REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

FITNESS BY DESIGN INC., Petitioner,	CTA CASE NO. 7160
	Members:
- versus -	ACOSTA, *Chairperson* UY, *and* FABON-VICTORINO, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: JUL 10 2012 ; 9:45 a.m.

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DECISION

FABON-VICTORINO, J.:

On the ground that the right of respondent Commissioner of Internal Revenue to issue the assailed assessment and enforce its collection through a warrant of distraint and/or levy has prescribed, petitioner Fitness By Design Inc. instituted this Petition for Review on March 1, 2005. Petitioner prays that a temporary restraining order and/or a writ of preliminary injunction be issued to enjoin respondent and/or his agents from any attempt to collect from it the alleged deficiency income tax (IT), documentary stamp tax (DST) and value-added tax (VAT) for the year 1995 in the total amount of P10,647,529.68 as indicated in the Final Assessment Notice (FAN) dated March 17, 2004. Petitioner further prays that the FAN as well as the Warrant of Distraint and Levy issued against it be declared void and without force and effect and that respondent be directed to withdraw them.

Petitioner alleges that it is a duly organized domestic corporation with principal office at Lower Level Alabang Town Center, Ayala Alabang Village, Muntinlupa City. It was registered with the Bureau of Internal Revenue (BIR) on August 4, 1995[1] and with the Securities and Exchange Commission (SEC) on May 30, 1995[2] under SEC Registration No. ASO95-005166.

Respondent, on the other hand, is the Commissioner of Internal Revenue (CIR) empowered to perform the duties of her office, with office located at the BIR National Office Building, BIR Road, Diliman, Quezon City.[3]

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[1] Docket p. 896.
[2] Exhibit "K"; Pars. 1 and 2, Summary of Admitted Facts, Joint Stipulation of Facts and Issues (JSFI), docket, p. 80.
[3] Par. 3, Summary of Admitted Facts, Joint Stipulation of Facts and Issues (JSFI), docket, p. 80.

On April 11, 1996, petitioner filed its Annual Income Tax Return for the taxable year 1995 reflecting that it was still on its pre-operating stage.[4]

On June 9, 2004, petitioner received from respondent a FAN dated March 17, 2004, for deficiency taxes in the total amount of P10,647,529.68.[5]

On June 25, 2004, petitioner filed a protest to the FAN raising prescription and lack of basis of the assessment as defense given that petitioner was incorporated only on May 30, 1995,[6] thus had no unreported sales for the period in question for which it could be held liable for the alleged deficiencies.

On February 2, 2005, respondent issued a Warrant of Distraint and/or Levy (WDL) with Reference No. OCN WDL-95-05-005 dated February 1, 2005 addressed to petitioner at 169 Aguirre Street, BF Homes, Paranaque City. The said WDL demanded payment of the following internal revenue taxes from petitioner:[7]

[4] Pars. 8 and 9, Summary of Admitted Facts, JSFI, docket, p. 81.
[5] Exhibits "A", "B", "C", "D", and "E"; Par. 6, Summary of Admitted Facts, JSFI, docket, p. 81.
[6] Par. 8, Petition for Review, docket, p. 3.
[7] Pars. 4 and 5, Summary of Admitted Facts, JSFI, p. 81.

Assessment/ Demand No.	Date Issued	Period Covered	Tax Type	Amount
NID 95-IT-020-04	March 17, 2004	1995	Income Tax	P 8,265,568.17
NID 95-VAT-021-04	March 17, 2004	1995	VAT	2,377,274.01
NID 95-DST-022-04	March 17, 2004	1995	DST	4,687.50
TOTAL				P10,647,529.68

On March 1, 2005, petitioner lodged the instant Petition for Review (With Motion to Suspend Collection of Income Tax, Value Added Tax, Documentary Stamp Tax and Surcharges and Interests subject of this Petition).

On May 17, 2005, respondent filed her Answer, [8] interposing the following special and affirmative defenses:

> "3. The assessments/warrant of distraint and levy in question were made and issued in accordance with law, rules and regulations.
>
> 4. The Honorable Court has no jurisdiction to adjudicate the instant case.
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> 5. The right of the respondent to assess petitioner for deficiency income tax, VAT and Documentary Stamp Tax for the year 1995 has not prescribed pursuant to Section 222(a) of the 1997 Tax Code. Petitioner's 1995 Income Tax return (ITR) filed on April 11, 1996 was false and fraudulent for its deliberate failure to declare its true sales. Petitioner declared in its 1995

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[8] Docket, pp. 44-46.

Income Tax Return that it was on its pre-operation stage and has not declared its income. Investigation by the revenue officers of the respondent, however, disclosed that it has been operating/doing business and had sales operations for the year 1995 in the total amount of P7,156,336.08 which it failed to report in its 1995 ITR. Thus, for the year 1995, petitioner filed a fraudulent annual income tax return with intent to evade tax. Likewise, petitioner failed to file Value-Added Tax (VAT) Return and reported the amount of P7,156,336.08 as its gross sales for the year 1995. Hence, for failure to file a VAT return and for filing a fraudulent income tax return for the year 1995, the corresponding taxes may be assessed at any time within ten (10) years after the discovery of such omission or fraud pursuant to Section 222(a) of the 1997 Tax Code.

6. The subject deficiency tax assessments have already become final, executory and demandable for failure of the petitioner to file a protest within the reglamentary (sic) period provided for by law. The "alleged protest" allegedly filed on June 25, 2004 at the Legal Division, Revenue Region No. 8, Makati City is nowhere to be found in the BIR Records nor reflected in the Record Book of the Legal Division as normally done by our receiving clerk when she received any document. The respondent, therefore, has legal basis to collect the tax liability either by distraint and levy or civil action.

7. Petitioner's motion for suspension of collection of taxes must be denied. It failed to present meritorious reasons that the collection of the aforesaid taxes may jeopardize petitioner's interest other than its allegation that the right of the respondent to

assess/collect the taxes has already prescribed. Taxes are the lifeblood of the government and should be collected without unnecessary hindrance. It is upon taxation that the Government chiefly relies to obtain the means to carry on its operations and it is of the utmost importance that the means adopted to enforce the collection of taxes levied should be summary and interfered with as little as possible **(Churchill & Tait v. Rafferty, 32 Phil. 580)**. As discussed above, considering that the right of the respondent to asses herein petitioner for deficiency income tax, value-added tax and documentary stamp tax has not prescribed pursuant to Section 222(a) of the 1997 Tax Code, and considering further that the subject tax assessments have already become final, executory and demandable, the said taxes have already been ripened for collection.

8. All presumptions are in favor of the correctness of the tax assessment **(Interprovincial Autobus vs. Collector of Internal Revenue, 98 Phil. 290)**."

On March 2, 2006, or after petitioner and respondent filed their respective Pre-trial Briefs on January 12, 2006 [9] and January 19, 2006, [10] submitted their Joint Stipulation of Facts and Issues, which the Court approved by its Resolution of January 15, 2007.[11]

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[9] Docket, pp. 66-73.
[10] Docket, pp. 74-76.
[11] Docket, p. 175.

To support its allegation, petitioner presented its Liaison Officer Tyrone Buala as its first witness. He testified that on June 25, 2004, petitioner's Managing Director Domingo C. Juan instructed him to file with the Legal Division of the BIR, Revenue Region 8, Makati City, a protest dated June 25, 2004 to the FAN issued pursuant to Letter of Authority No. 00002953, which petitioner received on June 9, 2004. One Elaine Magadia received the said protest.

Petitioner's President, Domingo C. Juan, Jr. also took the witness stand. He testified that petitioner was incorporated on May 30, 1995, thus, it indicated in its annual income tax return for 1995 that it was still in its pre-operating stage during the covered period. Per its Articles of Incorporation, petitioner was a pioneer in the business of buying, selling, distributing, wholesale marketing of sporting and exercise equipment, such as strength and cardiovascular machines which were entirely imported from the United States. During its pre-operating stage in 1995, petitioner imported equipment and distributed them for market testing in the Philippines without earning any profit.

More than three (3) years from the time petitioner filed its 1995 annual income tax return on April 11, 1996, respondent issued to petitioner a FAN dated March 17, 2004[12] for the year 1995, pursuant to the Letter of Authority No.00002953 dated May 13, 2002. The attached Details of Discrepancy[13] containing the assessment for income tax (IT), value added tax (VAT) and documentary stamp tax (DST) as well as the Audit Result/Assessment Notices[14] do not impute fraud on the part of petitioner. Moreover, it was based on information and documents illegally obtained by a BIR informant from petitioner's accountant Elnora Carpio in 1996.

When cross-examined, the witness admitted that he was not only the President of petitioner but was also its Managing Director. He further testified that petitioner's importation and distribution of equipment for market testing were covered with official receipts or sales invoices.

Petitioner's last witness Elnora Carpio testified that from May 30, 1995 until the middle of 1996, she was a part time Bookkeeper of petitioner thus had access to its books of accounts and other accounting records. In relation to her function, she constantly sought the assistance of her colleague and certified public accountant Leonardo Sablan. The latter verified the

[12] Exhibit A.
[13] Exhibit B.
[14] Exhibits C, D, and E.

entries in the invoices, receipts and other documents against petitioner's books of accounts and accounting records.

On or about March 2005, petitioner's President and Managing Director Domingo Juan asked her to locate the accounting records, invoices and official receipts of petitioner pertinent to this case, copies of which allegedly reached the hands of the BIR. She denied complicity to the insinuation as no document of petitioner was in her possession when she left the company. However, she recalled that Leonardo Sablan had access to and was aware of petitioner's transactions although she did not permit him to gain custody of any documents pertaining thereto. She intimated that any information gathered or documents given to the BIR were illegally and surreptitiously obtained from petitioner.

In the Resolution dated October 5, 2009, the Court, acting on petitioner's Formal Offer of Evidence filed on August 20, 2009,[15] admitted Exhibits A to E, and I to L but denied admission of the rest. Subsequently, the Court, in its Resolution of November 26, 2009[16] on petitioner's Motion for Reconsideration[17] filed on October 23, 2009, further admitted Exhibits S, T, U, U-1,

[15] Docket p. 813.
[16] Docket p. 985.
[17] Docket p. 913.

U-2, U-3, U-4, V, V-1 and V-2 but denied the admission of the remaining exhibits.

On December 8, 2009, petitioner filed a Formal Tender of Excluded Evidence, viz, Exhibits F, F-1, F-2, G, G-1, G-2, G-3, G-4, H, H-1, M-1 to M-14, N, N-1, O, O-1, O-2, P, P-1, P-2, P-3, P-4, Q, R, R-1, W, W-1, W-2. The action was noted by the Court in the Resolution dated January 20, 2010.

In support of her defense, respondent presented Socrates Regala from BIR RDO 49 North Makati. He was the Group Supervisor of the team that conducted the examination of petitioner's income tax liabilities. He testified that from the year 2000 to 2006, he was a Group Supervisor in the Tax Fraud Division, National Office. Acting on a tip gathered from an informant, his team examined the tax liabilities of petitioner for taxable year 1995.

Their investigation revealed that while petitioner was still at a pre-operating stage in 1995, it already made substantial sales amounting to P7,151,336.08. Petitioner however did not reflect this income in its ITR for the said year resulting in deficiencies in IT and VAT in the respective amounts of

P8,265,568.17 and P2,377,274.02, inclusive of interest and surcharges, and DST in relation to subscription of capital stock. The Memorandum Report dated March 17, 2003,[18] contained the result of their investigation.

Upon verification, petitioner's customers confirmed their purchases from petitioner for the year 1995. Among these customers were Congressman Jules Ledesma; Philippine Realty and Holdings Corporation, which issued a Certification[19] on its payment in favor of petitioner for the supply of life fitness equipment with Invoice No. 006 dated October 1995; the University of the Philippines-Diliman, which issued a Confirmation Letter[20] dated July 3, 1997; and the Makati Sports Club, which issued a Letter dated September 26, 2001.[21]

The informant provided them with the List of Sales of petitioner. The scheme was resorted to because petitioner refused to furnish them with a copy of its Book of Accounts, despite requests.

In their Memorandum Report, they recommended the filing of a civil case for the collection of petitioner's tax liabilities and a

[18] Exhibit 1 and T; BIR Record pp. 401 to 404 .
[19] Exhibit 3, BIR Record page 271.
[20] Exhibit 4, BIR Record page 270.
[21] Exhibit 5, BIR Record page 269.

criminal case, for its failure to declare in its ITR for the year 1995 the income derived from the cited sales. Thus, the BIR's filing of a criminal case against petitioner with the Department of Justice (DOJ).

The witness confirmed that the gathered information did not indicate that petitioner's failure to state in its ITR its income and sales for the year 1995 was deliberate. The instant case was precipitated by the issuance of the Letter of Authority on May 13, 2002.

Respondent's last witness Atty. Hayle F. Bonilla, assigned at the BIR's Prosecution Division, testified that he was previously a Technical Assistant at the Office of the Deputy Commissioner for Legal Inspection Group. His duties include review of the evaluation made by the Technical Working Group on the taxpayer's offer to settle or compromise.

He handled petitioner's case in which he prepared a Memorandum dated May 18, 2010[22] recommending the denial of petitioner's offer to settle its tax liabilities for taxable year 1995 on the ground that the case involved fraud which could not be a subject of compromise under Section 204 of the NIRC of 1997.

[22] Exhibit 7, BIR Record page 716.

Besides, a criminal complaint had already been lodged against petitioner before the DOJ.

The case against petitioner originated from a confidential information that petitioner filed a fraudulent tax return. After conducting an investigation based on the information, assessments were issued and a criminal complaint was filed before the DOJ.

In the Resolution dated January 14, 2011, respondent's Formal Offer of Evidence belatedly filed on December 30, 2010 was admitted. Acting on the incident, the Court admitted respondent's Exhibits 1, 1-a, 2, 3, 4, 5, 7, 7-a and 7-b in its Resolution of March 03, 2011.

On September 5, 2011, the case was submitted for decision, considering petitioner's Memorandum filed on August 15, 2011, *sans* any from respondent.

STATEMENT OF ISSUES

The issues[23] raised for the resolution of the Court are as follows:

A. Whether or not the right of respondent to issue an assessment and warrant of distraint and/or levy has prescribed;

B. Whether or not fraud which was raised in the defense was alleged and proven in the assessment;

C. Whether or not petitioner is liable for deficiency income tax, value added tax and documentary stamp tax for the tax year 1995;

D. Whether or not the Court of Tax Appeals has jurisdiction on the matters raised in the petition for review.

THE RULING OF THE COURT

From the evidence presented, it appears that the FAN dated March 17, 2004,[24] assessing petitioner for deficiency taxes in the total amount of P10,647,529.68 ignited the present controversy. Hence, the Court deems it appropriate to first determine the validity of the said FAN to ascertain if due process was accorded to petitioner.

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[23] JSFI, docket, p. 82
[24] Exhibit A.

A meticulous examination of the subject FAN reveals that it contains the computations of the following alleged deficiency tax liabilities of petitioner for the year 1995, to wit:

Income Tax		
Taxable Income per return		P -
Add: Unreported Sales		7,156,336.08
Taxable Income per audit		7,156,336.08
Tax due (35%)		2,504,717.63
Add: Surcharge (50%)	P1,252,358.81	
Interest (20% p.a. until 4.15.04)	4,508,491.73	5,760,850.54
Deficiency Income Tax		**8,265,568.17**
Value Added Tax		
Unreported sales		7,156,336.08
Output tax (10%)		715,633.61
Add: Surcharge (50%)	357,816.80	
Interest (20% p.a. until 4.15.04)	P1,303,823.60	1,661,640.40
Deficiency VAT		**2,377,274.01**
Documentary Stamps Tax		
Subscribed Capital Stock		375,000.00
DST Due (2/200)		3,750.00
Add: Surcharge (25%)		937.50
Deficiency DST		**4,687.50**
Total Deficiency Taxes		**P10,647,529.68**

The Details of Discrepancies[25] attached to the FAN, and the FAN itself provide the law and the facts on which the assessment was made. In fine, there is sufficient compliance with the provision of Section 228 of the NIRC on this aspect.

