Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

NICKEL ASIA CORPORATION,
Respondent.

CTA EB No. 1355
(CTA Case No. 8662)

Present:
DEL ROSARIO, *PJ,*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, *and*
MANAHAN, *J.J.*

Promulgated:

AUG 04 2017 4:08 p.m.

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DECISION

CASANOVA, *J.*:

This Petition for Review, filed by petitioner-Commissioner of Internal Revenue, seeks the nullification of the Decision dated February 2, 2015 (the "Assailed Decision") rendered by the Court of Tax Appeals (CTA)-Third Division, partially granting respondent-Nickel Asia Corporation's Petition for Review and, also, the Resolution dated August 20, 2015 (the "Assailed Resolution"), denying petitioner's Motion for Reconsideration.

The facts of the case, as narrated in the Assailed Decision, are as follows:

> "The petitioner is a corporation organized and existing under Philippine laws, with Certificate of Registration No. CS200811530 issued by the Securities and Exchange Commission. Petitioner is registered with the

Bureau of Internal Revenue as a VAT entity, with Tax Identification Number (TIN) 007-085-191-000.

The respondent is the duly appointed Commissioner of Internal Revenue (BIR), vested with authority to *inter alia*, decide refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the BIR, and holding office at the BIR National Office Building, Diliman, Quezon City.

JURISDICTIONAL FACTS

The instant petition was filed on June 21, 2013, within the thirty-day period from the receipt of the FDDA dated May 4, 2013 by the petitioner on May 22, 2013. Under the last paragraph of Section 228 of the NIRC of 1997:

> 'If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from the receipt of the said decision, or from the lapse of one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable.'

Although the FDDA was signed solely by OIC-Assistant Commissioner Alfredo V. Misajon (OIC-Assistant Commissioner Misajon) and not by the respondent Commissioner herself, it has been held that a letter signed by an acting chief revenue collection officer of a revenue district, so long as it contains a decision on a disputed assessment, such as a final notice before seizure of a taxpayer's property, is appealable to this Court for review. The authority to make tax assessments may be delegated to subordinate officers; said assessment has the same force and effect as that issued by the Commissioner himself, if not reviewed or revised by the latter. A demand letter for tax deficiency assessments issued and signed by a subordinate officer who was acting in behalf of the Commissioner of Internal Revenue, is deemed final and executory and subject to an appeal to the Court of Tax Appeals; the determination on whether or not a demand letter is final is conditioned upon the language used or the tenor of the letter being sent to the taxpayer. The FDDA in the instant case ended on the following, which left no doubt as to its finality:

> 'x x x This is our final decision. If you disagree, you may appeal this final decision with the Court of Tax Appeals within thirty (30) days from date of receipt hereof, otherwise our said deficiency tax assessment shall become final, executory and demandable.'

The instant petition for review against the FDDA is thus squarely within the jurisdiction of this Court.

FACTUAL ANTECEDENTS

Petitioner rendered management services to four (4) mining companies in the year 2009. These were the Rio Tuba Nickel Mining Corporation, Taganito Mining Corporation, Hinatuan Mining Corportion, and Cagdianao Mining Corporation. All of these companies were VAT-registered with the BIR, as well as registered with the Board of Investments (BOI) as 100% exporters pursuant to Executive Order No. 226.

To each of these four mining firms, the BOI issued a separate certification that the company exported 100% of its total sales for the year 2009. The BOI copy furnished the BIR these certifications.

Pursuant to Revenue Memorandum Order (RMO) No. 9-2000 ('Tax Treatment of Sales of Goods, Properties and Services made by VAT-registered Suppliers to BOI-registered Manufacturers-Exporters with 100% Export Sales'), petitioner deemed its sale of services to the four mining firms as subject to zero percent (0%) VAT when it billed the said firms for services. The corresponding invoices issued by the petitioner reflected the sales of services as zero-rated sales.

On November 9, 2011, petitioner received from the respondent Letter Notice No. LN (TRS) 10-0000015 for income tax and VAT liabilities for calendar year 2010.

On July 25, 2012, respondent served on petitioner a Preliminary Assessment Notice (PAN) for alleged basic deficiency VAT of ₱5,070,184.44 plus penalties and interest. This PAN was issued by the respondent thru OIC-Assistant Commissioner Misajon of the Large Taxpayers Service. This assessment was based on: (1) management fees of ₱42,173,079.00 paid by the four mining firms, and (2) 'Other Income' of ₱78,458.00 which was allegedly not subjected to VAT.

On August 9, 2012, petitioner disputed the PAN by filing a protest letter with the BIR's Large Taxpayers Service. Petitioner invoked Section 4.106-5(a)(5) of Revenue Regulations (RR) No. 16-2005, as amended, in relation to Section 106(A)(2)(a)(5) of the NIRC of 1997, as amended, as its basis for subjecting the sale of services to 0% VAT. For excluding its Other Income from the 12% VAT, petitioner cited as basis Section 105 of the NIRC.

On February 8, 2013, petitioner received from respondent a Formal Letter of Demand with Final Assessment Notice (FAN), assessing petitioner the same amount of ₱5,070,184.44 plus updated penalties and interest.

On February 27, 2013, by protest letter dated February 25, 2013, petitioner contested the FAN. Petitioner again invoked the same provisions of the NIRC and RR No. 16-2005, as amended.

On May 22, 2013, petitioner received respondent's Final Decision on Disputed Assessment (FDDA) dated May 4, 2013, for alleged basic deficiency VAT of ₱5,070,184.44 plus penalties and interest of ₱2,383,673.93, for a total of ₱7,453,858.37. The FDDA thereby denied the petitioner's protest with finality.

On June 21, 2013, the petitioner filed the instant petition for review. The respondent, by summons dated July 2, 2013, was required to file its Answer within fifteen (15) days from service of summons. Respondent received the summons on July 3, 2013, and filed on July 17, 2013 a Motion for Extension of Time to File Answer. On July 26, 2013, the Court granted the respondent an extension of time to file its Answer, until August 17, 2013, with a 'warning of no further extension'. It was not until August 22, 2013, however, that respondent actually filed its Answer dated August 16, 2013.

On August 27, 2013, the Court issued the Notice of Pre-Trial Conference, which was set for October 24, 2013.

On October 21, 2013, petitioner submitted its Pre-Trial Brief, dated October 18, 2013.

On October 22, 2013, respondent filed its Pre-Trial Brief, dated October 21, 2013.

At the hearing on October 24, 2013, the parties manifested in open court their agreement to limit the issues to questions of law inasmuch as the evidence already formed part of the BIR records. The parties were given ten (10) days within which to file their Joint Stipulation of Facts and Issues.

On November 14, 2013, the parties submitted their Joint Motion to Admit the Joint Stipulation of Facts and Issues. This Joint Motion was granted by Order dated November 18, 2013.

On January 30, 2014, the Court issued the Pre-Trial Order enumerating the facts stipulated upon by the parties, defining the issues and the applicable laws, rules, regulations and jurisprudence, terminating the Pre-Trial, and giving the parties fifteen (15) days from notice within which to file their respective memorandum.

On February 20, 2014, respondent moved for an extension of thirty (30) days for the filing of its Memorandum; this was granted by Resolution dated February 24, 2014, which gave the respondent until March 22, 2014.

On February 28, 2014, petitioner also moved for an additional fifteen (15) days, or until February 7, 2014 (sic) for the filing of its Memorandum; the Court by Resolution dated March 4, 2014 granted petitioner an extension until March 7, 2014.

Petitioner on March 18, 2014 moved for the admission of its Memorandum dated March 10, 2014. On March 20, 2014, the Court by Resolution ordered the respondent to comment on this motion within ten (10) days from notice.

On March 26, 2014, respondent filed a Manifestation that it had filed its Memorandum dated March 19, 2014 by registered mail on March 24, 2014, and was submitting four (4) copies thereof, which it sought to be admitted. This Manifestation was noted by the Court and the additional copies of the respondent's Memorandum were admitted by Order of March 27, 2014.

