REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

THIRD DIVISION

FSM CINEMAS, INC., *Petitioner,*	**C.T.A. CASE NO. 7074**
	Members:
-versus-	BAUTISTA, Chairperson, PALANCA-ENRIQUEZ, and COTANGCO-MANALASTAS, JJ.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	**Promulgated:** SEP 26 2012 3:45 p.m.

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DECISION

PALANCA-ENRIQUEZ, J.:

THE CASE

This is a Petition for Review filed by FSM Cinema, Inc. (hereafter "petitioner") praying for the cancelation and setting aside of the Formal Assessment Notices dated December 15, 2003, assessing petitioner of deficiency Income Tax in the amount of P5,404,829.89, Value-Added Tax ("VAT") in the amount of P17,000,253.28, Withholding Tax on

Compensation ("WTC") in the amount of P13,353.33 and Expanded Withholding Tax ("EWT") in the amount of P633,228.61, or the aggregate amount of P23,051,665.11 for taxable year 1999.

THE PARTIES

Petitioner FSM Cinema, Inc. is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, primarily engaged in the servicing, booking, and arranging of films, programs, shows, plays and movies of all kinds, types, makes and colors for movie houses, theaters or cinemas and to exhibit, lease, run or operate movie houses, theaters, cinemas, as well as supply equipment, machines and accessories needed in cinemas, theaters or movie houses, with principal place of business located at 4th level, Festival Supermall, Inc., Filinvest Corporate City, Alabang, City of Muntinlupa, Metro Manila.

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue (hereafter "CIR"), vested under the appropriate laws with authority to carry out all the functions, duties, and responsibilities of said office, including inter alia, the power to decide, cancel and abate tax liabilities, pursuant to *Section 204 (B) of the National Internal Revenue Code ("NIRC") of 1997, as amended.* She may be served with summons and other court processes at the 5th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City, Metro Manila.

THE FACTS

The facts, as culled from the records, are as follows:

On November 22, 2000, respondent issued a Letter of Authority ("LOA") No. 00013797, for the examination of petitioner's books of accounts and other accounting records for all internal revenue taxes for calendar year 1999.

On December 19, 2004, petitioner received FAN No. IT-3362-99-03-507, for deficiency income tax, in the amount of P5,404,829.89; No. VT-3362-99-03-507, for deficiency VAT, in the amount of P17,000,253.28; No. WC-3362-99-03-507, for deficiency WTC, in the amount of P13,353.33; and No. WE-3362-99-03-507, for deficiency EWT, in the amount of P633,228.61, all dated December 15, 2003.

On January 16, 2004, petitioner filed its formal protest against the subject FANs, pursuant to *Section 228 of the NIRC of 1997, as amended.*

Respondent failed to act on petitioner's protest within the 180-day period from the expiration of the 60-day period for petitioner to submit the supporting documents in support of its protest.

Hence, on October 12, 2004, petitioner filed the instant Petition for Review.

In her answer, respondent, by way of Special and Affirmative Defenses, alleged:

"A) Lack of legal capacity to sue:

5) Section 23 of the Corporation Code provides: 'Unless otherwise provided in this Code, the corporate powers of all corporations formed under this Code shall be exercised,.. by the board of directors...'. Section 36 of the same Code states: 'Every corporation incorporated under this Code has the power and capacity...To sue and be sued in its corporate name...";

6) The Petition disclosed that Josephine Gotianum Yap, treasurer, caused the preparation and filing of the same, however, it was not shown that she was authorized by the board of directors to institute a suit in behalf of the petitioner;

B) Deficiency Income Tax

7) Section 34 (K) of the 1997 Tax Code states: 'any amount paid or payable which is otherwise deductible from or taken into account in computing gross income...shall be allowed as a deduction only if it is shown that the tax required to be deducted and withheld therefrom has been paid to the Bureau of Internal Revenue...'

8) Verification disclosed that Petitioner failed to withhold the tax due on income payments/expenditures to its projectionist, electrician/plumber, film rental, cashiering, labor, rental, and on salaries and wages in the total amount of P8,405,609.97, pursuant to Section 57 of the 1997 Tax Code as implemented by Revenue Regulation 2-98, hence, the same

were disallowed as deductions from gross income and made part of the taxable income;

C) Deficiency Value Added Tax:

9) Section 106 of the 1997 Tax Code provides: 'there shall be *(sic)* levied, assessed and collected on every sale, barter or exchange of goods or properties, value added tax equivalent to ten percent (10%) of the gross selling price or gross value in money of the goods or properties sold, bartered or exchange... 'goods or properties' shall mean all tangible and intangible objects which are capable of pecuniary estimation...' while Section 108 of the same Code states: 'there shall be levied, assessed and collected a value added tax equivalent to ten (10%) of gross receipts derived from the sale or exchange of services... 'sale or exchange of services' means the performance of all kinds of services in the Philippines for others for a fee, remuneration or consideration...;

10) Verification disclosed that there was a substantial under-declaration in petitioner's sales/receipt. Based on the return, its sales/receipts is only P15,100,152.00, however, investigation disclosed that it has taxable sales/receipt from its cinema house, snack bar and other income in the total amount of P89,261,650.00;

D) Deficiency Withholding Tax (Compensation):

11) Section 2.79(A) of Revenue Regulations No. 2-98 states: 'every employer must withhold from compensation paid, an amount computed in accordance with these regulations...'

12) Computations disclosed that the withholding tax due from the petitioner on compensations paid is P92,443.91. However, the tax withheld based on their return is only P84,993.64, thereby producing a deficiency in the amount of P7,450.27 (exclusive of interest);

E) Deficiency Withholding Tax (Expanded)

13) Section 2.57.2 of Revenue Regulations No. 2-98 provides: 'Except as herein otherwise provided, there shall be withheld a creditable income tax at the rates herein specified for each class of payee from the following items of income payments to persons residing in the Philippines:.. (C) Rentals.. (5%), (D) Cinematographic film rentals and other payments... (5%), (E) Income payments to certain contractors... (1%)';

14) Verification disclosed that petitioner failed to withhold the tax due on its income payments to projectionist, electrician/plumber, film rental, cashiering labor and rental, hence, it was assessed the tax due thereon in the total amount of P633,228.61, inclusive of interest (1-26-00 to 1-12-04);

15) All presumptions are in favor of tax assessments *(Interprovincial Autobus Co., Inc. v. Collector, 98 Phil. 290; Cecilia Teodor Dayrit v. Hon. Fernando Cruz and Commissioner , L-39910, Sept. 26, 1988; Bonifacio Sy Po v. CTA & Commissioner, G.R. No. 81446, Aug. 18, 1988)*."

Petitioner presented Regina P. Pamiloza and Elisa M. Oregano, as witnesses, and documentary evidence, marked as *Exhibits "A" to "UUU"*, inclusive of their submarkings, which were admitted by the Court in its Resolution dated June 5, 2008, except for *Exhibits "A" to "H"*, as said exhibits cannot be found in the records of the case; *"BBB"*, for the same marking pertains to two different documents; *"M" to "M-6", "O" to "O-6", "P", "Q" to "Q-6", "R", "S" to "S-6", "T", "U" to "U-6", "V", "W" to "W-6", "X" "Y" to "Y-6", "Z" to "Z-6", "AA", "BB" to "BB-6", "CC", "DD" to "DD-6", "EE", "FF" to "FF-6", "GG" to "HH" to "HH-*

0P

6", "LL" "OO", "RR", "UU", "XX", "GGG", "JJJ" "MMM" to "SSS", for failure of petitioner to present the original copies thereof for comparison.

On the other hand, respondent presented Petronila DL. Palabrica, Gerardo Guido, and Ronaldo R. Reyes, as witnesses, and documentary evidence, marked as *Exhibits "1" to "15",* inclusive of their submarkings, which were all admitted by the Court, in Resolutions dated August 3, 2009 and September 17, 2009, after respondent filed a "Motion for Partial Reconsideration".

On October 8, 2009, the case was deemed submitted for decision.

On October 13, 2009, petitioner filed an "Omnibus Motion (Urgent Motion to Defer Submission of Memorandum and Motion for an Additional Hearing)", which the Court granted in a Resolution dated November 6, 2009. The Resolution dated October 8, 2009, submitting the case for decision was set aside.

On January 7, 2010, pursuant to *CTA Administrative Circular No. 01-2010 dated January 5, 2010*, "Implementing the Fully Expanded Membership in the Court of Tax Appeals", the instant case was transferred to the Third Division.

On February 1, 2010, petitioner presented again Elisa M. Oregano, as rebuttal witness.

On February 10, 2010, petitioner filed a "Motion to Declare the Alleged Deficiency Income Tax and Value-Added Tax Assessments Extinguished Under Republic Act No. 9480".

On March 2, 2010, respondent filed a "Motion for an Additional Time to File Comment (On Petitioner's Motion to Declare the Income & Value Added Taxes Assessments Extinguished under RA 9480)".

On March 16, 2010, petitioner filed a "Manifestation" stating that in February 2010, it filed a "Motion to Declare Alleged Deficiency Income Tax and VAT Assessments Extinguished under Republic Act No. 9480". In support thereof, petitioner submitted the following documents:

1) BIR Form No. 2116 – Tax Amnesty Return;
2) BIR Form No. 0617 – Tax Amnesty Payment Form;
3) Notice of Availment of Tax Amnesty;
4) Statement of Assets, Liabilities and Networth as of 31 December 2005;
5) Balance Sheet as of 31 December 2005; and
6) Bank Official Receipt issued by an authorized agent bank covering the payment of amnesty tax on 04 March 2008.

On March 25, 2010, petitioner's "Manifestation" filed on March 16, 2010, was noted and respondent's "Motion for an Additional Time to File

Comment (On Petitioner's Motion to Declare the Income & Value Added Taxes Assessments Extinguished under RA 9480)" was granted.

On March 31, 2010, respondent filed a "Motion to Admit (Respondent's Comment/Opposition on Petitioner's Motion to Declare Alleged Deficiency Income Tax & VAT Assessments Extinguished under Republic Act No. 9480)", with the Attached "Comment/Opposition (On Petitioner's Motion to Declare Alleged Deficiency Income Tax & VAT Assessments Extinguished under Republic Act No. 9480)", which was granted by the Court in a Resolution dated August 9, 2010. Petitioner was granted a period of fifteen (15) days to file its "Reply" thereto.

After the re-cross and redirect examinations of petitioner's witness, Eliza M. Oregano, on April 12, 2010 hearing, petitioner presented *Exhibit "WWW"*.

On May 17, 2010 hearing, petitioner presented *Exhibits "XXX"* and *"YYY"*.

On June 2, 2010, petitioner filed a "Motion for Leave of Court to Admit Attached Formal Offer of Evidence" and formally offered as additional evidence, *Exhibits "WWW" to "YYY"*, inclusive of their sub-markings, which the Court granted in a Resolution dated June 21, 2010.

On September 28, 2010, petitioner filed "Comments (to Respondent's Comment/Opposition dated March 29, 2010)".

On November 19, 2010, acting on petitioner's "Motion to Declare the Alleged Deficiency Income Tax and Value-Added Tax Assessments Extinguished Under Republic Act No. 9480", respondent's "Comment/Opposition (On Petitioner's Motion to Declare Alleged Deficiency Income Tax & VAT Assessments Extinguished under Republic Act No. 9480)", and petitioner's "Comments (to Respondent's Comment/Opposition dated March 29, 2010)", the Court ordered petitioner to submit the original or certified true copies of the following documents:

1) BIR Form No. 2116 – Tax Amnesty Return;
2) BIR Form No. 0617 – Tax Amnesty Payment Form;
3) Notice of Availment of Tax Amnesty; and
4) Statement of Assets, Liabilities and Networth as of 31 December 2005

On March 4, 2011, petitioner filed a "Compliance/Submission" with the Resolution dated November 19, 2010, submitting the originals and/or faithful reproduction of the original copies of said documents.

On April 4, 2011, in view of petitioner's availment of Tax Amnesty under *RA 9480*, the Court issued a Resolution considering closed and terminated only insofar as the alleged deficiency Income Tax and Value-Added Tax assessments were concerned, subject to the provisions of *RA 9480*.

On September 16, 2011, the Court admitted petitioner's *Exhibits "WWW" to "YYY"*. Thereafter, the 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.

Petitioner filed its "Memorandum", however, respondent failed to file her "Memorandum". Hence, the case was deemed submitted for decision on February 10, 2012.

ISSUES

As stipulated upon by the parties, the issues for this Court's consideration are:

I

WHETHER OR NOT FOR TAXABLE YEAR 1999, PETITIONER FAILED TO WITHHOLD THE TAX DUE ON INCOME PAYMENTS/EXPENDITURES TO ITS PROJECTIONIST, ELECTRICIAN/PLUMBER, CASHIERS/CASHIERING LABOR, ON FILM RENTALS, AND ON RENTALS.

