REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB No. 879
(CTA Case No. 7956)

- versus-

Present:

Del Rosario, *PJ,*
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas, and
Ringpis-Liban, *JJ.*

EAST ASIA POWER RESOURCES CORPORATION,
Respondent.

Promulgated:
JUN 17 2013 1:35 p.m.

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D E C I S I O N

COTANGCO-MANALASTAS, J.:

Before the Court *En Banc* is a Petition for Review filed by petitioner, Commissioner of Internal Revenue, assailing the Decision[1] dated December 26, 2011, and the Resolution[2] dated February 24, 2012, of the former Second Division of the Court cancelling and setting aside the assessment for deficiency income tax and expanded withholding tax against respondent due to prescription.

The Facts[3]

Petitioner Commissioner of Internal Revenue (Commissioner) is the public officer authorized under the

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[1] *Rollo*, CTA EB Case No. 879, pp. 20-30.
[2] *Rollo*, pp. 31-33.
[3] As found by the Court in Division, *Rollo*, pp. 21-24, citations omitted.

National Internal Revenue Code of 1997 (NIRC) with the power to decide disputed assessments arising under said law and other laws or portions thereof administered by the Bureau of Internal Revenue (BIR). She holds office at the 5th Floor, Bureau of Internal Revenue, National Office Building, Agham Road, Diliman, Quezon City, where she may be served with summons, notices and other court processes.

Respondent East Asia Power Resources Corporation is a corporation duly organized and existing under the laws of the Republic of the Philippines, with address at Ground Floor, PFDA Building, Navotas Fishport Complex, Navotas City.

On April 27, 2004, respondent filed its income tax return for the calendar year 2003 with the BIR-Revenue District Office (RDO) No. 43, Pasig City, reporting a total tax overpayment of Php22,096,342.00.

On August 11, 2004, respondent received Letter of Authority (LOA) No. 00088088 dated August 6, 2004 from the BIR, Revenue Region No. 7, RDO No. 43, Pasig City.

Respondent complied with the requests of BIR-RDO No. 43 by furnishing the latter its book of accounts, financial statements and other pertinent documents as enumerated in the List of Requirements attached to LOA No. 00088088 dated August 6, 2004. Thus, the examination of the respondent proceeded.

Respondent then, through its Group Controller, Jaime B. Robles, Jr., executed two (2) Waivers of the Defense of Prescription Under the Statute of Limitations of the NIRC dated March 22, 2006 and April 26, 2007[4], respectively.

On September 15, 2008, respondent received a Pre-Assessment Notice (PAN) dated September 5, 2008 from petitioner, through the Regional Director of BIR, Revenue Region No. 7, informing the former of the deficiency tax findings for the calendar year 2003 on Income Tax and Expanded Withholding Tax in the amount of Php3,294,023.88 and Php10,353.13, inclusive of interest from April 16, 2004 to August 30, 2008, respectively.

[4] The date was written as April 26, 2006 in the Division Decision but should be April 26, 2007, *Rollo*, p. 22. See *Division Docket*, p. 506 (*Exhibit "B-1"*).

On September 26, 2008, respondent filed a letter of Reply of even date disputing the deficiency taxes found in the PAN by presenting its computation to account for the said deficiency taxes.

On December 8, 2008, respondent received, through registered mail, a Formal Letter of Demand F43-018 dated November 28, 2008 with attached Assessment Notices demanding payment of assessed deficiency income tax in the amount of Php3,410,498.71 and deficiency expanded withholding tax of Php10,709.73 for the calendar year 2003, both inclusive of interest from April 16, 2004 to December 29, 2008 which is a mere reiteration of the PAN dated September 5, 2008.

On January 6, 2009, respondent timely filed a letter of protest to petitioner. Despite the lapse of one hundred eighty (180) days from the submission of respondent's letter of protest dated January 6, 2009, petitioner failed to act upon the same. The 180-day period lapsed on July 5, 2009, thus, respondent filed a Petition for Review on August 4, 2009.

