REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
Quezon City

Second Division

REBECCA D. DUKA, OWNER/SOLE PROPRIETOR OF DUKA GENERAL MERCHANDISE, as Represented by GIL D. DUKA AND/OR CELIA D. DUKA,
Petitioner,

CTA CASE NO. 10393

Members:

- versus -

RINGPIS-LIBAN, *Chairperson*
MODESTO-SAN PEDRO, *and*
FERRER-FLORES, *JJ.*

CAESAR R. DULAY, COMMISSIONER OF INTERNAL REVENUE, AND ROZIL R. LOZARES, REGIONAL DIRECTOR OF REVENUE REGION NO.10, LEGAZPI CITY,
Respondents.

Promulgated:
MAY 29 2024
2:40 p.m.

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DECISION

RINGPIS-LIBAN, J.:

The Case

The *Petition for Review* filed on November 05, 2020, prays that the assessments issued by respondent Commissioner of Internal Revenue against petitioner, for its alleged tax deficiency in the amount of Php34,385,860.39, for the year 2018, and for its alleged tax deficiency in the amount of Php25,561,505.04, for the year 2019, be reversed and declared null and void.[1]

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[1] Docket, Pre-Trial Order dated March 18, 2022, Summary of the Case, pp. 1533.

The Facts

Petitioner Rebecca D. Duka is the owner of a sole proprietorship duly organized and registered with the Department of Trade and Industry under the trade name of DUKA GENERAL MERCHANDISE (DGM), with principal office address at Cabid-an, Sorsogon City, Philippines, and primarily engaged in the retail business.[2]

Respondent Caesar R. Dulay is the duly appointed Commissioner of Internal Revenue ("respondent CIR"), of legal age and Filipino, and is represented by Litigation Division with office at Room 703 Litigation Division, Bureau of Internal Revenue ("BIR") National Office Building, BIR Road, Diliman Quezon City.[3]

Respondent Rozil R. Lozares is the duly appointed Regional Director of Revenue Region No. 10, Legazpi City ("respondent RD Lozares"), of legal age and Filipino.[4]

On February 24, 2020, the BIR, through respondent RD Lozares, issued Revenue Region Special Order ("RRSO") No. 38-2020,[5] directing certain Revenue Officers ("ROs") to undertake **Cash Register Machines/Point-of-Sale (CRM/POS) Post Evaluation and Z-Reading Generation for taxable years 2018 and 2019**, within the jurisdiction of Revenue District Office ("RDO") No. 68, Sorsogon City, to apprehend the business establishment of petitioner for violating all internal revenue laws, rules and regulations in the conduct of business and to take proper action thereon.

On the same date, the BIR, through respondent RD Lozares, issued *Mission Order* No. MSO2001 000068404 addressed to the same ROs relative to the said RRSO No. 38-2020.[6]

In the *Final Memorandum Report* dated April 01, 2020 prepared by the said ROs,[7] the latter recommended the issuance of an electronic *Letter of Authority* for taxable years 2018 and 2019, and a *48-Hour Notice* for the same years.

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[2] *Id., Joint Stipulation of Facts and Issues* (JSFI), Joint Stipulation of Facts, Par. 1, pp. 1524.
[3] *Id.*, JSFI, Joint Stipulation of Facts, Par. 2, pp. 1525.
[4] *Id.*, JSFI, Joint Stipulation of Facts, Par. 3, pp. 1525.
[5] BIR Records (Exhibit "R-13"), Exhibit "R-1", p. 2.
[6] Docket, Exhibit "P-2", p. 1583; BIR Records (Exhibit "R-13"), Exhibit "R-2", p. 1.
[7] BIR Records (Exhibit "R-13"), Exhibit "R-4", pp. 80A to 80D.

Thereafter, the BIR issued an undated *48-Hour Notice* against petitioner, which was received by the latter on June 01, 2020.[8] The said *48-Hour Notice* reads, in part, as follows:

> "A comparison of the Z-Reading (Accumulated Balance – new and old) and the Declaration of your Income Tax Return for Taxable years 2018 and 2019 would indicate that the under declaration is more than 30% compared to the actual sales.
>
> Please find herewith attached computations as Annex 'A', the computation of the total deficiency taxes for TY2018 and 2019 amounting to **Php2,949,599,999.78 (696%) and Php1,830,460,287.99 (413%)** as a result of the above under declarations, for your ready reference.
>
> For this reason, we are giving you a period of Forty-Eight hours from receipt hereof, within which to explain under oath why you should not be dealt with administratively, for suspension of your business or temporary closure of your establishments, and/or criminal liable for violation of pertinent provisions of the Tax Code, as amended."

On June 03, 2020, petitioner filed with the BIR the letter of even date, in response to the said *48-Hour Notice*,[9] stating, among others, that the Head Information Technology Officer and Systems Administrator of Basebyte Software and Consultancy Services explained to her that the "current grand total" and "previous grand total" are not actually the sales data recorded by each POS terminal independent and exclusive from the other terminal. Rather, they are cumulative, centralized, and compounding sales data generated from other terminals depending on which terminal was closed first or last.

Thereafter, the BIR, through respondent RD Lozares, issued the letter dated June 10, 2020, which was received by petitioner on June 17, 2020,[10] informing the latter of its answer to her letter, and that it shall proceed with the issuance of the *Five (5) Day VAT Compliance Notice* ("*5-Day VCN*").

On September 24, 2020, petitioner received the *5-Day VCN* issued by the BIR on even date,[11] demanding from petitioner to rectify her alleged violation by

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8 Docket, Exhibit "P-3", pp. 1586 to 1588; BIR Records (Exhibit "R-13"), Exhibit "R-5", pp. 80 to 82.

9 Docket, Exhibits "P-4" to "P-4-a", pp. 1589 to 1594.

10 BIR Records (Exhibit "R-13"), Exhibit "R-6, pp. 328 to 329.

11 Docket, Exhibit "P-15", pp. 1830 to 1832; BIR Records (Exhibit "R-13"), Exhibit "R-9", pp. 374 to 376.

reflecting her *"correct taxable sales/receipts for the taxable year 2018 and 2019 amounting to Php260,498,942.37 (38.056%) and Php193,647,765.49 (30.411%)"*.

Petitioner then filed her *Verified Response/Protest* against the said *5-Day VCN* on September 29, 2020.[12] However, the same was denied, for lack of factual and legal basis, by respondent RD Lozares in the letter dated October 05, 2020, which was received by petitioner on October 06, 2020.[13]

Petitioner filed with the BIR a *Request for Reconsideration of the Denial of Protest* on October 07, 2020.[14]

On October 14, 2020, Deputy Commissioner for Operations Group Arnel SD. Guballa issued the *Closure Order (SN: CO-RR10-068-005-2020)* against petitioner.[15] Notably, the latter refused to receive the same. Thus, the BIR resorted to tender of service, by leaving a copy thereof in the premises of petitioner's business, and through substituted service, by serving the copy of the said *Closure Order* to barangay officials.[16]

Petitioner filed the present *Petition for Review* on November 05, 2020.[17]

Respondents posted their *Answer* on February 15, 2021,[18] interposing the following special and affirmative defenses, to wit: (1) the Court has no jurisdiction over the instant case; (2) that the *48-Hour Notice* and the *5-Day VCN* were issued in accordance with law and the rules legitimately citing petitioner's violations, and affording the latter of her right to due process; (3) the conduct of the surveillance activities authorized under the *Mission Order*, issued in accordance with Revenue Memorandum Order ("RMO") No. 03-2009, is valid; and (4) the findings of the surveillance have legal and factual bases.

The Pre-Trial Conference was initially set on April 15, 2021.[19] *Petitioner's Pre-Trial Brief* was filed *via* electronic mail on April 14, 2021,[20] while *Respondents' Pre-Trial Brief* was submitted on July 01, 2021.[21]

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[12] Docket, Exhibit "P-17", pp. 1834 to 1843.
[13] Docket, Exhibit "P-18", p. 1844; BIR Records (Exhibit "R-13"), Exhibit "R-10", p. 391.
[14] Docket, Exhibit "P-19", p. 1845.
[15] Docket, Exhibit "P-20", p. 2005; BIR Records (Exhibit "R-13"), Exhibit "R-12", p. 561.
[16] Docket, Exhibit "R-4", Q&A No. 36, pp. 2189 to 2190.
[17] *Id.*, pp. 7 to 42.
[18] *Id.*, pp. 1386 to 1395.
[19] *Id.*, Notice of Pre-Trial Conference dated February 22, 2021, pp. 1398 to 1399.
[20] *Id.*, pp. 1400 to 1446.
[21] *Id.*, pp. 1461 to 1464.

The case was referred to mediation in the Philippine Mediation Center – Court of Tax Appeals ("PMC-CTA"), and the parties were ordered to immediately proceed, and to personally appear or through their authorized representative, before the PMC-CTA. [22] However, the mediation was unsuccessful.[23] Thus, the Pre-Trial conference was set anew for pre-trial,[24] and the same proceeded as scheduled on February 23, 2022.[25]

On March 15, 2022, the parties submitted their *Joint Stipulation of Facts and Issues*,[26] which was approved and adopted by the Court in the Pre-Trial Order dated March 18, 2022.[27]

Respondents transmitted the *BIR Records* of this case to the Court on May 26, 2022.[28]

The trial of the case then proceeded, with the parties presenting their respective testimonial and documentary evidence.

