REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB No. 662
(CTA Case No. 6606)

Members:

-versus-

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

UNITED SALVAGE AND TOWAGE (PHILS.),INC.,
Respondent.

Promulgated:
JUN 27 2011 3:10pm

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DECISION

CASTAÑEDA, JR., J.:

This Petition for Review assails the Decision dated March 12, 2010 and the Resolution dated July 15, 2010, both issued by the Court's Special First Division in the case entitled "United Salvage and Towage (Phils.) Inc. -versus- Commissioner of Internal Revenue" docketed as CTA Case No. 6606. The Decision dated March 12, 2010 cancelled Assessment Notice No. 25-1-00546-92 for deficiency Expanded Withholding Tax and Assessment Notice No. 25-1-

000545-92 for deficiency Withholding Tax on Compensation; while the Resolution dated July 15, 2010 denied the Commissioner of Internal Revenue's Motion for Reconsideration.

THE FACTS

The Commissioner of Internal Revenue ("Commissioner") is a public official tasked to decide disputed assessments, refund of erroneously or excessively paid internal revenue taxes, fees or other charges, penalties, or other matters arising under the National Internal Revenue Code ("NIRC"). United Salvage and Towage (Phils.), Inc., ("USTP") on the other hand, is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines.[1]

The Commissioner through BIR officials issued Demand Letters with attached Assessment Notices for various taxes, specifically for Withholding Tax on Compensation (WTC) and Expanded Withholding Tax (EWT) for the taxable years 1992, 1994 and 1998, detailed as follows:

Assessment Notice No.	Tax Covered	Period	Amount
25-1-000545-92	WTC	1992	P50,429.18
25-1-000546-92	EWT	1992	P14,079.45
034-14-000029-94	EWT	1994	P48,461.76
34-1-000080-98	EWT	1998	P22,437.01[2]

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[1] CTA Case No. 6606, p. 146.
[2] CTA Case No. 6606, pp. 147-148.

On January 29, 1998 and October 24, 2001, USTP filed administrative protests against the 1994 and 1998 EWT assessments, respectively.[3]

On February 21, 2003, USTP appealed by way of a Petition for Review before the Court in Division. USTP alleged among others that a) the Notices of Assessment are bereft of any facts, law, rules and regulations or jurisprudence; thus, the assessments are void[4] and the right of the government to assess and collect deficiency taxes from it has prescribed on account of the failure to issue a valid notice of assessment within the applicable period.[5]

During the pendency of the proceedings, USTP moved to withdraw the Petition because it availed of the benefits of the Tax Amnesty Program under Republic Act (R.A.) No. 9480. Being a tax amnesty compliant applicant, the Court in Division partially granted the Motion to Withdraw and declared the issues on income tax, VAT and documentary stamp tax deficiencies closed and terminated in accordance with the Supreme Court's pronouncement in *Philippine Banking Corporation v. Commissioner of Internal Revenue*.[6]

After the parties presented their testimonial and documentary evidence, the case was submitted for decision. ge

[3] *Ibid.*
[4] Docket, CTA Case No. 6606, p.10.
[5] Docket, CTA Case No. 6606, p.13.
[6] G.R. No. 170574, January 30, 2009, 577 SCRA 366 and see Docket, CTA Case No. 6606, pp. 929-931.

In ruling for USTP, the Court in Division cancelled Assessment Notice No. 25-1-00546-92 and Assessment Notice No. 25-1-000545-92 as declared in the Decision dated March 12, 2010, the dispositive portion of which provides:

> WHEREFORE, the instant Petition for Review is hereby **GRANTED**. Accordingly, Assessment Notice No. 25-1-00546-92 dated January 9, 1996 for deficiency Expanded Withholding Tax and Assessment Notice No. 25-1-000545 dated January 9, 1996 for deficiency withholding tax on compensation are hereby **CANCELLED**.
>
> **SO ORDERED.**[7]

Dissatisfied, the Commissioner moved to reconsider the Decision dated March 12, 2010; however in the Resolution dated July 15, 2010, the Court in Division denied the same for lack of merit.[8]

THE ISSUES

Unfazed, the Commissioner as petitioner appealed to the Court *En Banc* raising the following grounds:

> I. THE COURT OF TAX APPEALS IS NOT GOVERNED STRICTLY BY THE TECHNICAL RULES OF EVIDENCE, AND THE PETITIONER'S FAILURE TO FORMALLY OFFER PRELIMINARY ASSESSMENT NOTICES FOR TAXABLE YEARS 1994 AND 1998, THROUGH OVERSIGHT, IS NOT A VALID GROUND TO EXPUNGE THEM OUTRIGHT AS EVIDENCE CONSIDERING THAT THE BIR RECORDS FOR 1994 AND 1998 WERE ALREADY FORWARDED BY THE PETITIONER TO THE COURT OF TAX APPEALS FOR THEIR SCRUTINY IN THE EXERCISE OF JUDICIAL DISCRETION.

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[7] Rollo, p. 33.
[8] Rollo, pp.47- 49.

> II. THE COURT OF TAX APPEALS COMMITTED A REVERSIBLE ERROR WHEN IT DECLARED THAT THE EXPANDED WITHHOLDING TAX ASSESSMENTS ISSUED BY PETITIONER AGAINST THE RESPONDENT FOR TAXABLE YEARS 1994 AND 1998 WERE WITHOUT ANY FACTUAL AND LEGAL BASIS.
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> III. THE COURT OF TAX APPEALS COMMITTED A REVERSIBLE ERROR WHEN IT DECLARED THAT THE PETITIONER'S RIGHT TO COLLECT THE EXPANDED WITHHOLDING TAX FOR TAXABLE YEAR 1992 HAS ALREADY LAPSED.[9]

In the Resolution dated January 10, 2011, the Court gave due course to the Petition; noted USTP's failure to file Comment and ordered the parties to file their Memoranda within a period of thirty (30) days.[10]

The Commissioner filed her Memorandum in compliance with the Court's Resolution dated January 10, 2011.[11]

On March 16, 2011, the Court declared the case submitted for Decision.[12]

THE COURT'S RULING

1994 AND 1998 PANs FOR EWT DEFICIENCIES ARE INADMISSIBLE. ge

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[9] Rollo, p. 8
[10] Rollo, p. 118.
[11] Rollo, p. 120-133.
[12] Rollo, p. 143.

The Commissioner alleges that although the preliminary assessment notices of EWT for taxable years 1994 and 1998 were not formally offered, their existence and due execution were attested by witnesses Ruleo Badilles, Carmelita Lynne de Guzman, Susan Salcedo De Castro and Edna A. Ortalla. While these documents were not marked as exhibits, their existence and value were properly established. Moreover, BIR records for taxable years 1994 and 1998 were forwarded by the Commissioner to the Court of Tax Appeals. Technicalities should not defeat substantive rights of parties. It bears stressing that the absence of preliminary assessment notice does not affect the validity of the formal assessment notice duly issued.

We disagree.

Evidence not formally offered is inadmissible pursuant to Section 34, Rule 132 of the Rules of Court, stating:

> SEC. 34. *Offer of Evidence.* – The Court shall consider no evidence which has not been formally offered. xxx

In *Dizon v. Court of Tax Appeals*[13], the Supreme Court emphasized the importance of formal offer of evidence and explained why BIR records not formally offered are devoid of any evidentiary value as follows:

> Under Section 8 of RA 1125, the CTA is categorically described as a court of record. As cases filed before it are litigated *de novo*, party-

[13] G.R. No. 140944, April 30, 2008, 553 SCRA 111.

