REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	CTA EB No. 1259 (CTA CASE No. 8172)
-versus-	*Present*: DEL ROSARIO, P.J, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS, and RINGPIS-LIBAN, *JJ.*
CARGILL TEXTURIZING SOLUTIONS PHILIPPINES, INC. *Respondent.*	Promulgated: SEP 09 2016 2:40 p.m.

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a Petition for Review for the Court *En Banc* under *Section 4(b), Rule 8*[1] *of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA), as*

[1] **SEC. 4.** *Where to appeal; mode of appeal. –*

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(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court *en banc* shall act on the appeal.

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amended, of the Decision dated August 1, 2014[2] and the Resolution dated December 05, 2014[3] rendered by the Third Division of this Court, the dispositive portion of which reads as follows:

> "**WHEREFORE,** premises considered, the petition for review is hereby **GRANTED**. Accordingly, Assessment Notice No. IT-LA63372-06-10-005 for deficiency income tax, covering the taxable year 2006 in the amount of ₱2,499,169.30 is hereby **CANCELLED** and **SET ASIDE** for lack of basis in law and in fact.
>
> **SO ORDERED.**"

The facts of the case, as recited by the Third Division in its Decision, read as follows:

> "Petitioner Cargill Texturizing Solutions Philippines, Inc., is a corporation duly organized and existing under the laws of the Republic of the Philippines, with principal place of business at the 29th Floor, Citibank Tower, 8741 Paseo de Roxas, Makati City.
>
> Respondent is the Commissioner of Internal Revenue (CIR) who is the official authorized under Section 4 of the National Internal Revenue Code of 1997, as amended ("Tax Code"), to assess and collect internal revenue taxes, as well as to decide disputed assessments, among others, subject to the exclusive appellate jurisdiction of this Court. Her office is located at the Bureau of Internal Revenue (BIR) National Office Building, Dillman, Quezon City.
>
> On December 10, 2009, petitioner received a Preliminary Assessment Notice (PAN) dated December 7, 2009 from the BIR Revenue Region No. 8, Makati City, covering the alleged deficiency income tax and expanded withholding tax for the taxable year 2006 in the aggregate amount of Three Million Ninety Two

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[2] Penned by Associate Justice Ma. Belen M. Ringpis-Liban concurred in by Associate Justice Lovell R. Bautista and Associate Justice Esperanza R. Fabon-Victorino, *En Banc* Docket, pp. 12-28.
[3] *En Banc* Docket, pp. 29-31.

Thousand Seven Hundred Forty Two Pesos (₱ 3,092,742.00), inclusive of interest, xxx

On December 15, 2009, petitioner flied with BIR Revenue Region No. 8, its Reply to the foregoing PAN. Petitioner explained that (a) the withholding tax certificates for Creditable Withholding Tax (CWT) were already received by the BIR, and (b) the expense payments subject to Expanded Withholding Tax (EWT), including interest, were already paid and hence, petitioner requests that the aforestated items be excluded in the BIR's findings for deficiency income tax.

On February 24, 2010, petitioner received a copy of the FAN from the BIR for alleged deficiency income tax for the taxable year 2006 in the amount of Two Million Four Hundred Ninety Nine Thousand One Hundred Sixty Nine and 30/100 Pesos (₱2,499,169.30) xxx

In the Details of Discrepancies attached to the FAN, respondent stated his findings on the alleged deficiency income tax, as follows:

xxx xxx xxx

> **Unsupported Creditable Tax Withheld, ₱1,589,747.00** - The amount of ₱1,589,747.00 creditable tax withheld was disallowed due to your failure to submit supporting documents thereto, in violation of Section 2.58.3 (C) and 2.58.5 of Revenue Regulation No. 2-98, as amended.

xxx xxx xxx

In addition to the unsupported creditable tax withheld, respondent stated in the FAN that:

> "xxx. Moreover, the documents submitted to support your claimed Creditable Tax Withheld amounting to ₱1,589,747.00 which was disallowed under

> Income Tax is likewise acknowledged, however, a reinvestigation is necessary to determine the validity, hence, since you failed to execute [a] Waiver of Defense of Prescription as contemplated under Section 203 and 222 of the National Internal Revenue Code which we have already requested in our Preliminary Assessment Notice, the Formal Assessment Notice (FAN) has been issued to protect the interest of the government."
>
> On March 9, 2010, petitioner filed its protest of the FAN addressed to the Regional Director, Revenue Region No. 8. In the said protest-letter, petitioner stated the factual and legal bases supporting its arguments against the subject assessment and requested that it be withdrawn and cancelled.
>
> On October 5, 2010, petitioner filed the instant Petition for Review in view of the inaction of respondent in failing to rule on the disputed assessment within the period prescribed by law.
>
> xxx xxx xxx"

The Third Division cancelled the FAN, ruling that the CIR acknowledged therein receipt of documents submitted to substantiate Cargill Texturizing Solutions Philippines, Inc., (Cargill)'s claimed creditable tax withheld, which belies CIR's assertion of disallowing the said tax due to failure to submit supporting documents. As stated in the assailed Decision, copies of CWT Certificates were submitted to the CIR on December 15, 2009, when Cargill filed its letter-reply to the PAN.[4]

Presentation of secondary evidence was allowed by the Third Division through the submission of photocopies of the CWT certificates bearing the original receiving stamp of the BIR.

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[4] Assailed Decision, p. 9 thereof.

CIR filed her Motion for Reconsideration on August 22, 2014, which was denied by the Third Division through a Resolution promulgated on December 5, 2014, hence, CIR's Petition for Review.

CIR argues in her Petition for Review that Cargill failed to satisfy the requirements of the Rules of Court on presentation of secondary evidence. In its Comment,[5] Cargill contends that CIR failed to object to the admissibility of evidence on time thus, such right to object is waived. Moreover, Cargill was able to prove that the only original CWT Certificates on hand were filed with the BIR through the original receiving stamp of the BIR in the presented photocopies of the CWT Certificates.

We DENY the Petition for Review.

The arguments proffered by CIR in her Petition for Review are mere rehash of the arguments raised before the Court in Division, which were thoroughly and exhaustively passed upon in the assailed Decision, as well as in the Resolution denying CIR's Motion for Reconsideration.

CIR's arguments boil down to the sole issue of whether to admit the photocopied CWT Certificates as evidence to substantiate Cargill's claimed creditable tax withheld.

The CIR belies the fact that it received the original CWT Certificates without presenting evidence to prove her claim. On the contrary, as correctly observed in the assailed Decision, the FAN itself shows that the CIR acknowledged the receipt of the CWT Certificates.

To emphasize, when the subject of inquiry is the contents of a document, reception of secondary evidence is allowed when the original thereof is unavailable especially when in the possession of the adverse party and failed to produce it before the court.[6]

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[5] *En Banc Docket,* pp. 57-64.

[6] Rule 130, Section 5. When original document is unavailable. — When the original document has been lost or destroyed, or cannot be produced in court, the offeror, upon proof of its execution or existence and the cause of its unavailability without

In the instant case, such scenario to allow Cargill to present secondary evidence is proven by the original receiving stamp of the BIR in the photocopies.

As to how to present secondary evidence, Section 5 Rule 130 states that:

> "Section 5. When original document is unavailable. — When the original document has been lost or destroyed, or cannot be produced in court, the offeror, upon proof of its execution or existence and the cause of its unavailability without bad faith on his part, may prove its contents by a copy, or by a recital of its contents in some authentic document, or by the testimony of witnesses in the order stated."

Cargill has met all the requirements to allow it to present secondary evidence of the CWT Certificates. The proof of existence of the CWT Certificates was established upon presentation of the copies of such with the original receiving stamp of the BIR. The latter cannot simply deny its existence without explaining the presence of its original receiving stamp in each of the copies of the CWT Certificates. Cargill alleges submission of the original to the BIR and was able to prove it through the original receiving stamp in its copies. On the other hand, CIR who denies receipt of such cannot produce any proof of it.[7]

The Third Division gave credence to the testimonies of Cargill's witnesses[8] that the original CWT certificates in the possession of BIR were nowhere to be found and that diligent efforts were exerted for the BIR to produce the documents but to no avail. Such testimonies remained uncontroverted except on the mere denial of the CIR.

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bad faith on his part, may prove its contents by a copy, or by a recital of its contents in some authentic document, or by the testimony of witnesses in the order stated.

[7] Acabal v. Acabal, 494 Phil. 528, 541 (2005).
[8] Testimonies of Mr. Richard Radier, Division Docket pp. 942-952, Q&As 20 and 21; Mr. Ronald Allan Casion, Division Docket pp. 970-980.

The cause of its unavailability cannot be attributed to Cargill as it made efforts to produce to the very least certified true copies from its clients but to no avail,[9] thus, contents in the said documents may be proven by a copy, or by a recital of its contents in some authentic document, or by the testimony of witnesses in the order stated.

Thus, CIR's failure to present the same not only justifies the presentation by Cargill of secondary evidence in accordance with Section 6[10] of Rule 130 of the Rules of Court, but it also gives rise to the disputable presumption adverse to CIR under Section 3 (e) of Rule 131 of the Rules of Court that "evidence willfully suppressed would be adverse if produced."[11]

On the contention that Cargill was not able to prove the loss of the original CWT Certificates, the case of *Republic of the Philippines vs. Masongsong*[12] states:

> "The offeror is not obliged to prove the loss or destruction of the original document beyond all possibility, as it is enough to prove a reasonable probability of such loss. This may be done by a *bona fide* and diligent search, fruitlessly made in places where it is likely to be found. xxx loss signifies merely that it cannot be discovered.[13]"

Based on the records, Cargill filed its Formal Offer of Evidence on April 11, 2012. Respondent did not file any objection thereto.[14] On June 26, 2012, the then First Division issued a Resolution[15] denying the copies of CWT Certificates

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[9] Ibid.
[10] Section 6. When original document is in adverse party's custody or control. — If the document is in the custody or under the control of adverse party, he must have reasonable notice to produce it. If after such notice and after satisfactory proof of its existence, he fails to produce the document, secondary evidence may be presented as in the case of its loss.
[11] MCM Construction Corporation vs. Monark Equipment Corporation, G.R. No. 201001, November 10, 2014.
[12] G.R. No. 162846, September 22, 2005.
[13] Citing cases of *Paylago v. Jarabe*, G.R. No. L-20046, 27 March 1968, 22 SCRA 1247, *Government of the Philippine Islands v. Martinez*, 44 Phil. 817 (1918) and Francisco, The Revised Rules of Court in the Philippines, Vol. VII, Part I, 1997 ed., p. 157.
[14] Resolution dated June 26, 2012, Division Docket p. 862
[15] Ibid, pp. 862-864.

as evidence. An Opposition[16] was only filed by CIR upon Cargill's filing of its Motion for Reconsideration[17] to the said Resolution. A Resolution[18] was issued setting the case for presentation of the said documents as secondary evidence. Cargill then filed a Motion to Admit Exhibits asking that the CWT Certificates be admitted as secondary evidence on June 13, 2013.[19] CIR failed to file her objection thereto.[20] On July 16, 2013, the Third Division issued a Resolution[21] admitting the CWT Certificates into evidence. Still, CIR did not bother to file a Motion for Reconsideration therefrom.

The established doctrine is that when a party failed to interpose a timely objection to evidence at the time they were offered in evidence, such objection shall be considered as waived.[22] This is true even if by its nature the evidence is inadmissible and would have surely been rejected if it had been challenged at the proper time.[23] In *Tison vs. Court of Appeals*,[24] the Supreme Court set out the applicable principle in the following terms:

> "It is elementary that an objection shall be made at the time when an alleged inadmissible document is offered in evidence, otherwise, the objection shall be treated as waived, since the right to object is merely a privilege which the party may waive.
>
> As explained in *Abrenica vs. Gonda, et al.*, it has been repeatedly laid down as a rule of evidence that a protest or objection against the admission of any evidence must be made at the proper time, otherwise, it will be deemed to have been waived."

Nonetheless, even if there was a timely objection, as reiterated earlier, Cargill was able to prove presentation of secondary evidence. As stated by the then First Division in

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[16] September 27, 2012, Division Docket pp. 891-894.
[17] July 16, 2012, Division Docket pp. 865-878.
[18] dated November 14, 2012, Division Docket pp. 908-914.
[19] Division Docket, pp. 1064-1072.
[20] As per records verification dated July 4, 2013, Division Docket, p. 1075.
[21] Division Docket, pp. 1077-1079.
[22] Blas vs. Angeles-Hutalla, G.R. No. 155594. September 27, 2004.
[23] Interpacific Transit, Inc., vs. Rufo Aviles and Josephine Aviles, G.R. No. 86062, June 6, 1990.
[24] G.R. No. 121027. July 31, 1997.

its Resolution,[25] the copies of the CWT Certificates bear the original stamp marking of the BIR, which proves receipt of these documents. The original BIR stamp marking of receipt in the said documents established that the originals were submitted to the BIR but for an unknown reason, CIR now claims that the originals could not be found on record. Failure on the part of adverse party to produce the said originals is sufficient to allow Cargill to present secondary evidence pursuant to Sections 5 and 6, Rule 130 of the Rules of Court.

On an important note, Section 8 of Republic Act 1125 creating the Court of Tax Appeals expressly provides that it shall not be governed strictly by technical rules of evidence.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED**. Accordingly, the Decision dated August 1, 2014 and the Resolution dated December 5, 2014 rendered by the Third Division are hereby **AFFIRMED**.

SO ORDERED.

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

WE CONCUR:

ROMAN G. DEL ROSARIO see Concurring Opinion
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

[25] *Supra* note 14.

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation among the members of the Court En Banc before the case was assigned to the writer of the opinion of the Court En Banc.

ROMAN G. DEL ROSARIO
Presiding Justice

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CARGILL TEXTURIZING SOLUTIONS PHILIPPINES, INC., *Respondent.*	Promulgated: SEP 09 2016 2:40 p.m.

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CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the conclusion of the *ponencia* in denying the Petition for Review filed by the Commissioner of Internal Revenue (CIR) which thereby affirms the Court in Division's Decision promulgated on August 1, 2016 in cancelling the deficiency income tax assessment.

I find it necessary to stress on the authenticity of the original receiving stamp on the photocopies of the Creditable Withholding Tax (CWT) Certificates. Records bear that the authenticity of the original stamp was never questioned or disputed by petitioner when it was first formally offered in evidence. Even when herein respondent filed a Motion to Admit Exhibits praying that the CWT Certificates be admitted as secondary evidence, herein petitioner still failed to file any objection thereto. Thus, the admissibility of the copies of CWT

Certificates bearing the original receiving stamp is unquestionable and its probative value is undeniable.

All told, I **VOTE** to **DENY** the Petition for Review for lack of merit.

ROMAN G. DEL ROSARIO
Presiding Justice