REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

Third Division

STRAWBERRY FOODS CORPORATION, *Petitioner,*	**CTA CASE NO. 8569**
	Members:
- *versus* -	***Bautista,*** *Chairperson* ***Fabon-Victorino,*** *and* ***Ringpis-Liban, JJ.***
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: JAN 07 2016 11:30 a.m.

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DECISION

BAUTISTA, J:

The Case

Before the Court is a Petition for Review filed by petitioner Strawberry Foods Corporation ("SFC") on November 8, 2012, pursuant to *Rule 4, Section 3(a)(1)*[1] *of the Revised Rules of the Court of Tax Appeals, as amended,* in relation to *Section 7(a)(1)*[2] *of Republic Act ("RA")*

[1] Rule 4, Sec. 3. *Cases within the jurisdiction of the Court in Divisions.* – (a) Exclusive original or appellate jurisdiction to review by appeal the following: (1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue.

[2] Sec. 7.*Jurisdiction.* - The Court of Tax Appeals shall exercise: (a) Exclusive appellate jurisdiction to review by appeal, as herein provided. (1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue.

No. 1125,[3] *as amended by RA No. 9282*[4] and *RA No. 9503,*[5] which seeks for the Court to declare as null and void respondent's Final Decision dated September 17, 2012, and to render judgment declaring petitioner to be free from any liability for internal revenue tax deficiency for taxable year 2008.[6]

The Parties

Petitioner SFC, is a corporation duly organized and licensed to do business in the Philippines[7] with principal office address at SFC Bldg., No. 78 Gen. Luna St., Gitnang Bayan I, San Mateo, Rizal 1850.[8]

Respondent Commissioner of Internal Revenue ("CIR") is the government official with the authority to perform the duties of said office in accordance with law.[9]

The Facts

On March 25, 2009, Regional Director ("RD") Antonio F. Montemayor ("Montemayor") of Revenue Region No. 7 ("RR7"), Quezon City, wrote to petitioner expressing RR7's appreciation for the tax payments petitioner made for the year 2008 amounting to Php6,078,916.71 for withholding tax on compensation ("WTC") and expanded withholding tax ("EWT").[10]

On July 8, 2009, petitioner received Letter of Authority No. 2008-00039454 ("LOA No. 39454")[11] dated July 1, 2009, signed by RD Montemayor of RR7, Revenue District Office No. 45 ("RDO45") Marikina City, authorizing Revenue Officers ("RO") Carmelita Tamondong or Ma. Lourdes Ereno and Group Supervisor ("GS") Gilbert C. Ramos ("Ramos") to examine the books of accounts and

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[3] An Act Creating the Court of Tax Appeals, as amended
[4] An Act Expanding the Jurisdiction of the Court of Tax Appeals ("CTA"), Elevating its Rank to the Level of a Collegiate Court with Special Jurisdiction and Enlarging its Membership, Amending for the Purpose Certain Sections of Republic Act No. 1125, as amended, Otherwise Known as the Law Creating the Court of Tax Appeals, and for Other Purposes.
[5] An Act Enlarging the Organizational Structure of the Court of Tax Appeals, Amending for the Purpose Certain Sections of the Law Creating the Court of Tax Appeals, and for Other Purposes.
[6] *Records*, pp. 6-119, with Annexes
[7] *Id., Joint Stipulation of Facts and Issues ("JSFI")*, p. 302
[8] *Id., Petition for Review*, p. 7
[9] *Id., JSFI*, p. 302
[10] *Id., JSFI; Exhibit* "P-25," p. 539
[11] *Id., JSFI; Exhibit* "P-4," p. 466; *BIR Records, Exhibit* "R-1," p. 40

other accounting records of petitioner for *"all internal revenue taxes (refundable)"* for the period January 1, 2008 to December 31, 2008.

On July 8, 2009 and August 8, 2009, petitioner received the first[12] and second[13] Request for Presentation of Records ("RPR"), respectively.

On August 17, 2009, petitioner received the Final Notice[14] dated August 11, 2009, requiring it to send its representative in order to address its issues, otherwise, the recommendation for the issuance of a *subpoena duces tecum* shall be given due course.