II

WHETHER OR NOT FOR TAXABLE YEAR 1999, PETITIONER FAILED TO REMIT IN FULL ITS

WITHHOLDING TAX LIABILITIES ON THE SALARIES AND WAGES OF ITS EMPLOYEES.

III

WHETHER OR NOT FOR TAXABLE YEAR 1999, THERE WAS A SUBSTANTIAL UNDER-DECLARATION OF PETITIONER'S SALES/RECEIPTS.

IV

WHETHER OR NOT FOR TAXABLE YEAR 1999, PETITIONER INCURRED THE FOLLOWING TAX LIABILITIES: A) DEFICIENCY INCOME TAX COVERED BY FAN NO. IT-3362-99-03-507 DATED DECEMBER 15, 2003, IN THE AMOUNT OF P5,404,829.89; B) DEFICIENCY VAT COVERED BY FAN NO. VT-3362-99-03-507 DATED DECEMBER 15, 2003, IN THE AMOUNT OF P17,000,253.28; C) DEFICIENCY WITHHOLDIHNG TAX ON COMPENSATION COVERED BY FAN NO. WC-3362-99-03-507 DATED DECEMBER 15, 2003, IN THE AMOUNT OF P13,353.33; D) DEFICIENCY EXPANDED WITHHOLDING TAX COVERED BY FAN NO. WE-3362-99-03-507 DATED DECEMBER 15, 2003, IN THE AMOUNT OF P633,228.61.

V

WHETHER OR NOT THE SALE OF AMUSEMENT TICKETS BY CINEMA AND/OR THEATER OWNERS AND/OR OPERATORS IS SUBJECT TO VAT, SO AS TO BE COLLECTED BY RESPONDENT, OR IS SUBJECT TO WITHHOLDING TAX, FALLING WITHIN THE EXCLUSIVE COLLECTING JURISDICTION OF THE LOCAL GOVERNMENT HAVING TERRITORIAL JURISDICTION OVER THE CINEMA AND/OR THEATER OWNERS AND/OR OPERATORS.

VI

WHETHER OR NOT THE ALLEGED DISCREPANCY OF DISALLOWED SALARIES WAS ARRIVED AT USING A FORMULA ON AN APPROXIMATE RATE (ON CONTRACT LABOR) AND A PRESUMPTION (LABOR SUPPOSEDLY RENDERED BY PERSONNEL NOT DIRECTLY EMPLOYED BY PETITIONER).

VII

WHETHER OR NOT BIR RULINGS CANNOT BE GIVEN RETROACTIVE APPLICATION, IF SUCH APPLICATION WILL RESULT IN PREJUDICE TO TAXPAYERS, IN ACCORDANCE WITH SECTION 246 OF THE NIRC, AS AMENDED.

VIII

WHETHER OF NOT THE RULE ON NON-RETROACTIVITY OF BIR RULINGS UNDER SECTION 246 OF THE NIRC, AS AMENDED IS APPLICABLE IN THIS CASE.

The foregoing issues boil down to the following basic issues, whether or not petitioner may be held liable for:

1) Deficiency Income Tax in the amount of P5,404,829.89;

2) Deficiency Value-Added Tax in the amount of P17,000,253.28;

3) Deficiency Withholding Tax on Compensation in the amount of P13,353.33; and

4) Deficiency Expanded Withholding Tax in the amount of P633,228.61.

THE COURT'S RULING

The petition is partly meritorious.

Deficiency Income Tax and Value-Added Tax

As regards the assessments for deficiency Income Tax and Value Added Tax, in our Resolution dated April 4, 2011, we already ordered closed and terminated the said assessments for deficiency Income Tax and Value-Added Tax, subject to the provisions of *RA 9480*, in view of petitioner's availment of the Tax Amnesty under *RA 9480*.

Deficiency Withholding Tax on Compensation and Expanded Withholding Tax

As regards the assessments for deficiency Withholding Tax on Compensation and Expanded Withholding Tax, petitioner contends that the BIR has lost the right to issue the said withholding taxes assessments due to prescription.

Prescription

In cases of assessment, *Section 203 of the NIRC of 1997, as amended*, provides, as follows:

> "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."

Pursuant to the above provision, as a general rule, internal revenue taxes shall be assessed, within three (3) years after the last day prescribed by law for the filing of the return, or the day the return was filed, if the same was filed beyond the period prescribed by law. The assessment referred to herein is the Formal Assessment Notice, which is the official BIR action demanding the settlement of a taxpayer's liability.

