REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

METRO STAR SUPERAMA, INC.,
Respondent.

EB No. 306
(CTA Case No. 7169)

Present:
ACOSTA, *PJ.*
CASTAÑEDA JR.,
BAUTISTA
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, *JJ.*

Promulgated:
SEP 16 2008 Apolinario 1:45 p.m.

x - x

DECISION

Casanova, J.:

This is an appeal, by way of a Petition for Review,[1] filed by the petitioner-Commissioner of Internal Revenue (CIR) from the Decision[2] (*Assailed Decision*) of the Court of Tax Appeals Second Division (*CTA Second Division*) dated March 21, 2007 in CTA Case No. 7169 entitled, *"Metro Star Superama, Inc., petitioner vs. Commissioner of Internal Revenue, respondent"* granting herein respondent-Metro Star Superama, Inc.'s (METRO STAR) Petition for Review thus, ordering petitioner-CIR to desist from collecting the subject taxes, and from the

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[1] CTA En Banc Rollo, pp. 7-20.
[2] Annex "A", Petition for Review, CTA En Banc Rollo, pp. 22-33.

Resolution[3] (*Assailed Resolution*) dated July 27, 2007 denying CIR's Motion for Partial Reconsideration[4].

The facts of the case, as culled from the records, are as follows:

> *"Petitioner (Metro Star Superama, Inc.) is a domestic corporation duly organized and existing by virtue of the laws of the Republic of the Philippines, with principal office address at T. Cabiles Street, Tabaco City, Albay.*
>
> *On January 26, 2001, the Regional Director of Revenue Region No. 10, Legazpi City issued Letter of Authority No. 00006561 for Revenue Officer Daisy G. Justiniana to examine petitioner's books of accounts and other accounting records for income tax and other internal revenue taxes for the taxable year 1999.[5] Said Letter of Authority was revalidated on August 10, 2001 by Regional Director Leonardo Sacamos.*
>
> *For petitioner's failure to comply with several requests for the presentation of records and Subpoena Duces Tecum, OIC of the BIR Legal Division issued an Indorsement dated September 26, 2001 informing Revenue District Officer of Revenue Region No. 67, Legazpi City to proceed with the investigation based on the best evidence obtainable preparatory to the issuance of assessment notice.*
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> *On November 8, 2001, Revenue District Officer Socorro O. Ramos-Lafuente issued a Preliminary 15-Day Letter, which petitioner received on November 9, 2001. The said letter stated that a post-audit review was held and it was ascertained that there was deficiency value-added and withholding taxes due from petitioner in the amount of ₱292,874.16.*
>
> *On April 11, 2002, petitioner received a Formal Letter of Demand dated April 3, 2002 from Revenue District No. 67, Legazpi City, assessing petitioner the amount of Two Hundred Ninety Two Thousand Eight Hundred Seventy Four Pesos and Sixteen Centavos (₱292,874.16) for deficiency valued-added tax and withholding tax for the taxable year 1999, computed as follows:*

ASSESSMENT NOTICE NO. 067-99-003-579-072

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[3] Annex "B", Petition for Review, CTA En Banc Rollo, pp. 34-36.

[4] CTA Second Division Rollo, pp. 173-181.

[5] Based from the BIR Records, the said Letter of Authority, together with a checklist, was received by a certain Annie V. Nerbes on January 30, 2001.

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VALUE ADDED TAX			
Gross Sales			P1,697,718.90
Output Tax			P 154,338.08
Less: Input Tax			
VAT Payable			P 154,338.08
Add: 25% Surcharge		P 38,584.54	
20% Interest		79,746.49	
Compromise Penalty:			
Late Payment	P 16,000.00		
Failure to file VAT returns	2,400.00	18,400.00	136,731.01
TOTAL			P 291,069.09

WITHHOLDING TAX		
Compensation		P 2,772.91
Expanded		110,103.92
Total Tax Due		P 112,876.83
Less: Tax Withheld		111,848.27
Deficiency Withholding Tax		P 1,028.56
Add: 20% Interest p.a.	P 576.51	
Compromise Penalty	200.00	
TOTAL		P 1,805.07

*Expanded Withholding Tax	P1,949,334.25	x 5%	97,466.71
Film Rental	10,000.00	x 10%	1,000.00
Audit Fee	193,261.20	x 5%	9,663.06
Rental Expense	41,272.73	x 1%	412.73
Security Service	156,142.01	x 1%	1,561.42
Service Contractor			P 110,103.92
Total			

SUMMARY OF DEFICIENCIES	
VALUE ADDED TAX	P 291,069.09
WITHHOLDING TAX	1,805.07
TOTAL	**P 292,874.16**

Subsequently, Revenue District Office No. 67 sent a copy of the Final Notice of Seizure dated May 12, 2003, which petitioner received on May 15, 2003, giving the latter last opportunity to settle its deficiency tax liabilities within ten (10) from receipt thereof; otherwise, respondent BIR shall be constrained to serve and execute the Warrants of Distraint and/or Levy and Garnishment to enforce collection.

On February 6, 2004, petitioner received from Revenue District Office No. 67 a Warrant of Distraint and/or Levy No. 67-0029-03 dated May 12, 2003 demanding payment of deficiency value-added tax and withholding tax payment in the amount of ₱292,874.16.

> *On July 30, 2004, petitioner filed with the Office of respondent Commissioner a Motion for Reconsideration pursuant to Section 3.1.5 of Revenue Regulations No. 12-99.*
>
> *On February 8, 2005, respondent Commissioner, through its authorized representative, Revenue Regional Director of Revenue Region 10, Legaspi City, issued a Decision denying petitioner's Motion for Reconsideration. Petitioner, through counsel, received said Decision on February 18, 2005."*[6]

After trial on the merits, the *CTA Second Division* promulgated the *Assailed Decision*[7] on March 21, 2007, the dispositive portion of which reads as follows:

> ***"WHEREFORE**, premises considered, the Petition for Review is hereby **GRANTED**. Accordingly, the assailed Decision dated February 8, 2005 is hereby **REVERSED** and **SET ASIDE** and respondent is **ORDERED TO DESIST** from collecting the subject taxes against petitioner.*
>
> ***SO ORDERED**."*

Not satisfied with the above decision, petitioner-herein CIR filed a "Motion for Reconsideration[8]" on April 17, 2007. On June 28, 2007, counsel for METRO STAR filed a "Comment/Opposition (to the Respondent's Motion for Reconsideration dated 18 April 2007)".[9]

In the *Assailed Resolution*[10] dated July 27, 2007, the *CTA Second Division* denied CIR's Motion for Reconsideration for lack of merit.

On August 16, 2007, petitioner-CIR filed a "Motion for Extension of Time to File Petition for Review"[11] with the *CTA En Banc*. In a Resolution[12] dated

[6] Decision, CTA En Banc Rollo, pp. 23-25.
[7] Supra, note 2.
[8] Supra, note 3.
[9] CTA Second Division Rollo, pp. 191-197.
[10] Supra, note 3.
[11] CTA En Banc Rollo, pp. 1-3.
[12] CTA En Banc Rollo, p. 6.

August 21, 2007, the Court *En Banc* granted the said motion thereby giving petitioner a final and non-extendible period of fifteen (15) days from August 18, 2007 or until September 2, 2007, within which to file a Petition for Review. On August 29, 2007, petitioner-CIR filed the instant Petition for Review[13] with the *CTA En Banc*, praying that the Decision dated 21 March 2007 and the Resolution dated 27 July 2007, both promulgated in CTA Case No. 7169 entitled, "*Metro Star Superama, Inc., petitioner vs. Commissioner of Internal Revenue, respondent*" be reconsidered and set aside, and another decision be rendered ordering respondent-METRO STAR to pay the amounts of P291,069.09 as deficiency VAT and P1,805.07 as deficiency withholding tax for taxable year 1999 plus 25% surcharge and 20% annual interest for late payment from 3 May 2002 (due date indicated in the Assessment Notice) until fully paid pursuant to Sections 248 and 249 of the NIRC of 1997.

Petitioner raised the sole issue[14] in the instant Petition for Review, to wit:

WHETHER OR NOT THERE WAS A VIOLATION OF DUE PROCESS IN THE ISSUANCE OF THE SUBJECT DEFICIENCY ASSESSMENT.

Petitioner raised the following ground[15] in support of the instant petition:

THE SECOND DIVISION OF THIS HONORABLE COURT ERRED IN HOLDING THAT THE PRELIMINARY ASSESSMENT NOTICE AND THE FORMAL LETTER OF DEMAND DATED 3 APRIL 2002 ARE VOID THERE BEING NO PROOF OF ACTUAL RECEIPT BY RESPONDENT EITHER THROUGH PERSONAL SERVICE OR BY REGISTERED MAIL.

The CTA *En Banc* promulgated a Resolution[16] on September 20, 2007, ordering the respondent-METRO STAR to file a Comment on the said Petition for Review, within ten (10) days from receipt of the said Resolution. On October 5, 2007, respondent posted a "Motion for Extension (To file Comment)" which was

[13] Supra, note 1.
[14] Petition for Review, CTA En Banc Rollo, p. 11.
[15] Ibid.
[16] CTA En Banc Rollo, pp. 41-42.

granted by the Court *En Banc* in a Resolution dated October 16, 2007. In compliance with the said Resolution, METRO STAR filed a Comment (To Petitioner's Petition for Review dated 23 August 2007) on October 17, 2007.

After a careful and thorough evaluation and consideration of the records of the case, the Court *En Banc* finds no new matters which have not yet been considered and passed upon by the *CTA Second Division* in its assailed Decision and Resolution.

As aptly discussed by the *CTA Second Division*, and We quote, to wit:

> *"Assessment is a notice to the effect that the amount therein stated is due as a tax and a demand for the payment thereof.*[17] *It fixes and determines the tax liability of a taxpayer. As soon as it is served, an obligation arises on the part of the taxpayer concerned to pay the amount assessed and demanded.*[18] *Section 228 of the Tax Reform Act of 1997 ("Tax Code") laid the rules on assessment, 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:*
> >
> > *1. 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*
> >
> > *2. When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or*
> >
> > *3. 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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[17] *Republic v. Lim De Yu*, G.R. No. L-17438, (10 SCRA 737),

[18] *Commissioner of Internal Revenue v. Island Garment Manufacturing Corporation*, G.R. No. L-46644, September 11, 1987 (153 SCRA 665).

> *4. When the excise tax due on excisable articles has not been paid; or*
>
> *5. 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.*
>
> *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 the one hundred eighty (180) – day period; otherwise, the decision shall become final, executory and demandable.'*

The above-quoted section does not only require that there must be an investigation and determination of taxpayer's liability. The Commissioner or his duly authorized representative is required to send notice of assessment to the taxpayer in order to give the latter an opportunity to file a protest. An assessment is deemed made only when the same is actually received by the taxpayer. As held in Commissioner *of Internal Revenue vs. Pascor Realty and Development Corporation, Rogelio A. Dio and Virginia S. Dio:*[19]

> *'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 Appeals.*
>
> *Xxx xxx xxx*
>
> *'To start with, assessment must be sent to and received by a taxpayer, and must demand payment of the taxes described therein within a specific period. Thus, the NIRC imposes a 25 percent penalty, in addition to the tax due, in case the taxpayer fails to pay the deficiency tax within the time prescribed for its payment in the notice of assessment. Likewise, an interest of 20 percent per annum, or such higher rate as may be prescribed by rules and regulations, is to be collected from the date prescribed for its payment until the full payment.*
>
> *'The issuance of an assessment is vital in determining the period of limitation regarding its proper issuance and the period within which to protest it. Section 203 of the NIRC provides that internal revenue taxes must be assessed within three years from the last day within which to file the return. Section 222, on the other hand, specifies the period of ten years in case a fraudulent return with intent to evade was submitted or in case of failure to file a return. Also, Section 228 of the same law states that said assessment may be protested only within thirty days from receipt thereof. Necessarily, the taxpayer must be certain that a specific document constitutes an assessment. Otherwise, confusion would arise regarding the period within which to make an assessment or to protest the same, or whether interest and penalty may accrue thereon.*

[19] G.R. No. 128315, June 29, 1999 (309 SCRA 402).

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> ***'It should also be stressed that the said document is a notice duly sent to the taxpayer. Indeed, an assessment is deemed made only when the collector of internal revenue releases, mails or sends such notice to the taxpayer.'*** *(Emphasis Ours)*

Section 228 of the Tax Code operates for the benefit of both the taxpayer and the government. Said section guarantees a taxpayer due process before it may be held liable to pay tax found due. On the other hand, the government is given an opportunity to assess and collect internal revenue taxes, interests and penalties from delinquent taxpayers or tax-evaders within the prescriptive period.

In ***Estate of the Late Juliana Diez Vda. De Gabriel vs. Commissioner of Internal Revenue,***[20] *the Supreme Court emphasized that although there is no specific requirement that the taxpayer should receive the notice within the prescriptive period,* ***due process requires at the very least that such notice actually be received.*** *If it appears that the person liable for the payment did not receive the assessment, the assessment could not become final and executory.*[21]

In a number of instances, the Court upheld the taxpayers' right to due process.

In ***BPI Data System Corporation (formerly Filipinas Management and Leasing Services, Inc.) vs. Commissioner of Internal Revenue,***[22] *the Court ruled against the respondent when he failed to give the taxpayer a chance to respond to a pre-assessment notice before issuing an assessment and pronounced:*

> *'One of the most basic and fundamental precept of law enshrined in the Constitution is that no person shall be deprived of his property without due process of law (Sec. 1, Art. III, 1987 Constitution). The persuasiveness of the right to due process reaches our both substantive and procedural rights, regardless of their source, be it the constitution, or only a statute or a rule of court (Tupas vs. Court of Appeals, 193 SCRA 597). The procedure granted by law under Section 229 of the National Internal Revenue Code is a statutory right of the taxpayer that cannot be*

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[20] G.R. No. 155541, January 23, 2004 (421 SCRA 266).
[21] See *Republic v. De la Rama*, G.R. No. L-21108, November 29, 1966 (18 SCRA 861).
[22] CTA Case No. 4530, January 12, 1994.

> *wantonly disregarded without violating the taxpayer's right to due process.*
>
> *'In the observance of procedural due process, this court is always mindful that a taxpayer being made liable with his property be given an opportunity to be heard which is one of its essential elements (Banco Español vs. Palanca, 37 Phil. 921). With the failure of the respondent to strictly comply with the procedure prescribed by law and the failure of the petitioner to receive a copy of the alleged assessment, the latter was not afforded its right to be heard for it was denied the opportunity to protest or dispute the alleged assessment. The respondent utterly failed to establish that the assessment it has conducted is a disputed assessment whereby 'the taxpayer questions an assessment and asks the Collector to reconsider or cancel the same because he believes he is not liable therefor' (Morales vs. Collector of Internal Revenue, 17 SCRA 1018).*
>
> *'Had the taxpayer been given an opportunity to dispute the questioned assessment, then the same may have been given due consideration. In the absence of any showing that administrative remedies granted by law has been properly exhausted or that the petitioner failed to file a protest on the assessment within the prescribed period despite receipt thereof, this Court could not bestow the presumption of correctness on the said assessment. . . ." (Emphasis supplied)*

*In **Caltex (Philippines), Inc. vs. Commissioner of Internal Revenue**,[23] the Court held:*

> *'. . . this Court is of the opinion that herein respondent committed an arbitrary act tantamount to a violation of petitioner's right to procedural due process when the former issued the assessment in question. Petitioner has assiduously denounced the lack of prior notice for an informal conference and a pre-assessment notice attending the issuance of the assailed assessment, as required under BIR Revenue Regulation No. 12-85 which was issued pursuant to Section 229 of the Tax Code, as amended. Inexplicably, records bear that respondent did nothing to disprove petitioner's alleged non-receipt of notices.'*

[23] CTA Case No. 5664, October 4, 2000.

In ***A Brown Co., Inc. vs. Commissioner of Internal Revenue,***[24] *the Court declared:*

> *'To reiterate, the respondent committed grave violations of the law and regulations when he issued the subject Assessments. The above violations go against the values of right to due process held dearly by the judiciary. And this court is not about to exempt this instant case from the same principle it has long enshrined.'*

More importantly, in ***Commissioner of Internal Revenue vs. Azucena T. Reyes,***[25] *the Supreme Court categorically ruled that if there is no valid notice sent, the assessment is void. The reason is that "[t]he 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."*

In the present case, petitioner denied receiving the preliminary assessment notice. While there is a disputable presumption that a mailed letter is deemed received by the addressee in the ordinary course of mail, a direct denial of the receipt of mail shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee.[26] *In respondents' Answer and Memorandum, Joint Stipulation of Facts and Issue, and BIR Records, a preliminary assessment notice was issued. However, there is no clear showing of the fact that petitioner actually received, either personally or by registered mail, the issued preliminary assessment notice. The Court cannot countenance respondents' contention that there was observance of due process in the absence of proof of actual receipt by the petitioner of the preliminary assessment notice as required under Section 228 of the Tax Code and Revenue Regulations No. 12-99. As petitioner was not accorded due process, both the preliminary assessment notice and the Formal Letter of Demand dated April 3, 2002 are void. As void assessment cannot give rise to an obligation to pay deficiency taxes, it divests the taxing authority of the right to collect them,*[27] *the Warrant of Distraint and/or Levy dated May 12, 2003 is likewise void.'*[28]

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[24] CTA Case No. 6357, June 7, 2004.

[25] G.R. Nos. 159694 and 163581, January 27, 2006 (480 SCRA 382).

[26] *Republic of the Philippines vs. The Court of Appeals and Nielson & Company, Inc.*, G.R. No. L-38540 April 30, 1987 (149 SCRA 351).

[27] *FMF Development Corporation v. Commissioner of Internal Revenue*, C.A.-G.R. SP No. 73973, February 23, 2004.

[28] Decision, En Banc Rollo, pp. 26-32.

In sum, the Court *En Banc* finds no cogent justification to disturb the findings and conclusion spelled out in the assailed March 21, 2007 Decision and July 27, 2007 Resolution of the *CTA Second Division*. What the instant petition seeks is for the Court *En Banc* to view and appreciate the evidence in their own perspective of things, which unfortunately had already been considered and passed upon.

WHEREFORE, the instant Petition for Review is hereby **DENIED DUE COURSE** and **DISMISSED** for lack of merit. Accordingly, the March 21, 2007 Decision and July 27, 2007 Resolution of the *CTA Second Division* in CTA Case No. 7169 entitled, "*Metro Star Superama, Inc., petitioner vs. Commissioner of Internal Revenue, respondent*" are hereby **AFFIRMED *in toto***.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

(With Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

Juanito C. Castañeda, Jr.
(Separate Concurring Opinion)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

(Concurs with the Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
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COMMISSIONER OF INTERNAL REVENUE,
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-versus-

METRO STAR SUPERAMA, INC.,
Respondent.

Promulgated: SEP 16 2008 Apolinario 1:45 p.m.

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SEPARATE CONCURRING OPINION

CASTAÑEDA, JR., J.:

I agree with the position taken by the majority in affirming the Decision dated March 21, 2007 and the Resolution dated July 27, 2007 issued by the Court in Division in CTA Case No. 7169 ordering the petitioner to desist from collecting taxes against the respondent on the basis of absence of proof of service of the preliminary assessment notice ("PAN") to the taxpayer, nonetheless, I wish to add:

PETITIONER FAILED TO SERVE THE PAN TO THE RESPONDENT WHICH IS A CLEAR DENIAL OF DUE PROCESS RESULTING TO A VOID ASSESSMENT UNDER SECTION 228 OF THE 1997 NATIONAL INTERNAL REVENUE CODE ("NIRC"), AS AMENDED

In the event the Commissioner or any authorized representative decides to issue an assessment finding the taxpayer liable for national internal revenue taxes, Section 228 of the 1997 NIRC, as amended, requires both parties to comply with the following procedural requirements:

> 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**:
>
> (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
>
> (b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or
>
> (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
>
> (d) When the excise tax due on excisable articles has not been paid; or

> (e) 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. xxx xxx xxx
>
> **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. (Emphasis supplied).**
>
> 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. xxx xxx xxx

The proviso, "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" under Section 228 of the 1997 NIRC, as amended, refers to a PAN. As previously ruled by this Court in the case of *Goldstar Philippines Sales Corporation (now LG Collins Electronics Manila, Inc.) vs. Commissioner of Internal Revenue*[1]:

> xxx xxx xxx **the notice being referred to and required to be first sent to the taxpayer is the pre-assessment notice**. This is apparent from the subsequent sentence which enumerates of the exceptions when no preassessment notice is necessary. Further, the next two paragraphs also relate to the first paragraph of Section 228. Thus, what the law mandates of the Commissioner or his duly authorized representative, is to inform the taxpayer of the law and the facts on

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[1] CTA Case No. 5715, May 11, 2004, pp. 5-6. See *Toledo Power Company vs. Commissioner of Internal Revenue*, CTA Case No. 5881, March 2, 2002, pp. 11-12.

> which the assessment is made. Undoubtedly, this refer to a preassessment notice because the third paragraph provides that if the taxpayer fails to respond to such notice, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.[2](Emphasis supplied.)

In the instant case, the facts disclose that herein respondent was not informed of the law and the facts upon which the assessment was based. Consequently, respondent was not given sufficient opportunity to refute the assessment for failure of the petitioner to serve the PAN, a clear denial of due process in violation of Section 228 of the 1997 NIRC, as amended. The failure to serve the PAN to the taxpayer is tantamount to the non-issuance of such notice. This explains why a PAN is vital, and the absence or failure thereof to inform the taxpayer of the facts and law upon which the assessment was based results to a void assessment under Section 228 of the 1997 NIRC, as amended.

Apparently, the petitioner is required to issue and serve a PAN to the respondent considering that the instant case does not fall among the enumerated exceptions in Section 228 of the NIRC, as amended. Thus, Assessment Notice No. 067-99-003-579-072 finding the respondent liable in the cumulative amount of P292,874.16 representing Value Added Tax and Withholding Tax deficiencies for taxable year 1999, is void.

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[2] Id.

Notably, the "Preliminary 15 Day Letter" marked as exhibit 1 and served upon the respondent is the Notice of Informal Conference, and not the PAN. A Notice of Informal Conference is distinct and different from a PAN as prescribed by Sections 3.1.1 and 3.1.2 of Revenue Regulations (R.R.) No. 12-99[3], which state:

xxx xxx xxx

> **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.
>
> **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**

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[3] Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extra-judicial Settlement of a Taxpayer's Criminal Violation of the Code through Payment of a Suggested Compromise Penalty.

> **the law, rules and regulations, or jurisprudence on which the proposed assessment is based.** 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.[4]

The importance of a PAN for purposes of apprising the taxpayer of the factual and legal bases of its tax liability is pointed out in the case of *Commissioner of Internal Revenue vs. Reyes*[5] where the Supreme Court made the following pronouncements:

> 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 taxpayer should be able to present their case and adduce supporting evidence. In the instant case, respondent has not been informed of the basis of the estate tax liability. Without complying with the unequivocal mandate of first informing the taxpayer of the government's claim, there can be no deprivation of property, because no effective protest can be made. The haphazard shot at slapping an assessment, supposedly based on estate taxation's general provisions that are expected to be known by the taxpayer, is utter chicanery.
>
> **Even a cursory review of the preliminary assessment notice, as well as the demand letter sent, reveals the lack of basis for — not to mention the insufficiency of — the gross figures and details of the itemized deductions indicated in the notice and the letter.** This Court cannot countenance an assessment based on estimates that appear to have been arbitrarily or capriciously arrived at. Although taxes are the lifeblood of the government, their assessment and collection "should be made in accordance with law as any arbitrariness will negate the very reason for government itself.[6] (Emphasis supplied). *Jr*

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[4] Cited in the case of *Pilipinas Shell Petroleum Corporation vs. Commissioner of Internal Revenue*, G.R. No. 172598, December 21, 2007.
[5] G.R. Nos. 159694 and 163581, January 27, 2006, 480 SCRA 382.
[6] Id, pp. 16-17.

Indubitably, the Commissioner or any authorized representative is required to issue and serve a PAN, otherwise, the absence or failure thereof to serve the PAN to the taxpayer results to a void assessment pursuant to Section 228 of the NIRC, as amended.

A VOID ASSESSMENT DOES NOT RIPEN TO A VALID ASSESSMENT BY A TAXPAYER'S FAILURE TO PROTEST THE SAME WITHIN THE REGLEMENTARY PERIOD

While records show that the respondent failed to file a protest against the final assessment notice ("FAN") within the reglementary period, the assessment remains void due to petitioner's failure to serve the PAN.

A void assessment cannot be validated by failure of the taxpayer to file a protest within the thirty (30) day period in accordance with the analogous case of *Philippine Journalists, Inc. vs. Commissioner of Internal Revenue*.[7] In that case, the Commissioner of Internal Revenue through authorized representative assessed Philippine Journalist, Inc. of various tax liabilities, inclusive of interest and compromise penalty for taxable year 1994. The tax assessments were treated as void because the FANs were

[7] G.R. No. 162852, December 16, 2004, 447 SCRA 214.

issued beyond the three (3) year reglementary period which was not tolled by an equally defective Waiver of Statute of Limitations executed by Philippine Journalist, Inc., in violation of Revenue Memorandum Order No. 20-90.

Pertinent excerpts of the factual incidents of the *Philippine Journalist* case are as follows:

> On July 2, 1998, Revenue Officer de Vera submitted his audit report, with the following deficiency taxes, inclusive of surcharges, interest and compromise penalty: xxx xxx xxx
>
> On October 5, 1998, Pre-Assessment Notices were issued by the Assessment Division of the BIR, informing petitioner of the findings upon investigation and per review of the said Division (pp. 122-124, BIR Records). On December 9, 1998, the Assessment Notices and Letters of Demand subject of the instant petition were issued (Exhibits 1 to 6), showing the following deficiency taxes, inclusive of interest and compromise penalty): xxx
>
> On March 16, 1999, a Preliminary Collection Letter was sent by Deputy Commissioner Romeo S. Panganiban to the petitioner to pay the assessment within ten (10) days from receipt of the letter. On November 10, 1999, a Final Notice Before Seizure was issued by the same deputy commissioner giving the petitioner ten (10) days from receipt to pay.
>
> xxx xxx xxx
>
> On May 14, 2002, the CTA rendered its decision, to wit:
>
> As to whether or not the assessment notices were received by the petitioner, this Court rules in the affirmative.
>
> To disprove petitioner's allegation of non-receipt of the aforesaid assessment notices, respondent presented a certification issued by the Post Master of the Central Post Office, Manila to the effect that Registered Letter No. 76134 sent by the BIR, Region No. 6 Manila on December 15, 1998 addressed to Phil. Journalists, Inc. at Journal Bldg., Railroad St., Manila was duly delivered to and received by a certain Alfonso Sanchez, Jr. (Authorized Representative) on January 8, 1999.

> Respondent also showed proof that in claiming Registered Letter No. 76134, Mr. Sanchez presented three identification cards, one of which is his company ID with herein petitioner.[8]

Nowhere is it shown in the *Philippine Journalist* case that the taxpayer protested the FANs raising the infirmity of their delayed issuance, despite receipt of such notices. In upholding the invalidity of the assessment notices, the Supreme Court affirmed this Court's ruling that:

> WHEREFORE, premises considered, the instant petition for review is GRANTED. The Decision of the Court of Appeals dated August 5, 2003 and its Resolution dated March 31, 2004 are REVERSED and SET ASIDE. The Decision of the Court of Tax Appeals in CTA Case no. 6108 dated May 14, 2002, declaring Warrant of Distraint and/or Levy No. 33-06-046 null and void, is **REINSTATED**.[9]

In correlating the *Philippine Journalist* case with the case at bar, it can simply be deduced that a void assessment arising from petitioner's failure to serve the PAN to the respondent, cannot be validated by its failure to protest the FAN within the mandated period.

Citing the case of *Philippine Journalists, Inc. vs. Commissioner of Internal Revenue*, the Court of Appeals ruled in the case of *Takasago Import-Export Corporation vs. Commissioner of Internal Revenue*[10] that a

[8] See *Philippine Journalist, Inc. vs. Commissioner of Internal Revenue*, CTA Case No. 6108, May 14, 2002, pp. 3, 4 and 7 and See *Philippine Journalist vs. Commissioner of Internal Revenue*, G.R. No. 162852, 447 SCRA 214, pp. 217, 218 and 219.
[9] *Philippine Journalist, Inc. vs. Commissioner of Internal Revenue*, supra note 7.
[10] CA-G.R. SP No. 78777, January 31, 2007.

void assessment does not give rise to the liability of a taxpayer, despite its failure to protest the FAN.

The *Philippine Journalist* and *Takasago* cases exemplify the futility of protesting a FAN when an assessment is already void from inception. A void assessment bears no valid fruit.[11] The spring cannot rise above its source.

Black's Law Dictionary defined the term "**void**" as "an instrument or transaction which is wholly ineffective, inoperative, and incapable of ratification and which **thus has no force or effect so that nothing can cure it.**"[12] In applying the foregoing definition to the case at bar means that a void assessment of tax deficiencies cannot be enforced and give rise to a taxpayer's obligation with the government. To ratify a void assessment by the taxpayer's failure to protest the same within the prescribed period would render meaningless the wordings referred to in the second paragraph of Section 228 requiring the issuance and service of a PAN.

In view of the foregoing, I join the majority in ruling that the Commissioner of Internal Revenue or any authorized representative is mandated by Section 228 of the 1997 NIRC, as amended, to issue and

[11] *Commissioner of Internal Revenue vs. Reyes*, supra.
[12] 6th Edition, p. 1573.

Indubitably, the Commissioner or any authorized representative is required to issue and serve a PAN, otherwise, the absence or failure thereof to serve the PAN to the taxpayer results to a void assessment pursuant to Section 228 of the NIRC, as amended.

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While records show that the respondent failed to file a protest against the final assessment notice ("FAN") within the reglementary period, the assessment remains void due to petitioner's failure to serve the PAN.

A void assessment cannot be validated by failure of the taxpayer to file a protest within the thirty (30) day period in accordance with the analogous case of *Philippine Journalists, Inc. vs. Commissioner of Internal Revenue*.[7] In that case, the Commissioner of Internal Revenue through authorized representative assessed Philippine Journalists, Inc. of various tax liabilities, inclusive of interest and compromise penalty for taxable year 1994. The tax assessments were treated as void because the FANs were

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Nowhere is it shown in the *Philippine Journalists, Inc.* case that the taxpayer protested the FANs raising the infirmity of their delayed issuance, despite receipt of such notices. In upholding the invalidity of the assessment notices, the Supreme Court affirmed this Court's ruling that:

> WHEREFORE, premises considered, the instant petition for review is GRANTED. The Decision of the Court of Appeals dated August 5, 2003 and its Resolution dated March 31, 2004 are REVERSED and SET ASIDE. The Decision of the Court of Tax Appeals in CTA Case no. 6108 dated May 14, 2002, declaring Warrant of Distraint and/or Levy No. 33-06-046 null and void, is **REINSTATED**.[9]

In correlating the *Philippine Journalists, Inc.* case with the case at bar, it can simply be deduced that a void assessment arising from petitioner's failure to serve the PAN to the respondent cannot be validated by its failure to protest the FAN within the mandated period.

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[8] See *Philippine Journalists, Inc. vs. Commissioner of Internal Revenue*, CTA Case No. 6108, May 14, 2002, pp. 3, 4 and 7 and See *Philippine Journalists, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 162852, 447 SCRA 214, pp. 217, 218 and 219.
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In view of the foregoing, I join the majority in ruling that the Commissioner of Internal Revenue or any authorized representative is mandated by Section 228 of the 1997 NIRC, as amended, to issue and

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[11] *Commissioner of Internal Revenue vs. Reyes*, supra.
[12] 6th Edition, p. 1573.

serve the PAN to the taxpayer under the tenets of due process. I therefore, vote to **DISMISS** the Petition.

Juanito C. Castaneda, Jr.
JUANITO C. CASTANEDA, JR.
Associate Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

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COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**C.T.A. EB No. 306** (CTA Case No. 7169)
	Present:
-versus-	**Acosta, *P.J.*** **Castañeda, Jr.,** **Bautista,** **Uy,** **Casanova, and** **Palanca-Enriquez, *JJ.***
METRO STAR SUPERAMA, INC., *Respondent.*	Promulgated: SEP 1 6 2008 [illegible] 1:45 p.m.

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DISSENTING OPINION

ACOSTA, P.J.:

The sole issue raised in the instant Petition for Review is whether or not there was a violation of due process in the issuance of the subject deficiency assessment. Petitioner avers that the Second Division of this Court erred in holding that the preliminary assessment notice and the formal letter of demand are void, there being no proof of actual receipt of the preliminary assessment notice by Metro Star, either through personal service or registered mail.

The majority found no reason to disturb the Second Division's findings that Section 228 of the National Internal Revenue Code (NIRC) does not only require that there must be an investigation and determination of taxpayer's liability; but also requires the Commissioner or his duly authorized representative to send a notice of assessment to the taxpayer, to give the latter the opportunity to file a protest.

They found that an assessment is deemed made, only when the same is actually received by the taxpayer and emphasized the taxpayer's right to due process citing among others, ***Commissioner of Internal Revenue vs. Azucena T. Reyes***,[1] where the Supreme Court categorically ruled that if there is no valid notice sent, the assessment is void. The reason being: "[t]he 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."

While I agree with the above, I would like to clarify that the cited jurisprudence refers to the Formal Assessment Notice and not a mere Preliminary Assessment Notice.

The settlement of this controversy lies in the reading of Section 228 of the National Internal Revenue Code (NIRC). It 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:
>
> > (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
> > (b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or
> > (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

[1] *G.R. Nos. 159694 and 163581, January 27, 2006 (480 SCRA 382).*

> against the estimated tax liabilities for the taxable quarter or quarters of the succeeding taxable year; or
>
> (d) When the excise tax due on excisable articles has not been paid; or
>
> (e) 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.

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 the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable. *(Emphasis Supplied)*

From the language of the law, when the respondent or his duly authorized representative finds that proper taxes should be assessed, a written notice to the taxpayer informing him of the law and the facts upon which the assessment is based, is necessary. And as explained by the Second Division, the law imposes a substantive, not merely a formal, requirement. The essence of Section 228 is due

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process, that is, the taxpayer shall be accorded the opportunity to present his side and prove his defenses.

This has been settled in ***Commissioner of Internal Revenue vs. PASCOR Realty and Dev't. Corp., et al.***[2], cited by the Second Division, where the Supreme Court held that:

> "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 Appeals. xxx
>
> To start with, assessment must be sent to and received by a taxpayer, and must demand payment of the taxes described therein within a specific period. Thus, the NIRC imposes a 25 percent penalty, in addition to the tax due, in case the taxpayer fails to pay the deficiency tax within the time prescribed for its payment in the notice of assessment. Likewise, an interest of 20 percent per annum, or such higher rate as may be prescribed by rules and regulations, is to be collected from the date prescribed for its payment until the full payment.
>
> The issuance of an assessment is vital in determining the period of limitation regarding its proper issuance and the period within which to protest it. Section 203 of the NIRC provides that internal revenue taxes must be assessed within three years from the last day within which to file the return. Section 222, on the other hand, specifies a period of ten years in case a fraudulent return with intent to evade was submitted or in case of failure to file a return. ***Also, Section 228 of the same law states that said assessment may be protested only within thirty days from receipt thereof. Necessarily, the taxpayer must be certain that a specific document constitutes an assessment. Otherwise, confusion would arise regarding the period within which to make an***

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[2] *G.R. No. 128315, June 29, 1999.*

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> ***assessment or to protest the same, or whether interest and penalty may accrue thereon.***
>
> ***It should also be stressed that the said document is a notice duly sent to the taxpayer. Indeed, an assessment is deemed made only when the collector of internal revenue releases, mails or sends such notice to the taxpayer.***" *(Emphasis Supplied)*

That, what the law refers to is the Final Assessment Notice is further bolstered by the process of the assessment of taxes as set forth in Revenue Regulations 12-99[3]:

> 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:
>
> 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

[3] *Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extra-judicial Settlement of a Taxpayer's Criminal Violation of the Code Through Payment of a Suggested Compromise Penalty*

authorized representative, as the case may be, for appropriate review and issuance of a deficiency tax assessment, if warranted.

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: xxx

3.1.4 **Formal Letter of Demand and Assessment Notice**. — The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void (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.

There is no doubt then that Section 228 of the NIRC requires that the Commissioner or his duly authorized representative send a **notice of the**

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assessment against the taxpayer in order to give the latter an opportunity to file a protest. And that an assessment is only deemed made when it has been actually received by the taxpayer. Clearly, there is a need to inform the taxpayers of the assessment against them. The receipt of the assessment against them will commence the entire process in Section 228 of the National Internal Revenue Code. Without the assessment, there is nothing to protest. Consequently, nothing can attain finality.

However, this assessment should be taken to mean the Final Assessment Notice with the Formal Letter of Demand which demands payment of the taxpayer's deficiency tax assessment.

As quoted above, Section 228 of the NIRC, in relation to Revenue Regulations 12-99, provides that a notice of informal conference is held merely to inform the taxpayer of his liabilities and give the latter the opportunity to present his side of the case. At this stage, the taxpayer may or may not respond. The failure of the taxpayer to respond will only render him in default, in which case, the Assessment Division of the Bureau of Internal Revenue will review the taxpayer's records to determine if the issuance of the Preliminary Assessment Notice (PAN) is warranted. The PAN on the other hand is only a proposed assessment, and the taxpayer's failure to respond thereto will, at most, lead to the issuance of the Final Assessment Notice (FAN) together with the Formal Letter of Demand. It is the FAN or the Formal Letter of Demand which should be protested and which shall, absent any protest, attain finality.

Thus, while the notice of informal conference and the preliminary assessment notice are parts of the process of assessing a delinquent taxpayer of his liabilities, even without them, the taxpayer may question the assessment itself after the issuance of the Final Assessment Notice and Formal Letter of Demand. The taxpayer is not deprived of its right to due process.

Here, a review of the BIR records reveals that on April 30, 2002, petitioner received a letter dated April 29, 2002 from Mr. Antonio S. Tan Chairman of Metro Star Superama, Inc. which in part reads:

> **"This is in reply to your Assessment Notice No. 067-99-003-579-072 dated April 3, 2002**. Please be informed that we are willing to pay the aforesaid computation on the due date given by your office. In lieu of that, we want to clarify that following matters and hope would lessen our liability: xxx" *(Emphasis Ours)*

Further, records also reveal that indeed the Formal Letter of Demand is for the assessment number given by Metro Star in its April 29, 2002 letter. Having been able to respond thereto, Metro Star cannot deny having received **Assessment Notice No. 067-99-003-579-072** dated April 3, 2002. Moreover, note should be taken of the clear import of the said letter, where Metro Star categorically admitted its tax liabilities, as it was willing to pay the same on the day it falls due. Petitioner even responded to this April 29, 2002 letter of Metro Star on December 20, 2002, where the latter was requested to settle its tax liabilities.

Even more, the fact of receipt of the Formal Letter of Demand has not been contested by Metro Star, in fact the same was included in the Joint Stipulation of Facts[4].

Clearly, Metro Star received the April 3, 2002 Assessment Notice No. 067-99-003-579-072 before April 29, 2002, the day it was able to ask for clarification on the assessment. With these pieces of evidence, petitioner was able to prove receipt by Metro Star of the assessment issued against it. Thus, the requirement of informing the taxpayer of the facts and the law upon which they were based has been substantially complied with.

[4] *CTA Case No. 7160, rollo, page 98*

Consequently, for failure to file a protest against the assessment, the same has become final, executory, and demandable. Metro Star should now be precluded from disputing the correctness of the assessment. The failure to the exhaust administrative remedy of protest, bars the appeal, and deprives the Court of Tax Appeals of its jurisdiction to entertain and determine the correctness of the assessment.

I also agree with petitioner that it was only on July 29, 2004, after receipt of the Warrant of Distraint and Levy that the lack of due process was raised by Metro Star. However, as above discussed, the same was raised belatedly, considering the receipt of the April 3, 2002 Formal Letter of Demand/Assessment Notice on April 11, 2002. The lack of a pre-assessment notice or an informal conference should be raised in a protest against the Formal Letter of Demand. Failing in this regard, the assessment against Metro Star should be upheld and declared valid.

For emphasis, I would like to restate that under Section 228 of the NIRC, as well as Revenue Regulations 12-99, it is the Formal Letter of Demand and the Final Assessment Notice (FAN) which should be protested and which will attain finality, absent such protest. Thus, even granting for the sake of argument that the FAN is void there being no notice of informal conference or PAN, still the taxpayer is required to question the same thru a valid protest.

In ***Singer Finance Corp. vs. Commissioner of Internal Revenue***[5], this Court held that a taxpayer's argument that it is not duty-bound to file an administrative protest against a void assessment is misplaced. This was reiterated in ***Allied Banking Banking Corporation vs. Commissioner of Internal Revenue***[6]**,** where this Court held that:

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[5] *CTA EB 10, March 4, 2005.*
[6] *CTA EB 167, August 23, 2006.*

"The Tax Court's jurisdiction is over disputed assessments, and an assessment which has not been questioned in the administrative level, cannot be said to be a disputed one. The taxpayer should first exhaust all available administrative remedies before going to Court. Failing in this regard, the petition can be dismissed for lack of cause of action (Regalado, Remedial Law Compendium, 7th Rev. Ed., Vol. I, page 254).

Moreover, an administrative protest made against a Preliminary Assessment Notice (PAN) is not the 'valid protest' contemplated under Section 228 of the National Internal Revenue Code (NIRC) of 1997. As correctly explained in the assailed Resolution, to wit:

> 'Thus, a preliminary assessment notice is issued merely to inform the taxpayer of the findings of the Bureau of Internal Revenue ("BIR") anent his tax liabilities. All that is required of a taxpayer upon receipt of a preliminary assessment is to respond thereto if it wishes within fifteen days from receipt. If after such response by the taxpayer, the BIR still finds that correct taxes is yet to be paid, or if no response was sent by the taxpayer in the first place, the BIR shall issue a formal assessment notice based on the investigation. It is this assessment which should be administratively protested.
>
> Otherwise stated, a taxpayer may or may not dispute or protest the preliminary assessment against him. **The BIR still has to issue a formal assessment notice since it is this assessment which attains finality in the absence of a valid protest against it.**"'

We are consistent in ruling that an assessment, whether valid or void, shall become final and executory, when no administrative protest is filed within thirty (30) days from receipt thereof, for the very reason that an administrative protest is an integral part of the remedies given to the taxpayer in challenging the legality or validity of an assessment. It is absolutely necessary for the taxpayer to file an administrative protest in order for this Court to acquire jurisdiction. xxx"

In sum, the lack of informal conference and/or the preliminary assessment notice are mere defects of the assessment. It should be raised and questioned in a protest. The non-observance of the process set forth in Revenue Regulations 12-99 is a mere defense that must be invoked at the proper time, otherwise, it shall be considered waived. It is not jurisdictional.

Metro Star's failure to protest the assessment rendered the same final and demandable. Accordingly, I vote for the grant of the Petition for Review, the setting aside of the Second Division Decision, and the consequent holding of Metro Star Superama, Inc. liable for the payment of P291,069.09, deficiency Value Added Tax (VAT) and P1,805.07, deficiency withholding tax for the year 1999 plus interest and surcharges.

ERNESTO D. ACOSTA
Presiding Justice

I CONCUR:

LOVELL R. BAUTISTA
Associate Justice