On August 27, 2009, RDO45 received the required documents *per* LOA No. 39454 transmitted by Accounting Manager Angely D. Lim.[15]

On November 9, 2009, petitioner received a letter[16] from RR7, RDO45, informing it that, due to the transfer of the previous ROs assigned to its case, the whole docket including the submitted documents were referred to RO Milagros Leni Q. Flores ("Flores") for continuance of audit by virtue of Memorandum Referral ("MR") No. 045-00-025 dated September 17, 2009.[17]

On February 15, 2010, petitioner submitted its claims, with supporting documents, of casualty loss due to Typhoon *Ondoy* to RO Flores.[18]

On March 11, 2010, petitioner received a letter[19] together with a preliminary assessment from RR7, RDO45 dated March 10, 2010, which states that based on the report of investigation by RO Flores, as supervised by GS Ramos, it has total deficiency taxes amounting to Php13,895,987.43 for taxable year 2008, it likewise invited petitioner to an informal conference on March 12, 2010, otherwise, a formal letter of demand ("FLD") will be issued.

[12] *Id., Exhibit* "P-5," p. 467; *BIR Records,* p. 289
[13] *Id., Exhibit* "P-6," p. 468; *BIR Records,* p. 288
[14] *Id., JSFI, Exhibit* "P-7," p. 469
[15] *Id., JSFI, Exhibit* "P-8," pp. 470-471; *BIR Records,* pp. 285-286
[16] *Id., JSFI, Exhibit* "P-9," p. 472; *BIR Records, Exhibits* "R-3," p. 45
[17] *BIR Records, Exhibit* "R-2," p. 44
[18] *Id., JSFI, Exhibit* "P-21," with sub-markings, p. 522
[19] *Id., JSFI, Exhibit* "P-10," with sub-marking, pp. 473-475; *BIR Records,* p. 54

On March 18, 2010, RR7, RDO45, through a certain Rowena Sedovio, received petitioner's letter[20] dated March 12, 2010 , offering its explanations to refute the findings of RO Flores.

On May 21, 2010, petitioner received a letter[21] together with a preliminary assessment from RR7, RDO45 dated April 27, 2010, informing it of its total deficiency taxes amounting to Php5,007,916.99 for taxable year 2008, and inviting petitioner to an informal conference on May 7, 2010, otherwise, an FLD will be issued.

On June 2, 2010, RR7 RDO45, through RO Flores, received petitioner's Reply to Follow-Up Report re: LOA #00039454[22], dated June 1, 2010, stating that there has been no under-declaration of purchases, and requesting for clarification/ s on the findings contained in RR7, RDO 45's letter dated April 27, 2015.

On August 5, 2010, petitioner received a letter[23] together with a preliminary assessment from RR7, RDO45, dated August 3, 2010, informing it of its total deficiency taxes amounting to Php8,201,848.13 for taxable year 2008, with an invitation to an informal conference on August 11, 2010, otherwise, an FLD will be issued.

On August 23, 2010, petitioner wrote Re: Reply to Report of Findings dated August 3, 2010[24], offering its explanations to refute said findings.

On October 14, 2010, petitioner received, by registered mail, a letter[25] from RR7, RDO 45, dated October 4, 2010, informing it that the assessment will be forwarded to the Assessment Division of the region for the issuance of an FLD.

On October 17, 2011, RR7, RDO45, Marikina issued a Post Reporting Notice[26], personally served by RO Flores to petitioner through a certain Pio S. Lim on the same date, informing it that based on the amended audit report submitted by RO Flores and GS Ramos,

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[20] *Id., JSFI, Exhibit* "P-11," pp. 476-479
[21] *Id., JSFI, Exhibit* "P-12," with sub-markings, pp. 492-495; *BIR Records, Exhibit* "R-4," pp. 72-75
[22] *Id., JSFI, Exhibit* "P-13," with sub-markings, pp. 496-499; *BIR Records,* pp. 76-79
[23] *Id., JSFI, Exhibit* "P-14," with sub-markings, pp. 500 -502; *BIR Records,* pp. 80-82
[24] *Id., JSFI, Exhibit* "P-15," with sub-markings, pp. 503-509
[25] *Id., JSFI, Exhibit* "P-17," p. 510
[26] *Id., JSFI, Exhibit* "P-18," with sub-markings, pp. 511-512; *BIR Records,* pp. 134-135

it has deficiencies in IT, VAT and EWT, amounting to Php13,202,686.12, Php4,733,155.05 and Php25,408.40, respectively. Likewise, it urged petitioner to submit documentary evidence to support its objections, otherwise, an FLD will be issued.

On October 21, 2011, RR7, RDO45 received, through RO Flores, petitioner's reply[27] to the Post Reporting Notice, expressing petitioner's confusion over the amounts, which are totally different from the previous notices, and requesting for additional time for it to file its answer in view of the absence of its records and documents that were lost during typhoon Ondoy.

On October 28, 2011, petitioner, through its Reply to Post Reporting Notice - LOA #00039454[28], offered its explanations and reiterated that it does not owe any deficiency taxes, and that the findings, on which the assessment was based, were merely cases of oversight.

On January 4, 2012, petitioner received a Preliminary Assessment Notice ("PAN")[29] dated December 19, 2011 (dated December 23, 2011 in respondent's exhibits), giving it fifteen (15) days from receipt thereof the opportunity to rebut the assessment, otherwise, it shall be considered in default and an FLD and assessment shall ensue.

On January 11, 2012, petitioner received Final Assessment Notices ("FAN")[30] with Demand No. 45-B117-08 for its IT, EWT, and VAT deficiencies together with the Formal Letter of Demand ("FLD")[31], all dated January 13, 2012, which states that the amount due should be paid on or before February 13, 2012, with the following details:

[27] *Id., JSFI, Exhibit* "P-19," p. 513
[28] *Id., JSFI, Exhibit* "P-20," pp. 514-521
[29] *Id., JSFI, Exhibit* "P-3," with sub-markings, pp. 462-465; *BIR Records, Exhibit* "R-8," pp. 158-160
[30] *Id., JSFI, Exhibit* "P-22," with sub-markings, pp. 528-529; *BIR Records, Exhibit* "R-8," pp. 164-166
[31] *Id., JSFI; Exhibits* "P-22-b," "P-22-c,"and "P-22-d," pp. 530-532; *BIR Records, Exhibit* "R-8," pp. 161-163

I. <u>DEFICIENCY INCOME TAX</u>

Taxable Income per ITR			P	3,084,820.71
Add: Adjustment per Investigation				
Unaccounted source of cash	P	36,199,689.72		
Overstatement of VAT input		1,522,071.65		37,721,960.35
Taxable income per investigation			P	40,805,781.06
Income tax due thereon				P14,282,373.37
Less: Allowable tax credits/payments				
Excess of MCIT over RCIT carried over from prior year	P	61,992.00		
Creditable withholding claimed		1,091,560.00		
Total		1,153,542.00		
Less: Excess tax credits carried over to succeeding period		73,854.75		1,079,697.25
Deficiency Income Tax			P	13,202,685.12
Add: 20% Interest p.a. (04.16.09 to 02.13.12)				7,480,316.41
TOTAL AMOUNT DUE			**P**	**20,683,002.53**

II. DEFICIENCY VALUE-ADDED TAX

Taxable Sales/Receipts per VAT returns			P	657,141,728.72
Add: Adjustment per Investigation				
Sales/Receipts not subjected to VAT	P	720,998.28		
Undiscounted source of cash		26,199,888.72		
Overstatement of VAT Input		1,522,071.63		36,442,958.63
Taxable Sales/Receipts per investigation			P	695,584,687.35
Output Tax Due thereon			P	83,470,162.49
Less: Allowed tax credits/payments				
Input tax carried over from previous period	P	90,658.94		
Tax subsidy availment certificate		300,193.95		
Current VAT input		76,612,769.14		
Total	P	78,993,621.04		
Less: Input tax to be carried over to the succeeding period		73,899.37		78,920,021.67
Deficiency Value-Added Tax			P	4,550,140.81
Add: 20% interest p.a. (01.27.09 to 02.13.12)				2,774,962.59
TOTAL AMOUNT DUE			**P**	**7,325,103.40**

III. DEFICIENCY EXPANDED WITHHOLDING TAX

		Amount	Tax Rate		Tax Due
Professional fees	P	141,147.00	15%	P	21,172.05
Rentals		2,087,906.00	5%		104,395.50
Purchases by top 20,000 corporation on:					
Supplier of services		9,827,457.00	2%		196,549.14
Supplier of goods		519,970,658.45	1%		5,199,706.58
Expanded withholding tax				P	5,521,629.07
Less: Payments					5,496,414.67
Deficiency Expanded Withholding Tax				P	25,408.40
Add: 20% interest p.a. (01.16.09 to 02.13.12)					15,648.79
TOTAL AMOUINT DUE				**P**	**41,057.19**

*Please note that the interest and the total amount due will have to be adjusted if paid beyond February 13, 2012.

On January 19, 2012, respondent received petitioner's Protest to the 2008 PAN – Strawberry Foods Corporation (SFC)[32] dated January 18, 2012.

