REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

METRO STAR SUPERAMA, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 7169

Members:

CASTAÑEDA, JR., *Chairperson*
UY, *and*
PALANCA-ENRIQUEZ, *JJ.*

Promulgated:

MAR 2 1 2007

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DECISION

CASTAÑEDA, JR., *J.*:

Before the Court is a Petition for Review filed on March 18, 2005 praying for: (a) the reversal of respondent Commissioner's Decision dated February 8, 2005 denying petitioner's Motion for Reconsideration; and (b) declaration of the Formal Letter of Demand dated April 3, 2002 and Warrant of Distraint and/or Levy dated May 12, 2003 as void.

The facts of the case, as admitted by both parties and borne by the records of the case, are as follows:

Petitioner is a domestic corporation duly organized and existing by virtue of the laws of the Republic of the Philippines, with principal office address at T. Cabiles Street, Tabaco City, Albay.

On January 26, 2001, the Regional Director of Revenue Region No. 10, Legazpi City issued Letter of Authority No. 00006561 for Revenue Officer Daisy G. Justiniana to examine petitioner's books of accounts and other accounting records for income tax and other internal revenue taxes for the taxable year 1999.[1] Said Letter of Authority was revalidated on August 10, 2001 by Regional Director Leonardo Sacamos.

For petitioner's failure to comply with several requests for the presentation of records and Subpoena Duces Tecum, OIC of the BIR Legal Division issued an Indorsement dated September 26, 2001 informing Revenue District Officer of Revenue Region No. 67, Legazpi City to proceed with the investigation based on the best evidence obtainable preparatory to the issuance of assessment notice.

On November 8, 2001, Revenue District Officer Socorro O. Ramos-Lafuente issued a Preliminary 15-Day Letter, which petitioner received on November 9, 2001. The said letter stated that a post-audit review was held and it was ascertained that there was deficiency value-added and withholding taxes due from petitioner in the amount of ₱292,874.16.

On April 11, 2002, petitioner received a Formal Letter of Demand dated April 3, 2002 from Revenue District No. 67, Legazpi City, assessing petitioner the amount of Two Hundred Ninety Two Thousand Eight Hundred Seventy

[1] Based from the BIR Records, the said Letter of Authority, together with a checklist, was received by certain Annie V. Nerbes on January 30, 2001.

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Four Pesos and Sixteen Centavos (₱292,874.16) for deficiency valued-added tax and withholding tax for the taxable year 1999, computed as follows:

ASSESSMENT NOTICE NO. 067-99-003-579-072

VALUE ADDED TAX			
Gross Sales			P1,697,718.90
Output Tax			P 154,338.08
Less: Input Tax			
VAT Payable			P 154,338.08
Add: 25% Surcharge		P 38,584.54	
20% Interest		79,746.49	
Compromise Penalty:			
Late Payment	P 16,000.00		
Failure to file VAT returns	2,400.00	18,400.00	136,731.01
TOTAL			P 291,069.09
WITHHOLDING TAX			
Compensation			P 2,772.91
Expanded			110,103.92
Total Tax Due			P 112,876.83
Less: Tax Withheld			111,848.27
Deficiency Withholding Tax			P 1,028.56
Add: 20% Interest p.a.		P 576.51	
Compromise Penalty		200.00	
TOTAL			P 1,805.07
*Expanded Withholding Tax	P1,949,334.25	x 5%	97,466.71
Film Rental	10,000.00	x 10%	1,000.00
Audit Fee	193,261.20	x 5%	9,663.06
Rental Expense	41,272.73	x 1%	412.73
Security Service	156,142.01	x 1%	1,561.42
Service Contractor			P 110,103.92
Total			
SUMMARY OF DEFICIENCIES			
VALUE ADDED TAX			P 291,069.09
WITHHOLDING TAX			1,805.07
TOTAL			**P 292,874.16**

Subsequently, Revenue District Office No. 67 sent a copy of the Final Notice of Seizure dated May 12, 2003, which petitioner received on May 15, 2003, giving the latter last opportunity to settle its deficiency tax liabilities within ten (10) from receipt thereof; otherwise, respondent BIR shall be constrained to serve and execute the Warrants of Distraint and/or Levy and Garnishment to enforce collection.

On February 6, 2004, petitioner received from Revenue District Office No. 67 a Warrant of Distraint and/or Levy No. 67-0029-03 dated May 12, 2003 demanding payment of deficiency value-added tax and withholding tax payment in the amount of ₱292,874.16.

On July 30, 2004, petitioner filed with the Office of respondent Commissioner a Motion for Reconsideration pursuant to Section 3.1.5 of Revenue Regulations No. 12-99.

On February 8, 2005, respondent Commissioner, through its authorized representative, Revenue Regional Director of Revenue Region 10, Legaspi City, issued a Decision denying petitioner's Motion for Reconsideration. Petitioner, through counsel, received said Decision on February 18, 2005.

Hence, this petition.

The issues submitted for decision, as stipulated by the parties, are as follows:

1. Whether respondents complied with the due process requirement as provided under the National Internal Revenue Code and Revenue Regulations No. 12-99 with regard to the issuance of a deficiency tax assessment;
   1.1. Whether petitioner is liable for the respective amounts of ₱291,069.99 and ₱1,805.07 as deficiency VAT and withholding tax for the year 1999;
   1.2. Whether the assessment has become final, executory and demandable for failure of petitioner to protest the same within 30 days from its receipt thereof on April 11, 2002, pursuant to Section 228 of the National Internal Revenue Code;

2. Whether the deficiency assessments issued by the respondent are void for failure to state the law and/or facts upon which they are based;
   2.2. Whether petitioner was informed of the law and facts on which the assessment is made in compliance with Section 228 of the National Internal Revenue Code;

3. Whether or not petitioner, as owner/operator of a movie/cinema house, is subject to VAT on sales of services under Section 108(A) of the National Internal Revenue Code; and

4. Whether or not the assessment is based on the best evidence obtainable pursuant to Section 6(b) of the National Internal Revenue Code.

The Petition is with merit.

Assessment is a notice to the effect that the amount therein stated is due as a tax and a demand for the payment thereof.[2] It fixes and determines the tax liability of a taxpayer. As soon as it is served, an obligation arises on the part of the taxpayer concerned to pay the amount assessed and demanded.[3] Section 228 of the Tax Reform Act of 1997 ("Tax Code") laid the rules on assessment, to wit:

> "SEC. 228. ***Protesting of Assessment.***- When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however*, that a preassessment notice shall not be required in the following cases:
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> 1. When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the face of the return; or
> 2. When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or

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[2] *Republic v. Lim De Yu*, G.R. No. L-17438, (10 SCRA 737),

[3] *Commissioner of Internal Revenue v. Island Garment Manufacturing Corporation*, G.R. No. L-46644, September 11, 1987 (153 SCRA 665).

3. When a taxpayer who opted to claim a refund or tax credit of excess creditable withholding tax for a taxable period was determined to have carried over and automatically applied the same amount claimed against the estimated tax liabilities for the taxable quarter or quarters of the succeeding taxable year, or
4. When the excise tax due on excisable articles has not been paid; or
5. When an article locally purchased or imported by an exempt person, such as, but not limited to, vehicles, capital equipment, machineries and spare parts, has been sold, traded or transferred to non-exempt persons.

The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.

Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.

Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

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 receipt of the said decision, or from the lapse of the one hundred eighty (180) – day period; otherwise, the decision shall become final, executory and demandable."

The above-quoted section does not only require that there must be an investigation and determination of taxpayer's liability. The Commissioner or his duly authorized representative is required to send notice of assessment to the taxpayer in order to give the latter an opportunity to file a protest. An assessment is deemed made only when the same is actually received by the taxpayer. As held in *Commissioner of Internal Revenue vs. Pascor Realty and Development Corporation, Rogelio A. Dio and Virginia S. Dio*:[4]

> "An assessment contains not only a computation of tax liabilities, but also a demand for payment within a prescribed period. It also signals the time when penalties and interests begin to accrue against the taxpayer. To enable the taxpayer to determine his remedies thereon, due process requires that it must be served on and received by the taxpayer. Accordingly, an affidavit, which was executed by revenue officers stating the tax liabilities of a taxpayer and attached to a criminal complaint for tax evasion, cannot be deemed an assessment that can be questioned before the Court of Appeals.
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> xxx xxx xxx
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> "To start with, 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 addition to the tax due, in case the taxpayer fails to pay the 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 rate as may be prescribed by rules and regulations, is to be collected from the date prescribed for its payment until the full payment.
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> "The issuance of an assessment is vital in determining the period of limitation regarding its proper issuance and the period within which to protest it. Section 203 of the NIRC provides that internal revenue taxes must be assessed within three years from the last day within which to file the return. Section 222, on the other hand, specifies the period of ten years in case a fraudulent return wit intent to evade was submitted or in case of failure to file a return. Also, Section 228 of the same law states that said assessment may be protested only within thirty days from receipt thereof. Necessarily, the taxpayer must be certain that a specific document constitutes an assessment. Otherwise, confusion would arise regarding the period within which to make an assessment or to protest the same, or whether interest and penalty may accrue thereon.
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> "**It should also be stressed that the said document is a notice duly sent to the taxpayer. Indeed, an assessment**

[4] G.R. No. 128315, June 29, 1999 (309 SCRA 402).

> **is deemed made only when the collector of internal revenue releases, mails or sends such notice to the taxpayer**." *(Emphasis Ours.)*

Section 228 of the Tax Code operates for the benefit of both the taxpayer and the government. Said section guarantees a taxpayer due process before it may be held liable to pay tax found due. On the other hand, the government is given an opportunity to assess and collect internal revenue taxes, interests and penalties from delinquent taxpayers or tax-evaders within the prescriptive period.

In ***Estate of the Late Juliana Diez Vda. De Gabriel vs. Commissioner of Internal Revenue***,[5] the Supreme Court emphasized that although there is no specific requirement that the taxpayer should receive the notice within the prescriptive period, **due process requires at the very least that such notice actually be received**. If it appears that the person liable for the payment did not receive the assessment, the assessment could not become final and executory.[6]

In a number of instances, the Court upheld the taxpayers' right to due process.

In ***BPI Data System Corporation (formerly Filipinas Management and Leasing Services, Inc.) vs. Commissioner of Internal Revenue***,[7] the Court ruled against the respondent when he failed to give the taxpayer a chance to respond to a pre-assessment notice before issuing an assessment and pronounced:

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[5] G.R. No. 155541, January 23, 2004 (421 SCRA 266).
[6] See *Republic v. De la Rama*, G.R. No. L-21108, November 29, 1966 (18 SCRA 861).
[7] CTA Case No. 4530, January 12, 1994.

"One of the most basic and fundamental precept of law enshrined in the Constitution is that no person shall be deprived of his property without due process of law (Sec. 1, Art. III, 1987 Constitution). The persuasiveness of the right to due process reaches our both substantive and procedural rights, regardless of their source, be it the constitution, or only a statute or a rule of court (Tupas vs. Court of Appeals, 193 SCRA 597). The procedure granted by law under Section 229 of the National Internal Revenue Code is a statutory right of the taxpayer that cannot be wantonly disregarded without violating the taxpayer's right to due process.

"In the observance of procedural due process, this court is always mindful that a taxpayer being made liable with his property be given an opportunity to be heard which is one of its essential elements (Banco Español vs. Palanca, 37 Phil. 921). With the failure of the respondent to strictly comply with the procedure prescribed by law and the failure of the petitioner to receive a copy of the alleged assessment, the latter was not afforded its right to be heard for it was denied the opportunity to protest or dispute the alleged assessment. The respondent utterly failed to establish that the assessment it has conducted is a disputed assessment whereby 'the taxpayer questions an assessment and asks the Collector to reconsider or cancel the same because he believes he is not liable therefor'. (Morales vs. Collector of Internal Revenue, 17 SCRA 1018).

"Had the taxpayer been given an opportunity to dispute the questioned assessment, then the same may have been given due consideration. In the absence of any showing that administrative remedies granted by law has been properly exhausted or that the petitioner failed to file a protest on the assessment within the prescribed period despite receipt thereof, this Court could not bestow the presumption of correctness on the said assessment. . . ." *(Emphasis supplied)*

In ***Caltex (Philippines), Inc. vs. Commissioner of Internal Revenue***,[8] the Court held:

". . . this Court is of the opinion that herein respondent committed an arbitrary act tantamount to a violation of petitioner's right to procedural due process when the former issued the assessment in question. Petitioner has assiduously denounced the lack of prior notice for an informal conference and a pre-assessment notice attending the issuance of the assailed assessment, as required under BIR Revenue

[8] CTA Case No. 5664, October 4, 2000.

Regulation No. 12-85 which was issued pursuant to Section 229 of the Tax Code, as amended. Inexplicably, records bear that respondent did nothing to disprove petitioner's alleged non-receipt of notices."

In ***A Brown Co., Inc. vs. Commissioner of Internal Revenue***,[9] the Court declared:

"To reiterate, the respondent committed grave violations of the law and regulations when he issued the subject Assessments. The above violations go against the values of right to due process held dearly by the judiciary. And this court is not about to exempt this instant case from the same principle it has long enshrined."

More importantly, in ***Commissioner of Internal Revenue vs. Azucena T. Reyes***,[10] the Supreme Court categorically ruled that if there is no valid notice sent, the assessment is void. The reason is that "[t]he law imposes a substantive, not merely a formal, requirement. To proceed heedlessly with tax collection without first establishing a valid assessment is evidently violative of the cardinal principle in administrative investigations: that taxpayers should be able to present their case and adduce supporting evidence."

In the present case, petitioner denied receiving the preliminary assessment notice. While there is a disputable presumption that a mailed letter is deemed received by the addressee in the ordinary course of mail, a direct denial of the receipt of mail shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee.[11] In respondents' Answer and Memorandum, Joint Stipulation of Facts and Issue, and BIR Records, a preliminary assessment notice was

[9] CTA Case No. 6357, June 7, 2004.
[10] G.R. Nos. 159694 and 163581, January 27, 2006 (480 SCRA 382).
[11] *Republic of the Philippines vs. The Court of Appeals and Nielson & Company, Inc.*, G.R. No. L-38540 April 30, 1987 (149 SCRA 351).

issued. However, there is no clear showing of the fact that petitioner actually received, either personally or by registered mail, the issued preliminary assessment notice. The Court cannot countenance respondents' contention that there was observance of due process in the absence of proof of actual receipt by the petitioner of the preliminary assessment notice as required under Section 228 of the Tax Code and Revenue Regulations No. 12-99. As petitioner was not accorded due process, both the preliminary assessment notice and the Formal Letter of Demand dated April 3, 2002 are void. As void assessment cannot give rise to an obligation to pay deficiency taxes, it divests the taxing authority of the right to collect them,[12] the Warrant of Distraint and/or Levy dated May 12, 2003 is likewise void.

In view thereof, We find it no longer necessary to discuss the remaining issues.

WHEREFORE, premises considered, the Petition for Review is hereby **GRANTED**. Accordingly, the assailed Decision dated February 8, 2005 is hereby **REVERSED** and **SET ASIDE** and respondent is **ORDERED TO DESIST** from collecting the subject taxes against petitioner.

SO ORDERED.

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

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[12] *FMF Development Corporation v. Commissioner of Internal Revenue*, C.A.-G.R. SP No. 73973, February 23, 2004.

WE CONCUR:

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
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.

JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice