REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

TOLEDO POWER COMPANY,
Respondent.

CTA EB No. 833
(CTA Case No. 7571)

Present:

Acosta, *P.J.*,
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Palanca-Enriquez,
Fabon-Victorino,
Mindaro-Grulla, and
Cotangco-Manalastas, *JJ.:*

Promulgated:
OCT 01 2012 RAApolinario 2:15 p.m.

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D E C I S I O N

CASTAÑEDA, JR., J.:

On appeal are the Decision dated May 13, 2011 cancelling the assessments covering the 2002 value added tax ("VAT") and annual registration fee deficiencies in favor of Toledo Power Company, and the Resolution dated September 5, 2011 denying the Commissioner of Internal Revenue's Motion for Reconsideration for lack of merit both issued by the Court's Third Division in the case entitled, "Toledo Power Company vs. Commissioner of Internal Revenue" docketed as CTA Case No. 7571.

THE FACTS

The material antecedent facts of the case as found by the Division are as follows:

> Petitioner Toledo Power Company is a general partnership duly organized and existing under and by virtue of the laws of the Philippines.
>
> It is registered with and authorized by the Energy Regulatory Commission (ERC) to operate facilities used in the generation of electricity. It is likewise registered with the Bureau of Internal Revenue (BIR) as a VAT taxpayer with Tax Identification No. 003-883-626-000.
>
> Petitioner is principally engaged in the business of power generation and the subsequent sale thereof to the National Power Corporation, private electric utilities and electric cooperatives, and the carrying on of all businesses incident thereto, including but not limited to the sale of the by-products of power generation.
>
> Respondent Commissioner of Internal Revenue is the chief of the Bureau of Internal Revenue, the government agency charged with the assessment and collection of all national internal revenue taxes, fees and charges, and the enforcement of all forfeitures, penalties and fines connected therewith.
>
> Petitioner filed an administrative claim for refund and issuance of tax credit certificate of its unutilized input value-added tax on domestic purchases of goods/services and importation of goods related to zero-rated sale of services in the amount of P14,254,013.27. As a result of said application, respondent issued Letter of Authority No. 00077453 dated February 2, 2004 to examine petitioner's books of accounts and accounting records.
>
> Based on petitioner's claim for refund or tax credit for taxable year 2002, a Preliminary Assessment Notice (PAN), dated January 25, 2006, was issued by respondent and was received by petitioner on February 9, 2006. The PAN alleged that there are disallowed input taxes of P4,567,588.93 and unrecognized output VAT on sales amounting to P18,736,441.50, which resulted in deficiency VAT payable of P19,173,254.49, inclusive of increments; and that the failure to pay the annual registration fee for taxable year 2002 resulted in deficiency registration fee of P1,027.50, including surcharge and interest. Jr

On April 12, 2006, petitioner received a Formal Letter of Demand with Details of Discrepancies and Assessment Notices, all dated April 3, 2006, assessing petitioner for the following deficiency taxes:

Assessment No. 83-VAT-13-2002-2006-3-083

I. VALUE ADDED TAX			
Per Application of Tax Credit/Refund (as appearing also per VAT Return as of December 31, 2002)			P(14,254,013.27)
Less: Findings per investigation			
Disallowed Input Tax		P4,567,588.93	
Unrecognized VAT Output			
VAT Output per Investigation	P 349,861.22		
VAT Output per return on Sales Discrepancy	304,030.05	45,831.17	
Sales per ITR			
Gross	632,223,511.00		
Less: Sales ret. & disc.	5,159,579.00		
Net Sales	627,063,932.00		
Add: Other Income	3,460,054.00		
Total Sales	630,523,986.00		
Less: Export Sales per VAT return	439,660,958.77		
Vatable Sales	190,863,027.23		
Less: Vatable Sales per Investigation	3,498,612.23		
Vatable Sales with missing invoices	187,364,415.00		
VAT Rate	10%	18,736,441.50	23,349,861.60
VAT deficiency			P 9,095,848.33
Add: 50% surcharge		4,547,924.17	
20% Interest (01/26/03 to 03/30/06)		5,780,916.94	10,328,841.11
Total VAT Deficiency			**P19,424,689.44**

Assessment No. 83-rf-13-2002-2006-3-084

Annual registration fee		
Basic Registration Fee		P 500
Add: Surcharge	P 125	
Compromise Penalty	200	
Interest (02/01/02 to 03/30/06)	416.39	741.39
Deficiency Registration Fee		**P1,241.39**

jr

On May 12, 2006, petitioner filed with respondent its protest on said assessments.

On July 26, 2006, petitioner received a letter from the BIR dated July 10, 2006, requesting documentary evidence for proper evaluation of the merits of the protest and attaching the composition and reasons for the disallowed input taxes amounting to P4,567,588.93.

Since respondent failed to resolve petitioner's protest, petitioner filed a Petition for Review before this Court on February 6, 2007. [1]

In ruling for Toledo Power Company ("Toledo"), the Court in Division issued a Decision dated May 13, 2011 which granted the Petition and ordered the cancellation of the assessments for VAT and annual registration fee deficiencies for taxable year 2002.[2]

Dissatisfied, the Commissioner of Internal Revenue ("CIR") moved to reconsider the Decision dated May 13, 2011; however, the Court in Division denied the same for lack of merit as shown in the Resolution dated September 5, 2011.[3]

THE ISSUE

Unfazed, the CIR now as the petitioner appealed by way of a Petition for Review before the Court of Tax Appeals ("CTA") *en banc* interposing the lone issue:

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[1] Rollo, pp. 28-31.
[2] Rollo, pp. 28-41. Penned by Associate Justice Lovell R. Bautista and concurred in by Associate Justices Olga Palanca-Enriquez and Amelia R. Cotangco-Manalastas.
[3] Rollo, pp. 43-46.

> WHETHER OR NOT THE THIRD DIVISION OF THE HONORABLE COURT ERRED IN CANCELLING THE ASSESSMENT FOR DEFICIENCY VAT AND ANNUAL REGISTRATION FEE.[4]

On November 14, 2011, Toledo filed a Comment to the Petition.[5]

In the Resolution dated February 8, 2012, the Court noted the CIR's Manifestation that she is adopting the Petition for Review as her Memorandum. In view of the CIR's manifestation and considering that Toledo has already filed its Memorandum on January 16, 2012, the Court deemed the case submitted for decision.

Toledo raised the following points in its Comment and Memorandum:

i. Herein petitioner's Petition for Review must be dismissed outright for failure to comply with the mandatory requirements of a Petition for Review under the Revised Rules of Court and Revised Rules of the Court of Tax Appeals.

ii. Herein petitioner merely reiterated all her arguments contained in her Memorandum and Motion for Reconsideration which had already been exhaustively passed upon by this Honorable Court.

iii. The assessment is void for failure to clearly and properly inform respondent of the facts and the law on which the assessment is made.

iv. Herein petitioner has lost its right to assess the alleged deficiency value-added taxes and annual registration fees by reason of prescription.

v. Toledo properly reported its sales in its 2002 quarterly VAT returns. The CIR erred in comparing the amount of sales reported in the income tax return with the amount reported in the VAT return.

vi. Toledo's sale is subject to 0% VAT pursuant to EPIRA law.

vii. Toledo is not liable for 50% surcharge.

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[4] Rollo, p. 14.
[5] Rollo, p. 53.

viii. The assessment on the alleged deficiency registration fee is invalid for having been issued without authority.[6]

THE COURT'S RULING

THE 2002 VAT ASSESSMENT LACKS FACTUAL AND LEGAL BASES.

The CIR alleges that the statutory provisions supporting the assessment on Toledo's VAT deficiency are based on Sections 56 (B), 106(A), 248(B) and 249(B) of the 1997 NIRC.