[32] *Id., JSFI, Exhibit* "P-2," with sub-markings, pp. 454-461

On February 10, 2012, petitioner wrote to respondent informing it that it has protested the PAN and that the FANs with FLD were issued prematurely.[33]

Through a letter[34] dated March 2, 2012, the Office of the RD ("ORD"), Quezon City, informed petitioner that the case will be forwarded to RDO45, Marikina City, for appropriate action.

On October 10, 2012, petitioner received by mail, a letter[35] from the ORD of RR7, dated September 17, 2012, which serves as its final decision in petitioner's case, informing it that due to its failure to submit documents in support of its protest, the tax liability *per* FAN/Demand Letter No. 45-B117-08 dated January 13, 2012, should be paid immediately with the authorized agent bank, otherwise, petitioner may appeal with the Court of Tax Appeals ("CTA") within thirty (30) days from receipt.

On November 8, 2012, petitioner filed the instant Petition for Review[36].

On December 3, 2012, respondent filed a Motion for Extension of Time to File Answer[37], which the Court granted in its Resolution[38] dated December 12, 2012.

On January 8, 2013, respondent filed a Manifestation with Motion to Admit Attached Answer[39].

On January 11, 2013, the Court issued a Resolution[40] ordering petitioner to comment on the aforementioned motion.

On February 6, 2013, petitioner filed, by registered mail, its Comment on Respondent's Manifestation with Motion to Admit Attached Answer[41].

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[33] *Id., JSFI, Exhibit* "P-23," pp. 533-537
[34] *Id., Exhibit* "P-24," pp. 538; *BIR Records,* pp. 319-320
[35] *Id., JSFI; Exhibit* "P-1," p. 453; *BIR Records, Exhibit* "R-13," p. 335
[36] *Id., Petition for Review,* with Annexes, pp. 6-119
[37] *Id.,* pp. 122-123
[38] *Id.,* p. 125
[39] *Id.,* pp. 126-131
[40] *Id.,* p. 133
[41] *Id.,* pp. 135-137

On March 1, 2013, the Court, taking into consideration petitioner's comments, issued a Resolution[42] granting respondent's Manifestation with Motion to Admit Attached Answer, thus, admitting respondent's Answer and ordering petitioner to file its Reply thereto.

In her Answer[43], respondent interposed the following special and affirmative defenses:

> 4. She reiterates and repleads the foregoing paragraph of this Answer as part of the Special and Affirmative Defenses.
>
> 5. Herein petitioner is presumed to have received the Final Assessment Notice, Formal Demand Letter and Details of Discrepancies. As such he is presumed to have been fully appraised of the facts and the Law upon the Final Assessment was based.
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> 6. Respondent maintains that there was an unaccounted source of cash in the amount of [Php]36,199,888.72 which was not fully reported in the financial statement which led to the interference that part of his income has not been declared pursuant to Section 31 of the 1997 Tax Code, as amended.
>
> 7. Verification disclosed that [p]etitioner's VAT input under the current asset is overstated resulting to an unaccounted income which should be added to taxable income pursuant to Section 31 of the 1997 [NIRC], as amended.
>
> 8. Verification disclosed that taxable sales in the amount of Php720,998.28 was not fully subject to VAT, hence assessed pursuant to Section 106 and 108 of the [1997] NIRC, as amended.
>
> 9. Verification also disclosed that various income payments were not fully subjected to expanded withholding tax as required under RR 2-98, as amended.
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> 10. Finally, settled [is] the rule that the tax assessments by tax examiners are presumed correct and made in good faith (Cagayan Robina Sugar Milling Co. vs. Court of

[42] *Id.*, p. 140
[43] *Id.*, pp. 129-131

> Appeals, 324 SCRA 671). It is the taxpayer and not the Bureau of Internal Revenue who has the duty of proving otherwise. Equally settled is the rule that in the absence of proof of any irregularities in the performance of official duties, as assessment will not be disturbed. All presumptions are in favor of tax assessments. Dereliction on the part of petitioner to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notices.

On April 1, 2013, petitioner filed its Reply to the Answer to the Petition[44] by registered mail.

On July 29, 2013, the parties, through their respective counsels, filed their Joint Submission (of the admitted/stipulated facts and issues to be resolved) ("JSFI")[45].

On August 15, 2013, the Court issued a Pre-Trial Order[46] terminating the pre-trial and setting the date for the presentation of evidence by the parties.

During trial, petitioner presented the following witnesses: (1) Mr. Rolando S. Conte[47]; and (2) Ms. Pinky V. Reyes[48]. Upon motion of petitioner's counsel, it was granted ten (10) days or until September 26, 2013 within which to file its formal offer of evidence ("FOE").[49] On the other hand, respondent presented the following witnesses: (1) RO Milagros Leni Q. Flores[50]; and (2) Mr. Ramon O. Santiago[51]. Upon motion of respondent's counsel, it was granted fifteen (15) days within which to file its FOE, likewise, petitioner was given ten (10) days to comment on respondent's FOE.[52]

On September 25, 2013, petitioner filed, by private courier, its FOE[53] submitting *Exhibits* "P-1" to "P-27-e" (inclusive). While

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[44] *Id.*, pp. 144-146
[45] *Id.*, pp. 302-309
[46] *Id.*, pp. 319-328
[47] *Id., Minutes of Hearing held on August 28, 2013,* p. 442
[48] *Id., Minutes of Hearing held on September 16, 2013,* p. 443
[49] *Id.*, p. 443
[50] *Id., Minutes of Hearing held on December 9, 2013,* p. 574
[51] *Id., Minutes of Hearings held on January 20, 2014 and March 20, 2015,* pp. 581, 590
[52] *Id.*, p. 590
[53] *Id.*, pp. 445-559, with Annexes

respondent filed her FOE[54] presenting *Exhibits* "R-1" to "R-15a" (inclusive) on March 26, 2014.

The Court issued a Resolution admitting petitioner's and respondent's FOE on November 6, 2013[55] and May 23, 2014[56], respectively. In its latter Resolution, the Court required the parties to file their simultaneous Memoranda within thirty (30) days from receipt thereof.

On May 29, 2014, respondent filed her Omnibus Motion for Partial Reconsideration and to Set Commissioner's Hearing for Correction of Errors and For Comparison (Resolution 23 May 2014).[57]

On June 3, 2014, the Court issued a Resolution[58] ordering petitioner to file its comment to respondent's Omnibus Motion for Partial Reconsideration and to Set Commissioner's Hearing for Correction of Errors and For Comparison (Resolution 23 May 2014).

On June 30, 2014, petitioner filed, by private courier, its Comment on Respondent's Omnibus Motion for Partial Reconsideration and to Set Commissioner's Hearing for Correction of Errors and For Comparison (Resolution 23 May 2014)[59].

On July 11, 2014, petitioner filed, by private courier, its Urgent Motion for Extension of Time to File Memorandum[60], which was granted by the Court in its Resolution[61] dated July 22, 2014.

On August 13, 2014, the Court issued a Resolution[62] granting respondent's Motion to Set Commissioner's Hearing and holding in abeyance the resolution of its Motion for Partial Reconsideration of the Resolution dated May 23, 2014 and the submission of the parties' respective memoranda.

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[54] *Id.*, pp. 591-595
[55] *Id.*, pp. 565-566, all exhibits were admitted
[56] *Id.*, pp. 602-603; all, save for *Exhibits* "R-5," "R-6." "R-7," "R-8," and "R-9" were admitted
[57] *Id.*, pp. 604-606
[58] *Id.*, p. 608
[59] *Id.*, pp. 609-611
[60] *Id.*, pp. 615-616
[61] *Id.*, p. 620
[62] *Id.*, pp. 622-624

On August 27, 2014, respondent filed its Urgent Motion to Reset Commissioner's Hearing[63], which was granted by the Court in its Order[64] dated August 29, 2014.

During the Commissioner's Hearing held on September 30, 2014, respondent presented for marking *Exhibits* "R-5" to "R-9" (inclusive), while counsel for petitioner found all the Exhibits to be original documents.[65]

On October 7, 2014, the Court issued an Order[66] submitting for resolution respondent's Motion for Partial Reconsideration of the Resolution dated May 23, 2014, filed on May 29, 2014.

On October 27, 2014, the Court issued a Resolution[67] admitting *Exhibits* "R-5," "R-6," "R-7," "R-8" and "R-9."

On October 30, 2014, the Court issued a Resolution[68] granting both parties thirty (30) days from receipt thereof to file their respective memoranda.

On December 9, 2014, petitioner filed, by private courier, its Memorandum[69].

On December 11, 2014, respondent filed, by private courier, her Motion to Admit[70], with attached Memorandum[71].

On December 17, 2014, the Court issued a Resolution[72] ordering petitioner to file its comment on respondent's motion.

On January 26, 2015, petitioner filed, by private courier, its Comment on the Motion of Respondent (for the admission of the Memorandum of respondent)[73].

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[63] *Id.*, pp. 625-627
[64] *Id.*, p. 632
[65] *Id.*, p. 633
[66] *Id.*, p. 636
[67] *Id.*, pp. 638-639
[68] *Id.*, p. 641
[69] *Id.*, pp. 642-661
[70] *Id.*, pp. 662-663
[71] *Id.*, pp. 664-673
[72] *Id.*, p. 676
[73] *Id.*, pp. 678-680

On January 29, 2015, the Court issued a Resolution[74] granting the admission of respondent's Memorandum and submitting the case for decision, hence, this Decision.

The Issues[75]

For the Court's resolution are the following issues:

1. **WHETHER OR NOT PETITIONER WAS ACCORDED DUE PROCESS AS REQUIRED UNDER THE LAW;** and

2. **WHETHER OR NOT THE DEFICIENCY TAX ASSESSMENTS AGAINST PETITIONER FOR CALENDAR YEAR 2008 ARE NULL AND VOID FOR LACK OF FACTUAL AND LEGAL BASES.**

Petitioner's Arguments

Petitioner argues that it was not accorded due process because respondent disregarded its protest of the PAN, and proceeded to serve the FAN together with the FLD without resolving the protest first; that the deficiency tax assessments issued against it are null and void for lack of factual and legal bases; and that respondent violated *Revenue Regulations ("RR") No. 12-85, Section 3.1.2 of RR No. 12-99* and *Revenue Memorandum Order ("RMO") No. 37-94* when it issued the FAN without first resolving the protest to the PAN; that respondent violated *RMO Nos. 38-88 and 20-08*, which provides that a LOA which is outstanding for over one hundred twenty (120) days from the date of its issue loses its validity and must be revalidated; and that the LOA was invalid because it was never revalidated despite transfer to another revenue officer.

Respondent's Counter-Arguments

Respondent maintains that due process was accorded to petitioner and that it strictly followed the notice requirements provided under *RR No. 12-99*; that its right to assess petitioner's deficiency taxes for CY 2008 are valid; that the factual and legal bases

[74] *Id.*, p. 684
[75] *Id.*, *JSFI*, p. 308

are all stated in the FLD and attached details of discrepancies; that tax assessments by tax examiners are presumed correct and made in good faith; that it is the taxpayer and not the BIR who has the duty of proving otherwise; and that in the absence of proof of any irregularity in the performance of official duties, an assessment will not be disturbed.

The Ruling of the Court

Respondent failed to comply with Section 228 of the 1997 NIRC and RR No. 12-99

Petitioner argues that its right to due process was violated when the FAN with FLD were issued before its protest to the PAN could be resolved, hence, respondent violated the principle that no FAN and Demand Letter shall be issued unless the issues raised in the protest against the PAN are resolved.

It can be recalled that petitioner received the PAN dated December 19, 2011 on January 4, 2012,[76] wherein it is stated that:

> xxx xxx xxx
>
> Pursuant to the provision of Section 228 of the NIRC of 1997, as amended and its implementing Revenue Regulations (RR), you are hereby given the opportunity to present in writing your side of the case within fifteen (15) days from receipt hereof. If we fail to hear from you within the said period, you shall be considered in default, in which case, a formal letter of demand and assessment notice shall be issued by this Office calling for payment of your aforesaid deficiency taxes, inclusive of the aforementioned interest.

On January 11, 2012, or seven days after the issuance of the PAN and before the lapse of the fifteen (15)-day period to reply to the said

[76] *Id., JSFI, Exhibit* "P-3," pp. 462-465; *BIR Records, Exhibit* "R-8," pp. 158-160

PAN, it received (Final) Assessment Notice Demand No. 45-B117-08[77] together with the FLD[78], all dated January 13, 2012.

Section 228 of the 1997 NIRC is instructive of the procedure to be followed in assessments, to wit:

> Section 228. **Protesting an 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 pre-assessment notice shall not be required in the following cases:
>
> 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. xxx xxx xxx [underscoring ours]

Likewise, *RR No. 12-99*[79] provides that:

> SECTION 3. *Due Process Requirement in the Issuance of a Deficiency Tax Assessment.* —
>
> 3.1 Mode of procedures in the issuance of a deficiency tax assessment:
>
> 3.1.1*Notice for informal conference.* — xxx
>
> 3.1.2 *Preliminary Assessment Notice (PAN).* — If after review and evaluation by the Assessment Division or by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis

[77] *Id., JSFI, Exhibit* "P-22," pp. 528-529; *BIR Records, Exhibit* "R-8," pp. 161-166
[78] *Id., JSFI, Exhibit* "P-22," pp. 530-532
[79] Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extra-Judicial Settlement of a Taxpayer's Criminal Violation of the Code Through Payment of a Suggested Compromise Penalty, dated September 6, 1999, signed by Secretary of Finance Edgardo B. Espiritu

> to assess the taxpayer for any deficiency tax or taxes, the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing in detail, the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based. <u>If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN, he shall be considered in default, in which case, a formal letter of demand and assessment notice shall be caused to be issued by the said Office</u>, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.
>
> xxx xxx xxx

A reading of the above-quoted provisions clearly state that the taxpayer shall be given an opportunity to respond to the PAN, and only after its failure to do so will the corresponding assessment will be issued.

The Supreme Court has already ruled that failure to strictly comply with the notice requirements prescribed under Section 228 of the 1997 NIRC and RR No. 12-99, is a denial of due process. In the case of *CIR vs. Metro Star Superama, Inc.,*[80] the Supreme Court held:

> xxx xxx xxx
>
> Indeed, Section 228 of the Tax Code clearly requires that the taxpayer must first be informed that he is liable for deficiency taxes through the sending of a PAN. He must first be informed of the facts and the law upon which the assessment is made. 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 - <u>that taxpayers should be able to present their case and adduce supporting evidence</u>.
>
> xxx xxx xxx

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[80] G.R. No. 185371, December 28, 2010, 637 SCRA 633

> 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.
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> xxx xxx xxx

Applying the foregoing to the instant case, it is clear therefore, that respondent failed to observe due process when it issued the FAN even before the lapse of the fifteen (15)-day period given to petitioner to reply to the PAN.

<u>The assessment is void for lack of authority to conduct the same.</u>

Even assuming that petitioner was afforded due process, the assessment would still be cancelled for having been done without the necessary authority.

Petitioner argues that LOA No. 39454 is invalid because it was never revalidated despite the lapse of the one hundred twenty (120)-day period and its reassignment to another RO.

Anent the first ground, *Revenue Memorandum Circular ("RMC") No. 023-09*[81] *dated April 16, 2009* provides, as follows:

> Failure on the part of the RO to request for the revalidation of LA or the expiration of the 'revalidation period' <u>does not nullify the LA</u> nor will it affect or modify the rules on the reglementary period within which an assessment may be validly issued. However, <u>this shall be considered as a ground for the imposition of disciplinary action and demerit in the performance rating of the concerned RO</u>, including the

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[81] Reiteration of Policies and Procedures Relative to Revalidation of Letters of Authority, Issuance of *Subpoena Duces Tecum* and Review of Cases by the Assessment Division

> reassignment of the case to another RO if the Regional Director, upon the recommendation of the Revenue District Officer, deems it necessary. [underscoring ours]

Thus, based on the foregoing, the lack of revalidation of LOA No. 39454, despite the lapse of the one hundred twenty (120)-day period, did not render it invalid, but it will only subject the RO who was remiss of his/her duties to the corresponding disciplinary action.

On the other hand, on the matter of the re-assignment, *Section 13 of the 1997 NIRC* provides that:

> Section 13. **Authority of a Revenue Officer.** - Subject to the rules and regulations to be prescribed by the Secretary of Finance, upon recommendation of the Commissioner, a Revenue Officer assigned to perform assessment functions in any district may, pursuant to a Letter of Authority issued by the Revenue Regional Director, examine taxpayers within the jurisdiction of the district in order to collect the correct amount of tax, or to recommend the assessment of any deficiency tax due in the same manner that the said acts could have been performed by the Revenue Regional Director himself. *[underscoring ours]*

In order to implement *Section 13 of the 1997 NIRC, RMC No. 43-90*[82] provides as follows:

> Any reassignment/transfer of cases to another RO(s), and revalidation of L/As which have already expired, shall require the issuance of a new L/A, with the corresponding notation thereto, including the previous L/A, with the corresponding notation thereto, including the previous L/A number and date of issue of said L/As. [underscoring ours]

Basic is the rule in statutory construction that the use of the word *"shall"* connotes a mandatory order. Its use in a statute denotes an imperative obligation and is inconsistent with the idea of discretion. Where the law is clear and unambiguous, it must be taken to mean exactly what it says, and courts have no choice but to see to it that the

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[82] Amendment of Revenue Memorandum Order No. 37-90 Prescribing Revised Policy Guidelines for Examination of Returns and Issuance of Letters of Authority to Audit, Dated September 20, 1990

mandate is obeyed.[83] Hence, the use of the word *"shall"* in *RMC No. 43-90* can only mean that the issuance of a new LOA in cases of reassignment is mandatory.

Based on the foregoing provisions, it is clear that before an assessment can be conducted, the RO conducting the same must first be authorized to do so. A reading of LOA No. 39454 would show that a different RO was originally assigned to the case, *viz:*

> SIR/MADAM/GENTLEMEN:
>
> The bearer(s) hereof, <u>ROs CARMELITA TAMONDONG/MA. LOURDES ERENO/GS GILBERT C. RAMOS</u> of the Revenue District Office No. 45-MARIKINA CITY is/are authorized to examine your books of accounts and other accounting records for ALL INTERNAL REVENUE TAXES (REFUNDABLE) for the period from January 01, 2008 to December 31, 2008. <u>He is/They are provided with the necessary identification card(s)</u> which shall be presented to you upon request.
>
> xxx xxx xxx
>
> Very truly yours,
>
> ANTONIO F. MONTEMAYOR
> Regional Director

In her JA, RO Flores justified her authority to conduct the audit/investigation of petitioner's books of accounts by virtue of MR No. 045-00-025[84] dated September 17, 2009, which states that the entire docket, relative to the investigation of petitioner's internal revenue taxes, has been referred to her due to the transfer and reassignment of RO Carmelita Tamondong.

It is worthwhile to note that MR No. 045-00-025 dated September 17, 2009, to which RO Flores referred to as her authority to conduct the investigation/audit of petitioner's books of accounts, was signed by the Officer-In-Charge ("OIC") Revenue District Officer and not by the Regional Director. This is in contravention of the provisions of the *1997*

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[83] *Bataan Governor Enrique T. Garcia, Jr. v. Hon. Eduardo R. Ermita, et al.*, G.R. No. 168730. September 1, 2005, 469 SCRA 10
[84] *BIR Records, Exhibit* "R-2," p. 44

NIRC which specifically provides that the authority must be signed by the Revenue Regional Director.

The Supreme Court, in *Commissioner of Internal Revenue v. Sony Philippines, Inc.*[85], ruled in this wise:

> Based on Section 13 of the Tax Code, a Letter of Authority or LOA is the authority given to the appropriate revenue officer assigned to perform assessment functions. It empowers or enables said revenue officer to examine the books of account and other accounting records of a taxpayer for the purpose of collecting the correct amount of tax. The very provision of the Tax Code that the CIR relies on is unequivocal with regard to its power to grant authority to examine and assess a taxpayer.
>
>> SEC. 6. Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.
>>
>> (A)Examination of Returns and Determination of Tax Due. After a return has been filed as required under the provisions of this Code, the Commissioner or his duly authorized representative may authorize the examination of any taxpayer and the assessment of the correct amount of tax: *Provided, however,* That failure to file a return shall not prevent the Commissioner from authorizing the examination of any taxpayer. x x x
>
> Clearly, there must be a grant of authority before any revenue officer can conduct an examination or assessment. Equally important is that the revenue officer so authorized must not go beyond the authority given. In the absence of such an authority, the assessment or examination is a nullity. [underscoring ours]

The LOA is the proof that the person/s named therein is/are authorized to conduct the necessary investigation/audit, it is an express grant of authority. Thus, absent the necessary issuance of a new LOA specifically naming the person to whom the case will be reassigned with the corresponding annotation *per RMO No. 43-90,*

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[85] G.R. No. 178697, November 17, 2010, 635 SCRA 234

there is no authority to conduct the investigation/audit. Thus, RO Flores acted without authority when she conducted the audit of petitioner, hence, the assessment is null and void. Accordingly, a void assessment bears no valid fruit.[86]

Finding that the assessment is void for having been conducted without authority, the Court finds it no longer necessary to discuss the other issues raised.

WHEREFORE, premises considered, the Petition for Review is hereby **GRANTED.** Accordingly, Final Decision dated September 17, 2012 is **CANCELLED** and **WITHDRAWN.**

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ESPERANZA R. FABON-VICTORINO
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

[86] *Commissioner of Internal Revenue v. Azucena T. Reyes, Azucena T. Reyes v. Commissioner of Internal Revenue,* G.R. Nos. 159694 and 163581, respectively, January 27, 2006, 480 SCRA 382

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

Pursuant to *Article VIII, Section 13 of the Constitution*, and the Division Chairperson's Attestation, 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