[25] Exhibit "B"

However the FAN, to stand judicial scrutiny, must not only indicate its legal and factual bases but must also state a clear and unequivocal demand for payment of the computed tax liabilities within a prescribed period, thus:

> **An assessment contains not only a computation of tax liabilities, but also a demand for payment within a prescribed period. It also signals the time when penalties and interests begin to accrue against the taxpayer**. To enable the taxpayer to determine his remedies thereon, due process requires that it must be served on and received by the taxpayer. Accordingly, an affidavit, which was executed by revenue officers stating the tax liabilities of a taxpayer and attached to a criminal complaint for tax evasion, cannot be deemed an assessment that can be questioned before the Court of Tax Appeals.
>
> xxx xxx xxx
>
> (N)either the NIRC nor the revenue regulations governing the protest of assessments provide a specific definition or form of an assessment. However, the NIRC defines the specific functions and effects of an assessment. To consider the affidavit attached to the Complaint as a proper assessment is to subvert the nature of an assessment and to set a bad precedent that will prejudice innocent taxpayers.
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> **True, as pointed out by the private respondents, an assessment informs the taxpayer that he or she has tax liabilities. But not all documents coming from the BIR containing a computation of the tax liability can be deemed assessments.**
>
> To start with, an assessment must be sent to and received by a taxpayer, **and must demand payment of the taxes**

> **described therein within a specific period. Thus, the NIRC imposes a 25 percent penalty, in addition to the tax due, in case the taxpayer fails to pay the deficiency tax within the time prescribed for its payment in the notice of assessment. Likewise, an interest of 20 percent per annum, or such higher rate as may be prescribed by rules and regulations, is to be collected from the date prescribed for its payment until the full payment.**
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> xxx xxx xxx
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> **In the present case, the revenue officers' Affidavit merely contained a computation of respondents' tax liability. It did not state a demand or a period for payment**. Worse, it was addressed to the justice secretary, not to the taxpayers. (Emphases supplied) [26]

The foregoing pronouncement was reiterated in a subsequent case, in this wise:

> The issuance of a valid formal assessment is a substantive prerequisite to tax collection, **for it contains not only a computation of tax liabilities but also a demand for payment within a prescribed period, thereby signaling the time when penalties and interests begin to accrue against the taxpayer and enabling the latter to determine his remedies therefor.** Due process requires that it must be served on and received by the taxpayer.[27] (emphasis supplied)

[26] Commissioner of Internal Revenue vs. Pascor Realty and Development Corporation, et al., G.R. No. 128315, June 29, 1999.
[27] Commissioner of Internal Revenue vs. Menguito, G.R. No. 167560, September 17, 2008.

Clear as a day that a definite period or a date certain within which a taxpayer must pay the assessed tax liabilities is an important pre-requisite to a valid formal assessment notice and subsequent tax collection, as reiterated by the High Court when it set aside a formal assessment notice that did not contain a definite period for payment of the tax assessed, viz:

> We rule that the recommendation letter of the Commissioner cannot be considered a formal assessment. Even a cursory perusal of the said letter would reveal three key points:
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> 1. It was not addressed to the taxpayers.
> **2. There was no demand made on the taxpayers to pay the tax liability, nor a period for payment set therein.**
> 3. The letter was never mailed or sent to the taxpayers by the Commissioner.[28] (emphasis supplied)

The date certain for the payment of tax liabilities is indispensable in an assessment as it dictates the time when the penalties, surcharges and interest begin to accrue against the taxpayer as well as the measures or remedies which are still available upon the taxpayer under the rules, thus:

[28] Lucas G. Adamson, et al. vs. Court of Appeals, et al., G.R. No. 120935, May 21, 2009 and Commissioner of Internal Revenue vs. Court of Appeal, et al., G.R. NO. 124557.

> Jurisprudence, on the other hand, simply required that the assessments contain a computation of tax liabilities, the amount the taxpayer was to pay and a demand for payment within a prescribed period.[29]

Following the foregoing tenet, the Court finds the FAN dated March 17, 2004[30] issued by respondent unable to comply with the indispensable requirement of a period or date certain for the payment of the tax assessed. This is plain in the last paragraph of the FAN, to wit:

> 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**. (*Emphasis supplied*)

However, the enclosed Audit Result/Assessment Notices [31] referred to in the subject FAN reveals that the due dates are left blank or unaccomplished. Thus, the subject FAN cannot be deemed a valid formal assessment notice absent a specific date or period within which the alleged tax liabilities must be settled or paid by petitioner.

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[29] Commissioner of Internal Revenue vs. Bank of the Philippine Islands, G.R. NO. 134062, April 17, 2007.
[30] Exhibit "A".
[31] Exhibits "C", "D", and "E".

