REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB CASE NO. 895 (CTA Case No. 6842)**
- *versus* -	Present: *Castañeda, Jr., Acting P.J. Bautista, Uy, Casanova, Fabon-Victorino, Mindaro-Grulla, and Cotangco-Manalastas, JJ.*
UNION CEMENT CORPORATION, Respondent.	**Promulgated:** MAR 22 2013 4:00 p.m.

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DECISION

BAUTISTA, J.:

The Case

Before the Court *En Banc* is a Petition for Review,[1] filed by petitioner Commissioner of Internal Revenue, on May 3, 2012, pursuant to Section 18 of Republic Act ("RA") No. 1125, as amended by RA No. 9282, and RA No. 9503, praying for the reversal of the Decision,[2] and Resolution,[3] respectively promulgated by the Second Division of the Court ("Court in Division") on January 18, 2012 and March 30, 2012, and accordingly, for respondent Union Cement Corporation to pay the aggregate amount of Php97,698,105.26 covering the period from June 1, 1999 to December 31, 1999 as deficiency income tax, plus twenty five

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[1] *Rollo*, CTA EB Case No. 895 (CTA Case No. 6842), pp. 8-82, with Annexes.
[2] *Ibid.*, pp. 30-72; penned by Associate Justice Cielito N. Mindaro-Grulla, with Associate Justices Juanito C. Castañeda, Jr., and Caesar A. Casanova, concurring.
[3] *Ibid.*, pp. 74-79, with Annexes.

percent (25%) surcharge for late payment and twenty percent (20%) deficiency and delinquency interest from January 31, 2003 until fully paid pursuant to Sections 248 and 249 of the Tax Code.

Antecedent Facts

The relevant antecedents are succinctly recited by the Court in Division in its Decision dated January 18, 2012, as follows:

> Petitioner is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines. The principal office of petitioner is located at Phinma Plaza, 39 Plaza Drive, Rockwell Center, Makati City. It is a duly registered taxpayer with the Bureau of Internal Revenue (BIR) with Tax Identification No. 205-927-879.
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> Respondent is the official charged with the duty to assess and collect internal revenue taxes, as well as granted with the power to cancel disputed assessments. She holds office at the BIR National Office Building, Diliman, Quezon City.
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> Petitioner was involved in a two-step merger. The first merger involved three (3) cement manufacturing companies, namely, Davao Union Cement Corporation (DUCC), Bacnotan Cement Corporation (BCC), and Hi-Cement Corporation (HCC); with the latter as the surviving corporation and using "Union Cement Corporation" as its new corporate name upon the effective date of merger. The second merger involved petitioner Union Cement Corporation and three marketing companies, namely, Atlas Cement Marketing Corporation (ACMC), Davao Union Marketing Corporation (DUMC), and Bacnotan Marketing Corporation (BMC). Pursuant to law, petitioner Union Cement Corporation, as the surviving corporation, assumed all the rights and obligations of the merged corporations. The subject of the assessment in the instant case pertains to the business operations of BMC.
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> On January 11, 2001, the Securities and Exchange Commission (SEC) approved the Articles and Plan of Merger executed by and among BMC, ACMC, DUMC and petitioner, with petitioner as the surviving corporation. Prior to the

effective date of the merger, BMC, as a separate and distinct corporate entity, was engaged in the business of buying, selling, transporting, and warehousing of cement.

On March 28, 2003, petitioner received from respondent a Preliminary Assessment Notice (PAN) dated March 12, 2003 pertaining to the business operations of BMC, informing petitioner of BMC's alleged income tax and value-added tax liabilities for the period covering June 1999 to April 22, 2000 in the aggregate amount of P107,439,917.94, broken down as follows:

Kind of Tax	Basic Tax plus Interest and Compromise Penalty	Period Covered
Income	P97,698,105.26	June 1999 to December 31, 1999
Value-added Tax	9,741,812.68	January 2000 to April 2000
Total	P107,439,917.94	

On April 14, 2003, petitioner protested the said PAN for lack of factual and legal bases. On the same day, petitioner signed a waiver of the defense of prescription under the statute of limitations, extending the period to assess up to June 30, 2003. On the part of respondent, a certain Ms. Flor Mercado signed the waiver for Atty. Edwin R. Abella, Assistant Commissioner-BIR Large Taxpayers Service.

