**REPUBLIC OF THE PHILIPPINES**
**COURT OF TAX APPEALS**
**QUEZON CITY**

## ***SECOND DIVISION***

**JOPAUEN REALTY CORPORATION,**
*Petitioner,*

-versus-

**COMMISSIONER OF INTERNAL REVENUE,**
*Respondent.*

**CTA CASE NO. 8943**
For: Assessment

Members:

CASTAÑEDA, JR., *Chairperson,*
MINDARO-GRULLA, and
BACORRO-VILLENA, *JJ.*

Promulgated:
SEP 13 2019
10:10 a.m.

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# DECISION

***MINDARO-GRULLA, J.:***

Submitted for decision on January 11, 2019 is a Petition for Review with Urgent Motion to Suspend Collection of Taxes filed by petitioner Jopauen Realty Corporation on December 4, 2014, under Rule 4, Section 3(a)1[1], and Rule 10, Sections 2[2], and 3[3] of the Revised

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[1] RULE 4
*Jurisdiction of the Court*
xxx xxx xxx
SECTION 3. *Cases Within the Jurisdiction of the Court in Divisions.*— The Court in Divisions shall exercise:
(a) Exclusive original or appellate jurisdiction to review by appeal the following:
(1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;. . .xxx

[2] RULE 10
*Suspension of Collection of Tax*
xxx xxx xxx
SECTION 2. *Who May File.* — Where the collection of the amount of the taxpayer's liability, sought by means of a demand for payment, by levy, distraint or sale of any property of the taxpayer, or by whatever means, as provided under existing laws, may jeopardize the interest of the Government or the taxpayer, an interested party may file a motion for the suspension of the collection of the tax liability.

[3] SECTION 3. *When to File.* — The motion for the suspension of the collection of the tax may be filed together with the petition for review or with the answer, or in a separate motion filed by the interested party at any stage of the proceedings.

Rules of the Court of Tax Appeals, assailing the validity of the Final Decision on Disputed Assessment dated September 25, 2014 issued by respondent Commissioner of Internal Revenue, which was received by petitioner on November 5, 2014, holding petitioner liable for alleged deficiency Income Tax, Value Added Tax, Expanded Withholding Tax amounting to a total of ₱3,357,870.82, inclusive of interests and compromise penalty, for the taxable year 2008.

Petitioner Jopauen Realty Corporation is a domestic corporation duly organized and existing under Philippine laws with principal office at Burol Main, Dasmarinas, 4114 Cavite.[4] It may be served with orders and processes through its counsel at Kalaw Sy Selva & Campos Law Officers, West Tower 2106-A, Philippine Stock Exchange Centre, Exchange Road, Ortigas Center, Pasig City, 1605, Metro Manila.[5]

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue who is vested with authority to administer and enforce national internal revenue laws.[6] He may be served with summons and other legal processes at BIR National Office Building, Agham Road, Diliman, Quezon City.[7]

On January 22, 2010, petitioner received Letter of Authority (LOA) No. LOA 2008-00023692[8], dated December 29, 2009, together with the First Request for Presentation of Records[9].[10]

Subsequently, respondent issued a Second Request for Presentation of Records[11], which petitioner received on February 2, 2010.[12]

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[4] Par. 1, Joint Stipulation of Facts and Issues (JSFI) dated February 26, 2016, Docket, Vol. II, p. 595
[5] Par. 2, JSFI, Docket, Vol. II, p. 595
[6] Par. 3, JSFI, Docket, Vol. II, p. 595
[7] Ibid.
[8] Par. 17c, JSFI, Docket, Vol. II, p. 597; Exhibit "P-8", Docket, Vol. II, p. 877; Exhibit "R-15", BIR Records, p. 18
[9] Par. 17c, JSFI, Docket, Vol. II, p. 597; Exhibit "P-8", Docket, Vol. II, p. 877; Exhibit "R-16", BIR Records, p. 17
[10] Par. 4, JSFI, Docket, Vol. II, p. 596
[11] Par. 17d, JSFI, Docket, Vol. II, p. 597; Exhibit "P-9", Docket, Vol. II, p. 879; Exhibit "R-17", BIR Records, p. 19
[12] Par. 5, JSFI, Docket, Vol. II, p. 596

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Thereafter, respondent issued a Final Request for Presentation of Records[13], which petitioner received on May 12, 2010.[14]

Respondent then issued a Notice of Informal Conference[15] (NIC), which was received by the petitioner on April 14, 2011, scheduling the informal conference within fifteen (15) days from receipt of the notice.[16]

On May 24, 2011, an informal conference was set with the Revenue District Officer, Atty. Honorata S. Aguilar, together with the Revenue Examiners.[17]

Pursuant to the informal conference, and as instructed by Revenue Officer Norma Siscar, petitioner alleges that it paid the following taxes:[18]

| Tax Type | Amount | Proof of Payment[19] |
|---|---|---|
| Expanded Withholding Tax | P10,669.12 | Official Receipt (OR) No. 04261851 |
| Withholding Tax on Compensation | P12,689.26 | OR No. 04261852 |
| Miscellaneous Tax | P10,000.00 | OR No. 04261853 |
| Income Tax | P91,760.69 | OR No. 04261854 |

On December 22, 2011, respondent alleges that it issued and sent a Preliminary Assessment Notice[20] (PAN) to petitioner via registered mail.[21]

Subsequently, as there was no reply to the PAN, respondent issued a Formal Letter of Demand[22] (FLD) dated January 12, 2012, demanding payment of alleged deficiency taxes for the taxable year

[13] Par. 17e, JSFI, Docket, Vol. II, p. 597; Exhibit "P-9-1", Docket, Vol. II, p.880; Exhibit "R-18", BIR Records, p. 20
[14] Par. 6, JSFI, Docket, Vol. II, p. 596
[15] Par. 17f, JSFI, Docket, Vol. II, p. 597; Exhibit "P-10", Docket, Vol. II, pp. 881-884 ; Exhibit "R-22", BIR Records, p. 157
[16] Par. 8, JSFI, Docket, Vol. II, p. 596
[17] Par. 9, JSFI, Docket, Vol. II, p. 596
[18] Exhibit "P-13", Q&A Nos. 17 to 19, Judicial Affidavit of Shirley Enobal dated April 8, 2015, Docket, Vol. I, pp. 245-246
[19] Exhibit "P-11", Docket, Vol. II, p. 885-892
[20] Exhibit "R-3", BIR Records, pp. 181-184
[21] Exhibit "R-31", Q&A No. 8 and 10, Judicial Affidavit of Revenue Officer Teresita Tibayan dated January 13, 2016, Docket, Vol. I, p. 524
[22] Exhibit "R-4", BIR Records, pp. 194-197

2008.[23] Respondent alleges that the Final Assessment Notices[24] were attached to the FLD.[25] Petitioner filed a protest[26] on February 28, 2012.[27]

Respondent issued Letter[28] dated December 12, 2012 informing petitioner that Revenue Officer Teresita Tibayan and Group Supervisor Alexander O. Ricaforte, were assigned for examination of the case.[29]

Petitioner received an Amended Preliminary Assessment Notice[30] (the Amended PAN), demanding payment for alleged deficiency taxes for the taxable year 2008.[31] Petitioner claims that the Amended PAN was received on February 10, 2014.[32]

Ruby D. Lordan then consulted with the BIR Regional Director of San Pablo, Laguna.[33] The Regional Director immediately ordered a reinvestigation and assigned the case to another examiner.[34]

Subsequently, Shirley Enobal, the Administrator of the Petitioner, submitted supporting documents for various expenses that were required by the second examiner. The examination of these documents was not continued because the examiner was reshuffled to another assignment.[35]

Petitioner then received on November 5, 2015 [*sic*], the Final Decision on Disputed Assessment[36] (FDDA) dated September 25, 2014, holding the Petitioner liable for alleged deficiency tax assessments in

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[23] Exhibit "R-31", Q&A No. 11 and 12, Judicial Affidavit of RO Tibayan dated January 13, 2016, Docket, Vol. I, pp. 524-525
[24] Exhibit "R-4-A", BIR Records, pp. 198-200; Exhibit "R-31", Q&A No. 11 and 12, Judicial Affidavit of RO Tibayan dated January 13, 2016, Docket, Vol. I, pp. 524-525
[25] Q&A No. 11 and 12, Judicial Affidavit of RO Tibayan dated January 13, 2016, Docket, Vol. I, pp. 524-525
[26] Exhibit "R-5", Docket, BIR Records, p. 205
[27] Exhibit "R-31", Q&A Nos. 13 and 14, Judicial Affidavit of RO Tibayan dated January 13, 2016, Docket, Vol. I, p. 525
[28] Exhibit "R-11", BIR Records, p. 229
[29] Exhibit "R-31", Q&A No. 23, Judicial Affidavit of RO Tibayan dated January 13, 2016, Docket, Vol. I, p. 526
[30] Par. 17h, JSFI, Docket, Vol. II, p. 597; Exhibit "P-12", Docket, Vol. II, pp. 893-896; Exhibit "R-13", BIR Records, pp. 240-243
[31] Par. 10, JSFI, Docket, Vol. II, p. 596
[32] Exhibit "P-13", Q&A No. 22, Judicial Affidavit of Ms Enobal dated April 8, 2015, Docket, Vol. I, p. 246
[33] Par. 11, JSFI, Docket, Vol. II, p. 596
[34] Par. 11, JSFI, Docket, Vol. II, p. 596
[35] Par. 12, JSFI, Docket, Vol. II, p. 596
[36] Par. 17a, JSFI, Docket, Vol. II, p. 597; Exhibit "P-1", Docket, Vol. II, pp. 812-816

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the amounts of ₱769,673.05, ₱2,533,203.14, ₱12,494.63, and ₱42,500.00, representing alleged deficiency Income Tax, Value-added tax (VAT), Expanded Withholding Tax (EWT), and compromise penalties, respectively.[37]

Hence, the instant petition was filed.

On January 5, 2015, respondent filed a Manifestation and Submission[38], manifesting that the Comment or Opposition to petitioner's Urgent Motion for Suspension of Collection of Taxes was filed thru registered mail on December 22, 2014. The Comment and/or Opposition (Re: Petition for Review with Urgent Motion to Suspend Collection of Taxes dated 4 December 2014) filed by respondent was received by the Court on January 8, 2015.[39] In his Comment and/or Opposition, respondent argues that petitioner is not legally entitled to an order enjoining the collection of taxes; that it failed to show any urgency in the suspension; and that it failed to prove the prejudice that will be caused by such collection.

On January 6, 2015, petitioner filed an Urgent Motion for Extension of Time to File a Reply to respondent's Comment and/Opposition.[40]

In an Order[41] dated January 8, 2015, the Court noted respondent's Manifestation and Submission and granted petitioner's motion for extension of time to file a reply.

On January 9, 2015, petitioner filed its Reply to Respondent's Comment and/or Opposition[42]. Petitioner counters that the collection of taxes would cause irreparable injury because there is no basis for the same, and such FDDA and assessments have not become final, executory and demandable, thus, it is premature for the CIR to enforce and implement the FDDA. It further avers that the premature collection of the deficiency taxes will cripple its operations, thereby, jeopardizing its operations and interests.

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[37] Par. 13, JSFI, Docket, Vol. II, p. 596
[38] Docket, Vol. I, pp. 82-89
[39] Docket, Vol. I, pp. 98-103
[40] Docket, Vol. I, pp. 91-92
[41] Docket, Vol. I, p. 97
[42] Docket, Vol. I, pp. 105-108

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On January 30, 2015, respondent filed a Motion for Leave to File and Admit Attached Answer[43]. The Court granted respondent's motion and admitted the Answer thru a Resolution[44] dated February 4, 2015. In the same Resolution, the Court ordered the setting of the Pre-Trial Conference on April 16, 2015.

In his Answer[45], respondent raised the following special and affirmative defenses:

"**SPECIAL AND AFFIRMATIVE DEFENSES**

The 2008 deficiency assessments for Income Tax, VAT, and Expanded Withholding Tax were issued in accordance with law, jurisprudence and administrative issuances.

**Petitioner is liable to pay Income Tax**

4. Petitioner has undeclared income in the amount of P1,137,522.60.

5. Verification disclosed that petitioner has disallowable deductions aggregating to P1,137,522.60 based on various discrepancies with details as follows:

| | | |
|---|---|---|
| **Disallowed Deductions** | | |
| Unsupported salaries & wages | | P 153,249.86 |
| Not subject to withholding tax | | 230,923.90 |
| Disallowed representation expenses | | |
| Contractual Services | P462,056.65 | |
| Repairs & Maintenance | 292,192.19 | 754,248.84 |
| **Total disallowance** | | **P1,137,552.60** |

6. Pursuant to Section 34(A)(1)(b) of the Tax Code which states that no deductions shall be allowed unless the taxpayer has substantiated them with sufficient evidence,

[43] Docket, Vol. I, pp. 113-127
[44] Docket, Vol. I, p. 129
[45] Docket, Vol. I, pp. 119-127

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certain expenses were disallowed aggregating to P153,249.86 with details as follows:

| | |
|---|---|
| **Unsupported discrepancy on salaries** | |
| Per Financial Statement | P2,777,931.95 |
| Per Alphalist | 2,624,682.09 |
| **Total** | **P153,249.86** |

7. In addition, representation expenses claimed as deduction exceeded the allowable deduction from gross income from entertainment, amusement and recreational expenses as defined and stated in Sections 2 and 5 of Revenue Regulation 10-2002 implementing the provision of Section 34(A)(1)(a)(IV) of the Tax Code of 1997, authorizing the imposition of a ceiling on entertainment, amusement and recreational expenses to which amount equivalent to the actual entertainment, amusement and recreational expense paid or incurred within the taxable year by the taxpayer computed as follows:

| | | |
|---|---|---|
| Representation expenses per FS | | P405,508.77 |
| Less: Allowed representation expense | | |
| Rental Income | P17,548,487.05 | |
| Multiply by: | 1% | 175,484.87 |
| Disallowed representation expense | | **P230,923.30** |

8. Verification disclosed that petitioner has certain bad debt expenses amounting to P754,248.84 which petitioner failed to prove as worthless, hence, disallowed pursuant to Section 34(E) of the Tax Code. Also, verification disclosed that petitioner has certain expenses that were not subjected to expanded withholding tax, hence, disallowed as deductions pursuant to Section 34(K) of 1997 NIRC which states that deduction shall only be allowed if it is shown that the tax required to be deducted and withheld have been paid to the Bureau accordingly.

| | |
|---|---|
| Not subjected to withholding tax | |
| Contractual Services | P462,056.65 |

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| | |
|---|---|
| Repairs and Maintenance Fee | 292,192.19 |
| **Total** | **P754,248.84** |

**Petitioner is liable for VAT and Expanded Withholding Tax**

9. As a consequence of petitioner's failure to substantiate its alleged non-vatable rental income from dormitories as stated in its 27 February 2012 "Explanation on the examination findings", aggregate income amounting to P18,877.660.13 was assessed in full pursuant to Section 108 of 1997 NIRC as implemented by Section 4.110.8 of Revenue Regulations 16-2005.

**Details of Vatable Gross Income per FS**

| | |
|---|---|
| Rental Income | P17,548,487.05 |
| Other Income | 1,329,173.08 |
| **Total** | **P18,877,660.13** |

10. Audit revealed that certain income payments were not properly subjected to expanded withholding tax, thus assessed pursuant to Section 57 of the NIRC as implemented by Section 2.57.2€ of Revenue Regulation 2-98 as amended.

**List of Income Payments not subjected to Expanded Withholding Tax**

| | | |
|---|---|---|
| Contractual Services | P462,056.65 | P9,241 .13 |
| Repairs, maintenance & service fee | 292,192.19 | 5,483.84 |
| **Total** | | **P15,084.98** |

**Petitioner was not deprived of its right to due process**

11. Petitioner contends that it did not receive the Preliminary Assessment Notice (PAN) and the Final Assessment Notice (FAN) from the respondent and that such failure amounted to the violation of petitioner's right to due process.

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12. Due process was elaborated by the Supreme Court in the case of *Ray Peter Vivo vs. PAGCOR* wherein it held that:

> "The observance of fairness in the conduct of any investigation is at the very heart of procedural due process. **The essence of due process is to be heard, and, as applied to administrative proceedings, this means a fair and reasonable opportunity to explain one's side, or an opportunity to seek a reconsideration of the action or ruling complained of**. Administrative due process cannot be fully equated with due process in its strict judicial sense, for in the former a formal or trial-type hearing is not always necessary, and technical rules of procedure are not strictly applied. *Ledesma v. Court of Appeals* elaborates on the well-established meaning of due process in administrative proceedings in this wise:
>
> x x x Due process, as a constitutional precept, does not always and in all situations require a trial-type proceeding. **Due process is satisfied when a person is notified of the charge against him and given an opportunity to explain or defend himself. In administrative proceedings, the filing of charges and giving reasonable opportunity for the person so charged to answer the accusations against him constitute the minimum requirements of due process. The essence of due process is simply to be heard, or as applied to administrative proceedings, an opportunity to explain one's side, or an opportunity to seek a reconsideration of the action or ruling complained of. (emphasis supplied)**

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13. Petitioner was given ample opportunity to contest the assessment. It actively participated in the Notice of Informal Conference with RDO Atty. Honorata S. Aguilar together with other Revenue Examiners on 24 May 2011. It was appraised of its tax liabilities via a Formal Letter of Demand on 26 January 2012. Petitioner even had the opportunity to file a protest on the Formal Letter of Demand on 28 February 2012 and respondent's authorized representative even granted petitioner's request for reinvestigation and assigned the case to another examiner, twice. Petitioner admitted that it received an Amended PAN on 11 February 2014 demanding the payment for its deficiency taxes for the taxable year 2008.

14. Given the foregoing, petitioner's right to due process was never violated as it was duly informed and was given ample opportunity to present its side of the controversy.

15. It is basic that as long as a party is given the opportunity to defend his interest in due course, he would have no reason to complain, for it is this opportunity to be heard that makes up the essence of due process.

**Petitioner is not entitled to a VAT exemption**

16. Well established is the rule in taxation that a tax exemption is an exception, rather than the general rule.

17. In this regard, petitioner must show that it has a clear basis for its tax exemption under the law and that it had complied with all the requirements to claim such exemption.

**The right to assess has not prescribed**

18. Section 203 of the NIRC, as amended, states only the general rule. It admits of exception such as in case of a false or fraudulent return under Section 248 (B), or in case of a valid waiver of the prescription period to assess executed by a taxpayer. In the foregoing exceptions, the

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right to assess does not prescribe at the third year from the filing of the return.

19. Section 248 (B) of the NIRC states in part that:

> xxx A **substantial underdeclaration** of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, **shall constitute *prima facie* evidence of a false or fraudulent return**: *Provided, further*, That **failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return**, and a claim of deductions in an amount exceeding thirty percent (30%) of actual deductions, **shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions, as mentioned herein**.

20. As the discrepancy between the ITR filed and the assessment is more than 30%, there is clearly a substantial underdeclaration which is a *prima facie* evidence of fraud. Thus, the right to assess does not prescribe until ten (10) years thereafter.

21. Similarly, the above-stated under-declaration of VAT sales exceeds the amount of thirty percent (30%) of that declared per return. Such substantial under-declaration rendered petitioner's VAT returns filed for calendar year 2008 as a false or fraudulent return prescribed by Section 248(B) of the National Internal Revenue Code of 1997, as amended.

22. Based on the foregoing, respondent has ten (10) years within which to assess petitioner, thus the right to assess clearly has not prescribed.

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**Final discussions**

23. Well-settled is the rule that tax assessments are entitled to the presumption of correctness and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments.

24. Even an assessment based on estimates is *prima facie* valid and lawful where it does not appear to have been arrived at arbitrarily or capriciously.

25. The burden of proof is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the Commissioner of Internal Revenue is wrong but the taxpayer is right. Otherwise the presumption of correctness of tax assessment stands. The presumption in favor of the correctness of tax assessment stands where evidence to the contrary is wanting.

26. All presumptions are in favor of the correctness of tax assessments. Dereliction on the part of petitioner to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notice."

On February 24, 2015, petitioner filed a Motion for Reconsideration[46] from the Court's Resolution dated February 4, 2015 granting respondent's Motion for Leave to File and Admit Attached Answer dated January 30, 2015. Petitioner avers that it was not given an opportunity to file a Comment on or an Opposition to respondent's motion, considering the respondent failed to provide a justifiable reason for his belated filing. Petitioner prays that the motion filed by respondent be denied.

On February 26, 2015, petitioner presented its witness, Ms. Ruby D. Lordan, who testified by way of Judicial Affidavit[47] in lieu of direct examination in support of its Urgent Motion to Suspend Collection of

[46] Docket, Vol. I, pp. 200-203
[47] Exhibit "P-4", Docket, Vol. I. pp. 133-137

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Taxes.[48] During the hearing, respondent's counsel manifested that he will not be presenting any evidence with regard to the said motion.

On March 2, 2015, petitioner filed its Formal Offer of Evidence (FOE) in support of its Urgent Motion to Suspend Collection of Taxes.

On March 9, 2015, respondent filed his Comment or Opposition (re: Motion for Reconsideration dated 23 February 2015)[49]. Respondent argues that the Court was correct to admit his Answer on the basis that trial on the merits is definitely favored than a dismissal due to a technicality. He further argues that petitioner failed to file its motion to declare respondent in default.

In response, petitioner filed on March 20, 2015 a Motion for Leave to Admit Attached Reply to Comment or Opposition[50]. In its Reply, petitioner argues that the act of respondent in belatedly filing her Answer thirty (30) days after the prescribed date of filing such pleading is a blatant disregard of procedural rules, manifest bad faith and a clear disrespect to the Court, which must not be tolerated. Thus, petitioner prays that the Resolution dated February 4, 2015 be set aside; another be rendered denying respondent's Motion for Leave to File and Admit Attached Answer; and that respondent be declared in default.

On April 13, 2015, the Court issued a Resolution[51] denying petitioner's Motion for Reconsideration on the basis that there is no showing bad faith on the part of the respondent and admitting the Answer would properly dispose the case based on its merits. In the same Resolution, acting on petitioner's FOE, the Court admitted Exhibit "P-1", "P-2", "P-4" and "P-4-1", while Exhibit "P-3" was denied for failure to present the original document for comparison.

Subsequently, on May 25, 2015, a Resolution[52] was issued denying petitioner's Urgent Motion to Suspend Collection of Taxes on the ground that petitioner failed to prove that it will be jeopardized by the collection of its alleged tax liabilities.

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[48] Minutes of the Hearing, February 26, 2015, Docket, Vol. I, pp. 207-208
[49] Docket, Vol. I, pp. 221-225
[50] Docket, Vol. I, pp. 227-234
[51] Docket, Vol. I, pp. 383-388
[52] Docket, Vol. I, pp. 392-395

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A Notice of Pre-Trial Conference[53] was issued by the Court, resetting the case for pre-trial conference on August 13, 2015.

Aggrieved by the Resolution dated May 25, 2015, petitioner filed a Motion for Reconsideration on June 17, 2015. Petitioner raised the following arguments: the issues raised in the Petition for Review must first be addressed and resolved before respondent is allowed to execute and implement the FDDA; the FDDA has not yet become final, executory and demandable by reason of the filing of the Petition for Review; based on the 2014 Financial Statements, due to its deteriorated cash position, it would not be able to pay the alleged deficiency taxes for the taxable year 2008; it cannot rely on its Accounts Receivables to fund its business operations; and the implementation of the FDDA will lead into an absurd situation as it will pre-empt the Court from properly adjudicating on the merits of the issues raised in the petition.

On July 23, 2015, respondent filed his Comment (Re: Motion for Reconsideration dated 16 June 2015)[54], repleading the allegations and defenses in his Comment and/or Opposition filed on December 22, 2014.

On October 5, 2015, the Court issued a Resolution[55] denying petitioner's Motion for Reconsideration filed on June 17, 2015. Despite the presentation of the 2014 Financial Statements and statements made its witness, Ms. Erlinda F. Limjap, by way of Judicial Affidavit in lieu of direct examination, the Court maintains that petitioner still failed to sufficiently convince the Court that it will be jeopardized with the collection of the alleged deficiency taxes. In the same Resolution, the Court reset the Pre-Trial Conference on January 28, 2016.

Petitioner filed a Motion for Clarification and Reconsideration on October 23, 2015 with regard to the Resolution dated October 5, 2015. Petitioner seeks guidance and clarification on the proper treatment of the FDDA in relation to the unresolved Petition for Review and requests for reconsideration of the Court's Resolution.

In his Comment (Re: Motion for Clarification and Reconsideration dated 16 June 2015) filed on November 6, 2015, respondent argues

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[53] Docket, Vol. I, pp. 396-397
[54] Docket, Vol. I, pp. 444-450
[55] Docket, Vol. I, pp. 463-467

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that no second motion for reconsideration is allowed. He further maintains that petitioner is not entitled to suspension of taxes and that collection may still proceed even on appeal and even if the FDDA is not yet final and executory. He avers that the motion for clarification is not a proper remedy as the Resolution clearly shows why the motion for reconsideration was denied.

On November 27, 2015, petitioner filed a Motion for Leave to File the Attached Reply to the Respondent's Comment (Re: Motion for Clarification and Reconsideration dated 16 June 2015)[56]. In its reply, petitioner contends that the rule on "no second motion for reconsideration is allowed" only applies to final orders and/or resolutions and not to interlocutory orders such as the Resolution dated October 5, 2015. It insists that the issues raised in the Petition for Review should first be addressed and resolved as they have a direct bearing on any order that the Court will issue regarding the FDDA. On the argument that the motion for clarification is not a proper remedy, petitioner claims that a clarification and guidance is needed on the prematurity and absurdity for the respondent to execute and implement the FDDA prior to the promulgation and finality of the Court's judgment on the Petition for Review.

In resolving petitioner's Motion for Clarification and Reconsideration, the Court issued a Resolution[57] dated January 25, 2016 denying the said motion on the basis that respondent may proceed with the collection of taxes even pending appeal considering that no appeal taken to the Court shall suspend the payment, levy, distraint, or sale of any property of the taxpayer for the satisfaction of the tax liability, except when the collection of such tax may jeopardize the interest of the Government or the taxpayer, which the party who filed the motion to suspend must prove. The Court maintains that petitioner failed to convince the Court that such collection will jeopardize petitioner's interest or that of the Government.

In compliance with the Notice of Pre-Trial Conference, petitioner's Pre-Trial Brief[58] was filed on April 13, 2015 while respondent's Pre-Trial Brief[59] was filed on January 22, 2016.

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[56] Docket, vol. I, pp. 497-507
[57] Docket, Vol. I, pp. 542-546
[58] Docket, Vol. I, pp. 274-283
[59] Docket, Vol. I, pp. 510-515

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The Pre-trial conference proceeded.[60] Thereafter, the parties submitted their Joint Stipulation of Facts and Issues[61] on March 2, 2016. Subsequently, pursuant to the Court's Order[62] dated March 8, 2016, the parties filed a Supplemental Joint Stipulation of Facts and Issues[63] on March 18, 2016 to include the list of documentary exhibits to be presented. Accordingly, the Court issued a Pre-Trial Order[64] on May 2, 2016 and the pre-trial was deemed terminated.

During the trial, petitioner presented the testimonies of the following witnesses by way of Judicial Affidavits in lieu of direct examination: Ms. Shirley B. Enobal[65], Ms. Ruby Lordan[66] and Ms. Erlinda F. Limjap[67].

The Formal Offer of Evidence[68] for the Petitioner was filed on November 7, 2016. Exhibits "P-1", "P-2", "P-3", "P-4 to P-4-1", "P-8", "P-9", "P-9-1", "P-10", "P-11", "P-12", "P-13 to P-13-1", "P-18", "P-19", "P-19-1", "P-20", "P-20-1", "P-21", "P-21-1", "P-22", "P-22-1", "P-23", "P-23-1", "P-24", "P-24-1", "P-25", "P-25-1", "P-26", "P-26-1", "P-27", "P-27-1", "P-28", "P-28-1", "P-29", "P-29-1", "P-30", "P-30-1", "P-32", "P-32-1", "P-33", "P-33-1", "P-34", "P-34-1", "P-35", "P-35-1", "P-36", "P-36-1", "P-37", "P-37-1", "P-38", "P-38-1", "P-39", "P-39-1","P-40","P-40-1","P-41","P-41-1","P-42","P-42-1","P-43","P-43-1", "P-44", "P-44-1", "P-45", "P-45-1", "P-46", "P-46-1", "P-47", "P-47-1", "P-48", "P-49", "P-50 to P-50-1", and "P-51 to P-51-1" were admitted while Exhibits "P-14 to P-14-1", "P-15", "P-16", "P-16-1" and "P-17" were denied by the Court pursuant to the Resolution[69] dated July 13, 2017.

On July 28, 2017, petitioner filed a Motion for Partial Reconsideration (of the Resolution dated July 13, 2017)[70] seeking reconsideration of the denied exhibits and praying that it be allowed

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[60] Minutes of the Hearing dated January 28, 2016, Docket, Vol. II, pp. 550-551
[61] Docket, Vol. II, pp. 595-610
[62] Docket, Vol. II, p. 605
[63] Docket, Vol. II, pp. 606-610
[64] Docket, Vol. II, pp. 632-642
[65] Exhibit "P-13", Judicial Affidavit of Shirley Enobal dated April 8, 2015, Docket, Vol. I, pp. 240-249
[66] Exhibit "P-4", Judicial Affidavit of Ms. Ruby D. Lordan dated February 20, 2015, Docket, Vol. I, pp. 133-137; Exhibit "P-50", Amended Supplemental Judicial Affidavit of Ms. Lordan dated June 15, 2016, Docket, Vol. II, pp. 666-672
[67] Exhibit "P-51", Judicial Affidavit of Ms. Erlinda F. Limjap dated June 19, 2015, Docket, Vol. I, pp. 418-422
[68] Docket, Vol. II, pp. 790-811
[69] Docket, Vol. II, pp. 312, 386
[70] Docket, Vol. II, pp. 1099-1101

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to present secondary evidence. In a Resolution[71] dated October 23, 2017, the Court allowed the presentation of secondary evidence to prove the execution, loss and contents of the denied exhibits "P-15", "P-16", "P-16-1" and "P-17".

On March 6, 2018, petitioner presented its witness, Ms. Shirley Enobal[72], who testified by way of Judicial Affidavit in lieu of direct examination in support of petitioner's submission of secondary evidence. Thereafter, on March 16, 2018, petitioner submitted its FOE[73] in support of its secondary evidence.

In a Resolution[74] dated May 30, 2018, the Court granted petitioner's Motion for Partial Reconsideration and admitted Exhibits "P-15", "P-16", "P-16-1", "P-17", "P-52" and "P-52-1".

The admitted documentary exhibits for the petitioner are as follows:

| **Exhibit:** | **Description:** |
|---|---|
| **P-1** | Final Decision on Disputed Assessment, dated 25 September 2014 |
| **P-2** | Petition for Review with Urgent Motion to Suspend Collection of Taxes, dated 03 December 2014 |
| **P-3** | 2013 Audited Financial Statements of the Petitioner |
| **P-4 to P-4-1** | Judicial Affidavit of Ruby D. Lordan and Signature of Ruby Lordan |
| **P-8** | Letter of Authority No. LOA 2008-00236926, dated 29 December 2009 with the First Request for Presentation of Records |
| **P-9** | Second Request for Presentation of Records |
| **P-9-1** | Final Request for Presentation of Records |
| **P-10** | Notice of Informal Conference |
| **P-11** | Official Receipts and Payment Forms |
| **P-12** | Amended Preliminary Assessment Notice |
| **P-13 to P-13-1** | Judicial Affidavit of Shirly Enobal and Signature of Shirley Enobal |
| **P-15** | 2008 Income Statement and Supporting Receipts |
| **P-16** | Inventory of the unit by the Barangay Chairman |
| **P-16-1** | Write-off Ledgers |
| **P-17** | Receipts of Dormitory Unit Rentals |

[71] Docket, Vol. II, pp. 1122-1125
[72] Exhibit "P-52", Judicial Affidavit of Ms. Shirley Enobal dated March 1, 2018, Docket, Vol. II, pp. 1130-1136
[73] Docket, Vol. II, pp. 1149-1150
[74] Docket, Vol. II, pp. 1157-1160

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|---|---|
| **P-18** | Quarterly Income Tax Return (2008 3rd Quarter with Php3,000.00) Overpayment |
| **P-19** | Revenue Official Receipt for payment of 2nd Quarter Income Tax amounting to Php12,417.37 |
| **P-19-1** | Quarterly Income Tax Return (2008 2nd Quarter) with Php12,417.37 Total Amount Payable |
| **P-20** | Revenue Official Receipt for payment of 1st Quarter Income Tax amounting o Php27,940.73 |
| **P-20-1** | Quarterly Income Tax Return (2008 1st Quarter) with Php27,940.73 Total Amount Payable |
| **P-21** | BIR Payment Deposit Slip for payment of Quarterly VAT (2008 4th Quarter) amounting to Ph95,784.24 |
| **P-21-1** | Quarterly VAT Return (2008 4th Quarter) with Php95,784.24 Total Amount Payable |
| **P-22** | BIR Payment Deposit Slip for payment of Monthly VAT (2008 November) amounting to Php103,011.86 |
| **P-22-1** | Monthly Value-Added Tax Declaration (2008 November) with Php103,011.86 Total Amount Payable |
| **P-23** | BIR Payment Deposit Slip for payment of Monthly VAT (2008 October) amounting to Php41,797.80 |
| **P-23-1** | Monthly Value-Added Tax Declaration (2008 October) with Php41,797.80 Total Amount Payable |
| **P-24** | BIR Payment Deposit Slip for payment of Quarterly VAT (2008 3rd Quarter) amounting to Php77,380.18 |
| **P-24-1** | Quarterly VAT Tax Return (2008 3rd Quarter) with Php77,380.18 Total Amount Payable |
| **P-25** | BIR Payment Deposit Slip for payment of Monthly VAT(2008 August) amounting to Php61,996.54 |
| **P-25-1** | Monthly Value-Added Tax Declaration (2008 August) with Php61,996.54 Total Amount Payable |
| **P-26** | BIR Payment Deposit Slip for payment of Monthly VAT (2008 July) amounting to Php52,138.70 |
| **P-26-1** | Monthly Value-Added Tax Declaration (2008 July) with Php52,138.70 Total Amount Payable |
| **P-27** | BIR Payment Deposit Slip for payment of Quarterly VAT (2008 June) amounting to Php132,844.77 |
| **P-27-1** | Quarterly VAT Tax Return (2008 2nd Quarter) with Php132,844.77 Total Amount Payable |
| **P-28** | BIR Payment Deposit Slip for payment of Monthly VAT (2008 May) amounting to Php34,293.32 |
| **P-28-1** | Monthly Value-Added Tax Declaration (2008 May) with Php34,293.32 Total Amount Payalbe |
| **P-29** | BIR Payment Deposit Slip for payment of Monthly VAT (2008 April) amounting to Php31,125.09 |

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|---|---|
| **P-29-1** | Monthly Value-Added Tax Declaration (2008 April) with Php31,125.09 Total Amount Payable |
| **P-30** | BIR Payment Deposit Slip for payment of Quarterly VAT (2008 1st Quarter) amounting to Php64,623.70 |
| **P-30-1** | Quarterly Value-Added Tax Return (2008 1st Quarter) with Php64,623.70 Total Amount Payable |
| **P-31** | BIR Payment Deposit Slip for payment of Monthly VAT (2008 February) amounting to Php53,822.20 |
| **P-31-1** | Monthly Value-Added Tax Declaration (2008 February) with Php53,822.20 Total Amount Payable |
| **P-32** | BIR Payment Deposit Slip for payment of Monthly VAT (2008 January) amounting to Php63,648.08 |
| **P-32-1** | Monthly Value-Added Tax Declaration (2008 January) with Php63,648.08 Total Amount Payable |
| **P-33** | BIR Payment Deposit Slip for payment of Income Tax Withheld on Compensation (2008 December) amounting to P5,298.97 |
| **P-33-1** | Monthly Remittance return of Income Taxes Withheld on Compensation (2008 December) with Php5,298.97 Total Amount Payable |
| **P-34** | BIR Payment Deposit Slip for payment of Income Tax Withheld on Compensation (2008 November) amounting to P5,961.54 |
| **P-34-1** | Monthly Remittance return of Income Taxes Withheld on Compensation (2008 November) with Php5,961.54 Total Amount Payable |
| **P-35** | BIR Payment Deposit Slip for payment of Income Tax Withheld on Compensation (2008 October) amounting to Php8,305.34 |
| **P-35-1** | Monthly Remittance return of Income Tax Withheld on Compensation (2008 October) with Php8,305.34 Total Amount Still Due |
| **P-36** | BIR Payment Deposit Slip for payment of Income Tax Withheld on Compensation (2008 September) amounting to Php16,065.45 |
| **P-36-1** | Monthly Remittance return on Income Taxes Withheld on Compensation (2008 September) with Php16,065.45 Total Amount Still Due |
| **P-37** | BIR Payment Deposit Slip for payment of Income Tax Withheld on Compensation (2008 August) amounting to Php15,206.76 |
| **P-37-1** | Monthly Remittance return of Income Taxes Withheld on Compensation (2008 August) with Php15,206.76 Total Amount Still Due |
| **P-38** | BIR Payment Deposit Slip for payment of Income Tax Withheld on Compensation (2008 July) amounting to Php11,6211.29 |

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|---|---|
| **P-38-1** | Monthly Remittance return of Income Taxes Withheld on compensation (2008 July) with Php11,621.29 Total Amount Still Due |
| **P-39** | BIR Payment Deposit Slip for payment of Income Tax Withheld on Compensation (2008 June) amounting to Php3,411.19 |
| **P-39-1** | Monthly Remittance return of Income Taxes Withheld on Compensation (2008 June) with Php3,411.19 Total Amount Still Due |
| **P-40** | BIR Payment Deposit Slip for payment of Income Tax Withheld on Compensation (2008 May) amounting to Php2,987.44 |
| **P-40-1** | Monthly Remittance return of Income Taxes Withheld on Compensation (2008 May) with Php2,987.44 Total Amount Still Due |
| **P-41** | BIR Payment Deposit Slip for payment of Income Tax Withheld on Compensation (2008 April) amounting to Php3,565.48 |
| **P-41-1** | Monthly Remittance return of Income Taxes Withheld on Compensation (2008 April) with Php3,565/48 Total Amount Still Due |
| **P-42** | BIR Payment Deposit Slip for payment of Income Tax Withheld on Compensation (2008 March) amounting to Php2,665.39 |
| **P-42-1** | Monthly Remittance Return of Income Taxes Withheld on Compensation (2008 March) with Php2,665.39 Total Amount Still Due |
| **P-43** | BIR Payment Deposit Slip for payment of Income Tax Withheld on Compensation (2008 July) amounting to Php3,090.72 |
| **P-43-1** | Monthly Remittance return of Income Taxes Withheld on Compensation (2008 July) with Php3,090.72 Total Amount Still Due |
| **P-44** | BIR Payment Deposit Slip for payment of Income Tax Withheld on Compensation (2008 June) amounting to Php12,993.07 |
| **P-44-1** | Monthly Remittance return of Income Taxes Withheld on Compensation (2008 June) with Php12, 993.07 Total Amount Still Due |
| **P-45** | BIR Payment Deposit Slip for payment of Income Tax Withheld on Compensation (2008 May) amounting to Php12,180.48 |
| **P-45-1** | Monthly Remittance return of Income Taxes Withheld on Compensation (2008 May) with Php12,180.48 Total Amount Still Due |
| **P-46** | BIR Payment Deposit Slip for payment of Income Tax Withheld on Compensation (2008 April) amounting to Php13,031.96 |
| **P-46-1** | Monthly Remittance return of Income Taxes Withheld on Compensation (2008 April) amounting to Php13,031.96 |

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| **P-47** | BIR Payment Deposit Slip for payment of Income Tax Withheld on Compensation (2008 March) with Php13,666.66 Total Amount Still Due |
| **P-48** | 1604CF (Annual Information Return of Income Taxes Withheld) Transmittal Form |
| **P-49** | Annual Information Return of Income Taxes Withheld (Compensation and Final Withholding Taxes) 1604-CF |
| **P-50 to P-51-1** | Amended Supplemental Judicial Affidavit of Ruby R. Roldan and her signature above printed name |
| **P-51 to P-51-1** | Judicial Affidavit of Erlinda F. Limjap and her signature above her printed name |
| **P-52** | Judicial Affidavit of Shirley Enobal |
| **P-52-1** | Signature of Shirley Enobal in her Judicial Affidavit |

On the other hand, respondent presented the testimonies of the following witnesses by way of Judicial Affidavits in lieu of direct examination: Revenue Officer Norma Siscar[75] and Revenue Officer Teresita Tibayan[76].[77]

Respondent's Formal Offer of Evidence[78] was filed on July 11, 2018. On October 8, 2018, the Court issued a Resolution[79] admitting Exhibits "R-1", "R-2", "R-3", "R-4", "R-4-A", "R-5", "R-6", "R-7", "R-8", "R-9", "R-10", "R-11", "R-12", "R-13", "R-14", "R-15", "R-16", "R-17", "R-18", "R-19", "R-20", "R-21", "R-22", "R-23", "R-24", "R-25", "R-26", "R-27", "R-28" and "R-29".

Respondent's documentary exhibits are the following:

| Exhibit: | Description: |
|---|---|
| **R-1** | Assignment Slip |
| **R-2** | Reviewer's Audit Sheet with Supporting Documents |
| **R-3** | Preliminary Assessment Notice with Registry Return Card |
| **R-4** | Formal Letter of Demand and the Corresponding Registry Return Card |
| **R-4-A** | Assessment Notices |

[75] Exhibit "R-30", Judicial Affidavit of Revenue Officer Norma Siscar dated January 19, 2016, Docket, Vol. I, pp. 534-539
[76] Exhibit "R-31", Judicial Affidavit of Revenue Officer Teresita Tibayan dated January 13, 2016, Docket, Vol. I, pp. 523-528
[77] Order dated July 5, 2018, Docket, Vol. II, pp. 1162-1163
[78] Docket, Vol. II, pp. 1165-1174
[79] Docket, Vol. II, pp. 1206-1207

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|---|---|
| **R-5** | Letter dated 28 February 2012 |
| **R-6** | Letter dated 19 March 2012 |
| **R-7** | Letter dated 26 March 2012 |
| **R-8** | Memorandum of Assignment |
| **R-9** | Letter dated 25 June 2012 |
| **R-10** | Memorandum of Assignment |
| **R-11** | Letter dated 12 December 2012 |
| **R-12** | Computation Sheet |
| **R-13** | Amended Preliminary Assessment Notice with Attached Registry Receipt |
| **R-14** | Memorandum |
| **R-15** | Letter of Authority |
| **R-16** | First Request for Presentation of Documents |
| **R-17** | Second Request for Presentation of Documents |
| **R-18** | Final Request for Presentation of Documents |
| **R-19** | Recommendation for Issuance of Subpoena Duces Tecum dated 2 November 2010 |
| **R-20** | Letter dated 8 March 2011 |
| **R-21** | Letter dated 30 March 2011 |
| **R-22** | Notice of Informal Conference |
| **R-23** | Schedule of Deficiency Tax TY 2008 |
| **R-24** | Letter dated 20 October 2011 |
| **R-25** | Revenue Officer's Audit Report for Income |
| **R-26** | Revenue Officer's Audit Report for VAT |
| **R-27** | Revenue Officer's Audit Report for Expanded Withholding Tax |
| **R-28** | Revenue Officer's Audit Report for Withholding Tax on Wages |
| **R-29** | Memorandum |

This case was deemed submitted for decision on January 11, 2019[80], considering respondent's Memorandum[81] filed on December 11, 2018 and Memorandum for Petitioner[82] filed on December 17, 2018.

## THE ISSUE

As per the Joint Stipulation of Facts and Issues, the sole issue[83] for the Court's determination is:

Whether or not the Petitioner was denied due process of law, and is liable in the amount of Php769,673.05,

[80] Docket, Vol. II, p. 1256
[81] Docket, Vol. II, pp. 1220-1229
[82] Docket, Vol. II, pp. 1231-1253
[83] Simplification of Issues, JSFI, Docket, Vol. II, p. 597

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Php2,533,203.14, Php12,494.63 and Php42,500.00 representing the alleged deficiency Income Tax, Value-Added Tax (VAT), Expanded Withholding Tax, and Compromise Penalty, or in the aggregate amount of P3,357,870.82 for the taxable year 2008.

## Petitioner's Arguments[84]

Petitioner claims that the FDDA is null and void for having been issued in violation of its right to procedural due process considering that respondent failed to issue a PAN and FAN, and said notices were not received by the petitioner.

Petitioner further argues that the right to issue an assessment has already prescribed considering that respondent failed to issue the PAN and the FAN within the three (3) year prescriptive period.

On the assessment, petitioner argues that there are no factual and legal bases to hold it liable for deficiency Income Tax, VAT and Expanded Withholding Tax. It further claims that it is not liable to compromise penalty as it may not be imposed without its consent.

## Respondent's Counter-Arguments[85]

On the other hand, respondent counters that petitioner was not deprived of its right to due process on the ground that petitioner was given ample opportunity to contest the assessment. He further argues that petitioner even actively participated in the Notice of Informal Conference on May 24, 2011 and was apprised of its tax liabilities via a FLD on January 26, 2012.

Respondent claims that petitioner even had the opportunity to file a protest on the FLD on February 28, 2012 and her authorized representative even granted petitioner's request for reinvestigation and assigned the case to another examiner, twice. Moreover, petitioner admitted that it received an Amended PAN on February 11, 2014 demanding payment for its deficiency taxes for the taxable year 2008.

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[84] Memorandum, Docket, Vol. II, pp. 1231-1253
[85] Memorandum, Docket, Vol. II, pp. 1220-1229

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On the alleged deficiency taxes, respondent contends that petitioner is liable for deficiency income tax, VAT and EWT.

***The Court has jurisdiction over the instant Petition for Review***

The Court shall first determine whether it has jurisdiction over the Petition for Review in relation to the assessment issued by the respondent against the petitioner.

Jurisdiction over the subject matter or nature of an action is fundamental for a court to act on a given controversy. It is conferred only by law and not by the consent or waiver upon a court which, otherwise, would have no jurisdiction over the subject matter of an action. Lack of jurisdiction of the court over an action or the subject matter of an action cannot be cured by the silence, acquiescence, or even by express consent of the parties. If the court has no jurisdiction over the nature of an action, its only jurisdiction is to dismiss the case. The court could not decide the case on the merits.[86]

Section 228 of the National Internal Revenue Code (NIRC) of 1997, as amended, provides:

> **SEC. 228.** ***Protesting of Assessment.*** — When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however,* That a pre-assessment notice shall not be required in the following cases:
>
> 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.
>
> Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to

[86] *Nippon Express (Philippines) Corp. vs. Commissioner of Internal Revenue,* G.R. No. 185666, February 4, 2015.

respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.

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

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

In relation thereto, Section 11 of Republic Act (RA) No. 1125, as amended by Section 9 of RA No. 9282, provides:

**Section 9.** Section 11 of the same Act is hereby amended to read as follows:

"SEC. 11. Who May Appeal; Mode of Appeal; Effect of Appeal. - Any party adversely affected by a decision, ruling or inaction of the Commissioner of Internal Revenue, the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry or the Secretary of Agriculture or the Central Board of Assessment Appeals or the Regional Trial Courts may file an appeal with the CTA within thirty (30) days after the receipt of such decision or ruling or after the expiration of the period fixed by law for action as referred to in Section 7(a)(2) herein.

**"Appeal shall be made by filing a petition for review under a procedure analogous to that**

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> **provided for under Rule 42 of the 1997 Rules of Civil Procedure with the CTA within thirty (30) days from the receipt of the decision or ruling or in the case of inaction as herein provided, from the expiration of the period fixed by law to act thereon**. A Division of the CTA shall hear the appeal: Provided, however, That with respect to decisions or rulings of the Central Board of Assessment Appeals and the Regional Trial Court in the exercise of its appellate jurisdiction appeal shall be made by filing a petition for review under a procedure analogous to that provided for under rule 43 of the 1997 Rules of Civil Procedure with the CTA, which shall hear the case en banc."
>
> xxx xxx xxx
>
> (*Emphasis supplied.*)

Based on the foregoing provisions, petitioner has thirty (30) days either (1) from receipt of denial of the protest or (2) from the lapse of 180-day period fixed by law for the CIR to act upon the protest, within which to file an appeal before this Court.

In this case, petitioner received the FDDA on November 5, 2014. Counting 30 days from November 5, 2014, petitioner had until December 5, 2014 within which to file its appeal before this Court. Petitioner filed the instant petition on December 4, 2014. Hence, the petition was timely filed. Therefore, this Court has jurisdiction to take cognizance of the same pursuant to Section 11 of Republic Act (RA) No. 1125, as amended by Section 9 of RA No. 9282.

***Respondent failed to prove that the PAN was actually received by the petitioner***

Petitioner claims that it was deprived of its right to due process when it did not receive the PAN and FAN. On the other hand, respondent claims that the petitioner was given ample opportunity to contest the assessment and it's right to due process was never violated as it was duly informed to present its side of the controversy.

The Court finds merit in petitioner's argument.

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Under the above-quoted Section 228 of the NIRC of 1997, as amended, it is mandated that the taxpayer shall be informed in writing of the facts and laws on which the assessment is made, otherwise, the assessment is void.

In relation thereto, the same requirement is implemented in Revenue Regulations (RR) No. 12-99, which provides the procedural process with regard to an assessment. We quote the pertinent portions thereof -

> SECTION 3. Due Process Requirement in the Issuance of a Deficiency Tax Assessment. —
>
> 3.1 Mode of procedures in the issuance of a deficiency tax assessment:
>
> xxx xxx xxx
>
> 3.1.2 Preliminary Assessment Notice (PAN). — If after review and evaluation by the Assessment Division or by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, **the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing in detail, the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based** (see illustration in ANNEX A hereof). If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN, he shall be considered in default, in which case, a formal letter of demand and assessment notice shall be caused to be issued by the said Office, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.
>
> 3.1.4 Formal Letter of Demand and Assessment Notice. — The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. **The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations,**

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> **or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void** (see illustration in ANNEX B hereof). The same shall be sent to the taxpayer only by registered mail or by personal delivery. If sent by personal delivery, the taxpayer or his duly authorized representative shall acknowledge receipt thereof in the duplicate copy of the letter of demand, showing the following: (a) His name; (b) signature; (c) designation and authority to act for and in behalf of the taxpayer, if acknowledged received by a person other than the taxpayer himself; and (d) date of receipt thereof. (*Emphasis and underscoring supplied.*)

In the case of *Commissioner of Internal Revenue vs. Pascor Realty and Development Corporation, et. al.*[87], the Supreme Court held that due process requires that the assessment be served and received by the taxpayer, to wit:

> "An assessment contains not only a computation of tax liabilities, but also a demand for payment within a prescribed period. It also signals the time when penalties and interests begin to accrue against the taxpayer. To enable the taxpayer to determine his remedies thereon, **due process requires that it must be served on and received by the taxpayer**. Accordingly, an affidavit, which was executed by revenue officers stating the tax liabilities of a taxpayer and attached to a criminal complaint for tax evasion, cannot be deemed an assessment that can be questioned before the Court of Tax Appeals." (*Emphasis supplied*)

Further, in the case of *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.*[88], the Supreme Court held that failure to send the PAN voids the assessment in violation of Section 228 of the NIRC of 1997, *viz*:

> ". . . it is clear that the sending of a PAN to taxpayer to inform him of the assessment made is but part of the "due process requirement in the issuance of a deficiency

[87] G.R. No. 128315. June 29, 1999
[88] G.R. No. 185371, December 8, 2010

> tax assessment," the absence of which renders nugatory any assessment made by the tax authorities. The use of the word "*shall*" in subsection 3.1.2 describes the mandatory nature of the service of a PAN. The persuasiveness of the right to due process reaches both substantial and procedural rights and the failure of the CIR to strictly comply with the requirements laid down by law and its own rules is a denial of Metro Star's right to due process. **Thus, for its failure to send the PAN stating the facts and the law on which the assessment was made as required by Section 228 of R.A. No. 8424, the assessment made by the CIR is void.**" (*Emphasis supplied.*)

Accordingly, the tax authority is tasked to prove that the assessment notices are received by the taxpayer. Though there is a presumption that a letter duly directed and mailed is received in the regular course of the mail[89], such presumption is a disputable one. When the taxpayer denies receipt of the notice, the burden to prove such receipt shifts to the party favored by the presumption to prove that the mailed letter was indeed received by the addressee, as explained by the Supreme Court in the case of *Republic of the Philippines vs. The Court of Appeals*[90], to wit:

> "We do not agree with petitioner's above contentions. As correctly observed by the respondent court in its appealed decision, **while the contention of petitioner is correct that a mailed letter is deemed received by the addressee in the ordinary course of mail, still this is merely a disputable presumption, subject to controversion, and a direct denial of the receipt thereof shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee.**" (*Emphasis supplied.*)

Moreover, in the case of *Barcelon Roxas Securities, Inc. (now known as UBP Securities, Inc.) vs. Commissioner of Internal Revenue*[91], the Supreme Court, adopting the decision of this Court, held:

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[89] Section 3(v), Rule 131 of the Rules of Court
[90] G.R. No. L-38540, April 30, 1987
[91] G.R. No. 157064, August 7, 2006

"Jurisprudence is replete with cases holding that **if the taxpayer denies ever having received an assessment from the BIR, it is incumbent upon the latter to prove by competent evidence that such notice was indeed received by the addressee. The *onus probandi* was shifted to respondent to prove by contrary evidence that the Petitioner received the assessment in the due course of mail. The Supreme Court has consistently held that while a mailed letter is deemed received by the addressee in the course of mail, this is merely a disputable presumption subject to controversion and a direct denial thereof shifts the burden to the party favored by the presumption to prove that the mailed letter was indeed received by the addressee** *(Republic vs. Court of Appeals, 149 SCRA 351).* Thus as held by the Supreme Court in *Gonzalo P. Nava vs. Commissioner of Internal Revenue, 13 SCRA 104, January 30, 1965:*

> The facts to be proved to raise this presumption are (a) that the letter was properly addressed with postage prepaid, and (b) that it was mailed. Once these facts are proved, the presumption is that the letter was received by the addressee as soon as it could have been transmitted to him in the ordinary course of the mail. But if one of the said facts fails to appear, the presumption does not lie. (VI, Moran, Comments on the Rules of Court, 1963 ed, 56-57 citing *Enriquez vs. Sunlife Assurance of Canada, 41 Phil 269).*

x x x **What is essential to prove the fact of mailing is the registry receipt issued by the Bureau of Posts or the Registry return card which would have been signed by the Petitioner or its authorized representative. And if said documents cannot be located, Respondent at the very least, should have submitted to the Court a certification issued by the Bureau of Posts and any other pertinent document which is executed with the intervention of the Bureau of Posts.** This Court does not put much credence to the self serving documentations

> made by the BIR personnel especially if they are unsupported by substantial evidence establishing the fact of mailing. . .x x x" (*Emphasis supplied*)

The presentation of proof of actual receipt of the assessment by the taxpayer is required in order to establish that the right of the taxpayer to be informed of the assessment has not been violated as provided in Section 228 of the NIRC of 1997, as amended, and Section 3 of Revenue Regulations (RR) No. 12-99.

In view of the aforequoted cases, it is incumbent upon the respondent to prove that the assessment notices were actually received by the taxpayer. Otherwise, the assessment is void.

In the instant case, petitioner denies having received the PAN. Thus, the burden to prove that the said assessment was received by petitioner is shifted to the respondent.

Upon examination of the testimonial and documentary evidence presented by the parties, respondent failed to provide convincing proof that the said assessments were received by the petitioner. A perusal of the registry return receipt card[92] for the PAN would show that the portion where signature of the person who received the notice is blank. As held in the *Barcelon* case, what is essential to prove the fact of mailing is the registry receipt issued by the Bureau of Posts or <u>the Registry return card which would have been signed by the Petitioner or its authorized representative</u>.

Further, the Court notes the contradicting statements of respondent's witness on the mailing of the PAN. Based on the testimony of Revenue Officer Tibayan in her Judicial Affidavit[93], she sent out the PAN to the petitioner on December 22, 2011, quoted as follows:

> Q8: After this case was assigned to you, what did you do?
>
> A: I reviewed the findings of the examiner, the documents transmitted to us, and prepared the

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[92] Exhibit "R-3", BIR Records, p. 184

[93] Exhibit "R-31", Q&A No. 8, Judicial Affidavit of RO Tibayan dated January 13, 2016, Docket, Vol. I, p. 524

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> Reviewer's Audit Sheet. **Afterwards, I sent out the Preliminary Assessment Notice to petitioner on December 22, 2011**. (*Emphasis supplied.*)

However, during cross-examination[94], she testified that she was not the one who mailed the PAN. The pertinent portions of her testimony are as follows:

> Atty. Cobarrubias:
>
> Q. Okay. Were you the one who prepared the Preliminary Assessment Notice . . . (interrupted).
>
> Revenue Officer Tibayan:
>
> A. Yes. I was the one who prepared the Preliminary Assessment Notice, as well as the Formal Letter of Demand when I was still at the Assessment Division.
>
> Atty. Cobarrubias:
>
> Q. **Were you also the one who sent out the Preliminary Assessment Notice and the Formal Demand to the petitioner?**
>
> Revenue Officer Tibayan:
>
> A. **No.**
>
> Atty. Cobarrubias:
>
> Q. **Would you know who is the responsible person in this?**
>
> Revenue Officer Tibayan:
>
> A. **Yes. I believe, it was constructively sent via registered mail.** (*Emphasis supplied.*)

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[94] Transcript of Stenographic Notes (TSN), July 5, 2018, pp. 26-27

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Such contradicting statements of respondent's witness create doubt on whether the PAN was indeed sent to the petitioner. Hence, the statement by Revenue Officer Tibayan that the PAN was sent to the petitioner cannot be given credence.

In view of the foregoing, the fact that the PAN was not received by petitioner is a clear violation of its right to due process, which is contrary to the mandate required under Section 228 of the NIRC. Thus, the assessment notices issued against the petitioner, particularly the PAN, FLD, Amended PAN and FDDA, are void.

***The assessment notices issued against the petitioner is invalid for lack of authority.***

Pursuant to Section 6(A) of the NIRC of 1997, as amended, the Commissioner of Internal Revenue (CIR) is vested with the power to authorize the examination of any taxpayer and the assessment of the correct amount of tax due, to wit:

> "SEC. 6. *Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.*
>
> (A) *Examination of Returns 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." (*Emphasis supplied*)

As provided by the above provision, a valid grant of authority from the CIR or his duly authorized representative is required before a revenue officer conducts an examination or issue an assessment.

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Such grant of authority is in the form of a Letter of Authority (LOA), pursuant to Section 13 of the NIRC of 1997, as amended, which states:

> "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, pursuant to a Letter of Authority 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." (*Emphasis supplied*)

The Supreme Court discussed the importance of the issuance of an LOA in the case of *Commissioner of Internal Revenue vs. Sony Philippines, Inc.* (the *Sony case*).[95] The Supreme Court held:

> "Based on Section 13 of the Tax Code, a Letter of Authority or 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. The very provision of the Tax Code that the CIR relies on is unequivocal with regard to its power to grant authority to examine and assess a taxpayer.
>
> xxx xxx xxx
>
> **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. In the absence of such an authority, the assessment or examination is a nullity**." (*Emphasis supplied*)

[95] G.R. No. 178697, November 17, 2010.

In view of the above *Sony case*, the LOA is a crucial document especially to revenue officers as it grants them the authority to conduct examination or assess the taxpayer. Absence of the LOA would result to the nullity of the examination or assessment.

In this case, a perusal of the records shows that an LOA was issued to petitioner indicating Revenue Officer Norma Siscar and Group Supervisor Elizabeth Abello as the officers who will be conducting the investigation. However, based on the testimonial and documentary evidence presented, the PAN and FAN were issued by Revenue Officer Teresita Tibayan pursuant to an Assignment Slip and Memorandum of Assignment.

Based on her Judicial Affidavit, Revenue Officer Tibayan admitted that the case of petitioner was assigned to her for review and issuance of assessment notices[96], to wit:

> Q5: Are you familiar with the tax account of petitioner JOPAUEN REALTY CORP. for taxable year 2008?
>
> A: Yes. This case was assigned to me for the review and issuance of assessment notices and afterwards, it was again re-assigned to me and my supervisor for continuation of the audit reinvestigation.
>
> **Q6: What is your authority to review and issue the assessment notices of their account?**
>
> **A: An Assignment Slip was issued to me on December 16, 2011 for the review and issuance of assessment notices.**
>
> xxx xxx xxx
>
> Q8: After this case was assigned to you, what did you do?
>
> A: I reviewed the findings of the examiner, the documents transmitted to us, and prepared the Reviewer's Audit Sheet. Afterwards, I sent out the

[96] Exhibit "R-31", Q&A No. 5, 6, 8 and 11, Judicial Affidavit of RO Tibayan dated January 13, 2016, Docket, Vol. I, pp. 524-525

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Preliminary Assessment Notice to petitioner on December 22, 2011.

xxx xxx xxx

Q11: What happened next?

A: After the PAN was issued and no reply was received from petitioner, we subsequently issued the Formal Letter of Demand together with the Final Assessment Notices on January 12, 2012. (*Emphasis supplied.*)

During the hearing on July 5, 2018, Revenue Officer Tibayan confirmed that her authority to conduct an investigation was not based on a Letter of Authority, quoted as follows[97]:

JUSTICE GRULLA:

Question from the Court. All right. Just a few questions.

**Q. Madam Witness, you said that as Revenue Officer you are tasked to conduct an audit investigation of cases assigned to you. That's in answer to Question No. 24. Now, in Question 6, you were asked, what is your authority to review and issue the assignment notices? You said that an assignment slip was issued to me on December 16, 2011. Was that your authority to conduct the investigation in this case?**

REVENUE OFFICER TIBAYAN:

**A. Your Honors, this assignment slip was assigned to me, when I was still at the Assessment Division when I was doing the review of the case for issuance of PAN and FAN.**

JUSTICE GRULLA:

[97] TSN, July 5, 2018, pp. 30-32

**So, was there any Letter of Authority issued in this particular case?**

REVENUE OFFICER TIBAYAN:

**A. Yes. Actually, it is not a Letter of Authority, it is a Memorandum of Assignment when I was at the District Office.**

JUSTICE GRULLA:

So, it is just a Memorandum of Assignment?

REVENUE OFFICER TIBAYAN:

A. Yes.

JUSTICE GRULLA:

And his name was not under in the Memorandum of Assignment?

REVENUE OFFICER TIBAYAN:

A. It was under my name

JUSTICE GRULLA:

Under your name?

REVENUE OFFICER TIBAYAN:

A. Yes, Page 228, Memorandum of Assignment No. 54a-1212-00075

JUSTICE GRULLA:

**So, Letter of Authority was not issued?**

REVENUE OFFICER TIBAYAN:

**A. There was none.**

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In view of the foregoing, applying the Supreme Court's ruling in the *Sony case*, the revenue officer who conducted the investigation and issued the assessment notices has no authority to examine petitioner's books and other accounting records or issue an assessment against the petitioner. Further, it is noted that the Memorandum of Assignment[98] was issued by Revenue District Officer Honorata S. Aguilar. Hence, the deficiency tax assessment issued by the respondent against the petitioner is void for lack of authority.

Considering that the assessment is void for violation of due process and lack of authority, other issues raised shall no longer be discussed.

**WHEREFORE**, premises considered, the Petition for Review filed by petitioner Jopauen Realty Corporation is hereby **GRANTED**. Accordingly, the assessment notices issued by respondent Commissioner of Internal Revenue against the petitioner for the taxable year 2008, particularly, the Preliminary Assessment Notice dated December 22, 2011, Formal Letter of Demand dated January 12, 2012, Amended Preliminary Assessment Notice received by petitioner on February 10, 2014 and Final Decision on Disputed Assessment dated September 25, 2014 are **CANCELLED** and **SET ASIDE**.

**SO ORDERED.**

Cielito N. Mindaro-Grulla
**CIELITO N. MINDARO-GRULLA**
Associate Justice

WE CONCUR:

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

**JEAN MARIE A. BACORRO-VILLENA**
Associate Justice

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[98] Exhibit "R-10", BIR Records, p. 228.

## **ATTESTATION**

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

Juanito C. Castañeda, Jr.
**JUANITO C. CASTAÑEDA, JR.**
Associate Justice
2nd Division Chairperson

## **CERTIFICATION**

Pursuant to Section 13, Article VIII of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

**ROMAN G. DEL ROSARIO**
Presiding Justice