REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB No. 721
(CTA Case No. 7667)

- versus-

Present:
Acosta, ***PJ,***
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Palanca-Enriquez,
Fabon-Victorino,
Mindaro-Grulla, and
Cotangco-Manalastas, ***JJ.***

UNITED PARCEL SERVICE CO.,
(Philippine Branch)
Respondent.

Promulgated:
MAY 16 2012 Appolinario 9:00 a.m.

x- x

DECISION

COTANGCO-MANALASTAS, *J.*:

On appeal before the Court *En Banc* by way of a *Petition for Review*[1] filed by registered mail on February 9, 2011 by the Commissioner of the Bureau of Internal Revenue (BIR), pursuant to *Section 18 of Republic Act (R.A.) No. 1125, as amended by Section 11 of R.A. No. 9282, and Section 3(b), Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA)*, is the *Decision*[2] and *Resolution*[3] promulgated by the

[1] *Rollo*, pp. 8-26.
[2] *Rollo*, pp. 28-50, Decision dated August 18, 2010 penned by Associate Justice Lovell R. Bautista in the case entitled *United Parcel Service Co. (Philippine Branch), vs. Commissioner of Internal Revenue*, CTA Case No. 7667.

Special First Division of this Court on August 18, 2010 and January 5, 2011, respectively. Dispositive portions of the assailed *Decision* and *Resolution* are as follows:

Decision dated August 18, 2010:

> "**WHEREFORE,** premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, the Warrant of Distraint and/or Levy dated June 25, 2007 is hereby **CANCELLED** and **SET ASIDE** for having been issued pursuant to an invalid assessment.
>
> **SO ORDERED**."

Resolution dated January 5, 2011:

> "**WHEREFORE,** finding no cogent reason to disturb, reverse or modify the Decision dated August 18, 2010, respondent's Motion for Reconsideration is hereby **DENIED** for lack of merit.
>
> **SO ORDERED**."

Petitioner is praying for the setting aside of the above-quoted *Decision* and *Resolution* and that respondent be ordered to pay for the deficiency final withholding tax (FWT) for taxable year 2000 in the amount of P2,232,137.06 plus 25% surcharge for late payment and 20% interest per annum from January 28, 2005 (due date indicated in the Assessment Notice) until fully paid pursuant to Sections 248 and 249 of the National Internal Revenue Code (NIRC) of 1997, plus Compromise Penalty in the amount of P20,000 pursuant to Revenue Memorandum Order (RMO) No. 1-90 in relation to RMO No. 26-86.

[3] *Rollo,* pp. 51-54, Resolution dated January 5, 2011 penned by Associate Justice Lovell R. Bautista in the case entitled *United Parcel Service Co. (Philippine Branch), vs. Commissioner of Internal Revenue,* CTA Case No. 7667.

ANTECEDENT FACTS

The facts, as found by the Special First Division of this Court are as follows:

'"Petitioner United Parcel Service Co. (Philippine Branch) is a duly registered Philippine branch of United Parcel Service Co., a foreign corporation organized and existing under the laws of the State of Delaware, United States of America. Petitioner is registered with the Securities and Exchange Commission, and is licensed to coordinate the movement of air freight, and to carry property, cargo, and mail as a certificated international US carrier. Its office is located at UPS Intra-Asia Hub, Civil Aviation Complex, Diosdado Macapagal International Airport, Clark Special Economic Zone, Clark Field, Pampanga.

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR), empowered to perform the duties of said office, including, among others, the power to assess and collect all national internal revenue taxes, fees and charges, and to enforce all forfeitures, penalties, and fines connected therewith. He holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

Sometime in the middle of the year 2002, petitioner received an Audit Notice No. OCN9AN0000005184 dated June 26, 2002, authorizing the Revenue Officers named therein to examine all of petitioner's internal revenue taxes for the period covering January 1, 2000 to December 31, 2000.

In compliance thereto, petitioner sent to the BIR the required books of accounts and other related records concerning taxable year 2000, which was received by Revenue Officer Porfirio T. Dones on October 15, 2002.

As a result of the examination conducted by the BIR, petitioner received a Notice of Findings dated February 4, 2004, where petitioner was found to have incurred deficiency on expanded withholding tax, final withholding tax on Branch Profit Remittances, and documentary stamp tax.

Petitioner, through its Manager Benjamin S. Solis, executed a Waiver of the Defense of Prescription under the Statute of the National Internal Revenue Code on February 4, 2004.

Thereafter, petitioner sent its position paper contesting the above-mentioned Notice of Findings, which was received by the BIR on March 15, 2004. In reply thereto, on March 23, 2004, the BIR requested petitioner to submit the necessary documents and other pieces of evidence that would substantiate its claims. In lieu of the requested documents and evidence, petitioner sent a Letter/Reply dated April 26, 2004 to the BIR, where it emphasized the provisions of law and other rulings in support of its arguments.

The BIR issued a Preliminary Assessment Notice (PAN) dated September 17, 2004 against petitioner. The PAN stated that petitioner has deficiency income tax, expanded withholding tax, and final withholding tax on Branch Profit Remittances amounting to P6,473,902.64, P255,377.40, and P1,946,974.84, respectively. In the Details of Discrepancies attached to the PAN, the BIR requested petitioner to execute another Waiver of the Statute of Limitations to give respondent more time to conduct its tax investigation.

On October 12, 2004, petitioner filed a protest letter dated October 11, 2004 to the PAN issued by the BIR. Petitioner countered that the assessment on deficiency income tax and final withholding tax has no legal or factual basis. Likewise, petitioner manifested that it would be willing to pay the assessed expanded withholding tax upon receipt of the appropriate notice indicating the correct amount and the date of payment.

Respondent then sent a reply/collection letter dated December 13, 2004, to the protest filed by petitioner, requesting petitioner to pay the amount of P261,102.00 for the previously assessed expanded withholding tax liability; which petitioner subsequently paid on December 28, 2004.

On January 7, 2005, petitioner received a Formal Assessment Notice (FAN) dated December 28, 2004, assessing petitioner of the following alleged deficiency taxes:

Assessment No.	Tax Type	Amount	Period
IT-5184-00-04-1002	Income Tax	6,712,775.69	2000
WE-5184-00-04-1002	Expanded Withholding Tax	264,585.27	2000
WF-5184-00-04-1002	Final Withholding Tax	2,007,973.74	2000
MC-5184-00-04-1002	Penalty	20,000.00	2000

On January 28, 2005, petitioner filed with respondent its protest letter on the aforesaid assessments.

In a letter dated February 17, 2005, signed by Acting Regional Director Anselmo G. Adriano, the BIR acknowledged receipt of the proof of payment (BIR Form No. 0605 and BTR-BIR Payment Slip dated December 28, 2004) of the assessed deficiency expanded withholding tax amounting to P261,102.00, and informed petitioner that the entire docket of the case, together with the protest, was forwarded to Revenue District Office (RDO) No. 51-Pasay City.

On March 4, 2005, petitioner received a Tax Verification Notice (TVN) No. 2002-00125323 dated March 1, 2005, as well as a letter signed by Revenue Officer Porfirio T. Dones, which was noted by Group Supervisor Teodoro V. Malabanan, Jr., informing petitioner that the protest it previously filed was granted; thus, approving petitioner's request for reinvestigation.

In response to the said TVN and letter, petitioner sent a letter on April 15, 2005, reiterating its position that it is not liable for any assessed deficiency taxes as alleged in the Formal Assessment Notice. To support its contentions, petitioner attached to the said letter a copy of the RP-US Tax Treaty, International Tax Affairs Division (ITAD) Ruling No. 120-01, Income Tax Return, Land Bank of the Philippines Deposit Slip, and BIR Form No. 0605.

Petitioner, through the Law Offices of Perlas, De Guzman, Antonio, and Herbosa, sent a letter dated August 25, 2005, to the BIR in order to inquire about the status of the company's pending protest. In reply thereto, the BIR, through Acting Regional Director Anselmo G. Adriano, sent a letter dated September 26, 2005, which was duly received by aforesaid counsel on September 29, 2005. In the said letter, the BIR informed petitioner that only the issue on final withholding tax on Branch Profit Remittance was forwarded to the Legal Division of the BIR and that the assessment on deficiency income tax and expanded withholding tax had been cancelled.

Respondent issued his Final Decision on Disputed Assessment dated March 13, 2006, which was purportedly mailed to petitioner as evidenced by a Certified True Copy of the transmittal form. However, petitioner denied ever receiving the mailed copy of the said Final Decision on Disputed Assessment.

Respondent then issued a Warrant of Distraint and/or Levy dated June 25, 2007, for petitioner's alleged deficiency taxes, to wit:

Assessment No.	**Tax Type**	**Period Covered**	**Amount**
IT-5184-00-04-1002	Income Tax	2000	P6,712,775.69
WE-5184-00-04-1002	Expanded Withholding Tax	2000	264,585.27
WF-5184-00-04-1002	Final Withholding Tax	2000	2,007,973.74
	TOTAL		**P8,985,334.70**

Consequently, upon receipt of the above-mentioned warrant on July 9, 2007, petitioner filed the instant Petition for Review on August 8, 2007, praying for the cancellation and setting aside of the said Warrant of Distraint and/or Levy.

In his Answer 21 filed on October 5, 2007, respondent interposed the following Special and Affirmative Defenses:

> "8. Section 222 of the 1997 Tax Code authorizes the taxpayer and the government to extend by mutual agreement the prescriptive periods for the assessment and collection of taxes. Section 222 of the 1997 Tax Code provides, thus:
>
> '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.
>
> xxx xxx xxx'
>
> 9. The Waiver of Statute of Limitations was executed by and between Mr. Benjamin S. Solis, General

Manager of United Parcel Service Company (Philippine Branch) and the duly delegated signatory, Elenita B. Quimosing, Revenue District Officer, RDO 51, Pasay City. It was executed on February 4, 2004 and specified the period of extension agreed upon, which is December 31, 2004. Petitioner alleges that since the date of acceptance by the BIR and the fact of receipt of the waiver by petitioner were not indicated therein, such waiver becomes invalid. Respondent submits that such is not the case.

10. As to date of acceptance, the import of this requirement is to determine if the waiver was agreed upon by the parties before the expiration of the three-year period. Such rationale was provided in the case of PHILIPPINE JOURNALISTS, (SIC) INC. PETITIONER, VERSUS COMMISSIONER OF INTERNAL REVENUE, Respondent. (G.R. No. 162852 December 16, 2004) wherein it was stated:

'The other defect noted in this case is the date of acceptance which makes it difficult to fix with certainty if the waiver was actually agreed before the expiration of the three year prescriptive period.'

Thus, the evil which the date of acceptance address is the chance that the actual meeting of the minds took place beyond the period of limitation, therefore, in such a case, there is no more existent, valid period of assessment to extend as the period had prescribed. In this case, notwithstanding the lack of a definite date of acceptance, it is easy to determine if the waiver was actually agreed upon before the expiration of the three-year prescriptive period.

11. As appearing on the face of the waiver, petitioner's and respondent's authorized representatives duly executed the waiver and acknowledged the same before a notary public. Hence, contrary to its allegations, the waiver was duly received by the petitioner and duly accepted by respondent on the same date the waiver was executed and acknowledged before a notary public.

xxx xxx xxx

12. Section 228 of the 1997 Tax Code provides for the period within which to appeal the decision of respondent denying taxpayer's protest, Section 228 of the 1997 Tax Code provides, thus:

'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)

13. On December 28, 2004, respondent issued a Formal Assessment Notice with attached Details of Discrepancies and Assessment Notices bearing the following

Assessment Nos. i.e., IT-5184-00-04-1002, WE-5184-00-04-1002, WF-5184-00-04-1002 and MC-5184-00-04-1002. On January 28, 2005, petitioner filed a protest letter requesting for reinvestigation/reevaluation.

14. Thereafter, respondent issued a Final Decision on Disputed Assessment (FDDA) dated March 13, 2006. In the said decision, respondent discussed the results of its reinvestigation. Consequently, the assessment on income tax was dropped and cancelled. Further, since the deficiency expanded withholding tax was paid by petitioner, the same has been cancelled. On the other hand, petitioner's deficiency Final Withholding Tax on Branch Profit Remittance and compromise penalty were sustained.

15. Petitioner had thirty (30) days from receipt of the FDDA to appeal the same before the Court of Tax Appeals, but it failed to do so. It is only on August 8, 2007 that petitioner filed its petition for review before this Honorable Court. Obviously, the remedy of the taxpayer to appeal the FDDA had lapsed. Hence, the assessment has become final, executory and demandable.

xxx xxx xxx

16. Assuming for the sake of argument that the assessment has not become final, executory and demandable, petitioner is liable to pay the 15% Branch Profit Remittance Tax under Section 28(A) (5) of the 1997 Tax Code. Section 28 (A) (5) of the 1997 Tax Code clearly provides as follows:

'Section 28. Rates of Income Tax on Foreign Corporations. —

(A) Tax on Resident Foreign Corporations. —

(5) Tax on Branch Profits Remittances. — Any profit remitted by a branch to its head office shall be subject to a tax of fifteen (15%) which shall be based on the total profits applied or earmarked for remittance without any deduction for the tax component thereof (except those activities which are registered with the Philippine Economic Zone Authority).

The tax shall be collected and paid in the same manner as provided in Sections 57 and 58 of this Code: . . . .' (Emphasis supplied)

17. It is apparent from the foregoing that a resident foreign corporation is subject to tax at 15% on any profit remitted to its head office, based on the total profits applied or earmarked for remittance without any deduction for the tax component thereof, with exception to those activities which are registered with the Philippine Economic Zone Authority.

18. Based upon the foregoing, since the profit remittance of petitioner does not fall under the said exception above, the total profit it has applied or earmarked for remittance to its head office, without any

deduction for the tax component thereof, as declared in its Audited Financial Statement for taxable year 2000, in the amount of P6,509,118.00 should be subject to the 15% branch profit remittance tax under Section 28 (A) (5) of the 1997 Tax Code.

19. Hence, its argument that being a branch of an International Air Carrier, it is not subject to Final Tax on its profit remittance under Section 28 (A) (5) of the 1997 Tax Code, is bereft of any factual and legal basis. The cited provisions of Article 11 par. 6 of the RP-US Treaty and Reservations paragraphs 2 and 3, as well as Supreme Court decision in the case of Bank of America NT & SA, vs. CIR, G.R. Nos. 103092 and 103106, July 21, 1994 and BIR Ruling Nos. 211-85 and 213-82 dated November 29, 1985 and July 13, 1982, respectively, are erroneous, misplaced, irrelevant and inapplicable to the instant case since the facts and issues involved in the cited decision and BIR Rulings are remote and do not squarely fall in the case at bar.

20. Further, its argument that it did not actually remit any branch profit nor it had applied or earmarked any profit for remittance is clearly a self-serving allegation and bereft of any factual basis. Its Audited Financial Statement for taxable year 2000, clearly belied its allegations, specifically under Note 5 on Home Account which disclosed a net income of P6,509,118.00 out of the total assigned capital transactions to its head office, which partakes the nature of an indirect remittances to its head office.

21. This finds support under BIR Ruling No. 039-2005 dated January 28, 2005, wherein the BIR ruled that:

'Increasing the head office's assigned capital to its Philippine Branch by transferring net profits of the branch to the assigned capital account shall be subject to the 15% branch profit remittance tax. Although the profit from operation will not be physically remitted to the head office abroad, the transfer to assigned capital is an indirect remittance to the head office.' (Emphasis supplied)

22. Furthermore, settled is the rule in taxation that laws granting exemption from tax are construed in strictissimi juris against the taxpayer and liberally in favor of the taxing power. Taxation is the rule and exemption is the exception. The burden of proof rest upon the party claiming exemption to prove that it is in fact covered by the exemption so claimed. (Commissioner of Internal Revenue vs. Mitsubishi Metal Corp., et al., G.R. Nos. 54908 and 80041, January 22, 1990).

23. In this case, since petitioner failed to prove that indeed, it is exempt from the operation of Section 28 (A) (5) of the 1997 Tax Code, therefore, any profit remitted to its head office, based on the total profits applied or earmarked for remittance without any deduction for the tax

> component thereof shall be subject to the 15% branch profit remittance tax.
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> xxx xxx xxx
>
> 24. Pursuant to Revenue Memorandum Order No. 1-90, in lieu of instituting criminal action, petitioner is liable to pay compromise penalty in the amount of P20,000.00 in view of its failure to file Final Withholding Tax Returns on Branch Profit Remittance and pay the corresponding tax due thereon in violation of Section 255 of the 1997 Tax Code.
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> 25. Accordingly, the fact that the assessed deficiency final withholding tax of the petitioner for taxable year 2000 has already become final, executory and demandable, petitioner can no longer dispute the validity of such assessments either administratively or judicially through an appeal to the Court of Tax Appeals.
>
> 26. Finally, all presumptions are in favor of the correctness of tax assessments. The good faith of tax assessors and the validity of their actions are presumed. They are presumed to have taken into consideration all the facts to which their attention was called (CIR vs. Construction Resources of Asia, Inc. 145 SCRA 671). It is incumbent upon the taxpayer to prove the contrary (Mindanao Bus Company vs. CIR, 1 SCRA 538; CIR vs. Antonio Tuazon, Inc., 173 SCRA 397), and failure to do so shall vest legality to respondent's actions and assessments."'

During trial, the parties presented and formally offered their respective witnesses and documentary evidence.

The case was submitted for decision on August 18, 2009, taking into consideration respondent's Memorandum filed on July 29, 2009 and petitioner's Memorandum filed on August 17, 2009.

The following are the parties' jointly stipulated issues submitted for this Court's resolution:

"1. Whether or not the assessment issued by Respondent for deficiency final withholding tax on branch profit remittance has become final, executory, and demandable.

2. Whether or not Petitioner's right to appeal the assessment on the final withholding tax on branch profit remittance before the Honorable Court of Tax Appeals had elapsed.

3. Whether or not the right of the Respondent to assess the 2000 final withholding tax on branch profit remittance of the Petitioner had prescribed.

4. Whether or not the Waiver of Statute of Limitations executed by Benjamin S. Solis is valid and thus, extended the right of the Respondent to assess the 2000 internal revenue taxes of the Petitioner until December 31, 2004.

5. Whether or not Petitioner is liable for the amount of P2,232,137.06 as deficiency Final Withholding Tax on Branch Profit Remittance for taxable year 2000.

6. Whether or not Petitioner is liable to pay the amount of P20,000 as compromise penalty."'

The Ruling of the Court in Division

The Court in Division granted the petition filed by 'United Parcel Service Co. (Philippine Branch)' [respondent herein or "UPS (Philippine Branch)"], and cancelled and set aside the Warrant of Distraint and/or Levy[4] (*"Warrant")* dated June 25, 2007 for having been issued pursuant to an invalid assessment.

Hence, the filing of the instant *Petition for Review*[5] by the Commissioner of Internal Revenue.

Respondent was directed to file its comment within ten (10) days from receipt of the Resolution[6] dated March 29, 2011. On April 18, 2011, respondent filed its *Comment/Opposition (To Petitioner's Petition for Review)*[7].

[4] *Docket*, p 379, Exhibit "O".
[5] *Supra* Note 1.
[6] *Rollo,* pp. 60-61.
[7] *Rollo,* pp. 62 100.

In a Resolution[8] dated April 29, 2011 both parties were directed to submit their respective memoranda within thirty (30) days from receipt of the resolution. Petitioner seasonably filed her Memorandum[9] on May 5, 2011; respondent likewise timely filed its Memorandum[10] on June 6, 2011. Considering that both parties filed their respective memoranda, the instant Petition for Review was submitted for decision on June 27, 2011.

ISSUES

The foregoing account, as revealed by the records of this case, leads this Court to resolve the following controversies:

I. WHETHER THE SPECIAL FIRST DIVISION OF THE HONORABLE COURT ERRED WHEN IT ORDERED THE CANCELLATION OF THE WARRANT OF DISTRAINT AND/OR LEVY ON ACCOUNT OF AN INVALID ASSESSMENT.

II. WHETHER RESPONDENT RECEIVED THE FINAL DECISION ON DISPUTED ASSESSMENT (FDDA) DATED 13 MARCH 2006 INFORMING THE DENIAL OF ITS PROTEST ON THE ASSESSMENT FOR DEFICIENCY FWT ON BRANCH PROFITS REMITTANCES FOR TAXABLE YEAR 2000.

III. WHETHER RESPONDENT IS LIABLE FOR DEFICIENCY FWT ON BRANCH PROFITS REMITTANCES IN THE AMOUNT OF P2,232,137.06 FOR TAXABLE YEAR 2000.

[8] *Rollo*, pp. 103-104.
[9] *Rollo*, pp. 105-127.
[10] *Rollo*, pp. 129 173.

IV. WHETHER RESPONDENT IS LIABLE FOR COMPROMISE PENALTY IN THE AMOUNT OF P20,000.00 FOR FAILURE TO FILE FWT RETURNS FOR TAXABLE YEAR 2000.

Arguments of Petitioner

Anent the first issue, petitioner firmly stands on the argument that respondent cannot question the validity of the waiver of statute of limitations executed on February 4, 2004 by and between Mr. Benjamin Solis, General Manager of UPS Philippine Branch, and the duly delegated signatory Elenita B. Quimosing, Revenue District Officer, Revenue District Office (RDO) No. 51, Pasay City, merely on the allegation that the date of acceptance by petitioner was not indicated therein. Petitioner explains that in this case, notwithstanding the lack of a definite date of acceptance, it is easy to determine if the waiver was actually agreed upon before the expiration of the three-year prescriptive period as the face of the waiver shows that the parties' representatives duly executed the waiver and acknowledged the same before a notary public. Hence, petitioner concludes that, the waiver was duly received by the respondent and was accepted by petitioner on the same date the waiver was executed and acknowledged before a notary public.

Additionally, petitioner asserts that respondent is estopped from assailing the subject waiver. Respondent never questioned the validity of the waiver but went on and paid most of its tax liabilities with the exception of FWT on Branch Profits Remittances and the Compromise Penalty, thus, it is estopped to question its validity for any misgivings that it subsequently would have received.

As regards the second issue, petitioner contends that: the FDDA dated March 13, 2006 was duly received by respondent on March 15, 2006 as evinced by a certified true copy of the Transmittal Form[11] indicating mail matter delivered to the post for mailing; the receipt of said FDDA is presumed in the regular course of mail in accordance with Section 3(v), Rule 131 of the Revised Rules of Court; the FDDA dated March 13, 2006 has become final, executory and demandable for failure of respondent to appeal the same within the period of thirty (30) days as provided under Section 228 of the NIRC of 1997.

With respect to the third issue, petitioner insist that respondent is liable for deficiency FWT on branch profits remittances for taxable year 2000 in the amount of P2,232,137.06 pursuant to Section 28(A)(5) of the NIRC of 1997.

Finally, petitioner manifests that pursuant to RMO No. 1-90 in relation to RMO No. 26-86, a Compromise Penalty is proper in cases of failure to withhold and file FWT in lieu of instituting a criminal action before the courts.

Arguments of Respondent

In its *Memorandum*[12], respondent interposed the following contentions to controvert petitioner's allegations on the first issue, *viz*: [1] petitioner merely reiterated the arguments contained in her Answer, Memorandum and Motion for Reconsideration which had already been exhaustively passed upon by the Special First Division of this Court; [2] estoppel does not apply in the instant case considering that the present case is covered by myriad of settled jurisprudence and issuances by

[11] Exhibit "1" of respondent.
[12] *Rollo*, pp. 129 173.

the petitioner; [3] the waiver is defective and did not validly extend the prescriptive period for the petitioner to assess/collect taxes against the respondent in view of the absence of the date of petitioner's acceptance and proof that the respondent was duly served a copy of the accepted waiver, as well as the absence of the amounts and type of tax in the waiver.

On the second issue, respondent maintains that it did not receive the alleged FDDA dated March 13, 2006 from the petitioner, thus, the assessment has not become final, executory and demandable as it seasonably filed the Petition for Review within thirty (30) days from its receipt of the Warrant of Distraint and/or Levy dated June 25, 2007 on July 9, 2007.

A perusal of the documentary and testimonial evidence presented by the petitioner would show that they are insufficient for the presumption under Section 3(v), Rule 131 of the Revised Rules of Court to arise in this case. Respondent pointed out that the Transmittal Form marked as Exhibit "1" is not conclusive that it was the FDDA dated March 13, 2006 that was transmitted to the Makati City Central Post Office for mailing to the respondent considering that Exhibit "1" is captioned "PRELIMINARY ASSESSMENT NOTICE, FOR MAILING", which shows that a Preliminary Assessment Notice has been transmitted for mailing and not an FDDA.

Moreover, respondent avers that Exhibit "1-a" which purports to be a Receipt Stamp Mark of the Makati City Central Post Office on Exhibit "1" could only prove the fact that the post office received the document transmitted but it does not prove the mailing thereof, much less the receipt of the said document by the respondent. Respondent cited Section 13, Rule 13 of the Revised Rules of Court emphasizing that the required proof of service by registered mail shall consist of an affidavit of the person mailing and the registry receipt, and the registry return card shall be immediately filed upon receipt by the sender, or in lieu thereof, the unclaimed letter, together with the certified or sworn copy of the notice given by the postmaster to the addressee.

In response to petitioner's allegations on the third issue, respondent declared that it is not liable for branch profits remittances tax citing Article 9 of the Philippine-United States Tax Treaty ("RP-US Tax Treaty") and Article 2 of its Protocol read in relation to Article 11(6) of the same treaty. In addition, respondent made mention of the ruling issued by petitioner in to respondent in DA ITAD BIR Ruling No. 107-08 [December 18, 2008] confirming the latter's exemption from branch profits remittances tax.

Last on this issue, respondent stresses that it did not really remit any branch profits to its head office, neither did it apply nor earmark for remittance any profits earned in taxable year 2000, and for this reason the branch profits remittances tax for the taxable year 2000 may not be assessed and collected from respondent. Respondent further explained that: as shown in Note 5 on Home Office Account of its audited financial statements, its net income in 2000 of P6,509,118 had not become part of its assigned capital, the assigned capital of respondent in 1999 of P5,243,300 remained the same in 2000, there was no transfer of the income earned in 2000 to the assigned capital account; the Home Office Account of P14,111,726 is composed of several items, *i.e. Assigned Capital, Transactions with Head Office and the Accumulated Income (Losses),* and this item of net income [or Accumulated

Income (Losses)] in the amount of P6,509,118 is separate from the Assigned Capital of P5,243,300; and although the item of net income of P6,509,118 is included in the "Home Office Account", it did not result to an increase in the Assigned Capital account.

Anent the fourth issue, respondent is of the view that the compromise penalty in the amount of P20,000 may not be imposed by the petitioner to the respondent without the consent of the latter.

THE RULING OF THE COURT *EN BANC*

Whether the Court a quo erred when it ordered the cancellation of the Warrant of Distraint and/or Levy on account of an invalid assessment due to prescription of period to assess and defective waiver.

The answer to the first main issue is essentially dependent upon the determination of two important matters, *to wit*: [a] prescriptive period for assessment of internal revenue taxes; and [b] validity of the Waiver of the Statute of Limitations.

Section 203 of the NIRC of 1997, as amended, 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."

As stated in the above provision, internal revenue taxes shall be assessed, within three (3) years after the last day prescribed by law for the filing of the return, or from the day the return was filed, whichever is later. The aforementioned 3-year period of limitation, however, can be affected, adjusted, or suspended, in accordance with the following provision of the same Code:

> "**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 preceeding 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."
>
> (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.

The BIR issued RMO 20-90, which lays down the procedures in executing the waiver, implements Sections 203 and 222 (b) of the NIRC of 1997, as amended. Paragraph 2 thereof prescribes that the date of acceptance by the BIR should be indicated in the waiver; paragraph 4 mandates that the fact of receipt by the taxpayer of his/her copy of the accepted waiver shall be indicated in the original copy; and paragraph 5 forewarns that the foregoing procedures shall be strictly followed and that 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.

In this case, a scrutiny of the Warrant of Distraint and/or Levy would show that it seeks to enforce the collection of three types of taxes, *i.e. Income Tax, Expanded Withholding Tax ("EWT"), and Final Withholding Tax ("FWT") on Branch Profits Remittances.*

Taking into consideration the above-quoted provisions on prescription and waiver, *We* find it apropos to qualify our ruling in this particular issue and herein resolve as follows:

[I.] insofar as the portion of the Warrant of Distraint and/or Levy pertaining to the **collection of alleged deficiency Income Tax and EWT** is concerned, the Court *a quo* correctly ordered the cancellation of the said Warrant on account of invalid assessment;

[II.] however, the portion of the Warrant of Distraint and/or Levy pertaining to the **collection of alleged deficiency FWT on Branch Profit Remittance** should not have been cancelled on account of invalid assessment due to prescription of period to assess and defective waiver.

I.

Warrant of Distraint and/or Levy, insofar as it seeks to enforce collection of the deficiency Income Tax and Expanded Withholding Tax, aptly cancelled on account of invalid assessment.

The Court *En Banc* agrees with the order of the Court *a quo* cancelling the Warrant of Distraint and/or Levy but only insofar as said warrant seeks to enforce collection of alleged deficiency *Income Tax* and *Expanded Withholding Tax*.

This forum will no longer belabor on discussing the period of prescription covering the assessments for Income Tax and EWT, and the vailidity of the waiver, finding the same to be moot and academic since the assessments on Income Tax and EWT have already been dropped and cancelled[13], this fact alone is more than enough for this Court to regard aptness to the cancellation of the Warrant of Distraint and/or Levy seeking to enforce collection of the deficiency *Income Tax* and *Expanded Withholding Tax*.

The cancellation of the assessments on Income Tax and EWT is evinced by the letter[14] dated September 26, 2005, where petitioner informed respondent that only the issue on *Final Withholding Tax on Branch Profits Remittances* was forwarded to the legal division of the BIR for resolution[15]; and by the FDDA issued by petitioner on March 13, 2006, though respondent denies ever receiving a copy of the same. The Court is bowled over by the BIR's issuance of a warrant on June 25, 2007 seeking the enforcement of collection of the *Income Tax* and *EWT*, months **after** it issued an

[13] *Docket*, pp. 438-439, Exhibit "2".
[14] *Docket*, p. 378, Exhibit "N".
[15] *Rollo*, p. 5, Memorandum of petitioner.

FDDA on March 13, 2006 declaring the assessments for the said taxes dropped and cancelled.

To reiterate, considering the fact that the assessments on Income Tax and EWT had already been cancelled, the Court finds no error in the cancellation of the Warrant of Distraint and/or Levy seeking to enforce collection of the deficiency *Income Tax* and *Expanded Withholding Tax.*

II.

Portion of the Warrant of Distraint and/or Levy seeking to enforce collection of the deficiency Final Withholding Tax on Branch Profits Remittances, should not have been cancelled on account of invalid assessment due to prescription of period to assess and defective waiver.

In the case before us, records reveal that respondent UPS Philippine Branch failed to file final withholding tax returns on Branch Profits Remittances and pay the tax allegedly due thereon. In fact, respondent ardently declares that it is not liable to the assessed deficiency FWT on Branch Profits Remittances, thus, there would be no reason to file a return, pay the tax, and pay any compromise penalty in relation thereto. Thus, Section 222 of the NIRC of 1997, as amended, which provides for a ten (10)-year prescriptive period to assess from the discovery of the omission, will apply.

Respondent's deficiency FWT on Branch Profits Remittances may be assessed or a proceeding in this court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the said omission. Accordingly, petitioner's right to assess respondent's deficiency FWT on Branch Profits Remittances for taxable year 2000 has not prescribed when she issued on December 28, 2004 the Formal Assessment Notice[16] and Assessment Notice[17]. Hence, *We* hold the view that the portion of the Warrant of Distraint and/or Levy pertaining to the **collection of alleged deficiency FWT on Branch Profit Remittance** should not have been cancelled by the Court *a quo* on the ground of invalid assessment by reason of prescription of period to assess and defective waiver in view of the fact that the period to assess respondent for FWT on Branch Profits Remittances has not yet prescribed.

In view of the applicability of the 10-year prescriptive period, the resolution of the issue pertaining to the validity of waiver executed by respondent is no longer necessary.

Whether respondent received the FDDA dated March 13, 2006 informing the denial of its protest on the assessment for deficiency FWT on branch profits remittances for taxable year 2000.

Having ascertained that the assessment against respondent for deficiency FWT on Branch Profits Remittances for taxable year 2000 was issued within the ten-year prescriptive period, the Court now proceeds to address the issue on whether respondent UPS Philippine Branch received the FDDA dated March 13, 2006 where it

[16] *Docket*, pp. 349-350, Exhibit "E".
[17] *Docket*, p. 347, Exhibit "C".

is reflected that while the assessments for Income Tax and EWT have been cancelled, the assessment for deficiency FWT on Branch Profits Remittances and compromise penalty were sustained. This is crucial in determining whether the FDDA has attained a final and executory status and may no longer be a proper subject for appeal.

On the matter of proof of service of assessments and proof of mailed letters, there is a rule echoed and re-echoed in this jurisdiction through the cases, and that is 'when a mail matter is sent by registered mail, there exists a presumption, set forth under Section 3(v), Rule 131 of the Rules of Court, that it was received in the regular course of mail. The facts to be proved in order to raise this presumption are: (a) that the letter was properly addressed with postage prepaid; and (b) that it was mailed.'[18]

However, '**while a mailed letter is deemed received** by the addressee in the ordinary course of mail, **this is still merely a disputable presumption** subject to controversion, and **a direct denial of the receipt thereof shifts the burden upon the party favored by the presumption** to prove that the mailed letter was indeed received by the addressee.'[19] Simply put, '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.

[18] *Barcelon, Roxas Securities, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 157064, August 7, 2006 citing *Protector's Services, Inc. vs. Court of Appeals*, G.R. No. 386 Phil. 611, 623 (2000).
[19] *Republic v. Court of Appeals*, G.R. No. L 38540, 30 April 1987, 149 SCRA 351, 355.

The *onus probandi* shifts to BIR to prove by contrary evidence that the taxpayer received the assessment in the due course of mail.'[20]

In the case at bench, respondent UPS Philippine Branch categorically denies having received the FDDA dated March 13, 2006; and thus, the disputable presumption under Section 3(v), Rule 131 of the Rules of Court cannot be made to apply in this case; and by reason of respondent's direct denial, the *onus probandi* to prove by contrary evidence that respondent UPS Philippine Branch received the FDDA in the due course of mail now lies with petitioner BIR.

The next question now is whether BIR was able to satisfactorily discharge its burden of proving that respondent received the FDDA. *We* are constrained to answer in the negative.

In order to prove that the FDDA was mailed upon and received by respondent, petitioner offered in evidence a certified true copy of the Transmittal Form[21] where certain entries were made, *i.e. name of the taxpayer, year, kind of tax and amount*. The Transmittal Form bears the caption "PRELIMINARY ASSESSMENT NOTICE FOR MAILING" and a stamp mark of the Makati Central Post Office with date (i.e., "March 15, 2006") also appears on the same Transmittal Form.

It must be stressed that under the Rules of Court, there are procedural requirements that must be followed or resorted to in order to establish receipt of a particular mailed document by the addressee. Under Section 13, Rule 13 of the Rules of Court:

[20] *Barcelon, Roxas Securities, Inc. vs. Commissioner of Internal Revenue*, CTA Case No. 5662 May 17, 2000.
[21] Exhibit "1" of respondent.

RULE 13
FILING AND SERVICE OF PLEADINGS, JUDGMENTS AND OTHER PAPERS

> xxx
>
> 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. 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 of the unclaimed letter together with the certified or sworn copy of the notice given by the postmaster to the addressee.

The records of this case belie compliance therewith. The subject Transmittal Form being self-serving, bears no probative value, as neither one of the following were presented as evidence: 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, an affidavit of the person mailing of facts showing compliance with section 7 of the Rules of Court; if the service is made by registered mail, an affidavit and registry receipt issued by the Bureau of Posts, or registry return card supposedly returned by the postmaster after delivery of subject mail matter, duly signed by the supposed recipient, respondent or its authorized representative in the instant case. Also, the Court notes that the subject form indicates that the nature of the documents supposedly mailed to the respondent is a "PRELIMINARY ASSESSMENT NOTICE FOR

MAILING" and not an FDDA. In the alternative, granting for the sake of argument, that said documents cannot be located, petitioner at the very least, should have submitted a certification issued by the Postmaster of the Makati City Post Office to that effect. Failing thereon is fatal to petitioner's invoked presumption of regularity in the delivery of mails.

In *Commissioner of Internal Revenue vs. Kita Corporation*[22], this Court passed upon a similar scenario and held as follows:

> "This Court En Banc finds the Transmittal Reports presented by herein petitioner during trial in CTA Case No. 6605 (as the respondent therein) insufficient evidence to establish that respondent actually received the subject FAN and FLOD. Such transmittal reports being self-serving, bear no probative value, as these failed to state the nature of the documents supposedly mailed to the respondent; were not accompanied by the corresponding registry receipts issued by the Bureau of Posts, or registry return cards supposedly returned by the postmaster after delivery of subject mail matter/s, duly signed by the supposed recipient, respondent or its authorized representative in the instant case. In the alternative, granting for the sake of argument, that said documents cannot be located, petitioner at the very least, should have submitted a certification issued by the Postmaster of the San Fernando Post Office to that effect. Failing thereon is fatal to petitioner's invoked presumption of regularity in the delivery of mails.
>
> It must be remembered that under our Rules on Evidence, there are procedural requirements that must be followed or resorted to in order to establish receipt of a particular mailed document by the addressee. Unfortunately, the records of this case negate compliance therewith. Mere transmittal records do not prove anything as this is unreliable in proving that indeed the subject final assessment notice and formal letter of demand were sent to and received by the taxpayer as prescribed by law. This is so

[22] CTA EB Case No. 388, Octoer 24, 2008.

because transmittal records, by its very nature, do not clearly indicate whether it was indeed the assessment notices and letter of demand that were actually mailed and have no intervention or participation of whatever nature from the taxpayer.

We reiterate, for emphasis what the High Court said in the Nava case that mere notations made without the taxpayer's (respondent in this case) intervention, notice, or control, without adequate supporting evidence, cannot suffice; otherwise, the taxpayer would be at the mercy of the revenue officers, without adequate protection or defense.

It bears stressing that this Court cannot turn blind on the importance of such notices. Assessment is a notice to the effect that the amount therein stated is due as tax and a demand for the payment thereof. Otherwise put, an assessment contains not only a computation of tax liability, but also a demand for payment within a prescribed period. As soon as it is served, an obligation arises on the part of the taxpayer concerned to the amount assessed and demanded. It is relevant in the proper pursuit of judicial and extrajudicial remedies to enforce taxpayer's liabilities and certain matters that relate to it. The ultimate purpose of assessment is to ascertain the amount that the taxpayer is to pay. And a tax assessment is deemed made only when said notice is released, mailed or sent to the taxpayer, subject to proof of actual receipt by the taxpayer, in case of controversion or denial.

In the present case, the evidence presented by herein petitioner in C.T.A. Case No. 6605 as respondent therein, is insufficient to convince the Court En Banc that the subject Formal Assessment Notice No. 021-98-41B-000675 dated February 6, 2002, was released, mailed, and received by herein respondent-taxpayer, so as to render it final, executory and demandable after the lapse of the thirty (30) day period, from receipt thereof, within which to protest the same without said protest having been filed by the latter within the said period."

Verily, *We* find that the pieces of evidence presented and arguments interposed by herein petitioner are insufficient to establish and prove the mailing, service and receipt of the subject FDDA, so as to render it final, executory and demandable. To this Court's mind, petitioner utterly failed to discharge her burden to prove by competent evidence that the FDDA was indeed received by the respondent.

In view of the foregoing disquisition, the assessment for deficiency FWT on Branch Profits Remittances has not become final, executory and demandable; and respondent seasonably filed the Petition for Review on August 8, 2007, within thirty (30) days from its receipt of the Warrant of Distraint and/or Levy dated June 25, 2007 on July 9, 2007.

Whether respondent is liable for deficiency FWT on Branch Profits Remittances in the amount of P2,232,137.06 for taxable year 2000.

The groundwork of the petitioner's imputation of liability for deficiency FWT on Branch Profits Remittances against respondent UPS Philippine Branch can be found on Section 28 (A)(5) of the NIRC of 1997, worded as follows:

> **Section 28.** *Rates of Income Tax on Foreign Corporations.* -
>
> (A) Tax on Resident Foreign Corporations. -
>
> xxx
>
> (5) Tax on Branch Profits Remittances. - **Any profit remitted** by a branch to its head office shall be subject to a tax of fifteen (15%) which shall be based on the total profits applied or earmarked for remittance without any deduction for the tax component thereof (except those activities which are registered with the Philippine Economic Zone Authority). The tax shall be collected and paid in the same manner as provided in Sections 57 and 58 of this Code:

> provided, that interests, dividends, rents, royalties, including remuneration for technical services, salaries, wages premiums, annuities, emoluments or other fixed or determinable annual, periodic or casual gains, profits, income and capital gains received by a foreign corporation during each taxable year from all sources within the Philippines shall not be treated as branch profits unless the same are effectively connected with the conduct of its trade or business in the Philippines.

The afore-quoted section of the Tax Code levies a tax of fifteen percent (15%) to **any profit remitted** by a resident foreign corporation to its head office, and this tax shall be based on the total profits applied or earmarked for remittance without any deduction for the tax component thereof, with the exception of activities registered with the Philippine Economic Zone Authority (PEZA).

Petitioner's assessment for FWT against respondent is centered on Note 5 of the Audited Financial Statements (AFS) of respondent for the year 2000 which shows the composition of the Home Office Account. Petitioner insists that there is disclosed a net income of P6,509,118 out of the total assigned capital transactions to respondent's head office, which partakes the nature of indirect remittances to the head office. Following is the composition of the Home Office Account:

HOME OFFICE ACCOUNT

This account consists of:

	2000	1999
Assigned capital	P5,243,300	P5,243,300
Transactions with Head Office	2,750,056	1,353,583
Accumulated losses, beginning	(390,748)	(800,927)
Net income	6,509,118	410,179
Accumulated income (losses), end	6,118,370	(390,748)
	P14,111,726	P6,206,135

Petitioner likewise made reference to BIR Ruling NO. 039-2005 dated January 28, 2005 in which it has been held that:

> "Increasing the head office's assigned capital to its Philippine Branch by transferring net profits of the branch to the assigned capital account shall be subject to the 15% branch profit remittance tax. Although the profit from operation will not be physically remitted to the head office abroad, the transfer to assigned capital is indirect remittance to the head office"

Summarily, respondent stresses that it is not liable for branch profits remittances tax because of the following: Article 9 of the Philippine-United States Tax Treaty ("RP-US Tax Treaty") and Article 2 of its Protocol read in relation to Article 11(6) of the same treaty; the ruling issued by petitioner to respondent in DA ITAD BIR Ruling No. 107-08 [December 18, 2008] confirming the latter's exemption from branch profits remittances tax; that it did not really remit, applied or earmarked any branch profits to its head office in taxable year 2000; its net income in 2000 of P6,509,118 had not become part of its assigned capital.

The Court *En Banc* finds for the respondent.

Careful consideration has been given to every points raised and the pieces of evidence presented by the parties, the pertinent provisions of the NIRC, and applicable jurisprudential precepts in this case; and *We* find that respondent is not liable for Branch Profits Remittances Tax under Section 28(A)(5) of the NIRC of 1997 for the taxable year 2000.

Section 28(A)(5) of the NIRC of 1997 uses the phrase "**Any profit <u>remitted</u>**"; hence, it is crucial that before the 15% branch profit remittance tax is levied upon a resident foreign corporation, there should first be a **remittance** of branch profits by the branch to its head office.

In the records of this case there is not a scintilla of evidence not even any remote indication that respondent remitted, earmarked or applied for remittance its net income of P6,509,118 to its head office on taxable year 2000. There is nowhere in Note 5 of the respondent's AFS, the sole basis of petitioner's assessment, from which this Court can at the very least infer the fact of remittance of the net income allegedly made by respondent to its head office in the year 2000.

The Court finds the statement of petitioner that *"Under Note 5 on Home Account of the AFS for taxable year 2000, there is disclosed a net income of P6,509,118 out of the total assigned capital transactions to petitioner's head office, which partakes the nature of indirect remittances to the head office"* without legal and factual bases, inaccurate and presumptuous. First, albeit Note 5 of the AFS shows a net income of P6,509,118 for the year 2000, it does not, however, show that it was transferred or had become part of the assigned capital. As aptly explained by respondent, in line with the branch accounting principles of the Philippines, the Home Office Account of P14,111,726 being referred to in Note 5 is comprised of different items, *i.e. Assigned Capital, Transactions with Head Office, and Accumulated Income (Losses)*; clearly, the item of net income in the year 2000 in the amount of P6,509,118 is separate from the Assigned Capital of P5,243,300. Thus, although the item of net income of P6,509,118 in the year 2000 is included in the Home Office Account, it did not result to an increase in the Assigned Capital account, as can be gleaned from Note 5 of the AFS, the assigned capital of P5,243,300 in the year 2000 remained the same as that of the previous year. In line with the foregoing discussion, the BIR Ruling No. 039-2005 being invoked by petitioner cannot be made to apply in this case because as explicitly stated in the portion of the BIR ruling cited by petitioner, there was an "*increase in 'the head office's assigned capital to its Philippine Branch by transferring net profits of the branch to the assigned capital account shall be subject to the 15% branch profit remittance tax*"; and this scenario is not obtaining in this case, as can be seen from Note 5 of the AFS of respondent there was no transfer of the net income to the Assigned Capital.

Second, *We* find that it is erroneous for the BIR to conclude that the entire earnings of the respondent for the year 2000 in the amount of P6,509,118 partakes the nature of an indirect remittance to the head office. Since, under the branch accounting principles in the Philippines, the net income is a standard component or entry in the Home Office Account, which entry is added to the accumulated loss of the previous year (1999) in order to arrive at the Accumulated Income (losses) as of the end of 2000, it is presumptuous for the BIR to declare that this entire net income of respondent constitutes as indirect remittance as some or all of which may still remain with the branch; to hold otherwise would amount to giving license and authority to the BIR to consider every net income of a branch – appearing by standard practice in a Home Office Account of a financial statement – as a remittance subject to branch profits remittances tax under Section 28 (A)(5) of the NIRC of 1997. Such practice is not the clear import of the aforesaid provision of law.

Branch profits remittances tax may not be imposed just because there is an income. Section 28 (A) (5) of the NIRC of 1997 speaks of **"any profit remitted"** which pertains to that portion of the branch profits sent to the head office as distinguished from the total net income or profits of the branch; thus, for the said provision of law to apply there must be a remittance of the branch profits by the branch to the head office, and the mere existence of an income does not in any way justify the imposition of the branch profits remittances tax.

The provision of Section 28(A) (5) of the NIRC of 1997 is unambiguous, hence, there is no room for interpretation, and we need only apply the law. 'Under the principles of statutory construction, if a statute is clear, plain and free from ambiguity, it must be given its literal meaning and applied without attempted interpretation. This plain meaning rule or *verba legis*, derived from the maxim *index animi sermo est* (speech is the index of intention), rests on the valid presumption that the words employed by the legislature in a statute correctly express its intent by the use of such words as are found in the statute. *Verba legis non est recedendum*, or, from the words of a statute there should be no departure.'[23]

Third, considering that the income earned by respondent in 2000 in the amount of P6,509,118 was added to [effectively reduced by] the accumulated loss as of the end of 1999 in the amount of P390,748, the net Accumulated Income of respondent as of the end of 2000 is actually P6,118,370, hence, respondent could not have possibly remitted (directly or indirectly) the entire net income of

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[23] *Yolanda Signey vs. SSS, et al.*, G.R. No. 173582, January 28, 2008, citing *Globe Mackay Cable and Radio Corporation v. NLRC*, G.R. No. 82511, 3 March 1992, 206 SCRA 701, 711. See *Cecilleville Realty and Service Corporation v. Court of Appeals*, 344 Phil. 375, 381 (1997); *Republic v. Court of Appeals*, 359 Phil. 530, 602 (1998); *Victoria v. Commission on Election*, G.R. No. 109005, 10 January 1994, 229 SCRA 269, 273; *Fianza v. PLEB of the City of Baguio*, 312 Phil. 1108, 1123 1124 (1995).

P6,509,118 for the year 2000; and for this reason, the Formal Assessment Notice and the Assessment Notice for FWT on branch profits remittances tax against respondent is inaccurate as the same were based on the net income of P6,509,118.

The following principle on assessment reiterated by the Supreme Court in *Commissioner of Internal Revenue vs. Island Garment Manufacturing Corporation*[24] is instructive:

> "We find respondent Court's reasoning to be well-taken. As held in *Collector of Internal Revenue vs. Benipayo*:
>
> > An assessment fixes and determines the tax liability of a taxpayer. As soon as it is served, an obligation arises on the part of the taxpayer concerned to pay the amount assessed and demanded. **Hence, assessments should not be based on mere presumptions no matter how reasonable or logical said presumptions may be** ... ."
> >
> > In order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption ..."

The Court will no longer belabor on discussing the respondent's defense concerning the RP-USA Tax Treaty inasmuch as pursuant to Revenue Memorandum Order (RMO) 1-00 and established jurisprudence, before one may invoke the provisions of a tax treaty and claim exemption from tax or the application of special or preferential tax rates, one must file an application for tax-treaty relief with the International Tax Affairs Division (ITAD) 15 days before the transaction[25], i.e. payment of dividends, royalties, etc., accompanied by supporting documents justifying the relief, and records reveal that it was only in 2008 that respondent was

[24] G.R. No. L-46644, September 11, 1987.
[25] *Deutsche Bank AG Manila Branch v. CIR*, CTA Case No. 7344, August 29, 2008; Revenue Memorandum Order (RMO) 1 00.

able to secure an ITAD ruling[26] confirming its exemption from the branch profits remittances tax of 15%. Thus, respondent's defense hinged on the RP-USA Tax Treaty falls flat on the face of the aforementioned guidelines and decided cases in this jurisdiction.

Ultimately, while *We* find that the portion of the Warrant of Distraint and/or Levy pertaining to the collection of alleged deficiency FWT on Branch Profits Remittances should not have been cancelled by the Court *a quo* on the ground of invalid assessment by reason of prescription of period to assess and defective waiver [as explained earlier, it is the 10-year prescriptive period to assess which applies in this case pursuant to Section 222 of the NIRC of 1997, as amended]; after due consideration on the merits of the assessment for alleged deficiency FWT on Branch Profits Remittances against respondent, *We* herein finally declare that the Warrant of Distraint and/or Levy pertaining to the collection of alleged deficiency FWT on Branch Profits Remittances should still be cancelled, though not on the ground of invalid assessment by reason of prescription and defective waiver, but on the ground that the assessment is without legal and factual bases, inaccurate and presumptuous. Hence, respondent cannot be held liable for Branch Profits Remittances Tax under Section 28(A)(5) of the NIRC of 1997 for the taxable year 2000.

In view of the foregoing, the Court finds no need to discuss the remaining issue on the compromise penalty.

[26] *Docket*, pp. 632 637, DA ITAD 107 08, December 18, 2008.

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

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were 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.

ERNESTO D. ACOSTA
Presiding Justice