On June 30, 2003, petitioner received from respondent a Formal Letter of Demand with the attached "Details of Discrepancies" and Audit Result Assessment Notice with Assessment Number LTDO 122 IT-1999-0000, all dated June 16, 2003, for deficiency income tax covering the period June 1, 1999 to December 31, 1999 and signed by Deputy Commissioner Estelita C. Aguirre, Officer-in-Charge (OIC) of the Large Taxpayers Service. The total assessment amounts to P97,698,105.26, inclusive of interest and compromise penalty.

The assessment purportedly arose from the following:

a. Underdeclaration of salaries and wages in the amount of P2,104,146.51 based on the salaries and wages declared by BMC in its alpha list, which showed an amount less than that declared by BMC in its financial statements;

b. Undeclared sales of P48,536,479.05 based on the total sales recorded by BMC in its general ledger, which showed a sales amount higher than the sales recorded in petitioner's financial statements;

c. Undeclared income by understating income payment to contractors and sub-contractors of P150,770,101.00 based on a comparison of BMC's alpha list and financial statements; and

d. Disallowance of professional fees in the amount of P395,711.00 for under-withholding and commission expenses of P541,025.00 for non-withholding of taxes.

On July 10, 2003, petitioner filed a protest through its Senior Vice President-Comptroller Rene S. Ong, requesting the withdrawal and cancellation of the said assessment. Subsequent to the filing of the protest, petitioner submitted documents to respondent in support of its protest, as evidenced by a letter dated August 12, 2003.

On December 4, 2003, or within one hundred eighty (180) days from the date of filing of the foregoing protest, petitioner received a letter dated October 14, 2003 with the heading "Final Decision on Disputed Assessment" signed by Deputy Commissioner Estelita C. Aguirre, OIC-Large Taxpayers Service of the Bureau of Internal Revenue, denying petitioner's protest for allegedly lacking factual and legal bases.

Thus, on December 30, 2003, petitioner filed this appeal on the subject Final Decision on Disputed Assessment by way of a Petition for Review.

On February 23, 2004, respondent filed her Answer with the following special and affirmative defenses:

"3. Petitioner was assessed deficiency income tax in the total amount of *P97,698,205.27* for the taxable period from June to December of 1999 and VAT in the amount of *P9,741,812.68* for the period covering January to April of 2000. The deficiency income tax assessment arose from the findings of discrepancy as a result of reconciliation of petitioner's sales per ledger as against its financial statement and its salaries and wages per Alpha List vis-à-vis Financial Statement and disallowance of Professional Fees and Commission expenses as well as for under-withholding and no-withholding of taxes;

3.a Sales per general ledger as against Financial Statement uncovered understatement of sales in the amount of *P48,536,479.05* as shown below:

Sales per General Ledger	P1,097,976,326.05
Sales per Financial Statement	P1,049,439,847.00

Discrepancy	P 48,536,479.05
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3.b Salaries and wages per Financial Statement as against Alpha List showed discrepancy in the amount of P2,104,146.51, as shown below:

Per Alpha List	P15,310,956.97
Sales per Financial Statement	P13,206,810.46

Discrepancy	P 2,104,146.51
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3.c Furthermore, reconciliation of Income payment to Contractor/sub-contractor showed discrepancy in the amount of P150,255,252.56 to wit:

Per Alpha List	P151,770,101.00
Sales per Financial Statement	P 1,514,491.00

Discrepancy	P150,255,252.56
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3.d Disallowance of Professional Fees and Commission Expenses in the amounts of P395,711.40 and P541,025.00 respectively for under-withholding and non-withholding of taxes thereon;

4. Likewise, the deficiency VAT assessment in the amount of *P9,741,812.68* arose from understatement of sales in the amount *P59,898,980.90* from the reconciliation of Sales per General ledger as against petitioner's VAT Returns;

5. Petitioner assails the validity of the Waiver of the Defense of Prescription for alleged failure to comply with the requisites of a valid waiver under Revenue Delegation Authority Order (RDAO) No. 05-2001. *We disagree.* Under RDAO No. 05-2001, for cases in the Large Taxpayers District Office (LTDO), the Chief of the LTDO shall sign and accept the waiver for cases pending investigation/action in his possession. The waiver in question was signed and accepted by Flor M. Mercado, the Acting Chief of the LTDO. Furthermore, what is surprising is the fact that petitioner did not raise in the administrative level the issue regarding the validity of the waiver executed. Neither in its protest against the Preliminary Assessment Notice (PAN) nor in its protest against the Formal Assessment Notice (FAN), did it question the waiver. It was only in this instant Petition for Review that petitioner opted to assail or contest the validity of the waiver for alleged failure to comply with the above RDAO. Such being the case, petitioner is now barred from questioning or assailing the validity of the waiver for the first time on appeal;

6. The assessments were issued within the period agreed upon between petitioner and respondent;

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

> 8. Finally, it is a well-settled rule in taxation that assessments are prima facie presumed correct and made in good faith. The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed."

Thereafter, on April 16, 2004, the case was set for pre-trial conference. Petitioner filed its Pre-trial Brief on April 13, 2004; while respondent filed her Pre-trial Brief on April 15, 2004.

On May 12, 2004, the parties filed with this Court their Joint Stipulation of Facts and Issues, which was later approved in a Resolution dated June 10, 2004. In the same Resolution, the pre-trial conference was deemed terminated.

Upon motion, Ms. Leticia C. Tagle was commissioned as the Independent Certified Public Accountant (ICPA) to conduct the actual examination, evaluation and audit of the voluminous documents to be offered and presented by petitioner in the instant case.

Thereafter, trial proceeded, during which petitioner presented three (3) witnesses, namely: Randy B. Pineda, Leticia C. Tagle, and Atty. Victoria T. Tomelden.

On May 11, 2007, petitioner filed its Formal Offer of Evidence with Motion for Re-Marking of Exhibits.

Petitioner's documentary evidence which were formally offered and admitted are as follows:

xxx xxx xxx

Respondent presented only one (1) witness in the person of Rufo B. Ranario.

On August 4, 2009, respondent filed the Formal Offer of Documentary Evidence, to which petitioner filed its Comment on September 1, 2009.

The documentary evidence formally offered by respondent, and which were all admitted are as follows:

xxx xxx xxx

Petitioner submitted its Memorandum on June 27, 2011; while respondent filed her Memorandum (for Respondent) on July 7, 2011.

On July 8, 2011, the instant case was deemed submitted for decision.[4]

The Ruling of the Court in Division

On January 18, 2012, the Court in Division promulgated a Decision granting petitioner's Petition for Review by ruling that:

> **WHEREFORE,** premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, Assessment Notice No. LTDO 122 IT-1999-0000 covering deficiency income tax in the amount of P97,698,105.26 for the taxable period June 1, 1999 to December 31, 1999 is hereby **CANCELLED** and **SET ASIDE**.
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> **SO ORDERED.**[5]

On February 3, 2012, respondent filed her "Motion for Reconsideration (Re: Decision promulgated on January 18, 2012)." On March 30, 2012, the Court in Division issued a Resolution denying respondent's claim, the dispositive portion is as follows:

> **WHEREFORE,** the instant *Motion for Reconsideration* is hereby **DENIED** for lack of merit.
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> **SO ORDERED.**[6]

The Issues

Hence, the present Petition for Review where petitioner proffers the following grounds:

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[4] *Rollo*, pp. 31-54.
[5] *Ibid.*, p. 72.
[6] *Ibid.*, p. 79.

THE SECOND DIVISION OF THE HONORABLE COURT ERRED IN RULING THAT RESPONDENT IS NOT LIABLE TO PAY THE DEFICIENCY INCOME TAX ASSESSMENT FOR THE TAXABLE PERIODS FROM JUNE 1, 1999 TO DECEMBER 31, 1999; and

THE HONORABLE COURT ERRED IN CANCELLING AND SETTING ASIDE THE AFORESAID DEFICIENCY INCOME TAX ASSESSMENT FOR LACK OF MERIT.

Petitioner's Arguments

Petitioner argues in the following manner: that the deficiency tax assessment made was well within the prescriptive period as it was made pursuant to Sections 203 and 222 of the 1997 National Internal Revenue Code ("NIRC"), as amended; that the waiver cannot be raised for the first time on appeal as it was not raised during the administrative level; that by availing the Voluntary Assessment and Abatement Program ("VAAP") of the Bureau of Internal Revenue pursuant to Revenue Regulations Nos. 12-2002 and 17-2002, it recognizes the validity of the assessment and therefore cannot waive the same; and that the Court has no jurisdiction to try and hear the Petition for Review as the assessment has become final and executory.

Respondent's Counter-Arguments

Respondent in its "Comment to the Petition for Review," states the following: that the issues raised by petitioner have been succinctly discussed by the Court in Division; that the assessment notice was received beyond the reglementary period as subscribed in Section 203 of the 1997 NIRC, as amended; that there is no valid waiver as it failed to comply with the requirements provided under RMO No. 20-1990; that the issue of waiver can be raised for the first time on appeal as it is closely related to an issue raised that disposes of the case; that nothing in RR Nos. 12-2002 and 17-2002 and RMO No. 23-2002 which provide for an admission of the validity of the assessment in availing the same; and that it complied with the jurisdictional requirements under Section 228 of the 1997 NIRC, as amended.

The Ruling of the Court En Banc

The Court *En Banc* finds the Petition for Review bereft of merit.

In the Decision dated January 18, 2012, the Court in Division unanimously ruled as follows:

> "Based on the foregoing stipulated issues, the basic question that arises is whether the assessment was issued within the prescriptive period.
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> Section 203 of the National Internal Revenue Code (NIRC) of 1997, as amended, provides for the period within which assessment can be validly made, to wit:
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> xxx xxx xxx
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> Section 222(b) of the 1997 NIRC, as amended, provides however that the three-year prescriptive period may be extended upon agreement in writing by both the Commissioner of Internal Revenue and the taxpayer. Section 222 (b) states as follows:
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> xxx xxx xxx
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> In the instant case, while there appears to be a Waiver of the Statute of Limitations[7] executed by petitioner which may extend the prescriptive period provided under Section 203 of the NIRC of 1997, as amended, petitioner claims that the said waiver is defective.
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> Respondent maintains that petitioner is now barred from questioning the validity of the said waiver considering that the same is being raised for the first time on appeal. One of the cases invoked by respondent is the case of *Salvador A. Fernandez vs. Cristina D. Amagna,*[8] wherein the Supreme Court held that:

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[7] Exhibit "D."

[8] *Rollo,* p. 58, citing G.R. No. 152614, September 30, 2009, citing the case of Ulep vs. Court of Appeals, G.R. No. 125254, October 11, 2005.

> "Points of law, theories, issues and arguments not brought to the attention of the lower court need not be, and ordinarily will not be, considered by a reviewing court, as these cannot be raised for the first time on appeal. Basic considerations of fair play, justice and due process underlie the rule. It would be unfair to the adverse party who would have no opportunity to present evidence in contra to the new theory, which it could have done had it been aware of it at the time of the hearing before the trial court." (*Emphasis supplied*)

This Court cannot subscribe to respondent's assertion.

In the case of *Boston Bank of the Philippines, (formerly Bank of Commerce) vs. Perla P. Manalo and Carlos Manalo, Jr.*,[9] the Supreme Court held that the Court may consider an issue not raised during the trial when there is plain error. Although a factual issue was not raised in the trial court, such issue may still be considered and resolved by the Court in the interest of substantial justice, if it finds that to do so is necessary to arrive at a just decision, or when an issue is closely related to an issue raised in the trial court and the Court of Appeals and is necessary for a just and complete resolution of the case. When the trial court decides a case in favor of a party on certain grounds, the Court may base its decision upon some other points, which the trial court or appellate court ignored or erroneously decided in favor of a party.

Likewise, in the case of *Robert Dino vs. Maria Luisa Judal-Loot, et al.*,[10] it was held that the Court is clothed with ample authority to entertain issues or matters not raised in the lower courts in the interest of substantial justice,[11] further citing the case of *Casa Filipina Realty Corporation vs. Office of the President, et al.*,[12] which said:

> "[T]he trend in modern-day procedure is to accord the courts broad discretionary power such that the appellate court may consider matters bearing on the issues submitted for resolution which the

[9] *Ibid.*, p. 59, citing G.R. No. 158149, February 9, 2006.
[10] *Ibid.*, citing G.R. No. 170912, April 19, 2010.
[11] *Ibid.*, p. 60, citing G.R. No. 170912, April 19, 2010.
[12] *Ibid.*, citing G.R No. 99346, February 7, 1995.

> parties failed to raise or which the lower court ignored. Since rules of procedure are mere tools designed to facilitate the attainment of justice, their strict and rigid application which would result in technicalities that tend to frustrate rather than promote substantial justice, must always be avoided. Technicality should not be allowed to stand in the way of equitably and completely resolving the rights and obligations of the parties." (*Emphasis supplied*)

Consequently, the principle relied upon by respondent is not without exception.

It must be emphasized that Section 8 of Republic Act No. 1125 (An Act Creating the Court of Tax Appeals) provides categorically that the Court of Tax Appeals shall be a court of record and as such it is required to conduct a formal trial (*trial de novo*) where the parties must present their evidence accordingly if they desire the Court to take such evidence into consideration.[13]

Clearly, respondent had the opportunity to present evidence to contradict petitioner's assertion and to prove that the waiver was validly executed. Besides, the validity issue of the waiver was included in the parties' Joint Stipulation of Facts and Issues. In other words, respondent will not be prejudiced if this Court will address and determine the validity of the subject waiver. Thus, this Court may resolve the issue of prescription even if the same was not raised in the administrative protest filed by petitioner.

The next question is whether the subject waiver complied with the requisites provided under Revenue Memorandum Order (RMO) No. 20-90. The pertinent portions of the said RMO read:

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[13] *Ibid.*, p. 60, citing Commissioner of Internal Revenue vs. Manila Mining Corporation, G.R. No. 153204, August 31, 2005, Dizon vs. Court of Tax Appeals and Commissioner of Internal Revenue, G.R No. 140944, April 30, 2008.

In relation thereto, Revenue Delegation Authority Order (RDAO) No. 05-01 further provides:

xxx xxx xxx

Considering the requisites provided under the afore-quoted BIR issuances, there are infirmities in the execution of the subject waiver, which are as follows:

1. The waiver was signed by Ms. Flor Mercado for then Assistant Commissioner of the BIR Large Taxpayers Service, Atty. Edwin R. Abella;

2. The original copy of the waiver does not indicate the fact of receipt by the taxpayer of his/her file copy of the waiver; and

3. The subject waiver failed to indicate the specific kind of tax and the amount of tax due.

As to the authority of Ms. Flor Mercado to sign the subject waiver, a perusal of the records of the instant case would show that respondent failed to present documentary evidence to support her claim that Ms. Mercado, under the circumstances, was authorized to sign the waiver.

Even assuming, arguendo, that Ms. Flor Mercado had the authority to sign the subject waiver, there are other infirmities on the said waiver, particularly, the lack of date of receipt by petitioner of its copy of the approved waiver and failure to state the specific kind of tax and the amount of tax due.

Paragraph 4 of RMO No. 20-90 specifically provides that the waiver must be executed in three (3) copies, the original copy to be attached to the docket of the case, the second copy for the taxpayer, and the third copy for the office accepting the waiver. It is further provided that the fact of receipt by the taxpayer of his/her file copy must be indicated in the original copy.[14]

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[14] *Rollo*, p. 66, citing United Parcel Service Co. (Philippine Branch) vs. Commissioner of Internal Revenue, CTA Case No. 7667, August 18, 2010.

In the instant case, there is nothing in the waiver submitted to this Court which would show that petitioner was furnished with a copy of the approved and accepted waiver. This is admitted by respondent's witness during the hearing held on August 2, 2010, the significant portions of which state:

xxx xxx xxx

Suffice it to say that there is compliance with the provision of RMO No. 20-90 only if the taxpayer received a copy of the waiver accepted by the BIR. The requirement to furnish the taxpayer with a copy of the waiver is not only to give notice of the existence of the document but of the acceptance by the BIR and the perfection of the agreement.[15]

Moreover, the absence of proof that the taxpayer was furnished a copy of the approved and accepted waiver cannot be remedied by the fact that at the time of the Court proceedings, the taxpayer was able to bring before the Court its own copy of the waiver.[16] There being no indication in the subject waiver that the same was received by petitioner, the said waiver shall be considered defective.

Further, the waiver failed to state the specific kind of tax and the amount of tax due.

In the cases entitled *Scandinavian Motors Corporation vs. The Commissioner of Internal Revenue*[17] and *Dole Philippines, Inc. vs. Commissioner of Internal Revenue,*[18] this Court explained the reason for the requirement that a waiver must specify the type of tax and the amount of tax due, thus:

> "The purpose of stating the specific kind of tax and the amount of tax due is for the petitioner to pinpoint which among the proposed tax assessments may subsequently be issued without the petitioner invoking the defense of prescription (Pfizer, Inc. vs. Commissioner of Internal Revenue,

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[15] *Ibid,* p. 67, citing Philippine Journalists, Inc. vs. Commissioner of Internal Revenue, G.R. No. 162852, December 16, 2004.
[16] Ibid, p. 67, citing United Parcel Service Co. (Philippine Branch) vs. Commissioner of Internal Revenue, CTA Case No. 7667, August 18, 2010.
[17] *Rollo,* p. 68, citing CTA Case No. 7269, March 26, 2008.
[18] *Ibid.,* p. 68, citing CTA Case No. 5705, July 1, 2003.

> CTA Case No. 6135, April 21, 2003). If the amount and kind of tax were not indicated in the said waiver, logically, there was no agreement to speak of (Solid Cement Corporation vs. Liwayway Vinzons-Chato, in her capacity as the Commissioner of Internal Revenue, CTA Case No. 5420, May 27, 1999). It should be emphasized that RMO No. 20-90 requires specific information. Hence, to substitute the same with general statements is a departure from RMO No. 20-90."

As regards respondent's averment that petitioner is already estopped from questioning the validity of the subject waiver, it is worthy to emphasize that the doctrine of estoppel cannot be applied in the instant case as an exception to the statute of limitations on the assessment of taxes considering that there is a detailed procedure for the proper execution of the waiver, which the BIR must strictly follow. The doctrine of estoppel is predicated on, and has its origin in, equity which, broadly defined, is justice according to natural law and right. Hence, the doctrine of estoppel cannot give validity to an act that is prohibited by law or one that is against public policy. It should be resorted to solely as a means of preventing injustice and should not be permitted to defeat the administration of the law, or to accomplish a wrong or secure an undue advantage, or to extend beyond them requirements of the transactions in which they originate. Simply put, the doctrine of estoppel must be sparingly applied.[19]

Moreover, the BIR cannot hide behind the doctrine of estoppel to cover its failure to comply with RMO No. 20-90 and RDAO No. 05-01, which the BIR itself issued. Having caused the defects in the waiver, the BIR must bear the consequence. It cannot shift the blame to the taxpayer.

Needless to say, a waiver of the statute of limitations under the NIRC, to a certain extent, is a derogation of the taxpayers' right to security against prolonged and unscrupulous investigations and must therefore be carefully and strictly construed. The waiver of the statute of limitations is an agreement between the taxpayer and the

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[19] *Rollo*, p. 69, citing Commissioner of Internal Revenue vs. Kudos Metal Corporation, G.R. No. 178087, May 5, 2010.

BIR that the period to issue an assessment and collect the taxes due is extended to a date certain. The waiver does not mean that the taxpayer relinquishes the right to invoke prescription unequivocally particularly where the language of the document is equivocal. For the purpose of safeguarding taxpayers from any unreasonable examination, investigation or assessment, our tax law provides a statute of limitations in the collection of taxes. Thus, the law on prescription, being a remedial measure, should be liberally construed in order to afford such protection. Corollarily, the exceptions to the law on prescription should perforce be strictly construed.[20]

Considering all the defects in the subject waiver of the statute of limitation, the three-year prescriptive period was not tolled or extended.

Pursuant to the afore-cited Section 203 of the NIRC of 1997, the three-year period to assess commences from the date of actual filing of the return or from the last date prescribed by law for the filing of such return, whichever comes later. In the case of petitioner's income tax, the return is required to be filed and the payment must be made on or before the fifteenth (15th) day of April following the close of the taxable year 1999. In other words, if the return was filed earlier than the last day allowed by law, the period to assess shall still be counted from the last day prescribed for filing of the return. However, if the return was filed beyond the period prescribed by law, the three-year period shall be counted from the day the return was filed. Thus, counting from April 17, 2000, the date when petitioner filed its Annual Income Tax Return for the taxable year 1999, respondent had until April 17, 2003 within which to assess petitioner for deficiency income tax for the period covering June 1 to December 31 of the taxable year 1999. However, the Formal Letter of Demand and Assessment Notice No. LTDO 122 IT-1999-0000 dated June 16, 2003 was received by petitioner on June 30, 2003. Evidently, the assessment was made beyond the 3-year prescriptive period provided by law and thus, is considered void.

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[20] Ibid., p. 70, citing Philippine Journalists, Inc. vs. Commissioner of Internal Revenue, G.R. No. 162852, December 16, 2004.

> Since the assessment subject of the instant Petition for Review is now deemed null and void for having been issued beyond the prescriptive period, the resolution of the remaining stipulated issues is now considered moot."[21]

After a careful consideration of the factual milieu in the case at bench, the Court sitting *En Banc* finds no reason to depart from the Court in Division's ruling.

It is important to rule on the issue of prescription as it provides a statute of limitations on the assessment and collection of internal revenue taxes. This in order to safeguard the interest of the taxpayer against unreasonable investigation, as held by the Supreme Court in the case of *Philippine Journalists, Incs. vs. Commission of Internal Revenue*,[22] to wit:

> The NIRC, under Sections 203 and 222, provides for a statute of limitations on the assessment and collection of internal revenue taxes in order to safeguard the interest of the taxpayer against unreasonable investigation. Unreasonable investigation contemplates cases where the period for assessment extends indefinitely because this deprives the taxpayer of the assurance that it will no longer be subjected to further investigation for taxes after the expiration of a reasonable period of time. As was held in *Republic of the Phils. v. Ablaza*:
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>> The law prescribing a limitation of actions for the collection of the income tax is beneficial both to the Government and to its citizens; to the Government because tax officers would be obliged to act promptly in the making of assessment, and to citizens because after the lapse of the period of prescription citizens would have a feeling of security against unscrupulous tax agents who will always find an excuse to inspect the books of taxpayers, not to determine the latter's real liability, but to take advantage of every opportunity to molest peaceful, law-abiding citizens. Without such a legal defense taxpayers would furthermore be under obligation to always keep their books and keep them open for

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[21] *Rollo*, pp. 57-72.
[22] G.R. No. 162852, December 16, 2004, 447 SCRA 214.

> inspection subject to harassment by unscrupulous tax agents. **The law on prescription being a remedial measure should be interpreted in a way conducive to bringing about the beneficent purpose of affording protection to the taxpayer within the contemplation of the Commission which recommend the approval of the law.** (Emphasis supplied)

This is the reason why a waiver executed in accordance with Section 222(b) of the 1997 NIRC, as amended, cannot be taken lightly. For such is in derogation of the taxpayer's rights.

In the instant case, the issue of prescription is material. For if the period to assess prescribes, respondent Commissioner no longer has the authority to assess petitioner. Likewise, there is a need to rule on the validity of the waiver in order to determine whether the period to assess has been tolled.

Thus, ruling on this issue, Sections 203 and 222(b) of the 1997 NIRC, as amended, shall be taken into consideration, to wit:

> "SEC. 203. *Period of Limitation Upon Assessment and Collection.* — Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day."
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> xxx xxx xxx
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> "SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* —
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> xxx xxx xxx

> (b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon."

From the foregoing, assessment must be made within a period of three (3) years from the last day prescribed by law for the filing of the return, or from the day the return was filed. However, assessment can be made beyond the three (3) year prescriptive period, if there is an agreement in writing by both the Commissioner of Internal Revenue and the taxpayer.

In the instant case, the factual circumstances subscribed that assessment was made beyond the three (3) year period. However, assessment can no longer be made, for the parties failed to comply with Revenue Memorandum Order (RMO) No. 20-90 and Revenue Delegation Authority Order (RDAO) No. 05-01, thereby invalidating the waiver. Based on the case of *Commissioner of Internal Revenue vs. Court of Appeals*,[23] an invalid waiver does not toll the running of the prescriptive period, to wit:

> "The pivot of inquiry here is whether or not the three (3) waivers signed by the private respondent are valid and binding as to toll the running of the prescriptive period for assessment and not bar the Government from issuing subject deficiency tax assessments.
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> xxx xxx xxx
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> The decision of the Court of Appeals affirming what the Court of Tax Appeals decided, established that subject assessments of July 29, 1987 were issued outside the statutory prescriptive period. Carnation filed its annual income tax and percentage tax returns for the fiscal year ending September 30, 1981 on January 15, 1982 and November 20, 1981, respectively. In accordance with the above-quoted provision of law, private respondent's 1981 income and sales taxes could have been validly assessed only until January 14, 1987 and November 19, 1986,

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[23] G.R. No. 115712, February 25, 1999, 303 SCRA 614.

respectively. However, Carnation's income and sales taxes were assessed only on July 29, 1987, beyond the five-year prescriptive period.

Petitioner BIR Commissioner contends that the waivers signed by Carnation were valid although not signed by the BIR Commissioner because (a) when the BIR agents/examiners extended the period to audit and investigate Carnation's tax returns, the BIR gave its implied consent to such waivers; (b) the signature of the Commissioner is a mere formality and the lack of it does not vitiate the binding effect of the waivers; and (c) that a waiver is not a contract but a unilateral act of renouncing one's right to avail of the defense of prescription and remains binding in accordance with the terms and conditions set forth in the waiver.

Petitioner's submission is inaccurate. The same tax code is clear on the matter, to wit:

> SEC. 319. *Exceptions as to period of limitation of assessment and collection of taxes.* -- (a) x x x
> "(b) Where before the expiration of the time prescribed in the preceding section for the assessment of the tax, both the Commissioner of Internal Revenue and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreement in writing made before the expiration of the period previously agreed upon."
> The Court of Appeals itself also passed upon the validity of the waivers executed by Carnation, observing thus:

We cannot go along with the petitioner's theory Section 319 of the Tax code earlier quoted is clear and explicit that the waiver of the five-year prescriptive period must be in writing and signed by both the BIR Commissioner and the taxpayer.

> Here, the three waivers signed by Carnation do not bear the written consent of the BIR Commissioner as required by law.
>
> We agree with the CTA in holding "these 'waivers' to be invalid and without any binding effect on petitioner (Carnation) for the reason that there was no consent by the respondent (Commissioner of Internal Revenue).
>
> The ruling of the Supreme Court in *Collector of Internal Revenue vs. Solano*is, in point, thus:
>
> x x x The only agreement that could have suspended the running of the prescriptive period for the collection of the tax in question is, as correctly pointed out by the Court of Tax Appeals, a written agreement between Solano and the Collector, entered into before the expiration of the of the five-year prescriptive period, extending the limitation prescribed by law.
>
> For sure, no such written agreement concerning the said three waivers exists between the petitioner and private respondent Carnation."

Consequently, petitioner's right to assess respondent has prescribed.

Much so, We cannot go along petitioner's theory that the issue of waiver cannot be raised for the first time on appeal as such an issue is closely related to the issue of prescription. Based on the case of *Macaslang vs. Zamora*,[24] it was held that the Court is not precluded from deciding issues on matters whose consideration are necessary in arriving at a just decision and complete resolution of the case or in serving the interests of justice or avoiding dispensing piecemeal justice; or on matters closely related to an error assigned, to wit:

> "Yet, even without the differentiation in the procedures of deciding appeals, the limitation of the review to only the errors assigned and properly argued in the appeal brief or memorandum and the errors necessarily related to such assigned error sought not to have obstructed the CA from resolving the unassigned issues by virtue of

[24] G.R. No. 156375, May 30, 201, citing the case of Comilang v. Burcena, G.R. No. 146853, February 13, 2006, 482 SCRA 342, 349; Sumipat v. Banga, G.R. No. 155810, August 13, 2004, 436 SCRA 521, 532-533; Catholic Bishop of Balanga v. Court of Appeals, G.R. No. 112519, November 14, 1996, 264 SCRA 181, 191-192.

their coming under one or several of the following recognized exceptions to the limitation, namely:

(*a*) When the question affects jurisdiction over the subject matter;

(*b*) Matters that are evidently plain or clerical errors within contemplation of law;

(*c*) Matters whose consideration is necessary in arriving at a just decision and complete resolution of the case or in serving the interests of justice or avoiding dispensing piecemeal justice;

(*d*) Matters raised in the trial court and are of record having some bearing on the issue submitted that the parties failed to raise or that the lower court ignored;

(*e*) Matters closely related to an error assigned; and

(*f*) Matters upon which the determination of a question properly assigned is dependent."

Furthermore, anent the issue of Voluntary Assessment Abatement Program (VAAP) of the BIR pursuant to Revenue Regulations Nos. 12-2002[25] and 17-2002,[26] nowhere in the said Revenue Regulations that state that respondent having availed of the same have recognized the validity of the assessment and therefore cannot be waived. As the law is clear, hence, no room for interpretation but only for application.[27]

Finally, the assessment has not become final and executory as it was appealed within the reglementary period. A perusal of the documents reveal that on December 4, 2003, respondent received a "Final Decision on Disputed Assessment," denying respondent's protest for allegedly lacking factual and legal bases.[28] On December 30, 2003, respondent filed its Petition for Review. Thus, the appeal was

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[25] Regulations Providing for the Policies, Procedures, and Guidelines in the implementation of the Voluntary Assessment and Abatement Program (VAAP) for Taxpayers with Underdeclared Sales/Receipts/Income for the Calendar and Fiscal Years 2000, and 2001, and the First and Second Quarter ending June 30, 2002, Pursuant to the RELIEF Program of the Bureau of Internal Revenue, and the Consequences for Non-Availment Thereof.
[26] Regulations Providing for the Policies, Procedures, and Guidelines in the Implementation of the Expanded Voluntary Assessment and Abatement Program (VAAP).
[27] Agpalo, Statutory Construction, Fourth Edition, 1998, paragraph 2.15, pp. 58-59.
[28] *Rollo*, pp. 35-36.

filed within the reglementary period pursuant to Section 228 of the 1997 NIRC, as amended.[29]

In sum, the Court *En Banc* finds no cogent reason to rule the contrary.

WHEREFORE, premises considered, the Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the Decision and the Resolution dated January 18, 2012 and March 30, 2012, respectively, are hereby **AFFIRMED** in toto.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

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[29] Sec. 228. *Protesting 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

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, 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, executor and demandable.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

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

JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice