REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

Second Division

MARUKA ENTERPRISES, INC.,
Petitioner,

-versus-

CTA CASE NO. 5977

Members:

CASTAÑEDA, JR., Chairman
UY, and
PALANCA – ENRIQUEZ, JJ.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
FEB 02 2005

x - x

DECISION

CASTAÑEDA, *J.*:

This is a Petition for Review praying for the cancellation and withdrawal of the deficiency income tax, VAT, and expanded withholding tax assessments issued by the respondent against the petitioner for the taxable year 1994 in the aggregate amount of P11,216,208.04.

Petitioner is a domestic corporation duly organized and existing under and by virtue of the laws of the Philippines with office address at the Ground Floor, JM Building, South Superhighway corner Rockefeller Street, City of Makati. Petitioner is engaged in the importation and sale of various machinery and equipment.

The antecedent facts of the case are as follows:

On April 7, 1995, petitioner filed with the BIR its Annual Income Tax Return for the taxable year 1994.

Respondent issued Letter of Authority No. 26713 dated September 6, 1995 authorizing Revenue Officers Monica Zamora and Group Supervisor A. Goco, Jr., to examine the books of accounts and other accounting records of petitioner for all internal revenue taxes for the calendar year 1994.

On February 3, 1999, Petitioner received Final Assessment Notices (FANS) numbered 0000049-94-99-471, 02-294-94B-99-B2-471, and 0000049-94-99-471 all dated January 15, 1999 covering alleged deficiency Income, VAT and Expanded Withholding Tax in the total amount of P11,216,208.04. The alleged tax deficiencies of the petitioner are as follows:

A. Deficiency Income Tax (*Exhibit 9*)

Net Income disclosed by the return as audited		P204,672.00
Add: Discrepancies per investigation		
Undeclared income	9,394,545.16	
Salaries and wages	1,588,686.67	
Retainer's/Consultancy Fees	153,257.50	
Bad Debts	176,949.80	11,313,439.13
Taxable Income per Investigation		11,518,111.13
		=========
Income Tax due thereon		4,031,338.90
Less: Tax Credits		
Payments per BIR Form 1702Q	78,715.41	
Tax Credits-prior year	7,080.00	71,635.41
Deficiency Income Tax		3,959,703.49
Add: Interest from 4-15-95 to 1-15-99		2,960,274.33
Compromise		25,000.00
Total Amount Due		P6,944,977.82
		=========

B. Alleged Deficiency VAT (*Exhibit 11*)

Net Sales	P17,056,049.23

Proceeds from sale of Transportation equipment		124,000.00
Indent Commissions		13,978,059.85
Undeclared Sales		8,534,697.82
Total Discrepancies/Adjustment		P39,692,806.90
Output Tax Due Thereon		3,969,280.69
Less: Output Tax per VAT Return Filed	1,683,594.40	
Input Tax Disallowed	63,983.38	1,619,611.02
Deficiency Output Tax		2,349,669.67
Add: Interest from 1-20-95 to 1-15-99		1,864,932.82
Compromise Penalty		25,000.00
Total Amount Due		P4,239,602.49
		=========

C. Alleged Deficiency Expanded Withholding Tax (*Exhibit 13*)

On Retainer's/Consultancy fees:	
Per Financial Statements	P473,374.00
Per Alpha list	320,116.50
	153,257.50
	=======
10% tax due thereon – Def. EWT	15,325.75
Interest per 1-10-95 to 1-15-99	12,301.98
Compromise	4,000.00
Total Amount Due	P31,627.73
	=======

On March 5, 1999, through its external auditors, petitioner filed its protest-letter dated February 18, 1999 (*Exhibit F*) with the respondent. Said protest-letter contested each item of deficiency tax assessments and requested for the reconsideration and reinvestigation of the subject alleged deficiency tax assessments. Thereafter, on May 4, 1999 petitioner submitted certain documents to support its protest letter in accordance with Section 228 of the NIRC, as amended.

Respondent failed to act on petitioner's protest-letter as of October 31, 1999, which is the 180th day from submission of petitioner's supporting documents.

On December 1, 1999, petitioner filed the present Petition for Review with this Court. As of the date of filing of the instant Petition for Review, respondent has not acted upon the protest filed by the petitioner. The parties stipulated that the petition for review was timely filed (*Joint Stipulation of Facts and Issues, CTA Records, p. 48*), in accordance with the National Internal Revenue Code of 1997, as amended.

Based on Joint Stipulation of Facts and Issues, the following are the issues for resolution of the Court:

1. Whether or not the subject assessments were arrived at by Respondent on the basis of presumptions and approximations, and not on the basis of facts.

2. Whether or not Petitioner actually had undeclared income as alleged in the subject assessments which would form the basis of said assessments.

3. Whether or not Petitioner was correct in not subjecting certain exclusions from the gross income to the expanded withholding tax.

4. Whether or not the Formal Assessment Notices (FANS) were issued in accordance with existing laws, rules and regulations.

5. Whether or not Petitioner is correct in subjecting indent commissions to a VAT rate of 0%.

6. Whether or not an isolated transaction (sale) would be subject to the VAT.

7. Whether or not the gross selling price of an item, for VAT purposes, would necessarily include discounts on said item.

8. Whether or not petitioner's bad debts were properly deducted from its gross income.

9. Whether or not Petitioner had already paid all the necessary and appropriate VAT, income, and expanded withholding taxes on all its transactions for the calendar (taxable) year 1994. (*Joint Stipulation of Facts and Issues, CTA Records, p.49*).

During the course of the trial, petitioner presented both testimonial and documentary evidence to prove that the right of the respondent to make an assessment against petitioner for its taxable year 1994 had already prescribed considering that the Assessment Notices were issued beyond the three-year prescriptive period provided for in Section 203 of the 1997 National Internal Revenue Code (NIRC).

Petitioner advanced the following arguments on the matter of prescription of the respondent's right to make the above-mentioned assessments:

> Despite its non-inclusion in the stipulations of the parties, the issue of prescription can be considered part of the issues of the case even without amendment of the Petition for Review since it was tried, at the very least, with the implied consent of the Respondent. Respondent, by his failure to make an objection, impliedly consented to the admission of testimonial and documentary evidence which were offered to prove that the subject Assessment Notices covering alleged deficiency income tax, VAT and EWT issued against Petitioner were made beyond the 3-yr period prescribed by law.
>
> Thus, Section 5, Rule 10 of the Revised Rules on Civil Procedure states:
>
> > Section 5. *Amendment to conform to or authorize the presentation of evidence.* – **When issues not raised by the pleadings are tried with the express or implied consent of the parties, they shall be treated in all respects as if they have been raised in the pleadings**. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; **but failure to amend does not affect the result of the trial of these issues**. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so with liberality if the presentation of the merits of the action and the ends of substantial justice will be subserved thereby. The court may grant a continuance to enable the amendment to be made. (*Emphasis supplied*)
>
> xxx xxx xxx
>
> When Respondent presented Ms. Zamora on September 30, 2003, he was deemed to have expressly consented to the issue of prescription. Ms. Zamora identified the same invalid Waiver of Statute of Limitations (*Exhibit "14" for the Respondent, BIR Records, page 163*) which Petitioner first brought to the attention of the Honorable Court during the testimony of Ms. Centeno on December 10, 2002. Further, Respondent, in its Supplemental Offer of Evidence, offered the aforementioned Waiver for the purpose of proving that Petitioner duly executed a Waiver of Statute of Limitations under the NIRC. By the foregoing actions of the Respondent, he expressly consented to the issue on whether or not Respondent's right to make an assessment against Petitioner for taxable year 1994 has already prescribed. (*MEMORANDUM of the Petitioner, CTA Records, pp. 216-219*)

Moreover, petitioner argues that this Court had occasion to rule in the case of ***Central Cement Corporation vs. Liwayway Vinzons-Chato, CTA Case No. 5024, June 13, 1997*** that:

> "an appeal to this Court has the effect of re-opening the assessment entirely, tackling all the issues raised before it for resolution. In this case, it considered the issue of prescription despite petitioner's failure to raise such issue in its letter-protest to the BIR. The Honorable Court reasoned that the issue of prescription could not have been raised by the petitioner in its letter-protest for it was only after a perusal of the records of the BIR and during the pendency of the case before the Court that the invalidity of the waiver was discovered.
>
> In the instant case, it was also during the pendency of the case that Petitioner discovered the invalidity of the Waiver of the Statute of Limitations dated November 10, 1997 (Exhibit "I"), which was on file with the BIR docket of the case. Petitioner was unaware of the Waiver signed by its former officer. Upon discovery thereof, Petitioner immediately presented the same as evidence in accordance with Section 5, Rule 10 of the Revised Rules on Civil Procedure". (*MEMORANDUM of the Petitioner, CTA Records, pp. 221-222*)

Petitioner likewise points to the fact that one of the stipulated issues in the case is *"whether or not the Formal Assessment Notices (FANs) were issued in accordance with existing laws, rules and regulations"*. Petitioner argues that "[A]t the very least, this general issue should be deemed as encompassing the specific issue on whether or not the FANs were issued within the 3-year prescriptive period for Respondent to make an assessment. The issue of prescription goes into the very heart of the issue of whether the FANs were issued in accordance with existing laws, rules and regulations". (*MEMORANDUM of the Petitioner, CTA Records, p. 222*)

Corollary to the issue of prescription of the right of respondent to assess the petitioner is the issue on whether or not the Waiver of Statute of Limitations, dated November 10, 1997 and signed by Alberto L. Reyes, is valid. Petitioner argues that the aforementioned waiver is invalid, consequently, it did not suspend the running of the 3-year prescriptive period within which the respondent could legally make the assessment.

Petitioner contends that under Section 203 of the NIRC, as amended, an assessment notice issued after the lapse of the 3-year prescriptive period is no longer valid and effective although the same is subject to certain exceptions, one of which is Section 222 (b) which provides:

> Section 222. *Exceptions as to the Period of Limitation of Assessment and Collection of Taxes.* –
>
> (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.

Petitioner argues that before the foregoing exception can be resorted to by the respondent, there has to be a valid Waiver of the Statute of Limitations signed by the petitioner. Petitioner submits that the Waiver of Statute of Limitations, dated November 10, 1997 signed by Alberto L. Reyes (*Exhibit I*), is not valid for failure to comply with the requirements of a valid waiver. There being no valid waiver, the subject Assessment Notices issued against petitioner are void for having been issued beyond the 3-year prescriptive period.

Petitioner posits that the aforementioned waiver is null and void in view of the provisions of Revenue Memorandum Order (RMO) No. 20-90 dated April 4, 1990 which prescribes the procedures to be followed in the execution of a Waiver of Statute of Limitations, as follows:

> "1. The **waiver must be in the form identified as Annex "A" hereof**. This form may be reproduced by the Office concerned but **there should be no deviation from such form.** The phrase 'but not after ____________19___ should be filled up. This indicates the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription. The period agreed upon shall constitute the time within which to effect the assessment/collection of the tax in addition to the ordinary prescriptive period.
>
> 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**

<u>the Bureau should be indicated</u>. 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.

3. The following revenue officials are authorized to sign the waiver.

A. <u>In the National Office</u>

1.	ACIRs for Collection, Special Operations, National Assessment, Excise and Legal on tax cases pending before their respective offices. In the absence of the ACIR, the Head Executive Assistant may sign the waiver.	For tax cases involving not more than P500,000.00
2.	Deputy Commissioner	For tax cases involving more than P500,000.00 but not more than P1M
3.	Commissioner	For tax cases involving more than P1M

B. <u>In the Regional Offices</u>

1. The Revenue District Officer **<u>with respect to tax cases still pending investigation and the period to assess is about to prescribe regardless of amount</u>**.

2. The Regional Director, the Assistant Regional Director, the Chief, Assessment Branch or the Chief, Legal Branch with respect to cases still pending review and the period to assess/collect is about to prescribe, regardless of amount.

3. The Regional Director, the Assistant Regional Director, the Chief, Collection Branch or the Chief, Legal Branch with respect to cases still pending collection and the period to assess/collect is about to prescribe regardless of amount.

4. The waiver must be executed in three (3) copies, the original copy to be attached to the docket of the case, **<u>the second copy for the taxpayer</u>** and the third copy for the Office accepting the waiver. **<u>The fact</u>**

of receipt by the taxpayer of his/her file copy shall be indicated in the original copy.

5. **The foregoing procedures shall be strictly followed. Any revenue official found not to have complied with this Order resulting in prescription of the right to assess/collect shall be administratively dealt with**. (Emphasis supplied)" (*MEMORANDUM of the Petitioner, CTA Records, pp. 226 – 227*)

According to the petitioner the Waiver of Statute of Limitations is void because it suffers from the following infirmities:

1. The subject waiver was not signed by the Commissioner of Internal Revenue or by an authorized representative. It was signed by a Revenue District Officer and not by the Commissioner as required by RMO 20-90. A Revenue District Officer is authorized to sign only if the period to assess is about to prescribe. The Waiver of Statute of Limitations was executed at least 5 months before the expiration of BIR's right to make an assessment.
2. The date of acceptance and signing by the Revenue District Officer Edwin R. Abella was not indicated in the subject waiver. By failing to indicate in the Waiver the date of acceptance, it cannot be determined with certainty if the waiver was actually accepted before the expiration of the 3-year assessment period.
3. Petitioner was not provided with a copy of the subject Waiver of Statute of Limitations. RMO No. 20-90 also requires that the taxpayer be provided with a copy of the waiver and that the fact of receipt by the taxpayer of his file copy should be indicated in the original copy required to be attached to the docket of the case.
4. The subject Waiver of Statute of Limitations did not specify the kind of tax and the amount of the tax due. On the prescribed form of a waiver under RMO No. 20-90, it is required that the kind of tax and the amount of the tax due must be indicated. RMO No. 20-90 provides that there should be no deviation from the form of the waiver.

In view of the material defects of the subject Waiver dated November 10, 1997 (Exhibit "I"), we respectfully submit that said Waiver is invalid and has no binding force and effect. The Waiver did not suspend the running of the 3-year prescriptive period. Considering that the subject Assessment Notices were issued beyond the 3-year prescriptive period, said Assessment Notices are invalid and with no force and effect. Thus, the Respondent is barred by prescription to make an assessment against Petitioner for taxable year 1994." *(MEMORANDUM of the Petitioner, CTA Records, pp. 229-240)*

On the other hand, respondent relies upon the following grounds to prove that the Final Assessment Notices were issued within the prescriptive period:

A. Petitioner cannot be permitted to raise for the first time on appeal the issue of the invalidity of the waiver it executed on November 10, 1997 for it failed to raise the same in the administrative level. Well settled is the rule that "under the principle of prior exhaustion of administrative remedies, on the judicial level, issues not raised in the administrative level cannot be raised for the first time on appeal. To allow a litigant to assume a different posture when he comes before the court and challenge the position he had accepted at the administrative level, would be to sanction a procedure whereby the Court – which is supposed to review administrative determinations – would not review, but determine and decide for the first time, a question not raised at the administrative forum *(Commissioner of Internal Revenue vs. Wander Philippines, Inc., and Court of Tax Appeals, G.R. No. 68375, April 15, 1988; Commissioner of Internal Revenue vs. Procter & Gamble Philippine Manufacturing Corp., and Court of Tax Appeals, G.R. No. 60838, April 15, 1988; Aguinaldo Industries Corporation vs. Commissioner of Internal Revenue, L-29790, February 25, 1982, 112 SCRA 136)*;

B. The Waiver of the Statute of Limitations under the NIRC, executed by petitioner through its authorized representative is not a contract, but a unilateral act of petitioner, renouncing its right to avail of the defense of prescription under the NIRC. Hence, the same is valid and binding upon petitioner.

   Generally, Section 222 (b) of the 1997 Tax Code, provides as follows:

   (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.

   Clearly, the foregoing provision contemplates that an assessment may be made even after the three (3) year period under Section 203 of the 1997 Tax Code, provided that a written agreement is executed by both the Commissioner and the taxpayer, made prior to the expiration of the said period of prescription. Respondent submits, however, that the foregoing requirements are necessary only for a valid extension of the period of prescription under Section 203 of the NIRC. Where, however, there is no agreement to speak of, but a **WAIVER** duly executed by a taxpayer, who renounces its right to invoke the defense of prescription under Section 203 of the NIRC, as in this case, such requirements, do not apply.

   In the instant case, a perusal of the subject **WAIVER** duly executed by petitioner's authorized representative, Mr. Alberto L. Reyes, on November 10, 1997, is clearly not a written agreement contemplated under Section 222 (b) above, but a waiver of petitioner's right to invoke the defense of prescription under Section 203 and 223 of the NIRC.

C. The requirement under RMO 20-90 is a mere formality and the lack of it does not vitiate the binding effect of the questioned waiver.

Assuming *arguendo,* without admitting, that the subject waiver duly executed by petitioner's authorized representative, Mr. Alberto L. Reyes, on November 10, 1997, was not signed by the Commissioner of Internal Revenue, that the date of acceptance by the Commissioner was not indicated; that petitioner was not provided with a copy of the said waiver; and that it did not specify the kind of tax and amount of tax due, this reguirements under RMO 20-90 is a mere formality and lack of it does not vitiate the binding effect of the said waiver.

The Court of Appeals, in the recent case of Commissioner of Internal Revenue vs. Philippine Journalist, Inc., CA-G.R. SP No. 72128, March 31, 2004, held that: "But the CTA had a different view. Citing Revenue Memorandum Order (RMO) No. 20-90, the CTA found the waiver executed by Phil. Journalist to be invalid for the following reasons: (1) it does not indicate a definite expiration date; (2) it does not state the date of acceptance by the BIR; and (3) Phil. Journalist, the taxpayer was not furnished a copy of the waiver. These grounds are merely formal in nature. The date of acceptance by the BIR does not categorically appear in the document but it states at the bottom page that the BIR "accepted and agreed to:" ..., followed by the signature of the BIR's authorized representative. Although the date of acceptance was not stated, the document was dated 22 September 1997. This date could reasonably be understood as the same date of acceptance by the BIR since a different date was not otherwise indicated. As to the allegation that Phil. Journalists was not furnished a copy of the waiver, this requirement appears ridiculous. Phil. Journalists, through its comptroller, Lorenza Tolentino, signed the waiver. Why would it need a copy of the document it knowingly executed when the reason why copies are furnished to party is to notify it of the existence of a document, event or proceeding? It is suprefluous to give a copy to the person who executed a document since such person would obviously be aware of the existence of the document. Besides, the person executing the document would naturally retain a copy of the document. If we invalidate a document just because the person accepting the waiver failed to furnish a copy to the one executing said waiver, we would be giving too much emphasis on form and technicality that serve no useful purpose.

Based upon the foregoing, although the subject waiver was not accepted and signed by the Commissioner of Internal Revenue himself, said waiver was valid since the same was accepted and signed by the BIR authorized representative, Edwin R. Abella, the Revenue District Officer, RDO 24-West Makati, where the 1994 internal revenue tax case of petitioner was still pending investigation.

D. The waiver executed by petitioner being valid, the BIR's right to assess petitioner for taxable year 1994 has not yet prescribe.

As earlier discussed, the fact that the waiver duly executed by petitioner's authorized representative, Mr. Alberto L. Reyes, on November 10, 1997 was valid, the period of the BIR to assess petitioner for deficiency income tax, value-added tax and expanded withholding tax, for taxable year 1994 was, therefore, **extended until January 15, 1999**. Accordingly, the fact that the Final Assessment Notice for deficiency income tax, value-added tax and expanded withholding tax were served to petitioner, by registered mail, on January 15, 1999, the same was issued within the prescriptive period under Section 203, in relation to Sections 222 (b) of the 1997 Tax Code (*MEMORANDUM for the Respondent, CTA Records, pp. 269 – 275*).

In addition, respondent raised the following arguments in its Supplemental Memorandum filed on August 5, 2004:

> Assuming, without admitting that the Waiver of the Statute of Limitations duly executed by petitioner's representative on November 10, 1997 was invalid, the right of the BIR to assess petitioner of its 1994 internal revenue tax liabilities was suspended pursuant to Section 223 of the 1997 Tax Code which provides that: "when the taxpayer request for a reinvestigation which is granted by the Commissioner, the running of the Statute of Limitations under Section 203 and 222 of the Code shall be suspended.
>
> In the instant case, it is not disputed that in petitioner's protest letter dated February 18, 1999, duly filed with the BIR on March 5, 1999, it is manifest that petitioner requested for reinvestigation or reconsideration of the assessed deficiency income tax, value-added tax (VAT) and expanded withholding tax, for calendar year 1994 which was subsequently granted by the BIR, as evidenced by the Tax Verification Notice and other letter requests served to petitioner, to submit all supporting documents relative to its request for reinvestigation. (*CTA Records, p. 284*)

One of the issues agreed upon by the parties in the case before Us is whether or not the Formal Assessment Notices (FANs) were issued in accordance with existing laws, rules and regulations. The foregoing issue undoubtedly includes the issue of whether or not the FANs were issued within the prescriptive period provided by law. However, the respondent argues that the issue of prescription cannot be raised for the first time on appeal since it was not raised by the petitioner in its letter-protest.

The contention of the respondent that failure of the petitioner to raise the issue of prescription in its letter-protest precludes it from invoking the same before this Court is untenable.

The petitioner cannot raise the issue of prescription in its letter-protest filed on March 5, 1999 because of its prior execution of a supposedly valid Waiver of the Statute of Limitations. The authorized representative of the petitioner, Alberto L. Reyes, executed the waiver on November 10, 1997 in accordance with RMO 20-90. Everything was done in accordance with law insofar as petitioner's participation in the execution of the Waiver is concerned. Petitioner's witness testified that the petitioner did not receive a copy of the Waiver of Statute of Limitations from the Bureau of Internal Revenue (BIR) (*TSN, December 10, 2002, p.16*). Since petitioner was not furnished a copy of the Waiver, it did not have any knowledge of the alleged defects on the Waiver of the Statute of Limitations because the defects pertain to the requirements imposed by RMO 20-90 upon the respondent Commissioner of Internal Revenue. Consequently, since the petitioner had no knowledge of the alleged irregularities on said waiver, its due execution was not put in issue at the administrative level.

It was only after a careful perusal of the records of the Bureau of Internal Revenue during the pendency of the case before this Court that the petitioner discovered the alleged invalidity of the assailed Waiver of Statute of Limitations. In fact, upon the discovery of the defects of the Waiver during the pendency of the case, petitioner filed an "Urgent Motion to Defer Submission of Memorandum and for Leave of Court to Present Additional Evidence". Among the documentary evidence presented by the petitioner is the Waiver of the Statute of Limitations (*Exhibit I*).

As We held in the case of ***CENTRAL CEMENT CORPORATION vs. LIWAYWAY VINZONS-CHATO, in her capacity as the Commissioner of***

Internal Revenue, (C.T.A. CASE NO. 5024, June 13, 1997) involving the same issue:

> "In the first place, the petitioner cannot raise the issue of prescription in its letter-protest filed on July 15, 1993 because of its prior execution of a supposedly valid "Waiver of the Defense of Prescription" on August 17, 1992. It was only after a careful perusal of the records of the Bureau of Internal Revenue where the Waiver (Exhs. "X" and "Y", BIR records, pp. 99-100) was filed and during the pendency of the case before this Court, that the petitioner discovered the invalidity of the Waiver signed by its representative. Such knowledge prompted the petitioner to file a Motion to Allow Petitioner to Adduce Additional Rebuttal Evidence where it invoked the defense of prescription."

Secondly, there is merit in petitioner's contention that under Section 5, Rule 10 of the 1997 Rules of Civil Procedure, as amended, respondent's failure to make a timely objection to the introduction of the testimonial and documentary evidence tending to prove that respondent's right to assess the 1994 tax liabilities of petitioner had already prescribed constitutes an implied consent on the part of the respondent to include the issue of prescription in the trial of the case.

We now proceed to the issue of the validity of the Waiver of Statute of Limitations executed by petitioner's authorized representative. Petitioner filed its 1994 Annual Corporate Income Tax Return on April 7, 1995. Pursuant to Section 203 of the 1997 NIRC, respondent had until April 15, 1998 to assess the petitioner of its 1994 income tax liabilities of the petitioner. As previously stated, the FANs were dated January 15, 1999 and allegedly issued by respondent on the same day. At first glance, it is apparent that the FANs were issued beyond the prescriptive period. However, respondent claims that petitioner executed a Waiver of the Statute of Limitations on November 10, 1997 giving the respondent until January 15, 1999 within which to assess the petitioner. It, therefore, becomes necessary for this Court to determine the validity of the Waiver of the Statute of Limitations since the validity of the FANs depends upon said waiver.

For purposes of clarity, hereunder is a reproduction of the subject waiver:

WAIVER OF THE STATUTE OF LIMITATIONS UNDER THE NATIONAL INTERNAL REVENUE CODE

	Jm Bldg., Ground Floor,
Maruka Enterprises, Inc.	South Superhighway, Makati City
(Name of Taxpayer)	*(Address)*

in consideration of the approval by the Commissioner of Internal Revenue of our request for extension of time within which to present the required documents for business and income tax purposes involving the year 1994, hereby waive the running of the prescriptive period provided for in Sections 203 and 223 and other relevant provisions of the National Internal Revenue Code and consent to the assessment and collections of the taxes which may be found due and any increments thereto at any time before or after the lapse of the period of limitations fixed by said Sections 203 and 223 and other relevant provisions of the National Internal Revenue Code of 1989, but not after Jan 15 1999, 19___.

It is understood, however, that the undersigned taxpayer does not, by the execution of this waiver, admit in advance the correctness of the assessment which may be made against him/it for the periods above-mentioned; nor does he waive his right to use any of the legal remedies afforded by law to secure a credit of refund on such tax that may be assessed and paid for the same period pursuant to Sections 204 and 230 of the National Internal Revenue Code.

Executed this 10th day of November, 1997, in ______________.

MARUKA ENTERPRISES, INC.
By:

(Signed)
ALBERTO L. REYES
(*Taxpayer or Authorized Representative*)

ACCEPTED AND AGREED TO:

Com (erased portion) *enue*

(signed)

EDWIN R. ABELLA
Revenue District Officer
R.D.O. no. 48, West Makati

(*Exhibit I, CTA Records, p. 180; Exhibit 14, BIR Records, p. 163*)

Under Revenue Memorandum Order No. 20-90, the waiver must be in the following tenor:

WAIVER OF THE STATUTE OF LIMITATIONS
UNDER THE NATIONAL INTERNAL REVENUE CODE

____ in consideration of the approval by the Commissioner of Internal Revenue of my request for re-investigation and/or reconsideration of my pending internal revenue case involving the assessment of the sums of ____________________________________ as _________________ for the years ______________, hereby waive the running of the prescriptive period provided for in Sections 203 and 223 and other relevant provisions of the National Internal Revenue Code, and consent to the assessment and collection of the taxes which may be found due after re-investigation and reconsideration at any time before or after the lapse of the period of limitations fixed by said Sections 203 and 223 and other relevant provisions of the National Internal Revenue Code, but not after ____________, 19___.

The intent and purpose of this waiver is to afford the Commissioner of Internal Revenue ample time to carefully consider the instant protest of the undersigned taxpayer against the assessment. It is understood, however, that the undersigned taxpayer does not, by the execution of this waiver, admit in advance the correctness of the assessment which may be made against him for the periods above mentioned; nor does he waive his right to use any of the legal remedies afforded by law to secure a credit or refund on such tax that may be assessed and paid for the same period pursuant to Sections 204 and 230 of the National Internal Revenue Code. The period of suspension agreed upon herein may be extended by subsequent agreement in writing made before the expiration of said period of extension.

Executed this ________ day of _______________ 19 ___, in Quezon City, Philippines.

____

(Taxpayer or Authorized Representative)

ACCEPTED AND AGREED TO:

Commissioner of Internal Revenue
Date ________________

(Annex "A", Revenue Memorandum Order No. 20-90, April 4, 1990)

Furthermore, Section 1 of RMO No. 20-90 requires that the waiver must be in the form identified therein and that there should be NO deviation from such form. Section 2 thereof requires that soon after the waiver is signed by the taxpayer, the Commissioner of Internal Revenue or the revenue official authorized by him, 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. And that 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. Likewise, the fact of receipt by the taxpayer of his/her file copy shall be indicated in the original copy (*Section 4 of RMO No. 20-90*).

A scrutiny of the assailed waiver revealed the following defects:

a. The Waiver of Statute of Limitations was not signed by the Commissioner of Internal Revenue as required by RMO No. 20-90;
b. The date of acceptance by the Revenue District Officer Edwin R. Abella was not indicated therein;
c. Petitioner was not provided with a copy of the subject Waiver of Statute of Limitations as shown by the lack of an acknowledgment receipt on the original copy attached to the BIR docket of the case; and
d. The subject Waiver of Statute of Limitations did not specify the kind of tax and the amount of the tax due.

In addition, the tenor of the Waiver of the Statute of Limitations signed by petitioner's authorized representative varies significantly from what is required by RMO No. 20-90. The questioned waiver speaks of a request for extension of time within which to present the required documents whereas the waiver required by RMO No. 20-90 deals with approval by the Commissioner of Internal Revenue of the taxpayer's request for re-investigation and/or reconsideration of his/its pending internal revenue case. Moreover, the intent and purpose of the waiver which is to afford the Commissioner of Internal Revenue ample time to carefully consider the protest filed by the taxpayer against the assessment notice has been totally removed from the wordings of the assailed waiver.

In the recent case of ***PHILIPPINE JOURNALISTS, INC., VS. COMMISSIONER OF INTERNAL REVENUE, G.R. No. 162852, December 16, 2004,*** the Supreme Court discussed the nature and laid down the requisites of a valid Waiver of the Statute of Limitations. Aside from stating that RMO No. 20-90 must be strictly followed, the Supreme Court ruled:

> 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 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. RMO No. 20-90 explains the rationale of a waiver:
>
> > ... The phrase "but not after _________ 19___" should be filled up. This indicates the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription. **The period agreed upon shall constitute the time within which to effect the assessment/collection of the tax in addition to the ordinary prescriptive period.** (Emphasis supplied)

> As found by the CTA, the Waiver of Statute of Limitations, signed by petitioner's comptroller on September 22, 1997 is not valid and binding because it does not conform with the provisions of RMO No. 20-90. It did not specify a definite agreed date between the BIR and petitioner, within which the former may assess and collect revenue taxes. Thus, petitioner's waiver became unlimited in time, violating Section 222(b) of the NIRC.
>
> The waiver is also defective from the government side because it was signed only by a revenue district officer, not the Commissioner, as mandated by the NIRC and RMO No. 20-90. The waiver is not a unilateral act by the taxpayer or the BIR, but is a bilateral agreement between two parties to extend the period to a date certain. The conformity of the BIR must be made by either the Commissioner or the Revenue District Officer. This case involves taxes amounting to more than One Million Pesos (P1,000,000.00) and executed almost seven months before the expiration of the three-year prescription period. For this, RMO No. 20-90 requires the Commissioner of Internal Revenue to sign for the BIR.

In the case before Us, the Waiver of Statute of Limitations was executed by the petitioner's authorized representative on November 10, 1997. Respondent had more than five (5) months to accept or agree to the Waiver that was submitted by the petitioner, considering that the 3-year prescriptive period for assessment is up to April 15, 1998. Applying the ruling of the Supreme Court in the Philippine Journalists case, the period to assess is *NOT* about to prescribe. Therefore, the condition imposed by Section 3 B (1) of RMO No. 20-90 which would authorize the Revenue District Officer to make the acceptance did not exist at the time the petitioner executed the assailed waiver. There was no urgency since respondent had more than 5 months to accept the Waiver. Under these circumstances, acceptance of the waiver should have been made by the respondent Commissioner of Internal Revenue himself pursuant to Section 3 A (3) of RMO No. 20-90, in view of the fact that the assessments involved amounted to more than one million pesos.

Another defect of the assailed Waiver of Statute of Limitations is that it does not contain the date of acceptance by the respondent. This defect was made worse by erasures on the Waiver. The Waiver shows that on the space where the acceptance by the Commissioner of Internal Revenue or other authorized officer should be indicated, the name Leonardo B. Albar, Revenue District Officer, TIN 134-679-404, as well as the signature affixed thereon have been erased by applying some typewriter correction fluid. However, despite such erasures, the details remained visible and legible (*Exhibit 14, BIR Records, p. 163*). Below the erased portion, the name Edwin R. Abella, Revenue District Officer, R.D.O. no. 48, West Makati was typewritten and a signature was affixed thereon. The lack of a date of acceptance coupled with the erasures mentioned made respondent's position, i.e. that the date of acceptance is the same as the date of execution of the waiver, untenable. This ruling is in consonance with the ruling in the above-cited case of Philippine Journalists, Inc., where the Supreme Court said:

> The other defect noted in this case is the date of acceptance which makes it difficult to fix with certainty if the waiver was actually agreed before the expiration of the three-year prescriptive period. The Court of Appeals held that the date of the execution of the waiver on September 22, 1997 could reasonably be understood as the same date of acceptance by the BIR. Petitioner points out however that Revenue District Officer Sarmiento could not have accepted the waiver yet because she was not the Revenue District Officer of RDO No. 33 on such date. Ms. Sarmiento's transfer and assignment to RDO No. 33 was only signed by the BIR Commissioner on January 16, 1998 as shown by the Revenue Travel Assignment Order No. 14-98. The Court of Tax Appeals noted in its decision that it is unlikely as well that Ms. Sarmiento made the acceptance on January 16, 1998 because "Revenue Officials normally have to conduct first an inventory of their pending papers and property responsibilities."

The date of acceptance is important because it determines whether or not the acceptance was made within the prescriptive period. If the acceptance was made after the prescriptive period, the same is ineffectual since there is no more period to extend. In such a case, respondent's right to assess the petitioner had lapsed.

With respect to the failure of respondent to furnish the petitioner with a copy of the Waiver, respondent argued that "petitioner's allegation that it was not provided with a copy of the said waiver appears to be ridiculous since why would it need a copy of the document it knowingly executed when the reason why copies are furnished to party is to notify it of the existence of a document. Besides, the person executing the document would naturally retain a copy of the document, which petitioner failed to diligently inquired into". The foregoing argument is totally bereft of merit.

Section 4 of RMO No. 20-90 requires that a copy shall be given to the taxpayer and the fact of receipt by the taxpayer of his/her file copy shall be indicated in the original copy. A review of the BIR records revealed that, indeed, the original copy of the Waiver of the Statute of Limitations (*Exhibit 14*) does not contain any acknowledgment receipt made by the petitioner. On this point, the Supreme Court also ruled in the same case of ***Philippine Journalists, Inc.***, *supra,* that:

> Finally, the records show that petitioner was not furnished a copy of the waiver. Under RMO No. 20-90, the waiver must be executed in three copies with the second copy for the taxpayer. The Court of Appeals did not think this was important because the petitioner need not have a copy of the document it knowingly executed. It stated that the reason copies are furnished is for a party to be notified of the existence of a document, event or proceeding.
>
> The flaw in the appellate court's reasoning stems from its assumption that the waiver is a unilateral act of the taxpayer when it is in fact and in law an agreement between the taxpayer and the BIR. When the petitioner's comptroller signed the waiver on September 22, 1997, it was not yet complete and final because the BIR had not assented. There is compliance with the provision of RMO No. 20-90 only after the taxpayer received a copy of the waiver accepted by the BIR. The requirement to furnish the taxpayer with a copy of the waiver is not only to give notice of the existence of the document but of the acceptance by the BIR and the perfection of the agreement.

Moreover, pursuant to Section 223 of the NIRC of 1997, one of the instances when the Statute of Limitations on the making of assessments (Sections

203 and 222 of the same Code) shall be suspended is when the taxpayer had requested for a reinvestigation which has been granted by the Commissioner. In fact, this ground was relied upon by the respondent in his Supplemental Memorandum. Precisely, furnishing the taxpayer with a copy of the Waiver would notify him/it whether or not his/its request for reinvestigation has been granted since the prescribed format of the waiver in RMO No. 20-90 explains that the intent and purpose of such waiver is to afford the Commissioner of Internal Revenue ample time to carefully consider the instant protest of the undersigned taxpayer against the assessment. The respondent failed to do so.

With respect to last defect noted by the Court, the defect that the subject waiver did not indicate the kind and amount of tax due is a clear violation of RMO No. 20-90. This Court had the opportunity to discuss the importance of this requirement in the case of ***DOLE PHILIPPINES, INC. vs. COMMISSIONER OF INTERNAL REVENUE, CTA CASE NO. 5705, July 1, 2003***, thus:

> The purpose of stating the specific kind of tax and the amount of tax due is for the petitioner to pinpoint which among the proposed tax assessments may subsequently be issued without the petitioner invoking the defense of prescription (Pfizer, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 6135, April 21, 2003). If the amount and kind of tax were not indicated in the said waiver, logically, there was no agreement to speak of (Solid Cement Corporation vs. Liwayway Vinzons-Chato, in her capacity as the Commissioner of Internal Revenue, CTA Case No. 5420, May 27, 1999). It should be emphasized that RMO No. 20-90 requires specific information. Hence, to substitute the same with general statements is a departure from RMO No. 20-90.

The assailed Waiver of the Statute of Limitations is invalid because of the foregoing defects. Consequently, the three-year prescriptive period provided in Section 203 of the 1997 NIRC was not suspended by petitioner's request for re-investigation contained in its protest-letter. The subject assessment notices all dated and issued on January 15, 1999 are null and void for having been issued beyond the prescriptive period.

In view of the above ruling, the resolution of the merits of the subject assessments has been rendered unnecessary.

WHEREFORE, premises considered, the instant petition for review is hereby **GRANTED**. Accordingly, the assessments issued by respondent against petitioner for deficiency income tax, value-added tax and expanded withholding tax for the year 1994 in the total amount of P11,216,208.04 are hereby **CANCELLED** and **WITHDRAWN.**

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

We Concur:

Olga Palanca Enriquez
OLGA PALANCA-ENRIQUEZ
Associate Justice

ERLINDA P. UY
Associate Justice

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Division of Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Chairman