> litigants shall prove every minute aspect of their cases. Indubitably, no evidentiary value can be given the pieces of evidence submitted by the BIR, as the rules on documentary evidence require that these documents must be formally offered before the CTA. x x x
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> x x x x
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> x x x the presentation of the BIR's evidence is not a mere procedural technicality which may be disregarded considering that it is the only means by which the CTA may ascertain and verify the truth of BIR's claims against the Estate. The BIR's failure to formally offer these pieces of evidence, despite CTA's directives, is fatal to its cause. Such failure is aggravated by the fact that not even a single reason was advanced by the BIR to justify such fatal omission. This, we take against the BIR.
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> xxx xxx xxx in *Heirs of Pedro Pasag v. Parocha:*
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> ' a formal offer is necessary because judges are mandated to rest their findings of facts and their judgment only and strictly upon the evidence offered by the parties at the trial. Its function is to enable the trial judge to know the purpose or purposes for which the proponent is presenting the evidence and object to its admissibility. Moreover, it facilitates review as the appellate court will not be required to review documents not previously scrutinized by the trial court. xxx[14]

However, in *Mato Vda de Oñate v. Court of Appeals*[15], evidence not formally offered may be admitted and considered by the Court as an exception to the general rule under Section 34, Rule 132 of the Rules of Court upon compliance with the following requisites, namely:

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[14] *Ibid.*

[15] G.R. No. 116149, November 23, 1995, 250 SCRA 283. See *Dizon v. Court of Tax Appeals, supra.*

> First, evidence must have been duly identified by testimony duly recorded and, second, the same must have been incorporated in the records of the case.[16]

In *Ramos v. Dizon*[17], exhibits marked at the pre-trial proceedings are deemed incorporated in the records of the case.[18]

In the instant case, the 1994 and 1998 PANs for EWT deficiencies were not formally offered before the Court in Division. The same documents were not even duly identified by testimony and were not incorporated in the records of the case. Thus, these PANs are inadmissible and cannot be given evidentiary weight by the Court against USTP.

THE 1998 EWT FAN IS SUPPORTED BY FACTUAL AND LEGAL BASES; 1994 EWT ASSESSMENT VIOLATES SEC. 228 OF THE 1997 NIRC.

The Commissioner argues that when the FANs for taxable years 1994 and 1998 were issued to USTP on January 12, 1998 and January 19, 1998, respectively, Revenue Regulations ("RR") No. 12-85 was duly applied. Thus, the failure to reproduce the itemized factual findings found in the PAN would not invalidate the assessment because these were discussed by witnesses Ruleo Badilles and Carmelita Lynne de Guzman. By scrutinizing the detailed

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[16] *Ibid.*
[17] *Ramos v. Spouses Dizon,* G.R. No. 137247, August 07, 2006, 498 SCRA 17.
[18] *Vda. de Oñate v. Court of Appeals, supra* note 15.

computation of USTP's tax liability as shown in the PAN, there was substantial compliance of due process, the right of the taxpayer to ascertain the factual and legal bases of the assessment.

The 1998 assessment also contains factual and legal bases. The fact that USTP erroneously cited RR 12-85, instead of RR 12-99 would not invalidate substantial compliance of Section 228 of the NIRC.

Tax assessments are presumed correct and made in good faith and the taxpayer has the burden to prove otherwise.

The Commissioner's contention is partly correct.

The 1997 NIRC which took effect on January 1, 1998 requires "the taxpayer shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void."[19] The old tax code merely imposes the act of notifying the taxpayer of the Commissioner's findings.

The date of issuance of the notice of assessment determines which law applies- the 1997 NIRC or the old Tax Code. The case of *Commissioner of Internal Revenue v. Bank of Philippine Islands*[20] is instructive:

[19] Section 228.
[20] G.R. No. 134062, April 17, 2007, 521 SCRA 373, 382 citing *Commissioner of Internal Revenue v. Reyes*, G.R. Nos. 159694 and 163581, January 27, 2006, 480 SCRA 382.

> In merely notifying BPI of his findings, the CIR relied on the provisions of the former Section 270 prior to its amendment by RA 8424 (also known as the Tax Reform Act of 1997). In *CIR v. Reyes*, we held that:
>
> In the present case, Reyes was not informed in writing of the law and the facts on which the assessment of estate taxes had been made. She was merely notified of the findings by the CIR, who had simply relied upon the provisions of former Section 229 prior to its amendment by [RA] 8424, otherwise known as the Tax Reform Act of 1997.
>
> First, RA 8424 has already amended the provision of Section 229 on protesting an assessment. **The old requirement of merely notifying the taxpayer of the CIR's findings was changed in 1998** to *informing* the taxpayer of not only the law, but also of the facts on which an assessment would be made; otherwise, the assessment itself would be invalid.
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> **It was on February 12, 1998, that a preliminary assessment notice was issued against the estate. On April 22, 1998, the final estate tax assessment notice, as well as demand letter, was also issued. During those dates, RA 8424 was already in effect. The notice required under the old law was no longer sufficient under the new law.** (Emphasis Ours.)[21]

In the instant case, the 1997 NIRC covers the 1994 and 1998 EWT FANs because these were issued on January 19, 1998[22] and September 21, 2001[23], respectively, at the time of the effectivity of the 1997 NIRC. Clearly, the assessments are governed by this law.

A careful comparison of the Commissioner's Demand Letters with EWT FANs for taxable years 1994 and 1998 read:

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[21] *Ibid.*
[22] Docket, CTA Case No. 6606, Exhibit 23, pp. 596 & 688.
[23] Docket, CTA Case No. 6606, Exhibit 58, pp. 649 & 688.

1994 EWT

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Gentlemen/Sir/Madam:

Please be informed that upon review of the report of investigation covering your business tax return/s for the calendar/fiscal year/s ending 1994, there has been found due from you the total amount of P 48,461.76 representing deficiency EWT tax/es, including increments thereon, details of which are shown hereunder:

Taxable Sale/Receipt	____	
________% tax due thereon	____	
Less: Allowable tax credits/taxes Already paid	____	
Deficiency tax due	21,230.88	
Add: 25% Surcharge	5,307.72	248
20% Interest per annum from_______ to 1-19-98	15,923.16	249
Compromise penalty for late payment/ late/filing	6,000.00	254
TOTAL AMOUNT DUE & COLLECTIBLE	**48,461.76**[24]	
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1998 EWT

Gentlemen/Sir/Madam:

Please be informed that upon review of the report of investigation covering your income tax return/s for the calendar/fiscal year/s ending 1998, there has been found due from you the total amount of P 22,437.01 representing deficiency EWT tax/es, including increments thereon, details of which are shown hereunder:

	Sec. 57 B			
Sulu Venture:			P	
1.Hired Services	P 79,162.87	P 791.63		
2.Rental	122,553.40	P 6,127.67		
3.Class survey	374,540.03	3,745.40	P	10,664.70
Phil Sea				
1. Class Survey (P383,208.61 x 1%)				3,832.09
Expanded withholding tax due			P	14,496.79
Less: Tax paid				-------
Deficiency EWT			P	14,496.79
Add: 25% surcharge				
20% interest per annum from ___ to 10-5-01				7,940.22
Compromise penalty for late payment/late filing				____
TOTAL AMOUNT DUE & COLLECTIBLE				**P 22,437.01**[25]

[24] Docket, CTA Case No. 6606,p. 596.

[25] Docket, CTA Case No. 6606,p.649.

The 1994 EWT FAN disclosed EWT's tax liability of P48,461.76 not sufficiently supported by factual and legal bases. The Commissioner through Chief of Assessment Division, Ms. Erlinda A. Simple failed to provide a detailed computation how she was able to arrive at the principal amount of P21,230.88. Only the resulting interest, surcharge and penalty were anchored with legal basis. The Commissioner should have at least attached a detailed notice of discrepancy or stated in the formal letter of demand an explanation why the amount of P48,461.76 is collectible against USTP. Clearly, the Court in Division aptly concluded the 1994 EWT FAN void in violation of Section 228 of the 1997 NIRC and *BPI* case.

On the other hand, the 1998 EWT FAN reflected the following: a detailed factual account why the basic EWT is P14,496.79 and the legal basis, Section 57 B of the 1997 NIRC supporting findings of EWT liability of P22,437.01. Thus, the EWT FAN for 1998 is duly issued in accordance with the law.

THE 1992 EWT ASSESSMENT HAS PRESCRIBED.

The Commissioner asserts that in the event the taxpayer's request for reinvestigation is granted, the five year period to collect internal revenue taxes is interrupted. Once the assessment has been reconsidered, the period for tax collection should begin to run from the date of the reconsidered or modified assessment.

In the instant case, USTP requested for an investigation on March 14, 1997 which was granted by the Commissioner on January 22, 2001. The FAN and demand letter on EWT on compensation and services were all issued on January 9, 1996. Thus, the 5 year prescriptive period to collect these taxes commenced on the date of issuance of the FAN, January 9, 1996, but the period was interrupted when USTP filed its request for reinvestigation on March 14, 1997.

USTP's act of elevating its protest to the Court of Tax Appeals has fortified the continuing interruption of the prescriptive period to collect taxes under Section 223 of the NIRC. Thus, this Court has committed a reversible error when it declared that the Commissioner's right to collect EWT for taxable year 1992 has lapsed.

We are not persuaded.

The 1992 EWT assessment is governed by Section 203 of the 1977 Tax Code, as amended by Batasan Pambansa Blg. 700 which shortened the assessment and collection of national internal revenue from five (5) years to three (3) years. [26]

Corollarily, the statute of limitations on the assessment and collection of internal revenue taxes under Section 203 of the Tax Code may be suspended

[26] Approved on April 5, 1984; while the 1997 NIRC took effect on January 1, 1998.

when the taxpayer requests for reinvestigation and is granted by the Commissioner. Section 224 of the Tax Code states:

> Section 224. *Suspension of running of statute.* — The running of the statute of limitations provided in Sections 203 and 223 on the making of assessment and the beginning of distraint or levy or a proceeding in court for collection, in respect of any deficiency, shall be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or levy or a proceeding in court and for sixty days thereafter; when the taxpayer requests for a re-investigation which is granted by the Commissioner; xxx.

Mere filing of the protest which is not granted does not operate to suspend the running of the period to collect taxes.[27]

In this case, the Court in Division correctly concluded that the Commissioner's right to collect EWT deficiency for taxable year 1992 has prescribed considering that the payment of taxes was only sought beyond the three year collection period in defiance of Section 203 of the 1977 Tax Code, as amended. The Court in Division observed that:

> The Court notes however that the Preliminary Collection Letter for deficiency taxes for taxable year 1992 was dated February 21, 2002. Five (5) years had already lapsed when the Preliminary Collection Letter was issued, counted from January 9, 1996, the date when the FANs for the deficiency Withholding Tax on Compensation and for the deficiency Expanded Withholding Tax were issued. Under Section 203 of the NIRC of 1977, respondent's right to collect

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[27] *Commissioner of Internal Revenue v. Hambrecht & Quist Philippines,* Inc. G.R. No. 169225 November 17, 2010, 635 SCRA 162.

> deficiency Withholding Tax on Compensation and the deficiency Expanded Withholding Tax for taxable year 1992 had already lapsed.[28]

USTP's protest against the EWT FAN for 1992 could not have tolled the three year collection period as the Commissioner admits having acted on such protest only on January 22, 2001, also beyond the three year statute of limitations reckoned from January 9, 1996, the date of issuance of the 1992 EWT FAN.

WHEREFORE, premises considered, the Petition is **PARTLY GRANTED**. The Decision dated March 12, 2010 and the Resolution dated July 15, 2010 are **AFFIRMED** with **MODIFICATION** upholding the 1998 EWT assessment. In addition to the basic EWT deficiency of P14,496.79, USTP is ordered to pay surcharge, annual deficiency interest, and annual delinquency interest from the date due until full payment pursuant to Section 249 of the 1997 NIRC.

SO ORDERED.

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

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[28] Rollo, p. 32.

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

(I maintain my stance in the previous Decision dated March 12, 2010 and Resolution dated July 15, 2010)
LOVELL R. BAUTISTA
Associate Justice

(With Concurring and Dissenting Opinion)
ERLINDA P. UY
Associate Justice

(I maintain my stance in the previous Decision dated March 12, 2010 and Resolution Dated July 15, 2010)
CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB No. 662 (CTA CASE No. 6606)**
	Present:
- versus -	**ACOSTA,** *PJ* **CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA,** and **COTANGCO-MANALASTAS,** *JJ*
UNITED SALVAGE AND TOWAGE (PHILS.), INC., Respondent.	**Promulgated:** JUN 27 2011 3:10pm

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CONCURRING AND DISSENTING OPINION

UY, *J*.:

With all due respect to my esteemed colleagues, although I agree with the majority's position that: (a) the subject 1994 and 1998 Preliminary Assessment Notices (PANs) for Expanded Withholding Tax (EWT) Deficiencies are inadmissible in evidence for failure to formally offer the same; (b) the subject 1994 EWT Assessment is void considering that it violates Section 228 of the National Internal Revenue Code (NIRC) of 1997; and (c) the right to collect the EWT deficiency for taxable year 1992 has prescribed considering that the payment of taxes was only sought beyond the three year collection period in violation of Section 203 of the NIRC of 1977, I find difficulty in concurring with the majority's view that the subject 1998 EWT Final Assessment Notice (FAN) is valid for being supported by factual and legal bases.

Hence, I am constrained to register my dissent.

In the case at bench, the focal provision is Section 228 of the National Internal Revenue Code (NIRC) of 1997, as amended, to wit:

> "SEC. 228. Protesting of Assessment. - **When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings**: provided, however, that a ***preassessment notice*** shall not be required in the following cases:
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> (a) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the face of the return; or
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> (b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or
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> (c) When a taxpayer who opted to claim a refund or tax credit of excess creditable withholding tax for a taxable period was determined to have carried over and automatically applied the same amount claimed against the estimated tax liabilities for the taxable quarter or quarters of the succeeding taxable year; or
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> (d) When the excise tax due on exciseable articles has not been paid; or
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> (e) When the article locally purchased or imported by an exempt person, such as, but not limited to, vehicles, capital equipment, machineries and spare parts, has been sold, traded or transferred to non-exempt persons.

> **The taxpayers shall be informed in writing of the *law and the facts* on which the assessment is made; otherwise, the assessment shall be void.**
>
> **Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.**
>
> Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.
>
> 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 one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable. *(Emphasis and italics Ours).*

The Supreme Court, in the recent case of ***CIR vs. Metro Star Superama, Inc.***[1], clarified the "due notice" requirement provided under the aforesaid Section, as follows:

> "Indeed, **Section 228 of the Tax Code clearly requires that the taxpayer must first be informed that he is liable for deficiency taxes *through the sending of a PAN*. He must be informed of the facts and the law upon which the assessment is made. The law imposes a substantive, not merely a formal, requirement**. To proceed heedlessly with tax collection without first establishing a valid assessment is evidently violative of the cardinal principle in administrative investigations - that taxpayers should be able to present their case and adduce supporting evidence.

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

This is confirmed under the provisions R.R. No. 12-99 of the BIR which pertinently provide:

> SECTION 3. Due Process Requirement in the Issuance of a Deficiency Tax Assessment. —
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> 3.1 Mode of procedures in the issuance of a deficiency tax assessment:
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> 3.1.1 Notice for informal conference. — The Revenue Officer who audited the taxpayer's records shall, among others, state in his report whether or not the taxpayer agrees with his findings that the taxpayer is liable for deficiency tax or taxes. If the taxpayer is not amenable, based on the said Officer's submitted report of investigation, the taxpayer shall be informed, in writing, by the Revenue District Office or by the Special Investigation Division, as the case may be (in the case Revenue Regional Offices) or by the Chief of Division concerned (in the case of the BIR National Office) of the discrepancy or discrepancies in the taxpayer's payment of his internal revenue taxes, for the purpose of 'Informal Conference,' in order to afford the taxpayer with an opportunity to present his side of the case. If the taxpayer fails to respond within fifteen (15) days from date of receipt of the notice for informal conference, he shall be considered in default, in which case, the Revenue District Officer or the Chief of the Special Investigation Division of the Revenue Regional Office, or the Chief of Division in the National Office, as the case may be, shall endorse the case with the least possible delay to the Assessment Division of the Revenue Regional Office or to the Commissioner or his duly authorized representative, as the case may be, for appropriate review and issuance of a deficiency tax assessment, if warranted.
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> 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.

3.1.3 Exceptions to Prior Notice of the Assessment. — The notice for informal conference and the preliminary assessment notice shall not be required in any of the following cases, in which case, issuance of the formal assessment notice for the payment of the taxpayer's deficiency tax liability shall be sufficient:

(i) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax appearing on the face of the tax return filed by the taxpayer; or

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

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

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

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

3.1.4 Formal Letter of Demand and Assessment Notice. — The formal letter of demand

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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 (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.

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From the provision quoted above, **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 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 and italics Ours)*

The above pronouncements elucidated that the sending of a PAN to the taxpayer is part of the due process requirements in the issuance of a deficiency tax assessment. Section 228 categorically mandates that when the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings through a preliminary assessment notice (PAN) stating the law and the facts on which the assessment is made; otherwise, the assessment shall be void. Thereafter, within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said PAN. Subsequently, if the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment (FAN) based on his findings. Such assessment may be protested administratively.

In view of the foregoing, it becomes necessary therefore that the subject PANs should be formally offered in evidence for the purpose of establishing and proving that the same contain the facts and the law, rules and regulations, or jurisprudence on which the proposed assessments are based; and that they were properly sent to and received by the taxpayer. Otherwise, the assessments shall be void.

In the present case, it bears emphasis that the Court *en banc* affirmed the factual findings of the Special First Division of this Court that the PANs for deficiency EWT for both taxable years 1994 and 1998 shall not be considered as evidence by the Court nor rule on their validity considering that they were not formally offered in evidence, pursuant to Section 34, Rule 132 of the 1997 Rules on Civil Procedure. Consequently, since the subject PANs are inadmissible and cannot be given evidentiary weight, then how could the Court determine with certainty that the subject PANs contain the law and facts on which the assessments are based and that the same were actually sent to and received by respondent?

With this query in mind, it is therefore my diverse position that the corresponding 1994 and 1998 EWT FANs are void as they failed to comply with the due process requirement under Section 228 of the NIRC of 1997, as amended.

To reiterate, Section 228 of the NIRC of 1997, as amended, in relation to Revenue Regulations No. 12-99, is clear that the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based should be stated in the PAN, and not merely on the FAN. In this regard, the records of this case negate compliance with the rudiments on procedural due process. The failure of petitioner to formally offer in evidence the subject PANs is fatal as it becomes impossible to establish that indeed, the PANs contain factual and/or legal basis for the proposed assessment. This is a clear violation of the best evidence rule.

It must be remembered that in case of a civil action to collect unpaid taxes, the law requires a convincing proof to show that indeed preliminary assessment notice (PAN), assessment notice, and letter of demand were actually sent to and received by the taxpayer. This must be so because it is only when the (valid) assessment is served upon the taxpayer that the obligation to pay the amount assessed and demanded arises.[2] Moreover, mere receipt of the PAN, among others, by the taxpayer will not suffice considering that the same must state the facts and the law on which it is based, in compliance with the "due process" requirements under Section 228 of the NIRC of 1997, as amended.

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[2] See *Antonio P. Callanta, et al. vs. Office of the Ombudsman, et al.*, G.R. Nos. 115253-74, January 30, 1998.

This Court cannot turn a blind eye on the importance of such notices. For in the absence of due notice of the PANs, the corresponding FANs and demand letters are consequently void. And, without formally offering in evidence the said PANs, it is my humble opinion that the Court has no legal means of determining whether or not the Commissioner of Internal Revenue substantially complied with the "due process" requirements; therefore, the subject assessment notices covering the 1994 and 1998 EWT deficiencies are void.

All told, I vote to DENY the Petition for Review for lack of merit; and to AFFIRM *in toto* the Decision dated March 12, 2010 and Resolution dated July 15, 2010 of the Special First Division of this Court in CTA Case No. 6606. Accordingly, both the 1994 and 1998 EWT Assessment Notices are hereby void in violation of the "due process" requirement provided under Section 228 of the NIRC of 1997, as amended.

ERLINDA P. UY
Associate Justice