REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

AGM PACKAGING SYSTEM LTD. CORP.,
Petitioner,

- versus –

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1734
(CTA Case No. 8947)

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COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

AGM PACKAGING SYSTEM LTD. CORP.,
Respondent.

CTA EB NO. 1739
(CTA Case No. 8947)

Present:
DEL ROSARIO, *P.J.,*
CASTAÑEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, *and*
MANAHAN, *JJ.*

Promulgated:
MAR 29 2019
11:45a.m.

x- -x

DECISION

RINGPIS-LIBAN, *J.*:

The Case

Before the Court are the following:

1) Petition for Review filed by AGM Packaging System Ltd. Corp. ("AGM"), docketed as CTA EB No. 1734, seeking the reversal of the Decision[1] ("Assailed Decision") dated June 09, 2017 and Resolution[2] ("Assailed Resolution") dated October 20, 2017 of the Court of Tax Appeals Second Division ("Second Division"), insofar as it upheld in part the assessments issued by Respondent against Petitioner for taxable year 2009 covering deficiency income tax, value-added tax ("VAT"), expanded withholding tax ("EWT"), improperly accumulated earnings tax ("IAET") and documentary stamp tax ("DST"); and

2) Petition for Review filed by the Commissioner of Internal Revenue ("CIR"), docketed as CTA EB No. 1739, praying that the Assailed Decision and Assailed Resolution partially granting the Petition for Review in CTA Case No. 8621 be reversed and set aside, and a new one be rendered ordering AGM to pay the entire amount of Php5,066,781.11 as deficiency taxes plus compromise penalty for taxable year 2009.

<u>The Facts</u>

The facts as found by the Second Division are as follows:

> "[AGM] is a corporation organized and existing under the laws of the Republic of the Philippines with principal office address at Block 18, Lots 1 and 3, Philippine Economic Zone Authority (PEZA), Rosario, Cavite. It is registered with Philippine Economic Zone Authority (PEZA) as an Ecozone Export Enterprise inside Cavite Economic Zone under PEZA Registration Certificate No. 06-59 dated July 28, 2006, to engage in the manufacture of specialized wooden pallets. It is registered with the Bureau of Internal Revenue (BIR) with Tax Identification Number (TIN) 247-296-350-000 and Certificate of Registration No. OCN 1RC0000385690 issued on August 31, 2006.
>
> [CIR] is the duly appointed Commissioner of the BIR who has the power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto or other matters arising under the National Internal Revenue Code (NIRC) or other laws or portions thereof administered by the BIR. He holds office at 5th Floor, BIR Building, Diliman, Quezon City.

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1 Penned by Associate Justice Caesar A. Casanova, with Associate Justice Juanito C. Castañeda, Jr. and Catherine T. Manahan concurring. Docket, pp. 813-849.

2 Penned by Associate Justice Caesar A. Casanova, with Associate Justice Juanito C. Castañeda, Jr. and Catherine T. Manahan concurring. *Id.*, pp. 945-950.

[AGM] started its commercial operations on October 2006 per PEZA Notice of Approval Start of Commercial Operations (SCO No. 10-041).

On July 7, 2010, [AGM], through its duly authorized representative, Rodolfo C. Latayan, received a Letter of Authority (LOA) No. 200800025918 dated June 22, 2010, together with a Checklist of Requirements from the BIR, authorizing the conduct of examination of [AGM]'s books of accounts and other accounting records for period of January 1, 2009 to December 31, 2009. The BIR issued a Notice of Informal Conference on April 11, 2011 and Amended Notice of Informal Conference on January 12, 2012.

The BIR, through Regional Director Jose N. Tan of Revenue Region No. 9, San Pablo City, issued a Preliminary Assessment Notice (PAN) with Details of Discrepancies on June 21, 2012. Petitioner filed its protest dated July 25, 2012 to the PAN on July 26, 2012.

The BIR, through Regional Director Jose N. Tan issued a Formal Letter of Demand (FLD) with attached Details of Discrepancies and Audit/Results Assessment Notices all dated August 7, 2012, assessing [AGM] for the deficiency Income Tax, VAT, EWT, IAET and DST in the total amount of [Php]4,071,654.56 for taxable year 2009. [AGM] filed its reply dated August 25, 2012 to the FLD on August 29, 2012. [AGM] wrote another letter dated January 28, 2013, which was received by the [CIR] on January 30, 2013, addressing the issue on IAET.

On October 27, 2014, BIR, through Regional Director Jose N. Tan issued its Final Decision on Disputed Assessment (FDDA), which was received by [AGM] on November 17, 2014, assessing [AGM] for the deficiency Income Tax, VAT, EWT, IAET and DST in the adjusted total amount of [Php]5,066,781.11 for taxable year 2009.

[AGM] filed the present Petition for Review on December 17, 2014, while [CIR] filed his Answer, through registered mail on March 16, 2015[.]"[3]

The Ruling of the Second Division

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[3] *Id.*, pp. 813-815.

On June 09, 2017, the Second Division promulgated the Assailed Decision partially granting the Petition for Review, the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, the Petition for Review is **PARTIALLY GRANTED**. The assessments issued by [CIR] against [AGM] for taxable year 2009 covering deficiency Income Tax, Value-Added Tax, Expanded Withholding Tax, Improperly Accumulated Earnings Tax and Documentary Stamp Tax are **PARTIALLY UPHELD**. Accordingly, [AGM] is ordered to pay [CIR] the amount of **TWO MILLION NINE HUNDRED NINETY TWO THOUSAND THREE HUNDRED NINETY FOUR PESOS AND NINETY THREE CENTAVOS ([Php]2,992,394.93)**, representing basic deficiency Income tax, Value-Added Tax, Expanded Withholding Tax, Improperly Accumulated Earnings Tax and Documentary Stamp Tax and the 25% surcharge imposed under Section 248 (A) (3) of the NIRC of 1997, as amended, computed as follows:

Tax Type	Basic	25% Surcharge	Total
Income Tax	[Php]424,026.41	[Php]106,006.60	[Php]530,033.01
Value-Added Tax	128,838.72	32,209.68	161,048.40
Expanded Withholding Tax	17,802.03	4,450.51	22,252.54
Improperly Accumulated Earnings Tax	1,822,470.28	455,617.57	2,278,087.85
Documentary Stamp Tax	778.50	194.63	973.13
Total	**[Php]2,393,915.94**	**[Php]598,478.99**	**[Php]2,992,394.93**

> In addition, [AGM] is ordered to pay:
>
> (a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency income tax, VAT, EWT and IAET computed from the dates indicated below until full payment thereof pursuant to Section 249 (B) of the NIRC of 1997, as amended:

Tax Type	Basic Tax	Deficiency Interest Computed From
Income Tax	[Php]424,026.41	April 15, 2010
Value-Added Tax	128,838.72	January 25, 2010
Expanded Withholding Tax	17,802.03	January 15, 2010
Improperly Accumulated Earnings Tax	1,822,470.28	January 15, 2011

Documentary Stamp Tax	778.50	January 5, 2010

(b) Delinquency interest at the rate of twenty percent (20%) per annum on the total amount of [Php]2,992,394.93, and on the 20% deficiency interest which have accrued as aforestated in (a), computed from November 17, 2014 until full payment thereof pursuant to Section 249 (C) of the NIRC of 1997, as amended.

SO ORDERED."[4]

Aggrieved, both AGM and the CIR filed their Motions for Partial Reconsideration on June 29, 2017 *via* personal filing[5] and registered mail[6], respectively.

On October 20, 2017, the Second Division denied both motions in the Assailed Resolution, thus:

"**WHEREFORE**, finding no cogent reason to reverse the assailed Decision, [AGM]'s **Motion for Partial Reconsideration [To the Decision dated June 9, 2017]** and [CIR]'s **Motion for Partial Reconsideration (Re: Decision promulgated on 9 June 2017)**, are both **DENIED** for lack of merit."[7]

Hence, these petitions.

AGM filed a "Motion for Extension of Time" on November 08, 2017,[8] which the Court granted in a Resolution[9] dated November 10, 2017. Within the period granted, AGM filed its "Petition for Review" on November 23, 2017,[10] docketed as CTA EB No. 1734.

Meanwhile, the CIR filed his "Petition for Review" on November 09, 2017, docketed as CTA EB No. 1739.[11] On November 28, 2017, a Resolution[12] was issued by the Court ordering AGM to file its comment on the CIR's "Petition for Review".

4 *Id.*, pp. 847-849.
5 *Id.*, pp. 850-867.
6 *Id.*, pp. 922-925.
7 *Id.*, p. 950.
8 Rollo (CTA EB No. 1734), pp. 1-4.
9 *Id.*, p. 5.
10 *Id.*, pp. 6-38.
11 Rollo (CTA EB No. 1739), pp. 1-13.
12 *Id.*, pp. 61-62.

On December 06, 2017, the Court resolved to consolidate CTA EB No. 1734 with CTA EB No. 1739, considering that the Petitions for Review are appeals from the Decision and Resolution of the Second Division in the same case.[13]

In relation to CTA EB No. 1739, AGM filed a "Motion for Extension of Time"[14] to file its comment, which the Court granted in a Minute Resolution[15] dated January 05, 2018. On January 04, 2018, AGM filed its "Comment/Opposition (To Petitioner's Petition for Review dated November 9, 2017)".[16]

On January 10, 2018, in relation to CTA EB No. 1734, the Court ordered the CIR to file its Comment on AGM's "Petition for Review".[17] On March 23, 2018, the Court gave due course to the petitions and ordered the parties to submit their respective memoranda.[18]

On April 19, 2018, the CIR filed his "Memorandum with Manifestation".[19] On the other hand, AGM filed its "Memorandum"[20] on May 07, 2018.

Hence, on May 30, 2018, the Court issued a Resolution submitting the consolidated cases for decision.[21]

The Issues

AGM raised the following issues in CTA EB No. 1734:

1) The Second Division erred in ruling that it is within the CIR's authority to determine whether or not AGM is qualified to avail of the preferential income tax rate granted to Philippine Economic Zone Authority ("PEZA") registered entities;

2) The Second Division erred in ruling that the subcontracting in 2009 is not in accord with Petitioner's registration agreement and that the subcontracting for the manufacture of wooden pallets is outside the registered activity of AGM, and thus AGM is not entitled to its fiscal incentives; and

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13 Rollo (CTA EB No. 1734), p. 131.
14 *Id.*, pp. 132-135.
15 *Id.*, p. 147.
16 *Id.*, pp. 136-145.
17 *Id.*, pp. 149-150.
18 *Id.*, pp. 153-154.
19 *Id.*, pp. 155-165.
20 *Id.*, pp. 166-207.
21 *Id.*, pp. 19-20.

3) The Second Division erred in ruling that AGM is liable to pay Php530,033.01 deficiency income tax and Php2,278,087.85 deficiency IAET, its deficiency interest, delinquency interest to be computed from November 17, 2014.[22]

On the other hand, the CIR, in CTA EB No. 1739, assigned the following errors:

1) The Second Division erred in ruling that the disallowance of the interest income and foreign exchange loss is not proper;

2) The Second Division erred in ruling that the imposition of deficiency income tax on the Net Operating Loss Carry-Over ("NOLCO") in the amount of Php620,420.63 is incorrect; and

3) The Second Division erred when it cancelled the compromise penalty imposed.[23]

AGM's arguments:

AGM contends that it is the PEZA, under its power provided in Republic Act ("R.A.") No. 7916 or the "Special Economic Zone Act of 1995", which has the sole authority to declare upon factual compliance that AGM is a bona fide PEZA-registered enterprise and its entitlement to Income Tax Holiday ("ITH") or five percent (5%) Gross Income Tax ("5% GIT"). Therefore, it is PEZA which should prevail in the determination or qualification of a PEZA-registered entity's fiscal incentive, and not the CIR. AGM further claims that by virtue of PEZA Certification No. 2009-855, wherein it is evident that the PEZA registration of AGM is still valid, not revoked, suspended or cancelled for taxable year 2009, the CIR can only assess whether Petitioner correctly declared its income for purposes of imposing the 5% GIT. The CIR cannot totally set aside the 5% GIT entitlement and instead impose the thirty percent (30%) corporate income tax and ten percent (10%) IAET upon its finding that AGM has violated its PEZA Registration Agreement. Absent any categorical declaration from PEZA that AGM has failed to comply with the terms and conditions of the PEZA Registration Agreement, then the CIR has the obligation to respect the tax incentives extended to AGM under PEZA laws.

Likewise, AGM points out that the subcontracting in 2009 between AGM and AGM Ventures Enterprises, Inc. ("AGM Ventures") does not constitute "trading" of wooden pallets and cannot be considered as outside the registered activity of AGM inside the ecozone. The issuance of CEZ-SC-10-155 dated July 10, 2010 and other Letters of Authority ("LOA") to cover the subcontracting

[22] *Id.*, p. 11.
[23] Rollo (CTA EB No. 1509), p. 11.

agreement with AGM Ventures confirms that the said subcontracting is within the scope of AGM's registered activity.

Lastly, AGM submits that the CIR's assessment of thirty percent (30%) normal corporate income tax has no basis since for taxable year 2009, it has opted to be covered under the 5% GIT regime. Additionally, based on AGM's income tax returns and audited financial statements for 2007, 2008 and 2009, it is mathematically impossible for AGM to have accumulated retained earnings of Php18,224,702.76.

The CIR's arguments:

The CIR argues that AGM failed to substantiate its claimed interest income and foreign exchange loss aggregating to Php141,618.58. Thus, pursuant to Section 34(A)(1)(b) of the NIRC of 1997, as amended, the same cannot be allowed as deductions from gross income.

Moreover, the CIR points out that the net loss of Php620,420.63 was added back as net operating loss carry-over pursuant to Section 34(D)(3) of the NIRC of 1997, as amended, wherein loss of the business for any taxable year immediately preceding the current taxable year shall be carried over as a deduction from gross income for the next three (3) consecutive years immediately following the year of such loss.

Lastly, the CIR contends that the Supreme Court affirmed the imposition of surcharge, deficiency and delinquency interest, and even compromise penalties imposed on the deficiency assessment for DST in *Commissioner of Internal Revenue v. Filinvest Development Corporation*[24].

The Ruling of the Court

We deny the petitions.

At the outset, we note that the issues raised by AGM and the CIR are rehashed from their arguments before the Court in Division, and have been sufficiently passed upon and resolved in the Assailed Decision and Assailed Resolution.

CTA EB No. 1734

The CIR has authority to determine AGM's entitlement

[24] G.R. No. 163653, July 19, 2011.

to the five percent (5%) preferential tax rate incentive under R.A. No. 7916

As stated by the Second Division, the power and duty to assess national internal revenue taxes are lodged with the CIR pursuant to Sections 2 and 6 of the NIRC of 1997, as amended. The said provisions state:

> "SEC. 2. **Powers and Duties of the Bureau of Internal Revenue.** - The Bureau of Internal Revenue shall be under the supervision and control of the Department of Finance and its powers and duties shall comprehend the assessment and collection of all national internal revenue taxes, fees, and charges, and the enforcement of all forfeitures, penalties, and fines connected therewith, including the execution of judgments in all cases decided in its favor by the Court of Tax Appeals and the ordinary courts. The Bureau shall give effect to and administer the supervisory and police powers conferred to it by this Code or other laws.
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> xxx xxx xxx
>
> SEC. 6. **Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.** -
>
> (A) *Examination of Return and Determination of Tax Due.* After a return has been filed as required under the provisions of this Code, the Commissioner or his duly authorized representative may authorize the examination of any taxpayer and the assessment of the correct amount of tax: Provided, however, That failure to file a return shall not prevent the Commissioner from authorizing the examination of any taxpayer.
>
> xxx xxx xxx"

It logically follows then that the CIR has authority to determine whether or not a PEZA-registered entity such as AGM paid the proper tax due, more so considering the tax incentives given to it by virtue of its PEZA Registration.

This authority was confirmed by Revenue Regulations ("RR") No. 01-00[25], as amended by RR No. 27-02[26] which states:

> "Section 6. Authority to Issue, Collect, Compromise or Abate Any Deficiency 5% Special Income Tax Assessment. —
>
> > (a) Jurisdiction. — **Pursuant to Section 6 of the National Internal Revenue Code of 1997, in relation to Section 24 of R.A. 7916, as amended by R.A. 8748, <u>the power to</u> audit and <u>assess the</u> herein <u>five percent (5%) special income tax</u>**, as well as the power to abate, cancel, or compromise the payment of the said tax, including the power to implement special voluntary payment program/s for last priority in audit, **shall be under the exclusive jurisdiction of the Commissioner of Internal Revenue or his duly authorized representative**, subject to the approval of the Secretary of Finance in cases where such approval is necessary."[27]

Hence, there is no other conclusion but that it is clearly within the CIR's authority, in the exercise of his power to assess, to determine whether AGM is qualified to avail of the preferential income tax rate granted to PEZA registered entities.

The subcontracting for the manufacture of wooden pallets for 2009 is outside the registered activity of AGM as a PEZA registered enterprise

There is no dispute that during taxable year 2009, AGM is duly registered with the PEZA as an ecozone export enterprise entitled to the five percent (5%) preferential tax rate under Section 24 of R.A. No. 7916, otherwise known as "The Special Economic Zone Act of 1995".[28]

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25 Regulations Implementing Section 24 of RA. No. 8748, Entitled "An Act Amending Republic Act No. 7916," Otherwise Known as the Special Economic Zone Act of 1995, Amending for this Purpose Revenue Regulations No. 12-97, November 12, 1999.

26 Amending Revenue Regulations No. 1-2000 Further Implementing Section 4 of R.A. No. 8748, Entitled "An Act Amending R.A. No. 7916, Otherwise Known as the Special Economic Zone Act of 1995", November 14, 2002.

27 *Emphasis and underscoring supplied.*

28 Docket, Exhibits "P-17" and "P-19", pp. 690-697 and "700-701".

The only issue in the case is whether or not the subcontracting activity of AGM in 2009 is part of its registered activity, and thus subject to the 5% GIT regime. Lamentably, a review of the evidence presented by AGM show otherwise.

Under the Registration Agreement attached to AGM's PEZA Certificate of Registration[29] dated July 28, 2006, AGM's registered activity is limited to the manufacture of wooden pallets and the importation of raw materials, machinery, equipment, tools, goods, wares, articles, or merchandise directly used in its registered operations. In the event AGM engages in a new or additional activity, directly or indirectly related to its registered activity, it must apply anew with PEZA for the latter's approval.

However, as pointed out by the Court *a quo*, the examination of the Letters of Authority[30] from the PEZA, particularly No. CEZ-SC-10-155, discloses that the sub-contracting was approved only on July 13, 2010, which was valid for a period of six (6) months or until January 13, 2011, and subject to renewal for another six (6) months. In other words, there was no approval for the subcontracting in the year 2009 and hence not in accord with AGM's registration agreement with the PEZA. In sum, notwithstanding the several letters of authority from PEZA for the years 2011 to 2015, the fact is that there was no letter of authority for the year 2009.

The Second Division properly partially upheld the income tax and IAET assessments

Considering that the subcontracting agreement of AGM with AGM Ventures is outside the former's registered activity inside the ecozone, AGM is not entitled to the 5% GIT regime. Instead, it shall be subject to thirty percent (30%) regular corporate income tax. The income tax and IAET assessments of the CIR should be partially upheld.

Thus, We see no reason to deviate from the ruling of the Second Division as follows:

> "**I. Income Tax — [Php]800,243.87**
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> xxx xxx xxx
>
> As regards the interest income and foreign exchange loss, the disallowance of the same is not proper.

[29] *Id.*, Exhibit "P-17", pp. 690-697.
[30] *Id.*, Exhibits "P-22", "P-24", "P-24-a" to "P-24-I", pp. 705-706 and 709-719.

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A perusal of [AGM]'s Statement of Income for the year 2009 reveals that the assessed amount of [Php]141,618.58 pertains to [AGM]'s Other Income. Also, the Notes to FS, particularly Note 15, disclose that the said account consists of the interest income of [Php]69.45 and gain, not loss, on foreign exchange of [Php]141,549.13. Clearly, **the assessed items are not deductions from gross income or, more specifically, expenses**. Hence, [CIR]'s assessment shall be cancelled.

On the other hand, the disallowance of [AGM]'s purchases of goods and services due to non-withholding of tax is tenable.

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A comparison of the purchases of goods and services which were subjected to EWT as reported in [AGM]'s Alphalist of Payees Subject to Expanded Withholding Tax attached to its Annual Information Return of Creditable Income Taxes Withheld (Expanded)/Income Payments Exempt from Withholding Tax (BIR Form No. 1604-E) for taxable year 2009 with those reflected in its FS/ITR as found by CIR discloses the following discrepancies:

	Per Alphalist		**Per Assessment**		**Discrepancy**	
Payee	**Income Payment**	**EWT**	**Income Payment**	**EWT**	**Income Payment**	**EWT**
Purchases of goods:						
AGM Ventures Enterprises, Inc.	[Php]37,020,986.37	[Php]370,209.86	[Php]37,858,250.25	[Php]378,582.50	[Php]837,263.88	[Php]8,372.64
Purchases of services:						
Delivery expenses			198,023.10			
Membership dues & fees			19,258.94			
Repairs & maintenance			85,982.04			
Seminars & training			13,900.00			
Shipping & freight			27,339.37			
Telephone expense			66,259.62			
Utilities			60,706.29			
	-	-	471,469.36	9,429.39	471,469.36	9,429.39

Total	**[Php]37,020,986.37**	**[Php]370,209.86**	**[Php]38,329,719.61**	**[Php]388,011.89**	**[Php]1,308,733.24**	**[Php]17,802.03**

Clearly, [AGM] **failed to withhold EWT** of [Php]17,802.03 on its purchases of goods and services (delivery expenses, membership dues & fees, repairs and maintenance, seminars & training, shipping & freight, telephone expense and utilities amounting to [Php]1,308,733.24. Hence, [CIR]'s deficiency income tax assessment on this item shall be upheld.

However, [CIR]'s imposition of deficiency income tax on the Net Operating Loss Carry-Over (NOLCO) in the amount of [Php]620,420.63 is incorrect...

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However, [CIR] **failed to present evidence to prove that petitioner used its 2009 net loss as NOLCO in the succeeding years**. Furthermore, said NOLCO is beyond the scope of the present assessment as it can only be the subject of assessment in the taxable year when it is claimed as a deduction. Thus, [CIR] was wrong to add back the net loss in the amount of [Php]620,420.63 to [AGM]'s taxable income.

To reiterate, the Court held earlier that the sub-contracting for the manufacture of wooden pallets is outside the registered activity of the [AGM]. Thus, the latter is not entitled to the ITH.

Accordingly, the previously exempt income shall be subject to income tax. Combining the same with the taxable income and effecting thereto the disallowance of income payments, [AGM] is liable for basic deficiency Income Tax of [Php]602,619.65...

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The income tax still due from [AGM] of [Php]602,619.65 as computed above is much higher than the amount of [Php]424,026.41 assessed by [CIR]. In the consolidated cases of *Commissioner of Internal Revenue vs. Transnational Plans, Inc. and Transnational Plans, Inc. vs. Commissioner of Internal Revenue*, the CTA *En Banc* held that **the Court cannot go beyond the contested assessment per FDDA**...

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Considering that the power to assess is lodged in the [CIR] and is not within the province of this Court, the Court is constrained to limit its findings based on [CIR]'s assessment, albeit the erroneous computation per FLD. Hence, [AGM] is liable only to the extent of that assessed by [CIR] in the amount of [Php]424,026.41.

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IV. Improperly Accumulated Earnings Tax — [Php]3,949,767.44

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As held earlier, [AGM]'s activity is outside the registered activity with the PEZA. Accordingly, [AGM] is not entitled to the fiscal incentives provided for under RA No. 7916. More so, it is not exempt from any national internal revenue taxes.

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Absent any evidence proving the contrary, [AGM]'s accumulation of earnings in excess of 100% of paid-up capital shall be determinative of the purpose to avoid the tax upon its shareholders.

It should be noted that [AGM]'s taxable income for 2009 is [Php]2,045,662.62 and the corresponding income tax paid/payable is [Php]613,698.79, as computed earlier. Considering these facts, [AGM] is liable for IAET in the total amount of [Php]1,830,139.59, as computed below:

Taxable income for 2009	[Php]2,045,662.63
Less: Income tax paid/payable	613,698.79
Total	[Php]1,431,963.84
Add: Retained earnings from prior years	16,994,432.07
Less: Amount that may be retained	125,000.00
Net Retained Earnings	[Php]18,301,395.91
Improperly Accumulated Earnings Tax (10%)	**[Php]1,830,139.59**

However, as discussed earlier, this Court has no jurisdiction beyond the contested assessment per FDDA. Hence, [AGM] is

> liable only to the extent of that assessed by [CIR] in the amount of [Php]1,822,470.28."[31]

CTA EB No. 1739

Compromise penalty applies only in the settlement of criminal liability

The CIR insists that AGM is liable for compromise penalty.

We disagree.

It bears stressing that in tax cases, compromise penalty is applicable only in the settlement of criminal liability. Considering that this case is merely civil in nature, no compromise penalty may be imposed against AGM. As such, the Court *a quo* is correct when it held that:

> "The compromise penalties in the total amount of [Php]36,000.00 are hereby cancelled, there being no mutual agreement between the parties. **Settled is the rule that the imposition of the same <u>without</u> the conformity of the taxpayer is illegal and unauthorized.** RMO No. 1-90 expressly provides that 'compromise penalties are only amounts suggested in settlement of criminal liability, and may not therefore be imposed or exacted on the taxpayer in the event that a taxpayer refuses to pay the suggested compromise penalty.' Considering [AGM] did not pay the compromise penalty imposed by the [CIR], it clearly did not agree to settle the same."[32]

Considering that the other issues raised by the CIR in his "Petition for Review" were already addressed earlier, the Court will no longer belabor on the rest of the arguments raised therein.

WHEREFORE, premises considered, the Court **DENIES** the instant Petitions for lack of merit. The Decision dated June 09, 2017 and the Resolution dated October 20, 2017 of the Second Division in CTA Case No. 8947 are **AFFIRMED with MODIFICATION** in the computation of the deficiency interest and delinquency interests in view of the effectivity of Republic Act No.

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[31] *Id.*, pp. 825-840 and 843-846; *Emphasis supplied.*
[32] *Id.*, p. 847; *Emphasis and underscoring supplied.*

10963 ("TRAIN Law")[33] on January 01, 2018 and the issuance of RR No. 21-2018[34] dated September 14, 2018.

The assessment issued by CIR against AGM for taxable year 2009 covering deficiency income tax, VAT, EWT, IAET and DST is **UPHELD**. Accordingly, AGM Packaging System Ltd. Corp. is **ORDERED TO PAY NINE MILLION FOUR HUNDRED NINETY-FIVE THOUSAND THREE HUNDRED NINETY TWO AND 14/100 PESOS (Php9,495,392.14)** representing deficiency taxes for taxable year 2009, inclusive of twenty-five percent (25%) surcharge imposed under Section 248(A)(3) of the Tax Code, as amended, and twenty percent (20%) deficiency interest and 20% delinquency interest imposed under Section 249(A) and (B), respectively, of the same Code, computed until December 31, 2017, which is prior to its amendment under the TRAIN Law, thus:

	IT	VAT	EWT	IAET	DST	TOTAL
Basic Tax Due	Php424,026.41	Php128,838.72	Php17,802.03	Php1,822,470.28	Php778.50	Php2,393,915.94
Add: 25% Surcharge	106,006.60	32,209.68	4,450.51	455,617.57	194.63	598,478.99
20% Deficiency Interest from April 16, 2010 to November 17, 2014						
[Php424,026.41 x 20% x 1677/365 days]	389,639.61					389,639.61
20% Deficiency Interest from January 26, 2010 to November 17, 2014						
[Php128,838.72 x 20% x 1757/365 days]		124,038.15				124,038.15
20% Deficiency Interest from January 16, 2010 to November 17, 2014						
[Php17,802.03 x 20% x 1767/365 days]			17,236.27			17,236.27
20% Deficiency Interest from January 16, 2011 to November 17, 2014						
[Php1,822,470.28 x 20% x 1402/365 days]				1,400,056.62		1,400,056.62
20% Deficiency Interest from January 06, 2010 to November 17, 2014						
[Php778.50 x 20% x 1777/365 days]					758.02	758.02
Total Amount Due, November 17, 2014[35]	**Php919,672.62**	**Php285,086.55**	**Php39,488.80**	**Php3,678,144.47**	**Php1,731.15**	**Php4,924,123.60**
Add: 20% Deficiency Interest from						

[33] An Act Amending Sections 5, 6, 24, 25, 27, 31, 32, 33, 34, 51, 52, 56, 57, 58, 74, 79, 84, 86, 90, 91, 97, 99, 100, 101, 106, 107, 108, 109, 110, 112, 114, 116, 127, 128, 129, 145, 148, 149, 151, 155, 171, 174, 175, 177, 178, 179, 180, 181, 182, 183, 186, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 232, 236, 237, 249, 254, 264, 269, and 288; Creating New Sections 51-A, 148-A, 150-A, 150-B, 237-A, 264-A, 264-B, and 265-A; and Repealing Sections 35, 62, And 89; All Under Republic Act No. 8424, Otherwise Known as the National Internal Revenue Code of 1997, as Amended, and for Other Purposes.

[34] Regulations Implementing Section 249 (Interest) of the National Internal Revenue Code (NIRC) of 1997, as amended under Section 75 of the Republic Act (RA) No. I 0963 or the "Tax Reform for Acceleration and Inclusion (TRAIN Law)"

[35] The FDDA stated that the tax liabilities should be paid immediately upon receipt. Docket, Exhibit "P-15", pp. 685-688.

November 18, 2014 to December 31, 2017						
[Php424,026.41 x 20% x 1140/365 days]	264,871.29					264,871.29
[Php128,838.72 x 20% x 1140/365 days]		80,480.08				80,480.08
[Php17,802.03 x 20% x 1140/365 days]			11,120.17			11,120.17
[Php1,822,470.28 x 20% x 1140/365 days]				1,138,419.79		1,138,419.79
[Php778.50 x 20% x 1140/365 days]					486.30	486.30
20% Delinquency Interest from November 18, 2014 to December 31, 2017						
[Php919,672.62 x 20% x 1140/365 days]	574,480.43					574,480.43
[Php285,086.55 x 20% x 1140/365 days]		178,081.46				178,081.46
[Php39,488.80 x 20% x 1140/365 days]			24,666.98			24,666.98
[Php3,678,144.47 x 20% x 1140/365 days]				2,297,580.66		2,297,580.66
[Php1,731.15 x 20% x 1140/365 days]					1,081.38	1,081.38
Total Amount Due, December 31, 2017	**Php1,759,024.35**	**Php543,648.10**	**Php75,275.96**	**Php7,114,144.92**	**Php3,298.82**	**Php9,495,392.14**

In addition, AGM Packaging System Ltd. Corp. is **ORDERED TO PAY** delinquency interest at the rate of twelve percent (12%), which is double the legal interest rate for loans or forbearance of any money, on the total amount due as of November 17, 2014 in the amount of **Php4,924,123.60**, as determined above, computed from January 01, 2018 until full payment thereof pursuant to Section 249(C) of the Tax Code, as amended by TRAIN Law and implemented by RR No. 21-2018.

SO ORDERED.

Ma. Belen S.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

(See Concurring and Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

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

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

(With due respect, I join PJ's Concurring and Dissenting Opinion)
CIELITO N. MINDARO-GRULLA
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

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 cases were assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

AGM PACKAGING SYSTEM LTD. CORP.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent,

CTA EB NO. 1734
(CTA Case No. 8947)

x---x

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

AGM PACKAGING SYSTEM LTD. CORP.,
Respondent.

CTA EB NO. 1739
(CTA Case No. 8947)

Present:

DEL ROSARIO, *P.J.*,
CASTANEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, and
MANAHAN, *JJ.*

Promulgated:
MAR 29 2019
11:45 a.m.

x - x

CONCURRING AND DISSENTING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* in denying the Petition for Review in CTA EB No. 1739 for lack of merit. With due respect, however, I am constrained to withhold my assent in the denial of the Petition for Review in CTA EB No. 1734.

I submit that the assessments issued against AGM Packaging System Ltd. Corp. (AGM) are void. A careful perusal of the records discloses the following:

- On July 6, 2010, AGM received **Letter of Authority (LOA) No. 2008-00025918 dated June 22, 2010,**[1] signed by Regional Director Rodita B. Galanto of Revenue Region No. 9, authorizing Revenue Officer (RO) Edwin E. Aritumba and Group Supervisor (GS) Nena Joyce W. Geston of Revenue District Office No. 54B, Bacoor, Cavite to examine AGM's books of accounts and other accounting records for all internal revenue taxes for the period from January 1, 2009 to December 31, 2009.

- Memorandum of Assignment (MOA) numbered 11-240 dated September 16, 2011[2] was issued by **Revenue District Officer (RDO)** Carmelita B. Estolas of Revenue District Office No. 54B to **RO Ramon G. Deniega and GS Edison Del Agua** for the continuation of the audit or investigation of AGM, to replace the previously assigned RO who was transferred to another district office;

- **There is nothing on record which would show that RO Deniega and GS Del Agua were authorized by an LOA.**

In ***Commissioner of Internal Revenue vs. Lancaster Philippines, Inc.,***[3] the Supreme Court, citing Section 1, Rule 4 of A.M. No. 05-11-07- CTA, or the Revised Rules of the Court of Tax Appeals, declared that the CTA can resolve the issue on the authority of the ROs to conduct the audit, albeit the same was not raised by the parties in their pleadings or memoranda. For want of valid LOA, the Supreme Court ultimately resolved to declare the assessment void.

Moreover, in ***Medicard Philippines Inc. vs. Commissioner of Internal Revenue,***[4] the Supreme Court emphasized the importance of an LOA and the authority of ROs who conducted the audit and examination of the taxpayer. It went on further to declare as **void the subject disputed assessment for lack of an LOA authorizing the ROs to examine the taxpayer's books of account and other accounting records.**

While AGM failed to raise the issue of lack of an LOA which authorizes RO Deniega and GS Del Agua to conduct and continue the audit, the Court is not precluded from considering this issue as the absence of a valid LOA renders an assessment intrinsically void. The importance of the ROs' authority to conduct the audit cannot be

[1] Exhibit "P-1", CTA Docket, Vol. II, CTA Docket, p. 613.
[2] Exhibit R-4, BIR Records, p. 269.
[3] G.R. No. 183408, July 12, 2017.
[4] G.R. No. 222743, April 5, 2017.

over-emphasized as it goes into the issue of the validity of the assessment.

An officer of the Bureau of Internal Revenue (BIR) cannot simply subject a taxpayer to audit without valid authority issued for that purpose.[5] RMO No. 43-90 specifies the policy guidelines in the issuance of LOAs to audit. It likewise identifies and limits the BIR Officials who are authorized to issue LOAs, *viz.*:

> "D. Preparation and issuance of L/As.
>
> xxx
>
> 4. For the proper monitoring and coordination of the issuance of Letter of Authority, **the only BIR officials authorized to issue and sign Letters of Authority are the Regional Directors, the Deputy Commissioners and the Commissioner**. For the exigencies of the service, **other officials may be authorized to issue and sign Letters of Authority but only upon prior authorization by the Commissioner himself**." *(Boldfacing supplied)*

RMO No. 43-90 is explicit that the continuation of audit by a revenue officer other than the officer named in a previous LOA, **requires the issuance of a <u>new</u> LOA**:

> "C. Other policies for issuance of L/As.
>
> 1. **All audits/investigations, whether field or office audit, should be conducted under a Letter of Authority.**
>
> xxx
>
> 5. **<u>Any re-assignment/transfer of cases to another RO(s)</u>**, and revalidation of L/As which have already expired, **<u>shall require the issuance of a new L/A</u>, with the corresponding notation thereto, including the previous L/A number and date of issue of said L/As**." *(Boldfacing supplied)*

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[5] Section 13 of the National Internal Revenue Code of 1997, as amended.
Sec. 13. Authority of a Revenue Officer. — Subject to the rules and regulations to be prescribed by the Secretary of Finance, upon recommendation of the Commissioner, **a Revenue Officer assigned to perform assessment functions** in any district may, **<u>pursuant to a Letter of Authority</u>** issued by the **Revenue Regional Director**, examine taxpayers within the jurisdiction of the district in order **to collect the correct amount of tax, or to recommend the assessment of any deficiency tax due** in the same manner that the said acts could have been performed by the Revenue Regional Director himself." *(Boldfacing and underscoring supplied)*

Had the MOA been accorded the same legal effect as an LOA itself, then RMO No. 43-90 would not have categorically stated that *"revalidation of L/As ... shall require the issuance of a new L/A."* The use of the phrase *"shall require the issuance of new L/A"* emphasizes the mandatory nature of the said requirement. Needless to say, the BIR has the duty of exacting compliance therewith as it has the burden of ensuring that the right of the government to assess and collect tax deficiencies would not be defeated by its failure to comply with its own rules.

In the present case, while the MOA cannot be treated as an LOA as precisely, any re-assignment of cases requires the issuance of a new LOA, **its fatal infirmity is further highlighted by the fact that it was signed and issued by the RDO and not by the Regional Director.**

Section 6 of the National Internal Revenue Code (NIRC) of 1997, as amended, is clear and categorical in requiring an authority from the **CIR or from his duly authorized representatives** before an examination of a taxpayer may be made. The *"authorized representative"* contemplated by law who may issue an LOA is no other than a Revenue Regional Director pursuant to Section 13 of the NIRC of 1997, as amended.

The power to issue an LOA may not be delegated by the CIR or the Revenue Regional Director to any other officer - - much less to an RDO. On this point, the pronouncement in *NPC Drivers and Mechanics Association, (NPC DAMA) vs. The National Power Corporation*[6] is instructive, *viz.*:

> "We agree with petitioners. In enumerating under Section 48 those who shall compose the National Power Board of Directors, the legislature has vested upon these persons the power to exercise their judgment and discretion in running the affairs of the NPC. Xxx xxx xxx. It is to be presumed that in naming the respective department heads as members of the board of directors, the legislature chose these secretaries of the various executive departments on the basis of their personal qualifications and acumen which made them eligible to occupy their present positions as department heads. **Thus, the department secretaries cannot delegate their duties as members of the NPB, much less their power to vote and approve board resolutions, because it is their personal judgment that must be exercised in the fulfillment of such responsibility.**

[6] G.R. No. 156208, September 26, 2006.

> Xxx, the rule enunciated in the case of *Binamira v. Garrucho* is relevant in the present controversy, to wit:
>
> > **An officer to whom a discretion is entrusted cannot delegate it to another, the presumption being that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and unless the power to substitute another in his place has been given to him, he cannot delegate his duties to another**.
>
> Xxx." *(Citations omitted; Boldfacing supplied)*

In *Commissioner of Internal Revenue vs. Composite Materials, Inc.,*[7] the Supreme Court, citing *Medicard*, categorically held that an RO may only examine the taxpayer's books pursuant to an LOA issued by the Regional Director and emphasized that the Referral Memorandum issued by the RDO directing another RO to continue with the examination of Composite Materials, Inc.'s (CMI) records is not equivalent to an LOA nor does it cure the RO's lack of authority, *viz.*:

> "As regards the issue on Revenue Officer Mary Anne P. Cruz's (RO Cruz) authority to examine CMI's records, **the provisions of the National Internal Revenue Code of 1997, as amended, are clear that a Revenue Officer may only examine the taxpayer's books pursuant to a Letter of Authority (LOA) issued by the Regional Director**. This was reiterated by the Court in *Medicard Philippines, Inc. v. Commissioner of Internal Revenue*, ruling that in the absence of an LOA, the assessment or examination is a nullity.
>
> Here, the CTA *en banc* found that **the LOA issued in relation to the examination of CMI's book of accounts does not specifically mention the name of RO Cruz. Thus, the examination conducted by RO Cruz and the assessment issued against CMI was correctly declared null and void**.
>
> Moreover, the Court agrees with the CTA *en banc* that the **Referral Memorandum** issued by a Revenue District Officer **directing RO Cruz to continue with the examination of CMI's records is not equivalent to an LOA nor does it cure RO Cruz's lack of authority**. To be sure, Revenue Memorandum Order No. 43-90, which specified the guidelines in the issuance of LOAs states that **any reassignment or transfer of cases to another RO or revalidation of an expired LOA shall require the issuance of a new LOA**." *(Boldfacing supplied)*

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[7] G.R. No. 238352, September 12, 2018.

In fine, there is no denying that no new LOA was issued to RO Deniega and GS Del Agua by the Regional Director of Revenue Region No. 9 in relation to the investigation of AGM's tax liability for taxable year 2009. This procedural lapse, or the absence of a new LOA, rendered the assessments issued pursuant thereto void. Being a void assessment, the same bears no fruit[8] and must be slain at sight.

All told, I **VOTE** to:

i) **DENY** the Petition for Review in CTA EB No. 1739;

ii) **GRANT** the Petition for Review in CTA EB No. 1734;

iii) **REVERSE** and **SET ASIDE** the Decision dated June 9, 2017 and Resolution dated October 20, 2017; and,

iv) **CANCEL** and **SET ASIDE** the Formal Letter of Demand and Final Assessment Notices, all dated August 7, 2012, assessing AGM Packaging Systems Ltd. Corp. for deficiency income tax, value-added tax, expanded withholding tax, improperly accumulated earnings tax and documentary stamp tax, plus compromise penalties, 25% surcharge and 20% interest, for the taxable year 2009.

ROMAN G. DEL ROSARIO
Presiding Justice

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[8] *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.,* G.R. No. 185371, December 8, 2010.