REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	CTA EB No. 1446 (CTA CASE No. 7847)
	Present:
- versus -	DEL ROSARIO, *P.J.*, CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and, MANAHAN, *JJ.*
SPOUSES JOSEPH EJERCITO ESTRADA AND LUISA P. EJERCITO, Respondents.	Promulgated: OCT 19 2017 3:35 p.m.

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DECISION

***Fabon-Victorino, J.*:**

Between the power of the State to tax and an individual's right to due process, the scale favors the right of the taxpayer to due process.[1] This is the essence of the ruling of the Court in Division in the assailed Decision dated November 23, 2015 and the Resolution dated March 29, 2016, subject of the instant Petition for Review, filed by petitioner Commissioner of Internal Revenue (CIR) on April 13, 2016.

The facts as established during trial of the case are as follows:

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[1] *Commissioner of Internal Revenue v. Fitness by Design, Inc.*, G.R. No. 215957, November 6, 2016.

Petitioner CIR, is the Head of the Bureau of Internal Revenue (BIR), vested with the power to assess and collect internal revenue taxes. In the exercise of such power, petitioner issued the Decision No. PO5-08 dated September 26, 2008, the subject of respondents' appeal before the Court in Division.

Respondent Joseph Ejercito Estrada (JEE) is a resident of No. 1 Polk Street, North Greenhills, San Juan City, while his co-respondent, Luisa P. Ejercito Estrada (LPEE) is his spouse.

Pursuant to Letter of Authority (LOA) No. 000029150 dated January 22, 2001, the BIR issued a Notice to Taxpayer dated November 27, 2001, and sent it to respondents at No. 1 Polk Street, North Greenhills, San Juan City. The Notice to Taxpayer directed respondent JEE to appear for an informal conference at the BIR office within 15 days from notice, with warning that no appearance shall be deemed a waiver of his right to a preliminary conference. Admittedly, at the time of service of notice, respondent JEE was confined/detained at the Veterans Memorial Hospital.

On November 23, 2002, the BIR issued two (2) Preliminary Assessment Notices (PANs). The first PAN found respondents liable for deficiency income taxes (IT) in the amount of P1,825,561,356.25 for taxable year (TY) 1999, while the second PAN referred only to respondent JEE's liability for deficiency value-added tax (VAT) in the amount of P490,876.17 for the same TY.

Both PANs were sent to respondents at their residence at No. 1 Polk St., North Greenhills, San Juan City. Respondents protested both PANs in a Letter dated November 15, 2002, received by the BIR on even date.

Since the plunder case against respondent JEE was at that time being heard before the Sandiganbayan, the BIR Deputy Commissioner for Legal and Inspection Group instructed the investigating Revenue Officers (ROs) to hold in the meantime the issuance of a formal assessment against respondent JEE.

Thereafter, petitioner sent to respondents a Notice to Taxpayer dated June 12, 2008, denying the latter's protest to the PANs. The Notice likewise indicated that respondents' assessment for deficiency taxes shall be based on the decision of the Sandiganbayan in the plunder case docketed as Criminal Case No. 26558.

After trial, the Sandiganbayan found respondent JEE guilty beyond reasonable doubt of plunder. In the verdict, the Sandiganbayan declared respondent JEE as the real and beneficial owner of EPCIB Combo account CA No. 0110-25495 and SA No. 0610-62501-5 under the name of Jose Velarde.

Subsequently, petitioner issued Assessment Notice No. ES-IT-1999-0680 and a Formal Letter of Demand (FLD) both dated June 19, 2008, addressed to respondents demanding payment of the amount of P2,905,048,539.58 as deficiency income taxes for TY 1999. Attached to the FLD were the Schedule of Jose Velarde Accounts and Details of Discrepancy/Assessment.

On July 18, 2008, respondents filed a Formal Protest dated July 17, 2008 against the Assessment Notice for deficiency income tax and FLD, and submitted supporting documents on September 16, 2008.

On September 26, 2008, petitioner issued the Decision No. PO5-08 entitled "In the Matter of the Protest of Former President Joseph Ejercito Estrada and Spouse Luisa P. Ejercito Against the Assessment for Deficiency Income Tax in the Amount of P2,905,048,539.58 for Taxable Year 1999." The Decision denied respondents' Formal Protest and ordered them to immediately settle the amount of P2,905,048,539.58, representing their alleged IT deficiency for TY 1999.

Aggrieved, respondents elevated the adverse Decision to the Court in Division via Petition for Review filed on October 27, 2008.

On November 23, 2015, the Court in Division promulgated the assailed Decision disposing the case as follows:

> "WHEREFORE, premises considered, the instant Petition is hereby PARTIALLY GRANTED. Accordingly, the Deficiency Income Tax Assessment Notice No. ES-IT-1999-0680 and the Formal Letter of Demand dated June 19, 2008, and the decision dated September 26, 2008, are REVERSED and SET ASIDE. However, (respondents') prayer for costs of suit is DENIED.
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> SO ORDERED."

Unconvinced, petitioner filed a Motion for Reconsideration but it was denied in the similarly assailed Resolution dated March 29, 2016, for lack of merit.

Hence, the instant Petition for Review before the Court *En Banc,* with the following assignment of errors, thus:

I. PROCEDURALLY AND SUBSTANTIALLY, THE ASSAILED DECISION IS PATENTLY ERRONEOUS.

II. THE HONORABLE COURT ERRONEOUSLY CONCLUDED THAT NO AUDIT WAS CONDUCTED BY THE BIR. HOWEVER, THE AUDIT FINDINGS EXISTED AND PRECEDED THE SANDIGANBAYAN DECISION BY APPROXIMATELY FIVE (5) YEARS.

III. THE HONORABLE COURT ERRONEOUSLY REQUIRED THE BIR TO PROVE THAT JOSEPH E. ESTRADA IS THE OWNER OF THE JOSE VELARDE ACCOUNT AND THE AMOUNTS OF INCOME/WEALTH THEREIN. THIS IS AN UNDISPUTABLE FACT AND NEED NOT BE PROVED OR RE-LITIGATED.

In support of its claim that the assailed Decision of the Court in Division is patently flawed, petitioner invokes the legal presumptions that the assessment issued against respondents are *prima facie* correct as prepared by the BIR examiners who are deemed to have regularly performed their official duties in the preparation of the said assessment. Thus, contrary to the ruling of the Court in Division, it was not necessary for him to present any evidence to prove the validity or correctness of the assessment issued against respondents. With the presumption in his favor, the burden of proof is shifted upon respondents who must overcome such presumption. The latter however utterly failed, says petitioner. Allegedly, during the trial on the merits, respondents focused on proving the identity of the alleged owner of EPCIB Combo account CA No. 0110-25495 and SA No. 0610-62501-5 under the name of Jose Velarde, rather than presenting evidence to overthrow the presumption in favor of the correctness of the BIR's assessment.

Also in line with the principle that cases filed with the Court of Tax Appeals (CTA) are litigated *de novo,* respondents are mandated to prove before the Court in Division every minute aspect of their case to sustain their claim that the BIR assessment lack factual and legal bases justifying their cancellation. Again, respondents failed to discharge this burden.

Much premium is also given by petitioner on the Sandiganbayan's Decision in *People of the Philippines v. Joseph Ejercito Estrada, et al.*, docketed as Criminal Case No. 26558, wherein respondent JEE was allegedly declared as the real and beneficial owner of EPCIB Combo account CA No. 0110-25495 and SA No. 0610-62501-5 under the name of Jose Velarde. In the mind of petitioner, such pronouncement rendered respondent JEE's ownership over the said accounts indisputable. In fine, presentation of evidence to that effect is unwarranted.

Moreover, the existence of the Sandiganbayan Decision has been stipulated by the parties. By reason of such stipulation, respondents are deemed to have admitted everything therein including the finding that respondent JEE is the owner of the Jose Velarde bank accounts. This judicial admission is a waiver of proof pursuant to Section 4 of Rule 129 of the Rules of Court.

On the strength of the foregoing grounds, petitioner claims that he can dispense with the presentation of the Sandiganbayan Decision in Criminal Case No. 26558 to prove that respondent JEE is the real owner of the Velarde bank accounts on which the assessment for deficiency taxes were based.

Petitioner also claims that the Decision of the Sandiganbayan is an official act of the judicial department of the Philippines. That being the case, the Court in Division, was bound to take mandatory judicial notice of the same in the resolution of the case, pursuant to Section 1, Rule 129 of the Rules of Court, as amended. For this reason, the objection to such recognition interposed by respondents is of no moment.

To bolster his hypothesis, petitioner cites the case of *The Wellex Group, Inc. vs. Sandiganbayan (Wellex Case),*[2] and *Risos-Vidal, et al. vs. Commission on Elections, et al. (COMELEC Case)*[3] in which the Supreme Court allegedly held that the Sandiganbayan Decision in Criminal Case No. 26558 has become final and executory, and therefore immutable and unalterable. For petitioner, the two cases are binding precedents, which the Court can take judicial notice of in deciding the present case.

While petitioner insists that there is no need for him to present the Decision of the Sandiganbayan in Criminal Case 26558, he considers the same enough proof to seal his case against respondents. Allegedly, the declaration therein that respondent JEE is the owner of the Velarde bank accounts from which the questioned assessment stemmed can no longer be ignored.

Petitioner likewise postulates that under the principle of conclusiveness of judgment, the findings of the Sandiganbayan in the plunder case is conclusive upon the present case, albeit admission that identity of cause of action does not exist in the two cases. In any event, petitioner maintains that since sameness in the issue of ownership of the Velarde bank accounts is obtaining in both cases, the principle will still apply. While petitioner admits that the parties in the two cases are different, still they can be considered identical as both the CIR in the present case and the prosecution in the Sandiganbayan case represent the government and its interest.

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[2] G.R. No. 187951, June 25, 2012.
[3] G.R. No. 206666, January 21, 2015.

Anyhow, even without the Decision of the Sandiganbayan, it could not be said that there was absence of vital documents from which the Court in Division could verify the correctness of the assessment issued against respondents. According to petitioner, the FAN, the FLD and other notices were issued against respondents even before the Sandiganbayan rendered its verdict.

Petitioner further submits that an audit was conducted by the assigned investigating ROs pursuant to LOA No. 00029150 dated January 23, 2001 as testified to by his witnesses. The result of such audit is reflected in the Memorandum dated September 23, 2002, which was prepared *sans* any documents from respondents who failed to submit any despite notice.

For their part, respondents counter that the presumption of correctness of assessment made by tax examiners applies only when the assessment is based on sufficient evidence and not when it is baseless and arbitrarily issued, as in this case.

On the contention that an audit was conducted upon which the assessment was based, suffice it to say that no documentary evidence was submitted to substantiate such claim. Precisely, neither weight nor credence was accorded to the testimonies of the ROs to that effect. Besides, the allegation that an audit was conducted is a mere afterthought raised after the Court in Division rejected petitioner's reliance on the Sandiganbayan Decision. This change of theory should not be countenanced.

It is also misleading for petitioner to claim that the ROs did not waver in their testimonies that an audit was conducted for they admitted in open court that they did not examine the documents pertaining or in relation to the Velarde bank accounts. One witness even confessed that the assailed assessment were based on the Writ of Execution issued by the Sandiganbayan for the implementation of its Decision in the plunder case and on newspaper reports. Much more, no investigation or examination of bank deposits belonging to respondents was conducted before the issuance of the impugned assessment.

Respondents emphasize that by law, taxpayers must be informed of the law and the facts upon which the assessment is made, to comply with the due process requirement. In the instant case, respondents hold that they were denied due process as there was no audit conducted that would justify the assessment issued against them.

Respondents also reject petitioner's conclusion that the Decision of the Sandiganbayan in Criminal Case No. 26558 having become final and executory is binding upon the parties in the present case. Respondents explain that the Sandiganbayan case is criminal in nature while the present petition is civil pertaining to respondents' alleged tax liabilities, which is outside the jurisdiction of the Sandiganbayan. Therefore, the evidence in the former may not qualify as proper and sufficient evidence in the latter.

Also, to hold the result of the Sandiganbayan case as binding upon them is tantamount to violation of their right to due process. While it is true that respondent JEE was given the opportunity to defend himself in the plunder case before the Sandiganbayan, he could not have possibly adduced evidence on his alleged tax liabilities as they were beyond the competence of the Sandiganbayan. This, according to respondents, finds support in jurisprudence that a judgment of conviction in a criminal prosecution cannot be given in evidence in a civil action.

Anent the applicability of conclusiveness of judgment on the issue of ownership of the Velarde Bank accounts, respondents argue that the principle is just an aspect of *res judicata* where there must be privity of parties, as well as identity of issues, which are not attendant in this case. To begin with, petitioner was allegedly not a party in the Sandiganbayan case, hence, there is no privity of parties to speak of. Neither was there identity of issues as the Sandiganbayan case involved criminal liability for the crime of plunder penalized under Republic Act (R.A.) No. 7080, as amended, while the instant case pertains to respondents alleged tax liabilities under the NIRC, as amended.

On the stipulation as to the existence of the Sandiganbayan Decision, respondents stress that the admission was strictly on the existence of the said Decision alone.

Contrary to petitioner's insistence, the Court cannot take judicial notice of the Sandiganbayan Decision as courts are not authorized to do so even in cases pending before them, unless there be consent and without any objection on the part of the other party, which circumstances are wanting. Even assuming that the Sandiganbayan Decision has become final with respect to the issue of plunder, it is not binding as the baseline for a tax assessment in the case at bar.

Finally, the cases cited by petitioner as backbone of his position that the alleged Decision of the Sandiganbayan in Criminal Case No. 26558 may be used as authority to justify the tax assessment issued against respondents will not save the day for petitioner. The said cases are not in point and pertain to different subject matters, hence, cannot be used as precedent for the present case.

The *Wellex* case dealt with the ownership of 500 million pesos' worth of shares in respondent JEE's corporation while the *COMELEC* case involved the issue of whether the presidential pardon granted to respondent JEE by former President Gloria Arroyo was conditional or absolute as to restore respondent JEE's right to run for public office.

THE RULING OF THE COURT

There is no arguing that tax assessment by the examining revenue officers are presumed correct. The presumption is however drawn from the premise that the assessment was based on sufficient evidence, otherwise, the *prima facie* correctness of the tax assessment cease to exist. When that occurs, the party claiming the benefit of the legal presumption, is obliged to adduce all credible evidence necessary to sustain the claim that the assessment is correct justifying collection of unpaid or deficiency taxes. Failure on the part of the collecting authority to discharge this burden is fatal.

This is the core of the present controversy, *i.e.,* the validity of the subject assessment issued against respondents. Section 228 of the NIRC, as amended, is instructive in this regard. It reads as follows:

> 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: x x x
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> **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.**
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> 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.
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> 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.
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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 ours)

The due process requirement highlighted above is echoed in Revenue Regulations (RR) No. 12-99, Section 3.1.4, thus:

> *3.1.1.* 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.*** xxx The same shall be sent to the taxpayer only by registered mail or by personal delivery xxx

Thus, for the assessment to be valid, the taxpayer must first be informed in writing of the law and the facts on which the assessment issued against him is made, lest, the assessment is void. The use of the word "shall" in the provision indicates the mandatory nature of the requirements laid down therein.[4]

Compliance with Section 228 of the NIRC, as amended, is a substantive requirement. It is not a mere formality. Providing the taxpayer with the factual and legal bases for the assessment is crucial before proceeding with tax collection. Tax collection should be premised on a valid assessment, which would allow the taxpayer to present his or her case and produce evidence for substantiation.[5]

The requirement provides teeth to the constitutional mandate that no person shall be deprived of his or her property without due process of law. Between the power of the State to tax and an individual's right to due process, the scale favors the right of the taxpayer to due process. The purpose of the written notice requirement is to aid the taxpayer in making a reasonable protest, if necessary. Merely notifying the taxpayer of his or her tax liabilities without details or particulars is not enough.[6] Precisely, assessment notices are accompanied with Details of Discrepancies, a separate piece of document graphically showing how the amount of deficiencies were arrived at complete with computation of the total amount due.

A fortiori, it is not enough that written notices be issued, properly served and received by the taxpayer or his

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[4] *Commissioner of Internal Revenue vs. United Salvage and Towage (Phils.), Inc.*, G.R. No. 197515, July 02, 2014.
[5] *Commissioner of Internal Revenue vs. Fitness By Design, Inc.*, G.R. No. 215957, November 9, 2016.
[6] *Ibid.*

authorized representative, the notices must have factual and legal bases, without which, the assessment are void and without any legal effect.[7]

Petitioner insists that a separate investigation or audit was conducted by the assigned revenue officers, the result of which became the basis of the several notices issued against respondents.

However, the record is bereft of any indication which could at the very least give some hints that an actual audit or investigation was conducted by the assigned ROs to determine whether respondents indeed had undeclared income which must be assessed deficiency taxes and whether the said undeclared income pertain to the monies in the Velarde bank accounts.

As found by the Court in Division, no documentary evidence was presented to establish that an independent audit was conducted which resulted in the finding of non-payment of deficiency income tax on the part of respondents resulting in the issuance of the questioned assessment. Even the alleged replies to access letters or the documents obtained from various government agencies by virtue thereof were never presented in Court to substantiate the alleged conduct of audit.

That no audit was ever conducted by the assigned ROs was even made clear by the declaration of one of petitioner's witnesses that even the pertinent Annual Income Tax Return or Certificate of Compensation Payment/Tax Withheld of respondents, which were very relevant as they pertain to the very subject of inquiry, were neither seen by them nor were presented as evidence against respondents.

Most telling however is the testimony in open court by another witness of petitioner, namely, Lawyer Jaen, who confessed and confirmed that their assessment was solely based on the Writ of Execution issued by the Sandiganbayan in relation to the plunder case. Lawyer Jaen explained that they relied on the said Writ of Execution because the BIR

[7] *Commissioner of Internal Revenue vs. Reyes*, G.R. No. 159694, January 27, 2006.

took judicial notice of the same. It was also for this reason that he did not do any accounting works or digging of records for use in the issuance of assessment against respondent.[8]

Notably, the rest of the documents presented by petitioner as evidence in chief, including the PAN and the FLD anchored solely on the Sandiganbayan Decision in Criminal Case No. 26558 finding respondent JEE as the owner of the Velarde bank accounts, referring to it as basis of the assailed assessment. The same documents reveal that the BIR deemed the amount stated in the Decision as undeclared income of respondents.

Despite much reliance and faith on the said Sandiganbayan Decision, petitioner failed to present, much more offer it in evidence to substantiate its case. Apparently, petitioner lost sight of the rule that judgments must be based on the evidence presented before the court.[9]

Further, under Section 8 of RA 1125, the CTA is expressly described as a court of record. As cases filed before it are litigated *de novo*, party-litigants shall prove every minute aspect of their cases.[10] Obviously, petitioner failed to discharge this burden which is lethal to his case.

Thus, we concur with the Court in Division that "the absence of vital documents from which the Court can verify the correctness of the subject deficiency income tax assessment", the same should be cancelled.

To cure the deficiency in evidence, petitioner again asserts that the Sandiganbayan Decision is binding not only on respondents but also upon the Court under the principle of conclusiveness of judgment and *res judicata*.

Let it be stressed that this point has been amply considered and discussed at length by the Court in Division

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[8] TSN dated Oct. 10, 2012, pp.44-45.
[9] *Robert F. Mallilin vs. Luz G. Jamesolamin and the Republic of the Philippines*, G.R. No. 192718, February 18, 2015.
[10] *Dizon vs. CTA*, G.R. No. 140944, April 30, 2008.

in the assailed Decision of November 23, 2015. To reinvent the wheel is certainly a waste of time and futile. In any event, the disquisition of the Court in Division on the issue is hereby reproduced with approval, thus:

> "The doctrine of *res judicata* is a fundamental principle of law which precludes parties from re-litigating issues actually litigated and determined by a prior and final judgment." In the case of *Pryce Corporation vs. China Banking Corporation*, the following elements were enumerated in order for *res judicata* to apply:
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> (a) the former judgment was final;
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> (b) the court that rendered it had jurisdiction over the subject matter and the parties;
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> (c) the judgment was based on the merits; and
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> (d) between the first and the second actions, there was an identity of parties, subject matters, and causes of action,
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> The two concepts of *res judicata* are (1) bar by prior judgment and (2) conclusiveness of judgment.
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> "Bar by prior judgment exists 'when, as between the first case where the judgment was rendered and the second case that is sought to be barred, there is identity of parties, subject matter, and causes of action.' On the other hand, the concept of conclusiveness of judgment finds application 'when a fact or question has been squarely put in issue, judicially passed upon, and adjudged in a former suit by a court of competent jurisdiction.' This principle only needs identity of parties and issues to apply.
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> In both instances, the 'identity of parties and issues' are required. In this case, the elements of 'identity of parties' and 'causes of action' are wanting. In Criminal Case No. 26558, tried before the Special Division of Sandiganbayan, the parties were the 'People of the Philippines' and 'Joseph Ejercito Estrada, et al.' Here, the ones who initiated the petition are 'Spouses Joseph Ejercito Estrada and Luisa P. Ejercito' against the 'Bureau of Internal Revenue and Lilia Hefti, in her capacity as the Commissioner of Internal Revenue', as respondents.

In the case of *Republic of the Philippines vs. Tuvera, et al.*, the Supreme Court reversed the ruling of Sandiganbayan and held that there is no conclusiveness of judgment on the issue of Timber License Agreement (TLA) when there is no identity of parties and no identity of causes of action between the first case (recovery of ill-gotten wealth involving TLA No. 356) and the second case (revocation of TLA No. 356). Although the comparison of 'identity of parties' was made between the Republic of the Philippines and Felipe Ysmael, Jr. & Co., Inc., it is observed that the Supreme Court did not consider the **Republic of the Philippines**, as privy to the first case which involved the **Deputy Executive Secretary, the Secretary of Environment and Natural Resources, and the Director of the Bureau of Forest Development**. The Court held:

> 'For *res judicata* to serve as an absolute bar to a subsequent action, the following requisites must concur: (1) the former judgment or order must be final; (2) the judgment or order must be on the merits; (3) it must have been rendered by a court having jurisdiction over the subject matter and parties; and (4) there must be between the first and second actions, identity of parties, of subject matter, and of causes of action. When there is only identity of issues with no identity of causes of action, there exists *res judicata* in the concept of conclusiveness of judgment.
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> In *Ysmael*, the case was between Felipe Ysmael Jr. & Co., Inc. and the Deputy Executive Secretary, the Secretary of Environment and Natural Resources, the Director of the Bureau of Forest Development and Twin Peaks Development and Realty Corporation. The present case, on the other hand, was initiated by the Republic of the Philippines represented by the Office of the Solicitor General. No amount of imagination could let us believe that there was an identity of parties between this case and the one formerly filed by Felipe Ysmael Jr. & Co., Inc.
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> The Sandiganbayan held that despite the difference of parties, *res judicata* nevertheless applies on the basis of the supposed sufficiency of the 'substantial identity' between the Republic of the Philippines and Felipe Ysmael, Jr. & Co., Inc. We disagree. The Court in a number of cases considered the substantial identity of parties in the application of *res judicata* in instances where there is privity between the two parties, as between their

> successors in interest by title or where an additional party was simply included in the subsequent case or where one of the parties to a previous case was not impleaded in the succeeding case.
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> The Court finds no basis to declare the Republic as having substantial interest as that of Felipe Ysmael, Jr. & Co., Inc. In the first place, the Republic's cause of action lies in the alleged abuse of power on respondents' part in violation of R.A. No. 3019 and breach of public trust, which in turn warrants its claim for restitution and damages. *Ysmael*, on the other hand, sought the revocation of TLA No. 356 and the reinstatement of its own timber license agreement. Indeed, there is no identity of parties and no identity of causes of action between the two cases.'

Likewise, in the case of *Digital Telecommunications Philippines, Inc. vs. Cantos*, even if respondents in both cases similarly sought to enforce the tax obligations of petitioner therein, (first case involves the Mayor and Chief of the Permit and License Division of the Municipality of Balayan, Batangas; while the second case involves the Provincial Treasurer of the Province of Batangas) they were sued under different capacities, thus, the Supreme Court affirmed the ruling of the Regional Trial Court (RTC) and the Court of Appeals (CA), holding that:

> 'Here, there is no identity of parties between Civil Case No. 3514 and the instant case. 'Identity of parties exists "where the parties in both actions are the same, or there is privity between them, or they are successors-in-interest by title subsequent to the commencement of the action, litigating for the same thing and under the same title and in the same capacity."' In Civil Case No. 3514, the action was directed against Benjamin E. Martinez, Jr. and Francisco P. Martinez in their capacities as Mayor and Chief of the Permit and License Division of the Municipality of Balayan, Batangas, respectively. On the other hand, respondent, in the instant case, is being sued in his capacity as Provincial Treasurer of the Province of Batangas. While the defendants in both cases similarly sought to enforce the tax obligation of petitioner, they were sued under different capacities. Moreover, there is no identity in the causes of action between the two cases. In Civil Case No. 3514, the propriety of the municipal officials' closure/stoppage of

> petitioner's business operation in Balayan, Batangas was the one in question while what is involved in this case is respondent's act of issuing Warrants of Levy and proceeding with the auction sale of the real properties of petitioner. Clearly, the principle of res judicata does not apply. The RTC and the CA are therefore correct in ruling that respondent, not being a party thereto, is not bound by the Decision rendered in Civil Case No. 3514.'
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> As earlier stated, there is no identity of parties in Criminal Case No. 26658 and the present case. There is no privity, or even community of interest, between the 'People of the Philippines', the plaintiff in Criminal Case No. 26658, and the 'Bureau of Internal Revenue and Lilia Hefti, in her capacity as the Commissioner of Internal Revenue', the respondents in the present case. Aside from the fact that the foregoing parties sued and are now being sued under different capacities, they also represent different interests. In Criminal Case No. 26658, the interest of the plaintiff is to establish the culpability of the accused therein for the crime of plunder while in the present case, the respondents' interest is to enforce the alleged tax obligations of the petitioners.
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> Hence, the principle of *res judicata* will not apply here."

As to petitioner's plea for the Court to take judicial notice of the Sandiganbayan Decision, as a general rule, courts are not authorized to take judicial notice of the contents of the records of other cases, even when such cases have been tried or are pending in the same court, and notwithstanding the fact that both cases may have been tried or are actually pending before the same judge. However, this rule is subject to the exception that in the absence of objection and as a matter of convenience to all parties, a court may properly treat all or any part of the original record of the case filed in its archives as read into the records of a case pending before it, when with the knowledge of the opposing party, reference is made to it, by name and number or in some other manner by which it is sufficiently designated. Thus, for said exception to apply, the party concerned must be given an opportunity to object before the court could take judicial notice of any record pertaining to other cases pending before it.[11]

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[11] *Pilipinas Shell Petroleum Corporation vs. Commissioner of Customs*, G.R. No. 195876, December 5, 2016.

Obviously, the requisites for the grant of the relief sought are wanting. Also note that respondents vehemently objected to the proposition. More importantly, the Sandiganbayan Decision was never presented in Court, neither was it offered in evidence by petitioner. Let it be stressed that only evidence presented and formally offered in evidence will be considered in the resolution of the case.

It is also basic that a court is not bound take judicial notice of proceedings pending before another court. Thus, the Supreme Court held:

> "The Court does not take judicial notice of proceedings in the various courts of justice in the Philippines." At the time we decided the present case, we were thus not bound to take note of and consider the pendency of the rehabilitation proceedings, as the matter had not been properly brought to our attention. In *Social Justice Society v. Atienza*, we said that:
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>> In resolving controversies, courts can only consider facts and issues pleaded by the parties. Courts, as well as magistrates presiding over them are not omniscient. They can only act on the facts and issues presented before them in appropriate pleadings. They may not even substitute their own personal knowledge for evidence. Nor may they take notice of matters except those expressly provided as subjects of mandatory judicial notice.
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>> The party asking the court to take judicial notice is obligated to supply the court with the full text of the rules the party desires it to have notice of.[12]

In a final bid to have the Court take judicial notice of the Sandiganbayan case, petitioner cites the *Wellex* and *COMELEC* cases. However, the *Wellex* and *COMELEC* cases cited by petitioner did not squarely rule on the ownership of respondent JEE of the Velarde accounts, or on respondents' tax liability. Thus, not having categorically ruled on the

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[12] *Carlos De Castro vs. Liberty Broadcasting Network, Inc. and Edgardo Quiogue*, G.R. No. 165153, August 25, 2010.

issue involved in this case, the two cases cited are not binding jurisprudence and have no value as precedent in the case at hand. On this matter, the Supreme Court ruled thus:

> Any issue, whether raised or not by the parties, *but not passed upon by the Court*, does not have any value as precedent. As this Court has explained as early as 1926:
>
> > It is contended, however, that the question before us was answered and resolved against the contention of the appellant in the case of *Bautista vs. Fajardo* (38 Phil. 624). In that case no question was raised nor was it even suggested that said section 216 did not apply to a public officer. That question was not discussed nor referred to by any of the parties interested in that case. It has been frequently decided that the fact that a statute has been accepted as valid, and invoked and applied for many years in cases where its validity was not raised or passed on, does not prevent a court from later passing on its validity, where that question is squarely and properly raised and presented. **Where a question passes the Court *sub silentio*, the case in which the question was so passed is not binding on the Court (*McGirr vs. Hamilton and Abreu,* 30 Phil. 563), nor should it be considered as a precedent.** (*U.S. vs. Noriega and Tobias*, 31 Phil. 310; *Chicote vs. Acasio,* 31 Phil. 401; *U.S. vs. More*, 3 Cranch [U.S.] 159, 172; *U.S. vs. Sanges*, 144 U.S. 310, 319; *Cross vs. Burke*, 146 U.S. 82.) For the reasons given in the case of *McGirr vs. Hamilton and Abreu*, supra, the decision in the case of *Bautista vs. Fajardo*, supra, can have no binding force in the interpretation of the question presented here.
>
> In *Cebu Toyo*, the nature of the 120-day period, whether it is mandatory or optional, was not even raised as an issue by any of the parties. **The Court never passed upon this issue.** Thus, *Cebu Toyo* does not constitute binding precedent on the nature of the 120-day period.[13]

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[13] *Commissioner of Internal Revenue vs. San Roque Power Corporation*, G.R. No. 187485, *Taganito Mining Corporation vs. Commissioner of Internal Revenue*, G.R. No. 196113, *Philex Mining Corporation vs. Commissioner of Internal Revenue*, G.R. No. 197156, February 12, 2013.

"The basic rule is that past decisions of this Court be followed in the adjudication of cases. However, for a ruling of this Court to come within this rule (known as *stare decisis*), the Court must categorically rule on an issue expressly raised by the parties; it must be a ruling on an issue directly raised. When the court resolves an issue merely *sub silentio*, *stare decisis* does not apply on the issue touched upon. In fact, the same argument was struck down by this court in *San Roque-Taganito*. There, we held that, 'any issue, whether raised or not by the parties, but not passed upon by the court, does not have any value as precedent.'"[14]

To repeat, due process requires that taxpayers be informed in writing of the facts and law on which the assessment is based in order to aid the taxpayer in making a reasonable protest. To immediately ensue with tax collection without initially substantiating a valid assessment contravenes the principle in administrative investigations "that taxpayers should be able to present their case and adduce supporting evidence."[15]

WHEREFORE, the Petition for Review dated April 29, 2016 by the Commissioner of Internal Revenue is hereby **DENIED**, for lack of merit.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

(With Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

[14] *Procter and Gamble Asia PTE Ltd. vs. Commissioner of Internal Revenue*, G.R. No. 204277, May 30, 2016.
[15] *Commissioner of Internal Revenue vs. Fitness By Design, Inc.*, G.R. No. 215957, November 9, 2016.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ON LEAVE
CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
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 case was 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

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA EB NO. 1446** (CTA Case No. 7847)
	Present:
-versus-	**DEL ROSARIO**, *P.J.*, **CASTAÑEDA, JR.**, **BAUTISTA**, **UY**, **CASANOVA**, **FABON-VICTORINO**, **MINDARO-GRULLA**, **RINGPIS-LIBAN**, and **MANAHAN**, *JJ.*
SPOUSES JOSEPH EJERCITO ESTRADA AND LUISA P. EJERCITO, *Respondents.*	Promulgated:
	OCT 19 2017 3:35 p.m.

x---x

CONCURRING OPINION

DEL ROSARIO, PJ.:

I concur in the denial of the Petition for Review filed by the Commissioner of Internal Revenue (CIR) for reasons discussed hereunder.

Upon careful perusal of the records, I noted that petitioner offered in evidence a photocopy of **Letter of Authority (LOA) No. 00029150 dated January 23, 2001**, which was provisionally marked as **Exhibit 2**. In the Resolution dated February 28, 2014, the Court in Division denied the admission in evidence of Exhibit 2 for petitioner's failure to submit the original thereof for comparison with the provisionally marked document. Petitioner moved for a reconsideration of the Resolution dated February 28, 2014, and prayed, among others, that the denial of Exhibit 2 be reconsidered and that Exhibit 2 be admitted in evidence. In the Resolution dated September 30, 2014, the Court in Division maintained the denial of Exhibit 2 for petitioner's failure to produce the original document for comparison, and for failure to lay the basis provided for under the rules for the introduction of Exhibit 2 as secondary evidence.

Considering that Exhibit 2 was not admitted in evidence, I submit that the authority of the revenue officers who conducted the audit and examination of respondents' books of accounts and other accounting records for the calendar year ending December 31, 1999 was not sufficiently established. It is a basic rule that evidence which has not been admitted cannot be validly considered by the courts in arriving at their judgments.[1] Thus, the Court cannot consider Exhibit 2 in determining whether the revenue officers who conducted the audit and examination of respondents were authorized to do so pursuant to a valid LOA.

In ***Commissioner of Internal Revenue vs. Lancaster Philippines, Inc.***,[2] the Supreme Court reiterated and confirmed the power and jurisdiction of this Court to resolve the issue on the authority of revenue officers to conduct the audit, albeit the same was not raised by the parties in their pleadings or memoranda, *viz.*:

> "On whether the CTA can resolve an issue which was not raised by the parties, we rule in the affirmative.
>
> Under Section 1, Rule 4 of A.M. No. 05-11-07-CTA, or the Revised Rules of the Court of Tax Appeals, the CTA is not bound by the issues specifically raised by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case. The text of the provision reads:
>
> > 'SECTION 1. Rendition of judgment. – x x x
> >
> > In deciding the case, the Court may not limit itself to the issues stipulated by the parties, but may also rule upon related issues necessary to achieve an orderly disposition of the case.'
>
> The above section is clearly worded. **On the basis thereof, the CTA Division was, therefore, well within its authority to consider in its decision the question on the scope of authority of revenue officers who were named in the LOA even though the parties had not raised the same in their pleadings or memoranda**. The CTA En Banc was likewise correct in sustaining the CTA Division's view concerning such matter." *(Boldfacing supplied)*

For want of a valid LOA, ***Lancaster*** ultimately resolved to declare the assessment void, *viz.*:

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[1] Dra. Leila A. Dela Llano vs. Rebecca Biong, doing business under the name and style of Pongkay Trading, G.R. No. 182356, December 4, 2013.
[2] G.R. No. 183408, July 12, 2017.

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"In sum, and considering the foregoing premises, we find no cogent reason to overturn the assailed decision and resolution of the CTA. As the CTA decreed, Assessment Notice LTAID II IT-98-00007, dated 11 October 2002, in the amount of P6,466,065.50 for deficiency income tax should be cancelled and set aside. **The assessment is void for being issued without valid authority**. Furthermore, there is no legal justification for the disallowance of Lancaster's expenses for the purchase of tobacco in February and March 2008." *(Boldfacing and underscoring supplied)*

In other words, although the parties did not specifically put into issue the authority of the revenue officers to conduct the audit and investigation that ultimately led to the issuance of the deficiency tax assessment, the Court has the authority to rule upon matters which are vital in the disposition of the case; otherwise, the Court would abdicate its primary objective which is the just resolution of disputes brought before it.[3]

In the present case, the crux of the controversy revolves around whether respondents may be held liable for deficiency income tax for taxable year ending December 31, 1999, subject of the assessment issued by petitioner. **The issue about the revenue examiners' authority to conduct audit necessarily relates thereto as its absence makes the assessment a nullity.** The importance of the revenue officers' authority to conduct the audit cannot be over-emphasized as it goes into the issue of the validity of the assessment.

On this score, the Supreme Court's pronouncement in ***Medicard Philippines Inc. vs. Commissioner of Internal Revenue***[4] on the matter of the authority of revenue officers who conducted the audit and examination of the taxpayer is instructive, *viz.*:

"The absence of an LOA violated MEDICARD's right to due process

An LOA is the authority given to the appropriate revenue officer assigned to perform assessment functions. It empowers or enables said revenue officer to examine the books of account and other accounting records of a taxpayer for the purpose of collecting the correct amount of tax. **An LOA is premised on the fact that the examination of a taxpayer who has already filed his tax returns is a power that statutorily belongs only to the CIR himself or his duly authorized representatives.** Section 6 of the NIRC clearly provides as follows:

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[3] Ramona T. Logronio vs. Roberto Taleseo, G.R. No. 134602, August 6, 1999.
[4] G.R. No. 222743, April 5, 2017.

Based on the afore-quoted provision, it is clear that unless authorized by the CIR himself or by his duly authorized representative, through an LOA, an examination of the taxpayer cannot ordinarily be undertaken. The circumstances contemplated under Section 6 where the taxpayer may be assessed through best-evidence obtainable, inventory-taking, or surveillance among others has nothing to do with the LOA. These are simply methods of examining the taxpayer in order to arrive at the correct amount of taxes. **Hence, unless undertaken by the CIR himself or his duly authorized representatives, other tax agents may not validly conduct any of these kinds of examinations without prior authority**.

xxx xxx xxx

In this case, there is no dispute that no LOA was issued prior to the issuance of a PAN and FAN against MEDICARD. Therefore no LOA was also served on MEDICARD. The LN that was issued earlier was also not converted into an LOA contrary to the above quoted provision. Surprisingly, the CIR did not even dispute the applicability of the above provision of RMO 32-2005 in the present case which is clear and unequivocal on the necessity of an LOA for the assessment proceeding to be valid. xxx xxx xxx.

In the case of *Commissioner of Internal Revenue vs. Sony Philippines, Inc.*, the Court said that:

> Clearly, there must be a grant of authority before any revenue officer can conduct an examination or assessment. Equally important is that the revenue officer so authorized must not go beyond the authority given. **<u>In the absence of such an authority, the assessment or examination is a nullity</u>**. (Emphasis and underscoring ours)

xxx xxx xxx

xxx xxx xxx. In fact, apart from being a statutory requirement, an LOA is equally needed even under the BIR's RELIEF System because the rationale of requirement is the same whether or not the CIR conducts a physical examination of the taxpayer's records: **to prevent undue harassment of a taxpayer and level the playing field between the government's vast resources for tax assessment, collection and enforcement, on one hand, and the solitary taxpayer's dual need to prosecute its business while at the same time responding to the BIR exercise of its statutory powers. The balance between these is achieved by ensuring that any examination of the taxpayer by the BIR's revenue officers is properly authorized in the first place by those to whom the discretion to exercise the power of examination is given by the statute**.

That the BIR officials herein were not shown to have acted unreasonably is beside the point <u>because the issue of their lack of authority was only brought up during the trial of the case</u>. What is crucial is whether the proceedings that led to the issuance of VAT deficiency assessment against MEDICARD had the prior approval and authorization from the CIR or her duly authorized representatives. <u>Not having authority to examine MEDICARD in the first place, the assessment issued by the CIR is inescapably void</u>."
(Citations omitted; boldfacing and underscoring supplied)

In the aforequoted case, the Supreme Court declared as void the disputed assessment for lack of an LOA authorizing the revenue officers to examine the taxpayer's books of account and other accounting records.

In the absence of competent proof that the revenue examiners who conducted the audit and investigation of respondents' books of accounts and other accounting records for the calendar year ending December 31, 1999 were duly authorized pursuant to a valid LOA, I am of the view that the deficiency income tax assessment issued against respondents, arising from the audit they conducted, is void *ab initio*.

In addition to the foregoing, I would like to articulate my observation that petitioner's right to **assess respondents for deficiency income tax for the taxable year ending December 31, 1999 appears to have prescribed.**

The present case involves a deficiency income tax assessment against petitioners for the **taxable year ending December 31, 1999.** A Preliminary Assessment Notice (PAN) dated September 23, 2002 was issued against respondents and a Protest Letter dated November 15, 2002 against the PAN was submitted by respondents.[5] **Yet, the Notice to Taxpayer denying respondents' Protest Letter dated November 15, 2002 was issued by petitioner on June 12, 2008, or after almost six (6) years.[6] The Final Letter of Demand (FLD) with attached Details of Discrepancy, and the Assessment Notice (FAN) No. ES-IT-1999-0680, were issued on June 19, 2008.[7]**

Records reveal that the issuance of the FAN was held in abeyance during the pendency of respondent Joseph Ejercito Estrada's plunder case before the Sandiganbayan. The then Deputy Commissioner for Legal and Inspection Group, Atty. Edmundo P. Guevarra, instructed the assigned revenue officers not to make or issue a formal assessment against respondent Joseph Ejercito Estrada.[8] It was only after the Sandiganbayan found respondent Joseph Ejercito Estrada guilty beyond reasonable doubt of plunder that the FLD and FAN, assessing respondents for deficiency income tax for the taxable year ending December 31, 1999, were issued on June 19, 2008.

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[5] Exhibit 8, BIR Records, p. 32.
[6] Exhibit 8, BIR Records, p. 32.
[7] Exhibit 11, BIR Records, pp. 42 to 45.
[8] Par. h, Admitted Facts, Joint Stipulation of Facts and Issues (JSFI), CTA Docket, p. 191.

Again, while the issue of prescription was not raised by either parties, I submit that the Court is imbued with sufficient discretion to consider the same. In ***Bank of the Philippine Islands vs. Commissioner of Internal Revenue***,[9] the Supreme Court's affirmation of the pronouncement that courts may *motu proprio* dismiss the case on the ground of prescription is enlightening:

> "If the pleadings or the evidence on record show that the claim is barred by prescription, the court is mandated to dismiss the claim even if prescription is not raised as a defense. In Heirs of Valientes v. Ramas, we ruled that **the CA may *motu proprio* dismiss the case on the ground of prescription despite failure to raise this ground on appeal. The court is imbued with sufficient discretion to review matters, not otherwise assigned as errors on appeal, if it finds that their consideration is necessary in arriving at a complete and just resolution of the case. More so, when the provisions on prescription were enacted to benefit and protect taxpayers from investigation after a reasonable period of time.**" (*Citations omitted; boldfacing supplied)*

Section 203[10] of the National Internal Revenue Code (NIRC) of 1997, as amended, mandates the government to assess internal revenue taxes within three (3) years from the last day prescribed by law for the filing of the tax return or the actual date of filing such return, whichever comes later. Hence, an assessment notice issued after the three (3)-year period prescriptive period is no longer valid and effective. Exceptions, however, are provided under Section 222[11] of the NIRC,[12] as follows:

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[9] G.R. No. 181836, July 9, 2014.

[10] 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 filing thereof shall be considered as filed on such last day.

[11] SEC. 222. Exceptions as to the Period of Limitation of Assessment and Collection of Taxes. –

(a) In the case of a **false or fraudulent return with intent to evade tax 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 any time 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.

(b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, **both the Commissioner and the taxpayer have agreed in writing to its assessment after such time**, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.

xxx xxx xxx.

[12] Commissioner of Internal Revenue vs. Kudos Metal Corporation, G.R. No. 178087, May 5, 2010.

(i) In cases when both the Commissioner and the taxpayer have agreed in writing to extend the period to assess; and,

(ii) In cases of false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed at any time within ten (10) years after the discovery of the falsity, fraud or omission.

Notably, the pendency of a plunder case before the Sandiganbayan against respondent Joseph Ejercito Estrada neither precluded the government from issuing the FAN nor it suspended the running of the three (3)-year prescriptive period to assess respondents for deficiency taxes.

Truth to tell, in order to extend the period to assess under *(i)* above, it must be established that petitioner and respondents agreed in writing to extend the period to assess. There is, however, nothing on record which would show that petitioner and respondents executed a Waiver of the Defense of Prescription under the Statute of Limitations extending the period to assess beyond the original three (3)-year prescriptive period.

On the other hand, for the ten (10)-year prescriptive period to apply under *(ii)* above, petitioner must prove that respondents either filed a false or fraudulent return with intent to evade the taxes due or failed to file a return. Not only that. Petitioner must also establish that respondents were adequately informed that they were being assessed within the extraordinary prescriptive period of ten (10) years from the discovery of the falsity, fraud or omission.

In ***Commissioner of Internal Revenue vs. Asalus Corporation***,[13] the application of the ten (10)-year prescriptive period to assess the taxpayer for deficiency taxes was justified on the basis of the following:

(1) Pursuant to ***Aznar vs. CTA***,[14] the mere filing of false returns by a taxpayer, notwithstanding the absence of intent to defraud,[15] is sufficient to warrant the application of the

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[13] G.R. No. 221590, February 22, 2017.
[14] 157 Phil. 510 (1974).
[15] In Commissioner of Internal Revenue vs. Philippine Daily Inquirer, G.R. No. 213943, March 22, 2017, the Supreme Court held that mere entry of wrong information in tax returns due to mistake, carelessness, or ignorance, without intent to evade tax, does not constitute a false return.

ten (10) year prescriptive period under Section 222 of the National Internal Revenue Code (NIRC);

(2)Under Section 248(B) of the NIRC, there is ***prima facie* evidence of a false return** if there is substantial underdeclaration of taxable sales, receipt or income in an amount exceeding 30% of what is declared in the returns. When there is a showing that the taxpayer underdeclared its sales, receipt or income, there is a presumption that a false return was filed and the CIR is not required to present evidence to support the falsity of the return, unless the taxpayer overcomes the presumption against it;

(3)The **mere failure of the taxpayer to overcome the presumption of the "falsity of the returns" warrants the application of the ten (10)-year prescriptive period** to assess; and,

(4)Most importantly, there was **substantial compliance with the due process requirement of Section 228 of the NIRC[16] as the application of the extraordinary period of ten (10) years was categorically stated in the Preliminary Assessment Notice which was cited in subsequent communications of the CIR to the taxpayer**. Thus, the taxpayer was able to file a protest addressing the issue on prescription in its supplemental protest to the Final Assessment Notice.

Thus, in applying the ten (10)-year prescriptive period to assess, the Supreme Court in ***Asalus***, ultimately declared as follows:

> "Considering the **existing circumstances**, the assessment was timely made because the applicable prescriptive period was the ten (10)-year prescriptive period under Section 222 of the NIRC. To reiterate, **there was a *prima facie* showing that the returns filed by Asalus were false, which it failed to controvert**. Also, **it was adequately informed that it was being assessed within the extraordinary prescriptive period.**" (Boldfacing and underscoring supplied)

In laying down the doctrine declared in ***Asalus***, the existence of the following circumstances was highlighted: **one, there was *prima facie* showing that the returns filed by Asalus were false;**

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[16] SECTION 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: xxx xxx
xxx xxx
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. xxx xxx

and, two, Asalus was adequately informed that it was being assessed within the ten (10)-year prescriptive period.

In the present case, records disclose that there is nothing in the PAN and the FAN issued against respondents or in any subsequent communications from petitioner which stated or even suggested that the ten (10)-year prescriptive period to assess respondents for deficiency income tax liability for the taxable year ending December 31, 1999 was being applied.

Due process demands that petitioner should have **adequately informed respondents** that he was applying the ten (10)-year prescriptive period to assess at the earliest possible opportunity, or at the very least, at the time of the issuance of the PAN, consistent with the doctrine laid down in ***Asalus***.

The failure of petitioner to comply with the requirement laid down under Section 228 of the NIRC of 1997, as amended, of informing respondents that the ten (10)-year prescriptive period was being applied (thereby depriving respondents of their right to contest its applicability) makes the FAN issued against respondents intrinsically void.

It is undisputed that respondents filed their Income Tax Returns (ITRs) for the taxable year ending December 31, 1999. Petitioner never put in issue or questioned the timeliness of the filing of respondents' ITR as in truth petitioner theorizes that respondents are liable for deficiency income tax on the ground that they underdeclared their income for taxable year 1999 per their ITRs. In the Memorandum issued as early as September 23, 2002, which was approved by the then CIR Guillermo L. Parayno, Jr., respondents deficiency income tax liability was computed by making reference to the taxable income declared by respondents in their ITRs.[17] It may therefore be inferred that respondents filed their ITRs for the taxable year ending December 31, 1999 within the prescribed period, *i.e.,* on or before April 15, 2000, or not later than September 23, 2002 (otherwise petitioner could not have used the taxable income as declared in respondents' ITRs in computing respondents' deficiency income tax liability as stated in the Memorandum dated September 23, 2002).

Counting three (3) years from April 15, 2000 or from September 23, 2002, petitioner's right to assess respondents for

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[17] Exhibit 3, BIR Records, p. 17.

deficiency income tax for taxable year ending December 31, 1999 prescribed on April 15, 2003 or on September 23, 2005, **or long before the issuance of the FLD and FAN on June 19, 2008**.

As the FLD and FAN, both dated June 19, 2008, were issued by petitioner beyond the three (3)-year period to assess, the same must perforce be declared void *ab initio*.

All told, I **VOTE** to **DENY** the Petition for Review filed by petitioner Commissioner of Internal Revenue. The Final Letter of Demand with attached Details of Discrepancy and Assessment Notice (FAN) No. ES-IT-1999-0680, dated June 19, 2008, should be **CANCELLED** and **WITHDRAWN** for being void *ab initio*.

ROMAN G. DEL ROSARIO
Presiding Justice