Petitioner offered the testimonies of the following individuals, namely: (1) Mr. Loreto Carpio,[29] the bookkeeper of petitioner; and (2) Mr. Gil D. Duka,[30] Operations Manager of petitioner.

On June 6, 2022, petitioner filed its *Formal Offer of Evidence*,[31] to which respondents filed their *Comment Re: Petitioner's Formal Offer of Evidence* on June 13, 2022.[32] In the Resolution dated August 8, 2022,[33] the Court admitted petitioner's exhibits, *except* for the following:

1. Exhibits "P-19-a" and "P-48", for failure to submit the duly marked exhibit;

2. Exhibit "P-50", for failure to have the exhibit identified;

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22 *Id.*, Minutes of the hearing held on, and Order dated, July 07, 2021, pp. 1509 to 1510; Resolution dated July 07, 2021, p. 1512.
23 *Id.*, *No Agreement to Mediate* dated November 22, 2021, p. 1513.
24 *Id.*, Resolution dated December 01, 2021, p. 1515.
25 *Id.*, Minutes of the hearing held on, and Order dated, February 23, 2022, pp. 1522 to 1523.
26 *Id.*, pp. 1524 to 1531.
27 *Id.*, pp. 1533 to 1537.
28 *Id.*, Respondent's *Compliance* dated May 26, 2022, pp. 1546 to 1548.
29 *Id.*, Exhibit "P-51", pp. 363 to 370; Exhibit "P-55", pp. 1481 to 1488; Minutes of the hearing held on, and Order dated, April 25, 2022, pp. 1543 to 1545.
30 *Id.*, Exhibit "P-49", pp. 381 to 399; Exhibit "P-53", pp. 1468 to 1475; Minutes of the hearing held on, and Order dated, April 25, 2022, pp. 1543 to 1545.
31 *Id.*, pp. 1550 to 1578.
32 *Id.*, pp. 2170 to 2172.
33 *Id.*, pp. 2195 to 2197.

3. Exhibits "P-50-a" and "P-54-a", for failure to have the exhibit marked and identified; and

4. Exhibit "P-54", for failure to submit the duly marked exhibit and to identify the same.

Petitioner then filed a *Partial Motion for Reconsideration and Motion to Admit Documentary Exhibit (On the Resolution dated 08 August 2022)* on August 17, 2022,[34] praying for the Court to reconsider the Resolution denying the admission of Exhibit "P-19-A", and admit the said Exhibit and Exhibit "P-48" as evidence. Respondents submitted their *Comment (Re: Petitioner's Partial Motion for Reconsideration and Motion to Admit Documentary Exhibit)* on September 12, 2022.[35] In the Resolution dated October 12, 2022,[36] petitioner's *Partial Motion for Reconsideration and Motion to Admit Documentary Exhibit (On the Resolution dated 08 August 2022)* were both granted, and admitted Exhibits "P-19-a" and "P-48".

For their part, respondents presented Revenue Officer ("RO") II Diana V. Millena.[37]

On February 20, 2023, *Respondents' Formal Offer of Evidence* was filed.[38] Petitioner then filed her *Comment/Opposition (To the Respondent's Formal Offer of Evidence dated 20 February 2023) on* March 3, 2023.[39] In the Resolution dated May 04, 2023,[40] the Court admitted respondents' Exhibits.

Subsequently, *Petitioner's Memorandum* was filed on June 6, 2023,[41] while respondents' *Memorandum* was submitted on June 13, 2023.[42]

The present case was considered submitted for decision on June 27, 2023.[43]

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[34] *Id.*, pp. 2200 to 2203.
[35] *Id.*, pp. 2208 to 2210.
[36] *Id.*, pp. 2213 to 2214.
[37] *Id.*, Exhibit "R-4", pp. 2183 to 2192; Minutes of the hearing held on, and Order dated, February 14, 2023, pp. 2216, and 2219 to 2220, respectively.
[38] *Id.*, pp. 2222 to 2229
[39] *Id.*, pp. 2232 to 2236.
[40] *Id.*, pp. 2243 to 2244
[41] *Id.*, pp. 2247 to 2269.
[42] *Id.*, pp. 2271 to 2299.
[43] *Id.*, Resolution dated June 27, 2023, p. 2303.

The Issue

The parties submitted the following issues for this Court's resolution, to wit:

> "a. Whether or not the Honorable Court has jurisdiction over the instant Petition for Review;
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> b. Whether or not, based on relevant Revenue Memorandum, sufficient ground exists showing clear violation of petitioner's right to due process;
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> c. Whether or not respondents failed to conduct surveillance, as prescribed under RMO No. 3-2009;
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> d. Whether or not respondents committed a reversible error in issuing a 48 Hour Notice that is non-compliant with the requirements provided by RMO No. 3-2009, and despite the lack of surveillance; consequently, the 48 Hour Notice must be declared void;
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> e. Whether or not Respondents committed a reversible error in issuing the Five (5) day VAT Compliance Notice that is non-compliant with the requirements provided by RMO No. 3-2009, and despite the lack of surveillance; thus, the 5-Day VCN must likewise be declared void;
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> f. Whether or not Respondents' assessment for deficiency VAT of Thirty-Four Million Three Hundred Eighty-Five Thousand Eight Hundred Sixty Pesos and 39/100 (Php34,385,860.39) for the year 2018, and Twenty-Five Million Five Hundred Sixty-One Thousand Five Hundred Pesos and 04/100 (Php25,561,505.04) for the year 2019, is arbitrary, erroneous, and without factual basis; and
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> g. Whether or not respondents committed reversible indiscretion when they denied petitioner's protest on the ground of lack of factual and legal bases."[44]

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[44] *Id.*, JSFI, Issues to be Resolved, pp. 1525 to 1526.

Petitioner's arguments:

Petitioner argues that the Court has jurisdiction over the instant case; that the instant case shows clear violation of petitioner's right to due process when respondents failed to abide by the policies laid down by RMO No. 3-2009; that since the data obtained by the BIR representative do not comply with Item A(2.4) of RMO No. 3-2009, the *48-Hour Notice* should be declared void; that the respondent committed reversible error when it issued the *48-Hour Notice* despite non-compliance with the surveillance requirement; that since the *48-Hour Notice* is not in compliance with RMO No. 3-2009, the *5-Day VCN*, as well as the *Closure Order*, must likewise be held void; and that respondents' assessment is arbitrary, erroneous and without factual and legal bases.

Respondent's counter-arguments:

Respondents contend that the Court has no jurisdiction over the instant case; that the *48-Hour Notice* and the *5-Day VCN* were issued in accordance with law and the rules legitimately citing the violations, and affording petitioner its right to due process; and the findings of the post-evaluation of the Point-of-Sale ("POS") machines have legal and factual bases.

Discussion/Ruling

The present *Petition for Review* is meritorious.

The Court has jurisdiction over the instant case.

Respondents insist that it is only when there has been assessment and a protest on such assessment can there be a decision on disputed assessment which can be cognizable by this Court.

The Court disagrees.

The argument of respondents must fail in light of Section 7(a)(1) of Republic Act ("RA") No. 1125,[45] as amended by RA No. 9282,[46] which confers

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45 An Act Creating The Court Of Tax Appeals.

46 An Act Expanding The Jurisdiction Of The Court Of Tax Appeals (CTA), Elevating Its Rank To The Level Of A Collegiate Court With Special Jurisdiction And Enlarging Its Membership,

upon this Court the jurisdiction to decide not only cases on disputed assessments and refunds of internal revenue taxes, but also "other matters" arising under the National Internal Revenue Code ("NIRC") of 1997, as amended,[47] *viz.*:

> "SEC. 7. *Jurisdiction.* — The CTA shall exercise:
>
> (a) **Exclusive appellate jurisdiction to review by appeal**, as herein provided:
>
> (1) **Decisions of the Commissioner of Internal Revenue in cases involving** disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or **other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue**"[48]

Based on the foregoing provision, the exclusive appellate jurisdiction of this Court is not limited to cases involving decisions of the Commissioner of Internal Revenue or matters relating to assessments or refunds.[49]

In this case, per the *Mission Order* No. MSO2001 000068404 dated February 24, 2020,[50] the issuance thereof finds its justification under Section 6(C) of the NIRC of 1997, as amended, to wit:

> "SEC. 6. *Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.* –
>
> xxx xxx xxx
>
> (C) *Authority to Conduct Inventory-taking, Surveillance and to Prescribe Presumptive Gross Sales and Receipts.* – The Commissioner may, at any time during the taxable year, order inventory-taking of goods of any taxpayer as a basis for determining his internal

Amending For The Purpose Certain Sections Or Republic Act No. 1125, As Amended, Otherwise Known As The Law Creating The Court Of Tax Appeals, And For Other Purposes.

47 *Commissioner of Internal Revenue v. Court of Tax Appeals, et al.*, G.R. No. 258947, March 29, 2022.

48 *Emphasis supplied.*

49 *Commissioner of Internal Revenue v. Court of Tax Appeals, et al.*, G.R. No. 258947, March 29, 2022.

50 Docket, Exhibit "P-2", p. 1583; BIR Records (Exhibit "R-13"), Exhibit "R-2", p. 1.

revenue tax liabilities, or may place the business operation of any person, natural or juridical, under observation or surveillance if there is reason to believe that such person is not declaring his correct income, sales or receipts for internal revenue tax purposes. The findings may be used as the basis for assessing the taxes for other months or quarters of the same or different taxable years and such assessment shall be deemed *prima facie* correct.

When it is found that a person has failed to issue receipts and invoices in violation of the requirements of Sections 113 and 237 of this Code, or when there is reason to believe that the books of accounts or other records do not correctly reflect the declarations made or to be made in a return required to be filed under the provisions of this Code, the Commissioner, after taking into account the sales, receipts, income or other taxable base of other persons engaged in similar businesses under similar situations or circumstances or after considering other relevant information, may prescribe a minimum amount of such gross receipts, sales and taxable base, and such amount so prescribed shall be *prima facie* correct for purposes of determining the internal revenue tax liabilities of such person."

In addition, in their pleadings filed before this Court, respondents invoke Section 115 of the NIRC of 1997, as amended, to wit:

"SEC. 115. *Power of the Commissioner to Suspend the Business Operations of a Taxpayer.* – The Commissioner or his authorized representative is hereby empowered to suspend the business operations and temporarily close the business establishment of any person for any of the following violations:

(a) *In the Case of a VAT-registered Person.* –

(1) Failure to issue receipts or invoices;

(2) Failure to file a value-added tax return as required under Section 114; or

(3) Understatement of taxable sales or receipts by thirty percent (30%) or more of his correct taxable sales or receipts for the taxable quarter.

> (b) *Failure of any Person to Register as Required under Section 236.*
>
> —
>
> The temporary closure of the establishment shall be for the duration of not less than five (5) days and shall be lifted only upon compliance with whatever requirements prescribed by the Commissioner in the closure order."

It is clear then that the actions taken by the BIR in this case, by respondents' own admission, sprung from the foregoing provisions of the NIRC of 1997, as amended. Thus, the determination of whether the conduct of surveillance and the issuance of the Closure Order against petitioner were valid, being a matter provided for by the Tax Code, is well within the jurisdiction of this Court to decide.

Correspondingly, the reckoning of the thirty-day reglementary period under Section 11[51] of RA No. 1125, as amended by RA No. 9282, is based on petitioner's receipt of the letter dated October 05, 2020 denying its *Verified Response/Protest*, on October 06, 2020. Therefore, the *Petition for Review* was timely filed on November 05, 2020.

The issuance of the subject 48-Hour Notice, 5-Day VCN, and Closure Order violated petitioner's constitutional right to due process.

It is an elementary rule enshrined in the 1987 Constitution that no person shall be deprived of property without due process of law. In balancing the scales between the power of the State to tax and its inherent right to prosecute perceived transgressors of the law on one side, and the constitutional rights of a citizen to due process of law and the equal protection of the laws on the other, <u>the scales must tilt in favor of the individual, for a citizen's right is amply protected by the Bill of Rights under the Constitution</u>.[52] Thus, while taxes are the lifeblood of the government, the power to tax has its limits, in spite of all its

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[51] SEC. 11. Who May Appeal; Mode of Appeal; Effect of Appeal. - Any party adversely affected by a decision, ruling or inaction of the Commissioner of Internal Revenue, the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry or the Secretary of Agriculture or the Central Board of Assessment Appeals or the Regional Trial Courts may file an appeal with the CTA within thirty (30) days after the receipt of such decision or ruling or after the expiration of the period fixed by law for action as referred to in Section 7(a)(2) herein.

[52] *Commissioner of Internal Revenue v. Yumex Philippines Corp.* G.R. No. 222476, May 5, 2021, *citing Commissioner of Internal Revenue v. Metro Star Superama, Inc.,* 652 Phil. 172 (2010); *Commissioner of Internal Revenue v. BASF Coating + Inks Phils., Inc.,* G.R. No. 198677, November 26, 2014.

plenitude. Even as We concede the inevitability and indispensability of taxation, it is a requirement in all democratic regimes that it be exercised reasonably and <u>in accordance with the prescribed procedure</u>.[53]

Simply put, the BIR's power to collect taxes must yield to the fundamental rule that no person shall be deprived of his/her property without due process of law. **The rule is that taxes must be collected reasonably and in accordance with the <u>prescribed procedure</u>.**[54]

In this case, however, respondents clearly failed to observe the prescribed procedure in the issuance of the subject *48-Hour Notice*, *5-Day VCN*, and *Closure Order*. Particularly, respondents did not fully comply with the procedure prescribed under RMO No. 3-2009[55] in the issuance of the said Notices. Parenthetically, said RMO No. 3-2009 is the existing administrative issuance governing the issuance of the said notices.

Part III(1) of RMO No. 3-2009 defines what constitutes a *"non-compliant taxpayer"*, to wit:

> "A **non-compliant taxpayer** is defined as a taxpayer who, **as a result of surveillance / stocktaking activities,** has been found to have committed the violations enumerated in Item (1), Section IV of this Order, and who, notwithstanding the issuance of several notices of violations, continues to refuse to comply with the requirements provided under existing rules and regulations."[56]

Based on the foregoing definition, for purposes of RMO No. 3-2009 or the issuance of a *48-Hour Notice*, *5-Day VCN*, and *Closure Order*, a taxpayer, to be considered as *"non-compliant"*, must have resulted from *"surveillance / stocktaking activities"* by the BIR. In other words, before the issuance of the said notices against a particular taxpayer, the BIR must have initially conducted a surveillance or stocktaking against the latter. Otherwise, said taxpayer may not be categorized as a *"non-compliant taxpayer"* warranting the issuance of the same notices.

The prerequisite conduct and conclusion of surveillance by the BIR before the issuance of the said notices, and that the concerned taxpayer must be *"non-*

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[53] *Commissioner of Internal Revenue v. United Salvage and Towage (Phils.), Inc.,* G.R. No. 197515, July 02, 2014.

[54] *Commissioner of Internal Revenue v. Pilipinas Shell Petroleum Corporation, etseq.,* G.R. Nos. 197945 and 204119-20, July 9, 2018.

[55] SUBJECT: Amendment and Consolidation of the Guidelines in the Conduct of Surveillance and Stock-Taking Activities, and the Implementation of the Administrative Sanction of Suspension and Temporary Closure of Business.

[56] *Emphasis supplied.*

compliant", are even axiomatic under the following pertinent provisions of RMO No. 3-2009, to wit:

"V. GUIDELINES AND PROCEDURES

A. Surveillance Activities

xxx xxx xxx

2. **<u>Conduct of Surveillance</u>**

2.1. *Revenue Officer Authorized to Conduct Surveillance Activities on Business establishments for Possible Violations of Sections 113, 114, 236, 237 and 238 of the NIRC, as amended.* – **At least two (2) implementing officers comprised of Revenue Officers (ROs) (Assessment/Excise), Intelligence Officers (IOs) and special Investigators (SIs) assigned in the following investigating offices/ divisions shall be authorized <u>to conduct surveillance activities</u> on identified business establishment based on validly issued mission order signed by the concerned authorized revenue official:**

xxx xxx xxx

2.2. ***<u>Mandatory Requirement for the Conduct of Surveillance</u> and Apprehension of Business Establishments for Non-Compliance with the Provisions of Section 113, 114, 236, 237 and 238 of the NIRC, as amended.*** – **No surveillance activities shall be conducted nor apprehension effected unless the same has been authorized by a mission order issued in accordance with the provisions of this Order.**

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4. **Action on <u>Surveillance Results</u>**

<u>If after the conclusion of the surveillance</u>, there is a sufficient ground for the closure of the establishment as provided under Section 115 of the NIRC, as amended, **a recommendation shall be made to effect such closure.**

xxx xxx xxx

B. Suspension or Temporary Closure of Business

xxx xxx xxx

3. Confrontational Requirements

1.1. Consistent with the requirements of due process, the report of the handling Revenue Officer shall be concurred in by the Head of the investigating office. The findings of the investigating office shall be reviewed by a Review Board composed of the following:

xxx xxx xxx

If a report is approved by a Review Board, the concerned Regional Director or the ACIR, Enforcement Service/LTS, as the case may be, shall, in his capacity as Chair of the Review Board, sign and issue to the taxpayer concerned a Forty-Eight (48) Hour Notice, requiring him to explain under oath within forty eight (48) hours why he should not be dealt with administratively, by suspension of business or temporary closure of his establishment, and/or criminally, for violation of pertinent provisions of the Tax Code.

xxx xxx xxx

3.3. **If a Review Board deems it necessary to pursue administrative or criminal action against a <u>non-compliant taxpayer</u>, it shall cause the preparation of a 5-Day VAT Compliance Notice (VCN)** [Annex 'D'], which shall be issued in lieu of the 10-Day VCN, to expedite the resolution of the case at hand. The 5-Day VCN shall be signed by the Chair of the Review Board concerned.

xxx xxx xxx

C. Execution and Enforcement

xxx xxx xxx

2. **The signed Closure Order** shall be returned by the Office of the Commissioner, together with all supporting documents, to the Review Board concerned, **for immediate service to the <u>non-compliant taxpayer</u>**."[57]

Based on the foregoing provisions, it is clear that a surveillance is necessary before the BIR can issue a *48-Hour Notice*, *5-day VAT Compliance Notice*, and *Closure Order*, to a *"non-compliant taxpayer"*.

In this case, the Mission Order No. MSO2001 00068404 dated February 24, 2020[58] issued by respondent RD Lozares categorically directs the BIR composite team to conduct the following activities, *viz.*:

1. To monitor sales and/or place business establishment mentioned above under observation or surveillance for violation of bookkeeping rules and regulations, particularly on non-issuance of sales invoice or receipts.

2. To take an inventory on the number of active units of cash register/point of-sale machines authorized to issue receipts in lieu of the regular sales invoices or receipts and check taxpayer's compliance with the provisions of Revenue Regulations (RR) No. 4-80, as amended by RR No. 10-99, governing the use of cash register and point-of-sale machines in lieu of registered sales invoices or receipts.

3. To apprehend violators of revenue laws and regulations governing the activities mentioned in the preceding paragraphs 1 and 2.

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57 *Emphasis and underscoring supplied.*
58 Docket, Exhibit "P-2", p. 1583; BIR Records (Exhibit "R-13"), Exhibit "R-2", p. 1.

4. Others: CRM/POS POST EVALUATION AND Z-READING GENERATION FOR TAXABLE YEAR 2018 AND 2019.

It must be emphasized that apart from conducting CRM/POS Post Evaluation and Z-Reading Generation, the BIR composite team was required, among others, to conduct surveillance and inventory on the number of active units of cash register/point of-sale machines authorized to issue receipt.

Notably, even respondents themselves acknowledged in their *Answer* the importance of conducting a 10-day surveillance prior to the issuance of the said notices, and even thought that the assigned ROs in the subject Mission Order were able to comply with same as shown in his below quoted averments:

> 11. Relatedly, **Section 6 of Tax Code**, as amended **authorizes the Commissioner to conduct inventory taking of goods of the taxpayer and conduct surveillance if there is a reason to believe that such person is not declaring his correct income, sales or receipts for internal revenue tax purposes**, viz:
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> > SEC. 6. *Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.* –
> >
> > xxx xxx xxx
> >
> > (C) Authority to Conduct Inventory-taking, Surveillance and to Prescribe Presumptive Gross Sales and Receipts. – The Commissioner may, at any time during the taxable year, order inventory-taking of goods of any taxpayer as a basis for determining his internal revenue tax liabilities, or may place the business operations of any person, natural or juridical, under observation or surveillance if there is reason to believe that such person is not declaring his correct income, sales or receipts for internal revenue tax purposes. The findings may be used as the basis for assessing the taxes for the other months or quarters of the same or different taxable years and such assessment shall be deemed prima facie correct.
> >
> > When it is found that a person has failed to issue receipts and invoices in violation of the

requirements of Sections 113 and 237 of this Code, or when there is reason to believe that the books of accounts or other records do not correctly reflect the declarations made or to be made in a return required to be filed under the provisions of this Code, the Commissioner, after taking into account the sales, receipts, income or other taxable base of other persons engaged in similar businesses under similar situations or circumstances or after considering other relevant information may prescribe a minimum amount of such gross receipts, sales and taxable base, and such amount so prescribed shall be prima facie correct for purposes of determining the internal revenue tax liabilities of such person.

12. **The conducted ten (10) day surveillance on respondent was pursuant to a Mission Order No. 00068404, dated 24 February 2020. The surveillance resulted to deficiency taxes for taxable year 2018 and 2019 amounting to Php 2,949,599,999.78 and Php 1,830,460,287.99, respectively.**

xxx xxx xxx

The conduct of the surveillance activities authorized under the Mission Order issued in accordance with RMO 03-2009 is valid.

xxx xxx xxx

16. Mission Order No. 00068404 dated 24 February 2020 was specific in the conduct of a 10-day sales monitoring and surveillance operation against Petitioner from February 26 to March 20, 2020.

The findings of the surveillance have legal and factual basis.

17. Under the 48-Hour Notice, petitioner under declared its taxable sales by more than 30% resulting to a deficiency tax for both taxable years 2018 and 2019.

> 18. RMO No. 3-2009 provides that findings of the surveillance may be used for assessing taxes for the other months or quarters of the same or different taxable years, and such assessment shall be deemed *prima facie* correct.
>
> 19. The results and findings of the sales monitoring and surveillance operation were based on careful and meticulous appreciation of the data gathered, and said result of surveillance was reviewed by the Assessment Division before a recommendation for the issuance of a 48-Hour Notice and a 5 Day VCN was approved by the Regional Review Board. Hence, the issuance of the 48-Hour Notice and the 5-Day VCN has a valid, factual, and legal basis."[59]

However, respondents' sole witness implicitly admits that no surveillance was ever conducted before the issuance of the subject *48-Hour Notice*, *5-Day VCN*, and *Closure Order*. Pertinent portions of the testimony of RO Diana V. Millena[60] are herein quoted for ready reference:

> "ATTY. RONQUILLO
> Q What was the purpose of the mission order?
>
> MS. MILLENA
> A The purpose of the Mission Order is for us the composite team to evaluate both evaluate the CRM/POS of the taxpayers.
>
> ATTY. RONQUILLO
> Q Anything else you can add?
>
> MS. MILLENA
> A And the tax mapping it is embedded on the Mission Order.
>
> ATTY. RONQUILLO
> Q Also there was a notation that a surveillance should be conducted, right?
>
> x x x x x x x x x

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[59] *Emphasis supplied.*
[60] Transcript of Stenographic Notes at the hearing held on February 14, 2023, pp. 6 to 9, and 29 to 31.

MS. MILLENA
A If the Mission Order is only for the Post Evaluation of the CRM/POS, not surveillance.

JUSTICE LIBAN
But there was stated therein posted in the Mission Order for surveillance. Can you read the Mission Order if there is such an annotation, that is the question actually.

MS. MILLENA
A The Mission Order the CRM/POS Post Evaluation and Z-Reading Generation for taxable year 2018 and 2019.

JUSTICE LIBAN
So your answer is?

MS. MILLENA
None, Your Honor.

JUSTICE LIBAN
So the answer is no, there is no such stamp for surveillance.

x x x   x x x   x x x

JUSTICE SAN PEDRO
You can confront her with the document.

ATTY. RONQUILLO
Mission Order No. 68404, dated February 24, 2020, there was a check mark, Ms. Witness, the monitor sales and business establishment mentioned above under observation or surveillance for violation of rules and regulations. **So, there is check mark on the surveillance portion.**

MS. MILLENA
Yes.

x x x   x x x   x x x

JUSTICE SAN PEDRO

At that time, were you familiar with our RMO No. 3-2009 that requires a minimum 10 days surveillance?

MS. MILLENA
Yes, Your Honor.

JUSTICE SAN PEDRO
And here in this case you only visited only once?

MS. MILLENA
Yes, Your Honor.

JUSTICE SAN PEDRO
And you said you were there for four (4) hours?

MS. MILLENA
Yes, Your Honor.

JUSTICE SAN PEDRO
How come you did not comply with the 10-day minimum surveillance period required?

MS. MILLENA
There is a difference between the surveillance and the post evaluation, so the surveillance is you are going to the taxpayer's business and monitor the issuance of receipt. However, in this case, the post evaluation, we already extracted the receipts and it covers only the period from January to December.

JUSTICE SAN PEDRO
So, you were saying is you skipped the surveillance, you did not find it necessary to undergo or to affect the 10-day surveillance?

MS. MILLENA
Yes, Your Honor.

JUSTICE SAN PEDRO
You immediately proceeded to the post evaluation based on the data you extracted?

MS. MILLENA
Yes, Your Honor."[61]

It is evident that respondents' Composite Team did not follow the procedure prescribed under RMO No. 3-2009, particularly, the need to conduct prior surveillance. Thus, for purposes of RMO No. 3-2009, petitioner cannot be considered as a *"non-compliant taxpayer"*, warranting the issuance of the said *48-Hour Notice*,[62] *5-Day VCN*,[63] and *Closure Order*,[64] against her.

In sum, for the failure of respondents or the BIR to act in accordance with the prescribed procedures before issuing the subject notices, respondents have violated the due process right of petitioner. Correspondingly, the said notices are void, and thus, cannot be given effect.

WHEREFORE, in light of the foregoing considerations, the present *Petition for Review* is **GRANTED**. Accordingly, the undated *48-Hour Notice*, the *5-Day VCN* dated September 24, 2020, and the *Closure Order* (SN: CO-RR10-068-005-2020) dated October 14, 2020, all issued against petitioner, are hereby **CANCELLED** and **SET ASIDE**.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

I CONCUR:

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

CORAZON G. FERRER-FLORES
Associate Justice

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[61] *Emphasis supplied.*
[62] Docket, Exhibit "P-3", pp. 1586 to 1588; BIR Records (Exhibit "R-13"), Exhibit "R-5", pp. 80 to 82.
[63] Docket, Exhibit "P-15", pp. 1830 to 1832; BIR Records (Exhibit "R-13"), Exhibit "R-9", pp. 374 to 376.
[64] Docket, Exhibit "P-20", p. 2005; BIR Records (Exhibit "R-13"), Exhibit "R-12", p. 561.

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.

MA. BELEN M. RINGPIS-LIBAN
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.

ROMAN G. DEL ROSARIO
Presiding Justice