Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SECOND DIVISION

MID-LAND QC REALTY CORPORATION, Petitioner,	**CTA Case No. 8711**
-versus-	**Members:** CASTAÑEDA, JR., *Chairperson* CASANOVA, *and* COTANGCO-MANALASTAS, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** JAN 2 2 2016

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11:30 a.m.

DECISION

CASANOVA, *J.*:

This is a Petition for Review filed by Mid-land QC Realty Corporation seeking to (1) declare the Warrant of Distraint and/or Levy received on August 23, 2013 as null and void for the collection of the alleged deficiency income tax (IT) and value-added tax (VAT) of petitioner for taxable year 2007; (2) enjoin the respondent Commissioner of Internal Revenue and any of her duly authorized representatives from enforcing the aforesaid Warrant of Distraint and/or Levy; and (3) cancel the impugned assessment in the total amount of ₱8,254,612.29

Petitioner Mid-Land QC Realty Development Corporation is a corporation organized and existing under the laws of the Philippines with office address at #65 Broadway Ave., New Manila, Quezon City 1112.[1]

[1] Par. 1, The Parties, Petition for Review, Docket, p. 14.

Respondent is the duly appointed Commissioner of Internal Revenue (CIR) who holds office at the BIR National Office Building located at Agham Road, Diliman, Quezon City.[2]

Petitioner is a registered taxpayer with TIN/VAT Registration No. 238-613-832-000 effective June 8, 2005 and with BIR Certificate of Registration No. 3RC0000309310 issued by BIR Revenue District Office No. 39 (Quezon City).[3]

Petitioner received a copy of the Letter Notice (LN) No. 039-TRS-07-00-00120 dated March 15, 2010 from the BIR stating that a computerized matching was conducted on information/data provided by the Details of Withholding Agents/Payors and Payees/Income Recipients Records of withholding agent, Fresh N Famouns (*sic*) Foods, Inc. against the declarations of the petitioner's income tax returns and VAT for 2007 and alleged tax deficiencies were found.[4]

Petitioner received a follow-up letter from the BIR informing petitioner of the discrepancy resulting from the Reconciliation of Listing as declared in tax returns filed for CY 2007 and instructing it to refute the validity of the findings of the BIR and to present documentary evidence to reconcile the variances indicated in the LN No. 039-TRS-07-00-00120 dated March 15, 2010 and to settle the basic taxes.[5]

On May 18, 2011, petitioner received a Preliminary Assessment Notice (PAN) dated March 15, 2011 assessing petitioner for alleged deficiency income tax and VAT in the aggregate amount of ₱8,254,612.29, inclusive of interests, for the calendar year 2007.[6]

On July 6, 2012, petitioner received a First Notice Before Issuance of Warrant of Distraint and Levy dated June 21, 2012 which indicated that it pertained to Ass. No. F-039-LNTF-07-VT-033/2007 in the amount of ₱8,254,612.29 for IT/VAT for CY 2007.[7]

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[2] Par. 1, Joint Stipulation of Facts and Issues (JSFI), Docket, p. 206.
[3] Par. 5, Statement of Facts, Petition for Review, Ibid, p. 15.
[4] Par. 2, JSFI, Docket, p. 206.
[5] Par. 3, JSFI, Docket. P. 206.
[6] Par. 4, JSFI, Docket, p. 207.
[7] Par. 5, JSFI, Docket, p. 207.

On July 26, 2012, petitioner received a Final Notice Before Issuance of Warrant of Distraint and Levy dated July 5, 2012 which indicated that it pertained to Ass. No. F-039-LNTF-07-VT-033/2007 in the amount of ₱8,254,612.29 for IT/VAT for CY 2007.[8]

On August 23, 2013, petitioner received a Warrant of Distraint and/Or Levy (BIR Form No. [blank] "Revised July 1991 (Exh. O) containing only the name of the petitioner, the address, assessment /Demand No. F-039-LNTF-07-VT-033/2007, date issued 05-03-12, kind of tax IT/VT, year 2007, amount ₱8,254,612.29 signed by Clavelina S. Nacar with all other blanks unfilled.[9]

On September 23, 2013, petitioner filed a Petition for Review[10] before the Court of Tax Appeals (CTA).

Respondent filed her Answer[11] on November 26, 2013 and interposed the following Special and Affirmative Defenses:

> "5. She reiterates and repleads the preceding paragraphs of this Answer as part of her Special and Affirmative Defenses.
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> 6. Contrary to petitioner's claim, both the Notice For Informal Conference and FAN were duly sent to and received by petitioner.
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> Under Section 3(v) of Rule 131 of the Rules of Evidence, there is a disputable presumption that a letter duly directed and mailed was received in the regular course of the mail. Corollary thereto, Section 10 of Rule 13 of the Revised Rules of Court provides that '(s)ervice by registered mail is complete upon actual receipt by the addressee, or after five (5) days from the date he received the first notice of the postmaster, whichever date is earlier.'

