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

**EN BANC**

| | |
|---|---|
| **KABALIKAT PARA SA MAUNLAD NA BUHAY, INC.,**<br>*Petitioner,* | **CTA EB No. 1238**<br>(CTA Case No. 8336) |
| -versus- | |
| **COMMISSIONER OF INTERNAL REVENUE,**<br>*Respondent.* | |
| x----------x | |
| **COMMISSIONER OF INTERNAL REVENUE,**<br>*Petitioner,* | **CTA EB No. 1239**<br>(CTA Case No. 8336)<br>Present: |
| -versus- | **DEL ROSARIO**, *PJ*,<br>**UY**,<br>**RINGPIS-LIBAN**,<br>**MANAHAN**,<br>**BACORRO-VILLENA**,<br>**MODESTO-SAN PEDRO**,<br>**REYES-FAJARDO**,<br>**CUI-DAVID**, and<br>**FERRER-FLORES**, *JJ.* |
| **KABALIKAT PARA SA MAUNLAD NA BUHAY, INC.,**<br>*Respondent.* | Promulgated:<br>MAY 24 2023 4:22 PM |

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**DECISION**

*REYES-FAJARDO, J.:*

Before the Court *En Banc* are consolidated Petitions for Review filed by the following:

a. Kabalikat Para Sa Maunlad Na Buhay, Inc. (Kabalikat) on October 17, 2014, docketed as CTA EB No. 1238;[1] and

b. Commissioner of Internal Revenue (CIR) on November 3, 2014.[2]

These petitions assail the Decision dated June 20, 2014 (Assailed Decision)[3] and the Resolution dated October 1, 2014 (Assailed Resolution)[4] of the Second Division (Court in Division) in CTA Case No. 8336, which cancelled and set aside the CIR's tax assessments against Kabalikat.

The dispositive portions of the Assailed Decision and Resolution are reproduced below.

*Assailed Decision*

> **WHEREFORE,** the Petition for Review is hereby **GRANTED**. The assessments issued by respondent CIR to petitioner for deficiency income tax, VAT and Expanded Withholding Tax (EWT) for CY 2006 in the aggregate amount of P91,275,747.55, inclusive of interest, surcharge and compromise penalties are **CANCELLED** and **SET ASIDE**.

*Assailed Resolution*

> **WHEREFORE,** premises considered, respondent's Motion for Reconsideration (Of the Decision dated June 20, 2014) and petitioner's Motion for Partial Reconsideration are both DENIED for lack of merit.

## FACTS

Kabalikat is a non-stock, non-profit civic organization duly organized and existing under the laws of the Republic of the Philippines, with principal office at No. 12 San Francisco Street, Karuhatan, Valenzuela City, Philippines. The Bureau of Internal

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1 *Rollo* (CTA EB No. 1238), pp. 8-19.
2 *Rollo* (CTA EB No. 1239), pp. 5-19.
3 Penned by Associate Justice Caesar A. Casanova with Juanito C. Castañeda, Jr. and Amelia R. Cotangco-Manalastas concurring; *Rollo* (CTA EB No. 1238), pp. 61-81.
4 Penned by Associate Justice Caesar A. Casanova with Juanito C. Castañeda, Jr. and Amelia R. Cotangco-Manalastas concurring; *Rollo* (CTA EB No. 1238), pp. 82-96.

Revenue (BIR) confirmed Kabalikat's status as a civic organization, as well as its exemption from the payment of income tax, through BIR Ruling No. S-30-071-2001 7 dated October 8, 2001.

On the other hand, the CIR is vested with the power to decide disputed assessments and to cancel and abate tax liabilities, under the National Internal Revenue Code (NIRC) of 1997, as amended, and other tax laws, rules, and regulations.

On October 19, 2009, the BIR[5] issued Preliminary Assessment Notice[6] with attached Details of Discrepancy[7] (collectively referred to as "PAN") relative to alleged deficiency income tax, value-added tax (VAT), and expanded withholding tax (EWT) for calendar year (CY) 2006 in the aggregate amount of ₱78,380,415.03, computed as follows:

| Nature of Tax | Amount | | |
|---|---|---|---|
| | Basic | Interest & Penalties | Total |
| Income Tax | ₱23,038,457.05 | 10,774,744.00 | ₱33,813,201.05 |
| VAT | 25,365,653.48 | 19,024,240.37 | 44,389,893.85 |
| EWT | 110,770.13 | 66,550.00 | 177,320.13 |
| Total | **₱48,514,880.66** | ₱29,865,534.37 | **₱78,380,415.03** |

Kabalikat received the PAN on October 26, 2009. Consequently, on November 10, 2009, Kabalikat filed a Position Letter[8] for the cancellation and withdrawal of the above-enumerated assessments.

In the meantime or on December 28, 2009, the parties executed a Waiver of the Defense of Prescription under the Statute of Limitations (Waiver) to extend the period to assess, in connection with Kabalikat's CY 2006 tax liabilities, until December 31, 2010.

On November 18, 2010, the CIR[9] issued Final Assessment Notices (FAN)[10] and Formal Letters of Demand (FLD),[11] demanding

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5 Through Jaime B. Santiago, Regional Director, BIR Revenue Region No. 5, Caloocan City.
6 *Rollo* (CTA EB No. 1238), pp. 434-437.
7 *Rollo* (CTA EB No. 1238), p. 438.
8 *Rollo* (CTA EB No. 1238), pp. 439-448.
9 Through Arnel SD. Guballa, Regional Director, Revenue Region No. 5, Caloocan City.
10 *Rollo* (CTA EB No. 1238), pp. 450-452.
11 *Rollo* (CTA EB No. 1238), pp. 453-455.

the payment of alleged deficiency income tax, VAT, and EWT for CY 2006 in the aggregate amount of ₱91,275,747.55, computed as follows:

| Nature of Tax | Amount | | |
|---|---|---|---|
| | Basic | Interest & Penalties | Total |
| Income Tax | ₱23,038,457.05 | 16,760,477.50 | ₱39,798,934.55 |
| VAT | 25,365,653.48 | 25,872,966.54 | 51,238,620.02 |
| EWT | 110,770.13 | 86,422.85 | 197,192.98 |
| Compromise Penalty | | | 41,000.00 |
| Total | **₱48,514,880.66** | ₱42,719,866.89 | **₱91,275,747.55** |

**The CIR, in the FAN/FLD, no longer discussed or resolved the arguments and issues raised in Kabalikat's Position Letter nor provided reasons for denying the same.**

Kabalikat received copies of the FAN/FLD on November 25, 2010.

After the CIR denied its protest to the FAN/FLD, on September 16, 2011, Kabalikat elevated the case to the Court of Tax Appeals *via* Petition for Review.

## Ruling of the Court in Division

In the Assailed Decision, the Court in Division granted Kabalikat's petition and cancelled the tax assessments after finding that the CIR's right to assess in this case had already prescribed.

The Court in Division summarized the respective last days to assess each tax type in the subject assessment, *viz*:

*Income Tax and EWT*

| | *Last Day to File Return* | *Date Filed* | *Last Day to Assess* |
|---|---|---|---|
| 1. Income Tax Return for CY 2006 | April 15, 2007 | April 16, 2007 | April 16, 2010 |
| 2. Monthly Remittance | | | |

| | | | |
|---|---|---|---|
| Return of Creditable Income Taxes Withheld (Expanded) | | | |
| January 2006 | February 10, 2006 | February 10, 2006 | February 10, 2009 |
| February | March 10, 2006 | March 10, 2006 | March 10, 2009 |
| March | April 10, 2006 | April 10, 2006 | April 10, 2009 |
| Apr | May 10, 2006 | May 9, 2006 | May 10, 2009 |
| May | June 10, 2006 | June 8, 2006 | June 10, 2009 |
| June | July 10, 2006 | July 10, 2006 | July 10, 2009 |
| July | August 10, 2006 | August 7, 2006 | August 10, 2009 |
| August | September 10, 2006 | September 8, 2006 | September 10, 2009 |
| September | October 10, 2006 | October 9, 2006 | October 10, 2009 |
| October | November 10, 2006 | November 9, 2006 | November 10, 2009 |
| November | December 10, 2006 | December 8, 2006 | December 10, 2009 |
| December | January 25, 2007 | January 10, 2007 | January 25, 2010 |

*VAT*

| | **Last Day to File Return** | **Last Day to Assess** |
|---|---|---|
| 1st Quarter 2006 | April 25, 2006 | April 25, 2009 |
| 2nd Quarter 2006 | July 25, 2006 | July 25, 2009 |
| 3rd Quarter 2006 | October 25, 2006 | October 25, 2009 |
| 4th Quarter 2006 | January 25, 2006 | January 25, 2009 |

To the Court in Division, it was clear from the information above that the CIR's FAN and FLD dated November 18, 2010 were issued beyond the three-year prescriptive period within which it can assess Kabalikat for deficiency income tax, EWT, and VAT.

While the parties did execute a Waiver to extend the assessment period to December 31, 2010, the Court in Division explained that the validity of a waiver of the defense of prescription hinges upon compliance with the formal requirements set out in Revenue Memorandum Order No. 20-90, as well as those laid down in jurisprudence.[12]

In this regard, it noted certain defects in the execution of the subject Waiver, *viz*:

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12 The Court in Division relied on the ruling in *Commissioner of Internal Revenue v. Kudos Metal Corporation* (G.R. No. 178087, May 5, 2010, 634 PHIL 314-330), where the Supreme Court enumerated the requisites to a valid waiver.

A perusal of the Waiver executed by petitioner reveals the following:

> 1. The original copy of the Waiver in the BIR records submitted to this Court, does not indicate the date of acceptance by Jaime B. Santiago, Regional Director. While the Waiver was notarized on December 28, 2009, the Acknowledgment portion thereof shows that it was only the Deputy Executive Director of Kabalikat, Liza D. Eco, who personally appeared before the Notary Public.
>
> As the Supreme Court has ruled in the case of Philippine Journalists, Inc. vs. Commissioner of Internal Revenue that the waiver is in fact and in law an agreement between the taxpayer and the BIR, Regional Director Jaime B. Santiago, who signed for and in behalf of the BIR, should have, likewise, personally appeared before the notary public to acknowledge that the execution of the waiver is his free and voluntary act.
>
> 2. Nor was it also indicated therein the fact of receipt by the petitioner of its file copy. As correctly pointed out by petitioner, respondent failed to prove that she was able to furnish petitioner with a copy thereof. She neglected to counter petitioner's allegations by not presenting any evidence to show that petitioner, indeed, received a copy of said waiver. As a matter of fact, the records reveal that respondent opted not to offer the assailed Waiver as one of her exhibits in her Formal Offer of Documentary Evidence to refute petitioner's claim that it was not furnished a copy of said Waiver.
>
> Having said defects, no valid agreement between petitioner and respondent can, thus, be construed to have taken place. A waiver is not a unilateral act of the taxpayer or the BIR, it is a bilateral agreement between two parties that the period to issue an assessment and collect the taxes due is extended to a date certain. Consequently, the period to assess was not extended and respondent's right to assess petitioner for its alleged deficiency income tax and EWT for CY 2006 has already prescribed.

According to the Court in Division, these defects reflect the parties' non-compliance with the RMO No. 20-90 and applicable jurisprudence. Thus, it found the Waiver to be invalid, failing to extend the three-year assessment period.

Subsequently, in the Assailed Resolution, the Court in Division also denied the parties' subsequent motions for reconsideration.

Hence, both Kabalikat and the CIR have now elevated the case to the Court *En Banc via* the present petitions for review. These petitions, docketed as CTA EB No. 1238 and CTA EB No. 1239, respectively, have since been consolidated.[13]

Initially, in a Resolution dated January 13, 2015,[14] the consolidated petitions were denied due course and dismissed for being insufficient in form. When their respective motions for reconsideration of the dismissals were denied,[15] the parties filed separate petitions for review on *certiorari* under Rule 45 before the Supreme Court, docketed as G.R. Nos. 217530-31 and 217536-37 for Kabalikat, and G.R. No. 217802 for the CIR. Their Rule 45 petitions were also consolidated.

In a Resolution dated February 10, 2020, the Supreme Court granted the consolidated petitions, *viz*:

> WHEREFORE, the consolidated petitions are GRANTED. The Resolutions dated January 13, 2015 and March 25, 2015 of the Court of Tax Appeals En Banc in CTA EB Nos. 1238 and 1239 are REVERSED and SET ASIDE. The case is hereby REMANDED to the Court of Tax Appeals En Banc for a resolution on the merits of the case."[16]

On September 16, 2020, the Supreme Court also denied with finality Kabalikat's subsequent motion for partial reconsideration.[17] The afore-quote Supreme Court ruling became final and executory on September 16, 2020.[18]

Pursuant to the foregoing, on October 27, 2021, the present consolidated petitions were reinstated and the parties were required to file their respective comments.[19] Notably, only Kabalikat filed the required comment.[20]

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13 In a Minute Resolution dated November 12, 2014.

14 Penned by Justice Erlinda P. Uy with Presiding Justice Roman G. Del Rosario and Associate Justices Juanito C. Castañeda, Jr., Lovell R. Bautista, Caesar A. Casanova, Esperanza R. Fabon-Victorino, Cielito N. Mindaro-Grulla, Amelia R. Cotangco-Manalastas and Ma. Belen M. Ringpis-Liban, concurring.

15 In a Resolution dated March 25, 2015. *Rollo* (CTA EB No. 1238), pp. 163-166.

16 *Rollo* (CTA EB No. 1238), p. 664.

17 *Rollo* (CTA EB No. 1238), p. 699.

18 As per Supreme Court Entry of Judgment. *Rollo* (CTA EB No. 1238), p. 715.

19 *Rollo* (CTA EB No. 1238), pp. 722-727.

20 *Rollo* (CTA EB No. 1238), pp. 737-748.

## The Present Petitions

### *Kabalikat's Petition*

Kabalikat insists that the revenue it derives from the grant of loans to qualified borrowers is in fact *exempt* from VAT because "[a]n activity done pursuant to a social welfare purpose of a non-stock, non-profit organization cannot be considered as a sale of service made in the course of trade or business."[21] Kabalikat also claims that while it engages in micro-financing activities, it should be regarded as a *financial intermediary*.[22] Thus, alternatively, if found to be subject to tax, Section 122 of the National Internal Revenue Code of 1997 (NIRC) imposing percentage tax should be applied (instead of the provisions on VAT).[23]

While the Court in Division ruled for the cancellation of the subject assessments against Kabalikat, it nonetheless prays for the modification of the Assailed Decision and Resolution, *viz*:

> WHEREFORE, premises considered, it is most respectfully prayed of this Honorable Court that the June 20, 2014 Decision and the October 1, 2014 Resolution of the Honorable Second Division be modified by ruling that the Petitioner's micro-finance activities are not subject to 12% VAT, but, instead, be declared as VAT exempt or, at best, subject to 0% to 5% percentage tax on gross receipts under Section 122 of the Tax Code of 1997.[24]

### *The CIR's Petition*

In contrast, the CIR seeks the reversal of the Assailed Decision and Resolution. It maintains that, contrary to the Court in Division's ruling, prescription has not set in for the following reasons: *First*, it is entitled to the benefit of the ten-year assessment period as provided under Section 222(A) of the NIRC, instead of only three years under Section 203 of the NIRC.[25] *Second*, in any case, the Waiver's validity was not affected by any procedural lapse that the concerned revenue officer may have committed.[26] Consequently, the Waiver effectively

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21 *Rollo* (CTA EB No. 1238), p. 10.
22 *Rollo* (CTA EB No. 1238), p. 16.
23 *Rollo* (CTA EB No. 1238), p. 13.
24 *Rollo* (CTA EB No. 1238), p. 18.
25 *Rollo* (CTA EB No. 1239), p. 9.
26 *Rollo* (CTA EB No. 1239), p. 16.

extended the assessment period to December 31, 2010 and the subject assessments were issued within such extended period.[27]

In its Comment to the CIR's petition, Kabalikat counters that the CIR cannot invoke the defense of the ten-year prescription period *for the first time on appeal.*[28]

## ISSUE

Is the cancellation of the subject tax assessments proper?

## OUR RULING

The Petitions for Review are unmeritorious. We uphold the cancellation of the subject tax assessments as these are **void** for being issued, *first,* in violation of Kabalikat's right to due process and, *second,* beyond the three-year prescriptive period.

### *The FAN and FLD were issued in violation of Kabalikat's right to due process*

In the present case, We note that Kabalikat was able to file its Position Letter (to the PAN) and Protest Letter (to the FAN/FLD). However, the taxpayer's right to administrative due process does not consist only of the formal filing of its responses to the PAN and FAN/FLD. The cardinal rules in upholding a litigant's right to due process in administrative proceedings are laid out in *Ang Tibay v. Court of Industrial Relations* (Ang Tibay).[29] According to the second and seventh rules in *Ang Tibay,* "[n]ot only must the party be given an opportunity to present his case and to adduce evidence tending to establish the rights which he asserts but the tribunal **must *consider* the evidence presented**...[Further, the administrative tribunal or body] should, in all controversial questions, render its decision **in such a manner that the parties to the proceeding can know the various issues involved, and the reasons for the decisions rendered.**" (Emphasis supplied)

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27 *Rollo* (CTA EB No. 1239), p. 12.
28 *Rollo* (CTA EB No. 1238), p. 738.
29 G.R. No. 46496, February 27, 1940, 69 PHIL 635-645.

The Supreme Court reiterated these principles in *Commissioner of Internal Revenue v. Avon Products Manufacturing, Inc.* (Avon),[30] *viz*:

> In Ang Tibay, this Court similarly ruled that "[n]ot only must the party be given an opportunity to present his case and to adduce evidence tending to establish the rights which he asserts but the tribunal must consider the evidence presented."
>
> x x x
>
> The last requirement relating to the form and substance of the decision is the decision-maker's "'duty to give reason' to enable the affected person to understand how the rule of fairness has been administered in his [or her] case, to expose the reason to public scrutiny and criticism, and to ensure that the decision will be thought through by the decision-maker."

In *Avon*, the taxpayer responded to the PAN. However, the CIR simply reproduced the PAN's contents in the subsequent FLD/FAN. That the FLD/FAN had no mention of the taxpayer's arguments (raised in its reply) or any discussion on the merits thereof was, according to the Supreme Court, an indication that the tax authorities did not comply their own procedures. It explained further:

> It is true that the Commissioner is not obliged to accept the taxpayer's explanations, as explained by the Court of Tax Appeals. **However, when he or she rejects these explanations, he or she must give some reason for doing so. He or she must give the particular facts upon which his or her conclusions are based, and those facts must appear in the record**.
>
> Indeed, the Commissioner's inaction and omission to give due consideration to the arguments and evidence submitted before her by Avon are **deplorable transgressions of Avon's right to due process. The right to be heard, which includes the right to present evidence, is meaningless if the Commissioner can simply ignore the evidence without reason**. (Emphasis supplied)

It is clear from the pronouncements in *Ang Tibay* and *Avon* that the requirement of administrative due process is not met sufficiently by the mere formal act of receiving a taxpayer's defenses submitted in writing. Administrative due process also requires **judicious consideration of the matters raised therein, independent evaluation**

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30 G.R. Nos. 201398-99 & 201418-19, October 3, 2018.

**of the case, and due notification to parties of the reasons for judgment.**

In like manner, in the present case, We observe the following:

*First,* the FAN/FLD contained basic tax amounts (amounting to ₱48,514,880.66) identical to those in the PAN, varying only in computation of interest and penalties.

*Second,* the PAN and the FAN/FLD provided the following explanations:

| PAN | FAN/FLD |
|---|---|
| The complete details covering the aforementioned discrepancies established during the investigation of this case are shown hereunder:<br><br>• Verification disclosed that Kabalikat Para sa Maunlad na Buhay, Inc. conducted activities for profit which is contrary to the conditions stated in the ruling granting its exemption from taxation; hence assessed of deficiency Income and Value-Added Tax pursuant to Section 27 & 108 of the Tax Code.<br><br>• Expanded Withholding Tax - Verification disclosed that you failed to withhold and remit the exact amount of Expanded Withholding Tax on various income payments made in violation of Section 57-B of the Tax Code and RR 2-98, as amended.[31] | The complete details covering the aforementioned discrepancies established during the investigation of this case are shown hereunder:<br><br>1. Verification disclosed that Kabalikat Para Sa Maunlad na Buhay, Inc. conducted activities for profit which is contrary to the conditions stated in the ruling granting its exemption from taxation; hence assessed of deficiency Income and Value-Added Tax pursuant to Section 27 & 108 of the Tax Code.<br><br>2. Expanded Withholding Tax - Verification disclosed that you failed to withhold and remit the exact amount of Expanded Withholding Tax on various income payments made in violation of Section 57-B of the Tax Code and RR 2-98, as amended. |

31 *Rollo* (CTA EB No. 1238), p. 438.

| | |
|---|---|
| | 3. Interest of twenty percent per annum was imposed pursuant to Section 249 of the Tax Code.[32] |

*Third*, aside from these pro-forma explanations, the CIR did not mention any of Kabalikat's arguments, much less give an intelligent discourse in resolving each matter raised.

The identity in substance between the subject PAN and the subsequent FAN/FLD, as in *Avon*, shows that the CIR ignored completely Kabalikat's Position Letter (to the PAN) and failed to give due consideration to the arguments therein.

To reiterate, the filing of a response to the PAN prior to the issuance of the FAN/FLD cannot be a useless exercise. While the CIR remains to have the sole discretion whether or not to act favorably on the response/protest, it is nonetheless duty-bound to, at least, consider the taxpayer's defenses in resolving the case and provide clear reasons for its decision, citing the applicable factual and legal bases for its conclusion. The CIR's lapses in the present case amount to a violation of Kabalikat's violation to due process.

We are not unmindful that Kabalikat did not raise this as an argument. However, We cannot turn a blind eye to the tax authorities' disregard of the taxpayer's fundamental right. Precisely, in *Prime Steel Mill, Inc. v. Commissioner of Internal Revenue* (Prime Steel),[33] the Supreme Court ruled that this tax court may pass upon even issues not raised by the parties but must be considered necessary for the case's full disposition:

> For tax cases before the CTA, the Court pronounced in Commissioner of Internal Revenue v. Eastern Telecommunications Phils., Inc. that "[t]he appellate court may, in the interest of justice, properly take into consideration in deciding the case matters of record having some bearing on the issue submitted which the parties failed to raise or the lower court ignored, although they have not been specifically raised as issues by the pleadings. This is in consonance with the liberal spirit that pervades the Rules of Court, and the modern trend of procedure which accord the courts broad

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32 *Rollo* (CTA EB No. 1238), p. 454.
33 G.R. No. 249153, September 12, 2022.

discretionary power, consistent with the orderly administration of justice, in the decision of cases brought before them."

Conspicuously, it is this same spirit of liberality which impelled the Court to recognize that the CTA may even consider issues not specifically raised by the parties at all in the disposition of tax cases so long as the same is related to the principal issue for its resolution and is necessary to achieve an orderly disposition of the matter at hand.

**From the foregoing, the Court so holds that the CTA *En Banc*, or even a Division thereof, may consider arguments raised for the first time on appeal or on motion for reconsideration, respectively, only if two conditions concur: *one*, these arguments are related to the principal issue to be resolved by the court and is necessary to achieve an orderly disposition of the case; and *two*, the resolution of these new arguments would not require the presentation of additional evidence, and must rely solely on factual bases that are already matters of record in the case.**

x x x

**Conversely, the same procedural hindrance does not exist in resolving the issue on the violation of petitioner's right to due process.** (Citations omitted and Emphasis supplied)

To be sure, the CIR's violation of Kabalikat's due process is apparent on the face of the FAN/FLD with reference to the PAN and Kabalikat's Position Letter, all of which are on record. Certainly, consideration of Kabalikat's constitutional right is not only related to the principal assessment issue but also essential to the complete and orderly disposition of the present case.

***The FAN and FLD were issued beyond the three-year prescriptive period***

The general rule is that a valid tax assessment is that which is issued within the three-year period provided under Section 203[34] of

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34 SECTION 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.

the NIRC. This period may be extended upon the valid execution of a waiver to that effect.[35]

To recall, the Court in Division summarized the last days to assess Kabalikat for deficiency Income Tax, EWT, and VAT relative to CY 2006. To simplify, the CIR's right to assess deficiency income tax would have prescribed on April 16, 2010. On the other hand, the right to assess deficiency EWT and VAT would have prescribed in monthly and quarterly intervals, respectively, in 2009 and the last of which on January 25, 2010. The Court in Division also found that the Waiver executed by the parties on December 28, 2009 was invalid and did not effectively extend the assessment period to December 31, 2010, as intended. Thus, it concluded that, without any valid extension, the FAN/FLD dated November 18, 2010 was issued beyond the prescriptive period and, thus, void.

We do not find any reason to depart from these findings and conclusions.

In addition, it is worth noting that by the time the parties executed the Waiver on December 28, 2009, the right to assess EWT for the months of January to November 2006, as well as VAT for the first to third quarter of 2006 would have already prescribed. Thus, aside from the infirmities attending the formalities in the Waiver's execution, it was also belatedly executed.

Lastly, We cannot entertain the CIR's reliance on the 10-year assessment period under Section 222(A) of the NIRC. As Kabalikat points out, this is the first time the CIR invoked said exceptional period; notably, after the Court in Division cancelled the assessment based on the finding that the CIR failed to issue the FAN/FLD within the basic three-year period under Section 203.

The 10-year period for assessment under Section 222(A) is conditioned upon the existence of a false or fraudulent return and/or the failure to file a return. That the CIR in the present case did not

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35 SECTION 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes.– (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.

indicate in the FAN/FLD that it has decided to apply the 10-year period, much less inform the taxpayer clearly and adequately of the bases of its allegations (e.g., falsity, fraud, omission) is, likewise, a violation of Kabalikat's right to due process.[36]

Based on these premises, We arrive at the same conclusion that the FAN and FLD are void for having been issued beyond the prescriptive period set by law. Thus, these must be cancelled. On this account, We no longer find it necessary to discuss the substantive aspect of the subject tax assessments.

**WHEREFORE**, in light of the foregoing considerations, the consolidated Petitions for Review are **DENIED** for lack of merit. Accordingly, the assailed Decision dated June 20, 2014 and Resolution dated October 1, 2014, both rendered by the Second Division of this Court in CTA Case No. 8336 are **AFFIRMED**.

**SO ORDERED.**

**MARIAN IVY F. REYES-FAJARDO**
Associate Justice

**WE CONCUR:**

**ROMAN G. DEL ROSARIO**
Presiding Justice

**ERLINDA P. UY**
Associate Justice

*(with Concurring and Dissenting Opinion)*
**MA. BELEN M. RINGPIS-LIBAN**
Associate Justice

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36 See *Commissioner of Internal Revenue v. Spouses Magaan* (G.R. No. 232663, May 3, 2021); *Commissioner of Internal Revenue v. Fitness by Design, Inc.* (G.R. No. 215957, November 9, 2016, 799 PHIL 391-420); *Commissioner of Internal Revenue v. Asalus Corp.* (G.R. No. 221590, February 22, 2017, 806 PHIL 397-413).

**ON LEAVE**
**CATHERINE T. MANAHAN**
Associate Justice

*(I concur in the result)*
**JEAN MARIE A. BACORRO-VILLENA**
Associate Justice

**ON OFFICIAL BUSINESS**
**MARIA ROWENA MODESTO-SAN PEDRO**
Associate Justice

**ON LEAVE**
**LANEE S. CUI-DAVID**
Associate Justice

**CORAZON G. FERRER-FLORES**
Associate Justice

## CERTIFICATION

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

**ROMAN G. DEL ROSARIO**
Presiding Justice

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

***EN BANC***

| | |
|---|---|
| **KABALIKAT PARA SA MAUNLAD NA BUHAY, INC.,**<br>*Petitioner,*<br><br>*- versus -*<br><br>**COMMISSIONER OF INTERNAL REVENUE,**<br>*Respondent.* | **CTA EB No. 1238**<br>(CTA Case No. 8336) |
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| **COMMISSIONER OF INTERNAL REVENUE,**<br>*Petitioner,*<br><br>*- versus -*<br><br>**KABALIKAT PARA SA MAUNLAD NA BUHAY, INC.,**<br>*Respondent.* | **CTA EB No. 1239**<br>(CTA Case No. 8336)<br><br>Present:<br><br>Del Rosario, *P.J.*<br>Uy,<br>Ringpis-Liban,<br>Manahan,<br>Bacorro-Villena,<br>Modesto-San Pedro,<br>Reyes-Fajardo,<br>Cui-David, and<br>Ferrer-Flores, *JJ.*<br><br>Promulgated:<br><br>MAY 24 2023 |
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## CONCURRING AND DISSENTING OPINION

**RINGPIS-LIBAN, *J.:***

I concur with the *ponencia* of my esteemed colleague, Associate Justice Marian Ivy F. Reyes-Fajardo, with respect to its denial of the Petition for Review filed by Kabalikat Para Sa Maunlad Na Buhay, Inc. docketed as CTA EB No.

1238 for lack of merit but I disagree to it insofar as its denial of the Petition for Review filed by the Commissioner of Internal Revenue docketed as CTA EB No. 1239.

In the Assailed Decision, the Court in Division ruled that the right of the CIR to assess Kabalikat for deficiency income tax, VAT, and EWT for CY 2006 had already prescribed given that the waiver executed between them supposedly extending the period within which to issue the deficiency tax assessments was deemed defective. The Court in Division likewise ruled in the Assailed Decision that Kabalikat's microfinancing activity is subject to VAT.

**The CIR's right to assess Kabalikat for deficiency VAT has not yet prescribed.**

In her Petition for Review, the CIR posits that her right to assess Kabalikat for deficiency VAT has not yet prescribed. She claims that the ten (10) year prescriptive period under Section 222(a) of the 1997 NIRC is applicable based on Kabalikat's non-filing of its VAT returns. The CIR points out that it is explicit in Kabalikat's Petition for Review that the latter is a VAT non-filer, having registered itself as a non-VAT taxpayer. Accordingly, Kabalikat never filed its VAT returns warranting the application of the 10-year prescriptive period counted from the discovery of such omission.

In its Comment, Kabalikat counters that the Court in Division correctly held that the deficiency tax assessments had already prescribed. Insofar as the application of the 10-year prescriptive period is concerned, Kabalikat asserts that matters or defenses not raised during trial cannot be raised for the first time on appeal. Considering that the defense of 10-year prescriptive period was never raised by the CIR in her Answer or in her Motion for Reconsideration of the Assailed Decision, the CIR is barred from raised such defense for the first time on appeal.

I agree with the CIR's position.

As a rule, defenses not seasonably pleaded in the answer may not be raised for the first time on appeal. As the Supreme Court held in *Carantes v. Court of Appeals*,[1] to wit:

> "The settled rule is that defenses not pleaded in the answer may not be raised for the first time on appeal. A party cannot, on appeal, change fundamentally the nature of the issue in the case. When a party deliberately adopts a certain theory and the case is decided upon that theory in the court below, he will not be

[1] G.R. No. L-33360, April 25, 1977.

> permitted to change the same on appeal, because to permit him to do so would be unfair to the adverse party." *(Citations omitted)*

The underlying rationale of the said rule, as plainly explained by the Supreme Court in *Commissioner of Internal Revenue v. Mirant Pagbilao Corporation (formerly Southern Energy Quezon, Inc.).*,[2] is that:

> "It affirms that 'courts of justice have no jurisdiction or power to decide a question not in issue.' Thus, a judgment that goes beyond the issues and purports to adjudicate something on which the court did not hear the parties, is not only irregular but also extrajudicial and invalid. **The rule rests on the fundamental tenets of fair play.**" *(Emphasis supplied)*

By way of exception, however, the Supreme Court in a number of cases[3] held that:

> "In the interest of justice and within the sound discretion of the appellate court, **a party may change his legal theory on appeal, only when the factual bases thereof would not require presentation of any further evidence by the adverse party in order to enable it to properly meet the issue raised in the new theory**." *(Emphasis supplied)*

It is my view that the foregoing exception is obtaining in the present case. Considering Kabalikat's position that its microfinancing activity is not subject to the imposition of VAT coupled with the fact that Kabalikat is registered as a non-VAT taxpayer,[4] it is logical to presume that Kabalikat did not file any VAT return. Given these facts, there is no need to require Kabalikat to prove that it actually filed its VAT returns. To expect otherwise is to unduly stretch one's credulity.

For failure to file VAT returns, the 10-year prescriptive period under Section 222(a) of the 1997 NIRC applies, reckoned from the discovery of the omission or failure to file return. In the present case, the date of Kabalikat's receipt of the Preliminary Assessment Notice on October 26, 2009 shall be considered as the date of discovery of the omission. Given that the FAN and the FLD both dated November 18, 2010 assessing Kabalikat for deficiency VAT for CY 2006, among others, were received by Kabalikat on November 25, 2010, then

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[2] G.R. No. 159593, October 12, 2006.

[3] *Bote v. Spouses Veloso*, G.R. No. 194270, December 3, 2012; *Canlas v. Tubil*, G.R. No. 184285, September 25, 2009; *Quasha Ancheta Peña and Nolasco Law Office v. LCN Construction Corp.*, G.R. No. 174873, August 26, 2008; *Lianga Lumber Company et. al. v. Lianga Timber Co., Inc.*, G.R. No. L-38685, March 31, 1977.

[4] Item No. 2, Part II (Admitted Facts), Joint Stipulation of Facts and Issues, Division Docket Vol. I, p. 193; Annex B, Petition for Review, Division Docket Vol. I, p. 42.

the deficiency VAT assessment was timely issued within the 10-year period to assess.

In the Assailed Decision, the Court in Division ruled as defective and of no legal effect the waiver executed by and between Kabalikat and the CIR supposedly extending the period within which to issue the deficiency tax assessments for CY 2006. It thus held that the deficiency assessments for both income tax and EWT are already prescribed. Insofar as the deficiency VAT assessment is concerned, the Court in Division ruled as follows:

> "We shall now proceed to determine whether respondent's assessment of petitioner's deficiency VAT for CY 2006 is valid.
>
> Records show that petitioner was assessed by respondent for deficiency VAT for CY 2006, through a Notice of Assessment and Formal Letter of Demand, both dated November 18, 2010, in the amount of P51,238,620.02.
>
> A Waiver of Defense of Prescription under the Statute of Limitations was executed by petitioner and respondent on December 28, 2009.
>
> To reiterate, under Sec. 203 of the 1997 Tax Code, an assessment for deficiency taxes shall be issued by respondent within three (3) years after the last day prescribed by law for the filing of the return.
>
> Section 114 (A) of the 1997 Tax Code provides the time for the filing of quarterly return and payment of VAT. Section 114 (A) reads as follows:
>
> '***SEC. 114. Return and Payment of Value-Added Tax. -***
>
> (A) In General — Every person liable to pay the value-added tax imposed under this Title shall file a quarterly return of the amount of his gross sales or receipts within twenty five (25) days following the close of each taxable quarter prescribed for each taxpayer: Provided, however, That VAT-registered persons shall pay the value-added tax on a monthly basis.
>
> xxx xxx xxx.'

Thus, the following tabulation will show whether the assessment for petitioner's deficiency VAT for CY 2006 has not yet prescribed.

| | **Last Day to File Return** | **Last Day to Assess** |
|---|---|---|
| 1st Quarter 2006 | April 25, 2006 | April 25, 2009 |
| 2nd Quarter 2006 | July 25, 2006 | July 25, 2009 |
| 3rd Quarter 2006 | October 25, 2006 | October 25, 2009 |
| 4th Quarter 2006 | January 25, 2007 | January 25, 2010 |

Clearly, from the above tabulation, respondent's right to assess petitioner for deficiency VAT for CY 2006 had, likewise, prescribed as the period to assess was not extended due to infirmities in the Waiver executed by petitioner and respondent on December 28, 2009, thus rendering the Waiver null and void."

As may be gleaned from the above quoted portion of the Assailed Decision, the Court in Division used the supposed last days for filing the VAT returns per quarter of CY 2006 as reckoning point for counting the 3-year prescriptive period under Section 203 of the 1997 NIRC. After determining the end dates of the 3-year prescriptive period, the Court in Division then compared these "last day to assess" per quarter of CY 2006 with date of issuance of the FAN/FLD on November 25, 2010 and concluded that the CIR's right to assess deficiency VAT in the present case had already prescribed.

In my view, the proper application of Section 203 of the 1997 NIRC presupposes that the relevant tax return is actually filed. For ready reference, the full text of Section 203 of the 1997 NIRC is reproduced below:

> 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.** *(Emphasis supplied)*

It is important to note that Section 203 begins by acknowledging that the rule provided therein is subject to the exception laid down by Section 222 of the 1997 NIRC. Section 203 then states the general rule that internal revenue taxes

shall be assessed within 3 years after the last day prescribed by law for the filing of the return. Section 203 also contains a proviso stating that where a return is filed beyond the period prescribed by law, the 3-year period shall be counted from the day the return was filed. The proviso likewise states that if the relevant tax return is filed before the last day prescribed by law for the filing thereof, the same is considered as filed on such last day. In other words, the general rule may be stated as that internal revenue taxes must be assessed within 3 years reckoned from the last day fixed by law for the filing of the return or the actual date of filing, whichever comes later.

It thus becomes clear that the Court in Division erred in automatically using the supposed last days for filing the VAT returns per quarter of CY 2006 as reckoning point for counting the 3-year prescriptive period without first determining the dates when the VAT returns were actually filed. But since Kabalikat never filed any VAT return, there is no basis to apply Section 203 in the present case at least with respect to the deficiency VAT assessment. To apply the 3-year prescriptive period under Section 203 even without proof of the actual date of filing of the relevant tax returns is to render nugatory the exception provided by Section 222, *i.e.*, the 10-year prescriptive period due to non-filing of returns.

It may not be amiss to point out that in *Taligaman Lumber Co., Inc. v. The Collector of Internal Revenue*,[5] the Supreme Court held that it is incumbent upon the taxpayer wanting to set up prescription as an affirmative defense to prove its submission of a return and if it fails to do so, the conclusion should be that no such return was filed. According to the Supreme Court:

> "Petitioner objects to the application of this section 332(a)[6] upon the ground that there is no affirmative evidence that it had not filed the corresponding returns for the years 1948-1949. Thus the issue boils down to which of the two parties had the burden of proving such failure to file said returns. **It is, however, clear that since prescription is one of the affirmative defenses set up by petitioner herein, it was incumbent upon the latter, if it wanted to avail itself of the benefits of section 331,[7] to prove that it had submitted said returns, and that, having failed to do so, the conclusion must be that no such returns had been filed and that the Government had ten (10) years within which to make the corresponding assessments, as it did in this case.**" *(Emphasis supplied)*

There is no reason not to apply the foregoing rule in the present case. Moreover, as mentioned earlier, it is pointless to expect Kabalikat to file its VAT returns by virtue of its registration as a non-VAT taxpayer and its claim that it is

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[5] G.R. No. L-15716, March 31, 1962 (En Banc).
[6] Now Section 222(a) of the 1997 NIRC.
[7] Now Section 203 of the 1997 NIRC.

not subject to VAT. With these in mind, it is with more reason to apply the 10-year prescriptive period in the present case.

**Kabalikat's microfinancing activity is subject to VAT.**

In its Petition for Review, Kabalikat theorizes that an activity done pursuant to a social welfare purpose of a non-stock, non-profit organization cannot be considered as a sale of service made in the course of trade or business. Kabalikat claims that while it is true that it earns a minimal rate of interest, the said fact alone is not enough for the same to be subjected to VAT. Kabalikat also contends that its micro-financing activities may not be considered as a "business" given that its beneficiaries are poor people who have not access to formal financial institutions since they have no collateral and the size of their loans are too small to be considered by banks. In extending small scale loans to its borrowers pursuant to its purpose as a non-stock, non-profit social organization, Kabalikat posits that it cannot be said to be engaged in any trade or business since it is not engaged in the regular conduct or pursuit of a commercial or an economic activity or in transactions incidental thereto. Kabalikat also asserts that its income derived from the grant of loans is used to finance their social welfare activities. It likewise avers that it cannot shift the burden on VAT to its borrowers because to do so would, in effect, be taxing its own since the borrowers are themselves members of Kabalikat.

Kabalikat's assertions are unmeritorious.

After thorough evaluation of Kabalikat's arguments vis-à-vis the relevant laws and jurisprudence, I firmly believe that there is no compelling reason to modify the Court in Division's findings. If truth be told, Kabalikat's arguments are mere reiterations of those which were already considered, thoroughly discussed, and passed upon in the Assailed Decision. I quote below the pertinent disquisition by the Court in Division in the Assailed Decision on this matter, to wit:[8]

> "VAT is a form of sales tax. It is a tax on consumption levied on the sale, barter, exchange or lease of goods or properties and services in the Philippines and on importation of goods into the Philippines. It is an indirect tax, which may be shifted or passed on to the buyer, transferee or lessee of goods, properties or services.
>
> While it is true that Section 30(G) exempts, among others, the income received by civic league or organization not organized for profit but operated exclusively for the promotion of social welfare, a perusal of the said Section shows that the same is

[8] CTA EB No. 1239 Docket, pp. 32-39.

exempted only for taxes imposed under the Title upon which the said Section belongs. Thus:

> 'SEC. 30. ***Exemptions from Tax on Corporations.*** - The following organizations shall not be taxed under this Title in respect to income received by them as such.' (Underscoring Ours)

In other words, Section 30(G) exempts petitioner only for taxes on income under TITLE II of the Tax Code of 1997, as amended; Whereas, VAT is found under TITLE IV of the same Tax Code.

Similarly, Section 5 of RR No. 14-2007 only exempts NGOs from payment of income taxes and not VAT, to wit:

> 'SECTION 5. ***Tax Treatment of Microfinance Services Rendered by Non-Government Organizations.*** –
>
> All NGOs falling under the enumeration of Section 30 of the Tax Code of 1997, as amended, are exempt from income taxes, in respect of income received by them as such. However, income of such NGOs from microfinance activities and which are not in respect of their registered activities covered by Section 30 of the Tax Code of 1997, as amended, regardless of the disposition made of such income, shall be subject to tax under the Tax Code of 1997, as amended.
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> Similarly, non-stock, non-profit NGOs, whether or not engaged in microfinance activities are still also required to file withholding tax returns and remit withholding taxes on all income payments that are subject to withholding as specified in Revenue Memorandum Circular No. 76-2003.' (Underscoring Ours)

With regard to petitioner's contention that for a sale of service to be subjected to VAT it must be made for a fee or remuneration and must be done in the course of trade or business, this Court sees the same as impressed with no merit.

Section 105 of the Tax Code, as amended, explains that the phrase *'in the course of trade or business'* means the regular conduct or pursuit of a commercial or an economic activity, including transactions incidental thereto, by any person regardless of whether or not the person engaged therein is a non-stock, non-profit private organization (irrespective of the disposition of its net income and

whether or not it sells exclusively to members or their guests), or government entity, to wit:

> '**SEC. 105.** ***Persons Liable.*** - Any person who, in the course of trade or business, sells barters, exchanges, leases goods or properties, renders services, and any person who imports goods shall be subject to the value-added tax (VAT) imposed in Sections 106 to 108 of this Code.
>
> xxx xxx xxx
>
> The phrase *'in the course of trade or business'* means the regular conduct or pursuit of a commercial or an economic activity, including transactions incidental thereto, by any person regardless of whether or not the person engaged therein is a nonstock, nonprofit private organization (irrespective of the disposition of its net income whether or not it sells exclusively to members or their guests), or government entity.' (Underscoring Ours)

As can be gleaned above, the provision clarifies that even a non-stock, non-profit organization or government entity is liable to pay VAT on the sale of goods or services. VAT is a tax on transactions, imposed at every stage of the distribution process on the sale, barter, exchange of goods or property, and on the performance of services, even in the absence of profit attributable thereto.

In the case of *Commissioner of Internal Revenue vs. Court of Appeals and Commonwealth Management and Services Corporation*, the Supreme Court addressed the issue at hand and ruled that:

> 'COMASERCO contends that the term 'in the course of trade or business' requires that the 'business' is carried on with a view to profit or livelihood. It avers that the activities of the entity must be profit-oriented. COMASERCO submits that it is not motivated by profit, as defined by its primary purpose in the articles of incorporation, stating that it is operating 'only on reimbursement-of-cost basis, without any profit.' Private respondent argues that profit motive is material in ascertaining who to tax for purposes of determining liability for VAT.
>
> We disagree.
>
> xxx xxx xxx

> Contrary to COMASERCO's contention the above provision [Section 105 of the NIRC of 1997] clarifies that even non-stock, non-profit, organization or government entity, is liable to pay VAT on the sale of goods or services. VAT is a tax on transactions, imposed at every stage of the distribution process on the sale, barter, exchange of goods or property, and on the performance of services, even in the absence of profit attributable thereto. The term 'in the course of trade or business' requires the regular conduct or pursuit of a commercial or an economic activity regardless of whether or not the entity is profit-oriented.
>
> xxx xxx xxx
>
> Hence, it is immaterial whether the primary purpose of a corporation indicates that it receives payments for services rendered to its affiliates on a reimbursement-on-cost basis only, without realizing profit, for purposes of determining liability for VAT on services rendered. As long as the entity provides services for a fee, remuneration or consideration, then the service rendered is subject to VAT.' (Underscoring Ours)

Consequently, the mere fact that petitioner earns interest even at a 'minimal rate' is enough for it to be subjected to VAT. In fact, Section 108 of the NIRC of 1997, as amended, defines the phrase 'sale of services' as the 'performance of all kinds of services for others for a fee, remuneration or consideration.'

All told, it is a rule that because taxes are the lifeblood of the nation, statutes that allow exemptions are construed strictly against the grantee and liberally in favor of the government. Otherwise stated, any exemption from the payment of a tax must be clearly, stated in the language of the law; it cannot be merely implied therefrom. That having been said, Section 109 of the Tax Code, as amended, specifically enumerates the transactions exempted from VAT. As such:

> 'SEC. 109. ***Exempt Transactions.*** - (1) Subject to the provisions of subsection (2) hereof, the following transactions shall be exempt from the value-added tax:
>
> (A) Sale or importation of agricultural and marine food products in their original state, livestock and poultry of a kind generally used as, or yielding or

producing foods for human consumption; and breeding stock and genetic materials therefor.

'Products classified under this paragraph shall be considered in their original state even if they have undergone the simple processes of preparation or preservation for the market, such as freezing, drying, salting, broiling, roasting, smoking or stripping. Polished and/or husked rice, corn grits, raw cane sugar and molasses, ordinary salt, and copra shall be considered in their original state;

(B) Sale or importation of fertilizers, seeds, seedlings and fingerlings; fish, prawn, livestock and poultry feeds, including ingredients, whether locally produced or imported, used in the manufacture of finished feeds (except specialty feeds for race horses, fighting cocks, aquarium fish, zoo animals and other animals generally considered as pets);

(C) Importation of personal and household effects belonging to the residents of the Philippines returning from abroad and nonresident citizens coming to resettle in the Philippines: Provided, That such goods are exempt from customs duties under the Tariff and Customs Code of the Philippines;

(D) Importation of professional instruments and implements, wearing apparel, domestic animals, and personal household effects (except any vehicle, vessel, aircraft, machinery, other goods for use in the manufacture and merchandise of any kind in commercial quantity) belonging to persons coming to settle in the Philippines, for their own use and not for sale, barter or exchange, accompanying such persons, or arriving within ninety (90) days before or after their arrival, upon the production of evidence satisfactory to the Commissioner, that such persons are actually coming to settle in the Philippines and that the change of residence is bona fide;

(E) Services subject to percentage tax under Title V;

(F) Services by agricultural contract growers and milling for others of palay into rice, corn into grits and sugarcane into raw sugar;

(G) Medical, dental, hospital and veterinary services except those rendered by professionals;

(H) Educational services rendered by private educational institutions, duly accredited by the Department of Education (DepEd), the Commission on Higher Education (CHED), the Technical Education and Skills Development Authority (TESDA) and those rendered by government educations institutions;

(I) Services rendered by individuals pursuant to an employer-employee relationship;

(J) Services rendered by regional or area headquarters established in the Philippines by multinational corporations which act as supervisory communications and coordinating centers for their affiliates, subsidiaries or branches in the Asia-Pacific Region and do not earn or derive income from the Philippines;

(K) Transactions which are exempt under international agreements to which the Philippines is a signatory or under special laws, except those under Presidential Decree No. 529;

(L) Sales by agricultural cooperatives duly registered with the Cooperative Development Authority to their members as well as sale of their produce, whether in its original state or processed form, to non-members; their importation of direct farm inputs, machineries and equipment, including spare parts thereof, to be used directly and exclusively in the production and/or processing of their produce;

(M) Gross receipts from lending activities by credit or multi-purpose cooperatives duly registered with the Cooperative Development Authority;

(N) Sales by non-agricultural, non-electric and non-credit cooperatives duly registered with the Cooperative Development Authority: Provided, That the share capital contribution of each member does not exceed Fifteen thousand pesos (P15,000) and regardless of the aggregate capital and net surplus ratably distributed among the members;

(O) Export sales by persons who are not VAT-registered;

(P) Sale of real properties not primarily held for sale to customers or held for lease in the ordinary course of trade or business, or real property utilized for low-cost and socialized housing as defined by Republic Act No. 7279, otherwise known as the Urban Development and Housing Act of 1992, and other related laws, residential lot valued at One million five hundred thousand pesos (P1,500,000) and below, house and lot, and other residential dwellings valued at Two million five hundred thousand pesos (P2,500,000) and below: Provided, That not later than January 31, 2009 and every three (3) years thereafter, the amount herein stated shall be adjusted to its present value using the Consumer Price Index as published by the National Statistics Office (NSO);

(Q) Lease of a residential unit with a monthly rental not exceeding Ten thousand pesos (P10,000) Provided, That not later than January 31, 2009 and every three (3) years thereafter, the amount herein stated shall be adjusted to its present value using the Consumer Price Index as published by the National Statistics Office (NSO);

(R) Sale, importation, printing or publication of books and any newspaper, magazine, review or bulletin which appears at regular intervals with fixed prices for subscription and sale and which is not devoted principally to the publication of paid advertisements;

(S) Sale, importation or lease of passenger or cargo vessels and aircraft, including engine, equipment and spare parts thereof for domestic or international transport operations;

(T) Importation of fuel, goods and supplies by persons engaged in international shipping or air transport operations;

(U) Services of banks, non-bank financial intermediaries performing quasi-banking functions, and other non-bank financial intermediaries; and

(V) Sale or lease or goods or properties or the performance of services other than the transactions

> mentioned in the preceding paragraphs, the gross annual sales and/or receipts do not exceed the amount of One million five hundred thousand pesos (P1,500,000): Provided, That not later than January 31, 2009 and every three (3) years thereafter, the amount herein stated shall be adjusted to its present value using the Consumer Price Index as published by the National Statistics Office (NSO);
>
> (2) A VAT-registered person may elect that Subsection (1) not apply to its sale of goods or properties or services: Provided, That an election made under this Subsection shall be irrevocable for a period of three (3) years from the quarter the election was made.'

Unfortunately, however, the micro-financing services rendered by petitioner do not fall within the exemptions enumerated in the afore-cited Section.

Clearly, therefore, petitioner's microfinance activities are subject to income tax and VAT as discussed above."

**Kabalikat cannot be considered as non-bank financial intermediary.**

Kabalikat likewise postulates that it is, at best, subject only percentage tax under Section 122 of the National Internal Revenue Code of 1997, as amended (1997 NIRC). It submits that it is a financial intermediary under Section 122 of the 1997 NIRC considering that microfinance activities basically involve extension of small loans or lending of funds though such activity is exclusively intended for the poor segments of our society. Kabalikat surmises that its extension of loans to the poor is no different from other entities whose principal function is to lend money. In support of its position, Kabalikat cited BIR Ruling 159-87 dated June 9, 1987 wherein Tulay sa Pag-unlad, Inc. (TSPI) was categorized as a lending investor subject to 5% tax on its gross income in accordance with Section 175 of the 1997 NIRC. Kabalikat asserts that its microfinance activity is no different from the activities of TSPI. Kabalikat likewise invoked Article VI, Section 28 of the 1987 Constitution to buttress its position that the "lending of monies to the poor."

Kabalikat's position is untenable.

Kabalikat cannot seek refuge under BIR Ruling 159-87 dated June 9, 1987 as these rulings are merely of persuasive character and cannot be considered as conclusive interpretation of the law. On this point, the ruling of the Supreme

Court in *Philippine Bank of Communications v. Commissioner of Internal Revenue*[9] is instructive:

> "x x x It is widely accepted that the interpretation placed upon a statute by the executive officers, whose duty is to enforce it, is entitled to great respect by the courts. **Nevertheless, such interpretation is not conclusive and will be ignored if judicially found to be erroneous. Thus, courts will not countenance administrative issuances that override, instead of remaining consistent and in harmony with, the law they seek to apply and implement.**" (Emphasis supplied)

Kabalikat cannot simply rely on this BIR Ruling especially when the same was not even issued in its favor.

Section 122 of the 1997 NIRC reads as follows:

> Sec. 122. *Tax on Other Non-Bank Finance Intermediaries.* - There shall be collected a tax of five percent (5%) on the gross receipts derived by other non-bank financial intermediaries doing business in the Philippines, from interest, commissions, discounts and all other items treated as gross income under this Code: *Provided,* That interests, commissions and discounts from lending activities, as well as income from financial leasing, shall be taxed on the basis of the remaining maturities of the instruments from which such receipts are derived, in accordance with the following schedule:
>
> Maturity period is five (5) years or less — 5%
>
> Maturity period is more than five (5) years — 1%
>
> *Provided, however,* That in case the maturity period is shortened thru pretermination, then the maturity period shall be reckoned to end as of the date of pretermination for purposes of classifying the transaction and the correct rate shall be applied accordingly.
>
> *Provided, finally,* That the generally accepted accounting principles as may be prescribed by the Securities and Exchange Commission for other non-bank financial intermediaries shall likewise be the basis for the calculation of gross receipts.
>
> Nothing in this Code shall preclude the Commissioner from imposing the same tax herein provided on persons performing similar financing activities.

[9] G.R. No. 112024, January 28, 1999, 302 SCRA 241, 252.

In *City of Davao v. Randy Allied Ventures, Inc.*,[10] the Supreme Court aptly held as follows:

> "x x x In order to be considered as an NBFI under the National Internal Revenue Code, banking laws, and pertinent regulations, the following must concur:
>
> a. **The person or entity is authorized by the BSP to perform quasi-banking functions;**
>
> b. The principal functions of said person or entity include the lending, investing or placement of funds or evidences of indebtedness or equity deposited to them, acquired by them, or otherwise coursed through them, either for their own account or for the account of others; and
>
> c. The person or entity must perform any of the following functions on a regular and recurring, not on an isolated basis, to wit:
>
> 1. Receive funds from one (1) group of persons, irrespective of number, through traditional deposits, or issuance of debt or equity securities; and make available/lend these funds to another person or entity, and in the process acquire debt or equity securities;
>
> 2. Use principally the funds received for acquiring various types of debt or equity securities;
>
> 3. Borrow against, or lend on, or buy or sell debt or equity securities." *(Emphasis supplied and citations omitted)*

In view of the foregoing, I submit that Kabalikat cannot be considered as a non-bank financial intermediary subject to Section 122 of the 1997 NIRC because there is no proof that it is authorized by the *Bangko Sentral ng Pilipinas (BSP)* to perform quasi-banking functions. In the same vein, there is no merit in Kabalikat's assertion that the "lending of monies to the poor' cannot be a substantial factor to distinguish petitioner from "other non-bank financial intermediaries" such as pawnshops. The distinction lies in the fact that these other non-bank financial intermediaries are authorized by the *BSP* to engage in quasi-banking functions while Microfinance NGOs are not.

It should be noted that under Section 6, Chapter II of RA 8791 or "The General Banking Law of 2000", no person or entity is allowed to engage in banking or quasi-banking operations without authority from the *BSP*.

[10] G.R. No. 241697, July 29, 2019.

Moreover, under Section 3, Article I, Chapter I of RA No. 7653 or "The New Central Bank Act", the *BSP* shall exercise regulatory powers over the operations of non-bank financial institutions performing quasi-banking functions, among others. On the other hand, microfinance NGOs are accredited by and are subject to the supervision of Microfinance NGO Regulatory Council, a body created pursuant to the provisions of RA 10693 or the Microfinance NGOs Act of 2015.[11]

**IN VIEW OF THE FOREGOING,** I vote to **PARTIALLY GRANT** the Petition for Review filed by the Commissioner of Internal Revenue docketed as CTA EB No. 1239. Accordingly, the Assailed Resolution dated October 1, 2014 of the Second Division of this Court in CTA Case No. 8336 should be reversed and set aside and that the Assailed Decision dated June 20, 2014 shall be modified to read as follows:

> "**WHEREFORE**, the Petition for Review is hereby **PARTIALLY GRANTED**. The assessments issued by respondent CIR to petitioner for deficiency income tax in the amount of ₱39,798,934.55 and Expanded Withholding Tax (EWT) in the amount of ₱197,192.98 for CY 2006, inclusive of increments, are both **CANCELLED** and **SET ASIDE.**
>
> The deficiency value-added tax assessment issued by respondent against petitioner for CY 2006 is **UPHELD**. Accordingly, petitioner is ordered to pay ₱31,707,066.85, inclusive of the 25% surcharge imposed under Section 248(A)(1) of the National Internal Revenue Code of 1997, as amended, computed as follows:
>
> | | |
> |---|---|
> | Basic deficiency VAT | ₱ 25,365,653.48 |
> | Add: 25% Surcharge | 6,341,413.37 |
> | Total deficiency VAT | ₱ 31,707,066.85 |
>
> In addition, petitioner is **ORDERED TO PAY**:
>
> a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency VAT of ₱25,365,653.48 computed from January 26, 2007 until December 31, 2017 pursuant to Section 249(B) of the National Internal Revenue Code of 1997, as amended;
>
> b) Delinquency interest at the rate of 20% per annum on the total amount of ₱31,707,066.85, and on the 20% deficiency interest which have accrued as aforestated in (a), computed from December 18, 2010 until December 31, 2017 pursuant

[11] Section 10, RA 10693.

to Section 249(C) of the National Internal Revenue Code of 1997, as amended; and

c) Delinquency interest at the rate of 12% on the unpaid amount (basic tax plus surcharge plus interests computed in (a) and (b) above) from January 1, 2018 until the amount is fully paid pursuant to the relevant provisions of the TRAIN Law.

**SO ORDERED.**"

On the other hand, I vote to **DENY** the Petition for Review filed by Kabalikat Para Sa Maunlad Na Buhay, Inc. docketed as CTA EB No. 1238 for lack of merit.

**MA. BELEN M. RINGPIS-LIBAN**
Associate Justice