REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

Special Third Division

MAX'S STA. MESA, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 8786

Members:
FABON-VICTORINO,
RINGPIS-LIBAN, *and*
MANAHAN, *JJ.*

Promulgated:

SEP 28 2018
3:06 p.m.

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DECISION

RINGPIS-LIBAN, *J.*:

This Petition for Review[1] filed by Max's Sta. Mesa, Inc. (MSMI) against the Commissioner of Internal Revenue (CIR) prays for the cancellation and/or withdrawal of the deficiency income tax (IT) and value-added tax (VAT) assessments inclusive of compromise penalties, interests and surcharges, in the aggregate amount of ₱95,002,952.60 for taxable year (TY) 2009.

THE FACTS

Petitioner MSMI is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with office address at 3rd Floor, SM City Sta. Mesa, Aurora Boulevard, Doña Imelda, Quezon City.[2]

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[1] Docket, pp. 14-25.
[2] *Id.* at p. 14.

On the other hand, respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) who has the power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto or other matters arising under the National Internal Revenue Code (NIRC) or other laws or portions thereof administered by the BIR. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On April 14, 2010,[3] petitioner filed its Annual Income Tax Return (AITR) and its Quarterly[4] and Monthly[5] VAT Returns for TY 2009.

On May 24, 2010, respondent issued Letter of Authority (LOA) No. LOA 2009 00014334 authorizing the examination of petitioner's books of accounts and other accounting records for all internal revenue taxes covering the period from January 1, 2009 to December 31, 2009.[6]

On May 31, 2010, respondent issued to petitioner a Checklist of Requirements[7] for purposes of the audit. This was followed by a Second and Final Request/Notice for Presentation of Records[8] issued on March 21, 2011.

The audit resulted in finding petitioner liable for deficiency Documentary Stamp Tax (DST), Final Withholding Tax (FWT), Expanded Withholding Tax (EWT), Withholding Tax on Compensation (WTC), VAT, and IT.[9] However, in the Amended Post Reporting Notice[10] dated November 15, 2012, with Details of Discrepancy[11], petitioner was only assessed deficiency IT and VAT, as well as compromise penalty.

On January 4, 2013, petitioner received a Preliminary Assessment Notice[12] (PAN) for deficiency IT, VAT and compromise penalty for TY 2009 in the respective amount of ₱34,104,447.79, ₱59,207,968.34, and ₱27,000.00.

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[3] *Id.* at pp. 442 to 443, Exhibit "P-1".
[4] *Id.*, pp. 444 to 445, 447 to 448, 450 to 451, and 453 to 454, Exhibits "P-2", "P-3", "P-4", and "P-5", respectively.
[5] *Id.*, pp. 519 to 520, 522 to 523, 525 to 526, 528 to 529, 531 to 532, 534 to 535, 537 to 538, and 540 to 541, Exhibits "P-32", "P-33", "P-34", "P-35", "P-36", "P-37", "P-38", and "P-39", respectively.
[6] Exhibit "R-2", BIR records, p. 520.
[7] Exhibit "R-2.1", BIR records, p. 519.
[8] Exhibit "R-3", BIR records, p. 521.
[9] Exhibits "R-4", "R-4.1", "R-4.2", "R-4.3", "R-4.4", and "R-4.5", BIR records, pp. 536, 540, 544, 548, 552, and 556, respectively.
[10] Exhibit "R-5", BIR records, p. 562
[11] Exhibit "R-5.1", BIR records, pp. 573 to 575
[12] *Id.* at Note 1, pp. 543 to 544; Exhibit "P-40"; Exhibit "R-7", BIR records, pp. 590 to 591

Petitioner filed its protest to the PAN on January 21, 2013.[13] On even date, petitioner received a Formal Letter of Demand[14] (FLD) and Final Assessment Notice (FAN) No. 39-B093-09[15], both dated January 25, 2013, for IT deficiency of ₱34,733,324.14, VAT deficiency of ₱60,269,628.46, and compromise penalty of ₱27,000.00 for TY 2009.[16]

On February 20, 2013, petitioner submitted its Formal Protest Letter[17] to the said FLD/FAN.

On March 4, 2014, petitioner received a Final Decision on Disputed Assessment (FDDA) dated February 13, 2014 which denied its protest against the FLD and FAN signed by the Regional Director of Revenue Region No. 7, Jonas DP Amora.[18]

As a consequence thereof, petitioner filed the instant Petition for Review[19] on March 21, 2014.

In the Answer[20] filed on May 23, 2014, respondent challenges the Court's jurisdiction over the petition on the ground that the disputed assessment is already final, executory and demandable, pursuant to Section 228 of the NIRC, as amended. He argues that considering petitioner's admission in filing its Protest Letter on February 20, 2013, the sixty-day period within which petitioner should submit documents supporting its protest had already lapsed without any such documents being submitted. Hence, the protest has been rendered invalid and of no legal consequence.

Petitioner's Pre-Trial Brief[21] and Respondent's Pre-Trial Brief[22] were filed on July 4, 2014 and on August 1, 2014, respectively.

After the Pre-trial Conference, the parties submitted their Joint Stipulation of Facts and Issues[23] on August 20, 2014. Afterwards, the Court issued a Pre-Trial Order[24] on September 2, 2014, thereby terminating the pre-trial proceeding.

[13] *Id.* at Note 1, pp. 547 to 549, Exhibit "P-41".
[14] *Id.*, pp. 550 to 554, Exhibit "P-42".
[15] *Id.*, pp. 555 and 556, Exhibits "P-43" and "P-44".
[16] *Id.*, p. 289, par. 3, Admissions, Joint Stipulation of Facts and Issues (JSFI).
[17] *Id.*, pp. 558 to 564, Exhibit "P-45".
[18] *Id.*, p. 290; Exhibit "P-46", Exhibit "R-14".
[19] *Id.* at Note 1.
[20] *Id.*, pp. 56 to 59.
[21] *Id.*, pp. 63 to 70.
[22] *Id.*, pp. 280 to 283.
[23] *Id.*, pp. 289 to 297.
[24] *Id.*, pp. 300 to 309.

In support of its petition, petitioner presented as its witnesses Maria Carolyn C. Angeles, Marifloss S. Alilio, and Emmanuel M. Florece.

Witness **Maria Carolyn C. Angeles** testified[25] that as petitioner's Finance Manager she reviews its accounting records composed of journal vouchers, disbursements, invoices and other related records. She helps in the preparation of petitioner's Financial Statement (FS) by verifying the figures indicated therein. She also supervises the preparation and filing of its ITRs, Withholding Tax Returns, VAT Returns and other government reportorial requirements.

She is familiar with the assessment issued against petitioner from the time the latter received the PAN dated January 8, 2013[26] on January 4, 2013. On January 21, 2013, she filed a Protest[27] against the PAN to dispute the findings against petitioner. On even date, petitioner received the FAN/FLD[28] issued by respondent, both dated January 25, 2013 for IT[29] and Improperly Accumulated Earnings Tax (IAET)[30] for TY 2009.

After receipt of the FAN/FLD, petitioner filed a Protest to the FAN through its external auditors on February 20, 2013.[31] On March 4, 2014, petitioner received the FDDA dated February 13, 2014.[32] Upon consultation with its external counsel, petitioner filed the instant Petition for Review.

The witness declared that the IT deficiency assessment pertaining to unaccounted source of cash amounting to ₱25,501,348.13 resulted from the discrepancy between the amount stated in petitioner's Alphalist amounting to ₱328,215,820.13 and the amount stated in petitioner's ITR[33] and FS[34] amounting to ₱302,714,472.00. To show the basis of said discrepancy, she prepared a reconciliation summary of petitioner's expenses subject to EWT for 2009[35] and submitted it together with the Protest against the PAN. But despite the reconciliation summary, there was still a discrepancy between the amount stated in the ITR and FS and the Alphalist in the amount of ₱1,751,926.00, which was due to the amount of credit card rebates debited from petitioner's account in the amount of ₱1,721,881.00, and the amount of reimbursements of meals and other client representations in the amount of ₱30,046.00.

[25] Exhibits "P-52" and "P-52-A".
[26] Exhibit "P-40".
[27] Exhibit "P-41".
[28] Exhibit "P-42".
[29] Exhibit "P-43".
[30] Exhibit "P-44".
[31] Exhibit "P-45".
[32] Exhibit "P-46".
[33] Exhibit "P-1".
[34] Exhibit "P-47".
[35] Exhibit "P-48".

With respect to the deficiency IT assessment arising from the purported income payments not subjected to withholding tax amounting to ₱37,589,831.40, the witness explained that per BIR's investigation, the said amount was due to the difference between the amount of ₱67,451,915.00, representing payments for personnel costs, repair and maintenance, transportation and travel and entertainment as reflected in petitioner's FS, and the amount of ₱34,053,562.72, representing petitioner's payments for salaries, as reflected in its ITR and Alphalist of 2009. But since the items on repairs and maintenance, transportation and travel and entertainment costs were already subjected to EWT, there should be no discrepancy and it should not have been included as basis for deficiency tax assessment. Anyhow, there would still be a remaining difference of ₱28,610,430.00, representing the salaries, wages and benefits. The said amount covers reimbursement and payment to manpower agencies, which have already been subjected to EWT, transportation and allowance of practicum participants and employer's contribution to SSS, Pag-Ibig, Philhealth and employers commission contribution. In support thereof, she prepared a Reconciliation Summary[36] to trace and reconcile the payments made by petitioner which were subject to WTC for TY 2009.

Anent the deficiency IT assessment arising from the disallowed expenses of ₱10,472,070.00, the witness claimed that the said amount represents petitioner's payments for local taxes and business license, loss on disposal of property, bank and other finance charges, as evidenced by the schedule of Payments for TY 2009[37].

Finally, as to the deficiency VAT assessment, witness volunteered that petitioner submitted all the documents to support the input taxes claimed, as evidenced by the Transmittal Letters[38] they sent.

Witness, **Marifloss S. Alilio**, declared[39] that she is petitioner's Comptroller since 2008. As such, she helps and oversees the preparation and filing of petitioner's tax returns to the BIR. In relation to the instant case, she supervised the filing of petitioner's AITR for 2009[40] on April 14, 2010[41]; quarterly VAT Returns for the four quarters of TY 2009[42]; Monthly VAT Returns[43]; Monthly Expanded Withholding Tax Returns[44]; Monthly Withholding Tax

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[36] Exhibit "P-49".
[37] Exhibit "P-50".
[38] Exhibits "P-51", "P-51-A", "P-51-B", "P-51-C", "P-51-D" and "P-51-E".
[39] Exhibits "P-53" and "P-53-A".
[40] Exhibit "P-1".
[41] Exhibit "P-1-A".
[42] Exhibits "P-2", "P-3", "P-4" and "P-5".
[43] Exhibits "P-32", "P-33", "P-34", "P-35", "P-36", "P-37", "P-38" and "P-39".
[44] Exhibits "P-6", "P-7", "P-8", "P-9", "P-10", "P-11", "P-12", "P-13", "P-14", "P-15", "P-16" and "P-17".

Returns for Compensation[45]; and Annual Information Return for Creditable Income Taxes Withheld or Expanded Withholding Tax[46] and Annual Information Return on Income Tax Withheld on Compensation and Final Withholding Taxes[47], all for TY 2009. In all instances, petitioner filed said Returns through the BIR's E-filing System.

The witness clarified that although she did not personally fill-up petitioner's Returns, she reviewed and checked them before filing through the BIR's System.

The Court-commissioned **Independent Certified Public Accountant (ICPA) Emmanuel M. Florece** testified[48] that he examined, audited and evaluated petitioner's voluminous documents in support of the present Petition for cancellation of the alleged IT and VAT deficiencies for TY 2009.

The following findings are indicated in his Final Report[49], to wit: 1) that petitioner has no unaccounted cash of ₱25,501,348.14; 2) that the amount of ₱24,426,888.60 out of the total amount of ₱67,451,915.00, representing payments for personnel costs, repair and maintenance, transportation and travel and entertainment per petitioner's FS, was erroneously included by the BIR since it is not required to be included in the Alphalist of Employees; 3) that the amount of ₱600,000.00 which was not reported in petitioner's Monthly Remittance Return of Final Income Taxes Withheld pertains to intra-corporate dividends given to a domestic corporation, i.e., FSS Realty Corporation, which is not subject to FWT; 4) that the amount of ₱6,045,547.52 disallowed by the BIR for being unsupported expenses were substantiated for IT purposes; 5) that all VATable revenues recorded in petitioner's daily Sales Journals were reported in its VAT Returns; 6) that the Royalties reported in petitioner's FS were all reported in its Monthly Remittance Returns of Final Income Taxes Withheld; 7) that only the amount of ₱20,874.30 of input VAT were properly substantiated; and 8) that the input tax carried over from the previous period in the amount of ₱2,062,884.57 was not properly substantiated.

After petitioner rested[50], respondent presented his witnesses, Revenue Officers (ROs) Faridah C. Lao, Rocky D. Torres and Owen R. Villanueva.

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[45] Exhibits "P-18", "P-19", "P-20", "P-21", "P-22", "P-23", "P-24", "P-25", "P-26", "P-27", "P-28" and "P-29".
[46] Exhibit "P-30".
[47] Exhibit "P-31".
[48] Exhibits "P-77" and "P-77-A".
[49] Exhibit "P-76".
[50] *Id.* at Note 1, pp. 707-709.

RO Faridah C. Lao declared[51] that she reexamined/reinvestigated the accounting and business records of petitioner for TY 2009[52] to verify the accuracy of petitioner's payment of all internal taxes for said TY by virtue of Memorandum of Assignment (MOA) No. 039-0313-02406 dated March 21, 2013[53] as indicated in the Memorandum dated March 19, 2013 issued by OIC-Reginal Director Jonas BP. Amora. However, the MOA was not signed by petitioner which would indicate lack of service thereof. On March 21, 2013, she began to re-examine and reinvestigate petitioner's tax case. Subsequently, she issued a Letter dated July 23, 2013[54], informing petitioner of the investigation and requesting it to submit documents in support of its protest. She called petitioner for the additional documents, but it still failed to comply, hence, she prepared a Revenue Officer's Audit Report[55], recommending that the case be forwarded to the Assessment Division for collection.

Per record, it was RO Rocky D. Torres, together with RO Ma. Teresita B. Doma, who conducted the tax examination of petitioner by virtue of LOA No. 00014334 dated May 24, 2010[56]. The said LOA was personally served to petitioner with the Checklist of Requirements for Audit on June 1, 2010[57]. The Second and Final Notice[58], on the other hand, was sent to petitioner through registered mail, per Registry Receipt No. 16.

The Revenue Officer's Audit Reports for DST, FWT, EWT, WTC, VAT and IT[59] was prepared by a RO. On December 11, 2012, an Amended Post Reporting Notice with details dated November 15, 2012[60] was served to petitioner and received by a certain Sheryl Claudio. Thereafter, a Memorandum Report[61] was issued recommending the issuance of an Assessment Notice. Consequently, the BIR issued the PAN with Details of Discrepancies[62] and subsequently, the FAN[63] and FLD with Details of Discrepancies[64]. On February 13, 2014[65], the Regional Director of Revenue Region No. 7 issued a Final Decision.

[51] Exhibits "R-15" and "R-15.1".
[52] Exhibit "R-1".
[53] Exhibit "R-10".
[54] Exhibit "R-11".
[55] Exhibits "R-12", "R-12.1" and "R-13".
[56] Exhibit "R-2".
[57] Exhibit "R-2.1".
[58] Exhibit "R-3".
[59] Exhibits "R-4", "R-4.1", "R-4.2", "R-4.3", "R-4.4" and "R-4.5".
[60] Exhibits "R-5" and "R-5,1".
[61] Exhibit "R-6".
[62] Exhibits "R-7" and "R-7.1".
[63] Exhibits "R-8", "R-8.1" and "R-8.2".
[64] Exhibits "R-9", "R-9.1" and "R-9,2".
[65] Exhibit "R-14".

Witness **RO Rocky D. Torres** corroborated the testimony of RO Lao[66]. He testified that he personally delivered LOA No. 00014334 dated May 24, 2010 together with the Checklist of Requirements for Audit[67] to petitioner. It was received by Judith Ampit on June 1, 2010. However, the Second and Final Notice were sent by him through registered mail[68]. Thereafter, he prepared the Revenue Officer's Audit Report for DST, FWT, EWT, WTC, VAT and IT[69].

On December 11, 2012, he issued and served to petitioner an Amended Post Reporting Notice with details[70]. In a Memorandum Report[71], he recommended the issuance of the PAN with Details of Discrepancies[72], which he personally served to petitioner on the day it was issued. Thereafter, he issued and served to petitioner the FAN[73] and FLD with Details of Discrepancies[74] for deficiency Income Tax amounting to ₱34,733,324.14, deficiency VAT amounting to ₱60,269,628.46 and compromise penalty amounting to ₱27,000.00.

RO Torres clarified that the PAN and the FAN issued against petitioner were prepared by the Assessment Division based on his Memorandum Report and Amended Post Reporting Notice. While there was nothing in his recommendation about petitioner's alleged unaccounted source of cash, the same was included as basis for deficiency IT assessment in the PAN and the FLD issued against petitioner.

He further testified that the PAN and the FAN were served to petitioner on the same day they were issued. Admittedly, he was not conscious about the 15-day requirement in the issuance of the PAN and the FAN as his only concern was to serve them upon receipt from the Assessment Division. Likewise, there was nothing in his Memorandum Report about the existence of fraud, thus, it was just an afterthought.

Anent the imposition of compromise penalty, he explained that it was due to petitioner's failure to submit certain documents requested by the RO.

The testimony of respondent's last witness **RO Owen R. Villanueva**[75] merely corroborated those of the other two witnesses pertaining to the issuance

[66] Exhibits "R-16" and "R-16.1".
[67] Exhibit "R-2.1".
[68] Exhibits "R-3" and "R-3.1".
[69] Exhibits "R-4", "R-4.1", "R-4.2", "R-4.3", "R-4.4" and "R-4.5".
[70] Exhibits "R-5" and "R-5.1".
[71] Exhibit "R-6".
[72] Exhibits "R-7" and "R-7.1".
[73] Exhibits "R-8", "R-8.1" and "R-8.2".
[74] Exhibits "R-9", "R-9.1" and R-9.2".
[75] Exhibits "R-16" and "R-16.1".

of the LOA up to the issuance of the PAN, FAN and FLD with Details of Discrepancies to petitioner. He also reviewed the examination/investigation of the accounting and other business records of petitioner for TY 2009 contained in its case docket, albeit no written authority was issued in his favor for that purpose. He however stressed that it is part of the Assessment Division's procedure to review the taxpayer's case prior to the issuance of the PAN.

Respondent rested his case per Resolution dated July 25, 2017.[76]

On September 20, 2017[77], petitioner filed its Memorandum. Respondent failed to file his Memorandum despite notice. On September 28, 2017[78], the case was submitted for decision.

THE ISSUES

The parties submitted the following issues[79] for this Court's resolution:

1. Whether petitioner is liable to pay the alleged income and VAT deficiencies against petitioner for TY 2009, as well as other compromise penalties, interests and surcharges, in the aggregate amount of ₱95,002,952.60;

2. Whether the FAN and FLD issued for TY 2009 against petitioner representing alleged income and VAT deficiencies have prescribed pursuant to Section 203 of the 1997 Tax Code;

3. Whether respondent failed to inform petitioner about the facts and the laws upon which the present assessment is made;

4. Whether respondent violated the right of petitioner to due process for not complying with the BIR Rules and Regulations regarding the service of assessments, thus making the present assessment null and void; and

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[76] *Id.* at Note 1, pp. 853-854.
[77] *Id.*, pp. 861-877.
[78] *Id.*, p. 879.
[79] *Id.*, p. 290, JFSI.

5. Whether petitioner failed to file a valid and binding protest with the respondent.

THE RULING OF THE COURT

The Court's Jurisdiction

The Court shall first rule on respondent's argument that the questioned assessment was rendered final, demandable and executory due to petitioner's failure to submit supporting documents for its protest within sixty (60) days from the filing of the protest. As respondent considered petitioner's protest to the FAN/FLD as a request for reinvestigation, citing Section 228 of the NIRC of 1997, as amended and implemented by Section 3.1.4 of RR 12-99, and, later on RR 18-2013, the failure to submit supporting documents marked the assessment with a stamp of finality over which this Court no longer has jurisdiction on.

There is no dispute that petitioner filed a valid protest to the FAN/FLD on February 20, 2013. However, regardless of whether or not the protest would be considered a "request for reconsideration" or a "request for reinvestigation", the fact that petitioner did not submit any other supporting documents thereafter does not foreclose the remedy of appeal to it.

In *Commissioner of Internal Revenue v. First Express Pawnshop Company, Inc.*[80], the Supreme Court rejected the argument of the CIR that the that the assessment had become final and unappealable by the mere failure of the taxpayer to submit supporting documents. It held therein that as long as respondent has complied with the requisites in disputing an assessment pursuant to Section 228 of the Tax Code, the remedy of appeal is still availing if perfected within the mandatory and jurisdictional periods therefore.

A perusal of the contents of the FDDA show that it also does not state whether or not respondent considered the protest to be a request for reconsideration or reinvestigation. However, due to the lack of supporting documents submitted after the protest, it should be deemed a request for reconsideration as there was only a re-evaluation of the assessment on the basis of existing records.

[80] G.R. Nos. 172045-046, June 16, 2009.

Section 3.1.4 on Disputed Assessments in RR 18-2013 distinguishes when an assessment or parts thereof are to be considered "final" as opposed to "final, executory and demandable". It provides:

> "3.1.4 Disputed Assessment. — The taxpayer or its authorized representative or tax agent may protest administratively against the aforesaid FLD/FAN within thirty (30) days from date of receipt thereof. The taxpayer protesting an assessment may file a written request for reconsideration or reinvestigation defined as follows:
>
> (i) Request for reconsideration — refers to **a plea of re-evaluation of an assessment on the basis of existing records without need of additional evidence**. It may involve both a question of fact or of law or both.
>
> (ii) Request for reinvestigation — refers to a plea of re-evaluation of an assessment on the basis of newly discovered or additional evidence that a taxpayer intends to present in the reinvestigation. It may also involve a question of fact or of law or both.
>
> The taxpayer shall state in his protest (i) the nature of protest whether reconsideration or reinvestigation, specifying newly discovered or additional evidence he intends to present if it is a request for reinvestigation, (ii) date of the assessment notice, and (iii) the applicable law, rules and regulations, or jurisprudence on which his protest is based, otherwise, his protest shall be considered void and without force and effect.
>
> **If there are several issues involved in the FLD/FAN but the taxpayer only disputes or protests against the validity of some of the issues raised, the assessment attributable to the undisputed issue or issues shall become final, executory and demandable**; and the taxpayer shall be required to pay the deficiency tax or taxes attributable thereto, in which case, a collection letter shall be issued to the taxpayer calling for payment of the said deficiency tax or taxes, inclusive of the applicable surcharge and/or interest.
>
> If there are **several issues involved in the disputed assessment** and **the taxpayer fails to state the facts, the**

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applicable law, rules and regulations, or jurisprudence in support of his protest against some of the several issues on which the assessment is based, <u>the same shall be considered undisputed issue or issues</u>, in which case, the assessment attributable thereto shall become <u>final, executory and demandable</u>; and the taxpayer shall be required to pay the deficiency tax or taxes attributable thereto and a collection letter shall be issued to the taxpayer calling for payment of the said deficiency tax, inclusive of the applicable surcharge and/or interest.

For requests for reinvestigation, the taxpayer shall submit all relevant supporting documents in support of his protest within sixty (60) days from date of filing of his letter of protest, otherwise, the assessment shall become final. The term "relevant supporting documents" refer to those documents necessary to support the legal and factual bases in disputing a tax assessment as determined by the taxpayer. The sixty (60)-day period for the submission of all relevant supporting documents shall not apply to requests for reconsideration. **Furthermore, the term "the assessment shall become final" shall mean <u>the taxpayer is barred from disputing the correctness of the issued assessment by introduction of newly discovered or additional evidence, and the FDDA shall consequently be denied.</u>**

If the taxpayer fails to file a valid protest against the FLD/FAN within thirty (30) days from date of receipt thereof, the assessment shall become final, executory and demandable. No request for reconsideration or reinvestigation shall be granted on tax assessments that have already become final, executory and demandable.

If the **protest is denied**, in whole or in part, by the Commissioner's duly authorized representative, **the taxpayer may either: (i) appeal to the Court of Tax Appeals (CTA) within thirty (30) days from date of receipt of the said decision; or (ii) elevate his protest through request for reconsideration to the Commissioner within thirty (30) days from date of receipt of the said decision.** No request for reinvestigation shall be allowed in administrative appeal and only issues raised in the decision of the Commissioner's duly authorized representative shall be entertained by the Commissioner.

If the protest is not acted upon by the Commissioner's duly authorized representative **within one hundred eighty (180) days counted from the date of filing of the protest in case of a request reconsideration**; or **from date of submission by the taxpayer of the required documents within sixty (60) days from the date of filing of the protest in case of a request for reinvestigation**, the taxpayer may **<u>either</u>**: (i) appeal to the CTA within thirty (30) days after the expiration of the one hundred eighty (180)-day period; or (ii) await the final decision of the Commissioner's duly authorized representative on the disputed assessment.

If the protest or administrative appeal, as the case may be, is denied, in whole or in part, by the Commissioner, the taxpayer may appeal to the CTA within thirty (30) days from date of receipt of the said decision. Otherwise, the assessment shall become <u>final, executory and demandable</u>. A motion for reconsideration of the Commissioner's denial of the protest or administrative appeal, as the case may be, shall not toll the thirty (30)-day period to appeal to the CTA.

If the protest or administrative appeal is not acted upon by the Commissioner within one hundred eighty (180) days counted from the date of filing of the protest, the taxpayer may either: (i) appeal to the CTA within thirty (30) days from after the expiration of the one hundred eighty (180)-day period; or (ii) await the final decision of the Commissioner on the disputed assessment and appeal such final decision to the CTA within thirty (30) days after the receipt of a copy of such decision.

It must be emphasized, however, that in case of inaction on protested assessment within the 180-day period, the option of the taxpayer to either: (1) file a petition for review with the CTA within 30 days after the expiration of the 180-day period; or (2) await the final decision of the Commissioner or his duly authorized representative on the disputed assessment and appeal such final decision to the CTA within 30 days after the receipt of a copy of such decision, are mutually exclusive and the resort to one bars the application of the other." *(Emphasis supplied)*

From the foregoing, it is indubitable that the word *"final"* in the phrase *"the assessment shall become final"* means that taxpayer is barred from disputing the correctness of the issued assessment by introduction of newly discovered or

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additional evidence which, consequently, leads to the FDDA being denied. It cannot be taken to mean as a bar to avail the remedy of appeal because the rules also say that if the taxpayer opts to await the final decision of the Commissioner on the disputed assessment, the taxpayer can appeal such final decision to the CTA within 30 days after the receipt of a copy of such decision.

It is, in fact, exactly what happened in the case at bar. Petitioner filed its protest to the FLD/FAN on February 20, 2013. Although it could have appealed to the CTA within 30 days after the expiration of the 180-day period which would have ended on August 19, 2013, petitioner opted to await the final decision of respondent which it received on March 4, 2014. The rules state that petitioner had 30 days therefrom within which to appeal to the CTA. Therefore, petitioner had until April 3, 2014 within which to file its appeal. Since the Petition for Review was timely filed on March 21, 2014, the appeal has been perfected and this Court has jurisdiction over this case.

Compliance with Due Process is Essential for the Validity of an Assessment

At the crux of matter raised for the scrutiny of the Court is the validity of the assessment. One of the issues to be resolved in this case is whether or not due process was observed by the respondent in the issuance of the PAN and the FAN/FLD.

A review of the evidence of the parties shows that there is substance to the claim of petitioner that discrepancies exist in the issuance of the mandatory twin notices.

The first glaring irregularity is that the PAN and FAN/FLD were issued or dated subsequent to the service thereof to petitioner. Witness for petitioner, Maria Carolyn Angeles, testified that petitioner received the **PAN**[81] on **January 4, 2013**. However, the PAN itself is dated **January 8, 2013,** four days later. Similarly, she testified that the **FAN/FLD**[82] was served on petitioner on **January 21, 2013**. However, the FAN/FLD is dated **January 25, 2013**.

As regards the issuance and service of the PAN and FAN/FLD, witness for the respondent RO Torres testified during cross-examination[83], as follows:

[81] Docket, Vol. 2, Exhibit "P-40", pp. 543-546.
[82] Docket, Vol. 2, Exhibit "P-42", pp. 550-557.
[83] TSN of the Hearing dated December 5, 2016.

ATTY. MONTENEGRO
Q Now, Mr. Witness, you mentioned and let me refer you to your answer in Questions No. 20 to 22. You said that you served the preliminary assessment notice with details of discrepancy personally, is that correct?

MR. TORRES
A Yes, sir.

ATTY. MONTENEGRO
Q May I know what date you served this on the taxpayer?

MR. TORRES
A Sir, as far as I can recall, sir, I served it on the date it was issued.

ATTY. MONTENEGRO
Q So would that mean if the document is dated January 8, you served it on January 8?

MR. TORRES
A Yes, sir.

ATTY. MONTENEGRO
Q So likewise in Question and Answer 22, may I know what exact date did you serve or were you the one who served the final assessment?

MR. TORRES
A Yes, sir.

ATTY. MONTENEGRO
Q May I know what date you served the final assessment on the taxpayer?

MR. TORRES
A The PAN, sir, was … interrupted

ATTY. MONTENEGRO
Q The final assessment.

MR. TORRES
A The final assessment was served also on the day of issuance.

ATTY. MONTENEGRO
Q So does that means (sic), Mr. Witness, that if the date issued as written on the formal, the final assessment notice of January 25, 2013, that is the date you served on the taxpayer?

MR. TORRES
A Yes, sir. *(Emphasis supplied)*

From the foregoing facts, it appears as though petitioner miraculously received the PAN, FAN/FLD even before it existed, and yet, the evidence bears testament to this discrepancy which has not been sufficiently explained by respondent.

The second glaring irregularity is the fact that the FLD/FAN was received by petitioner prior to the lapse of the 15-day period given to the petitioner to respond to the PAN. Counting fifteen (15) days from the time petitioner received the PAN on January 4, 2013, petitioner had until January 19, 2013 within which to file its protest to the PAN. However, January 19, 2013 fell on a Saturday which gave petitioner until the next working day, Monday, January 21, 2013, to file its protest. Indeed, petitioner filed its protest to the PAN on January 21, 2013. **However, on the same day, even prior to the expiration of the 15-day period within which it could contest the PAN, petitioner was served a <u>post-dated</u> FAN/FLD.**

Section 228 of the National Internal Revenue Code ("Tax Code") is clear in its provisions regarding the procedure for protesting of assessments, 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 **<u>preassessment notice</u>** 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

(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 exciseable articles has not been paid; or

(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.

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

It is clear from the above provision of law that the Commissioner of Internal Revenue is required to issue a PAN save for several instances, none of which obtains in this case. It is likewise clear that the taxpayer shall be required to respond to said notice, and that only if the taxpayer fails to respond, then the Commissioner or her duly authorized representative shall issue an assessment based on his findings. More importantly, the Commissioner or her duly authorized representative shall issue an assessment based on her findings only if the taxpayer fails to respond.

Based on the records of this case, at the time that the PAN and FAN were issued, RR No. 12-99, had not yet still been amended by RR No. 18-2013 which was issued on November 28, 2013. Nonetheless, **the CIR was still obligated to wait fifteen (15) days for petitioner to file its response to the PAN** for this is the period that it provided itself in its very own rules, to wit:

> "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 the payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties." *(Emphasis supplied)*

Section 228 of the Tax Code itself provides that the period for responding to the PAN is to be prescribed by implementing rules and regulations. RR No. 12-99 is precisely that regulation entitled "Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of

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National Internal Revenue Taxes."[84] Taxpayers may rely upon a rule or ruling issued by the Commissioner from the time the rule or ruling is issued up to its reversal by the Commissioner or this Court.[85] It is clear that RR No. 12-99 was effective and in force at the time that petitioner filed its response to the PAN issued to it.

In *Commissioner of Internal Revenue v. Metro Star Superama, Inc.*[86], the Supreme Court emphasized the importance of complying with the requirement to send a PAN to the taxpayer as an integral part of due process in the issuance of a deficiency tax assessment. It then declared in no uncertain terms that the failure of the CIR to strictly comply with the requirements laid down by law and its own rules is a denial of the taxpayer's right to due process. Undeniably, providing the taxpayer with a copy of the PAN is meaningless to the concept of due process if, after all, his right to respond to it within the prescribed period would be ignored.

Also in *Pilipinas Shell Petroleum Corporation v. Commissioner of Internal Revenue*[87], the Supreme Court ruled that non-compliance with statutory and procedural due process renders the FAN as null and void even if the taxpayer protested the formal assessment, to wit:

> "**While PSPC indeed protested the formal assessment, such does not denigrate the fact that it was deprived of statutory and procedural due process to contest the assessment before it was issued**. Respondent must be more circumspect in the exercise of his functions, as this Court held in *Roxas v. Court of Tax Appeals*:
>
> > 'The power of taxation is sometimes called also the power to destroy. Therefore it should be exercised with caution to minimize injury to the proprietary rights of a taxpayer. It must be exercised fairly, equally and uniformly, lest the tax collector kill the 'hen that lays the golden egg.' **And in order to maintain the general public's trust and confidence in the Government this power must**

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[84] Complete Title: "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".
[85] Commissioner of Internal Revenue v. San Roque, G.R. No. 187485, October 8, 2013.
[86] G.R. No. 185371, December 8, 2010.
[87] G.R. No. 172598, December 21, 2007.

be used justly and not treacherously.'" *(Emphasis supplied)*

The above jurisprudence finds application in the instant case where the CIR unfairly surprised petitioner with an FLD/FAN without waiting for the period within which petitioner could submit its protest to the PAN to expire. More egregious is the obvious fact that respondent did not even consider the points and arguments petitioner raised in its protest to the PAN prior to issuing a decision thereon in the form of the FLD/FAN.

It is clear from Section 228 of the Tax Code that the right to respond to a "preassessment notice" or PAN is given to the taxpayer, and from RR No. 12-99, that the period of fifteen (15) days to file said response is also the taxpayer's right; they are not for the CIR to waive. Petitioner's right to due process has therefore been violated and the FAN/FLD is null and void.

Finding that the assessments for taxable year 2009 void for lack of due process, the Court finds it no longer necessary to discuss the other issues raised.

WHEREFORE, the instant Petition for Review is **GRANTED.** Accordingly, the deficiency income tax and value-added tax assessments for taxable year 2009, amounting to ₱95,002,952.60 as found in FAN/FLD Demand No. 39-B093-09, are hereby **CANCELLED** and **WITHDRAWN.**

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

With Dissenting Opinion
ESPERANZA R. FABON-VICTORINO
Associate Justice
Acting Chairperson

CATHERINE T. MANAHAN
Associate Justice

ATTESTATION

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

ESPERANZA R. FABON-VICTORINO
Associate Justice
Acting Chairperson

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL THIRD DIVISION

MAX'S STA. MESA, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8786

Members:

FABON-VICTORINO,
RINGPIS LIBAN, and
MANAHAN; *JJ.*

Promulgated:

SEP 2 6 2018
3:10 p.m.

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DISSENTING OPINION

Fabon-Victorino, *J.*:

With due respect, I dissent.

In resolving the case, the majority holds that the Court has jurisdiction over the instant Petition for Review given that petitioner validly filed its protest in the form of a request for reconsideration and after the denial thereof, it timely elevated its case through the instant Petition for Review filed before the Court in Division on March 21, 2014.

I submit however that the instant Petition for Review should be dismissed on jurisdictional ground as the questioned assessment has long become final, executory and demandable when petitioner failed to submit to respondent the relevant supporting documents it obliged to submit in support of its Protest to the FAN/FLD dated January 25, 2013 but received on January 21, 2013, within sixty (60) days from date of its filing.

A scrutiny of petitioner's Protest Letter dated and filed on February 20, 2013 indicates that it was a request for reinvestigation and not for reconsideration since petitioner prayed for a re-evaluation of the disputed assessment based on the pieces of evidence it would eventually present that would change the respondent's finding. While it could be true that the subject Protest Letter was not written in a legalese approach, the same would not necessarily affect its validity. It was sufficient as it raised the factual errors that the BIR committed in making the assessment, and the justifications for re-evaluating the same. Such intention to seek reinvestigation of its case was clearly indicated in the reservation made by petitioner in its Protest Letter, to wit:

> "xxxx
>
> We reserve the right to submit additional documents and information to further support this protest."

Under RR No. 12-99, as amended by RR No. 18-2013, a distinction is made between a protest in the form of a request for reconsideration and a protest in the form of a request for reinvestigation.

A request for reconsideration refers to a plea of re-evaluation of an assessment on the basis of existing records without need of any additional evidence for that purpose. It may involve both a question of fact or of law or both.

On the other hand, a request for reinvestigation refers to a plea of re-evaluation of an assessment based on newly discovered and/or additional supporting evidence which the petitioner must submit to respondent within sixty (60) days from date of filing of its protest, otherwise, the assessment shall become final, executory and demandable. It may also involve a question of fact or of law or both.

Irrefragably, petitioner's Protest Letter of February 20, 2013 to the FAN/FLD was a request for reinvestigation, which under the rules requires submission of supporting or relevant documents to the revenue officer conducting the audit pursuant to Section 228 of the NIRC of 1997, as amended[1], and implemented by Section 3.1.4. of RR No. 12-99, as amended[2].

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[1] Section 228 of the NIRC of 1997, as amended states:

SEC. 228. Protesting of Assessment. — When the Commissioner of 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:

xxx xxx xxx

The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.

Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to 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

[2] Section 3.1.4. of RR No. 12-99, as amended states:

3.1.4 Disputed Assessment. — The taxpayer or its authorized representative or tax agent may protest administratively against the aforesaid FLD/FAN within thirty (30) days from date of receipt thereof. The taxpayer protesting an assessment may file a written request for reconsideration or reinvestigation defined as follows:

(i) Request for reconsideration — refers to a plea of re-evaiuation of an assessment on the basis of existing records without need of additional evidence. It may involve both a question of fact or of law or both.

(ii) Request for reinvestigation — refers to a plea of re-evaluation of an assessment on the basis of newly discovered or additional evidence that a taxpayer intends to present in the reinvestigation. It may also involve a question of fact or of law or both.

The taxpayer shall state in his protest (i) the nature of protest whether reconsideration or reinvestigation, specifying newly discovered or additional evidence he intends to present if it is a request for reinvestigation, (ii) date of the assessment notice, and (iii) the applicable law, rules and regulations, or jurisprudence on which his protest is based, otherwise, his protest shall be considered void and without force and effect.

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For requests for reinvestigation, the taxpayer shall submit all relevant supporting documents in support of his protest within sixty (60) days from date of filing of his letter of protest, otherwise, the assessment shall become final. The term 'relevant supporting documents' refer to those documents necessary to support the legal and factual bases in disputing a tax assessment as determined by the taxpayer. The sixty (60)-day period for the submission of all relevant supporting documents shall

The term "relevant supporting documents" should be understood as **those documents necessary to support the legal basis in disputing a tax assessment as determined by the taxpayer**[3]. Such discretion to determine what documents will substantiate the taxpayer's protest must however be exercised within the period of 60 days from the filing of the protest if such protest is in the nature of a request for reinvestigation as in the present case. Failure to do so will render the assessment final divesting this Court of competence to review the merit of the case.

In the instant petition, petitioner presented several Transmittal Letters[4] to prove that it submitted documents in support of its protest. However, only Exhibits P-51, P-51-D, and P-51-E were admitted. The Transmittal Letters dated June 11, 2010[5], October 8, 2012[6], and October 18, 2012[7] were sent to respondent when neither the PAN nor the FLD and FAN were issued. In other words, when petitioner submitted the cited documents, there was yet no tax assessment issued by respondent against it, let alone a protest that required substantiation. Thus, the said submission was not the submission of supporting documents contemplated under Section 228 of the NIRC of 1997, as amended, and implemented by Section 3.1.5 of RR No. 12-99.

Moreover, the record shows that after petitioner filed its Protest to FLD/FAN on February 20, 2013 indicating its intention to submit further documents to substantiate its Protest, respondent sent to petitioner a letter[8] dated July 23, 2013 requesting it to submit documents/evidence in relation to its Protest. While it appears that the said letter was received by petitioner through Jessie Socorro on July 26, 2013, there is no showing that petitioner replied to or complied with the said request. Significantly, petitioner's Protest Letter dated February 20, 2013 also suggests that it

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become final' shall mean the taxpayer is barred from disputing the correctness of the issued assessment by introduction of newly discovered or additional evidence, and the FDDA shall consequently be denied.

[3] *Commissioner of Internal Revenue v. First Express Pawnshop Company, Inc.*, G.R. Nos. 172045-46, June 16, 2009

[4] Exhibits "P-51" up to "P-51-E".

[5] Exhibit "P-51".

[6] Exhibit "P-51-D", docket, vol. 2, p. 614

[7] Exhibit "P-51-E", docket, vol. 2, p. 615

did not attach to it or submit any supporting documents, precisely the reservation made by petitioner to submit additional documents and information to support its Protest.

In view of petitioner's failure to submit additional supporting documents or information to substantiate its Protest, respondent, via the BIR's Letter dated February 13, 2014 signed by Regional Director Jonas DP. Amora, informed petitioner that its case was returned by the investigating officer with the recommendation to reiterate the questioned assessment for petitioner's failure to submit documents in support of its Protest within sixty days from filing the same, pursuant to Section 228(e) of the NIRC of 1997, as amended, in relation to Section 3.1.5 of RR No. 12-99, as amended. Such failure on the part of petitioner rendered the subject disputed assessment final, executory, and demandable. In fine, it is no longer appealable before this Court and petitioner is already barred from disputing the correctness of the assessment or invoking any defense that would reopen the question of its tax liability on the merits.[9]

Further, petitioner's failure to submit supporting documents to its request for reinvestigation is considered failure to comply with the form and manner of protesting an assessment as required under Section 228 of the NIRC of 1997, as amended and implemented by Section 3.1.4 of RR No. 12-99, as amended, and thereby rendering its Protest void and without any legal effect.

Finally, with respect to petitioner's contention that it was denied due process, a careful examination of the evidence presented however shows otherwise. The standard of due process was met when petitioner was able to intelligently dispute the PAN through its Letter Protest as well as the FAN/FLD on January 21, 2013 and February 20, 2013, respectively. As enunciated in the case of *Flores, et al. v. Montemayor,*[10] as long as the party is given the opportunity to explain his side, the requirements of due process are satisfactorily complied with, as obtaining in the present case.

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[9]*Manila Electric Company v. Barlis*, 433 SCRA 33.

On this note, I vote to dismiss the instant Petition for Review on jurisdictional ground.

Respectfully submitted.

ESPERANZA R. FABON-VICTORINO
Associate Justice