REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

MINDANAO SANITARIUM AND HOSPITAL, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8108

Members:

Del Rosario, *Chairperson*
Uy,
Mindaro-Grulla, *JJ.*

Promulgated:

DEC 16 2013 4:28 pm

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DECISION

DEL ROSARIO, P.J.:

This is a Petition for Review filed on June 18, 2010 by Mindanao Sanitarium and Hospital, Inc. (petitioner) seeking to set aside a decision (by inaction) of the Commissioner of Internal Revenue (respondent) on petitioner's protest of the Formal Letter of Demand and the cancellation and withdrawal of alleged deficiency income tax, value-added tax (VAT), withholding tax on compensation, and expanded withholding tax (EWT) assessments for taxable year 2007 in the aggregate amount of ₱37,245,026.16, as shown in the Formal Letter of Demand.

THE FACTS

Petitioner is a non-stock, non-profit corporation duly organized and existing under the laws of the Philippines, with principal office located at Tibanga, Iligan City.[1] As a non-stock, non-profit corporation, no part of its net income shall inure to the benefit of any of its members or to any of its working force.[2]

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[1] Exhibits "A" and "B", inclusive of sub-markings, CTA Docket, pp. 226 to 233.
[2] Exhibit "B-3", CTA Docket, p. 228; Exhibit "CC", CTA Docket, pp. 310 to 311.

Based on petitioner's Articles of Incorporation, petitioner was formed for the following purposes, namely: to "advance through medical missionary work the cause and kingdom of Jesus Christ, the Great Physician; to further, by all proper and legitimate agencies and means a better knowledge of the laws of life and true hygiene, the relief of suffering, and the prevention or cure of disease, subject to the condition that purely professional, medical or surgical services in connection therewith shall be performed by duly qualified physicians or surgeons who may or may not be connected with the corporation and who shall be freely and individually contracted by patients; to publish and circulate health literature dealing with diseases; hygiene and kindred subjects; to educate and train nurses; to furnish lecturers and teachers to instruct the people regarding the laws of life and the true methods of living; to do benevolent, charitable, philanthropic, and Christian help work for the good of humanity and the uplift of our fellow men; to receive for the advancement of this work, gifts, legacies and donations, from any source whatever."[3]

Respondent is the Commissioner of the Bureau of Internal Revenue (BIR), the official authorized under Section 4 of the National Internal Revenue Code (NIRC) of 1997 to decide disputed assessments, among others, subject to the exclusive appellate jurisdiction of the Court of Tax Appeals. She holds office at the 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.

Respondent issued Letter of Authority No. 00031914 dated June 16, 2008 for purposes of investigating all internal revenue tax liabilities of petitioner for the year ending December 31, 2007.[4] As a result of said investigation, petitioner received on November 6, 2009[5] a Formal Letter of Demand (FLD) dated September 25, 2009, with attached annexes described as "Computation of Discrepancies"[6] and "Facts, Laws, Rules and Regulations as basis of the assessment"[7] issued by the Regional Director.[8]

The contents of the Formal Letter of Demand are quoted below: OM

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[3] Exhibits "B" and "B-1", CTA Docket, p. 228.
[4] Pre Trial Order, CTA Docket, p. 165.
[5] Exhibit "E-1", CTA Docket, p. 251.
[6] CTA Docket, pp. 252 to 253.
[7] CTA Docket, pp. 254 to 261.
[8] Exhibit "E", CTA Docket, p. 251.

"**FORMAL LETTER OF DEMAND**

September 25, 2009

Mindanao Sanitarium and Hospital, Inc.
National Highway, San Miguel, Iligan City

Attention: **Mr. Carlos M. Morente**
The VP-Finance

Gentlemen:

Please be informed that after investigation of your **2007** All Internal Revenue Tax Liabilities by Revenue Officer Jonainah G. Usman pursuant to **Letter of Authority No. 00031914** dated June 16, 2008, it was ascertained that there is still due from you the total amount of Thirty Seven Million Two Hundred Forty Five Thousand Twenty Six Pesos and 16/100 (P37,245,026.16), inclusive of legal increments as shown hereunder:

Assessment No: RR16-101-628-09

	Basic	Surcharge	Interest	Compromise	Total
Income Tax on:					
Non-hospital Receipts	P 14,415,659.39	P 3,603,914.85	P 4,324,697.82	-	P 22,344,272.06
Hospital Receipts	3,057,142.20	764,285.55	917,142.66	-	4,738,570.41
Value-Added Tax	3,884,300.76	971,075.19	1,337,753.18	-	6,193,129.13
Withholding Tax-Comp.	1,296,984.79	324,246.20	446,681.56	-	2,067,912.55
Expanded Withholding Tax	1,054,404.17	263,601.04	363,136.80	25,000.00	1,706,142.01
Others	-	-	-	195,000.00	195,000.00
TOTAL DEFICIENCY	**P23,708,491.31**	**P5,927,122.83**	**P7,389,412.02**	**P220,000.00**	**P37,245,026.16**

Please note that the interest and total amount due shall be adjusted if paid beyond 10/16/09.

The complete details of the aforementioned discrepancies established during the investigation are shown in **Annexes A and B**.

In view thereof, you are requested to pay your aforesaid deficiency internal revenue tax liabilities through the duly authorized agent bank in which you are enrolled within the time shown in the enclosed assessment notice.

Very truly yours,

ESMERALDA M. TABULE, CESO VI
Regional Director"

On November 27, 2009, petitioner protested the foregoing FLD by filing a protest letter dated November 25, 2009 with attached supporting document[9] addressed to Esmeralda M. Tabule, the Regional Director of BIR Revenue Region No. 16, praying that the assessment involving income tax and VAT be withdrawn and the docket be remanded to the District Office.

[9] Exhibits "F-5" and "F-6", CTA Docket, pp. 268 to 269.

for the conduct of examination of the supporting documents involving withholding taxes.[10]

On December 15, 2009, petitioner, through Francisco I. Naputo and Crispulo T. Aguillon, Jr., verbally requested from respondent, through Adora L. Sijo, the Chief of the Assessment Division of the Cagayan de Oro Regional Office, a copy of the 2007 Final Assessment Notice (FAN) that respondent allegedly failed to attach to the FLD dated September 25, 2009.[11] Subsequently, since respondent failed to furnish petitioner a copy of the FAN despite the said verbal request, petitioner again made a request for a copy of the FAN via a letter dated April 27, 2010 addressed to the Regional Director of BIR Revenue Region No. 16-Cagayan de Oro.[12]

While petitioner's protest with the BIR remained unresolved, petitioner was able to secure a BIR Ruling No. NSNP (S30E-157) 803-2009 dated December 21, 2009 issued by Assistant Commissioner for Legal Service, James H. Roldan, confirming that petitioner being *"a corporation organized for charitable purposes as contemplated under Section 30(E) of the Tax Code of 1997 xxx it is exempt from the payment of income tax on income received by it as such organization, and therefore, need not file an income tax return concerning such income."*[13]

Due to the inaction of respondent on its protest dated November 25, 2009 and its verbal and written requests[14] for a copy of the FAN, petitioner filed the instant Petition for Review on June 18, 2010, praying that the deficiency income, VAT, withholding tax on compensation, and expanded withholding tax assessments in the aggregate amount of ₱37,245,026.16 for taxable year 2007, as shown in the FLD dated September 25, 2009, be cancelled and withdrawn. In its Petition for Review, petitioner cites BIR Ruling No. NSNP (S30E-157) 803-2009 dated December 21, 2009 and the letter dated April 20, 1966 issued by the BIR as basis for its exemption from payment of income tax.[15]

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[10] Exhibit "F", inclusive of sub-markings, CTA Docket, pp. 262 to 267.
[11] Exhibits "L" and "M", CTA Docket, pp. 281 to 286.
[12] Exhibits "L" and "M", CTA Docket, pp. 281 to 286; Exhibit "G", CTA Docket, p. 270.
[13] Par. 1, Facts Jointly Stipulated and Admitted, Joint Stipulations of Facts and Admissions, CTA Docket, p. 145; Annex "A", Petition for Review, CTA Docket, pp. 9 to 11.
[14] Exhibit "M", CTA Docket, pp. 284 and 285.
[15] Par. 3 and Par. 4, Petition for Review, CTA Docket, p. 2; Annex "A", Petition for Review, CTA Docket, pp. 9 to 11; Annex "B", Petition for Review, CTA Docket, pp. 12 to 13.

On September 2, 2010, respondent filed her Motion to Admit Attached Answer,[16] which was granted by this Court in the Resolution[17] dated September 9, 2010.

On October 18, 2010, respondent sent through mail and received by this Court on October 29, 2010 her Motion for Leave of Court to Amend Answer,[18] praying for the admission of the attached Amended Answer; which was granted in the Resolution[19] dated November 8, 2010.

In her Amended Answer,[20] respondent raised special and affirmative defenses which are summarized hereunder:

1. Assessments are presumed correct and issued in accordance with laws and regulations, hence, valid and binding;

2. Petitioner is a non-stock, non-profit hospital/institution which makes it liable to pay the preferential rate of ten percent (10%) on its taxable income for the year 2007 pursuant to Section 27 of the NIRC of 1997, as amended;

3. Petitioner's failure to establish that it is an institution organized and operated exclusively for charitable purposes warrants the payment of deficiency tax assessments;

4. The BIR ruling allegedly issued to petitioner confirming its exemption from income tax is no longer controlling by express provision of the NIRC of 1997, as amended;

5. The FAN issued against petitioner is valid and binding as it was issued within the prescriptive period. The FAN and the FLD, both dated September 25, 2009, were served upon petitioner by registered mail as evidenced by Registry Receipt No. 8889 on October 20, 2009;

6. The administrative protest filed by petitioner is devoid of any factual and legal basis to support petitioner's contentions. Hence,

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[16] CTA Docket, pp. 52 to 55.
[17] CTA Docket, p. 85.
[18] CTA Docket, pp. 102 to 107.
[19] CTA Docket, pp. 136 to 137.
[20] CTA Docket, pp. 109 to 130.

by express provisions of law, the administrative protest filed by petitioner should be considered void and without force and effect;

7. Petitioner failed to submit all relevant documents in support of its administrative protest within sixty (60) days from its filing, in violation of Section 228 of the NIRC of 1997, as amended and RR No. 12-99; and,

8. This Court has no jurisdiction to try and hear the instant petition for review considering that the deficiency tax assessments issued against petitioner have become final, executory and unappealable.

During trial, petitioner presented Crispulo T. Aguillon, Jr.;[21] Atty. Francisco Naputo, petitioner's legal counsel;[22] Dr. Edgar Claude A. Nadal, petitioner's President from 2007 to 2010 and former member of the Board of Trustees;[23] Joaquin S. Samaco, petitioner's external auditor;[24] and Levi B. Baliton, member of petitioner's Board of Trustees,[25] as its witnesses.

Thereafter, petitioner filed its Formal Offer of Evidence[26] on June 19, 2012, submitting Exhibits "A" to "DD", inclusive of sub-markings; which this Court admitted in the Resolution[27] dated July 31, 2012, except Exhibits "Y-1" and "U-1".

On October 9, 2012, respondent presented her witnesses, BIR Revenue Officers Jonainah G. Usman and Aisah M. Acedillo.[28]

Respondent filed her Formal Offer of Documentary Evidence[29] on November 6, 2012, submitting Exhibits "1", "5" to "9", "12", "13", and "16", inclusive of sub-markings all of which were admitted in the Resolution[30] dated December 20, 2012. On March 7, 2013, respondent filed her Supplemental Formal Offer of Documentary Evidence,[31] submitting

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[21] Minutes of Hearing dated February 24, 2011, March 31, 2011, September 15, 2011, CTA Docket pp. 155, 171 to 172, and 190, respectively.
[22] Minutes of Hearing dated May 3, 2011, CTA Docket, p. 175.
[23] Minutes of Hearing dated June 21, 2011, CTA Docket, p. 180.
[24] Minutes of Hearing dated November 17, 2011, CTA Docket, p. 199.
[25] Minutes of Hearing dated January 27, 2012, CTA Docket, pp. 207 to 208.
[26] CTA Docket, pp. 219 to 225.
[27] CTA Docket, pp. 328 to 329.
[28] Minutes of Hearing dated October 9, 2012, CTA Docket, p. 378.
[29] CTA Docket, pp. 388 to 394.
[30] CTA Docket, pp. 402 to 403.
[31] CTA Docket, pp. 435 to 437.

Exhibits "18" and "19", inclusive of sub-markings which this Court admitted in a Resolution[32] dated July 12, 2013.

With the filing of petitioner's Memorandum on February 6, 2013 and the Memorandum (for the Respondent) on March 8, 2013, the case was considered submitted for decision on July 12, 2013.[33]

THE ISSUES

The following are the parties' jointly stipulated issues[34] submitted for this Court's consideration:

> "1. Whether or not respondent violated Section 3.1.4 of Revenue Regulations 12-99.
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> 2. Whether or not the 2007 deficiency tax assessments and Formal Letter of Demand dated September 25, 2009 have factual and legal bases.
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> 3. Whether or not petitioner was denied due process.
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> 4. Whether or not petitioner is considered a non-profit hospital within the purview of Section 27 (B) of the NIRC of 1997, as amended, relative to the deficiency tax assessments for taxable year 2007.
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> 5. Whether or not petitioner remains as a charitable institution.
>
> 6. Whether or not all the funds of petitioner are devoted exclusively for its maintenance as charitable institution.
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> 7. Whether or not the unnumbered Letter of Exemption dated April 20, 1966 allegedly granting income tax exemption in favor of petitioner is still valid and controlling.
>
> 8. Whether or not petitioner submitted all relevant documents in support of its administrative protest pursuant to the provisions of Section 228 of the NIRC of 1997, as amended and RR 12-99.
>
> 9. Whether or not the administrative protest was filed within the prescriptive period by law.
>
> 10. Whether or not petitioner is liable to pay deficiency Income Tax, VAT, Expanded Withholding Tax, and Withholding Tax on Compensation for taxable year 2007 in the total amount of ₱37,245,026.16." OM

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32 CTA Docket, pp. 500 to 501.
33 CTA Docket, pp. 500 to 501.
34 CTA Docket, pp. 145 to 146.

The enumerated issues can be summarized as follows:

"Whether or not petitioner is liable to pay the aggregate amount of ₱37,245,026.16, allegedly representing deficiency income tax, value-added tax, withholding tax on compensation, and expanded withholding tax, inclusive of surcharges, interest, and penalties for taxable year 2007."

THE COURT'S RULING

The Court shall first resolve the issue of whether or not respondent violated the procedure specified under Section 3.1.4 of Revenue Regulations (RR) No. 12-99, specially on the issuance of the Final Assessment Notice (FAN).

Petitioner contends that respondent violated its right to due process when respondent failed to issue the FAN required under Section 228 of the NIRC of 1997, as amended and Section 3.1.4 of RR No. 12-99. As a consequence of respondent's failure to issue the FAN, petitioner argues that the assessment against it is void.

On the other hand, respondent posits that the FAN was valid and binding as it was issued within the prescriptive period. Allegedly, the FLD and the FAN, all dated September 25, 2009, were sent to petitioner by registered mail as evidenced by Registry Receipt No. 8889 on October 20, 2009.

Section 228 of the NIRC of 1997, as amended, which provides for the procedure in issuing and protesting an assessment, states:

> "**SEC. 228.** *Protesting of Assessment.* — When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however*, That a preassessment notice shall not be required in the following cases:
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> xxx xxx xxx
>
> The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.
>
> Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, **the Commissioner or his duly authorized representative shall issue an assessment based on his findings.**

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> Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.
>
> If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable." (Emphasis supplied)

To implement the provisions of Section 228 of the NIRC of 1997, as amended, RR No. 12-99 was issued. Section 3.1.4 of RR No. 12-99 reads:

> "3.1.4. *Formal Letter of Demand and Assessment Notice.* - The **formal letter of demand <u>and</u> assessment notice shall be issued** by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, *otherwise, the formal letter of demand and assessment notice shall be void.* xxx **The same shall be sent to the taxpayer only by registered mail or by personal delivery**. xxx" *(Emphases supplied)*

Clearly, a formal letter of demand **<u>AND</u>** an assessment notice shall be issued by the Commissioner of Internal Revenue (CIR) or his duly authorized representative. **The use of the word "shall" in these legal provisions indicates the mandatory nature of the requirements laid down therein.**[35] Thus, it is mandatory for respondent to demonstrate that both the formal letter of demand and the assessment notice were issued to the taxpayer within the prescriptive period.

Here, petitioner confirms that it received the FLD dated September 25, 2009,[36] with attached Computation of Discrepancies[37] and Facts, Laws, Rules and Regulations as basis of the assessment.[38] It, however, vehemently denies receipt of the FAN. On the other hand, respondent insists that the

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[35] *Commissioner of Internal Revenue vs. Enron Subic Power Corporation*, G.R. No. 166387, January 19, 2009.
[36] Exhibit "E", CTA Docket, p. 251; Par. 2, Facts Jointly Stipulated and Admitted, Joint Stipulation of Facts and Admissions, CTA Docket, p. 145.
[37] CTA Docket, pp. 252 to 253.
[38] CTA Docket, pp. 254 to 261.

FLD and the FAN were sent to petitioner by registered mail as evidenced by Registry Receipt No. 8889 on October 20, 2009.

Under the afore-quoted Section of RR No. 12-99, service of the assessment notice to the taxpayer may be by registered mail or by personal delivery. If the assessment is served by registered mail, and the original was not returned to respondent BIR, the presumption is that the taxpayer received the said assessment in the regular course of mail pursuant to Section 3 (v), Rule 131 of the Rules of Court.[39]

Thus, the facts to be proven in order to raise this disputable presumption are: (a) that the letter was properly addressed with postage prepaid; and (b) that it was mailed. Once these facts are established, the presumption is that the letter was received by the addressee as soon as it could have been transmitted to him in the ordinary course of the mail.[40]

In *Barcelon, Roxas Securities, Inc. (now known as UBP Securities, Inc.) vs. Commissioner of Internal Revenue*,[41] the Supreme Court ruled that while a mailed letter is deemed received by the addressee in the ordinary course of mail, this is still merely a disputable presumption subject to controversion, and a direct denial of the receipt thereof shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee, as quoted below:

> "In *Protector's Services, Inc. v. Court of Appeals*, this Court ruled that when a mail matter is sent by registered mail, there exists a presumption, set forth under Section 3(v), Rule 131 of the Rules of Court, that it was received in the regular course of mail. The facts to be proved in order to raise this presumption are: (a) that the letter was properly addressed with postage prepaid; and (b) that it was mailed. **While a mailed letter is deemed received by the addressee in the ordinary course of mail, this is still merely a disputable presumption subject to controversion, and a direct denial of the receipt thereof shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee.**

[39] "Sec. 3. Disputable presumptions. — The following presumptions are satisfactory if uncontradicted, but may be contradicted and overcome by other evidence:

xxx xxx xxx

(v) That a letter duly directed and mailed was received in the regular course of the mail;" (Section 3 (v), Rule 131 of the Rules of Court).

[40] Gonzalo P. Nava vs. Commissioner of Internal Revenue, G.R. No. L-19470, January 30, 1965; Protector's Services, Inc. vs. Court of Appeals, et al., G.R. No. 118176, April 12, 2000.

[41] G.R. No. 157064, August 7, 2006, citing *Protector's Services, Inc. vs. Court of Appeals*, 386 Phil. 611, 623 (2000).

In the present case, petitioner denies receiving the assessment notice, and the respondent was unable to present substantial evidence that such notice was, indeed, mailed or sent by the respondent before the BIR's right to assess had prescribed and that said notice was received by the petitioner. The respondent presented the BIR record book where the name of the taxpayer, the kind of tax assessed, the registry receipt number and the date of mailing were noted. The BIR records custodian, Ingrid Versola, also testified that she made the entries therein. xxx

xxx xxx xxx

In this case, the entries made by Ingrid Versola were not based on her personal knowledge as she did not attest to the fact that she personally prepared and mailed the assessment notice. Nor was it stated in the transcript of stenographic notes how and from whom she obtained the pertinent information. Moreover, she did not attest to the fact that she acquired the reports from persons under a legal duty to submit the same. Hence, Rule 130, Section 44 finds no application in the present case. Thus, the evidence offered by respondent does not qualify as an exception to the rule against hearsay evidence.

Furthermore, independent evidence, such as the registry receipt of the assessment notice, or a certification from the Bureau of Posts, could have easily been obtained. Yet respondent failed to present such evidence." *(Emphasis supplied)*

As afore-stated, petitioner vigorously denies receiving the FAN. In support of its claim, petitioner presented Atty. Francisco I. Naputo, Crispulo T. Aguillon, Jr. and Joaquin S. Samaco, who testified by way of their Judicial Affidavits that the FAN was not attached to the FLD; and that petitioner even made repeated verbal and written requests for a copy of the said FAN from respondent. The significant portions of their respective Judicial Affidavits[42] are quoted hereunder:

"JUDICIAL AFFIDAVIT
(Of Petitioner's Witness – Francisco I. Naputo)

xxx xxx xxx

3. Q. Having been aware of the missing 2007 assessment notice, what did you or MSH do about it, if any?

A. On December 15, 2009, we (Mr. Aguillon, Jr. the MSH Treasurer and I) went to see Ms. Adora L. Sijo, Chief of the Assessment

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[42] Exhibits "L", "M", and "BB".

Division of the Cagayan de Oro Regional Office to discuss among other things the missing 2007 assessment notice. I requested her to furnish us a copy [of] the said 2007 assessment notice which she agreed to do after reviewing the file-docket of the case.

4. Q. After that December 15, 2009 meeting, did the BIR actually furnish you or MSH a copy of the 2007 assessment notice?

A. As of the third week of April, 2010, both MSH and myself *(sic)* have not received any copy of the 2007 assessment notice from BIR – Cagayan de Oro Regional Office.

5. Q. With this turn of events, what did you do?

A. I sent a letter dated April 27, 2010 to the BIR Regional Director of Cagayan de Oro City (which was previously marked as petitioner's Exhibit 'G'), requesting for a copy of the 2007 Final Assessment Notice that should have been attached or enclosed to the BIR's Formal Letter of Demand dated September 25, 2009.

6. Q. Did the BIR Regional Director of Cagayan de Oro make any response to your 27 April 2010 letter?

A. None so far at least as of June 18, 2010. Significantly, it was on June 18, 2010 that MSH lodged a Petition for Review with the Honorable Court of Tax Appeals which is now the case at bar. Noteworthy is the fact that since our visit to the Chief of the Assessment Division of BIR Cagayan de Oro City on December 15, 2009, up until MSH filed a Petition for Review with CTA on June 18, 2010, the BIR simply ignored our request for a copy of the 2007 Assessment Notice."

"JUDICIAL AFFIDAVIT
(Of Petitioner's Witness – Crispulo T. Aguillon, Jr.)

xxx xxx xxx

3. Q. What is the time shown in the assessment notice for 2007?

A. Unfortunately there is no time period to speak of because the assessment notice was nowhere enclosed to the FLD. In other words, with the missing 2007 assessment notice, we at MSH were at a loss when deficiency taxes as shown in the FLD were due and collectible.

4. Q. Given the missing 2007 assessment notice, what did MSH do?

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A. First, MSH emphasized in the opening statement of its letter-protest dated November 25, 2009, the receipt of the FLD from the BIR, omitting on purpose the mention of assessment notice because it was not in fact appended to the FLD. Second, on December 15, 2009, we (MSH tax lawyer and I) went to the Cagayan de Oro Regional Office to discuss the missing 2007 assessment notice and request a copy thereof. There, we talked about this matter with Ms. Adora L. Sijo, Chief of the Assessment Division, and our lawyer requested for a copy of the missing 2007 assessment notice. She agreed to give MSH a copy of the said 2007 assessment notice after going over the file-docket of the case.

5. Q. Did the BIR actually furnish MSH a copy of the 2007 assessment notice after the December 15, 2009 meeting?

A. No, nothing of that sort happened at least as of the third week of April, 2010. MSH has not received the aforesaid 2007 assessment notice from BIR up until that time.

6. Q. With this development, what did MSH do?

A. We notified our tax lawyer on BIR's failure to furnish MSH a copy of the assessment notice for 2007.

7. Q. What then was the reaction of your lawyer to this piece of information?

A. He told us that he will take appropriate action on the matter.

8. Q. And what specifically was the action taken by your lawyer?

A. He sent a letter dated April 27, 2010 to the BIR Regional Director of Cagayan de Oro City requesting for a copy of the Final Assessment Notice (FAN) or assessment notice that should have been attached or enclosed to the BIR's FLD dated September 25, 2009.

9. Q. What was the response of the BIR Regional Director of Cagayan de Oro to this 27 April 2010 letter of the MSH lawyer that you mentioned, if any?

A. As of June 18, 2010, there was still no response by the BIR Regional Director of Cagayan de Oro to the 27 April 2010 letter of MSH lawyer. Incidentally, on June 18, 2010, MSH lodged the instant case with the Honorable Court of Tax Appeals via a Petition for Review. In other words, since our visit to the Chief of the Assessment Division of BIR Cagayan de Oro City on December 15, 2009 up to MSH's filing of its Petition for Review

> with CTA on June 18, 2010, the BIR did not lift a finger vis-à-vis the request of MSH lawyer for a copy of the 2007 FAN."
>
> **"JUDICIAL AFFIDAVIT**
> **(Of Petitioner's Witness – Joaquin S. Samaco)**
>
> xxx xxx xxx
>
> 8. Q. Could you please tell us what particular defects did you notice in the FLD while in the course of your consultation and which you eventually pointed out to your client (MSH)?
>
> A. Firstly, I noticed the obvious absence of Assessment Notice that should have been appended or enclosed to the FLD, that is if we go by the last paragraph of the said FLD explicitly stating in the last line the phrase – 'enclosed assessment notice'. xxx"

The testimony of Francisco I. Naputo remains uncontroverted and is given credence specifically since respondent never cross-examined him.[43] Moreover, even on cross-examination, witness Crispulo T. Aguillon, Jr. never wavered from his declaration that petitioner did not receive the FAN;[44] while Joaquin S. Samaco was not cross-examined by respondent on the aspect of the non-existence of the FAN.[45]

In addition thereto, petitioner submitted in evidence its letter dated April 27, 2010[46] requesting a copy of the FAN, addressed to respondent, through the Regional Director of BIR Revenue Region No. 16-Cagayan de Oro City.

A careful scrutiny of the said testimonies and the letter dated April 27, 2010 sufficiently established that petitioner did not receive the FAN that respondent claims to have been mailed or sent, together with the FLD, to petitioner.

In contrast, respondent was unable to present substantial evidence that the FAN was indeed mailed or sent and that the same was received by petitioner. Records reveal that respondent merely alleges that the FLD and the FAN both dated September 25, 2009 were sent to petitioner by registered mail as purportedly evidenced by Registry Receipt No. 8889 on October 20, 2009. She failed, however, to present independent evidence, such as the

[43] Transcript of Stenographic Notes taken during the Hearing dated May 3, 2011.
[44] Transcript of Stenographic Notes taken during the Hearing dated March 31, 2011.
[45] Transcript of Stenographic Notes taken during the Hearing dated November 17, 2011.
[46] Exhibit "G", CTA Docket, p. 270.

said Registry Receipt No. 8889, or a certification from the Bureau of Posts, which could have easily been obtained. It is basic in the rule of evidence that bare allegations, unsubstantiated by evidence, are not equivalent to proof.[47]

In *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.*,[48] the Supreme Court made a pronouncement that failure to strictly comply with the notice requirements prescribed under Section 228 of the NIRC of 1997, as amended, and RR No. 12-99 amounts to a denial of due process and makes the assessment void, *viz.*;

> "From the provision quoted above, it is clear that the sending of a PAN to taxpayer to inform him of the assessment made is but part of the "due process requirement in the issuance of a deficiency tax assessment," the absence of which renders nugatory any assessment made by the tax authorities. The use of the word "shall" in subsection 3.1.2 describes the mandatory nature of the service of a PAN. The persuasiveness of the right to due process reaches both substantial and procedural rights and the failure of the CIR to strictly comply with the requirements laid down by law and its own rules is a denial of Metro Star's right to due process. **Thus, for its failure to send the PAN stating the facts and the law on which the assessment was made as required by Section 228 of R.A. No. 8424, the assessment made by the CIR is void.**
>
> The case of *CIR v. Menguito* cited by the CIR in support of its argument that only the non-service of the FAN is fatal to the validity of an assessment, cannot apply to this case because the issue therein was the non-compliance with the provisions of R.R. No. 12-85 which sought to interpret Section 229 of the old tax law. RA No. 8424 has already amended the provision of Section 229 on protesting an assessment. The old requirement of merely notifying the taxpayer of the CIR's findings was changed in 1998 to informing the taxpayer of not only the law, but also of the facts on which an assessment would be made. Otherwise, the assessment itself would be invalid. The regulation then, on the other hand, simply provided that a notice be sent to the respondent in the form prescribed, and that no consequence would ensue for failure to comply with that form.
>
> **The Court need not belabor to discuss the matter of Metro Star's failure to file its protest, for it is well-settled that a void assessment bears no fruit.** *(Emphases supplied; Citations omitted)*

If the failure to send a Preliminary Assessment Notice (PAN) to the taxpayer was considered a violation of due process warranting the declaration that the assessment is void, with more reason that the failure to

[47] *Domingo vs. Robles, et al.*, G.R. No. 153743, March 18, 2005.
[48] G.R. No. 185371, December 8, 2010.

send the FAN itself to petitioner would render the assessment against it also void following the rationale laid down by the High Court in *Metro Star Superama, Inc.*[49]

In *Commissioner of Internal Revenue vs. Azucena T. Reyes*,[50] the Supreme Court declared that **if there is no valid notice sent, the assessment is void**, and the reason is that the *"law imposes a substantive, not merely a formal, requirement. To proceed heedlessly with tax collection without first establishing a valid assessment is evidently violative of the cardinal principle in administrative investigations: that taxpayers should be able to present their case and adduce supporting evidence."*

The failure of respondent to prove that the FAN was mailed or sent to petitioner and that said FAN was received by petitioner leads to the conclusion that no FAN was issued against petitioner. In the absence of a valid FAN, there is no basis for respondent to issue the FLD dated September 25, 2009 demanding payment of deficiency taxes, inclusive of legal increments, for year 2007 in the amount of ₱ 37,245,026.16, as contained in the alleged in FAN.

Truth to tell, a void assessment bears no fruit and it cannot give rise to an obligation to pay deficiency taxes. Consequently, there is no legal basis for the CIR to formally demand the payment or to collect the deficiency taxes which are not covered by a valid FAN.

In view of the foregoing, this Court deems it no longer necessary to discuss the other arguments and issues raised by the parties.

WHEREFORE, premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, the Formal Letter of Demand dated September 25, 2009 demanding the payment of deficiency income, VAT, Withholding Tax on Compensation, and Expanded Withholding Tax Assessment in the total amount of ₱37,245,026.16 for the period covering taxable year 2007 pursuant to Assessment No. RR16-101-628-09, which is void, is hereby **CANCELLED** and **WITHDRAWN**.

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[49] *Supra.*
[50] G.R. Nos. 159694 and 163581, January 27, 2006.

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

WE CONCUR:

ERLINDA P. UY
Associate Justice

CIELITO N. MINDARO-GRULLA
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