As stated in the Preliminary Notice dated June 16, 2005, Toledo's excess input VAT of P14,354,013.27 was decreased to P8,181,626.89 due to its disallowances on the input taxes. On account of some of the official receipts submitted by Toledo, the disallowance on input VAT was reduced to P4,567,588.93. Toledo was even furnished a schedule of disallowed input VAT. It was able to intelligently answer the assessment as shown in the letter protest.

Toledo argues that the legal provisions of Sections 56(B) and 106(A) of the 1997 NIRC are inapplicable to the instant case. Section 56(B) refers to assessment and payment of income tax deficiency and has nothing to do with VAT. Section 106(A) of the 1997 NIRC on the other hand, refers to VAT on sale of goods or properties. Toledo is principally engaged in the business of generating power for lighting and power purposes and the wholesale of electric power to National Power Corporation, private electric utilities and electric

[6] Rollo, pp. 54, 57, 60, 63, 99, 111, 115 and 117.

cooperatives. Sales of electricity by generation companies, transmission and distribution companies are included in the definition of "sale or exchange of services" under Section 108 (A) of the 1997 NIRC. The CIR's witness, the examiner herself, admitted that Toledo is a seller of electricity and as such is subject to VAT based on collection.

Both Sections 56(B) and 106(A) of the 1997 NIRC cannot be used as grounds for assessing Toledo for VAT deficiency. Thus, the assessment is void.

We disagree with the CIR's posture.

Section 228 of the 1997 NIRC mandates the Commissioner of Internal Revenue or his duly authorized representatives to inform the taxpayer in writing of the facts and law on which the assessment is made. It is the contents of the assessment notice which should inform the taxpayer of the declaration of deficiency tax against the taxpayer. Both the formal letter of demand and the notice of assessment shall be void if there was a failure to state the fact, the law, rules and regulations or jurisprudence on which the assessment is based.[7]

Amending Section 270 of the old NIRC, Section 228 of the 1997 NIRC now requires the CIR to inform instead of merely notifying the taxpayer on her findings on any tax deficiency or delinquency. Citing the case of *Commissioner of Internal Revenue v. Reyes*[8], the Supreme Court in the case of *Commissioner of Internal Revenue v. Bank of the Philippine Islands*[9] explained the implication

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[7] *Commissioner of Internal Revenue v. Hon. Raul M. Gonzalez, Secretary of Justice, L. M. Camus Engineering Corporation(represented by Luis M. Camus and Lino D. Mendoza*, G.R. No. 177279, October 13, 2010, 633 SCRA 139.
[8] G.R. No. 159694 & 163581, January 27, 2006, 480 SCRA 382.
[9] G.R. No. 134062, April 17, 2007, 521 SCRA 373.

of informing the taxpayer in relation to notifying the taxpayer on the basis of the tax assessment as follows:

> **Admittedly, the CIR did not inform BPI in writing of the law and facts on which the assessments of the deficiency taxes were made. He merely notified BPI of his findings, consisting only of the computation of the tax liabilities and a demand for payment thereof within 30 days after receipt.**
>
> In merely notifying BPI of his findings, the CIR relied on the provisions of the former Section 270 prior to its amendment by RA 8424 (also known as the Tax Reform Act of 1997). In *CIR v. Reyes*, we held that:
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>> In the present case, Reyes was not informed in writing of the law and facts on which the assessment of estate taxes had been made. She was merely notified of the findings by the CIR, who had simply relied upon the provisions of former Section 229 prior to its amendment by RA 8424, otherwise known as the Tax Reform Act of 1997.
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>> First, RA 8424 has already amended the provisions 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 the facts on which the assessment would be made; otherwise, the assessment itself would be invalid.
>>
>> It was on February 12, 1998, that a preliminary assessment notice was issued against the estate. On April 22, 1998, the final estate tax assessment notice, as well as demand letter, was also issued. During those dates, RA 8424 was already in effect. **The notice required under the old law was no longer sufficient under the new law.** (Emphasis supplied.)

Also in the case of *Commissioner of Internal Revenue v. Enron Subic Power Corporation*[10], the Supreme Court stated the relevance of informing the taxpayer of the factual and legal bases of the assessment in the following manner: Jr

[10] G.R. No. 166387, Resolution dated January 19, 2009, 576 SCRA 212.

It is clear from the foregoing that a taxpayer must be informed in writing of the legal and factual bases of the tax assessment made against him. The use of the word "shall" in these legal provisions indicates the mandatory nature of the requirements laid down therein. We note the CTA's findings:

In [this] case, **[the CIR] merely issued a formal assessment and indicated therein the supposed tax, surcharge, interest and compromise penalty due thereon. The Revenue Officers of the [the CIR] in the issuance of the Final Assessment Notice did not provide Enron with the written bases of the law and facts on which the subject assessment is based. [The CIR] did not bother to explain how it arrived at such an assessment.** Moreso, he failed to mention the specific provision of the Tax Code or rules and regulations which were not complied with by Enron. (Emphasis supplied).

In the formal letter of demand with the attached assessment notice ("FAN"), the CIR merely stated the computation for the 2002 VAT and annual registration deficiencies and the applicable legal provision. But this is not sufficient. The reason or basis for disallowed input VAT must be explained. We subscribe to the Court in Division's findings in this wise:

In the present case, the Formal Letter of Demand with Details of Discrepancies and Assessment Notice issued against petitioner are not valid. Said notices failed to state the legal and factual bases of the assessment for deficiency value-added tax in violation of Section 228 of the NIRC.

A careful perusal of the facts stated in the Details of discrepancies shows that the details stated therein are not sufficient to afford petitioner the opportunity to intelligently answer the assessment as well as prepare the documentary evidence to support its protest.

Respondent failed to indicate the basis of the disallowance of the input taxes amounting to P4,568,588.93. Further, respondent neglected to state the schedule or the composition of the supposed disallowed to input tax, VAT output per investigation, and the vatable sales per investigation.[11] (Emphasis supplied.)

[11] Rollo, pp. 37-38. As appearing in the CIR's Formal Letter of Demand, the disallowed input taxes should be P4,567,588.93.

The Court in Division emphasized on the CIR's failure to provide a breakdown or explanation of the disallowed input VAT of P4,567,588.93. Contrary to the CIR's contention that Toledo was able to duly contest the FAN as to the disallowed input VAT, the letter protest shows otherwise:

> Disallowed input Taxes – P4,567,588.93
>
> The examiners failed to state the reason for the disallowance of the input taxes. Thus, we submit that the assessment on this item is null and void. For an assessment to be valid, it must state clearly the facts and the law on which it is based. Revenue Regulations No. 12-99 provides that:
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> 3.1.4. Formal Letter of Demand and Assessment Notice. – The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void.[12]

As to the alleged unrecognized VAT output of P45,831.17, this discrepancy resulted from deducting the VAT output per investigation of P349,861.22 and VAT output per return on sales of P304,030.05. The amount of P349,861.22 is 10% of P3,498,612.23, the vatable sales per investigation. The CIR failed to provide a breakdown or an explanation how it was able to conclude that the vatable sales should be P3,498,612.23 and not P3,040,300.05. Logically, the alleged unrecognized VAT output of P45,831.17 was also not explained by the CIR. Je

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[12] Docket, CTA Case No. 7571, p. 38.

Clearly the 2002 VAT deficiency assessment is void in violation of Section 228 of the 1997 NIRC.

2002 VAT ASSESSMENT AGAINST TOLEDO HAS PRESCRIBED.

The CIR also asserts that Toledo's sales subject to VAT with missing invoices amount to P187,364,415.00 which represents 98% of the total sales subject to VAT for taxable year 2002. In other words, only 2% of the total sales subject to VAT had been substantiated with invoices during investigation. This 98% discrepancy corresponding to Toledo's vatable sales with missing invoices in the amount of P187,364,415.00 manifests an evident substantial underdeclaration demonstrating falsity or fraudulent tax returns with intent to evade payment of tax. Thus, the CIR's right to assess is within ten (10) years from discovery of the falsity or fraud under Section 222 of the 1997 NIRC.

Toledo counters that the 2002 assessment for VAT deficiency was issued beyond the three (3) year reglementary period.

As correctly found by the Court, the CIR failed to prove the existence of fraud or falsity. Mere allegation is not evidence, and is not equivalent to proof. In addition, Toledo did not execute any waiver of defense of prescription extending CIR's right to assess pursuant to Sections 203 and 222 of the 1997 NIRC.

Since the issue of prescription was never raised in the administrative level, it cannot be alleged for the first time on appeal.

We are not persuaded with the CIR's stance.

The period to assess internal revenue taxes is three years from the date prescribed by law for filing of the return or from the date of actual filing of the return whichever comes later[13] pursuant to Section 203 of the 1997 NIRC which reads:

> "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*, That in a 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 three year period may extend to ten (10) years in the event of filing false or fraudulent returns or omission to file the required returns under Section 222 of the 1997 NIRC which provides:

> SEC. 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes. –
>
> "(a) In the case of false or fraudulent return with intent to evade or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment at anytime within ten (10) years after the discovery of the falsity, fraud or omission: *Provided*, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof. xxx

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[13] *Commissioner of Internal Revenue v. Headstrong Philippines, Inc.*, CTA EB Case No. 489, August 26, 2010.

The case of *Jose B. Aznar vs. Court of Tax Appeals*[14] is instructive on the difference between a fraudulent return and false return, *viz*:

> We believe that the proper and reasonable interpretation of said provision should be that in the three different cases of (1) false return, (2) fraudulent return with intent to evade tax, (3) failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within ten years after the discovery of the (1) falsity, (2) fraud, (3) omission. Our stand that the law should be interpreted to mean a separation of the three different situations of false return, fraudulent return with intent to evade tax, and failure to file a return is strengthened immeasurably by the last portion of the provision which segregates the situations into three different classes, namely "falsity", "fraud" and "omission". That there is a difference between "false return" and "fraudulent return" cannot be denied. While the first merely implies deviation from the truth, whether intentional or not, the second implies intentional or deceitful entry with intent to evade the taxes due.

Fraud is a question of fact and the circumstances constituting fraud must be alleged and proved in the court.[15] Fraud has been interpreted as actual and not constructive. It must be intentional fraud, consisting of deception willfully and deliberately done or resorted to[16] with intent to evade taxes.[17] While false return refers to deviation from the truth whether the falsity arises from mistake, ignorance or carelessness.[18]

Here, the CIR had failed to raise in the FAN the findings attesting on the existence of fraud and falsity of returns which would justify the assessment period of ten years. During the pendency of the case with the Court in Division,

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[14] *Jose B. Aznar v. Court of Tax Appeals*, G.R. No. L-20569, August 23, 1974, 58 SCRA 519.
[15] *Commissioner of Internal Revenue vs. Ayala Securities Corporation*, G.R. No. L-29485, March 31, 1976,70 SCRA 204.
[16] *Commissioner of Internal Revenue v. Melchor Javier, Jr.*, G.R. No. 78953, July 31, 1991, 199 SCRA 824.
[17] See *Jose B. Aznar v. Court of Tax Appeals, supra.*
[18] See *Philippine National Oil Company v. Commissioner Sixto S. Esquivias IV of the Bureau of Internal Revenue*, CTA EB Case No. 587, Resolution dated November 10, 2011 and *Samar-I Electric Cooperative, Inc. v. Commissioner of Internal Revenue*, CTA Case No. 6697, May 27, 2008.

it is at this stage she belatedly alleged in her Answer that the amount of P187,364,415.00 or 98% of the total sales subject to VAT for taxable year 2002 validate the existence of substantial underdeclaration as a prima facie case of false or fraudulent return under Section 222 of the 1997 NIRC.

The CIR cannot assume that the amount of P187,364,415.00 allegedly corresponding to 98% of the total sales subject to VAT for taxable year 2002 proves the existence of substantial underdeclaration of taxable sales, receipts or income which constitutes prima facie case of false or fraudulent return. As a service oriented enterprise, Toledo recognizes its sales per income tax return on accrual basis that is income is reported in the period it is earned regardless of whether it has been received or not.[19] While sales per VAT return arises from the time of collection as shown in the official receipt. Clearly, there is no basis to conclude that Toledo substantially underdeclared its sales, receipts or income because the sales per income tax return and sales per VAT return are incomparable.

There being no proof of the existence of false or fraudulent returns in the instant case, the three year assessment period applies and since the 2002 VAT assessment was issued beyond the three year period, the CIR is now barred from assessing Toledo of the 2002 VAT deficiency. The Court in Division correctly ruled that:

> Applying the rule to the present case, the last day to file and pay value-added tax is on the twenty-fifth day following the close of each taxable quarter. So if the return was filed beyond the period prescribed

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[19] See Exhibit "S". See *Telesat v. Commissioner of Internal Revenue*, CTA Case No. 6812, January 2, 2006.

by law, the three-year period shall be counted from the day the return was filed. Thus, respondent had until the following dates within which to assess petitioner for the subject deficiency value added tax for taxable year 2002:

Year 2002	Exhibit	Date Filed	Last Day to File Return	Last Day To Assess
1st Qtr	E	4/25/02	04/25/02	04/25/05
2nd Qtr	F	7/25/02	07/25/02	07/25/05
3rd Qtr	G	10/25/02	10/25/02	10/25/05
4th Qtr	H	1/27/03	1/27/03	1/27/06

Clearly, the Formal Letter of Demand and Assessment Notice both dated April 3, 2006 and received by petitioner on April 12, 2006 are beyond the three-year prescriptive period within which respondent could make an assessment for deficiency VAT for taxable year 2002.[20]

THE ASSESSMENT ON TOLEDO'S 2002 BIR REGISTRATION FEE DEFICIENCY SHOULD BE CANCELLED.

Concerning the assessment on Toledo's 2002 registration fee deficiency, we find the same unmeritorious. Toledo paid annual registration fee covering the assessed period. The Court in Division aptly observed that:

> Section 236(B) of the NIRC provides that the annual registration fee in the amount of five hundred pesos for every separate or distinct establishment or place of business shall be paid on or before the last day of January. In this case, petitioner's annual registration fee should be payable on or before January 31, 2002.
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> A review of the BIR revenue official receipt (ROR 2000-01464910 dated January 30, 2002 for payment of Annual Registration in the amount of P500.00 and Payment Form (BIR Form No. 0605 dated January 30, 2002 for payment of Annual Registration in the amount of P500 clearly proves that petitioner paid its annual BIR Registration fee for taxable year 2002.[21] *gr*

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[20] Rollo, pp. 39-40.
[21] See Exhibits "P", "Q". Docket, CTA Case No. 7571, pp. 1078, 1103 & 1104.

Clearly, the Court in Division correctly ordered the cancellation of the assessment for BIR Registration fee deficiency for taxable year 2002.

The Court sees no cogent reason to delve on the other grounds raised by the parties.

WHEREFORE, PREMISES CONSIDERED, the Petition for Review is hereby **DISMISSED**. The assailed Decision dated May 13, 2011 and the Resolution dated September 5, 2011 are **AFFIRMED**.

SO ORDERED.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

(On Leave)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

C E R T I F I C A T I O N

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.

ERNESTO D. ACOSTA
Presiding Justice