REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

LINDE PHILIPPINES, INC. (formerly, CONSOLIDATED INDUSTRIAL GASES, INC.),
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8724

Members:

CASTAÑEDA, JR., *Chairperson,*
CASANOVA, *and*
COTANGCO-MANALASTAS, *JJ.*

Promulgated:

AUG 2 5 2016 4:02 pm

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RESOLUTION

CASANOVA, *J.*:

This addresses respondent's **Motion for Reconsideration (Re: Decision Promulgated May 04, 2016)**, filed on May 20, 2016, with petitioner's **Comment/Opposition To Respondent's Motion for Reconsideration (Re: Decision Promulgated May 04, 2016)**, filed through registered mail on June 13, 2016.

Respondent seeks to reverse and set aside the Court's Decision promulgated on May 4, 2016 (assailed Decision)[1], the dispositive portion of which reads:

> "**WHEREFORE**, the instant Amended Petition for Review is hereby **GRANTED**. Accordingly, the assessments for deficiency income tax and value-added

[1] Docket (Vol. IX), pp. 4322-4362.

tax, including their respective interest and compromise penalties for the year 2009 in the total amount of Sixteen Million Two Hundred Thirty Thousand Two Hundred Ninety Six and 9/100 (₱16,230,296.09) are hereby **CANCELLED AND WITHDRAWN**. Further, respondent is hereby ordered to **REFUND** in favor of petitioner the aggregate amount of Eighteen Million Five Hundred Sixty Seven Thousand Seven Hundred Thirty One and 69/100 (₱18,567,731.69), representing petitioner's erroneously paid deficiency income tax and value-added tax assessment, inclusive of interest and surcharges, with the interest adjustment and compromise penalties up to January 16, 2015.

SO ORDERED."[2]

In seeking reconsideration of the assailed Decision, respondent raises the following arguments:

1. There was compliance with the audit procedures required under Section 228 of the National Internal Revenue Code (NIRC) of 1997, as amended, and as implemented by Revenue Regulations (RR) No. 12-99, as amended;

2. The judicial claim was filed ahead of the administrative claim for refund;

3. Petitioner failed to comply with the doctrine of exhaustion of administrative remedies; and

4. The conversion of the instant Petition for Review from assessment to refund resulted in a radical change of the cause of action, theory and nature of the case.

Meanwhile, in petitioner's comment/opposition, it counters that respondent did not afford petitioner the required fifteen (15)-day period to respond or refute the findings in the Preliminary Assessment Notice (PAN) before the issuance of the Formal Assessment Notice (FAN).

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[2] Docket (Vol. IX), p. 4361.

Petitioner claims that the amended petition is in consonance with Section 204 in relation to Section 229 of the NIRC of 1997, as amended; and that the amendment of the petition does not substantially alter petitioner's cause of action. Thus, petitioner maintains that it is entitled to the refund or credit of the aggregate amount of Eighteen Million Five Hundred Sixty Seven Thousand Seven Hundred Thirty One and 69/100 (₱18,567,731.69) that it paid under protest.

Respondent transgressed petitioner's right to procedural due process.

In the assailed Decision, We ruled that respondent transgressed petitioner's right to procedural due process as the FAN was received by petitioner six (6) days ahead of its receipt of the PAN. The said act of respondent violates Section 228 of the NIRC of 1997[3], as amended, and as implemented by RR No. 12-99, as

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[3] SEC. 228. Protesting of Assessment. — **When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings:** Provided, however, That a preassessment notice shall not be required in the following cases:

(a) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the face of the return; or

(b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or

(c) When a taxpayer who opted to claim a refund or tax credit of excess creditable withholding tax for a taxable period was determined to have carried over and automatically applied the same amount claimed against the estimated tax liabilities for the taxable quarter or quarters of the succeeding taxable year; or

(d) When the excise tax due on excisable articles has not been paid; or

(e) When the article locally purchased or imported by an exempt person, such as, but not limited to, vehicles, capital equipment, machineries and spare parts, has been sold, traded or transferred to non-exempt persons.

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.

Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

amended. Quoted hereunder is the pertinent portion of the assailed Decision, to wit:

> "Based on the foregoing discussion, we hold that issuance of the PAN, save for certain instances, its receipt by the taxpayer and giving the taxpayer a chance to respond thereto should precede the issuance of the FAN. The process cannot be reversed. Thus, *for failure of respondent to provide petitioner a chance to file a response or reply to the PAN, petitioner's right to procedural due process has been transgressed.* Consequently, the assessments for deficiency income tax and VAT for the year 2009 issued by respondent against petitioner are void."[4] (italics supplied)

In the case of *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.*[5] (*Metro Star* case), the Supreme Court acknowledged that the sending of a PAN is a substantive, not merely a formal requirement. In the same case, the Court wrote that strict compliance with the notice requirements must be observed otherwise there will be a denial of due process, it held:

> "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 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 — that taxpayers should be able to present their case and adduce supporting evidence.

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If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable. (emphasis supplied)

[4] Decision, Docket (Vol. IX), p. 4352.

[5] G.R. No. 185371, December 8, 2010.

From the provision quoted above, it is clear that **<u>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.</u>** The use of the word 'shall' in subsection 3.1.2 describes the mandatory nature of the service of a PAN. The persuasiveness of the right to due process reaches both substantial and procedural rights and the failure of the CIR to strictly comply with the requirements laid down by law and its own rules is a denial of Metro Star's right to due process. Thus, for its failure to send the PAN stating the facts and the law on which the assessment was made as required by Section 228 of R.A. No. 8424, the assessment made by the CIR is void.

The case of *CIR v. Menguito* cited by the CIR in support of its argument that only the non-service of the FAN is fatal to the validity of an assessment, cannot apply to this case because the issue therein was the non-compliance with the provisions of R.R. No. 12-85 which sought to interpret Section 229 of the old tax law. RA No. 8424 has already amended the provision of Section 229 on protesting an assessment. The old requirement of merely notifying the taxpayer of the CIR's findings was changed in 1998 to informing the taxpayer of not only the law, but also of the facts on which an assessment would be made. Otherwise, the assessment itself would be invalid. The regulation then, on the other hand, simply provided that a notice be sent to the respondent in the form prescribed, and that no consequence would ensue for failure to comply with that form."[6] (emphasis supplied)

Thus, the Court recognizes that although "the power of taxation is deemed inherent in order to support the government, tax provisions are not all about raising revenue. Our legislature has provided safeguards and remedies beneficial to both the taxpayer, to protect against abuse; and the government, to promptly act for the availability and recovery of revenues."[7] And in order to make sure that there will be no abuse and that due process is properly complied

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[6] *Ibid.*

[7] *Commissioner of Internal Revenue vs. Stanley Works Sales (Phils.), Inc.*, G.R. No. 187589, December 3, 2014.

with, strict compliance with the notice requirements must be observed.

The filing of the Amended Petition for Review is in accordance with the applicable law, rules and regulations.

As regards respondent's allegation that the judicial claim was filed ahead of the administrative claim, the same deserves scant consideration. As borne by the records of the case and as found in the assailed Decision, petitioner's administrative claim for refund was filed ahead of its judicial claim, thus:

> "*First,* it bears stressing that when petitioner filed the petition for review on November 4, 2014, nowhere in the said petition can it be discerned that petitioner categorically prayed for the grant of a tax refund. Petitioner, in the said petition, only prayed to set aside the assessment for deficiency income tax and value-added tax; and, the cancellation and withdrawal of the assessments for compromise penalties.
>
> Contrary to respondent's assertion, on January 21, 2015, petitioner filed with respondent a written administrative protest requesting the latter for a tax refund or credit of the allegedly erroneously and illegally collected deficiency income tax, VAT and compromise penalty in the aggregate amount of ₱18,567,731.69. Thereafter, petitioner's judicial claim was filed on February 5, 2015, through its Motion for Leave to File Amended Petition (with Motion for Leave to Present Additional Evidence) with attached Amended Petition for Review. It was only in the Amended Petition for Review that petitioner included an additional prayer for refund. Thus, the administrative claim with respondent was filed ahead of petitioner's judicial claim."[8]

On the issue of non-adherence to the doctrine of exhaustion of administrative remedies, We have ruled in the assailed Decision[9] that

[8] Decision, Docket (Vol. IX), p. 4353.
[9] *Ibid*, Docket (Vol. IX), p. 4354.

since petitioner received the FAN prior to its receipt of the PAN, respondent did not give petitioner a chance to file a response or reply to the PAN, an act which is violative of petitioner's right to procedural due process. Consequently, the violation of due process made this case an exception to the doctrine of exhaustion of administrative remedies.

With regard to the allegation of respondent that the amendment of petitioner's original petition for review resulted in a radical change in the cause of action, theory and nature of the case, We held in the assailed Decision[10] that Section 3, Rule 10 of the Rules of Court allows an amendment of the pleading, even if the same would result in a substantial change in a cause of action.

Moreover, the nature of petitioner's "amendment" of its original petition may be treated as a supplemental Petition for Review considering that both the assessment case and the claim for refund arose from the same set of facts and issues. Considering further that the payment made by petitioner of its deficiency taxes, and the subsequent filing of a claim for refund of the taxes paid under protest all transpired after the filing of the original Petition for Review. Thus, to avoid multiplicity of suits, the Court allows the amendment of the petition.

Petitioner has sufficiently established all the requisites to warrant its entitlement to a refund.

We have discussed at length the positions posed by the parties in the assailed Decision,[11] and ruled that the all the requisites for petitioner's entitlement to a refund were complied with. To repeat, respondent transgressed petitioner's right to procedural due process when the FAN was received by petitioner six (6) days ahead of its receipt of the PAN and respondent did not give petitioner a chance to file a response to the PAN. An assessment that proceeds therefrom is void, thus, the amount of ₱18,567,731.69, which was paid under protest, as a consequence thereof must be returned to petitioner.

WHEREFORE, finding no cogent reason to depart from the findings and conclusions in the assailed Decision, respondent's

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[10] *Ibid*, Docket (Vol. IX), pp. 4355-4356.
[11] *Ibid*, Docket (Vol. IX), pp. 4357-4360.

Motion for Reconsideration (Re: Decision Promulgated May 04, 2016) is hereby **DENIED** for lack of merit.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice