BDB Law wts
DU-BALADAD AND ASSOCIATES

SIGNIFICANT DECISIONS OF THE COURT OF TAX APPEALS
SEPTEMBER 2014

ASSESSMENT

1. A defective waiver is void and therefore does not extend the three-year prescriptive period.

Taxpayer was issued by the BIR a Final Assessment Notice (FAN), dated November 28, 2008, assessing the taxpayer deficiency income tax, VAT, expanded and final withholding taxes for the taxable year ending December 31, 2004. Prior to that, the taxpayer executed a waiver on October 9, 2007 supposedly extending the period to assess to June 20, 2008 and another one was executed on June 2, 2008, extending the period to assess to November 30, 2008. Taxpayer filed a protest arguing that the year being audited has prescribed considering that the FAN was only mailed on December 2, 2008. Nonetheless, the BIR issued a Final Decision on Disputed Assessment, holding that taxpayer remains liable for the assessed deficiency taxes. Thus, taxpayer filed a petition for review before the CTA, raising the same issue on the prescription.

The Court ruled that the 3-year period to assess internal revenue taxes commences from the period fixed by law for the filing of the return or the date of actual filing or returns, whichever is later. Accordingly, if the return was filed earlier than the last day allowed by law, the period to assess shall still be counted from the last day prescribed for filing of the return. However, if the return was filed beyond the period prescribed by law, the three-year period shall be counted from the day the return was filed. In this case, considering that the returns filed by the taxpayer were not presented before the Court, the counting of the prescriptive period is reckoned from the last day prescribed by law for filing the returns. The deficiency taxes involved in this case pertain to income tax, value-added tax, expanded withholding tax, and final tax on royalty and final tax on interest income. Counting three years from the prescribed filing of the tax returns, the assessment was made beyond the three-year prescriptive period. This notwithstanding the contention of the BIR that the FAN was issued on November 28, 2008, because the supposed waivers were defective and had no effect of extending the 3-year prescriptive period. The waivers are defective on the following grounds:

1. The written and notarized authorities of taxpayer's representatives to sign for and its behalf were not secured by the BIR as required by Revenue Delegation Authority Order (RDAO) No. 05-01, which requires the BIR to ensure the presentation of a written and notarized authority from the taxpayer if such authority was delegated to a representative.

2. The waivers failed to indicate the date of acceptance by the BIR's authorized representative and do not indicate the fact of receipt by the taxpayer of its copy of the waivers.

Thus, the waivers are defective and void. Since the waivers are defective, the assessment was issued beyond the prescriptive period. ***(Transitions Optical Philippines, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 8442, September 1, 2014)***

2. The date of mailing of motions, pleadings, or any other papers or payments or deposits, as shown by the post office stamp on the envelope or the registry receipt, shall be considered as the date of their filing, payment, or deposit in court.

In the above case, the date indicated in the envelope/mail matter containing the Final Assessment Notice and the Formal Letter of Demand is December 4, 2008, which is considered as the date of their mailing. Clearly, such date is beyond the period agreed upon in the second waiver within which to issue the assessment, which is until November 30, 2008. It is imperative for the BIR to satisfactorily prove the release, mailing or sending of the FAN and the FLD. ***(Transitions Optical Philippines, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 8442, September 1, 2014)***

3. Issuance of the Final Assessment Notice before the lapse of the 15-day period for the taxpayer to file its protest to the Preliminary Assessment Notice inflicts no prejudice to the taxpayer.

On February 22, 2012, the BIR issued a revised Preliminary Assessment (PAN) against the taxpayer, which the taxpayer received on March 9, 2012, assessing the said taxpayer for deficiency income tax, withholding tax and penalties for the year 2006. Consequently, the taxpayer filed a protest to the PAN on March 23, 2012. However, on the same date, the BIR issued the Formal Letter of Demand (FLD). On May 3, 2012, taxpayer protested the FLD. The same was denied by the BIR.

On appeal to the Court of Tax Appeals, the taxpayer contented that the deficiency tax assessment was void for failure of the BIR to observe due process. According to the taxpayer, it was deprived of its right to respond to the PAN, considering that the FLD was issued on the same day the taxpayer submitted its protest to the PAN. The Court disagreed and held that a preliminary assessment notice preparatory to the issuance of a formal or final assessment notice is not, legally speaking, an assessment even if it contains a computation of the tax liabilities of a taxpayer and a demand for payment of the computed tax liabilities was made in such preliminary assessment notice. The issuance of the FAN before the lapse of the fifteen (15) day period for the taxpayer to file its protest to the PAN, inflicts no prejudice on the taxpayer for as long as the latter is properly served a Formal Assessment Notice and that it was able to intelligently contest the FAN by filing a protest letter within the period provided by law. ***(Medtex Corporation vs. Commissioner of Internal Revenue, CTA Case No. 8508, September 1, 2014[1])***

[1] The same decision was made in the case of Global Metal Tech Corporation vs. Commissioner of Internal Revenue, CTA Case No. 8329, September 23, 2014

4. The enumeration of direct costs under Revenue Regulations No. 11-05 is not exclusive or closed list of expenses that may be deducted by PEZA-registered enterprises from their gross sales for the purpose of computing the 5% gross income tax.

In the above case, one of the deficiency income tax assessment is due to the disallowance of the forex loss, other dues to authorities, insurance, documents and handling, miscellaneous, office supplies, and tools and spare parts. According to the BIR, the taxpayer, a PEZA-registered entity, is not allowed to claim the same as deductions in the computation of the 5% tax on gross income, the said expenses not being included in the allowable expenses under RR No. 11-05.

According to the Court, the enumeration of direct costs is intended as a guide in determining the items that may be considered direct costs or costs of sales. It noted that RR No. 11-05 amended Section 7 of RR No. 02-05 by deleting the words "consist only" and restating the pertinent phrase to "the following direct costs are included in the allowable deductions xxx". For purposes of computing the 5% preferential tax, gross sales/revenues may be reduced only by sales discounts, sales returns and allowances, cost of sales or direct costs or any of the enumerated allowable deductions under RR No. 11-2005. Corollary thereto, in determining whether an expense is part of direct cost, said expense must be directly attributed to the performance of the Company's PEZA-registered activity. ***(Medtex Corporation vs. Commissioner of Internal Revenue, CTA Case No. 8508, September 1, 2014)***

5. A taxpayer cannot be assessed deficiency income tax and deficiency VAT on a supposed undeclared disbursement.

Taxpayer was assessed deficiency taxes for the taxable year 2004. Among the deficiency assessments are the income tax and VAT assessment from undeclared disbursement treated as undeclared income. This alleged undeclared purchases is the difference between the summary list of sales submitted by the taxpayer's suppliers and the purchases declared in the taxpayer's VAT returns. In other words, the sales reported by the taxpayer's suppliers are higher than the purchases declared by taxpayer. The BIR treated the difference as undeclared sales, for which the BIR assessed deficiency income tax and deficiency VAT.

The Court disagreed with the BIR. According to the CTA, the 3 elements on the imposition of income tax are: (1) there must be gain or profit, (2) the gain or profit is realized, actually or constructively, (and) it is not exempted by law or treaty from income tax. Income tax is assessed on income received from any property, activity or service. It is not when there is an underdeclared disbursement but only when there is an income and such income is received or realized by the taxpayer. Furthermore, it must be emphasized that for income tax purposes, a taxpayer is free to deduct from its gross income a lesser amount or not claim any deduction at all. What is prohibited is to claim a deduction beyond the amount authorized therein. Hence, even granting that there is undeclared disbursement, the same is not prohibited by law. Similarly for VAT, this is assessed on the gross selling price or gross value in money of the goods or properties sold and is to be paid by the seller or transferor. Thus, what is critical to be shown, in the imposition or assessment of VAT in the sale of goods or properties, is that the taxpayer is paid or ought to be paid in an amount of money or its equivalent, in consideration of such sale, and not when said taxpayer purchases or disburses an amount of money to purchase goods or properties. Simply put, the VAT is imposed when one sells, not when one purchases. ***(Toyota***

Manila Bay Corporation vs. Commissioner of Internal Revenue, CTA Case No. 8227, September 3, 2014)

6. A mere request for reinvestigation without the corresponding action on the part of the CIR does not interrupt the running of the prescriptive period to collect.

Taxpayer was assessed deficiency taxes for the year 2009 through the issuance of Formal Assessment Notice, dated January 21, 2003. Thereafter, taxpayer submitted its protest letter, dated March 5, 2003, requesting a reconsideration of the assessment. On November 11, 2010, taxpayer received a Final Decision on Disputed Assessment (FDDA), informing the taxpayer that after "reinvestigation", taxpayer is still liable to pay deficiency taxes. Taxpayer then appealed the FDDA with the CTA.

The Court in Division ruled that the right of the BIR to collect the deficiency taxes had already prescribed. The BIR, however, argued that with the testimony of the taxpayer's own witness, it is clear that the protest filed was one for a reinvestigation and not for a reconsideration, which in effect tolled the running of the prescriptive period prescribed by the law for the collection of deficiency tax assessment. The Court En Banc ruled that a mere request for reinvestigation without the corresponding action on the part of the CIR does not interrupt the running of the prescriptive period to collect. The request should first be granted in order to effect suspension. The burden of proof lies on the BIR to show that the request for reinvestigation had been actually granted. Such grant may be expressed in the BIR's communications with the taxpayer or implied from her action or her authorized representative in response to the request for reinvestigation. In the present case, however, there were no actions which could be interpreted as a grant by the BIR of the request for reinvestigation. Thus, the BIR's argument must fail. ***(Commissioner of Internal Revenue vs. Bravo Alabang, Inc., CTA EB Case No.997, September 30, 2014)***

VAT REFUND

7. Under the best evidence rule, the original document must be produced whenever its contents are the subject of the inquiry. A photocopy, being a mere secondary evidence is not admissible unless it is shown that the original is unavailable.

In this case, petitioner presented the photocopies of the subject documents and the testimony of Ms. Maria Lina P. Grecia, the treasurer of petitioner, to prove the existence and execution of the subject documents.

However, it must be noted that a party must also present to the court proof of loss or other satisfactory explanation for the non-production of the original instrument. Ms. Grecia's testimony that the government agencies have the original copies of the exhibits subject of the Motion for Reconsideration and that they tried to ask the lawyers to get the original copies but not successful is not sufficient to support petitioner's allegation that it was able to lay the basis for the introduction of the excluded exhibits as secondary evidence considering that the said testimony failed to show diligent effort on the part of the petitioner to request and secure from the concerned government agencies, and produce the said originals before the Court. Petitioner failed to prove that the originals had been lost or could not be produced in court after

reasonable diligence and good faith in searching for them. ***(GST Philippines, Inc. vs. Commissioner of Internal Revenue, CTA EB Case No. 982, September 25, 2014)***

8. Requisites for VAT zero-rating of sale of services under Section 108(B)(2) of the 1997 Tax Code

For the supply of services to be VAT zero-rated under Sec. 108 (B)(2) of the NIRC of 1997, the following requisites must be satisfied:

A. The services must be other than processing, manufacturing, or repacking of goods;
B. The payment for such services must be in acceptable foreign currency accounted for in accordance with BSP rules; and
C. The recipient of such services is doing business outside the Philippines.

To be considered as non-resident foreign corporation doing business outside the Philippines, each entity (foreign client) must be supported, at the very least, by both SEC Certificate of Non-registration of Corporation/Partnership and Certificate/Articles of Foreign Incorporation/Association/Registration. ***(Deutsche Knowledge Services, Pte., Ltd. Vs. Commissioner of Internal Revenue, CTA Case No. 8342, September 23, 2014)***

REFUND - WITHOLDING TAX

9. A statutory withholding agent for Withholding Tax on Compensation is entitled to claim the refund of WTC erroneously paid on separation pay of its employees.

On December 14, 2009, taxpayer resolved to retire his business and applied with the Department of Labor and Employment for authority to terminate 37 employees. Petitioner paid the separation pay of its terminated employees, and accordingly, on January 12, 2010, filed the monthly withholding tax return for the month of December (BIR Form No. 1601-C) and remitted the corresponding withholding taxes on the separation pay. Realising that the separation pay he paid to the employees should not have been subjected to withholding taxes pursuant to Section 32(B)(6)(b) of the Tax Code, he filed an administrative claim for refund with the BIR. And due to the BIR's inaction, taxpayer filed a petition for review with the CTA.

One of the issues raised in the CTA is whether a withholding agent for withholding tax on compensation is entitled to claim the refund. Citing the case of *Commissioner of Internal Revenue vs. Smart Communication, Inc. (G.R. No. 179045-46, August 25, 2010)*, the CTA ruled that a withholding agent has a legal right to file a claim for refund for two reasons. First, he is considered a "taxpayer" under the NIRC as he is personally liable for the withholding tax as well as for deficiency assessments, surcharges, and penalties, should the amount of the tax withheld be finally found to be less than the amount that should have been withheld under the law. Second, as an agent of the taxpayer, his authority to file the necessary income tax return and to remit the tax withheld to the government impliedly includes the authority to file a claim for refund and to bring an action for recovery of such claim. As an agent of the taxpayer, it is his duty to return what he has recovered; otherwise, he would be unjustly enriching himself at the expense of the principal taxpayer from whom the taxes were withheld, and from whom he derives his legal right to file a claim for refund. ***(Ong Beng Gui vs. Commissioner of Internal Revenue, CTA Case No. 8410, September 8, 2014)***

10. Final withholding tax paid on dividends that did not materialize is refundable under Section 204 (C) and 229 of the 1997 NIRC, as amended.

Taxpayer paid 10% final withholding due on dividends to its sole stockholder, a foreign corporation based in Japan. Subsequently, the foreign stockholder informed the taxpayer of the discontinuance of the said dividends. As a result, the taxpayer did not release any amount of cash dividends to its sole stockholder. Consequently, taxpayer filed a claim for the refund of the final withholding tax paid.

According to the Court, having proved that the cash dividends distribution did not materialize, the 10°/o final withholding tax on cash dividends paid by taxpayer constitutes erroneously paid tax which is refundable under Sections 204(C) and 229 of the 1997 NIRC, as amended. Consequently, the principle of *solutio indebiti* under Article 2154 of the New Civil Code must be applied. ***(Nanox Philippines, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 8320, September 26, 2014)***

LOCAL TAXATION

11. A refund claim cannot prosper on the payment of local business tax assessment that had already become final and unappealable.

TRANSCO was issued three assessment notices by the Municipality of Labrador, Pangasinan for deficiency local business taxes for various years. TRANSCO protested the said assessments. However, no appeal was made by TRANSACO to the court of competent jurisdiction. Collection suits were thereafter filed by the Municipality against TRANSCO. In the meantime, the Municipality collected the assessed taxes from TRANSCO's bank accounts, through the issuance of Order of Seizure or Order to Deliver Money/Bank Account. Thereafter, TRANSCO wrote the Municipality for the refund of the taxes paid. A subsequent complaint for refund was filed with the Regional Trial Court (RTC), and the refund claim was granted by the RTC.

On appeal to the CTA, the CTA ruled that Section 195 of the Local Government Code (LGC) of 1991 provides that the taxpayer shall have 30 days from the receipt of the denial of the protest or from the lapse of the 60 day period xxx within which to appeal with the court of competent jurisdiction otherwise the assessment becomes conclusive and unappealable. On the other hand, the taxpayer may, instead of filing a written protest, opt to pay the tax, fee or charge and seek a refund thereof within the 2-year statute of limitation. The payment, if an assessment is issued, must be made before the lapse of the 60-day period from receipt thereof, otherwise, the assessment becomes final and executory and it may no longer be disputed. TRANSCO filed letters of protest on the assessment notices instead of paying the amount indicted in the assessment within the 60-day period to protest pursuant to Section 195 of the LGC. In view of TRANSCO's failure to appeal the assessment notices, the same become final, executory and unappealble. Accordingly, the Court cannot sustain the grant of refund by the RTC considering that a grant of refund would necessarily violate Section 195 of the LGC. ***(Municipality of Labrador, Pangasinan vs. National Transmission Corporation, CTA AC Case No. 112, September 3, 2014)***

12. An assessment that is time-barred is void despite failure of the taxpayer to file a protest within the mandated period.

On September 12, 2005, the Municipal Treasurer of Cainta issued local business tax assessment against the taxpayer covering the taxable years 1999 to 2005. On December 29, 2005, taxpayer questioned the local business tax assessments. On July 4, 2006, the Municipal Treasurer denied the protest and demanded the payment of the business taxes due. The taxpayer then filed a petition for review before the Regional Trial Court (RTC). The RTC dismissed the petition for lack of jurisdiction – the taxpayer did not avail the proper administrative remedies in protesting the assessment. Taxpayer then appealed to the CTA.

The CTA En Banc upheld the assessment for the years 2001 to 2005 but declared the assessment for 1999 and 2000 as void. According to the Court, the taxpayer failed to file a timely protest. Based on Section 195 of the Local Government Code (LGC), the taxpayer is given 60 days from the receipt of the assessment notice to protest in writing. Thus, counting 60 days from September 12, 2005, the taxpayer had until November 11, 2005 within which to file its protest. However, it was only on December 29, 2005 that the taxpayer, through its lessee, filed the protest. Thus, the assessment has become final and executory due the taxpayer's failure to seasonably file a protest against the assessment. Nonetheless, for the years 1999 and 2000, the five-year period for the issuance of an assessment under Section 194(a) of the LGC had already prescribed when the assessment was issued on September 12, 2005. Applying the Supreme Court decision in the case of Philippine Journalists, Inc. vs. Commissioner of Internal Revenue, G.R. No. 162852, December 16, 2004, the Court ruled that notwithstanding the failure of the taxpayer to file a timely protest, it is void since it was issued beyond the prescriptive period. Although the Philippine Journalist case involves internal revenue taxes, and is premised on prescription as a ground to invalidate assessment, the same can be applied by analogy to the instant case. ***(SPC Realty Corporation vs. Municipal Treasurer of Cainta, CTA EB No. 985, September 29, 2014)***

13. The sixty (60) day period within which to file an appeal before the LBAA shall be counted from the date of receipt of the written notice of assessment.

Since the actual dates of receipt of the assailed assessments are not indicated in the parties' pleadings, the exact date thereof cannot be specifically ascertained. However, assuming arguendo, that the date when taxpayer paid under protest was the same date that it received the assailed assessments, such would reveal that taxpayer still failed to perfect its appeal with the LBAA within the period provided for by law.

A taxpayer's failure to question the assessment before the LBAA renders the assessment of the local assessor final, executory and demandable. Such failure precludes the taxpayer from questioning the correctness of the assessment, or from invoking any defense that would reopen the question of its liability on the merits. ***(Belle Bay City Corporation vs. Central Board of Assessment Appeals, CTA EB Case No. 1038, September 2, 2014)***

JURISDICTION

14. The jurisdiction of the CTA to resolve tax disputes in general excludes the power to rule on the constitutionality or validity of a law, rule or regulation.

Taxpayer, a resident of France, filed for Tax Treaty Relief Application (TTRA) with the International Tax Affairs Division of the BIR (BIR-ITAD), requesting for a confirmation of its opinion that the dividends paid to it by Manila North Tollways Corporation (MNTC) are entitled to the preferential tax rate under the Philippines – France Tax Treaty. The BIR denied the application since it was filed after the first taxable event in violation of RMO No. 72-2010. Taxpayer appealed to the Secretary of Finance but the latter affirmed the ruling of the BIR. Hence, taxpayer filed a petition for review with the CTA, questioning the validity or constitutionality of the ruling and RMO Nos. 72-2010 and 1-2000.

BIR Rulings and RMOs fall under the quasi-legislative or rule-making powers of the CIR provided in the first paragraph of Section 4 of the NIRC of 1997, as amended, and not under the CIR's power to decide tax cases including "other matters" arising under tax laws provided in the second paragraph of the same section. Since decisions of the CIR rendered in the exercise of her power to decide tax cases provided in the second paragraph of Section 4 of the NIRC of 1997, as amended, are the ones that are subject to review, on appeal, to the CTA under Section 7 (a) (1) of R.A. No. 1125, as amended by R.A. No. 9282, then BIR Rulings and RMOs does not fall under "other matters" to which the CTA has jurisdiction.

Time and again, it has been held that the CTA is a court of special jurisdiction and can only take cognizance of such matters as are clearly within its jurisdiction and its jurisdiction should not be deemed to exist on mere implication. Therefore, the Court in Division did not err when it dismissed petitioner's petition for review in CTA Case No. 8413 on the ground of lack of jurisdiction. ***(Egis Projects S.A. vs. The Secretary of Finance, CTA EB No. 1023, September 16, 2014)***

15. The CTA has jurisdiction over the decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, but this does not cover assessment which became final, executory and demandable.

On February 25, 2009, taxpayer received from the BIR Formal Letter of Demand, assessing it for deficiency taxes. On May 15, 2009, taxpayer protested the assessment. On appeal to the CTA, one of the issues raised is the jurisdiction of the CTA to try the case.

The Court found that it has no jurisdiction over the case. A taxpayer is given 30 days to protest the Formal Letter of Demand. Otherwise, the assessment shall become final and executory. In the present case, the assessment has become final and executory for failure of petitioner to timely protest the Formal Letter of Demand with attached Final Assessment Notices. The law categorically states that an assessment may be protested administratively within thirty days from receipt, otherwise, it shall become final. Since taxpayer's protest was filed beyond the 30-day prescriptive period to file the same, the Formal Letter of Demand has become final and executory. Thus, there is no disputed assessment to speak of. ***(Global Metal Tech Corporation vs. Commissioner of Internal Revenue, CTA Case No. 8329, September 23, 2014)***