REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 2233** (CTA Case No. 9490 & 9503)
- versus -	Present: **DEL ROSARIO,** *P.J.*, **UY, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, MODESTO-SAN PEDRO, REYES-FAJARDO,** *and* **CUI-DAVID,** *JJ.*
FORT 1 GLOBAL CITY CENTER INC., Respondent.	Promulgated: OCT 07 2022 2:57 pm

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RESOLUTION

RINGPIS-LIBAN, *J.*:

This resolves the following:

1) Petitioner's "Motion for Reconsideration (On the Decision promulgated on November 10, 2021)"[1] filed on December 02, 2021, with Respondent's "Comment/Opposition (to CIR's Motion for Reconsideration)"[2] ("Comment") filed on December 16, 2021; and

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[1] Rollo, pp. 296-306.
[2] *Id.*, pp. 253-295.

2) Respondent's "Motion for Reconsideration"[3] filed on December 03, 2021, without Petitioner's comment thereon.[4]

Petitioner's "Motion for Reconsideration (On the Decision promulgated on November 10, 2021)"

Petitioner's "Motion for Reconsideration (On the Decision promulgated on November 10, 2021)" prays for the reversal of the Court's Decision[5] dated November 10, 2021, the dispositive portion of which reads:

> "**WHEREFORE**, considering that the required affirmative votes of five (5) members of the Court *En Banc* was not obtained in the instant case, pursuant to Section 2 of Republic Act No. 1125, as amended by Republic Act No. 9503 in relation to Section 3 of Rule 2 of the RRCTA, the Petition for Review filed by the CIR is instead **DENIED** and the Decision of the Court in Division promulgated on September 24, 2019 and the Resolution dated January 23, 2020 are deemed **AFFIRMED**.
>
> **SO ORDERED.**"[6]

Petitioner laments the fact that the decision of the Court in Division was upheld only because the necessary votes of the members of the Court *En Banc* was not obtained and prays for the reversal of the assailed Decision based on the following grounds:

1) Letter Notice ("LN") No. 044-RLFTRS-L2-00-00161 dated June 19, 2014 was issued to respondent as said LN was stated in the Exhibits of both petitioner and respondent (CTA Case No. 9490-TY2012);

2) Respondent is subject to Value-Added Tax ("VAT"), being engaged in "buying, selling, renting, leasing operation of dwellings…." As reflected in the registration of respondent in the BIR-Integrated Tax System (BIR-ITS). Hence, Bureau of Internal Revenue ("BIR") Ruling No. DA(C-129) 375-2009 is not applicable, respondent being registered as a developer engaged in the construction of condominium projects (CTA Case No. 9503) – TY 2009;

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[3] *Id.*, pp. 201-242.
[4] Records Verification Report dated May 24, 2022 stating that Petitioner failed to file its comment on Respondent's "Motion for Reconsideration".
[5] *Id.*, pp. 141-194.
[6] *Id.*, Decision dated November 10, 2021, p. 192.

3) The retroactive application of BIR Rulings or Circulars may be made if the facts subsequently gathered by the BIR are materially different from the facts on which the ruling is based or where the taxpayer acted in bad faith; and

4) There is presumption of falsity of returns.

Petitioner requests the Court *En Banc* to look beyond the technicality of not reaching the five (5) affirmative votes of the Justices (necessary to overturn the decision of the Court in Division) and instead revisit and focus on the substantive merits of the assessments issued and the evidence it offered in Court.

Specifically, Petitioner prays that the Court *En Banc* set aside its Decision dated November 10, 2021, and a new one be issued granting Petitioner's "Petition for Review" declaring the assessments for deficiency income tax ("IT") and VAT for TY 2012 and deficiency IT, VAT, Expanded Withholding Tax (EWT) Withholding Tax-One Time Transaction (WO) and Documentary Stamp Tax (DST) for TY for TY 2009 valid.

Respondent on the other hand, in the Comment, counters that an unverified third-party information cannot be considered as factual basis for an assessment and that there were no allegations that the computerized third-party matching on which the tax assessments were based had been verified and attested to by third party informants. More than this, respondent points to the alleged defects in the service of the official notices such as the Letter of Authority ("LOA"), Preliminary Assessment Notice ("PAN") and the Final Assessment Notice ("FAN") which resulted in the invalidity of the subject deficiency tax assessments for being violative of its constitutional right to due process.

Respondent also denies being engaged in developing, buying, selling, renting, leasing, or in the operation of condominiums and that petitioner failed to show during trial that it actually had vatable transactions, such issue being raised only in petitioner's Motion for Reconsideration.

Respondent's "Motion for Reconsideration"

Respondent acknowledges that the decision of the Court in Division was upheld only because the necessary number of votes to overturn the same was not obtained but in its motion intends to confront head on the following findings of the Court *En Banc*, to wit:

"a) Respondent's right to due process could not be deemed violated as it was able to file protest on the Preliminary Assessment Notice (PAN) and Final Assessment Notice (FAN), despite allegations that the LOA, PAN, FAN, and FDDA were sent to the wrong address or received by an unauthorized person);

b) The issue of lack of authority of the revenue examiners as they were authorized by a mere Memorandum of Assignment and not a valid Letter of Authority was belatedly raised in the Comment/Opposition; and

c) The ten (10) year prescriptive period should apply because the time of filing of the respondent's Tax Returns for the taxable year 2009 and 2012 cannot be determined."

Respondent puts particular emphasis on the invalidity of the subject deficiency tax assessments due to improper or defective service of the official notices such as the LOA, the PAN and the FAN for taxable years ("TY") 2009 and 2012 as they were all allegedly sent to the wrong address and/or served to unauthorized persons or persons not affiliated with their company. Respondent asserts that its direct and categorical denial of the receipt of the PAN, FAN including the LOA for TY 2009 and 2012 shifts the burden to petitioner to prove that said official notices were served to the correct address and to its authorized representatives. Respondent alleges that petitioner failed to discharge this burden. It additionally contends that the fact that it was able to file a protest against these deficiency tax assessments did not operate to negate the violation of its right to due process as such assessments remain to be null and void.

The supposed reliance of the Court *En Banc* in the Supreme Court's decision in the case of *CIR vs. Fitness by Design*[7] was downplayed by respondent and argued that the Supreme Court still stresses heavily on a taxpayer's right to due process even if it ruled that "the mandate of giving the taxpayer a notice of the facts and laws on which the assessment are based should not be mechanically applied."

Respondent also disputes the findings of the Court *En Banc* and maintains that the issue of lack of authority of the revenue examiners was not raised for the first time in its Comment/Opposition. Respondent explains that it could not have presented the subject LOA and the Memorandum of Assignment ("MOA") in its Petition for Review simply because it has never seen these documents prior to the trial and was made aware of their existence through the testimonies of petitioner's witnesses. Even assuming that the issue of lack of authority of the revenue examiners was belatedly raised, respondent submits that this may still be considered by the Court as it goes into the intrinsic validity of the assessment

[7] G.R. No. 177982, October 17, 2008.

itself as supposedly ruled by the Supreme Court in the case of *Himlayang Pilipino Plans, Inc. vs. CIR.*[8]

On March 29, 2022, respondent filed a Manifestation informing the Court that it received a Notice from the Supreme Court dated March 25, 2022 which supposedly upheld the Order issued by the Regional Trial Court of Taguig Branch 266 affirming the validity and existence of BIR Ruling No. DA (129) 375-2009.

We rule.

After due consideration of the arguments and counter-arguments of the parties, this Court finds Petitioner's motion to be devoid of merit. The Court *En Banc* finds no cogent reason to overturn the Decision dated September 24, 2019 and Resolution dated January 23, 2020 of the Second Division.

The tenets of due process mandate that an assessment should be properly served by the BIR on the taxpayer, otherwise the same is void.[9] Section 3.1.4 of Revenue Regulations No. 12-99[10] states that service of the FAN may be made by registered mail or *via* personal delivery. Under the rules on personal delivery, service of the FAN must only be made **to the taxpayer <u>or</u> his duly authorized representative**; the keyword being the "[the taxpayer's] duly authorized representative". Service upon any person, other than the taxpayer, will only be valid if it is shown such other person is empowered to do so.

Respondent denies having received both the PAN and FAN for TY 2009 and 2012. Instead of proving that the personal service of the subject assessments was done properly and that the notices were received by Respondent or the taxpayer's authorized representative, Petitioner failed to do so. Even Petitioner's witnesses show uncertainty about how the personal deliveries were made and whether they ascertained that the notices were being served upon Respondent's authorized representative. Therefore, the BIR notices of assessment were received by individuals who are unauthorized to do so, and as such, their receipt of these notices cannot be deemed as receipt by Respondent.

Additionally, it is of no consequence that Respondent later protested the PAN and FAN for TY 2009 and 2012. The Supreme Court in the recent case of *Commissioner of Internal Revenue v. Yumex Philippines Corporation*[11], without any

8 G.R. No. 241848. May 14, 2021.
9 Commissioner of Internal Revenue v. Metro Star Superama, Inc., G.R. No. 185371, December 08, 2010; Barcelon Roxas Securities, Inc. v. Commissioner of Internal Revenue, G.R. No. 157064, August 07, 2006.
10 Implements the provisions of the National Internal Revenue Code of 1997 governing the rules on assessment of national internal revenue taxes, fees and charges, September 14,1999
11 G.R. No. 222476, May 05, 2021.

reservation, emphasized that the taxpayer's filing of a protest does not detract the fact that there was violation of the right to due process.

Finally, suffice it to say that since the Decision and Resolution of the Second Division were deemed affirmed in the Decision promulgated by the Court *En Banc* on November 10, 2021, it follows that the subject assessments were invalidated and Respondent's prayer in its "Motion for Reconsideration" were already effectively granted in the original Decision. Thus, We see no need to grant Respondent's motion.

WHEREFORE, premises considered, Petitioner's "Motion for Reconsideration (On the Decision promulgated on November 10, 2021)" and Respondent's "Motion for Reconsideration" are both **DENIED** for lack of merit.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

(With due respect, attached is my Dissenting Opinion)
CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

Marian Ivy F. Reyes-Fajardo
MARIAN IVY F. REYES-FAJARDO
Associate Justice

LANEE S. CUI-DAVID
Associate Justice

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DISSENTING OPINION

MANAHAN, J.:

I respectfully express my dissent to the majority opinion and hold that respondent's right to due process has not been violated and that the subject deficiency assessments for taxable years 2009 and 2012 are valid and should be examined on the merits.

I remain unconvinced with the allegation proffered by respondent that it did not receive the official notices sent by petitioner.

The records show that the Letter of Authority (LOA), the Preliminary Assessment Notice (PAN) and the Final Assessment Notice (FAN) as well as the Final Decision on Disputed Assessment (FDDA) for taxable years 2009 and 2012 were all served by petitioner to respondent *via* personal service. Petitioner (as respondent during the trial of the case before the

Court in Division) admitted that the relevant notices were indeed sent to respondent by personal service.

Respondent asserts that these notices were served to the incorrect business address and maintains that their official business address is at Unit 2CB, FPS Building, 1st Avenue corner 30th Street, Global City, Taguig as indicated in its 2016 General Information Sheet (GIS) filed with the Securities and Exchange Commission (SEC). Moreover, respondent submits that these notices were all sent to unauthorized persons, thereby violating the procedural due process requirements prescribed by law and implementing regulations.

The GIS is not the proper or competent evidence to prove a taxpayer's business address for purposes of service of official notices emanating from the Bureau of Internal Revenue (BIR). It is my humble opinion that respondent should have offered in evidence its Certificate of Registration (COR) issued by the BIR which clearly indicates the business address of the taxpayer and which is reflected in the BIR-Integrated Tax System (ITS) and which in turn serves as a reference of the BIR in service of official notices to taxpayers. Unfortunately, respondent did not offer this in evidence and instead offered its 2016 GIS.[1]

It is also glaringly obvious that respondent was able to prepare and file the necessary protests to the PANs and the FANs for TY 2009 and 2012 on the following dates:

A. For TY 2009

PAN dated January 24, 2012	Protest was filed on February 10, 2012.	Exhibit "P-3-a"[2]
FAN dated July 20, 2012	Request for Reconsideration dated July 31, 2012 and filed with the BIR on August 31, 2012.	Exhibit "P-4-a" [3]

[1] Exhibit "P-8", Court in Division Docket, Volume I, page 447 and admitted by the Court in Division in the Resolution dated June 19, 2018.
[2] Court in Division Docket, pp. 403-413.
[3] Court in Division Docket, Volume I, pp. 424-431.

B. For TY 2012

FAN dated March 15, 2016	Protest was filed in the form of a Request for Reconsideration and/or Reinvestigation dated March 31, 2016.	Exhibit "P-6-a"[4]

Equally significant to the undersigned is the quality of respondent's arguments and disquisitions embodied in its protests against the findings of the revenue officers which seem to belie its allegation that it was not properly apprised of the facts and the law on which the deficiency assessments were made

Clearly, respondent was able to secure copies of the PANs and the FANs for 2009 and 2012 as well as the FDDA for 2009 to enable it to file timely and intelligent protests.

In the face of its allegations that these notices were sent to the wrong address, it is of record that respondent managed to secure copies of the PANs and the FANs as well as the FDDA.

In respondent's Amended Petition for Review filed with the Court in Division for taxable year 2012,[5] docketed as CTA Case No. 9490, it was alleged that a copy of the FAN dated March 15, 2016 was brought to its attention by an "uninterested third party" and we quote:

> "Be that as it may, a copy of the FAN dated March 15, 2016 was brought to the attention of Fort I by a **third party unknown** to them." (emphasis supplied)

In its Memorandum[6] for the consolidated cases (9490 and 9503), respondent alleges as follows:

> "Sometime in the last week of January 2012, a copy of the Preliminary Assessment Notice (PAN) dated January 24, 2012 for the taxable year 2009 was forwarded by **an uninterested third party** to herein petitioner because the same was erroneously

[4] Court in Division Docket, Volume I, pp. 440-443.
[5] Court in Division Docket, Volume I, pp. 34-47.
[6] Court in Division Docket, Volume I, pp. 504-531.

> delivered to **Fort I Global City Center Building**." (emphasis supplied)

Witness for respondent, Mr. Philip Cea, by way of an amended Judicial Affidavit,[7] testified as follows:

> Q18. What happened after the issuance of BIR Ruling No. DA (129) 375-2009?
>
> A. The investors of Fort 1 proceeded with the construction and transfer of the condominium and parking units to their respective names.
>
> Q.19. What other incident happened after that?
>
> A. "Sometime in the last week of January 2012, a copy of a Preliminary Assessment Notice (PAN) dated January 24, 2012 for the taxable year 2009 was forwarded by an **uninterested third** *(sic)* **to herein petitioner**. Thereafter, on July 31, 2012 a Formal Assessment Notice (FAN) dated July 20, 2012 for the taxable year 2009 was again forwarded to herein petitioner **by an uninterested third party**." (emphasis supplied)

Records do not show that respondent identified this "uninterested third party" during trial. In light of its allegations that the official notices for TYs 2009 and 2012 were received by an unauthorized person in one of its offices in Taguig City, I find that it was essential for respondent to present or at least identify this so-called "uninterested third party".

It is clear from the evidence presented by both parties that respondent was able to file the appropriate protests which negated its allegation that its right to due process was violated.

The Supreme Court in the *Fitness by Design*[8] case, declared that the requirement of informing the taxpayer of the facts and the law on which the assessment is based should not be applied "mechanically", and I quote:

> "However, the mandate of giving the taxpayer a notice of the facts and laws on which the assessments are based should not be **mechanically applied**. To emphasize, the purpose of this requirement is to sufficiently inform the taxpayer of the bases for

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[7] Exhibit "P-11", Court in Division Docket, Volume I, pp. 468-481.

[8] Commissioner of Internal Revenue vs. Fitness by Design, Inc., G.R. No. 215957, November 9, 2016. *crm*

the assessment to enable him or her to make an intelligent protest" (emphasis supplied)

It may be very well said that if the issue pertains to a taxpayer's right to due process in an assessment case, the written notice is deemed sufficient if taxpayer was able to respond adequately and effectively to the findings embodied in the official notices issued by the BIR. The ruling of the Supreme Court in the case of *Samar-I Electric Cooperative vs. CIR*[9] is instructive, and I quote:

"Considering the foregoing exchange of correspondences and documents between the parties, we find that the requirement of Section 228 was substantially complied with. **Respondent had fully informed petitioner in writing of the factual and legal bases of the deficiency taxes assessment, which enabled the latter to file an "effective" protest, much unlike the taxpayer's situation in Enron. Petitioner's right to due process was thus not violated**." (emphasis supplied)

In view of the foregoing premises, I vote to rule on the substantive merits of the deficiency tax assessments for taxable years 2009 and 2012 issued against respondent instead of cancelling the same for the sole reason of lack of due process.

CATHERINE T. MANAHAN
Associate Justice

[9] G.R. No. 103100, December 10, 2014.