thirty (30) days from receipt of the FLD and FAN, it substantially complied with the provisions of law and regulations on the filing of the protest.

Lastly, petitioner prays that it be allowed to present additional evidence in support of its Motion for Reconsideration; specifically, to present the supplemental testimony of Antionio Reyes-Cuerva and Josefa Maria Bernadette Dizon, who will (i) identify petitioner's submissions of supporting documents to the BIR from the issuance of the Letter of Authority up until the execution of the subject waiver; (ii) identify the BIR Records submitted by the BIR; and, (iii) testify that petitioner has not benefitted at all by the subject waiver, and that the same was executed at the instance of the BIR.

THE COURT'S RULING

The Court notes that petitioner's Motion for Reconsideration reiterates or amplifies the arguments previously raised in its Petition for Review[4] and Memorandum dated May 16, 2017[5] which were already considered and passed upon in the assailed Decision, *save* for its invocation of the doctrine in *PDI case* in support of its position that the waiver it executed is void. The Court shall nonetheless discuss petitioner's arguments relative to the application of the doctrines laid down in the *Next Mobile case* and *PDI case* if only to reinforce the disquisition in the assailed Decision.

[4] CTA Docket, pp. 6-28.
[5] CTA Docket, pp. 1188-1219.

In the *Next Mobile case*, the validity of the defective waivers were upheld by the Supreme Court based on a categorical finding that both parties are *in pari delicto* in causing the deficiencies of the subject waivers. It further emphasized that a taxpayer who voluntarily executed the waivers could not insist on their invalidity by raising the very same defects it caused.

On the other hand, in the *PDI case*, the Supreme Court upheld the ruling of the First Division of the Court of Tax Appeals (CTA) which pronounced that the three waivers did not extend the BIR's period to assess. But a plain reading of the factual circumstances in the *PDI case* reveals that the defects in the waivers were attributed solely to the BIR. The BIR failed to provide the office accepting the First and Second Waivers with their respective third copies. As to the Third Waiver, aside from not being executed in three copies, the revenue official who accepted the Third Waiver was not authorized to execute the same. Thus, the BIR in the said case is solely at fault. Evidently, in the *PDI case*, **facts and circumstances that show an equal fault on the part of the taxpayer are absent, which could have otherwise justified a finding of "*in pari delicto.*"**

In the present case, petitioner is not faultless as it supplied the defective proof of identity before the notary public and voluntarily signed the waiver. Since certain defects in the waiver were actually caused by petitioner, it is precluded from raising the same as a ground to render the waiver invalid. Thus, the assailed Decision elucidates:

> "Petitioner also argues that the Waiver is void on account of its defective notarization and due to the BIR's failure to specify the kind and amount of tax due against petitioner.
>
> It is undisputed that the proof of identity provided by petitioner's President when he subscribed the Waiver before the notary public was his Community Tax Certificate, which is not considered as competent evidence of identity under Section 12, Rule II of Administrative Matter No. 02-8-13-SC (Rules on Notarial Practice) as amended. But the Court finds it worthy to emphasize that it was petitioner's President who furnished the details of his Community Tax Certificate to the Notary Public.
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> Likewise, when petitioner's President executed the Waiver, he indicated therein the phrase *"in connection with the investigation [it's]* ***all internal revenue taxes liabilities*** *for the calendar year ending December 31, 2010..."* instead of specifying the kind and amount of tax due that should be covered by the extended period to assess.

> **Undeniably, the foregoing infirmities in the Waiver are attributable to petitioner, albeit respondent may have been equally remiss in his duty to ascertain that the Waiver was not in compliance with RMO No. 20-90**. For this reason, the exception to the rule that failure to observe the procedures specified in RMO No. 20-90 and RDAO No. 05-01 shall render the Waiver void shall be applicable in the present case. **Despite their knowledge of the Waiver's infirmities, the parties continued to deal with each on the basis of the defective Waiver. By the principle of estoppel**, as enunciated in the earlier quoted ***Next Mobile, Inc. case***, **petitioner may no longer question the validity of the Waiver and raise the defense of prescription against the government's right to assess**." (Citation omitted; additional boldfacing supplied)

In the more recent case of ***Commissioner of Internal Revenue vs. Transitions Optical Philippines, Inc.,***[6] the Supreme Court further clarified the applicability of the *Next Mobile* case. In the aforementioned case, the respondent (taxpayer) therein only raised the issue of the First and Second Waivers in its Petition for Review before the CTA First Division and that respondent did not raise the same at the earliest opportunity in its protest to the PAN, Protest to the FAN, or Supplemental FAN. The Supreme Court opined that respondent impliedly recognized the waivers' validity and its representatives' authority to execute them. Applying the *Next Mobile case*, the Supreme Court found that respondent is estopped from claiming that they were invalid and that prescription had set in. Thus, the Supreme Court declared:

> "In this case, two (2) waivers were supposedly executed by the parties extending the prescriptive periods for assessment of income tax, value-added tax, and expanded and final withholding taxes to June 20, 2008, and then to November 30, 2008.
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> The Court of Tax Appeals, both its First Division and En Banc, declared as defective and void the two (2) Waivers of the Defense of Prescription for non-compliance with the requirements for the proper execution of a waiver as provided in RMO No. 20-90 and RDAO No. 05-01. Specifically, the Court of Tax Appeals found that these Waivers were not accompanied by a notarized written authority from respondent, authorizing the so-called representatives to act on its behalf. Likewise, neither the Revenue District Office's acceptance date nor respondent's receipt of the Bureau of Internal Revenue's acceptance was indicated in either document.
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> However, Presiding Justice Roman G. Del Rosario (Justice Del Rosario) in his Separate Concurring Opinion in the Court of Tax Appeals June 7, 2016 Decision, found that respondent is estopped

[6] G.R. No. 227544, November 22, 2017.

from claiming that the waivers were invalid by reason of its own actions, which persuaded the government to postpone the issuance of the assessment. He discussed:

> **In the case at bar, respondent performed acts that induced the BIR to defer the issuance of the assessment.** Records reveal that to extend the BIR's prescriptive period to assess respondent for deficiency taxes for taxable year 2004, respondent executed two (2) waivers. The first Waiver dated October 2007 extended the period to assess until June 20, 2008, while the second Waiver, which was executed on June 2, 2008, extended the period to assess the taxes until November 30, 2008. **As a consequence of the issuance of said waivers, petitioner delayed the issuance of the assessment.**
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> Notably, when respondent filed its protest on November 26, 2008 against the Preliminary Assessment Notice dated November 11, 2008, it merely argued that it is not liable for the assessed deficiency taxes and did not raise as an issue the invalidity of the waiver and the prescription of petitioner's right to assess the deficiency taxes. In its protest dated December 8, 2008 against the FAN, respondent argued that the year being audited in the FAN has already prescribed at the time such FAN was mailed on December 2, 2008. Respondent even stated in that protest that it received the letter (referring to the FAN dated November 28, 2008) on December 5, 2008, which accordingly is five (5) days after the waiver it issued had prescribed. **The foregoing narration plainly does not suggest that respondent has any objection to its previously executed waivers. By the principle of estoppel, respondent should not be allowed to question the validity of the waivers.**

In *Commissioner of Internal Revenue v. Next Mobile, Inc. (formerly Nextel Communications Phils., Inc.)*, this Court recognized the doctrine of estoppel and upheld the waivers when both the taxpayer and the Bureau of Internal Revenue were *in pari delicto*. **The taxpayer's act of impugning its waivers after benefitting from them was considered an act of bad faith:** xxx

xxx xxx xxx

Parenthetically, this Court stated that **when both parties continued to deal with each other in spite of knowing and without rectifying the defects of the waivers, their situation is 'dangerous and open to abuse by unscrupulous taxpayers who intend to escape their responsibility to pay taxes by expedient of hiding behind technicalities.'**

> *Estoppel similarly applies in this case.*
>
> Indeed, the Bureau of Internal Revenue was at fault when it accepted respondent's Waivers despite their non-compliance with the requirements of RMO No. 20-90 and RDAO No. 05-01.
>
> **Nonetheless, respondent's acts also show its implied admission of the validity of the waivers. *First*, respondent never raised the invalidity of the Waivers at the earliest opportunity, either in its Protest to the PAN, Protest to the FAN, or Supplemental Protest to the FAN. It thereby impliedly recognized these Waivers' validity and its representatives' authority to execute them. Respondent only raised the issue of these Waivers' validity in its Petition for Review filed with the Court of Tax Appeals. In fact, as pointed out by Justice Del Rosario, respondent's Protest to the FAN clearly recognized the validity of the Waivers, when it stated:**
>
>> This has reference to the Final Assessment Notice ('[F]AN') issued by your office, dated November 28, 2008. The said letter was received by Transitions Optical Philippines[,] Inc. (TOPI) on December 5, 2008, **five days after the waiver we issued which was valid until November 30, 2008 had prescribed.** (Emphasis supplied)
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>> xxx xxx xxx (*Boldfacing supplied*)

Similarly, petitioner did not raise the invalidity of the waiver at the earliest possible opportunity. It is only when petitioner filed its Petition for Review before this Court did it raise the issue on the invalidity of the waiver. Petitioner's failure to timely raise the defect in the waiver in its reply to the Notice of Informal Conference, PAN, FLD and FAN implies that it recognized its validity.

With regard to petitioner's theory that the doctrine in the *Next Mobile case* is not applicable as petitioner did not execute multiple waivers, the Court finds the same bereft of merit. As long as both parties voluntarily agreed to execute a waiver, and the waiver complied with the requirements mandated in Revenue Memorandum Order (RMO) No. 20-90 and Revenue Delegation Authority Order (RDAO) No. 05-01 or when both parties are in *pari delicto,*[7] the waiver's validity would be upheld. Since petitioner and the BIR continued to deal with each other despite having knowledge of the infirmities attendant to the subject waiver, the waiver they executed is valid and sufficient to extend the prescriptive period to assess.

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[7] *Supra Note 3.*

Petitioner's argument that the waiver it executed is a contract of adhesion also holds no water. The procedure and guidelines as to the form and manner of execution of waiver is provided for in RMO No. 20-90 and RDAO No. 05-01. The form and manner of execution of a waiver is required by law but the taxpayer has the final say on whether or not execute the same. Since petitioner opted to submit a waiver, albeit with certain defects, and respondent, on his part, accepted the same, it is only proper for the Court to sustain its validity.

Finally, petitioner seeks that it be allowed to present the supplemental testimony of Antonio Reyes-Cuerva and Josefa Maria Bernadette Dizon to testify on petitioner's submission of supporting documents to the BIR from the issuance of the Letter of Authority up until the execution of the Waiver, to identify the BIR Records submitted by the BIR, and to testify that petitioner was not benefitted at all by the subject Waiver and the same was executed at the instance of the BIR.

An evaluation of the additional evidence sought to be presented by petitioner reveals that their presentation, even if considered by the Court in resolving its Motion for Reconsideration, will not materially alter the conclusions reached by the Court in the assailed Decision. Thus, the Court finds no sufficient basis to grant petitioner's prayer to present supplemental evidence.

Imposition of deficiency and delinquency interests

At the time of the promulgation of the assailed Decision of the Court, the governing provision relating to the imposition of interests is Section 249 of the NIRC of 1997 which provides:

> "SEC. 249. *Interest.* -
>
> (A) *In General.* - There shall be assessed and collected on any unpaid amount of tax, interest at the rate of **twenty percent (20%) per annum**, or such higher rate as may be prescribed by rules and regulations, **from the date prescribed for payment until the amount is fully paid.**
>
> (B) ***Deficiency Interest.*** - Any deficiency in the tax due, as the term is defined in this Code, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected **<u>from the date prescribed for its payment until the full payment thereof</u>**.

> (C) ***Delinquency Interest.* -** In case of failure to pay: (1) The amount of the tax due on any return to be filed, or (2) The amount of the tax due for which no return is required, or (3) A deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner, there shall be assessed and collected on the unpaid amount, interest **at the rate prescribed in Subsection (A) hereof until the amount is fully paid**, which interest shall form part of the tax." *(Boldfacing & underscoring supplied)*

After the promulgation of the assailed Decision and the filing of petitioner's Motion for Reconsideration, **Republic Act (RA) No. 10963 or otherwise known as the *"Tax Reform for Acceleration and Inclusion"*** *(Train Law)* took effect on January 1, 2018, amending pertinent provisions of the NIRC of 1997, among which is Section 249. The amendatory provision of Section 249 of the NIRC now reads as follows:

> "SEC. 249. *Interest.* –
>
> (A) *In General.* – There shall be assessed and collected on any unpaid amount of tax, **interest at the rate of double the legal interest rate for loans or forbearance of any money in the absence of an express stipulation as set by the Bangko Sentral ng Pilipinas from the date prescribed for payment until the amount is fully paid**: *Provided,* That **in no case shall the deficiency and delinquency interest prescribed under Subsections (B) and (C) hereof, be imposed simultaneously**.
>
> (B) *Deficiency Interest.* – Any deficiency in the tax due, as the term is defined in this Code, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected **from the date prescribed for its payment until the full payment thereof, or upon issuance of a notice and demand by the Commissioner of Internal Revenue, whichever comes earlier**.
>
> (C) *Delinquency Interest.* – xxx" *(Boldfacing & underscoring supplied)*

The imposition of deficiency interest as sustained in the assailed Decision is based on the NIRC of 1997. When the NIRC was amended by the TRAIN Law during the pendency of the case, and **there being a specific provision as to when the amendment becomes effective**, the Court has to apply the TRAIN Law.

In the consolidated cases of *Republic of the Philippines vs. Hon. Jesus M. Mupas,*[8] *Republic of the Philippines vs. Philippine International Air Terminals Company, Inc.,*[9] *Takenaka Corporation and Asahikosan Corporation vs. Republic of the Philippines,*[10] *Philippine International Air Terminals Co., Inc. vs. Republic of the Philippines,*[11] the Supreme Court imposed the amended rate of interest immediately upon the effectivity of the corresponding amendment despite the fact that the purported cause of action has arisen before the amendment, and notwithstanding the absence of any provision stating that it should be applied either retroactively or prospectively. There was a "cut off" date made, however, that is - - by applying the old rate before the effectivity of the amendment and the new rate after such effectivity.

Since there is no way to reasonably apply a cut-off date on deficiency interest because of the strikingly opposing rule on **rate of interest** and **mode of computation** between the old provision and the new provision, the logical approach is to apply the amended rate consistent with the intent of RA No. 10963 to make it effective on January 1, 2018.

A *propos*, Section 249 of the NIRC of 1997, as amended by RA No. 10963 (TRAIN Law) categorically incorporates three (3) provisos that cannot be applied without setting aside the original version of Section 249 of the NIRC of 1997:

> First, the TRAIN Law proscribes the simultaneous imposition of deficiency interest and delinquency interest, which the old version allows;
>
> Second, the TRAIN Law prescribes a rate of double the legal interest rate for loans or forbearance of any money in the absence of express stipulation as set by the Bangko Sentral ng Pilipinas (which at present is 6% per annum), which is lower than the old version prescribing the rate of 20% per annum; and,
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> Third, deficiency interest is allowed to be computed from the date prescribed for its payment until the full

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[8] G.R. No. 181892, September 8, 2015.
[9] G.R. No. 209917, September 8, 2015.
[10] G.R. No. 209696, September 8, 2015.
[11] G.R. No. 209731, September 8, 2015.

> payment thereof, **or upon issuance of a notice and demand by the CIR**, whichever comes earlier; while the old version confined its computation strictly from the date prescribed for its payment until the full payment thereof.

In view of the effectivity of the TRAIN Law on January 1, 2018 (during the pendency of petitioner's motion for reconsideration) and guided by existing precedents that imposed the amended rate of interest to the cause of action that arose before amendment, the amendatory provisions of the TRAIN Law on the imposition of deficiency and delinquency interests must be applied in determining the amount of petitioner's tax liability.

WHEREFORE, premises considered, petitioner's "**Motion for Reconsideration with Motion to Present Evidence in Support of the Motion for Reconsideration**" is **PARTIALLY GRANTED**.

The dispositive portion of the assailed Decision is hereby **MODIFIED** to read, as follows:

The Assessment Notices and Formal Letters of Demand No. 043A-B020-10 with Details of Discrepancies, assessing petitioner for deficiency income tax, interest and compromise penalty for taxable year ending December 31, 2010 and the Letter dated August 29, 2014 (Final Decision), signed by Regional Director Alfredo Y. Misajon, stating that the aforesaid Assessment Notices and Formal Letters of Demand have become final, executory and demandable, are **AFFIRMED** with **MODIFICATION**.

Tektite Insurance Brokers, Inc. is **ORDERED** to **PAY** the Bureau of Internal Revenue basic deficiency income tax in the amount of P247,810.19 and compromise penalty for failure to submit SLS/SLP of P12,000.00.

Petitioner is also **ORDERED** to **PAY** the Bureau of Internal Revenue the following deficiency and delinquency interest, computed in accordance with the provision of Section 249 of the NIRC of 1997, as amended by RA No. 10963 (TRAIN law), *viz.*:

(a) **Deficiency interest** at the rate of twelve percent (12%) per annum on the basic deficiency income tax of P247,810.19, computed from April 16, 2011, the date prescribed for payment, until <u>June 18, 2014</u>, the date of Tektite Insurance Brokers, Inc.'s receipt of the

Assessment Notices and Formal Letters of Demand No. 043A-B020-10, dated June 18, 2014, pursuant to Section 249 (B) of the NIRC of 1997, as amended by RA No. 10963; and,

(b) **Delinquency interest** at the rate of 12% per annum on the basic deficiency income tax in the amount of P247,810.10 and on the 12% deficiency interest which have accrued as aforestated in (a) above, computed from July 18, 2014, the due date appearing in the Assessment Notices and Formal Letters of Demand No. 043A-B020-10, until the amount is fully paid, pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Amended 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