On April 10, 2014, respondent filed another Manifestation dated April 8, 2014, informing the Court of the filing by registered mail on April 7, 2014 of its Comment, and submitting four (4) additional copies of the same. In its Comment, respondent asked that the Memorandum of the petitioner be denied admission for being filed out of time.

By Resolution dated April 14, 2014, the Court admitted the petitioner's Memorandum and declared case submitted for decision.

On April 24, 2014, the Court by another Resolution deemed moot the Comment of the respondent, which the Court received only on April 15, 2014, a day after it had already admitted the petitioner's Memorandum.

On May 6, 2014, the Court by Order of even date noted but deemed moot the Manifestation filed by the respondent on April 10, 2014."

On February 2, 2015, the CTA-Third Division promulgated the Assailed Decision[1] which partially granted respondent's Petition for Review. Thereafter, petitioner filed, on February 23, 2015, his Motion for Partial Reconsideration (Re: Decision Promulgated February 2, 2015)[2] with respondent's Manifestation[3], filed thru registered mail on April 20, 2015, stating that it was waiving its right to file a comment to petitioner's Motion for Partial Reconsideration and was submitting the same to the sound discretion of the Court.

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[1] Docket, pp. 249-265.
[2] *Ibid*, pp. 266-270.
[3] *Id.*, pp. 279-280.

In a Resolution[4] promulgated on August 20, 2015, petitioner's Motion for Partial Reconsideration (Re: Decision Promulgated on February 2, 2015) was denied for lack of merit.

On September 10, 2015, petitioner filed a Motion for Extension of Time (to file Petition for Review)[5] which was granted by the Court *En Banc* in the Minute Resolution dated September 15, 2015. Thus, petitioner was given a final and non-extendible period of fifteen (15) days from September 10, 2015 within which to file his Petition for Review.

On September 28, 2015, petitioner filed, thru registered mail his Petition for Review without respondent's Comment per Records Verification Report dated July 5, 2016 stating that petitioner failed to file its Comment despite notice.

On August 1, 2016, a Resolution[6] was promulgated giving due course to petitioner's Petition for Review and directing both parties to submit simultaneously their respective memoranda within thirty (30) days from receipt of the Resolution. And, thereafter, with or without such memoranda, the Petition for Review shall be deemed submitted for decision.

On September 14, 2016, respondent filed, thru registered mail a Motion for Extension of Time to File Memorandum[7] requesting an extension of fifteen (15) days or until September 29, 2016 within which to file its Memorandum. Respondent's Motion was granted per Minute Resolution[8] dated September 23, 2016, thus, respondent was given a final and non-extendible period of fifteen (15) days from September 14, 2016, or until September 29, 2016 within which to file Memorandum.

A 2nd Motion for Extension of Time to File Memorandum[9] was filed by respondent, thru registered mail on September 29, 2016, which was subsequently denied by the Court *En Banc* in its Resolution[10] dated October 21, 2016. In the same Resolution, the Court resolved to submit for decision the Petition for Review filed by petitioner-Commissioner of Internal Revenue.

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[4] *Id.*, 283-288.
[5] *En Banc* Docket, pp. 1-4.
[6] *Ibid*, pp. 63-64.
[7] *Id.*, pp. 65-66.
[8] *Id.*, p. 68-A.
[9] *Id.*, pp. 69-70.
[10] *Id.*, p-73-74.

On October 20, 2016, the Court received respondent's Memorandum (with Motion to Admit) filed, thru registered mail on October 14, 2016. Since respondent's 2nd Motion for Extension of Time had been denied by the Court in its Resolution dated October 21, 2016, respondent's Memorandum (with Motion to Admit) dated October 14, 2016 is, thus, considered filed out of time.

Hence, this Decision.

In its Petition for Review, petitioner presented the following grounds in support thereof, to wit:

> A. OIC-Assistant Commissioner of Internal Revenue Misajon did not interpret Section 4-106.5(a)(5) of Revenue Regulation (RR) No. 16-2005, as amended by RR 4-2007;
>
> B. The National Internal Revenue Code outweights (sic) any Revenue Regulations issued by petitioner.

Petitioner contends that the only issue to be resolved in his Petition is whether OIC-Assistant Commissioner of Internal Revenue Misajon interpreted Section 4-106.5(a)(5) of Revenue Regulation (RR) No. 16-2005, as amended by RR 4-2007, to warrant the cancellation of the VAT assessment against respondent. Petitioner posits that Assistant Commissioner of Internal Revenue Misajon merely enforced RR 16-2005, as amended, and that a plain reading of the following portion of the subject Final Decision on Disputed Assessment ("FDDA") dated May 4, 2013, to wit:

> "We find this allegation of yours to be incorrect simply because Section 4.106-5 of RR 16-2005 pertains only to sale of goods or properties, as the Section's title, which is Zero-Rated Sales of Goods or Properties, clearly indicates. Thus, any reference to sale of services under this Section must be erroneous, and accordingly, we believe that the inclusion of services in the reference to sales to Board of Investments (BOI)-registered manufacturer/producer in the proviso in paragraph (a)(5) of Section 4.106-5 is an inadvertent or typographical error. Further, we believe that Section 4.108-5 of RR 16-2005, with the title 'Zero-Rated Sale of Services' is intended to govern zero-rated sales of

> services, including sale of services to BOI-registered manufacturer/producer. Paragraph (b) of said Section 4.108-5 entitled 'Transactions Subject To Zero Percent (0%) VAT Rate', enumerates the various zero-rated sales of services-numbering seven (7) kinds of transactions which enumeration should have included the sale of services to BOI-registered manufacturer/producer if it were the intention of the Revenue Regulations to provide such sale of services is subject to zero-rating."

would demonstrate that ACIR Misajon was merely enforcing pertinent tax rules and regulations. That, nowhere in the FDDA did ACIR Misajon create a new interpretation of the law, much less a new legislation to that effect.

After a careful and thorough evaluation and consideration of the records of the case, We find no merit in petitioner's Petition for Review.

The records of the case indubitably show that the CTA-Third Division had already fully and exhaustively resolved the issue in relation to the arguments/grounds raised in the Petition, which We noted are mere rehash of the arguments proffered by petitioner in his Motion for Reconsideration in the Court in Division.

There being no new matters or issue raised in the instant Petition for Review, the Court finds no cogent reason to reverse and set aside the Assailed Decision dated February 2, 2015 and Assailed Resolution dated August 20, 2015 of the CTA-Third Division.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

(With Separate Concurring Opinion)
CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

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COURT OF TAX APPEALS
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EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA EB No. 1355** (CTA Case No. 8662)
	Members :
-*versus*-	**DEL ROSARIO**, *P.J.* **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** *and* **MANAHAN,** *JJ.*
NICKEL ASIA CORPORATION, *Respondent.*	Promulgated: AUG 04 2017 4:08 p.m.

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SEPARATE CONCURRING OPINION

MANAHAN, J.:

I concur with the conclusions propounded by my esteemed colleagues which denied the instant Petition for Review and effectively affirmed the well-written ponencia of the Third Division of this Court ("Court in Division").

While the denial of the Petition for Review filed by the Commissioner of Internal Revenue ("respondent") is partially anchored on the lack of authority of the revenue official to interpret a duly issued revenue regulation, I respectfully submit that the denial can be further buttressed by the applicable law, implementing regulations and the doctrines behind the Value-Added Tax (VAT) zero rating status of sales made to Board of Investments (BOI) -registered enterprises.

The facts of the case show that taxpayer Nickel Asia Corporation ("respondent") rendered management services to four (4) mining companies. The recipients of said management services were all VAT-registered and registered with the Board of Investments (BOI) as 100% exporters pursuant to Executive Order No. 226, otherwise known as the Omnibus Investments Code of 1987. Respondent considered its sales of services as VAT zero-rated and reflected the same in its corresponding invoices. Petitioner served assessment notices which in part, declared respondent deficient in paying its VAT liabilities on its sale of services to said BOI registered enterprises for taxable year 2010.

I find respondent's VAT assessment on sale of services to BOI-registered enterprises erroneous and without legal basis.

