**REPUBLIC OF THE PHILIPPINES**
**COURT OF TAX APPEALS**
**QUEZON CITY**

**FIRST DIVISION**

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| **MCDONALD'S PHILIPPINES REALTY CORPORATION,** Petitioner, | **CTA Case No. 8655** |
| | ***Members:*** |
| **- versus -** | **DEL ROSARIO,** *Chairperson*, **UY**, and **MINDARO-GRULLA,** *JJ.* |
| **COMMISSIONER OF INTERNAL REVENUE,** Respondent. | ***Promulgated:*** OCT 03 2016 2:40 p.m. |

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# RESOLUTION

**UY, *J.*:**

For resolution is respondent's **"MOTION FOR RECONSIDERATION (Re: Decision dated 1 June 2016)"** filed on June 17, 2016, with petitioner's **"COMMENT/OPPOSITION (RE: MOTION FOR RECONSIDERATION DATED JUNE 17, 2016)"** filed on July 29, 2016, seeking the reconsideration of this Court's Decision dated June 1, 2016, the dispositive portion of which reads:

> "**WHEREFORE**, in light of the foregoing consideration, the instant Petition for Review is **GRANTED**. The deficiency VAT assessment issued by respondent against petitioner for CY 2006 is **CANCELLED** and **SET ASIDE**.
>
> **SO ORDERED**."

In his Motion, respondent argues as follows:

1. The instant case does not fall under paragraph 17 of Revenue Memorandum Order (RMO) No. 12-2007;
2. RMO No. 17-2007 does not state that violation thereof would cancel the assessment;

*mj*

3. The audit investigation conducted by Revenue Officer (RO) Rona Marcellano was made with proper authority under Letter of Authority (LOA) No. 000006717; and
4. Petitioner is estopped from questioning the Authority of the RO.

On the other hand, petitioner, in its Comment, contends as follows:

1. RO Rona B. Marcellano, Group Supervisor (GS) Frances E. Leonida, and GS Juvy S. Dela Pena had no authority to investigate petitioner's books of accounts and other accounting records for calendar year (CY) 2006;
2. Referral Memo No. 122-LOA-1208-00039 (Exhibit "R-1") did not validly grant RO Rona Marcellano authority to investigate petitioner's books of accounts and other accounting records for CY 2006; and
3. Petitioner is not estopped from questioning the authority of RO Rona Marcellano.

**THE COURT'S RULING**

We deny respondent's Motion for Reconsideration.

To reiterate, Sections 6(A) and 13 of the National Internal Revenue Code (NIRC) of 1997 provide as follows, to wit:

> "SEC. 6. *Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.* —
>
> (A) *Examination of Returns and Determination of Tax Due.* — After a return has been filed as required under the provisions of this Code, the Commissioner or his duly authorized representative **may authorize the examination of any taxpayer and the assessment of the correct amount of tax**: *Provided, however,* That failure to file a return shall not prevent the Commissioner from **authorizing the examination of any taxpayer**.
>
> xxx xxx xxx." *(Emphases supplied)*
>
> "SEC. 13. ***Authority of a Revenue Officer.*** — Subject to the rules and regulations to be prescribed by the Secretary of Finance, upon recommendation of the

> Commissioner, a Revenue Officer assigned to perform assessment functions in any district may, **pursuant to a Letter of Authority** issued by the Revenue Regional Director, **examine taxpayers within the jurisdiction of the district in order to collect the correct amount of tax, or to recommend the assessment of any deficiency tax due** in the same manner that the said acts could have been performed by the Revenue Regional Director himself." *(Emphases supplied)*

In *Commissioner of Internal Revenue vs. Sony Philippines, Inc.* (hereinafter referred to as the "*Sony* case"),[1] the Supreme Court said:

> "Based on Section 13 of the Tax Code, **a Letter of Authority or LOA is the authority given to the appropriate revenue officer assigned to perform assessment functions. It empowers or enables said revenue officer to examine the books of account and other accounting records of a taxpayer for the purpose of collecting the correct amount of tax.** The very provision of the Tax Code that the CIR relies on is unequivocal with regard to its power to grant authority to examine and assess a taxpayer.
>
> xxx xxx xxx
>
> **Clearly, there must be a grant of authority before any revenue officer can conduct an examination or assessment.** Equally important is that the revenue officer so authorized must not go beyond the authority given. **In the absence of such an authority, the assessment or examination is a nullity.**" *(Emphases supplied)*

Based on the foregoing, the law and jurisprudence thereto is clear: **in the absence of a Letter of Authority (LOA) to examine any taxpayer, the assessment or examination is a nullity.**

In this case, to show that RO Rona Marcellano has the authority to examine petitioner's records, respondent offered in evidence merely the Referral Memo No. 122-LOA-1208-00039 dated December 2, 2008.[2] In fact, it is, in effect, admitted by respondent that no LOA was ever issued in favor of RO Rona Marcellano.

[1] G.R. No. 178697, November 17, 2010.
[2] Exhibit "R-1", BIR Records, p. 2

Thus, even without RMO 12-2007, the fact remains that RO Rona Marcellano was without authority to conduct the examination of petitioner's records. Correspondingly, pursuant to the above-quoted Sections 6(A) and 13 of the NIRC of 1997 in relation to the *Sony* case, RO Rona Marcellano's examination of petitioner's records and the resulting tax assessments are a nullity. As a corollary, respondent's arguments that the instant case does not fall under paragraph 17 of RMO No. 12-2007, and that the same issuance[3] does not state that violation thereof would cancel the assessment, are both of no consequence.

In any event, paragraph 17 of RMO 12-2007 has even bolstered the said provisions and jurisprudence when it stated that "[t]*he practice of issuing...referral memoranda...for the purpose of audit examination and assessment of internal revenue taxes is...strictly prohibited.*"

In this connection, respondent alleges, *inter alia*, that the said paragraph refers to original issuances of the said documents for the purpose of audit examination and assessment; that it does not cover cases where a LOA was already issued authorizing the audit of a taxpayer; that it is not always the case that the revenue officers indicated in the original LOA would be able to complete their investigation for some reasons; that that is the reason why referral memoranda and memorandum of assignments are given to other revenue officers to continue the audit investigation made by the original revenue officers; that their authority to audit is not derived from the referral memoranda or memorandum of assignment, but from the original LOA; and that the memorandum is merely for the continuation of the audit.

We do not agree.

To the mind of the Court, these allegations find no basis, in fact or in law. Moreover, respondent did not present any evidence to support said allegations.

Lastly, respondent contends that petitioner is estopped from questioning the authority of the RO, because petitioner allegedly never questioned said authority, and only when petitioner received an adverse assessment, that it raises the argument that said RO had no such authority.

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[3] Erroneously referred to by respondent as "RMO 17-2007" in the instant Motion for Reconsideration.

We find respondents contention untenable.

The doctrine of estoppel springs from equitable principles and the equities in the case. It is designed to aid the law in the administration of justice where without its aid injustice might result.[4]

The elements of estoppel are: *first*, the actor who usually must have knowledge, notice or suspicion of the true facts, communicates something to another in a misleading way, either by words, conduct or silence; *second*, the other in fact relies, and relies reasonably or justifiably, upon that communication; *third*, the other would be harmed materially if the actor is later permitted to assert any claim inconsistent with his earlier conduct; and *fourth*, the actor knows, expects or foresees that the other would act upon the information given or that a reasonable person in the actor's position would expect or foresee such action.[5]

In this case, respondent failed to establish each of the said elements.

Particularly, in relation to the first element, the Court observes that respondent did not present any evidence to show that petitioner had knowledge, notice or suspicion that RO Rona Marcellano had **no authority** to examine its records. In fact, petitioner has proved that it believed that the said RO had such authority, until it was discovered otherwise. Petitioner's witness and Director for Accounting, Ms. Cornelia M. Naguit, during her cross examination at the hearing held on January 23, 2014, testified as follows:

"ATTY. SILERIO

Q So, did you assist the Revenue Officer of the BIR particularly during the audit examination that eventually led to this present case?

MS. NAGUIT

A Yes, I am.

ATTY. SILERIO

[4] *Megan Sugar Corporation vs. Regional Trial Court of Iloilo, et al.*, G.R. No. 170352, June 1, 2011.
[5] *British American Tobacco vs. Camacho, et al.*, G.R. No. 163583, August 20, 2008.

Q In your answer to Question No. 42 found in page 11, you stated your basis on saying that the Revenue Officer who conducted the audit investigation had no authority to examine the petitioner's books to conduct the informal conference. Is that correct?

MS. NAGUIT

A **That is true because we based on her representation that she is the authorized person to conduct the audit.**

ATTY. SILERIO

Q So, did you question the Revenue Officer's authority to conduct the audit during the time that she was investigating the *(interrupted)*

MS. NAGUIT

A Actually now, when the Letter of Authority to conduct the examination of the Books of Accounts of MPRC for calendar year 2006 was served, it was a different person, it was *(interrupted)*

ATTY. SILERIO

Q What I was trying to ask you is that did you particularly question her *(interrupted)*

MS. NAGUIT

A Not really because *(interrupted)*

ATTY. SILERIO

Q Yes or no only.

MS. NAGUIT

A Can I just explain?

JUSTICE DEL ROSARIO

Ms. Naguit, kindly face the Court so that we can see you also.

MS. NAGUIT

Okay, your Honors.

A Not really. I would just like to expound on my answer because whenever the BIR Examiner's served the Letter of Authority, they usually come in group and when you take a look, you don't really single read or remember the names indicated in the Letter of Authority, it's only the being the leader of the team that you recognized. So, when she came to the office and represented the Eulema Demadura was already reassigned to another BIR office, she said to us that she is the replacement to continue with the audit and **we took her representation.**

ATTY. SILERIO

Q So, your company did not take any particular action on the matter that the Revenue Officer had no authority?

MS. NAGUIT

A Actually, we do not really bother to check until we prepare the reply to PAN when we found out about it that's why as early as reply to PAN, we raised that issue that she lacks authority to conduct or continue the audit."[6] *(Emphases supplied)*

In this connection, this Court finds the applicability of Section 3(x) of the Rules of Court in favor of petitioner, to wit:

"SEC. 3. Disputable presumptions.— The following presumptions are satisfactory if uncontradicted, but may be contradicted and overcome by other evidence:

xxx xxx xxx

(x) **That acquiescence resulted from a belief that the thing acquiesced in was conformable to the law or fact**". *(Emphasis supplied)*

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[6] Transcript of Stenographic Notes at the hearing held on January 23, 2014, pp. 11 to 13.

And even granting that petitioner had knowledge, notice or suspicion that Rona Marcellano had **no authority** to examine its records, there is no indication that it had communicated such fact to respondent *"in a misleading way, either by words, conduct or silence"*. No such evidence was ever presented by respondent.

The basic rule is that mere allegation is not evidence and is not equivalent to proof.[7]

Hence, this Court finds no basis in ruling that petitioner is estopped from questioning the authority of RO Rona Marcellano and the resulting tax assessments.

**WHEREFORE**, premises considered, respondent's Motion for Reconsideration is **DENIED** for lack of merit.

**SO ORDERED.**

**ERLINDA P. UY**
Associate Justice

WE CONCUR:

**ROMAN G. DEL ROSARIO**
Presiding Justice

**CIELITO N. MINDARO-GRULLA**
Associate Justice

[7] *De Jesus vs. Guerreo III, et al.*, G.R. No. 171491, September 4, 2009.