

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

SPECIAL FIRST DIVISION

**PERF RESTAURANTS, INC. as
successor-in-interest of PHILKING
RESTAURANTS DEVELOPMENT
CORPORATION,**

Petitioner,

- versus -

**COMMISSIONER OF INTERNAL
REVENUE,**

Respondent.

C.T.A. CASE NO. 7334

Members:

**ACOSTA, Chairperson
BAUTISTA, and
CASANOVA, JJ.**

Promulgated:

MAY 05 2010 10:05 a.m.

X ----- X

DECISION

BAUTISTA, J.:

Before this Court is a Petition for Review, praying for a judgment canceling and withdrawing the Warrant of Distrainment and Levy dated August 17, 2005, including the Formal Letter of Demand and Assessment Notice, issued against petitioner for alleged deficiency withholding tax for taxable year 2000 in the total amount of P1,091,580.75.

Philking Restaurants Development Corporation (hereinafter referred to as "Philking Restaurants") is a corporation organized and existing under Philippine



laws, with current principal place of business located at 2/F Topy Building, No. 3 Economia Street, Bagumbayan, Quezon City.¹

On July 19, 2005, the Securities and Exchange Commission approved the merger of Philking Restaurants Development Corporation, as the absorbed corporation, and PERF Restaurants, Inc., as the surviving corporation. PERF Restaurants, Inc. assumed all the rights, interests and liabilities of Philking Restaurants as of the effective date of the merger on July 19, 2005.²

Sometime in December 2001, Philking Restaurants transferred its principal office from the 18/F JMT Corporate Condominium, ADB Avenue, Ortigas Center, Pasig City, to its new and current principal place of business located at 2/F Topy Building, No. 3 Economia Street, Bagumbayan, Quezon City.³

As a result of the change in the principal place of business, petitioner wrote the Bureau of Internal Revenue (BIR) Pasig Revenue District Office (RDO) a letter dated May 9, 2002, requesting approval of the transfer of petitioner's tax registration from RDO No. 043-Pasig City to RDO No. 040-Quezon City.⁴

Revenue Officer Renato M. Atos recommended to Mr. Raul Vicente L. Recto, the Revenue District Officer of RDO No. 043-Pasig City, the approval of petitioner's application to transfer its office registration from RDO No. 043-Pasig City to RDO No. 040-Quezon City, considering that petitioner has submitted all the required documents. The said recommendation was duly approved by Revenue District Officer Raul Vicente L. Recto.⁵

¹ Par. 1, Joint Stipulation of Facts, Joint Stipulation of Facts and Restatement of Issues (JSFRI), docket, p. 119

² Annex "B", Petition for Review, docket, pp. 29-44; par. 2, Joint Stipulation of Facts, JSFRI, docket, pp. 119-120

³ Par. 3, Joint Stipulation of Facts, JSFRI, docket, p. 120

⁴ Exhibit "B"

⁵ Exhibit "C"



On February 1, 2002, Assistant Revenue District Officer Cesar Charlie C. Lim issued Transfer Confirmation Notice No. OCN 3TR0000023259, confirming the request of Philking Restaurants to transfer its tax registration from RDO No. 043 to RDO No. 040.⁶

On January 20, 2004, respondent, through Regional Director Nestor S. Valeroso, issued Formal Letters of Demand and Assessment Notice against Philking Restaurants for deficiency withholding tax in the sum of P939,580.73, plus compromise penalty of P152,000.00, for taxable year 2000. The address in said Formal Letters of Demand and Assessment Notice was 18th/F JMT Condominium, ADB Ave., Ortigas Center, Pasig City.⁷

On May 12, 2004, Revenue District Officer Raul Vicente L. Recto issued a Preliminary Collection Letter to petitioner, addressed at 18th/F JMT Condominium, Ortigas Center, Pasig City.⁸

On June 17, 2005, respondent, through Revenue District Officer Romeo E. Naranjo, issued First Notice Before Issuance of Warrant of Distrainment and Levy against Philking Restaurants for the settlement of its supposed outstanding tax liability, addressed at No. 3 Topy Building, Economia Street, Bagumbayan, Quezon City. The same was received by petitioner on June 23, 2005.⁹

In response thereto, Mr. Abundio B. Jabines, Jr., Chief Finance Officer of Philking Restaurants, wrote Revenue District Officer Romeo E. Naranjo on June 28, 2005 and pointed out that no Assessment Notice or Formal Letter of Demand was received prior to its receipt of the First Notice Before Issuance of Warrant of

⁶ Exhibits "A" and "C-1"

⁷ Exhibits "D", "E", and "F"

⁸ Exhibit "H"

⁹ Exhibits "I" and "I-1"



Distrainment and Levy. The letter also protested the Assessment Notice dated January 20, 2004, but received only on June 23, 2005.¹⁰

On August 16, 2005, petitioner received a Final Notice Before Seizure dated August 11, 2005, issued by Revenue District Officer Romeo E. Naranjo.¹¹

On August 17, 2005, Revenue District Officer Romeo E. Naranjo issued a Warrant of Distrainment and Levy to collect the purported deficiency withholding tax of petitioner for taxable year 2000; which was received by petitioner on September 6, 2005. The address of petitioner stated therein was No. 3 Topy Economia, Bagumbayan, Quezon City.¹²

On September 14, 2005, petitioner wrote the Revenue District Officer of Revenue Region No. 7, RDO No. 040-Quezon City, requesting the cancellation of the alleged deficiency withholding tax assessment for late remittance in the amount of P1,091,580.73 and the cancellation/withdrawal of the Warrant of Distrainment and Levy due to non-observance of due process requirements and prescription.¹³

Petitioner filed the instant Petition for Review on October 6, 2005, as the administrative appeal remains unresolved.

In his Answer filed on January 4, 2006, respondent raised the following Special and Affirmative Defenses: (1) lack of cause of action; (2) assessment is based on the late remittance of withholding taxes for taxable year 2000; (3) assessment is valid and in accordance with law; (4) assessment is *prima facie* presumed correct and made in good faith; (4) petitioner has the burden to prove

¹⁰ Exhibit "K"

¹¹ Par. 11, Joint Stipulation of Facts, JSFRI, docket, p. 121

¹² Exhibit "L"

¹³ Annex "N", Petition for Review, docket, pp. 57-66; par. 13, Joint Stipulation of Facts, JSFRI, docket, pp. 121-122

that the assessment is void; and (5) procedures for the issuance of pre-assessment notices and assessment notices were observed.¹⁴

Pre-trial conference was held. Thereafter, trial proceeded where the parties presented their respective evidence.

The case was submitted for decision on May 7, 2009, after petitioner filed its Memorandum on April 30, 2009 and respondent failed to file his Memorandum despite notice.¹⁵

The issues¹⁶ submitted for this Court's resolution are as follows:

"1. Whether or not there was a valid assessment notice issued by the Respondent addressed to Petitioner's new and current principal place of business located at 2/F Topy Building, No. 3 Economia Street, Bagumbayan, Quezon City within the prescriptive period allowed by law to assess deficiency taxes;

2. Whether or not the Respondent Commissioner of Internal Revenue or his duly authorized representative/s observed the requirements of 'DUE PROCESS' in notifying the Petitioner of the aforementioned deficiency withholding tax assessment for year 2000 in accordance with Section 228 of the Tax Code of 1997 as implemented by Revenue Regulations No. 12-99 and other pertinent laws and regulations;

3. Whether or not the right of the Respondent to assess deficiency withholding tax for late remittance for year 2000 has prescribed already pursuant to Section 203 and 223 of the Tax Code of 1997;

4. Whether or not the Petitioner filed a notice or application with the BIR to transfer its principal place of business from 18/F JMT Corporate Condominium, ADB Avenue, Ortigas Center, Pasig City, to its new and current principal place of business located at 2/F Topy Building, No. 3 Economia Street, Bagumbayan, Quezon City;

5. Whether or not the Petitioner's Chief Finance Officer, Mr. Abundio B. Jabines, Jr. informed BIR Revenue Officer, Ms. Margarita R. Jose of RDO No. 40 during their meeting on June 27, 2005 that Petitioner has not received a copy of the following documents in relation to the aforementioned deficiency withholding tax for late

¹⁴ Docket, p. 81

¹⁵ Resolution dated May 7, 2009, docket, p. 339

¹⁶ Docket, pp. 122-124

remittance for taxable year 2000 at its new and current place of business located at 2/F Topy Building, No. 3 Economia Street, Bagumbayan, Quezon City, viz.:

- (a) Preliminary Assessment Notice (PAN);
- (b) Formal Letter of Demand/Final Assessment Notice (FAN);
- (c) Notice for informal conference.

6. Whether or not during the aforementioned June 27, 2005 meeting between Petitioner's Chief of Finance Officer, Mr. Jabines and BIR Examiner Ms. Jose, the Petitioner informed the BIR that Petitioner first became aware of the aforementioned alleged deficiency withholding tax assessment for late remittance for year 2000 upon Petitioner's receipt by registered mail last June 23, 2005 of the *'First Notice Before Issuance of Warrant and Levy'* at its current business address at 2/F Topy Building, No. 3 Economia Street, Bagumbayan, Quezon City;

7. Whether or not the Petitioner secured from the BIR docket during the aforementioned June 27, 2005 meeting, copies of the following documents pertaining to the alleged deficiency withholding tax for late remittance for year 2000, viz.:

- (a) Assessment Notice dated June 20, 2004 addressed to the old business address of the Petitioner at 18/F JMT Condominium, ADB Avenue, Ortigas Center, Pasig City (Annex 'G' of Petition for Review);
- (b) Formal Letter of Demand dated January 20, 2004 addressed to the old business address of Petitioner (Annex 'H' of Petition for Review);
- (c) Preliminary Collection Letter dated May 12, 2004 addressed to the old business address of Petitioner (Annex 'I' of Petition for Review); and
- (d) BIR letter dated September 14, 2004 issued by Revenue Officer No. 1, Mr. John B. Bajador of Revenue Region No. 7, RDO No. 43-Pasig City (Annex 'J' of Petition for Review).

8. Whether or not the Petitioner received a written notice from the Respondent for informal conference; Preliminary Assessment Notice or Formal Letter of Demand relating to the aforementioned deficiency withholding tax for late remittance (year 2000) at its new and current principal place of business located at 2/F Topy Building, No. 3 Economia Street, Bagumbayan, Quezon City within the three (3) year prescriptive period to assess under Section 203 of the Tax Code, as amended and Revenue Regulations No. 12-99;

9. Whether or not at the time of the filing of the instant Petition for Review, the 180-day period from the filing of the protest



allotted by law for the Commissioner to resolve the protest has not yet lapsed.

10. When is the withholding tax withheld by the Petitioner on royalties paid to Petitioner's licensor/franchisor, Burger King Corporation, due to be remitted to the BIR under the existing law/s?"

After weighing the respective arguments of the parties, the evidence on record, and the facts established, this Court rules in favor of petitioner.

Due process requires that petitioner must actually receive the Pre-Assessment Notice and the Final Assessment Notice. In the case of **Estate of the Late Juliana Diez Vda. De Gabriel vs. Commissioner of Internal Revenue**¹⁷, the Supreme Court ruled:

"xxx (D)ue process requires at the very least that such notice actually be received. In *Commissioner of Internal Revenue v. Pascor Realty and Development Corporation*, we had occasion to say:

An assessment contains not only a computation of tax liabilities, but also a demand for payment within a prescribed period. It also signals the time when penalties and interests begin to accrue against the taxpayer. To enable the taxpayer to determine his remedies thereon, due process requires that it must be served on and received by the taxpayer.

In *Republic v. De le Rama*, we clarified that, when an estate is under administration, notice must be sent to the administrator of the estate, since it is the said administrator, as representative of the estate, who has the legal obligation to pay and discharge all debts of the estate and to perform all orders of the court. In that case, legal notice of the assessment was sent to two heirs, neither one of whom had any authority to represent the estate. We said:

The notice was not sent to the taxpayer for the purpose of giving effect to the assessment, and said notice could not produce any effect. In the case of *Bautista and Corrales Tan v. Collector of Internal Revenue* ... this Court had occasion to state that 'the assessment is deemed made when the notice to this effect is released, mailed or sent to the taxpayer for the purpose of giving effect to said

¹⁷ G.R. No. 155541, January 27, 2004



assessment.' It appearing that the person liable for the payment of the tax did not receive the assessment, the assessment could not become final and executory. xxx"

The above ruling of the High Court corroborates Section 228 of the National Internal Revenue Code (NIRC) of 1997, which reads:

"SEC. 228. *Protesting of Assessment.* - When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however,* That a preassessment notice shall not be required in the following cases:

(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.

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

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

Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as



may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable." (*Emphasis supplied*)

In **Commissioner of Internal Revenue vs. Pascor Realty and Development Corporation**¹⁸, the Supreme Court issued the following explanations:

"To start with, **an assessment must be sent to and received by a taxpayer, and must demand payment of the taxes described therein within a specific period.** Thus, the NIRC imposes a 25 percent penalty, in addition to the tax due, in case the taxpayer fails to pay the deficiency tax within the time prescribed for its payment in the notice of assessment. Likewise, an interest of 20 percent *per annum*, or such higher rate as may be prescribed by rules and regulations, is to be collected from the date prescribed for its payment until the full payment.

The issuance of an assessment is vital in determining the period of limitation regarding its proper issuance and the period within which to protest it. Section 203 of the NIRC provides that internal revenue taxes must be assessed within three years from the last day within which to file the return. Section 222, on the other hand, specifies a period of ten years in case a fraudulent return with intent to evade was submitted or in case of failure to file a return. Also, Section 228 of the same law states that said assessment may be protested only within thirty days from receipt thereof. Necessarily, the taxpayer must be certain that a specific document constitutes an assessment. Otherwise, confusion would arise regarding the period within which to make an assessment or to protest the same, or whether interest and penalty may accrue thereon.

It should also be stressed that the said document is a notice duly sent to the taxpayer. Indeed, an assessment is deemed made

¹⁸ G.R. No. 128315, June 29, 1999



only when the collector of internal revenue releases, mails or sends such notice to the taxpayer." (*Emphasis supplied*)

Section 228 of the NIRC of 1997 operates for the benefit of both the taxpayer and the government. Said Section guarantees a taxpayer due process before it may be held liable to pay tax found due. On the other hand, the government is given an opportunity to assess and collect internal revenue taxes, interests, and penalties from delinquent taxpayers or tax evaders within the prescriptive period.

It should be emphasized that petitioner properly notified respondent, through BIR Pasig Revenue District Office, of the change of its principal place of business, and that it requested the approval of the transfer of its tax registration from RDO No. 043-Pasig City to RDO No. 040-Quezon City.¹⁹

As stipulated by the parties and supported by evidence, Revenue Officer Renato M. Atos recommended the approval of petitioner's application to transfers its office registration; which was also duly approved by Revenue District Officer Raul Vicente L. Recto.²⁰ Assistant Revenue District Officer Cesar Charlie C. Lim likewise issued Transfer Confirmation Notice No. OCN 3TR0000023259 dated February 1, 2002, for the purpose of confirming the said transfer.²¹ Therefore, respondent should have issued and sent the Final Assessment Notice to petitioner's new place of business, not to its old business address.

This Court further notes that respondent likewise failed to properly send a Preliminary Assessment Notice²² to petitioner.



¹⁹ Exhibit "B"

²⁰ Exhibit "C"

²¹ Exhibits "A" and "C-1"

²² Exhibit "1-B"

In **BPI Data Systems Corporation (formerly Filipinas Management and Leasing Services, Inc.) vs. Commissioner of Internal Revenue**²³, this Court ruled against respondent when he failed to give the taxpayer a chance to respond to a pre-assessment notice before issuing an assessment, to quote:

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

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

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



²³ C.T.A. Case No. 4530, January 12, 1994

In **Caltex (Philippines), Inc. vs. Commissioner of Internal Revenue**²⁴, this Court declared that respondent committed an arbitrary act tantamount to a violation of petitioner's right to procedural due process when respondent failed to issue prior notice for an informal conference and a pre-assessment notice.

Finally, in **A Brown Co., Inc. vs. Commissioner of Internal Revenue**²⁵, this Court emphasized:

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

As there were no Preliminary Assessment Notice and Final Assessment Notice sent to petitioner, the subject assessments are void. In **Commissioner of Internal Revenue vs. Azucena T. Reyes**²⁶, the Supreme Court categorically ruled that if there is no valid notice sent, the assessment is void. The reason is that the "law imposes a substantive, not merely a formal, requirement. To proceed heedlessly with tax collection without first establishing a valid assessment is evidently violative of the cardinal principle in administrative investigations: that taxpayers should be able to present their case and adduce supporting evidence".

A void assessment cannot give rise to an obligation to pay deficiency taxes, and it divests the taxing authority of the right to collect them.²⁷

In view of the foregoing finding and discussion, the resolution of the other issues is no longer necessary.

²⁴ C.T.A. Case No. 5664, October 4, 2000

²⁵ C.T.A. Case No. 6357, June 7, 2004

²⁶ G.R. Nos. 159694 and 163581, January 27, 2006

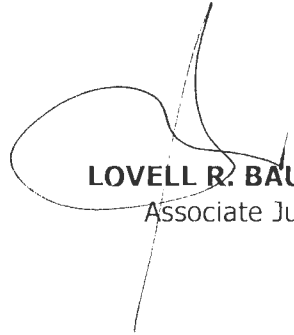
²⁷ BASF Coatings + Inks Philippines, Inc. vs. Commissioner of Internal Revenue, citing FMF Development Corporation vs. Commissioner of Internal Revenue, CA-G.R. SP No. 73973, February 23, 2004



WHEREFORE, the instant Petition for Review is hereby **GRANTED**.

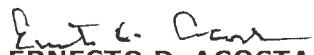
Accordingly, the Warrant of Dstraint and Levy dated August 17, 2005 and the Formal Letter of Demand and Assessment Notice dated January 20, 2004, issued against petitioner for alleged deficiency withholding tax for taxable year 2000 are hereby **CANCELLED**.

SO ORDERED.



LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

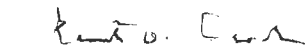


ERNESTO D. ACOSTA
Presiding Justice

ON LEAVE
CAESAR A. CASANOVA
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's Division.



ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division