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[8] Par. 6, JSFI, Docket, p. 207.
[9] Par. 7, JSFI, Docket, p. 207.
[10] Docket, pp. 14-34.
[11] Docket, pp. 110-116.

7. The Honorable Court has no jurisdiction over the instant Petition since the subject assessments already became final, demandable, and unappleable on account of petitioner's failure to file a protest to the Formal Letter of Demand (FLD) and assessment notices as mandated by Section 228 of the 1997 National Internal Revenue Code (NIRC), as amended, and Section 3.1.5 of Revenue Regulations (RR) No. 12-99, thus:

'**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: xxx xxx xxx

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 one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable.' (Emphasis supplied)

'**3.1.5 Disputed Assessment**. – The taxpayer or his duly authorized representative may protest administratively against the aforesaid formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof. If there are several issues involved in the formal letter of demand and assessment notice but the taxpayer only disputes or protests against the validity of some of the issues raised, the taxpayer shall be required to pay the deficiency tax or taxes attributable to the undisputed issues, in which case, a collection letter shall be issued to the taxpayer calling for payment of the said deficiency tax, inclusive of the applicable surcharge and/or interest. No action shall be taken on the taxpayer's disputed issues until the taxpayer has paid the deficiency tax or taxes attributable to the said undisputed issues. The prescriptive period for assessment or collection of the tax or taxes attributable to the disputed issues shall be suspended.

The taxpayer shall state the facts, the applicable law, rules and regulations, or jurisprudence on which his protest is based, otherwise, his protest shall be considered void and without force and effect. If there are several issues involved in the disputed assessment and the taxpayer fails to state the facts, the applicable law, rules and regulations, or jurisprudence in support of his protest against some of the several issues on which the assessment is based, the same shall be considered undisputed issue or issues, in which case, the taxpayer shall be required to pay the corresponding deficiency tax or taxes attributable thereto.

The taxpayer shall submit the required documents in support of his protest within sixty (60) days from date of filing of his letter of protest, otherwise, the assessment shall become final, executory and demandable. The phrase 'submit the required documents' includes submission or presentation of the pertinent documents for scrutiny and evaluation by the Revenue Officer conducting the audit. The said Revenue Officer shall state this fact in his report of investigation.

If the taxpayer fails to file a valid protest against the formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof, the assessment shall become final, executory and demandable.

xxx xxx xxx.' (Emphasis supplied)

8. The assessments have not yet prescribed since the same were issued on 1 April 2011 or within the three (3) year period mandated by Section 203 of the 1997 NIRC, as amended.

9. Assuming *arguendo* that respondent failed to issue the subject assessments within the three (3) year period under Section 203 of the 1997 NIRC, as amended, still, the government's right to assess petitioner for deficiency income and VAT for taxable year 2007 in the total amount of P8,254,612.29 has not yet prescribed.

Sections 222 (a) and 248 (B) of the 1997 NIRC, amended, reads:

'**SEC. 222.** ***Exceptions as to Period of Limitation of Assessment and Collection of Taxes***. —

(a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

SEC. 248. ***Civil Penalties.*** **—**

(B) In case of willful neglect to file the return within the period prescribed by this Code or by law or regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud: *Provided*, That a substantial underdeclaration of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, shall constitute *prima facie* evidence of a false or fraudulent return: *Provided, further*, That failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding thirty percent (30%) of actual deductions, shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions, as mentioned herein.

In this case, the percentage (%) of discrepancy on sales/revenues/receipts amounted to 69.48 after a computerized matching conducted by the BIR on information/data provided by Withholding Agents/Payors and Payees/Income Recipients against petitioner's declarations per INCOME/VAT/Percentage/Withholding Tax returns for the year 2007.

Therefore, since the discrepancy exceeded thirty percent (30%), there exists *prima facie* fraud, and the period to assess is ten (10) years.

In Commissioner of Internal Revenue vs. Arturo Tulio (*G.R. No. 139858, October 25, 2005*), the Supreme Court held:

'Section 223 specifies three (3) instances when the running of the three-year prescriptive period does not apply. These are (1) filing a false return, (2) filing a fraudulent return with intent to evade tax or (3) failure to file a return. <u>The period within which to assess tax is ten years from discovery of the fraud, falsification or omission</u>.' (Underscoring supplied)

10. The income and VAT deficiencies for calendar year 2007 has factual basis.

Verification disclosed that the following discrepancy resulted from the Reconciliation of Listing for Enforcement (RELIEF) and Third Party Matching – BOC Data Program as declared in petitioner's tax returns, hence assessed in accordance with Section 31, 32, 106 and 108 of the 1997 NIRC, as amended, and Revenue Memorandum Order (RMO) No. 32-2007:

A. Sales (VAT)	
Per Summary List of Purchases submitted by your customers	13,524,718.00
Sales per Tax Returns Filed	3,986,657.33
Under-Declaration on Sales	<u>9,538,060.67</u>

Sales (IT)	
Per Summary List of Purchases submitted by your customers	13,524,718.00
Sales per Income Tax Returns	4,092,804.91
	9,431,913.09
Multiplied by Gross Profit Rate	.8732
Under-declaration on Sales per ITR	8,235,946.51

11. Finally, well-settled is the rule that tax assessments by tax examiners are presumed correct and made in good faith (Cagayan Robina Sugar Milling Co. vs. Court of Appeals, 342 SCRA 671). It is the taxpayer and not the Bureau of Internal Revenue who has the duty of proving otherwise. Equally settled is the rule that in the absence of proof of any irregularities in the performance of official business, an

> assessment will not be disturbed. All presumptions are in favor of tax assessments. Dereliction on the part of petitioner to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notices.

The case was then set for pre-trial conference on January 16, 2014.[12]

After the parties filed their Pre-Trial Briefs,[13] they entered into a Joint Stipulation of Facts and Issues (JSFI)[14]. The Court then issued the Pre-Trial Order[15] which approved the JSFI, terminated the pre-trial and set the initial presentation of evidence for the petitioner on February 26, 2014.

Petitioner presented its witness Ms. Angelina Salomon-Butac, who by way of Judicial Affidavit[16], testified that during the time she was retained as petitioner's External Auditor, she received from respondent the following: (1) Letter Notice; (2) Follow-up Letter; (3) Preliminary Assessment; (4) First Notice before Issuance of Warrant of Distraint and Levy; (5) Final Notice before Issuance of Warrant of Distraint and Levy; and (6) Warrant of Distraint and/or Levy. However, she denied receipt of the Notice for Informal Conference and the Formal Letter of Demand and Assessment Notice. She then filed with the respondent a letter dated July 20, 2012 protesting the assessment because it used as basis the Details of Withholding Agents/Payors And Payees/Income Recipients Records of Fresh N' Famous Foods, Inc. ("Chowking") which made erroneous reports on ATC WC 158 in the amount of ₱10,294,245.00 and ATC WC 120 in the amount of ₱467,462.00.

Thereafter, petitioner submitted its Formal Offer of Evidence[17] on March 7, 2014 offering Exhibits "A" to "R", with sub-markings. The Court issued a Resolution[18] on April 15, 2014 admitting all

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[12] Notice of Pre-Trial Conference issued on November 28, 2013, Docket, p. 117.
[13] Petitioners' Pre-Trial Brief was filed on December 23, 2013, Docket, pp. 118-122; Respondent's Pre-Trial Brief was filed on January 14, 2014, Docket, pp. 167-171.
[14] Docket, pp. 206-208.
[15] Docket, pp. 209-214.
[16] Exhibit R.
[17] Docket, pp. 217-220.
[18] Docket, pp. 248-249.

exhibits except "M", "P", and "Q". In a Resolution[19] dated May 20, 2014, the Court eventually admitted Exhibits "P" and "Q", while Exhibit "M" was still denied.

On the other hand, respondent presented her lone witness, Revenue Officer (RO) Cristy E. Rejuso, who testified by way of Judicial Affidavit[20], that she was then a member of the LN Task Force assigned to investigate petitioner's discrepancy/ies on income tax and VAT for taxable year 2007 per Letter Notice (LN) No. 039-TRS-07-00-00120. The said LN was based on Details of Withholding Agents/Payors and Payees/Income Recipients Records against petitioner's declarations per income and VAT for the year 2007. A Follow-Up Letter dated May 18, 2010 and a Notice for Informal Conference with Registry Receipt dated/posted November 25, 2010 were issued to petitioner. She then prepared and submitted her Audit Report on VAT and income tax, and a Memorandum Report finding petitioner liable for deficiency income tax of ₱5,857,888.41 and deficiency VAT of ₱2,396,723.88. Thereafter, the PAN with Details of Discrepancies dated March 15, 2011 and Final Assessment Notice (FAN) with Details of Discrepancies dated April 1, 2011 were issued to petitioner.

On July 7, 2014, respondent filed her Formal Offer of Evidence[21] consisting of Exhibits "R-1" to "R-14-A" which were all admitted in a Resolution[22] dated August 14, 2014.

In rebuttal, petitioner presented Ms. Clarissa R. Hornilla, Tax Manager of Jollibee Worldwide Services[23] who identified the Letter of Fresh and Famous Foods, Inc.[24] to petitioner dated July 11, 2012. Petitioner's second rebuttal witness, Assistant Regional Director of Revenue Region No. 9 Clavelina Sim Nacar, testified on the issuance of the Warrant of Distraint and/or Levy. [25]

Petitioner's Supplemental Formal Offer of Evidence[26], offering Exhibit "U-Rebuttal", was admitted in the Court's Resolution[27] dated October 22, 2014.

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[19] Docket, pp. 262-263.
[20] Exhibit R-14.
[21] Docket, pp. 273-276.
[22] Docket, p. 283.
[23] Transcript of Stenographic Notes (TSN), August 20, 2014, p. 7.
[24] Exhibit U-Rebuttal.
[25] Minutes of the Hearing, August 20, 2014, Docket, p. 284.
[26] Docket, pp. 291-292.

This case was then submitted for decision on January 23, 2015[28], after the Memorandum for the Petitioner[29] and respondent's Memorandum[30] were filed on November 20, 2014 and January 20, 2015, respectively.

The parties jointly stipulated on the following issues[31] for this Court's resolution:

a. Whether or not petitioner is liable for deficiency income tax in the amount of ₱5,857,888.41 for the year 2007; and

b. Whether or not petitioner is liable for deficiency VAT in the amount of ₱2,396,723.88 for the year 2007.

Petitioner is not liable for deficiency IT and VAT for taxable year 2007 since there was lack of due process in the issuance of assessment notices. Accordingly, the Warrant of Distraint and/or Levy is invalid and unenforceable.

A void assessment bears no valid fruit.[32] In a tax assessment, the law requires that the taxpayer shall be notified in writing of the law and the facts on which the assessment is made. Otherwise, the assessment is void. The relevant provision of Section 228 of the National Internal Revenue Code (NIRC) of 1997 provides:

> "SEC. 228. *Protesting of Assessment.* — When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify

[27] Docket, p. 296.
[28] Docket, p. 321.
[29] Docket, pp. 297-307.
[30] Docket, pp. 314-320.
[31] Stipulated Issues, JSFI, Docket, p. 207.
[32] *Samar-I Electric Cooperative vs. Commissioner of Internal Revenue*, G.R. No. 193100, December 10, 2014, citing *Commissioner of Internal Revenue vs. Reyes*, 516 Phil. 176, 189-190 (2006).

the taxpayer of his findings: *Provided, however*, That a preassessment notice shall not be required in the following cases:

(a) 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

(b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or

(c) 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

(d) When the excise tax due on excisable articles has not been paid; or

(e) 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.

<u>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</u>.

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."

Revenue Regulations (RR) No. 12-99[33] puts into effect the above-cited provision as follows:

"SECTION 3. *Due Process Requirement in the Issuance of a Deficiency Tax Assessment.* —

3.1 Mode of procedures in the issuance of a deficiency tax assessment:

3.1.1 *Notice for informal conference.* — The Revenue Officer who audited the taxpayer's records shall, among others, state in his report whether or not the taxpayer agrees with his findings that the taxpayer is liable for deficiency tax or taxes. If the taxpayer is not amenable, based on the said Officer's submitted report of investigation, the taxpayer shall be informed, in writing, by the Revenue District Office or by the Special Investigation Division, as the case may be (in the case Revenue Regional Offices) or by the Chief of Division concerned (in the case of the BIR National Office) of the discrepancy or discrepancies in the taxpayer's payment of his internal revenue taxes, for the purpose of "Informal Conference," in order to afford the taxpayer with an opportunity to present his side of the case. If the taxpayer fails to respond within fifteen (15) days from date of receipt of the notice for informal conference, he shall be considered in default, in which case, the Revenue District Officer or the Chief of the Special

[33] Some portions of RR 12-99 were later on amended by RR 18-13.

Investigation Division of the Revenue Regional Office, or the Chief of Division in the National Office, as the case may be, shall endorse the case with the least possible delay to the Assessment Division of the Revenue Regional Office or to the Commissioner or his duly authorized representative, as the case may be, for appropriate review and issuance of a deficiency tax assessment, if warranted.

3.1.2 *Preliminary Assessment Notice (PAN).* — If after review and evaluation by the Assessment Division or by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing in detail, the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based (see illustration in ANNEX A hereof). If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN, he shall be considered in default, in which case, a formal letter of demand and assessment notice shall be caused to be issued by the said Office, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.

3.1.3 *Exceptions to Prior Notice of the Assessment.* — The notice for informal conference and the preliminary assessment notice shall not be required in any of the following cases, in which case, issuance of the formal assessment notice for the payment of the taxpayer's deficiency tax liability shall be sufficient:

(i) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax appearing on the face of the tax return filed by the taxpayer; or

(ii) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or

(iii) 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

(iv) When the excise tax due on excisable articles has not been paid; or

(v) 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.

3.1.4 *Formal Letter of Demand and Assessment Notice.* — <u>The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative.</u> The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, *otherwise, the formal letter of demand and assessment notice shall be void* (see illustration in ANNEX B hereof). <u>The same shall be sent to the taxpayer only by registered mail or by personal delivery.</u> If sent by personal delivery, the taxpayer or his duly authorized representative shall acknowledge receipt thereof in the duplicate copy of the letter of demand, showing the following: (a) His name; (b) signature; (c) designation and authority to act for and in behalf of the taxpayer, if acknowledged received by a person other than the taxpayer himself; and (d) date of receipt thereof.

xxx xxx xxx

> 3.1.7 *Constructive Service.* — If the notice to the taxpayer herein required is served by registered mail, and no response is received from the taxpayer within the prescribed period from date of the posting thereof in the mail, the same shall be considered actually or constructively received by the taxpayer. If the same is personally served on the taxpayer or his duly authorized representative who, however, refused to acknowledge receipt thereof, the same shall be constructively served on the taxpayer. Constructive service thereof shall be considered effected by leaving the same in the premises of the taxpayer and this fact of constructive service is attested to, witnessed and signed by at least two (2) revenue officers other than the revenue officer who constructively served the same. The revenue officer who constructively served the same shall make a written report of this matter which shall form part of the docket of this case (Underlining ours)
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> xxx xxx xxx."

As part of the due process requirements, the notices relative to tax assessment must be served on and received by the taxpayer. In this case, petitioner denied receipt of the Notice for Informal Conference and the Final Assessment Notice (FAN) or Formal Letter of Demand (FLD), but receipt of the following documents was duly acknowledged and confirmed:

1. Letter Notice dated March 15, 2010[34];
2. Follow up Letter dated May 18, 2010[35];
3. PAN dated March 15, 2011[36];
4. First Notice Before Issuance of Warrant of Distraint and Levy dated June 21, 2012[37];
5. Final Notice Before Issuance of Warrant of Distraint and Levy dated July 5, 2012[38]; and
6. Undated Warrant of Distraint and Levy[39].

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[34] Exhibit R-1.
[35] Exhibit R-3.
[36] Exhibit R-9.
[37] Exhibit K.
[38] Exhibit N.
[39] Exhibit O.

When the taxpayer denies the receipt of the required notices, it is obligatory on the part of the respondent to prove that such notices were indeed received by the former. In the case of *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.*,[40] citing the case of *Barcelon, Roxas Securities, Inc. (now known as UBP Securities, Inc.) vs. Commissioner of Internal Revenue*,[41] the Supreme Court ruled that if the taxpayer denies ever having received an assessment from the BIR, it is incumbent upon the latter to prove by competent evidence that such notice was indeed received by the addressee. The Court held:

> "Jurisprudence is replete with cases holding that if the taxpayer denies ever having received an assessment from the BIR, it is incumbent upon the latter to prove by competent evidence that such notice was indeed received by the addressee. The *onus probandi* was shifted to respondent to prove by contrary evidence that the Petitioner received the assessment in the due course of mail. The Supreme Court has consistently held that while a mailed letter is deemed received by the addressee in the course of mail, this is merely a disputable presumption subject to controversion and a direct denial thereof shifts the burden to the party favored by the presumption to prove that the mailed letter was indeed received by the addressee (*Republic vs. Court of Appeals*, 149 SCRA 351). Thus as held by the Supreme Court in *Gonzalo P. Nava vs. Commissioner of Internal Revenue*, 13 SCRA 104, January 30, 1965:
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> > 'The facts to be proved to raise this presumption are (a) that the letter was properly addressed with postage prepaid, and (b) that it was mailed. Once these facts are proved, the presumption is that the letter was received by the addressee as soon as it could have been transmitted to him in the ordinary course of the mail. But if one of the said facts fails to appear, the presumption does not lie. (VI, Moran, *Comments on the Rules of Court*,

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[40] G.R. No. 185371, December 8, 2010.
[41] G.R. No. 157064, August 7, 2006.

> 1963 ed, 56-57 citing *Enriquez vs. Sunlife Assurance of Canada*, 41 Phil. 269).'

x x x. What is essential to prove the fact of mailing is the registry receipt issued by the Bureau of Posts or the Registry return card which would have been signed by the Petitioner or its authorized representative. And if said documents cannot be located, Respondent at the very least, should have submitted to the Court a certification issued by the Bureau of Posts and any other pertinent document which is executed with the intervention of the Bureau of Posts. This Court does not put much credence to the self serving documentations made by the BIR personnel especially if they are unsupported by substantial evidence establishing the fact of mailing. Thus:

> 'While we have held that an assessment is made when sent within the prescribed period, even if received by the taxpayer after its expiration (*Coll. of Int. Rev. vs. Bautista*, L-12250 and L-12259, May 27, 1959), this ruling makes it the more imperative that the release, mailing or sending of the notice be clearly and satisfactorily proved. Mere notations made without the taxpayer's intervention, notice or control, without adequate supporting evidence cannot suffice; otherwise, the taxpayer would be at the mercy of the revenue offices, without adequate protection or defense.' (Nava vs. CIR, 13 SCRA 104, January 30, 1965).
>
> xxx xxx xxx.

The failure of the respondent to prove receipt of the assessment by the Petitioner leads to the conclusion that no assessment was issued. Consequently, the government's right to issue an assessment for the said period has already prescribed. (*Industrial Textile Manufacturing Co. of the Phils., Inc. vs. CIR*, CTA Case 4885, August 22, 1996)." (Underlining ours)

Moreover, in the case of *Estate of the Late Juliana Diez Vda. De Gabriel vs. Commissioner of Internal Revenue*,[42] the Supreme Court held that although there is no specific requirement that the taxpayer should receive the notice within the said period, *due process requires at the very least that such notice actually be received*.

In this case, respondent alleges that the Notice for Informal Conference[43], FAN with attached Details of Discrepancies[44], Assessment Notice for VAT[45], and Assessment Notice for IT[46] were served upon petitioner. In order to prove the sending of the Notice for Informal Conference, respondent offered in evidence the Registry Receipt[47] dated/posted November 25, 2010, while for FAN, respondent submitted the Registry Return Receipt[48].

It appears from the records of the case that the Notice for Informal Conference and the FAN were served *via* registered mail. Although the Registry Receipt and the Registry Return Receipt were presented, the rule requires that if the service is made by registered mail, proof shall be made by affidavit of the party mailing it and the registry receipt.

When the service is made by registered mail, Section 13, Rule 13 of the Rules of Court provides:

> "Sec. 13. *Proof of service*. — Proof of personal service shall consist of a written admission of the party served, or the official return of the server, or the affidavit of the party serving, containing a full statement of the date, place and manner of service. If the service is by ordinary mail, proof thereof shall consist of an affidavit of the person mailing of facts showing compliance with section 7 of this Rule. <u>If service is made by registered mail, proof shall be made by such affidavit and the registry receipt issued by the mailing office. The registry return card shall be filed immediately upon its receipt by the sender, or in lieu thereof the unclaimed letter</u>

[42] G.R. No. 155541, January 27, 2004.
[43] Exhibit R-4.
[44] Exhibit R-10.
[45] Exhibit R-11.
[46] Exhibit R-12.
[47] Exhibit R-5.
[48] Exhibit R-13.

> together with the certified or sworn copy of the notice given by the postmaster to the addressee." (underlining ours)

In this case, the Registry Receipt is the sole proof of service of Notice for Informal Conference, while only the Registry Return Receipt was presented to prove the alleged sending of FAN. Respondent did not offer the affidavit of the person mailing the said notices. Furthermore, an examination of the Registry Return Receipt reveals that neither the date of delivery, nor the signature or name of addressee, or the signature of addressee's agent was filled up.

From the foregoing, respondent falls short of the requirements to establish petitioner's actual receipt of Notice for Informal Conference and FAN. The failure to attach the required affidavit of service is not fatal if the registry receipt clearly shows service to the other party[49], but in this case, the receipts were not filled up.

Therefore, respondent's issuance of the Warrant of Distraint and/or Levy violated petitioner's right to due process since there was no valid service of assessment notices. The validity of the Warrant of Distraint and/or Levy rests upon the validity of tax assessment. Thus, 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.[50]

The law imposes a substantive, not merely a formal, requirement. Without complying with the unequivocal mandate of first informing the taxpayer of the government's claim, there can be no deprivation of property, because no effective protest can be made.[51]

The assessments lack factual basis.

Even assuming both PAN and FAN were duly served upon petitioner, the assessment notices would still be cancelled for lack of

[49] *Philippine National Bank vs. Commissioner of Internal Revenue*, G.R. No. 172458, December 14, 2011.
[50] *Commissioner of Internal Revenue vs. BASF Coating + Inks Phils. Inc.*, G.R No. 198677, November 26, 2014.
[51] *Ibid.*

factual basis. The FAN and Details of Discrepancies[52], containing the computation of petitioners' alleged tax deficiencies as well as the basis of the alleged undeclared taxable income, are herein reproduced, to wit:

I. DEFICIENCY VALUE ADDED TAX		
Discrepancy per Letter Notice (Sales)		9,538,060.67
Multiply by Gross Profit Rate		
Additional Gross Income (Figure 1)		
Discrepancy per Letter Notice (Purchases)		
	Local Purchases	
	Importation	
	Total	
Divided by Cost of Sales Ratio		
Additional Taxable Sales		
Multiply by Gross Profit		
Additional Gross Income (Figure 2)		
Additional Gross Income (whichever is higher between Figure 1 and 2)		9,538,060.67
Multiply by VAT Rate		12%
Deficiency VAT		1,144,567.28
Add:	Surcharge	572,283.64
	Interest up to 01-15-11	679,872.96
	Compromise	-
TOTAL AMOUNT DUE		2,396,723.88
II. DEFICIENCY INCOME TAX		
Net Taxable Income per Annual ITR filed		422,048.43
Add: Additional Gross Income (Figure 2)		8,235,946.51
Total Taxable Income		8,657,994.94
Multiply by Normal Income Tax Rate		35%
Adjusted Income Tax Due		3,030,298.23
Less: Income Tax Due per ITR filed		172,791.69
Deficiency Income Tax		2,857,506.54
Add:	Surcharge	1,428,753.27
	Interest up to 01-15-11	1,571,628.60
	Compromise	-
TOTAL AMOUNT DUE		5,857,888.41

[52] Exhibit R-10.

The complete details covering the aforementioned discrepancies resulting from the Reconciliation of Listing for Enforcement (RELIEF) and Third Party Matching-BOC are shown in the accompanying "ANNEX A" of this letter.

xxx xxx xxx

"Annex A"

xxx

DETAILS OF DISCREPANCIES

DEFICIENCY INCOME TAX AND VAT

Under-declaration (9,538,060.67) – Verification disclosed that the following discrepancy resulted from the Reconciliation of Listing for Enforcement (RELIEF) and Third Party Matching – BOC Data Program as declared in your tax returns, hence assessed in accordance with Section 31, 32, 106 and 108 of the 1997 NIRC, as amended and RMO No. 32-2007:

A. Sales (VAT)

Per Summary List of Purchases submitted by your customers	13,524,718.00
Sales per Tax Returns Filed	3,986,657.33
Under-Declaration on Sales	9,538,060.67

Sales (IT)

Per Summary List of Purchases submitted by your customers	13,524,718.00
Sales per Income Tax Returns	4,092,804.91
	9,431,913.09
Multiplied by Gross Profit Rate	.8732
Under-declaration on Sales per ITR	8,235,946.51

As found in the records of the case, the assessments arose after a computerized matching was conducted using respondent's

Reconciliation of Listing for Enforcement (RELIEF) and Third Party Matching – BOC Data Program. There appeared a discrepancy between the income declared per tax returns and the amount derived from the system generated document involving one of petitioner's withholding agents, Fresh N Famous Foods, Inc. (FNF).

During the cross-examination of respondent's witness, Ms. Cristy E. Rejuso, she confirmed that the basis of her assessment was the "Details of Withholding Agent/Payors and Payees/Income Recipient Records", a matching document electronically generated from the BIR's computer. She admitted that she was not involved in the generation of the said document, hence, she cannot authenticate the same. She further conceded that she did not verify the contents of the document from FNF.[53]

Considering the sole basis of assessment is an unverified and unauthenticated document, without any support of externally sourced data, the assessments must therefore fail. As the Court held in *Commissioner of Internal Revenue vs. Hantex Trading Co. Inc.*,[54] in order to stand judicial scrutiny, the assessment must be based on facts. The presumption of the correctness of an assessment, being a mere presumption, cannot be made to rest on another presumption.

Moreover, when the Court subpoenaed Ms. Clarissa Hornilla, Tax Manager of Jollibee Worldwide Services, she appeared in open court and testified that they erroneously posted petitioner's name in their Alpha List. She also identified her signature on the Letter of FNF stating that the latter has withholding tax remitted for the account of petitioner amounting to only ₱60,500 for taxable year 2007. She acknowledged their oversight while preparing the FNF Alpha List of Suppliers which reflected purchases from petitioner instead of purchases from another client of FNF. The pertinent portions of Ms. Hornilla's testimony are herein reproduced:

"MS. HORNILLA:

A. Yes. Based on the record, on the verified records, we've checked that the Alpha List of Suppliers submitted to the BIR during the year 2007, instead of copying the name of Mid-Land, of other supplier, the name of Mid-Land was copied in the BIR Alpha List of Suppliers.

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[53] TSN, June 4, 2014, pp. 12-35.
[54] G.R. No. 136975, March 31, 2005.

ATTY. SAMSON:
Q. Okay. I will show you the Alpha List of Suppliers which is incorporated in a BIR Form which was presented as Exhibit 'R-2' of the respondent.

ATTY. STO. DOMINGO:
In the BIR Records.

JUSTICE CASTAÑEDA:
Are you saying that the inclusion of Mid-Land in that Alpha List is a mistake?

MS. HORNILLA:
A. Yes, your honor.

JUSTICE CASTAÑEDA:
All right.

ATTY. SAMSON:
Q. 'R-2', I am showing to you Exhibit R-2. Does this contain the Alpha List of Suppliers you mentioned?

MS. HORNILLA:
A. The details under Fresh and Famous Inc. is based on the Alpha List of Fresh and Famous. The first three (3) named under Fresh and Famous.

ATTY. SAMSON:
All right.

MS. HORNILLA:
A. It was found from the Alpha List of Fresh and Famous.

ATTY. SAMSON:
Q. Now, in your Letter, you stated that, you confirmed that Fresh and Famous Foods Inc. has withholding tax remitted for the account of Mid-Land QC Realty Development amounting to P60,500 for the taxable year 2007. Is that found there?

MS. HORNILLA:

A. Yes, Attorney. It is under No. 3, the Fresh and Famous. The gross receipt payment is amounting to P1,210,000 and the corresponding tax is P60,500.

ATTY. SAMSON
Q. Which is equivalent to five (5%) percent?

MS. HORNILLA:
A. Yes, sir.

ATTY. SAMSON:
Q. How about these two (2) other entries for Fresh and Famous? The first line reading, P10,294,245 with the tax rate of one (1%) percent or a withholding tax of P102,942. You did not pay that to the petitioner, Mid-Land?

MS. HORNILLA:
A. No, sir. This is the mistake that was committed in preparing the Alpha List. Instead of indicating the name of other supplier, the supplier indicated in the report is Mid-Land, for the tax withheld P100,942 and P9,349.

ATTY. SAMSON:
Q. So, who received that payment?

MS. HORNILLA:
A. This is for Middle B World Wide Corporation.

xxx xxx xxx

ATTY. SAMSON:
Q. Mid-Land, Middle B, alphabetically, they are next to one another?

MS. HORNILLA:
A. It is because when we generate the file from the system, it is in alphabetical order. But upon transferring that to the BIR Report formal, there was an error in picking up the right name, supplier.

ATTY. SAMSON:
Q. All right. Let us summarize this, okay. The only payment you made to petitioner, Mid-Land QC Realty Corporation

is P1,210,000 with a tax rate of five (5%) percent and a tax withheld of P60, 500.

Now, the other two lines paid by or the other payments made by Fresh and Famous Foods Inc. were made to Middle B World Wide Corporation.

MS. HORNILLA:
A. Yes, sir.

ATTY. SAMSON:
Q. So, the industrial code appearing here for the payments to Middle B World Wide Corporation?

JUSTICE CASTAÑEDA:
Clarification. What was the only payment made to Mid-Land?

MS. HORNILLA:
A. Sir, rental payments.

JUSTICE CASTAÑEDA:
Which is?

MS. HORNILLA:
A. Subject to five (5%) percent, amounting to P1,210,000.

JUSTICE CASTAÑEDA:
And how much was the withholding tax thereof?

MS. HORNILLA:
A. Five (5%) percent, so P60,500."[55]

Based on the foregoing, the discrepancy between the amount appearing in petitioner's tax returns and Details of Withholding Agent/Payors and Payees/Income Recipient Records was the result of an erroneous posting committed by petitioner's withholding agent. Since the testimony of the witness is clear, convincing and uncontroverted, the Court gives weight and credence to it.

WHEREFORE, premises considered, the Petition for Review is **GRANTED**. The Final Assessment Notice, Assessment Notice No. F-

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[55] TSN, August 20, 2014, pp. 12-17.

039-LNTF-07-VT-033 for Value-Added Tax, and Assessment Notice No. F-039-LNTF-07-IT-033 for Income Tax for the calendar year 2007, are declared **NULL** and **VOID**. Accordingly, the Warrant of Distraint and/or Levy for the amount of Eight Million Two Hundred Fifty Four Thousand Six Hundred Twelve Pesos and 29/100 (₱8,254,612.29) is **CANCELLED** and deemed **WITHDRAWN**.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson, Second Division

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's Division.

ROMAN G. DEL ROSARIO
Presiding Justice