Sale of goods, properties and services by A VAT-registered supplier to a BOI-registered manufacturer/producer whose products are 100% exported are considered "export sales" subject to zero percent VAT

Section 106 (A) (2) (a) (5) of the 1997 National Internal Revenue Code as amended (NIRC) provides, thus:

> Section 106 . Value Added Tax on Sale of Goods or Properties.-
>
> (A).
>
> (2) Zero-rated Sales of Goods or Properties, The following sales by VAT-registered persons shall be subject to zero percent (0%) rate :
>
> (a) Export Sales. The term "export sales" means:
>
> (5) Those considered export sales under Executive Order No. 226, otherwise known as the "Omnibus Investments Code of 1987" and other special laws."

The "Omnibus Investments Code of 1987" covers incentives granted to enterprises registered with the BOI so it is clear that the aforequoted Section 106 ascribes zero-rating status to sales made to BOI- registered enterprises subject to certain conditions imposed by relevant regulations. cm

The rationale behind the grant of zero-rating status to sales made to export-oriented industries such as those registered under the Philippine Economic Zone Authority (PEZA) and BOI is indirectly rooted in the so-called "destination principle" where exports are zero-rated while imports are taxed. More specifically, such zero-rating incentive finds its *raison d" etre* in the "Cross Border Doctrine" enunciated clearly in Revenue Memorandum Circular (RMC) 74-99 in this manner, thus:

> "The Philippines' Value-Added Tax Law adheres to the "Cross Border Doctrine" of the VAT system which basically means that no VAT shall be imposed to form part of the cost of goods destined for consumption outside of the territorial border of the taxing authority. Hence actual export of goods and services from the Philippines to a foreign country must be *free of VAT*, Conversely, those destined for use or consumption within the Philippines shall be imposed with the 10% VAT. Accordingly, interpretation of the provisions of the VAT law has been harmonized with the "Cross Border Doctrine."[1] (italics mine)

This "Cross Border Doctrine" described in RMC 74-99 was supplemented and modified by Revenue Regulations (RR) No 14-05 dated June 22, 2005 which included under the definition of "export sales", the "sales of goods, properties or services made by a VAT-registered supplier to a BOI-registered manufacturer/producer whose products are 100% exported". [2] This same provision was included in Section 4.106-5 (a) (5) of RR 16-2005 entitled "Consolidated Value-Added Tax Regulations of 2005" issued on September 1, 2005 which is now the subject of the controversy in the instant case.

The Supreme Court has acknowledged the "Cross Border Doctrine" in the leading case of *CIR vs. Seagate Technology*[3], when it stated:

> "Under the Cross Border principle of the VAT system being enforced by the Bureau of Internal Revenue, no VAT shall be imposed to form part of the cost of goods destined for consumption outside the territorial border of the taxing authority. If exports of goods and services to a foreign country are free of the VAT, then the same rule holds for such exports from the National Territory – except specifically declared areas – to an ecozone".

[1] Revenue Memorandum Circular 74-99, October 15, 1999.
[2] Section 4.106-5, RR 14-05 dated June 22, 2005.
[3] G.R. No. 1538666, February 11, 2005.

Based on the foregoing discourse, the VAT assessment on sale of services to BOI-registered enterprises must fail for being bereft of legal merit.

I agree with the decision of the Court in Division as affirmed by the decision of the Court *En Banc* that the presumption of correctness of an assessment cannot extend to the Final Decision on Disputed Assessment (FDDA) especially one "that openly deviates from and refuses to apply a provision of a duly issued revenue regulation"[4].

Having said this, I wish to clarify that the interpretations or reasonings adopted by the Commissioner of Internal Revenue or his authorized representatives in denying the protests of taxpayers as embodied in the FDDA, does not make the FDDA void or invalid no matter how ill-founded and deviant the arguments may be from the law and its implementing regulations. Alas, the Bill of Rights enshrined in our Constitution and the Taxpayer's Bill of Rights only assure the taxpayers of due process when it comes to the issuance of tax assessments but does not protect them from revenue officers who issue assessments and final decisions based on a misapprehension of the law and its implementing rules.

The Courts can only provide them relief.

CATHERINE T. MANAHAN
Associate Justice

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[4] Nickel Asia vs. CIR, CTA Case No. 8662, February 2, 2015.