While it may be true that the second paragraph on the second page of the FAN contains a date, as follows:

> "The complete details covering the aforementioned discrepancies established during the investigation of this case are shown in the accompanying Annex 1 of this notice. The 50% surcharge and 20% interest have been imposed pursuant to Sections 248 and 249(B) of the NIRC, as amended. **Please note, however, that the interest and the total amount due will have to be adjusted if paid prior or beyond April 15, 2004.**" (emphasis ours)

the same is hardly a definite and unequivocal demand for payment on a date certain. Firstly, the amount indicated therein is not fixed as it is still subject to adjustments depending on when the actual payment of the tax liabilities is made. The uncertainty in the amount due and the date of payment is a far cry from the basic requirement, viz., a definite demand to immediately pay the assessed tax liabilities within a time certain as ruled by the Supreme Court, in this wise:

> In the context in which it is used in the NIRC, **an assessment is a written notice and demand made by the BIR on the taxpayer for the settlement of a due tax liability that is there definitely set and fixed. A written communication** containing a computation by a revenue officer of the tax liability of a taxpayer and giving him an opportunity to contest or disprove the BIR examiner's findings **is not**

> **an assessment since it is yet indefinite.**[32] (emphasis supplied)

Secondly, the date of April 15, 2004 is obviously not the deadline for payment of the alleged tax liabilities as the FAN itself refers to the enclosed assessment notices for the due date. But as earlier pointed out the said documents bear no date or the boxes for the due date were left blank or unaccomplished.

Thirdly, the subject FAN did not make a clear and categorical demand for payment of the alleged tax liabilities for it contains merely a request for payment.

In sum, the FAN failed to comply with the requirements of a valid assessment notice and create confusion on the part of the taxpayer. In one case, the Supreme Court admonished respondent for using vague language in an assessment notice. It was held that words must be carefully chosen to avoid any confusion that could adversely affect the rights and interest of the taxpayer.[33] Respondent must therefore indicate in a clear and unequivocal language whether his action on a disputed

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[32] Lucas G. Adamson, et al. vs. Court of Appeals, et al., G.R. No. 120935, May 21, 2009 and Commissioner of Internal Revenue vs. Court of Appeal, et al., G.R. NO. 124557.

[33] Allied Banking Corporation vs. Commissioner of Internal Revenue, G.R. No. 175097, February 05, 2010.

assessment constitutes his final determination thereon in order for the taxpayer concerned to determine when his or her right to appeal to the tax court accrues.[34] This is certainly absent in the subject assessment notices.

Further, basic is the tenet in civil law that any ambiguity is to be taken *contra proferentum*, that is, construed against the party who caused the ambiguity which could have avoided it by the exercise of a little more care.[35] There is no reason why the same principle cannot be made applicable to the instant case.

The Supreme Court likewise ruled in favor of the taxpayer and against respondent who caused an ambiguity in a formal letter of demand, thus:

> Besides, any doubt in the interpretation or use of the word "appeal" in the Formal Letter of Demand with Assessment Notices should be resolved in favor of petitioner, and not the respondent (Commissioner) who caused the confusion.[36]

Hence, to be considered a valid assessment, the taxpayer must be informed not only of the law but more importantly, the

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[34] Id.
[35] Prudential Bank vs. Don A. Alviar and Georgia B. Alviar, G.R. NO. 150197, August 28, 2005.
[36] Allied Banking Corporation vs. Commissioner of Internal Revenue, G.R. No. 175097, February 05, 2010.

surrounding circumstances supporting the assessment, for it is only through a detailed appraisal of its basis that the taxpayer may be able to dispute the imposition or agree with it.[37]

It is also worth to note that the alleged "unreported sales" in the huge amount of P7,156,336.08 is not even substantiated with documents of the alleged transactions. As pointed out by petitioner, the Details of Discrepancies, annexed to the FAN, merely provide a general statement of "unreported sales" *sans* details or particulars of the transactions. There is likewise no indication whether the amount of P7,156,336.08 refers to the gross sales or gross profit from the sales.

The Details of Discrepancies[38] likewise failed to show how the amount of the purported "unreported sales" was arrived at. The fact that only three alleged clients of petitioner issued certification of payments in its favor, the sum of which is just over a million or significantly remote from the amount of P7,156,336.08 cannot also be ignored. Significantly, none among the witnesses presented by respondent clarified or shed

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[37] *Abbott Laboratories, Inc. vs. Commissioner of Internal Revenue*, CTA Case No. 5718 dated February 16, 2001; *Commissioner of Internal Revenue vs. Enron Subic Power Corporation*, G.R. No. 166387, January 19, 2009.
[38] Exhibit "B".

light on these "unreported sales", when these transactions were the only bases of assailed assessment.

Given that the assessment issued against petitioner is invalid, it cannot give rise to an obligation to pay deficiency taxes, and it divests respondent of the right to collect them.[39] The WDL subsequently issued to collect the alleged tax liabilities for year 1995 as reflected in the FAN suffers the same infirmity for a spring cannot rise above its source. Well-settled is the rule that a void assessment bears no fruit.[40]

On the issue of prescription, petitioner contends that respondent's right to assess as well as to issue a WDL to effect collection of the alleged tax deficiencies has prescribed pursuant to Section 203 of the NIRC, as amended, which provides as follows:

> "SEC. 203. **Period of Limitation Upon Assessment and Collection.** – Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*,

[39] *FMF Development Corporation vs. Commissioner of Internal Revenue*, CA-GR SP No. 73973, February 23, 2004.
[40] Commissioner of Internal Revenue vs. Metro Star Superama, Inc., G.R. No. 185371, December 08, 2010.

> That in case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day."

The record shows that petitioner filed its 1995 Annual Income Tax Return (ITR) on April 11, 1996.[41] Counting from April 15, 1996, which by law was the last day for petitioner to file an ITR, respondent had until April 15, 1999 to issue the assessment on the alleged deficiency taxes for taxable year 1995. However, it was stipulated that respondent issued a Final Assessment Notice (FAN) only on March 17, 2004 which petitioner received on June 09, 2004.[42] Pursuant to the foregoing provision, the subject FAN was issued by respondent way beyond the three (3) year prescriptive period.

As provided in Section 222 of the Tax Code, only in case of a false or fraudulent return with intent to evade tax or of failure to file a return that tax may be assessed beyond the three-year period but within ten (10) years after the discovery of the falsity, fraud or omission.

[41] No. 8, Summary of Admitted Facts, JSFI dated March 06, 2006, docket page 81.
[42] No. 6, Summary of Admitted Facts, JSFI dated March 06, 2006, docket page 81.

In the instant case however, allegation of fraud on the part of petitioner neither appeared in the assessment notices nor in any of the attachments. It was only in the Memorandum dated May 18, 2010 prepared by Attorney Hayle F. Bonilla that the allegation of fraud on the part of petitioner appears. It has been ruled that in all averments of fraud, the circumstances constituting fraud must be stated with particularity to enable the opposing party to controvert the particular facts alleged constituting the same.[43]

It cannot also be ignored that no sufficient evidence was presented to sustain the accusation that fraud was intentionally committed by petitioner. It is plain that fraud should be uncovered in this case to determine the exact liability of petitioner.

Significantly, the party who alleges fraud must prove it. Fraud is never presumed, but must be established by clear and convincing evidence.[44] To be sure, respondent failed to discharge this burden.

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[43] Gonzales v. Climax Mining Ltd. 512 SCRA 148.
[44] Cuenca v. Atas, 535 SCRA 48, Estate of the Late Encarnacion Vda. De Panlilio v. Dizon, 536 SCRA 565.

WHEREFORE, the Petition for Review dated February 24, 2005 filed by petitioner Fitness By Design, Inc, is hereby **GRANTED**. Accordingly, the Final Assessment Notice dated March 17, 2004,[45] finding petitioner liable for deficiency income tax, documentary stamp tax and value-added tax for taxable year 1995 in the total amount of P10,647,529.69 is hereby **CANCELLED** and **SET ASIDE**. The Warrant of Distraint and Levy dated February 01, 2005 is likewise **CANCELLED** and **SET ASIDE**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We concur:

ERNESTO D. ACOSTA
Presiding Justice

ERLINDA P. UY
Associate Justice

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[45] Exhibit A.

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's Division.

ERNESTO D. ACOSTA
Presiding Justice