In her Answer[5], petitioner raised the following special and affirmative defenses:

> "4. The assessments for calendar year 2003 in the amounts of P3,410,498.71 and P10,709.73 for deficiency income and expanded withholding taxes, respectively, were issued in accordance with law and regulations. The factual and legal bases of the assessments are contained in the Final Assessment Notices.
>
> 5. Verification disclosed that the salaries and wages per alphalist compared to amounts reported in the financial statements is construed as unaccounted source of income, thus, considered as undeclared income pursuant to the ruling enunciated in the case of *Perez vs. CTA and CIR*, L-10507 dated May 30, 1958, to wit:

Salaries and wages per FS/ITR	P12,982,053.00	
Less: Fringe benefit expense	1,064,540.71	
Fringe benefit tax	639,112.34	
SSS, employer cost	116,315.40	
Pag-ibig, employer cost	11,500.00	
Medical health insurance	64,652.73	11,085,931.82
Salaries and wages per alphalist		12,776,904.24
Unaccounted salaries and wages		**1,690,972.42**

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[5] *Division Docket*, pp. 114-119.

6. Verification disclosed that income payments per alphalist compared to amounts reported in the financial statements is construed as unaccounted source of income, thus, considered as undeclared income pursuant to the ruling in the case of *Perez vs. CTA and CIR*, L-10507 dated May 30, 1958, to wit:

	Per FS	Per alphalist	Unaccounted
Professorial fees	5,438,782.69		
Management fees	29,109,210.41		
Total Professional fees per FS/ITR	34,547,993.10	37,945,718.09	3,397,724.99
Fringe benefit Expense	1,064,540.71	1,358,113.73	293,573.02
Unaccounted income payments			**3,691,298.01**

7. Verification disclosed that petitioner [respondent herein] failed to subject the total rentals to expanded withholding tax, hence, disallowed as deductions from gross income pursuant to Section 34 (K) of the 1997 Tax Code, as amended, to wit:

Income payments	Per F/S	Per Alphalist	Not subjected
Rentals	2,251,259.99	2,143,691.19	**107,568.80**

8. Verification disclosed that these aforementioned receipts per BIR Form No. 2307 were not fully reported in the Financial Statements, wherein the difference is considered as unaccounted income subject to 10% pursuant to Sections 106 and 108 of the 1997 Tax Code, as amended.

9. Verification disclosed that portion of rentals was not subjected to withholding tax, hence, assessed pursuant to Revenue Regulations No. 2-98, as amended, to wit:

Income payments	Not subjected	Rate	EWT due
Rentals	107,568.80	5%	5,378.44
			5,378.44

10. 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 duties, an assessment will not be disturbed. All presumptions are in favor of tax assessments. Dereliction on the part of petitioner [respondent herein] to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notices."

The former Second Division, in its Decision[6] dated December 26, 2011, cancelled and set aside the Formal Letter of Demand No. F43-018 assessing respondent for deficiency income tax and expanded withholding tax for being barred by prescription.

The Motion for Reconsideration filed by petitioner was denied for lack of merit in the Resolution[7] dated February 24, 2012.

Aggrieved, petitioner filed the subject *Petition for Review*[8].

In the Resolution[9] dated April 18, 2012, respondent was directed by the Court *En Banc* to file its Comment in this case. On May 17, 2012, respondent filed its Comment[10], and sought the dismissal of the subject Petition for Review for lack of merit.

Thereafter, both parties were ordered to file their respective memoranda[11]. Respondent filed its Memorandum[12] on July 11, 2012 while petitioner failed to file her memorandum within the period prescribed; hence, the above-captioned case was deemed submitted for decision on September 5, 2012.

Issues[13]

Petitioner raises the following issues:

I. WHETHER THE SECOND DIVISION OF THE HONORABLE COURT ERRED WHEN IT HELD THAT THE SUBJECT DEFICIENCY TAX ASSESSMENTS HAVE ALREADY PRESCRIBED.

II. WHETHER OR NOT RESPONDENT IS LIABLE TO PAY PETITIONER THE SUBJECT DEFICIENCY TAX ASSESSMENTS.

[6] *Supra*, Note 1.
[7] *Supra*, Note 2.
[8] *Rollo*, pp 5-17.
[9] *Rollo*, pp. 38-39.
[10] *Rollo*, pp. 45-67.
[11] *Rollo*, pp. 87-88.
[12] *Rollo*, pp. 89-126.
[13] *Rollo*, pp. 9-10.

Ruling of the Court

This Court shall resolve first the issue of whether the assessment notices were issued beyond the prescriptive period provided by law.

<u>Prescription</u>

Under Section 203 of the NIRC, internal revenue taxes must be assessed within three years counted from the period fixed by law for the filing of the tax return or the actual date of filing, whichever is later.[14]

Section 203 of the NIRC provides:

> "**SEC. 203.** ***Period of Limitation Upon Assessment and Collection.*** — Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided,* That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day."

In this case, respondent was being assessed for deficiency income tax and expanded withholding tax for calendar year 2003.

Income Tax

With respect to income tax, Section 77(B) of the NIRC provides that the annual corporate income tax return shall be filed on or before the fifteenth (15^{th}) day of April, or on or before the fourth (4th) month following the close of the fiscal year, as the case may be, to wit:

> "SEC. 77. *Place and Time of Filing and Payment of Quarterly Corporate Income Tax.* —

xxx xxx xxx.

[14] *Commissioner of Internal Revenue vs. FMF Development Corporation (G.R. No. 167765, June 30, 2008).*

> (B) *Time of Filing the Income Tax Return.* — The corporate quarterly declaration shall be filed within sixty (60) days following the close of each of the first three (3) quarters of the taxable year. The final adjustment return shall be filed on or before the fifteenth (15th) day of April, or on or before the fifteenth (15th) day of the fourth (4th) month following the close of the fiscal year, as the case may be."

Pursuant to the above provision, respondent had until April 15, 2004 to file its Annual Income Tax Return for calendar year 2003. Records show that petitioner filed its Annual Income Tax Return for calendar year 2003 on April 27, 2004[15] and pursuant to Section 203 of the NIRC, since the Annual Income Tax Return was filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. Consequently, petitioner had until April 27, 2007 to assess respondent for deficiency income tax.

However, the Formal Letter of Demand dated November 28, 2008 with Assessment Notices was received by respondent on December 8, 2008. Clearly, the assessment notice for deficiency income tax was issued beyond the three (3)-year prescriptive period.

Expanded Withholding Tax

With respect to expanded withholding taxes, Section 2.58(A)(2) of RR No. 2-98, as amended by RR No. 17-2003, provides that the expanded withholding tax return, shall be filed and payments should be made, within ten (10) days after the end of each month, except for taxes withheld for the month of December of each year, which shall be filed on or before January 15 of the following year, to wit:

> "Sec. 2.58. RETURNS AND PAYMENT OF TAXES WITHHELD AT SOURCE.
>
> (A) Monthly return and payment of taxes withheld at source. —
>
> xxx xxx xxx
>
> (2) WHEN TO FILE —

[15] *Division Docket, pp. 502-504 (Exhibit "A").*

> (a) For both large and non-large taxpayers, the withholding tax return, whether creditable or final (including final withholding taxes on interest from any currency bank deposit and yield or any other monetary benefit from deposit substitutes and from trust funds and similar arrangements) shall be filed and payments should be made, within ten (10) days after the end of each month, except for taxes withheld for the month of December of each year, which shall be filed on or before January 15 of the following year; xxx xxx xxx."

Pursuant to the above provision and Section 203 of the NIRC, for each of the monthly expanded withholding tax returns, petitioner had three years from the date of filing the respective monthly remittance returns or the period prescribed by law for filing the same, whichever comes later, within which to assess respondent for any deficiency expanded withholding tax. Since the last monthly remittance for calendar year 2003 was due on January 15, 2004, petitioner had until January 15, 2007, at the latest, within which to assess respondent for deficiency expanded withholding tax.

However, *We* note that there is nothing in the Petition for Review[16], Comment on the Petition for Review[17], respondent's Memorandum[18], and even the Joint Stipulation of Facts and Issues[19] that asserts when the monthly expanded withholding tax returns were filed. Neither were the dates of filing of the said returns put in issue by both parties. *We* also note that on record is BIR Form No. 1604-E[20] filed by respondent for calendar year 2003 which listed the dates when the monthly expanded withholding tax returns were filed.

Moreover, respondent erroneously counted the running of the prescriptive period for assessing expanded withholding tax for calendar year 2003 from April 27, 2004, the date when the annual income tax return was filed. Petitioner did not oppose the same.

Despite the foregoing, whether petitioner had until April 27, 2007 or January 15, 2007 to assess the respondent for deficiency expanded withholding tax, the Formal Letter of Demand dated November 28, 2008 with Assessment Notices was received by respondent on December 8, 2008. Clearly, the

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[16] *Supra*, Note 8.
[17] *Supra*, Note 10.
[18] *Supra*, Note 12.
[19] *Division Docket, pp. 205-211.*
[20] Annual Information Return of Creditable Income Taxes Withheld (Expanded)/Income Payments Exempt from Withholding Tax, *Division Docket*, p. 634 (*Exhibit "V"*).

assessment notice for deficiency expanded withholding tax was issued beyond the three (3)-year prescriptive period.

Petitioner does not deny that the assessment notices were issued beyond the three-year prescriptive period, but claims that the period was extended by the two waivers of the defense of prescription executed by respondent.

Waiver of the Defense of Prescription

Section 222 (b) of the NIRC, provides that an assessment notice may be issued after the lapse of the three-year prescriptive period, as follows:

> "SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* —
>
> xxx xxx xxx
>
> (b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon."

In the instant case, records show that respondent executed two (2) Waivers of the Defense of Prescription Under the Statute of Limitations of the NIRC, *to wit*:

1. Waiver dated March 22, 2006[21] extending the period to assess all internal tax liabilities until December 31, 2007; and

2. Waiver dated April 26, 2007[22] extending the period to assess income and withholding tax liabilities until December 31, 2008.

Respondent submits that the above waivers cannot suspend the running of the prescriptive period as said waivers were not made in accordance with the requirements of Revenue Memorandum Order (RMO) No. 20-90[23], more

[21] Division Docket, p.505 (*Exhibit "B"*).
[22] Division Docket, p.506 (*Exhibit "B-1"*).
[23] Proper Execution of the Waiver of the Statute of Limitations under the National Internal Revenue Code

particularly, the date of acceptance of the Commissioner was not indicated.

RMO No. 20-90 provides for the procedures to be followed in the proper execution of waivers. Pertinent portions thereof are quoted below:

> "1. The waiver must be in the form identified hereof. This form may be reproduced by the Office concerned but there should be no deviation from such form. The phrase "but not after ______ 19 ___" should be filled up. This indicates the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription. The period agreed upon shall constitute the time within which to effect the assessment/collection of the tax in addition to the ordinary prescriptive period.
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> 2. The waiver shall be signed by the taxpayer himself or his duly authorized representative. In the case of a corporation, the waiver must be signed by any of its responsible officials.
>
> Soon after the waiver is signed by the taxpayer, the Commissioner of Internal Revenue or the revenue official authorized by him, as hereinafter provided, shall sign the waiver indicating that the Bureau has accepted and agreed to the waiver. **The date of such acceptance by the Bureau should be indicated.** Both the date of execution by the taxpayer and date of acceptance by the Bureau should be before the expiration of the period of prescription or before the lapse of the period agreed upon in case a subsequent agreement is executed.
>
> 3. The following revenue officials are authorized to sign the waiver.
>
> x x x x
>
> 4. The waiver must be executed in three (3) copies, the original copy to be attached to the docket of the case, the second copy for the taxpayer and the third copy for the Office accepting the waiver. The fact of receipt by the taxpayer of his/her file copy shall be indicated in the original copy.
>
> 5. **The foregoing procedures shall be strictly followed.** Any revenue official found not to have complied with this Order resulting in prescription of the right to assess/collect shall be administratively dealt with." (*Emphasis supplied*)

After a careful examination of the subject waivers, *We* find the same to be defective and did not validly extend the original three-year prescriptive period because the date of acceptance by the Revenue District Officer was not indicated in the said waivers in violation of RMO No. 20-90.

The date of acceptance is necessary to fix with certainty if the waiver was actually agreed upon before the expiration of the three-year prescriptive period[24].

RMO No. 20-90 must be strictly followed. A waiver of the statute of limitations under the NIRC, to a certain extent being a derogation of the taxpayer's right to security against prolonged and unscrupulous investigations, must be carefully and strictly construed.[25]

However, petitioner asserts that the date of notarization of the waivers may also be considered as the date of acceptance of the Revenue District Officer considering that when the said waivers were notarized, it can be presumed that the parties appeared, signed and swore before the notary public.

We are not persuaded.

The date of notarization cannot be regarded as the date of acceptance for the same refers to different aspects, as the notary public is distinct from the Commissioner of BIR who is authorized by law to accept Waivers of the Statute of Limitations.[26]

Moreover, there is no indication that the Revenue District Officer was present during the notarization of the waivers. A plain reading of the "Acknowledgement" [27] portion reveals that only one person appeared before the notary public as shown by the use of the singular pronoun "he/she" and such person is the representative of respondent. Pertinent portions of the acknowledgement are quoted below:

> "x x x personally appeared before me _____ x x x known to me and to me known to be the same person who executed the foregoing waiver for and in behalf of the said taxpayer x x x."

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[24] *Philippine Journalists, Inc. vs. Commissioner of Internal Revenue* (G.R. No. 162852, December 16, 2004)
[25] *Supra*, Note 14, citing *Philippine Journalists, Inc. vs. Commissioner of Internal Revenue, ibid.*
[26] *Commissioner of Internal Revenue vs. Kudos Marketing Corporation* (C.T.A. E.B. No. 176, September 25, 2006).
[27] *Supra*, Notes 21 and 22.

Clearly, the person who appeared before the notary public is the one who "executed the foregoing waiver for and in behalf of the said taxpayer", which can only be taken to mean as referring to the representative of respondent and not the Revenue District Officer.

Furthermore, the Revenue District Officer could not have appeared before the notary public because the acceptance of the BIR, as a matter of procedure, cannot be had unless and until the same has been earlier notarized as manifested in Revenue Delegation Authority Order No. 05-01, *to wit*:

> "The authorized revenue official shall ensure that the waiver is duly accomplished and signed by the taxpayer or his authorized representative before affixing his signature to signify acceptance of the same. In case the authority is delegated by the taxpayer to a representative, the concerned revenue official shall see to it that such delegation is in writing and duly notarized. **The 'WAIVER' should not be accepted by the concerned BIR office and official unless duly notarized**." (*Emphasis supplied*)

Petitioner insists that the three (3) essential elements of a valid waiver pursuant to Article 6 of the New Civil Code, to wit: "(a) existence of a right; (b) the knowledge of the existence thereof; and (c) an intention to relinquish such right" are present in this case, hence, the subject waivers are valid and effective. *We* do not agree.

In *Commissioner of Internal Revenue vs. Intel Technology Philippines, Inc.*[28], this Court ruled that:

> "A waiver of the statute of limitations under the NIRC, is not an ordinary agreement, according to the Supreme Court, it is to a certain extent, is a derogation of the taxpayers' right to security against prolonged and unscrupulous investigations and must therefore be carefully and strictly construed. **It is governed not by the general provisions of the New Civil Code but by the National Internal Revenue Code** following the basic principle in statutory construction that a special law prevails over a general law." (*Emphasis supplied*)

Petitioner also argues that respondent is already estopped from impugning the validity of the waivers that it has voluntarily executed. Again, *We* are not persuaded.

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[28] C.T.A. E.B. Case No. 379, November 18, 2008 [citing *Ouano v. Court of Appeals*, G.R. No. 129279, March 4, 2003 (citing *People v. Donato*, G.R. No. 72969, June 5, 1991)].

The Supreme Court already ruled that estoppel does not apply in this kind of case, to wit:

> "**The doctrine of estoppel cannot be applied in this case as an exception to the statute of limitations on the assessment of taxes considering that there is a detailed procedure for the proper execution of the waiver, which the BIR must strictly follow.** As we have often said, the doctrine of estoppel is predicated on, and has its origin in, equity which, broadly defined, is justice according to natural law and right. As such, the doctrine of estoppel cannot give validity to an act that is prohibited by law or one that is against public policy. It should be resorted to solely as a means of preventing injustice and should not be permitted to defeat the administration of the law, or to accomplish a wrong or secure an undue advantage, or to extend beyond them requirements of the transactions in which they originate. Simply put, the doctrine of estoppel must be sparingly applied.
>
> Moreover, the BIR cannot hide behind the doctrine of estoppel to cover its failure to comply with RMO 20-90 and RDAO 05-01, which the BIR itself issued. As stated earlier, the BIR failed to verify whether a notarized written authority was given by the respondent to its accountant, and to indicate the date of acceptance and the receipt by the respondent of the waivers. **Having caused the defects in the waivers, the BIR must bear the consequence. It cannot shift the blame to the taxpayer.** To stress, a waiver of the statute of limitations, being a derogation of the taxpayer's right to security against prolonged and unscrupulous investigations, must be carefully and strictly construed."[29] (*Emphasis supplied, citations omitted*)

Due to the defect in the waivers, the period to assess taxes was not extended. Consequently, the assessments were issued by the BIR beyond the three-year period prescribed by law and are, therefore, void.

In view of the above ruling, the Court finds it no longer necessary to dwell on the other issues, more particularly, the merits of the assessments. /

[29] *Commissioner of Internal Revenue vs. Kudos Metal Corporation* (G.R. No. 178087, May 5, 2010).

WHEREFORE, premises considered, the instant Petition for Review is hereby **DISMISSED** for lack of merit.

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

(No Part)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice