Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

AJINOMOTO PHILIPPINES CORPORATION,
Respondent.

CTA EB CASE NO. 1010
(CTA Case No. 7877)

x------------------------------------x

AJINOMOTO PHILIPPINES CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 1015
(CTA Case No. 7877)

Present:
DEL ROSARIO, P.J.,
CASTAÑEDA, JR.
BAUTISTA
UY
CASANOVA
FABON-VICTORINO
MINDARO-GRULLA
COTANGCO-MANALASTAS
RINGPIS-LIBAN, JJ.

Promulgated:
NOV 03 2014
4:05 p.m.

x--x

DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a consolidated "Petition for Review" for the Court *En Banc* under Rule 4, Section 2(a)(1), in relation to Rule 8, Section 3(b) of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA)[1], as amended, of the

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1 RULE 4
JURISDICTION OF THE COURT

Sec. 2. *Cases within the jurisdiction of the Court en banc.*- The Court en banc shall exercise exclusive appellate jurisdiction to review by appeal the following:

(a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Division in the exercise of its exclusive appellate jurisdiction over:

Decision[2] dated December 11, 2012, rendered by the Third Division of this Court in CTA Case No. 7877, and its Resolution[3] dated April 16, 2013.

The Commissioner of Internal Revenue (CIR) filed on May 21, 2013 a "Petition for Review" with the CTA en banc docketed as EB Case No. 1010, while Ajinomoto Philippines Corporation (Ajinomoto) filed on May 20, 2013 a "Petition for Review" with the CTA en banc docketed as EB Case No. 1015.

CIR and Ajinomoto assail the aforesaid Decision and Resolution, the dispositive portions of which, respectively read as follows:

Decision dated December 11, 2012:

*"**WHEREFORE**, premises considered, the present Petition for Review is hereby **PARTIALLY GRANTED.** Accordingly:*

(1) Cases arising from administrative agencies- Bureau of Internal Revenue, Bureau of Customs, Department of Finance, Department of Trade and Industry, Department of Agriculture;

xxx xxx xxx

RULE 8
PROCEDURE IN CIVIL CASES

xxx xxx xxx

Sec. 3. *Who may appeal; period to file petition.* –

xxx xxx xxx

(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review.

[2] En banc Docket, pp. 39-99.
[3] En banc Docket, pp. 100-103.

A. The Formal Letter of Demand, with Formal Assessment Notices:

1) *No. IT-FY 3.2005-000230, for deficiency Income Tax, in the amount of P181,164,275.04 is hereby ordered **CANCELLED** and **SET ASIDE**, for having been issued beyond the three (3)- year prescriptive period to assess;*
2) *No. VAT-FY 3.2005-000273, for deficiency Value Added Tax, in the amount of P 24,974,439.13 is hereby ordered **CANCELLED** and **SET ASIDE**, for having been issued beyond the three (3)- year prescriptive period to assess;*
3) *No. EWT-FY 3.2005-00243, for deficiency Expanded Withholding Tax, in the amount of P45, 403,934.34 is hereby **CANCELLED** and **SET ASIDE**, for having been issued beyond the three (3)- year prescriptive period to assess;*
4) *No. WC-FY 3.2005-000141, for deficiency Withholding Tax on Compensation, in the amount of P5,985,020.16 is hereby **CANCELLED** and **SET ASIDE**, for having been issued beyond the three (3)- year prescriptive period to assess;*

B. However, as regards the Formal Letter of Demand with Assessment Notice No. FBT-FY 3.2005-000066, for deficiency Fringe Benefit Tax, in the amount of P30,582,321.15, petitioner is liable in the reduced amount of P12,392,831.10, representing basic deficiency Fringe Benefit Tax of P9,914,264.88, and 25% surcharge of P2,478,566.22, as computed above.

In addition, petitioner is liable [for](a) deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency Fringe Benefit Tax of P9,914,264.88 computed from April 15, 2005 until full payment thereof, pursuant to Section 249 (B) of the NIRC of 1997, as amended; and (b) delinquency interest at the rate of twenty percent(20%) per annum on the total deficiency taxes of P12,392,831.10 and on the 20% deficiency interest which have accrued as afore-stated in (a), computed from December 31, 2008 until full payment thereof pursuant to Section 249 (c) of the NIRC of 1997, as amended.

SO ORDERED." [2]

Resolution dated April 16, 2013:

"***WHEREFORE**, the parties' respective motions for partial reconsideration are **DENIED** for lack of merit.*

***SO ORDERED**."*

The antecedent facts narrated by this Court's Division are as follows:

"On March 31, 2005, petitioner[4] filed with the BIR its Annual Income Tax Return for the fiscal year ending March 31, 2005.

On June 17, 2008, Marco M. Perez ("Mr. Perez") executed a Waiver of the Defense of Prescription under the Statute of Limitations under the NIRC of 1997, as amended, which was received by respondent on June 25, 2008.

On December 5, 2008, petitioner received an undated letter from respondent informing petitioner that the results of investigation of its internal revenue taxes for fiscal year ending March 31, 2005 had been submitted with proposed assessment.

On December 11, 2008, respondent [5] provided petitioner a copy of the Waiver, which was accepted by Atty. Romulo L. Aguila.

On December 16, 2008, petitioner received a Preliminary Assessment Notice ("PAN") for deficiency Income Tax, VAT, Expanded Withholding Tax, Withholding Tax on Compensation and Fringe Benefit Tax for fiscal year ending March 31, 2005.

On December 22, 2008, petitioner received the Formal Letter of Demand and Assessment Notices, dated December 15, 2008, requiring petitioner to pay the following deficiency taxes:

Income Tax	*P181,164,275.04*
Value-Added Tax	*24,974,439.13*

[4] Ajinomoto was the petitioner while the CIR was the respondent in the Third Division of this Court.
[5] Id.

Expanded Withholding Tax	*45,403,934.34*
Withholding Tax on Compensation	*5,985,020.16*
Fringe Benefit Tax	*30,582,321.15*

xxx xxx xxx.

On January 5, 2009, petitioner protested the Preliminary Assessment Notice, received by petitioner on December 16, 2008, and Formal Letter of Demand, received on December 22, 2008.

On February 2, 2009, petitioner received the Final Decision, dated January 23, 2009, denying petitioner's request for cancellation of the deficiency tax assessment.

On March 3, 2009, petitioner filed the instant Petition for Review.

On April 13, 2009, respondent filed her answer, alleging special and affirmative defenses: the right of respondent to assess petitioner for deficiency taxes did not prescribe in view of the execution of a waiver extending the period of assessment; the PAN, Formal Letter of Demand and Final Decision on Disputed Assessment were issued in accordance with law, rules and jurisprudence.

On April 30, 2009, petitioner filed a "Reply" to respondent's Answer alleging that: the Head Revenue Executive Assistant ("HREA") is not authorized to sign the waiver of the Statute of Limitations under Revenue Delegation Authority Order No. 05-01. The revenue official expressly authorized to sign the waiver in cases of large taxpayers is the Assistant Commissioner ("ACIR"), and HREA is certainly not ACIR. The authority to execute and sign a waiver cannot be merely implied from the job title of the person executing and signing the waiver. Petitioner cannot be deemed to have acquiesced to defects of the notarial acknowledgment of the purported waiver since it gained knowledge of the said defects only on December 11, 2008. The BIR did not follow the provisions of Revenue Regulations No. 12-99. The PAN was issued even before the expiration of the 15-day period granted by the NIRC of 1997, as amended, and RR 12-99 for the Notice of Informal Conference. Likewise, the Formal Letter of Demand was received by petitioner even before the lapse of the 15-day period for the petitioner to respond to the PAN. Hence, respondent did not follow the procedure prescribed in RR 12-99.

Petitioner presented Rommel Arroyo, Salome Luber, Roxanne Cerezo, Katherine Constantino, and Jemardi Orendez, as witnesses, and documentary evidence.

On January 8, 2010, pursuant to CTA Administrative Circular No. 01-2010, dated January 5, 2010, "Implementing the Fully Expanded Membership in the Court of Tax Appeals", this case was transferred to the Third Division of this Court.

On the other hand, respondent presented Revenue Officer Felina Guimbao and Group Supervisor Melinda Ann Perez, as witnesses. However, as regards Felina Guimbao, respondent was deemed to have waived the right to present said witness in a Resolution dated July 18, 2011. Respondent also presented documentary evidence, marked as Exhibits "1" to "7", inclusive of their submarkings, which were all admitted by the Court in a Resolution dated February 15, 2012.

Both parties were granted thirty (30) days from notice within which to file their simultaneous memoranda. After which, the case shall be deemed submitted for decision.

Both parties having filed their respective memorandum, the case was deemed submitted for decision on April 24, 2012." [6]

On December 11, 2012, the Third Division of this Court promulgated a decision which cancelled and set aside the Formal Assessment Notices (FAN) on the deficiency income tax, value-added tax (VAT), expanded withholding tax (EWT), withholding tax on compensation (WTC), in the total amount of P257,527,668.67 for having been issued beyond the three (3) year prescriptive period. The Third Division of this Court ruled that the waiver executed between CIR and Ajinomoto was defective, to wit:

"In the case of Commissioner of Internal Revenue vs. FMF Development Corporation, 556 SCRA 709, the Supreme Court invalidated the waiver therein for not having been signed by the proper signatory of the BIR.

[6] En banc Docket, pp. 50-45.

> Considering that the waiver executed between the petitioner and respondent is defective, then pursuant to the afore-quoted ruling of the Supreme Court, the periods to assess the deficiency income tax, value-added tax, expanded creditable withholding tax and income taxes withheld on compensation were not extended. Consequently, the Formal Assessment Notices for deficiency income tax, value-added tax, expanded creditable withholding tax and income taxes withheld on compensation, having been issued only on December 15, 2008, beyond the three (3)-year prescriptive period, said Assessment Notices are null and void."[7]

As to the Formal Assessment Notice (FAN) on the deficiency fringe benefit tax, in the amount of P30,582,321.15, the Third Division of this Court reduced the amount to P12,392,831.10 after evaluating the evidence presented by the parties.

The parties' motions for reconsideration on the said Decision were later denied in a Resolution dated April 16, 2013.

In assailing the Decision and Resolution of this Court's Third Division, CIR raised couple of grounds in her Petition for Review, to wit:

"I

WHETHER OR NOT THE HONORABLE THIRD DIVISION ERRED IN RULING THAT THE WAIVER EXECUTED BY PETITIONER IS DEFECTIVE, THUS THE PERIOD TO ASSESS THE DEFICIENCY INCOME TAX, VALUE ADDED TAX, EXPANDED WITHHOLDING TAX AND WITHHOLDING TAX ON COMPENSATION WERE NOT EXTENDED.

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[7] Ibid.

II

WHETHER OR NOT RESPONDENT IS LIABLE TO PAY THE DEFICIENCY INCOME TAX, VALUE ADDED TAX, EXPANDED WITHHOLDING TAX, WITHHOLDING TAX ON COMPENSATION AND FRINGE BENEFIT TAX FOR THE FISCAL YEAR ENDING MARCH 31, 2005 IN THE AGGREGATE AMOUNT OF P288,109,989.82."[8]

CIR maintains that her right to assess has not prescribed in view of the waiver of the statute of limitations executed by Ajinomoto through its Accounting Manager, Mr. Marco Perez. CIR claims that Ajinomoto cannot impugn the validity of the waiver on the ground that: (a) the signatory, Accounting Manager Mr. Marco Perez, is purportedly unauthorized to execute the same; (b) the date of acceptance of the CIR is not indicated in the waiver, and (c) notarial acknowledgement appears to be missing. CIR asserts that the waiver is valid and in accordance with the rules and regulations, specifically Revenue Delegation Authority No. 05-01.[9]

CIR argues that Ajinomoto is estopped from questioning the validity of the waiver, and assuming the waiver is invalid, Ajinomoto is still liable for deficiency withholding tax which is considered a penalty. Thus, the period of limitation provided in Section 203 of the 1997 NIRC finds no application. Likewise, CIR maintains that the deficiency tax assessments have factual and legal basis.

On the other hand, Ajinomoto in its Petition for Review raised this sole issue:

"WHETHER AJINOMOTO WAS DEPRIVED OF ITS RIGHT TO PROCEDURAL DUE

[8] Ibid. at pp.10-11.
[9] Delegation of Authority to Sign and Accept the Waiver of the Defense of Prescription Under the Statutes of Limitation.

PROCESS UNDER SECTION 228 OF THE TAX CODE AND REVENUE REGULATIONS NO. 12-99"[10]

Ajinomoto argues that the opportunity to protest the final assessment notice is not the sole aspect of procedural due process and the procedure for issuance of a final assessment notice, including the taxpayer's opportunity to refute a possible assessment under Section 228 of the Tax Code and Revenue Regulations No. 12-99 is not merely perfunctory but should be mandatorily complied with. Thus, Ajinomoto asserts that the absence of its opportunity to contest and reply to the PAN before the FAN was issued is an infirmity that effectively deprives Ajinomoto of its right to due process.

We resolve to deny both petitions.

The Formal Assessment Notices (FAN) for deficiency income tax, value-added tax, expanded creditable withholding tax and income taxes withheld on compensation, together with the Formal Letter of Demand, were issued only on December 15, 2008, and received by petitioner on December 22, 2008[11], were issued beyond the three (3) year prescriptive period. The waiver of the statute of limitations executed by Ajinomoto through its Accounting Manager was defective and the period to assess was not extended.

Likewise, it is undisputed that the assessment on the deficiency fringe benefit tax was within the ten (10) year prescriptive period[12] as there is nothing in the record which shows that Ajinomoto filed a Quarterly Remittance Return of

[10] En banc Docket (CTA EB No. 1015), p. 13.

[11] Ibid. p.3

[12] SEC. 222. Exception as to Period of Limitation of Assessment and Collection of Taxes.

(a) In the case of false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission. xxx.

xxx xxx xxx.

Final Income Taxes Withheld and that Ajinomoto was not deprived of its right to procedural due process.

The petition docketed as CTA EB Case No. 1010 is without merit. CIR's claim, that the waiver executed on June 17, 2008 was made before the period to assess has prescribed and that Ajinomoto cannot impugn the waiver executed on the ground that (a) the signatory is purportedly unauthorized to execute the same; (b) the date of acceptance of the CIR is not indicated in the waiver, and (c) notarial acknowledgement appears to be missing, are unmeritorious.

In several cases,[13] the Supreme Court consistently held that "a waiver of the statute of limitations under the NIRC, to a certain extent being a derogation of the taxpayer's right to security against prolonged and unscrupulous investigations, must be carefully and strictly construed." Under the principle of *stare decisis*, CIR's petition must be denied. We find that this Court's Division correctly applied the case of Commissioner of Internal Revenue vs. Kudos Metal Corporation[14], whereby the Supreme Court ruled as follows:

> *"Section 203 of the National Internal Revenue Code of 1997 (NIRC) mandates the government to assess internal revenue taxes within three years from the last day prescribed by law for the filing of the tax return or the actual date of filing of such return, whichever comes later. Hence, an assessment notice issued after the three-year prescriptive period is no longer valid and effective. Exceptions however are provided under Section 222 of the NIRC.*
>
> ***The waivers executed by respondent's accountant did not extend the period within which the assessment can be made***

[13] Philippine Journalist, Inc. v. Commissioner of Internal Revenue, G.R. No. 162852, December 16, 2004, 488 Phil. 218, 235; Commissioner of Internal Revenue vs. FMF Development Corporation, G.R. No. 167765, June 30, 2008, Commissioner of Internal Rvenue vs. Kudos Metal Corporation, G.R. No. 178087, May 5, 2010.
[14] G.R. No. 178087, May 5, 2010.

Petitioner does not deny that the assessment notices were issued beyond the three-year prescriptive period, but claims that the period was extended by the two waivers executed by respondent's accountant.

We do not agree.

Section 222 (b) of the NIRC provides that the period to assess and collect taxes may only be extended upon a written agreement between the CIR and the taxpayer executed before the expiration of the three-year period. RMO 20-90 issued on April 4, 1990 and RDAO 05-01 issued on August 2, 2001 lay down the procedure for the proper execution of the waiver, to wit:

1. *The waiver must be in the proper form prescribed by RMO 20-90. The phrase "but not after _______ 19 ___", which indicates the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription, should be filled up.*

2. *The waiver must be signed by the taxpayer himself or his duly authorized representative. In the case of a corporation, the waiver must be signed by any of its responsible officials. In case the authority is delegated by the taxpayer to a representative, such delegation should be in writing and duly notarized.*

3. *The waiver should be duly notarized.*

4. *The CIR or the revenue official authorized by him must sign the waiver indicating that the BIR has accepted and agreed to the waiver. The date of such acceptance by the BIR should be indicated. However, before signing the waiver, the CIR or the revenue official authorized by him must make sure that the waiver is in the prescribed form, duly notarized, and executed by the taxpayer or his duly authorized representative.*

5. *Both the date of execution by the taxpayer and date of acceptance by the Bureau should be before the expiration of the period of prescription or before the lapse of the period agreed upon in case a subsequent agreement is executed.*

6. *The waiver must be executed in three 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. The fact of receipt by the taxpayer of*

his/her file copy must be indicated in the original copy to show that the taxpayer was notified of the acceptance of the BIR and the perfection of the agreement.

A perusal of the waivers executed by respondent's accountant reveals the following infirmities:

1. *The waivers were executed without the notarized written authority of Pasco to sign the waiver in behalf of respondent.*

2. *The waivers failed to indicate the date of acceptance.*

3. *The fact of receipt by the respondent of its file copy was not indicated in the original copies of the waivers.*

Due to the defects in the waivers, the period to assess or collect taxes was not extended. Consequently, the assessments were issued by the BIR beyond the three-year period and are void."

Based on the foregoing, defects in the waiver of the defense of prescription such as unauthorized signatory, failure to indicate the date of acceptance of CIR and the non-indication of the fact of receipt by the respondent of its file copy in the original copies of the waivers will not extend the period to assess. Similarly, CIR failed to prove that the signatory in Ajinomoto's waiver was authorized. In the instant case the following defects of the waiver as found by this Court's Division were as follows:

"First, the waiver was executed by Mr. Perez without any written notarized authority from the board of directors of petitioner. Petitioner, being a juridical entity, it acts only through its duly authorized representative, either through its Board of Directors, or through its officers duly authorized by the board. Considering that Mr. Perez is petitioner's Section Manager (Exhibits "F" and "Y") and there is no proof that Mr. Perez was duly authorized by the board to sign the waiver for the petitioner, and considering further that petitioner is denying to have authorized Mr. Perez to sign the waiver (Exhibit "Y"); then, it is evident that the waiver was indeed executed without written authority from the Board.

Second, the waiver failed to indicate the date of acceptance by the BIR. The need to indicate the date of acceptance is to fix with certainty if the waiver was actually agreed upon before the expiration of the three-year prescriptive period (Philippine Journalists, Inc. vs. Commissioner of Internal Revenue, 447 SCRA 230). Since a waiver is not a unilateral act of the taxpayer, but in fact and in law an agreement between the taxpayer and the BIR, the agreement by the BIR should be made prior to the expiration of the three-year prescriptive period. Accordingly, the date of acceptance is a requisite for determining whether the waiver was validly perfected before the expiration of the original three-year period (Commissioner of Internal Revenue vs. FMF Development Corporation, 556 SCRA 709).

Third, petitioner was furnished a copy of the waiver only on December 11, 2008, beyond the three-year prescriptive period to assess under the NIRC. 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 (Philippine Journalists, Inc. vs. Commissioner of Internal Revenue, 447 SCRA 231). A waiver is an agreement executed for the purpose of extending the period to assess. Section 222 (b) of the NIRC of 1997, as amended, provides that both the Commissioner and the taxpayer should have agreed in writing to the assessment after the period prescribed in Section 203. Hence, the perfection of an agreement depends upon the concurrence of the offer and the acceptance. Settled is the rule that no contract shall arise unless the acceptance of the contract is communicated to the offeror (The Insular Life Assurance Company, Ltd. vs. Asset Builders Corporation, 442 SCRA 162).

Finally, the waiver was not signed by the duly authorized representative of the BIR. The aforequoted fourth requisite provides that the CIR or the revenue official authorized by him must sign the waiver indicating that the BIR has accepted and agreed to the waiver. Revenue Memorandum Order 20-90 provides that for tax cases involving more than P1,000,000.00, the revenue officer authorized to sign the waiver is only the Commissioner of Internal Revenue. While Revenue Delegation Authority Order No. 05-01 ("RDAO 05-01") delegates the authority to sign and accept the Waiver of the Defense of Prescription under the Statute of Limitations; however, for large taxpayers cases, it is the

Assistant Commissioner of Internal Revenue ("ACIR") of the large taxpayers service who is authorized to sign and accept the waiver.

A perusal of the waiver shows that the waiver was accepted by Romulo Aguila, Jr., OIC — Head Revenue Executive Assistant of the Large Taxpayers Service — Regular. The OIC — Head of Revenue Executive Assistant of the Large Taxpayers Service is definitely not the ACIR of the Large Taxpayers Service; but, a rank lower than the ACIR. Since RDAO 05-01 is a delegation of the authority of the Commissioner to sign and accept the waiver, then only the named revenue officers duly authorized thereof must act in behalf of the Commissioner. The OIC — Head of Revenue Executive Assistant of the Large Taxpayers Service being not the duly authorized representative named in RDAO 05-01 to sign and accept the waiver, then said waiver cannot be considered to have been validly accepted by the BIR."[15]

Thus, We find that this Court's Division correctly declared that the waiver executed between the CIR and Ajinomoto to be defective and the assessment notices for deficiency income tax, value-added tax, expanded creditable withholding tax and income taxes withheld on compensation as null and void, to wit:

"In the case of Commissioner of Internal Revenue vs. FMF Development Corporation, 556 SCRA 709, the Supreme Court invalidated the waiver therein for not having been signed by the proper signatory of the BIR.

Considering that the waiver executed between the petitioner and respondent is defective, then pursuant to the afore-quoted ruling of the Supreme Court, the periods to assess the deficiency income tax, value-added tax, expanded creditable withholding tax and income taxes withheld on compensation were not extended. Consequently, the Formal Assessment Notices for deficiency income tax, value-added tax, expanded creditable withholding tax and income taxes withheld on compensation, having been issued only on December 15, 2008, beyond the three (3)-year prescriptive period, said Assessment Notices are null and void."

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[15] Supra. Note 2

In addition, the June 17, 2008 waiver was executed after CIR's right to assess has prescribed. CIR has until July 15, 2008 within which to assess petitioner of deficiency income tax.[16] As to the deficiency VAT, CIR had three (3) years, or until the following dates to assess petitioner of deficiency Value-Added Tax[17]:

Quarter	Deadline to Assess deficiency VAT
First Quarter	July 25, 2007
Second Quarter	October 25, 2007
Third Quarter	January 25, 2008
Fourth Quarter	April 25, 2008

For expanded creditable withholding tax and Withholding Tax on Compensation, CIR has three (3) years or until the following dates to assess[18]:

Month	Deadline to Assess
April 2004	May 15, 2007
May 2004	June 15, 2007
June 2004	July 15, 2007
July 2004	August 15, 2007
August 2004	September 15, 2007
September 2004	October 15, 2007
October 2004	November 15, 2007
November 2004	December 15, 2007
December 2004	January 20, 2008
January 2005	December 15, 2004
February 2005	February 15, 2008
March 2005	April 15, 2008

Evidently, the waiver executed on June 17, 2008 was made after the period to assess has prescribed which is contrary to CIR's claim that the waiver is made before the period to assess deficiency income tax, value-added tax, expanded withholding tax and withholding tax on

[16] Ibid.
[17] Ibid.
[18] Ibid.

compensation has prescribed, a clear violation of the requirements that both the date of execution of the waiver by the taxpayer and date of acceptance by the CIR should be before the expiration of the period of prescription.[19]

Furthermore, CIR should not benefit from the doctrine of estoppel for failure to assess Ajinomoto within the prescriptive period. CIR was remiss in its duty. Due to numerous defects[20] found in the waiver of the defense of prescription, for which CIR ought to have exercised due diligence, CIR therefore must bear the consequence. The Supreme Court in the case of Commissioner of Internal Revenue vs. Kudos Metal Corporation[21] ruled as follows:

> "The doctrine of estoppel cannot be applied in this 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. As we have often said, the doctrine of estoppel is predicated on, and has its origin in, equity which, broadly defined, is justice according to natural law and right. As such, 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.
>
> Moreover, the BIR cannot hide behind the doctrine of estoppel to cover its failure to comply with RMO 20-90 and RDAO 05-01, which the BIR itself issued. As stated earlier, the BIR failed to verify whether a notarized written authority was given by the respondent to its accountant, and to indicate the date of acceptance and the receipt by the respondent of the

[19] Commissioner of Internal Revenue vs. Kudos Metal Corporation, G.R. No. 178087, May 5, 2010.
[20] The waiver of the defense of prescription had several defects: (1) the waiver was executed without any written authority from petitioner's board of directors; (2) the waiver failed to indicate the date of acceptance by the BIR; (3) petitioner was furnished a copy of the waiver beyond the three-year prescriptive period to assess under the NIRC; and, (4) the waiver was not signed by the duly authorized representative of the BIR. Considering all the foregoing defects, the waiver did not serve to extend the prescriptive period to assess.
[21] Commissioner of Internal Revenue vs. Kudos Metal Corporation, G.R. No. 178087, May 5, 2010.

waivers. Having caused the defects in the waivers, the BIR must bear the consequence. It cannot shift the blame to the taxpayer. To stress, a waiver of the statute of limitations, being a derogation of the taxpayer's right to security against prolonged and unscrupulous investigations, must be carefully and strictly construed."

As to Ajinomoto's petition docketed as CTA EB Case No. 1015, praying for the cancellation of the deficiency fringe benefit tax assessment, it lacks merit.

Ajinomoto received the Preliminary Assessment Notice (PAN) on December 16, 2008 giving Ajinomoto 15 days from receipt thereof to respond and thereafter on December 22, 2008, received the Final Assessment Notice (FAN). Thus, Ajinomoto asserts that the absence of its opportunity to contest and reply to the PAN before the FAN was issued is an infirmity that effectively deprives Ajinomoto of its right to procedural due process. We are not persuaded

The case of Commissioner of Internal Revenue vs. Metro Star Superama, Inc.[22] (Metrostar) and Pilipinas Shell Petroleum Corp. vs. Commissioner of Internal Revenue [23] (Shell) relied upon by Ajinomoto do not apply in all fours. In both *Metro Star* and *Shell*, the failure to send or non-issuance of PAN stating the facts and the law on which the assessment was made as required by Section 228 of R.A. No. 8424, renders the assessment made by the CIR void. In this case, there was no failure to send or non-issuance of PAN but rather, Ajinomoto received the PAN and FAN. This Court agrees with the findings of this Court's Division, to wit:

"Though respondent successively issued the Notice of Informal Conference, the Preliminary Assessment Notice and the Formal Letter of Demand, together with the Details of Discrepancies and Assessment Notices, one after another, the fact remains that petitioner has been duly notified of the procedures prescribed under Section 228 and has been informed of the factual and legal bases of

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[22] G.R. No. 185371, December 8, 2010.
[23] G.R. no. 172598, December 21, 2007.

the assessments. In fact, petitioner was able to exhaustively protest respondent's assessments in a Letter dated December 23, 2008. Even the Court-commissioned ICPA in his Final and Consolidated Report made mention of the basis of the BIR's computation of the deficiency tax assessments. Had the assessment (sic) no factual and legal bases and had petitioner not been properly informed of the said factual and legal bases of the assessment, then the Court-commissioned ICPA and this Court would not have been able to compute the deficiency FBT assessment against the petitioner. "

Concomitantly, there is no violation of the cardinal principle in administrative investigations - that taxpayers should be able to present their case and adduce supporting evidence[24]. While the FAN was issued before the period to respond to PAN has expired, Ajinomoto nevertheless received the PAN and FAN, was informed of the factual and legal bases of the assessments, and was able to intelligently respond to the PAN and FAN in a Letter dated December 23, 2008.

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.[25] It has been held that the essence of due process is found in the reasonable opportunity to be heard and submit any evidence one may have in support of one's defense. What the law proscribes is the lack of opportunity to be heard.[26]

It cannot be denied that Ajinomoto had been given the opportunity to refute the charges against it, was able to timely file its administrative protest and was able to discuss its position on the deficiencies being assessed against it. Apparently, there was substantial compliance in the procedure in protesting the assessments and petitioner's

[24] Commissioner of Internal Revenue vs. Metro Star Superama, Inc., G.R. No. 185371, December 8, 2010.
[25] Rizal Commercial Banking Corporation vs Commissioner of Internal Revenue, G.R. No. 168498, June 16, 2006
[26] Estares, et al. vs. Court of Appeals, et al., G.R. No. 144755, June 8, 2005.

right to due process was adequately observed and protected. Thus, We find that the Court's Division correctly ruled as follows:

> "xxx due process in our jurisdiction refers to the right of the taxpayer to be informed of the legal and factual findings of the BIR as regards its deficiency taxes, and the opportunity to be heard through protest. Section 228 of the NIRC of 1997 clearly refers to the Final Assessment Notice that should be formally protested. In the instant case, there is no doubt that petitioner was able to file its protest to the FAN.[27]

In view of all the foregoing, the Court en banc finds no reversible error committed by the Court in Division and no cogent reason to reverse or modify the assailed Decision and Resolution.

WHEREFORE, the consolidated Petitions for Review, CTA EB No. 1010 filed on May 21, 2013 and CTA EB No. 1015 filed on May 20, 2013, are both **DENIED** for lack of merit. Accordingly, the assailed Decision dated December 11, 2012 and Resolution dated April 16, 2013 are hereby **AFFIRMED.**

SO ORDERED.

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

WE CONCUR:

(with Concurring and Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

[27] Supra. Note 3.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

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 for the opinion of the Court *En Banc.*

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE
Petitioner,

-versus-

AJINOMOTO PHILIPPINES CORPORATION,
Respondent.

CTA EB N0. 1010
(CTA Case No. 7877)

x--------------------------------------x

AJINOMOTO PHILIPPINES CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1015
(CTA Case No. 7877)

Present:

DEL ROSARIO, *P.J.*,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS, *and*
RINGPIS-LIBAN, *JJ.*

Promulgated:

NOV 03 2014
4:05p.m.

x -- x

CONCURRING AND DISSENTING OPINION

DEL ROSARIO, P.J.:

In her *ponencia,* my esteemed and learned colleague, the Honorable Associate Justice Cielito N. Mindaro-Grulla, denied the Petition for Review dated May 10, 2013 filed by the Commissioner of Internal Revenue (CIR) in CTA EB Case No. 1010 and the Petition for Review dated May 20, 2013 filed by Ajinomoto Philippines Corporation (Ajinomoto) in CTA EB Case No. 1015, both for lack of merit.

I concur in the denial of the Petition for Review filed by the CIR in CTA EB Case No. 1010. As extensively discussed by the *ponente*, considering that the Waiver executed by Marco M. Perez (Ajinomoto's Section Manager) on June 17, 2008 is defective, the three-year period within which to assess Ajinomoto for deficiency income tax, value-added tax, expanded withholding tax and withholding tax on compensation for the fiscal year ending March 31, 2005 was not validly extended. As a consequence, the assessment notices issued on December 15, 2008 assessing Ajinomoto for the afore-mentioned taxes are null and void for having been issued beyond the three-year prescriptive period.

With all due respect, however, I dissent on the denial of the Petition for Review filed by Ajinomoto in CTA EB Case No. 1015. I am of the humble view that the subject assessment notices issued against Ajinomoto are null and void for having been issued in violation of Ajinomoto's right to due process.

Section 228 of the National Internal Revenue Code (NIRC) of 1997, as amended, provides:

> "**SEC. 228. Protesting of Assessment. -** When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: provided, however, That a preassessment notice shall not be required in the following cases:
>
> Xxx xxx xxx.
>
> The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.
>
> **Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.**
>
> Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations.

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

Xxx xxx xxx."

Corollary thereto, Section 3.1.2 of Revenue Regulations No. 12-99[1] provides:

"3.1.2 *Preliminary Assessment Notice (PAN).* – If after review and evaluation by the Assessment Division or by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing in detail, the facts and law, rules and regulations, or jurisprudence on which the proposed assessment is based..... If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN, he shall be considered in default, in which case, a formal letter of demand and assessment notice shall be caused to be issued by the said Office, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.

xxx xxx xxx"

Pursuant to the above provisions, it is clearly mandated that a taxpayer is given an opportunity to respond to the Preliminary Assessment Notice (PAN) within fifteen (15) days from receipt of thereof. Upon the lapse of the 15-day period, without any response from the taxpayer, the latter shall be considered in default and the BIR shall issue a formal letter of demand (FLD) and assessment notices.

In the instant case, **records show that Ajinomoto received a copy of the PAN on December 16, 2008**. Thus, Ajinomoto has fifteen (15) days or until **December 31, 2008** within which to file a reply or protest against the PAN. Prior to the lapse of the fifteen-day period within which Ajinomoto can respond to the PAN, **Ajinomoto received a copy of the FLD and assessment notices dated December 15, 2008 on December 22, 2008**. Notably, **the BIR did not even wait for Ajinomoto to receive a copy of the PAN before issuing the FLD and assessment notices on December 15, 2008**. Stated differently, the FLD and assessment notices were issued by

[1] dated September 6, 1999.

the BIR even before the lapse of the fifteen-day period within which Ajinomoto could file a reply or protest to the PAN.

As earlier quoted, Section 228 of the NIRC of 1997, as implemented by RR No. 12-99, specifically Section 3.1.2 thereof, prescribes a fifteen (15)-day period from receipt of a PAN within which a taxpayer may respond thereto. Indubitably, the right of the taxpayer to respond to the PAN is an important part of the due process requirement in the issuance of a deficiency tax assessment. In wantonly disregarding Ajinomoto's right to be heard with regard to its positions or arguments against the PAN, the BIR clearly violated Ajinomoto's right to due process as enshrined in Section 228 of the Tax Code and RR No. 12-99. To be sure, procedural due process is not satisfied with the mere issuance of a PAN, *sans* giving the taxpayer an opportunity to respond thereto.

In *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.*,[2] the Supreme Court emphasized the importance of complying with the requirement to send a PAN to the taxpayer as an integral part of due process in the issuance of a deficiency tax assessment. It then declared in no uncertain terms that **<u>the failure of the CIR to strictly comply with the requirements laid down by law and its own rules</u>** is a denial of Metro Star's right to due process. Undeniably, providing the taxpayer with a copy of the PAN is meaningless to the concept of due process if, after all, his right to respond to it within the prescribed period would be ignored.

Although Ajinomoto was given ample opportunity to contest the FLD and assessment notices, **the fatal infirmity that attended its issuance prior to the lapse of the period to respond to the PAN is not cured thereby**. In *Pilipinas Shell Petroleum Corporation vs. Commissioner of Internal Revenue,*[3] the Supreme Court ruled that the non-compliance with statutory and procedural due process renders the final assessment notice as null and void, *viz*:

> "In short, respondent merely relied on the findings of the Center which did not give PSPC ample opportunity to air its side. **<u>While PSPC indeed protested the formal assessment, such does not denigrate the fact that it was deprived of statutory and procedural due process to contest the assessment before it was issued.</u>** Respondent must be more

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[2] G.R. No. 185371, December 8, 2010.
[3] G.R. No. 172598, December 21, 2007.

circumspect in the exercise of his functions, as this Court aptly held in Roxas v. Court of Tax Appeals:

> The power of taxation is sometimes called also the power to destroy. Therefore it should be exercised with caution to minimize injury to the proprietary rights of a taxpayer. It must be exercised fairly, equally and uniformly, lest the tax collector kill the "hen that lays the golden egg." And, in the order to maintain the general public's trust and confidence in the Government this power must be used justly and not treacherously."

Considering the palpable violation of Ajinomoto's right to procedural due process pursuant to Section 228 of the NIRC, as amended, and the provisions of RR No. 12-99, the assessment - - being fatally infirm - - should be considered void.

Notably, the Court has upheld the taxpayer's right to due process in several assessment cases.

In *A Brown Co., Inc. vs. Commissioner of Internal Revenue*,[4] the CTA ruled that an assessment is void because of the multiple violations of due process committed by the BIR. The violations include, among others: (1) **issuance of the final assessment only four (4) days after the issuance of the PAN**; and, (2) **the lack of opportunity given to the taxpayer to reply to the PAN within fifteen (15) days from its receipt**.

Similarly, in *Puratos Philippines, Inc. vs. Commissioner of Internal Revenue*,[5] the Court ruled that:

> "**Given that the FAN was issued on the same day petitioner received the PAN, it is evident that respondent violated the provisions of Section 228 of the NIRC of 1997, as well as of the provisions of Revenue Regulations Nos. 12-85 and 12-99 and Revenue Memorandum Order No. 37-94, which give the taxpayer a period of fifteen days within which to reply to the PAN**. Even assuming that there was an Informal Conference that took place between petitioner and respondent, and that during the conference and even thereafter, petitioner,

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[4] CTA Case 6357, June 7, 2004, penned by Presiding Justice Ernesto P. Acosta and concurred by Justice Juanito C. Castañeda and Justice Lovell R. Bautista.

[5] CTA Case No. 6980, October 4, 2010, penned by Associate Justice Lovell R. Bautista and concurred by Presiding Justice Ernesto D. Acosta and Associate Justice Caesar A. Casanova.

through its counsel, requested a copy of the FAN, the fact remains that as indicated in the FAN, it was issued on the same day the PAN was received by petitioner. Clearly, petitioner was denied of its right to due process." *(Emphasis supplied)*

The above rulings were reiterated in *Yumex Philippines Corporation vs. Commissioner of Internal Revenue*[6] wherein the assessments were cancelled on the ground of non-observance by the CIR of the 15-day period granted to the taxpayer to respond to the PAN, *viz*:

> "Respondent violated Section 228 of the NIRC of 1997 and the provisions of Revenue Regulations No. 12-99, which give the taxpayer a period of fifteen days within which to reply to the PAN. **In view of respondent's violation of petitioner's right to due process, the assessment would thus be considered void**." *(Emphasis supplied)*

In fine, unless in the meantime an assessment has become final and executory for failure to assail it within the reglementary period, its issuance that suffers from fatal infirmity must necessarily result in its nullity.[7]

For the reasons afore-stated, I VOTE to DENY the Petition for Review filed by CIR in CTA EB Case No. 1010 and GRANT the Petition for Review filed by Ajinomoto in CTA EB Case No. 1015.

ROMAN G. DEL ROSARIO
Presiding Justice

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[6] CTA Case No. 8331, 28 November 2013, penned by Associate Justice Cielito N. Mindaro-Grulla and concurred by Associate Justice Juanito C. Castañeda, Jr. and Associate Justice Caesar A. Casanova.

[7] In Global Metal Tech Corporation vs. Commissioner of Internal Revenue, CTA Case No. 8329, September 23, 2014, penned by Associate Justice Cielito N. Mindaro-Grulla and concurred by Presiding Justice Roman G. Del Rosario and Associate Justice Erlinda P. Uy, although the BIR did not wait for the lapse of the 15-day period to contest the PAN before issuing the Formal Letter of Demand/Final Assessment Notice (FAN), nonetheless, the FAN became final and executory for petitioner Global's failure to file a timely protest thereon. Since the FAN became final and executory, the Court in Division dismissed the petition for lack of jurisdiction.