Corollary thereto, *Section 58 of the NIRC of 1997, as amended*, provides:

> "SEC. 58. Returns and Payment of Taxes Withheld at Source. –
>
> (A) Quarterly Returns and Payments of Taxes Withheld. – Taxes deducted and withheld under Section 57 by withholding agents shall be covered by a return and paid to, except in cases where the Commissioner otherwise permits, an authorized agent bank, Revenue District Officer, Collection Agent, or duly authorized Treasurer of the city or municipality where the withholding agent has his legal residence or principal place of business, or where the withholding agent is a corporation, where the principal office is located.

The taxes deducted and withheld by the withholding agent shall be held as a special fund in trust for the government until paid to the collecting officers.

The return for final withholding tax shall be filed and the payment made within twenty-five (25) days from the close of each calendar quarter, while the return for creditable withholding taxes shall be filed and the payment made not later than the last day of the month following the close of the quarter during which the withholding was made. Provided, That the Commissioner, with the approval of the Secretary of Finance, may require these withholding agents to pay or deposit the taxes deducted or withheld at more frequent intervals when necessary to protect the interest of the government."

In conjunction thereto, *Sections 2.58(A)(2) and 2.81 of Revenue Regulations 2-98 dated April 17, 1998,* provide for the period for filing of the withholding tax return, to wit:

"SEC. 2.58. Returns and Payment of Taxes Withheld at Source.

(A) Monthly return and payment of taxes withheld at source —

xxx xxx.

(2) WHEN TO FILE —

(a) The withholding tax return, whether creditable or final, shall be filed and payments should be made within ten (10) days after the end of each month except for taxes withheld for December which shall be filed on or before January 25 of the following year.

(b) For large taxpayers, the filing of the return and the payment of tax shall be made within twenty five (25) days after the end of each month.

> (c) The return for final withholding taxes on interest from any currency bank deposit and yield or any other monetary benefit from deposit substitutes and from trust funds and similar arrangements shall be filed and the payment made within twenty five (25) days from the close of each calendar quarter."
>
> "SECTION 2.81. Filing of Return and Payment of Income Tax Withheld on Compensation (Form No. 1601). — Every person required to deduct and withhold the tax on compensation shall make a return and pay such tax on or before the 10th day of the month following the month in which withholding was made to any authorized agent bank within the Revenue District Office (RDO) or in places where there are no agent banks, to the Revenue District Officer of the City or Municipality where the withholding agent/employers legal residence or place of business or office is located; provided, however, that taxes withheld from the last compensation (December) for the calendar year shall be paid not later than January 25 of the succeeding year; Provided, further, that large taxpayers as determined by the Commissioner shall remit taxes withheld on or before the 25th day of the following month.
>
> If the person required to withhold and pay the tax is a corporation, the return shall be made in the name of the corporation and shall be signed and verified by the president, vice-president, or authorized officers.
>
> With respect to any tax required to be withheld by a fiduciary, the returns shall be made in the name of the individual, estate, or trust for which such fiduciary acts, and shall be signed and verified by such fiduciary. In the case of two or more joint fiduciaries the return shall be signed and verified by one of such fiduciaries."

In the case of *Commissioner of Internal Revenue vs. Aichi Forging Company of Asia, Inc., 632 SCRA 441*, the Supreme Court ruled that in the computation of legal periods *Section 31, Chapter VIII, Book I of the*

Administrative Code of 1987, being the more recent law, governs, wherein a "Year" shall be understood to be twelve calendar months.

Applying the foregoing rules and jurisprudence, the three (3)-year period within which respondent CIR can validly issue assessments for expanded withholding taxes and withholding taxes on compensation, are, as follows:

A. As regards the Expanded Withholding Tax:

EXPANDED WITHHOLDING TAX	Date Filed	Exhibit	Last day prescribed by law	END OF THE THREE-YEAR PRESCRIPTIVE PERIOD
January 1999	February 9, 1999	"CCC"	February 10, 1999	February 10, 2002
February 1999	March 9, 1999	"FFF"	March 10, 1999	March 10, 2002
March 1999	April 7, 1999	"III"	April 10, 1999	April 10, 2002
April 1999	May 10, 1999	"LLL"	May 10, 1999	May 10, 2002
May 1999	June 9, 1999	"OOO"	June 10, 1999	June 10, 2002
June 1999	July 9, 1999	"RRR"	July 10, 1999	July 10, 2002
July 1999	August 9, 1999	"KK"	August 10, 1999	August 10, 2002
August 1999	September 9, 1999	"NN"	September 10, 1999	September 10, 2002
September 1999	October 8, 1999	"QQ"	October 10, 1999	October 10, 2002
October 1999	November 10, 1999	"TT"	November 10, 1999	November 10, 2002
November 1999	December 10, 1999	"WW"	December 10, 1999	December 10, 2002
December 1999	January 10, 2000	"ZZ"	January 25, 2000	January 25, 2003

From the foregoing, considering that petitioner filed its monthly withholding tax remittance returns for expanded withholding taxes for taxable year 1999 on or before January 25, 2000, the assessment for deficiency expanded withholding tax should have been issued on or before January 10, 2003, pursuant to *Section 203 of the NIRC of 1997, as amended.*

Records show, however, that the Formal Assessment Notice No. WE-3362-99-03-57 for deficiency expanded withholding tax was issued only on December 19, 2003, almost one year after the BIR's right to issue the assessment notice had already prescribed. Clearly, said assessment notice was issued beyond the three (3)-year prescriptive period.

Waiver of the Statue of Limitation

However, *Section 222 (b) of the NIRC of 1997, as amended,* provides for an exception to the period of limitation, as follows:

> "SEC. 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes. –
>
> 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."

In the instant case, records show that petitioner executed two (2) Waivers of the Statute of Limitations. The first, extended the period to assess until December 31, 2002 *(BIR Records, pp. 487-488, 498-499)*, while the second was executed on May 20, 2003, extending the period to assess until December 31, 2003 *(BIR Records, pp. 517-518)*.

However, a perusal of the first waiver shows that: 1) it does not bear the date of execution; 2) it does not bear the date of acceptance by the BIR; 3) it was not duly notarized; and 4) the fact of receipt by the taxpayer of its file copy was not indicated in the original copy. On the other hand, the other copy of the first waiver shows that: 1) it does not bear the date of execution; 2) it was not accepted by the CIR or the revenue official authorized by him; 3) it does not bear the date of acceptance by the BIR; and 4) the fact of receipt by the taxpayer of its file copy was not indicated in the original copy.

In the landmark case of *Philippine Journalists, Inc. vs. Commissioner of Internal Revenue, 447 SCRA 226 & 228*, the Supreme Court ruled that the requirements of *RMO No. 20-90* must be strictly followed in order for a waiver to be considered valid.

In the recent case of *Commissioner of Internal Revenue vs. Kudos Metal Corporation, 640 SCRA 241-244*, the Supreme Court reiterated said ruling, as follows:

"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 17 issued on April 4, 1990 and RDAO 05-01 18 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."

Considering that the first waiver executed between the petitioner and respondent was defective as afore-mentioned, then pursuant to the foregoing jurisprudence, the period to assess the deficiency expanded withholding tax was not extended. Accordingly, the second waiver, having been executed only on May 20, 2003, after the three-year period to assess had lapsed on January 20, 2003, did not extend the period to assess. Consequently, Formal Assessment Notice No. WE-3362-99-03-57, having been issued beyond the three (3)-year prescriptive period, is void.

B. As regards the Withholding Tax on Compensation:

WITHHOLDING TAX ON COMPENSATION	Date Filed	Exhibit	Las Day Prescribed by Law	END OF THE THREE-YEAR PRESCRIPTIVE PERIOD
January 1999	February 9, 1999	"4"	February 10, 1999	February 10, 2002
February 1999	March 9, 1999	"4"	March 10, 1999	March 10, 2002
March 1999	April 7, 1999	"4"	April 10, 1999	April 10, 2002
April 1999	May 10, 1999	"4"	May 10, 1999	May 10, 2002
May 1999	June 9, 1999	"4"	June 10, 1999	June 10, 2002
June 1999	July 9, 1999	"4"	July 10, 1999	July 10, 2002
July 1999	August 9, 1999	"4"	August 10, 1999	August 10, 2002
August 1999	September 9, 1999	"4"	September 10, 1999	September 10, 2002
September 1999	October 8, 1999	"4"	October 10, 1999	October 10, 2002
October 1999	November 10, 1999	"4"	November 10, 1999	November 10, 2002
November 1999	December 10, 1999	"4"	December 10, 1999	December 10, 2002
December 1999	NONE	"4"	January 25, 2000	January 25, 2010

Based on the above data, petitioner failed to file the monthly withholding tax remittance return for withholding tax on compensation for the month of December for the year 1999. Having failed to file its December Withholding Tax Remittance Return, the ten (10)-year prescriptive period under *Section 222 (a) of the NIRC of 1997, as amended*, shall apply.

Section 222 (a) of the NIRC of 1997, as amended, provides:

> "SEC. 222. – Exceptions 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

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> filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof."

Considering that the Formal Assessment Notice No. WC-3362-99-03-57 for withholding tax on compensation was issued on December 19, 2003, then, said assessment notice was issued within the ten (10)-year prescriptive period.

Petitioner was assessed for basic Withholding Tax on Compensation in the amount of P7,450.27, computed, as follows:

Salaries per financial statements	P1,372,014.00
Withholding tax due	92,443.91
Less: Tax withheld per return	84,993. 64
Deficiency tax due	P7,450.27

Petitioner contends that the assessment for withholding tax on compensation was arrived at using a formula based on an approximate rate (on contract labor) and a presumption labor (labor supposedly rendered by personnel not directly employed by petitioner). Hence, the basis for the particular assessment is based on a presumption.

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Respondent's witness, Petronila DL Palabrica, on the other hand, on direct examination testified that the assessment on withholding tax on compensation was based on facts and was arrived at by comparing the amount of salaries appearing on petitioner's Annual Income Tax Return for the year 1999 with the amount of salaries appearing on petitioner's Annual Information Return of Income Taxes Withheld on Compensation *(Exhibit "11")*.

A perusal of the records shows that indeed the Annual Income Tax Return of petitioner shows the amount of P1,372,014.00, as salaries and allowances *(Exhibit "3")*. However, in BIR Form No. 1604 – Annual Information Return, the amount of tax withheld on compensation for taxable year 1999 amounts only to P84,993.70, attributable to taxable income of P950,170.90, non-taxable income of P121,6978.06, or a total of gross compensation income of only P1,071,867.96 *(Exhibit "4")*. Petitioner failed to reconcile the amounts of salaries and allowances that were subjected to withholding tax, as appearing in the Annual Information Return, with the amount of salaries and allowances, as shown in its Annual Income tax Return.

Settled is the rule that tax assessments by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments *(Commissioner of Internal Revenue vs. Bank of the Philippine Islands, 521 SCRA 386)*.

Thus, finding the basic deficiency assessment for withholding tax on compensation in the amount of P7,450.27 to be with factual and legal bases, we hereby upheld said assessment.

WHEREFORE, premises considered, the present Petition for Review is hereby **PARTLY GRANTED**. Accordingly, the Formal Letter of Demand, with Formal Assessment Notices:

1) No. IT-3362-99-03-507, for deficiency Income Tax, in the amount of P5,404,829.89; and
2) No. VT-3362-99-03-507, for deficiency Value-Added Tax, in the amount of P17,000,253.28

are hereby ordered **CANCELLED** and **SET ASIDE**, solely in view of petitioner's availment of Tax Amnesty under *RA 9480*;

3) No. WE-3362-99-03-507, for deficiency Expanded Withholding Tax, in the amount of P633,228.61 is hereby ordered **CANCELLED** and **SET ASIDE**, for having been issued beyond the three (3)-year prescriptive period to assess; and

4) No. WC-3362-99-03-507, for basic deficiency Withholding Tax on Compensation, in the amount of P7,450.27 is hereby **UPHELD**.

In addition, petitioner is ordered to pay the following:

a) 25% surcharge of the basic deficiency Withholding Tax on Compensation of P7,450.27, pursuant to *Section 248(A)(3) of the NIRC of 1997, as amended*;

b) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency Withholding Tax on Compensation of P7,450.27, computed from January 25, 2000, until full payment thereof, pursuant to *Section 249 (B) of the NIRC of 1997, as amended*; and

c) Delinquency interest at the rate of twenty percent (20%) per annum on the total amount of P9,312.84, representing the basic deficiency Withholding Tax on Compensation of P7,450.27, 25% surcharge of P1,862.57 and on the 20% deficiency interest which have accrued as afore-stated in (b), computed from

January 19, 2004, until full payment thereof, pursuant to *Section 249 (C) of the NIRC of 1997, as amended.*

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

LOVELL R. BAUTISTA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice