REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

Third Division

FIRST GAS POWER CORPORATION,
Petitioner,

-*versus*-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 7281

Members:
Bautista, *Chairperson*
Palanca-Enriquez, *and*
Cotangco-Manalastas, *JJ.*

Promulgated:

SEP 24 2012
8:30 p.m.

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D E C I S I O N

BAUTISTA, J.:

This is an appeal from respondent's Final Assessment Notices ("FAN") and Formal Letters of Demand (the "Assessments") all dated July 19, 2004 against petitioner for deficiency income taxes and penalties for the taxable years 2000 and 2001 pursuant to Section 228 of the 1997 National Internal Revenue Code, as amended ("1997 NIRC") for respondent's failure to act on petitioner's protest dated October 5, 2005 within 180 days from petitioner's submission of documents in support of its protest.[1]

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[1] *Records*, p. 1; Raffled to the then First Division of the Court before the issuance of CTA Administrative Circular No. 01-2010, entitled "Implementing the fully Expanded Membership in the Court of Tax Appeals," dated January 5, 2010.

The Parties[2]

Petitioner is a corporation duly organized and existing under the laws of the Philippines. Its office is located at the 3rd Floor, Benpres Building, Exchange Road corner Meralco Avenue, Pasig City, Philippines.

Respondent Commissioner of Internal Revenue is a public officer duly appointed by the President of the Republic of the Philippines and is the head of the Bureau of Internal Revenue ("BIR"), the government agency officially responsible for the assessment and collection of all national and internal revenue taxes, as well as the cancellation of disputed assessments. Respondent's office address is located at the Bureau of Internal Revenue National Building, Diliman, Quezon City.

The Facts

Based on the Joint Stipulation of Facts and Issues,[3] dated September 1, 2006, petitioner was registered with the Board of Investments in accordance with the provisions of Executive Order No. 226, otherwise known as the Omnibus Investment Code of 1987, and was given an income tax holiday incentive for six (6) years from commencement of actual operations, or until May 2006.[4] Petitioner applied for a change of accounting period from June 30 to December 31 was approved by the BIR on. February 7, 2001.[5]

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[2] *Id.*, pp. 1-2.
[3] *Id.*, pp. 299-304
[4] *Id.*, *p.* 302.
[5] *Id.*

With regards to the assessment in question, the Joint Stipulation of Facts and Issues[6] dated September 1, 2006 provided that:

"4. On 24 October 2002, [p]etitioner received a Letter of Authority ("LA") from the [r]espondent authorizing the BIR's representative to examine the books of accounts and other accounting records of [p]etitioner for all revenue taxes for the taxable years 2000 and 2001.

5. On 30 September 2003, [p]etitioner received a Notice to Taxpayer from the BIR requesting [p]etitioner to appear for an informal conference on 15 October 2003.

6. On 11 March 2004, [p]etitioner received Preliminary Assessment Notices ("PAN") dated 15 December 2003 and 28 January 2004, wherein [p]etitioner was assessed the following alleged deficiency taxes and penalties for the years 2000 and 2001:

a) Deficiency Income Tax for 2000	PhP84,571,959.65
b) Deficiency Income Tax for 2001	PhP97,999,363.41
c) Late Payment Penalties for 2001	PhP4,670,630.18

7. On 06 April 2004, [p]etitioner filed its Preliminary Reply to the PAN issued by the [r]espondent.

8. On 06 September 2004, [p]etitioner received another set of Assessments all dated 19 July 2004.

8.1 Under the Assessments, [p]etitioner is being assessed the following alleged deficiency taxes and penalties for the years 2000 and 2001:

a) Deficiency Income Tax for 2000	PhP37,099,915.29
b) Deficiency Income Tax for 2001	PhP82,365,799.90
c) Late Payment Penalties for 2001	PhP4,670,630.18

8.2 Petitioner is being assessed deficiency income tax for the calendar year ending 31 December 2000 due to its alleged unreported income on pre-income tax holiday sale of electricity to Meralco and Siemens, as well as for its alleged unreported interest

[6] *Id.*, pp. 299-304.

income from foreign investments and dollar loan proceeds realized prior to commercial operations.

8.3 On the other hand, [p]etitioner is being assessed deficiency income tax for the calendar year ending 31 December 2001 due to its disallowed interest expense from dollar deposits in foreign banks and its disallowed compensation expense.

8.4 Finally, [p]etitioner is being assessed penalties for the calendar year ending 31 December 2001 due to the late payment of withholding tax on interest on foreign loans and late payment of excise tax on natural gas.

9. On 5 October 2004, [p]etitioner filed a Letter of Protest before [r]espondent Commissioner of Internal Revenue, Honorable Guillermo L. Parayno, Jr., which has not yet been acted upon up to this date.

x x x *x x x* *x x x*

3. Petitioner submitted its documentary evidence in support of its Protest on 02 December 2004, or fifty eight (58) days from filing of its Protest, well within the sixty (60) day period required by Section 228 of the NIRC, as implemented by Section 3 of Revenue Regulations No. 12-99.

4. Petitioner filed its Petition for Review on 30 June 2005, thirty (30) days after the lapse of the 180 days within which respondent has to act upon the Letter of Protest."[7]

On October 15, 2007, petitioner filed a Motion for Preferential Resolution on the Issue of Prescription,[8] which was denied via a Resolution promulgated by the First Division of the Court on June 6, 2008.[9]

On June 23, 2008, petitioner filed through registered mail a Motion for Reconsideration with Motion to Admit Attached Memorandum,[10] which was received by the Court on July 2, 2008.

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[7] *Id.*, pp. 300-302.
[8] *Id.*, pp. 363-368.
[9] *Id.*, pp. 500-501.

On September 17, 2008, the First Division of the Court resolved to deny petitioner's Motion for Reconsideration with Motion to Admit Attached Memorandum.

On January 25, 2010, the Court issued an Order[11] setting the commissioner's hearing for the marking of petitioner's documentary evidence and presentation of petitioner's witnesses for the identification of several exhibits.

On December 5, 2011, respondent filed her Memorandum,[12] while petitioner filed its Memorandum[13] on even date through registered mail.

On December 21, 2011, the Court promulgated a Resolution[14] submitting the case for decision.

On February 10, 2012, petitioner submitted its Reply Memorandum.

Hence, this Decision.

The Issues

The Joint Stipulation of Facts and Issues[15] dated September 1, 2006 enumerate the following issues to be resolved:

> "1. Whether or not respondent's right to issue an assessment for deficiency income tax for the taxable year 2000 has prescribed.
>
> 2. Whether or not petitioner is liable for deficiency income tax for the calendar year ending December 31, 2000 due to its alleged unreported income on pre-Income Tax Holiday sale of electricity to Meralco and Siemens, as well as for its alleged unreported income from foreign investments and dollar loan proceeds realized prior to commercial operations.

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[10] *Id.*, pp. 506-545, with attachments.
[11] *Id.*, p. 1020.
[12] *Id.*, pp. 1177-1200.
[13] *Id.*, pp. 1204-1307.
[14] *Id.*, pp. 1311.
[15] *Id.*, pp. 299-304.

3. Whether or not petitioner is liable for deficiency income tax for the calendar year ending December 31, 2001 due to its disallowed interest expense from dollar deposits in foreign banks and its disallowed compensation expense.

4. Whether or not petitioner is liable for penalties for late payment of excise tax on natural gas."

The Ruling of the Court

As gleaned from the facts, the assessments that are the subject of this case involves two taxable years: 2000 and 2001. Thus, the Court will tackle each taxable year separately below.

Taxable Year 2000

Petitioner asserts that respondent's right to assess deficiency taxes for the year 2000 has prescribed considering that it received the Final Assessment Notice ("FAN") with accompanying Formal Letter of Demand only on September 6, 2004.

From the records, it has been shown that petitioner changed its accounting period from fiscal to calendar.[16] As its original fiscal year ended June 30, 2000, petitioner filed its Annual Income Tax Return on October 16, 2000.[17] For the period covering July to December 2000, petitioner filed another Annual Income Tax Return on April 16, 2001.[18] Counting from the foregoing dates of filing, respondent has three (3) years, or until October 16, 2003 and April 16, 2004, respectively, to assess petitioner, pursuant to Section 203 of the 1997 NIRC.

[16] Exhibit "O."
[17] Exhibit "N."
[18] Exhibit "P."

Respondent, on the other hand, counters that petitioner executed a waiver[19] of the Statute of Limitations on April 12, 2004 thereby suspending the running of the three (3)-year prescriptive period.

However, petitioner questions the validity of the said waiver, pointing out that the said waiver did not indicate the date of receipt and acceptance by respondent, a violation of pertinent provisions of Revenue Memorandum Order (RMO) No. 20-90, which states that:

> "*x x x*   *x x x*   *x x x*
>
> In the execution of said waiver, the following procedures should be followed:
>
> *x x x*   *x x x*   *x x x*
>
> 2. The waiver shall 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.
>
> Soon after the waiver is signed by the taxpayer, the Commissioner of Internal Revenue or the revenue official authorized by him, as hereinafter provided, shall sign the waiver indicating that the Bureau has accepted and agreed to the waiver. The date of such acceptance by the Bureau should be indicated. 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 of a subsequent agreement is executed."

Respondent explains that the dates of execution and notarization are identical, indicating that the same were executed and accepted by both petitioner and respondent on the same date. However, upon scrutiny of the waiver executed on April 12, 2004, it

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[19] Exhibit "Q."

reveals that only petitioner's Vice President Mr. Nestor H. Vasay appeared before the Notary Public.[20]

Further, the original copy of the same waiver likewise lack the signature showing receipt by the taxpayer of his/her files copy as provided in RMO No. 20-90:

> "4. The waiver must be executed in three (3) copies, the original copy to be attached to the docket of the case, the second copy for the taxpayer and the third copy for the Office accepting the waiver. **The fact of receipt by the taxpayer of his/her file copy shall be indicated in the original copy."** *(emphasis supplied)*

In *Commissioner of Internal Revenue v. Kudos Metal Corporation*,[21] the Supreme Court enunciated the requirements of a properly executed waiver:

> "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:
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> 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.
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> 3. The waiver should be duly notarized.
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> 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

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[20] Exhibit "22."
[21] G.R. No. 178087, May 5, 2010, 620 SCRA 232.

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."

In the same case, the Supreme Court came to the conclusion that the waivers were executed without the notarized written authority to sign the waiver in behalf of respondent, as well as failing to indicate the date of acceptance and the fact of receipt by respondent of its file copy was not indicated in the original copies of the waivers. Thus, 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.[22]

In *Philippine Journalist, Inc. v. Commissioner of Internal Revenue*,[23] the Supreme Court held that:

"A waiver of the statute of limitations under the NIRC, to a certain extent, is a derogation of the taxpayers' right to security against prolonged and unscrupulous investigations and must therefore be carefully and strictly construed. The waiver of the statute of limitations is not a waiver of the right to invoke the defense of prescription as erroneously held by the Court of Appeals. It is an agreement between the taxpayer and the BIR that the period to issue an assessment and collect the taxes due is

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[22] *Id.*
[23] G.R. No. 162852, December 16, 2004, 447 SCRA 214, 224.

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

Thus, it does not surprise Us that the Supreme Court has upheld decisions of this Court wherein strict compliance of the provisions of RMO No. 20-90 and RDAO No. 05-01 when executing waivers of the Statute of Limitations were required of the parties.

Taxable Year 2001

In the last paragraph of the Assessments, it was stated that:

> In view thereof, you are requested to pay your aforesaid deficiency income tax liability/penalties through the duly authorized agent bank in which you are enrolled within the time shown in the enclosed assessment notice.

However, the due date in each of the FANs[24] referred to in the Assessments was left blank. Thus, the FANs in this case are not demands but mere requests for payment.

In the case of *Commissioner of Internal Revenue v. Pascor Realty and Development*,[25] the Supreme Court ruled that:

> "True, as pointed out by the private respondents, an assessment informs the taxpayer that he or she has tax liabilities. But not all documents coming from the BIR containing a computation of the tax liability can be deemed assessments.
>
> To start with, an assessment must be sent to and received by a taxpayer, and **must demand payment of the taxes described therein within a specific period**. Thus, the NIRC imposes a 25 percent penalty, in

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[24] Exhibits "J" and "I."
[25] G.R. No. 128315, June 29, 1999, 309 SCRA 402.

> addition to the tax due, in case the taxpayer fails to pay deficiency tax within the time prescribed for its payment in the notice of assessment. Likewise, an interest of 20 percent *per annum*, or such higher rates as may be prescribed by rules and regulations, is to be collected form the date prescribed for its payment until the full payment." *(emphasis supplied)*

Applying the aforecited jurisprudence to the present case, the FANs and related Assessments issued by respondent against petitioner for taxable year 2001 cannot be legally considered as valid assessment notices since respondent did not indicate therein a specific date or period within which the alleged tax liabilities shall be paid by petitioner.

In fine, due to the defects found in the waivers for taxable year 2000 and the Final Assessment Notice for the taxable year 2001, the Court has no choice but to cancel the said assessments.

For taxable year 2000, the period to assess was not suspended or tolled. It is therefore unnecessary to discuss the validity of the subsequent waivers executed. Consequently, the deficiency income tax assessment issued by respondent for taxable year 2000 amounting to 37,099,915.29 is barred by prescription.

As for the deficiency income tax assessment and the late payment penalties for taxable year 2001, there being no valid Final Assessment Notice, the Court has no choice but to cancel and withdraw the said assessment.

WHEREFORE, the instant Petition for Review is hereby **GRANTED.** Accordingly, the following are hereby **CANCELLED** and **WITHDRAWN**:

1. Final Assessment Notice and Formal Letter of Demand for deficiency income tax for Calendar Year ended December 31, 2000 in the total amount of Php37,099,915.29 inclusive of surcharge, interest and compromise penalties;
2. Final Assessment Notice and Formal Letter of Demand for deficiency income tax for Calendar Year ended December 31, 2001 in the total amount of Php82,365,799.90 inclusive of surcharge, interest and compromise penalties; and
3. Final Assessment Notice and Formal Letter of Demand for penalties assessment for Calendar Year ended December 31, 2001 in the total amount of Php4,670,630.18 inclusive of surcharge, interest and compromise penalties.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

OLGA PALANCA-ENRIQUEZ
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 Section 13 of Article VIII of the Constitution, 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's Division.

ERNESTO D. ACOSTA
Presiding Justice