REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
Quezon City

EN BANC

8199 CONVENIENCE CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1912
(CTA Case No. 8853)

Present:

DEL ROSARIO, *P.J.*,
CASTAÑEDA, JR.,
UY,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA, and
MODESTO-SAN PEDRO, *JJ.*

Promulgated:
SEP 03 2020 3:20pm

x - x

DECISION

***BACORRO-VILLENA, J.*:**

Before the Court is a Petition for Review[1] pursuant to Rule 8, Section 3(b)[2] of the Revised Rules of the Court of Tax Appeals

[1] Filed 07 September 2018, *Rollo*, pp. 5-15.
[2] **SEC. 3.** *Who may appeal; period to file petition.* –
...
(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an

(**RRCTA**), filed by petitioner 8199 Convenience Corporation (**petitioner**) seeking the reversal of the Decision dated 02 February 2018[3] and Resolution dated 31 July 2018[4], respectively, of the First Division[5] in CTA Case No. 8853, entitled *8199 Convenience Corporation v. Commissioner of Internal Revenue.*

The antecedent facts follow.

Petitioner filed its Annual Income Tax Return (**ITR**) and quarterly Value-Added Tax (**VAT**) Returns for taxable year (**TY**) 2009 on the following dates:

Tax Type	Period	Date of filing
Income Tax	Annual[6]	April 15, 2010
Value-Added Tax	1st Quarter[7]	June 29, 2009
	2nd Quarter[8]	July 17, 2009
	3rd Quarter[9]	October 26, 2009
	4th Quarter[10]	January 25, 2010

On 04 June 2010, petitioner received Letter of Authority[11] (**LOA**) No. 2009-00022985 authorizing an investigation against it for all national revenue taxes for TY 2009. Pursuant to the LOA, respondent Commissioner of Internal Revenue (**respondent/CIR**) sent petitioner a First[12], Second[13] and Final Request for Presentation of Records[14] as well as a Subpoena *Duces Tecum*[15] (**SDT**). In turn, petitioner transmitted copies of its tax returns and other documents to respondent on 29 June 2010.[16]

additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review.

3 Division Docket, Volume III, pp. 1697-1737.
4 Id., pp. 1769-1777.
5 With Hon. Justice Cielito N. Mindaro-Grulla (Ret.) as *ponente*; Hon. Presiding Justice Roman G. Del Rosario and Hon. Justice Erlinda P. Uy, concurring.
6 Exhibit "P-3", Division Docket, Volume II, pp. 1071-1073.
7 BIR Records, p. 91.
8 Exhibit "P-5", Division Docket, Volume II, p. 1076.
9 Exhibit "P-6", id., p. 1077.
10 Exhibit "P-7", id., p. 1078.
11 Exhibit "P-1", id., p. 1069.
12 Exhibit "R-2", id., Volume III, p. 1611.
13 Exhibit "R-3", id., p. 1612.
14 Exhibit "R-4", id., p. 1613.
15 Exhibit "R-6", id., p. 1615.
16 Exhibits "P-2" to "P-2-1", id., Volume II, p. 1070.

Thereafter, respondent was issued a Notice of Informal Conference[17] (**NIC**) with the summary of the audit's findings on 09 July 2012 and later revised[18] on 26 July 2012.

On 08 January 2013, a Preliminary Assessment Notice[19] (**PAN**) was issued against petitioner and a Formal Letter of Demand (**FLD**) on 24 January 2013.[20] Based on the "best evidence obtainable rule", respondent disallowed as deductions 50% of petitioner's purchases and operating expenses.[21]

On 06 February 2013, petitioner filed its protest against the assessments.[22] It also submitted copies of its records and other pertinent documents on 07 May 2013 and 17 June 2013, respectively. After reinvestigation, respondent was still found liable for deficiency taxes.

On 03 February 2014, petitioner received a Final Decision on Disputed Assessment[23] (**FDDA**) dated 28 January 2014. The FDDA found petitioner liable for income tax deficiencies in the amount of ₱5,497,415.40 and VAT deficiencies amounting to ₱4,777,597.65.

Challenging the assessment, petitioner simultaneously filed Motions for Reconsideration (**MR**) of the FDDA with respondent's office[24] and Revenue Region No. 6 on 28 February 2014.[25] However, the latter denied petitioner's protest alleging that the same was filed out of time.[26]

On 10 July 2014, petitioner received a Preliminary Collection Letter[27] (**PCL**). Subsequently, on 09 July 2014, respondent issued a Final Notice Before Seizure[28] (**FNBS**) against petitioner.

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17 Exhibits "P-11" to "P-11-1", id., pp. 1161-1162.
18 Exhibits "P-12" to "P-12-1", id., pp. 1163-1164.
19 Exhibit "R-17", id., pp. 1628-1629.
20 Exhibits "P-13" to "P-13-1", id., pp. 1165-1166.
21 JSFI, Paragraph 11, id., Volume I, pp. 719-720.
22 Exhibits "P-14" to "P-14-2", id., Volume II, pp. 1170-1175.
23 Exhibit "P-19", id., p. 1197.
24 Exhibits "P-20" to "P-20-2", id., pp. 1198-1205.
25 Exhibits "P-21" to "P-21-2", id., pp. 1546-1554.
26 Exhibit "P-22", id., p. 1555.
27 Exhibit "P-23", id., p. 1556.
28 Exhibit "R-34", id., p. 1648.

On 30 July 2014, petitioner thereafter filed its Petition for Review before the Court.[29] The case was raffled to the First Division.

During trial, petitioner presented Joseph Cedric Calica[30] (**Calica**) and Schwendi S. Fajardo[31] (**Fajardo**), the court-appointed Independent Certified Public Accountant (**ICPA**) as its witnesses. Essentially, Calica testified as to being petitioner's representative during the period of respondent's audit while the ICPA testified on her findings as contained in her written report. On the other hand, respondent offered the testimonies of Revenue Officers Marvin C. Sevilla[32] (**RO Sevilla**) and Allan C. Quizon[33] (**RO Quizon**), both of whom testified to conducting the audit investigation against petitioner.

Later, the First Division issued the assailed 02 February 2018 Decision.[34] The dispositive portion thereof reads:

> ...
>
> **WHEREFORE**, premises considered, the assessments issued by respondent against petitioner for taxable year 2009 covering deficiency income tax and deficiency VAT are **PARTIALLY UPHELD**. Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of **SEVEN HUNDRED SEVENTY-FOUR THOUSAND TWO HUNDRED EIGHTY PESOS AND 54/100(₱774,280.54)** representing the sum of the basic deficiency income tax and deficiency VAT and the twenty-five percent (25%) surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended, computed as follows:

TAX TYPE	BASIC TAX	25% SURCHARGE	TOTAL
Income Tax	₱ 487,192.05	₱ 121,798.01	₱ 608,990.06
Value-Added Tax	132,232.38	33,058.10	165,290.48
Total	**₱ 619,424.03**	**₱ 154,856.11**	**₱ 774,280.54**

> In addition, petitioner is **ORDERED to PAY**:
>
> a) Deficiency interest at the rate of twelve percent (12%) per annum on the basic deficiency income tax and value-added tax, computed from the date prescribed for

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29 Id., Volume I, pp. 6-19.
30 Judicial Affidavit of Joseph Cedric V. Calica, id., pp. 95-107.
31 Judicial Affidavit of Schwendi S. Fajardo, id., Volume II, pp. 768-773.
32 Judicial Affidavit of Marvin C. Sevilla, id., Volume I, pp. 674-681.
33 Judicial Affidavit of Allan C. Quizon, id., pp. 653-657.
34 Supra at note 3.

payment as indicated below until January 25, 2013, the date of petitioner's receipt of the notice and demand, pursuant to Section 249 (B) of the NIRC of 1997, as amended by RA No. 10963:

TAX TYPE	BASIC TAX	DEFICIENCY INTEREST COMPUTED FROM
Income Tax	₱ 487,192.05	April 15, 2010
Value-Added Tax	₱ 132,232.38	January 25, 2010

b) Delinquency interest at the rate of 12% per annum on the total amount of ₱774,280.54, and on the 12% deficiency interest which have accrued as aforestated in (a) above, computed from February 25, 2013, the due date appearing in the notice and demand, until the amount is fully paid, pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED.[35]

...

Both petitioner and respondent filed their MRs on 21 February 2018[36] and 26 February 2018[37], respectively. The First Division denied both MRs in its Resolution dated 31 July 2018.[38] Hence, the present petition.

Before Us, petitioner raises this sole issue for resolution-

WHETHER THE COURT'S FIRST DIVISION ERRED IN UPHOLDING PETITIONER'S LIABILITY FOR BASIC DEFICIENCY INCOME TAX AND VALUE-ADDED TAX NOTWITHSTANDING THAT THE ASSESSMENT WAS BASED ON THE "BEST EVIDENCE OBTAINABLE RULE".

In support of its petition, petitioner argues that its assessment based on the "best evidence obtainable rule" is without basis in law and therefore, against its right to due process. It maintains that, although respondent has this power under Section 6(B)[39] of the

35 Emphasis in the original text.
36 Division Docket, Volume III, pp. 1738-1746.
37 Id., pp. 1749-1753.
38 Supra at note 4.
39 **SEC. 6.** *Power of the Commissioner to Make assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.* -
...

National Internal Revenue Code (**NIRC**) of 1997, as amended, resort to the aforesaid rule can only be done when: (1) the report or records requested from the taxpayer are not forthcoming, that is, the records are lost; (2) the taxpayer refuses to submit such records; and, (3) the reports submitted are false, incomplete or erroneous.[40] Petitioner cites Section 2.3 of Revenue Memorandum Circular (**RMC**) No. 23-00[41] to support its argument.

The Court's ruling follows below.

After a careful review of the records, We find the petition bereft of merit.

Petitioner does not question the correctness or accuracy of the First Division's findings on the computation of its tax deficiencies. Petitioner challenges the validity of the assessment itself, taking refuge in the notion that respondent's reliance on the "best evidence obtainable rule" was in violation of its right to due process. Petitioner essentially wants this Court to rule in its favor by transferring the burden of submitting documents in support of its tax returns to respondent, something that this Court cannot do.

As petitioner admits, it had omitted transmittal of its books of accounts, official receipts, invoices, as well as other supporting documents to the Bureau of Internal Revenue (**BIR**) as requested under the LOA. To excuse its refusal to transmit the same, petitioner alleges that it had experiences in the past wherein the BIR did not return its complete records. Therefore, instead of complying with the LOA and the BIR's subsequent requests for submission of the foregoing documents and an SDT, petitioner insisted for BIR to check its records inside its office premises.

(B) *Failure to Submit Required Returns, Statements, Reports and other Documents.* - When a report required by law as a basis for the assessment of any national internal revenue tax shall not be forthcoming within the time fixed by laws or rules and regulations or when there is reason to believe that any such report is false, incomplete or erroneous, the Commissioner shall assess the proper tax on the best evidence obtainable.

...

40 Id.

41 *Existing Revenue Procedures on the Assessment of Deficiency Internal Revenue Taxes Based on the "Best Evidence Obtainable".*

Needless to say, at the time, the BIR was in no way obligated to abide with petitioner's requests. Contrary to petitioner's claim, it was incumbent upon it to ensure the prompt and timely transmittal of the records that the BIR requested. Had it really wanted to prove the correctness of its tax return, it should have complied especially that an SDT had already been sent to it. Section 4.3 of Revenue Memorandum Order (**RMO**) 10-2013[42] requires compliance with the SDT under pain of prosecution for violation of Section 266[43] of the NIRC of 1997, as amended, to wit:

> ...
>
> 4.3 In case there is no submission or incomplete presentation of the required books of accounts and other accounting records, the action lawyer assigned to the case shall request the concerned revenue officers for a conference. This shall be scheduled on the fifth (5th) working day from the date set for compliance with the SDT. The revenue officers shall work jointly with the action lawyer in documenting/gathering evidence/s for the criminal prosecution of the individual who disobeyed the SDT.
>
> ...

The same RMO compels submission of the documents subject of the SDT to the signatory thereof. Likewise, it provides where to submit them, hence Section 3.6 thereof reads:

> ...
>
> 3.6 In case the request for issuance of SDT is found to be meritorious, the SDT shall be issued to the person liable for tax or required to file a return, or should the information or records be in the possession of a third party or office, then in that party's name, requiring the concerned person to **appear and submit before the signatory of the SDT the mandated information/documents at an appointed time, date and place.**
>
> The time to be indicated in the SDT shall be during regular business hours or from eight o'clock in the morning and five o'clock in the

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[42] Revised Guidelines and Procedures in the Issuance and Enforcement of Subpoenas Duces Tecum and the Prosecution of Cases for Non-Compliance Therewith.

[43] **Sec. 266.** *Failure to Obey Summons.* - Any person who, being duly summoned to appear to testify, or to appear and produce books of accounts, records, memoranda or other papers, or to furnish information as required under the pertinent provisions of this Code, neglects to appear or to produce such books of accounts, records, memoranda or other papers, or to furnish such information, shall, upon conviction, be punished by a fine of not less than Five thousand pesos (P5,000) but not more than ten thousand pesos (P10,000) and suffer imprisonment of not less than one (1) year but not more than two (2) years.

afternoon during the work week, excluding holidays. **The venue shall be in the BIR office of the signatory of the SDT.**[44]

...

A review of the SDT[45] will show clearly that respondent sufficiently provided petitioner with details such as the manner of submission, time, place and documents to be submitted. The SDT reads:

...

MR. MELVIN S. GERVACIO (President)
8199 CONVENIENCE CORPORATION
Nestor Bldg., 1578 Mabini St., Pedro Gil
Malate, Manila

GREETINGS:

By the authority vested in me by the provisions of Section 37, Chapter 9, Book I of the Administrative Code of 1987, in relation to Sections 5, 14 and 266 of the National Internal Revenue Code of 1997, you are hereby **commanded to appear before me at the Legal Division, 5th Floor, BIR Office Building I, Solana Street, Intramuros, Manila on DEC 01 2011 at 10:00 a.m. and to bring with you and submit the books of accounts and other accounting records of 8199 CONVENIENCE CORPORATION** as follows:

DESCRIPTION
(All for Taxable Year 2009)

1. General Ledger;
2. Sales Books / Purchase Books;
3. Subsidiary Sales & Purchase Books;
4. Sales Invoices & Official Receipts;
5. Purchase Invoices with Vouchers; and
6. Check and Journal Vouchers

FAIL NOT UNDER PENALTY OF LAW

Issued on NOV 09 2011
LOA No. 2007 00022985 dated May 24, 2010
SN: eLA201000001 2128 dated September 02, 2010

KIM S. JACINTO-HENARES
Commissioner of Internal Revenue
By:

(signature)
SIMPLICIO A. MADULARA
OIC-Regional Director

...

[44] Emphasis supplied.
[45] Supra at note 15; emphasis supplied.

At this juncture, it is worthy to note that an SDT, by its very nature, is a coercive process. Rule 21, Section 1 of the Rules of Court (**ROC**) states:

> ...
>
> **Sec. 1.** *Subpoena and subpoena duces tecum.* – Subpoena is a process directed to a person requiring him to attend and to testify at the hearing or the trial of an action, or at any investigation **conducted by competent authority**, or for the taking of his deposition. It may also **require him to bring with him any books, documents, or other things under his control, in which case it is called a subpoena *duces tecum*.**[46]
>
> ...

As the Supreme Court explains in the case of *Domingo Roco v. Hon. Edward B. Contreras, et al.*[47]:

> ...
>
> In this jurisdiction, there are two (2) kinds of subpoena, to wit: subpoena *ad testificandum* and subpoena *duces tecum*. The first is used to compel a person to testify, while the second is used to **compel the production of books, records, things or documents therein specified.** As characterized in *H.C. Liebenow vs. The Philippine Vegetable Oil Company*:
>
> The subpoena *duces tecum* is, in all respects, like the ordinary subpoena *ad testificandum* with the exception that it concludes with an injunction that the witness shall bring with him and produce at the examination the books, documents, or things described in the subpoena.[48]
>
> ...

This compulsory nature of a subpoena belies petitioner's contention that it is should be excused from compliance with respondent's order (due to the unfounded reason that the BIR had lost some of its documents previously). As can be gleaned from the cited rules, such a reason is no justification for petitioner's non-compliance with the SDT; neither do these rules provide petitioner with the option to elect a manner by which it is to comply with it.

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46 Emphasis supplied.

47 G.R. No. 158275, 28 June 2005; See also *H.C. Liebenow v. The Philippine Vegetable Oil Company*, G.R. No. L-13463, 09 November 1918.

48 Emphasis supplied and citation omitted.

To think that petitioner has come to this Court, admitting a violation of the NIRC of 1997, as amended, yet expecting to be benefitted thereby is incredible. Equally absurd is its claims that its right to due process right was violated hence it should be afforded redress.

Due process is the right of every person to be notified of the charge against him and be given an opportunity to be heard, unless law provides for a specific manner by which such should be accorded. The Supreme Court declares rather consistently:

> ...
>
> ...Due process is satisfied when a person is notified of the charge against him and given an opportunity to explain or defend himself. In administrative proceedings, the filing of charges and giving reasonable opportunity for the person so charged to answer the accusations against him constitute the minimum requirements of due process. The essence of due process is simply to be heard, or as applied to administrative proceedings, an opportunity to explain one's side, or an opportunity to seek a reconsideration of the action or ruling complained of.[49]
>
> ...

It is not disputed that the BIR, in conducting assessments of erring taxpayers, has to abide strictly to Section 228[50] of the NIRC of

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[49] *Vivo v. Philippine Amusement and Game Corporation (PAGCOR)*, G.R. No. 187854, 12 November 2013; See also *Ledesma v. Court of Appeals, et al.*, G.R. No. 166780, December 27, 2007.

[50] **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 pre-assessment 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 the 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.

1997, as amended, as well as Revenue Regulation (**RR**) 12-99[51] as amended. However, We have not found respondent or his agents to have transgressed any of the requirements mandated in the aforementioned rules. We also find that petitioner has been duly notified of the assessment against it and that respondent has amply given petitioner several opportunities to defend its position before the BIR as shown by the LOA, Requests for Presentation of Records and the SDT. Petitioner's failure to take such opportunity is solely its own fault. Besides, petitioner had already brought its case before this Court's First Division wherein it was allowed to present evidence it had previously withheld from the BIR. The First Division likewise decided its case fully on the merits.

Lastly, the Court *En Banc* finds no error in respondent's resort to the "best evidence obtainable rule" as petitioner's case falls squarely under Section 2.3 (1) of RMC No. 23-00[52]; specifically, when a taxpayer refuses to submit the records required.[53] Oddly, petitioner invokes the same RMC in questioning respondent's reliance on the said rule yet forgets that the same is but the necessary consequence of its own failure to submit its documents when required to.

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.

51 *Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extra-Judicial Settlement of a Taxpayer's Criminal Violation of the Code Through Payment of a Suggested Compromise Penalty.*

52 Sec. 2.3. *Assessment Based on Best Evidence Obtainable.* — An assessment based on best evidence obtainable is justified when any of the grounds provided by law is clearly established, *viz*:

1. The report or records requested from the taxpayer are not forthcoming i.e. the records are lost; refusal of the taxpayer to submit such records ...

53 Supra at note 40.

WHEREFORE, the foregoing considered, petitioner 8199 Convenience Corporation's Petition for Review filed on 07 September 2018 is hereby **DENIED**. Accordingly, the assailed Decision dated 02 February 2018 and Resolution on 31 July 2018 of the First Division in CTA Case No. 8853, entitled *8199 Convenience Corporation v. Commissioner of Internal Revenue* are hereby **AFFIRMED.**

SO ORDERED.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice