REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

En Banc

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

FIRST GLOBAL BYO CORPORATION,
Respondent.

CTA EB NO. 2168
(CTA Case Nos. 9172, 9212, & 9242)

Present:

DEL ROSARIO, *PJ*,
CASTAÑEDA, JR.,
UY,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA, *and*
MODESTO-SAN PEDRO, *JJ.*

Promulgated:

JUL 0 1 2021
11:45a.m.

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DECISION

RINGPIS-LIBAN, *J.*:

Before the Court *En Banc* is a Petition for Review[1] filed by petitioner Commissioner of Internal Revenue (CIR) against respondent First Global BYO Corporation (FGBC) seeking to set aside the assailed Decision of this Court's Special Second Division, dated August 6, 2019,[2] which granted FGBC's Petition for Review and cancelled and set aside the Final Assessment Notices (FANs) dated February 23, 2015, April 23, 2015, and June 16, 2015 respectively issued for taxable years (TYs) 2009, 2010, and 2011.

The CIR likewise seeks to set aside the assailed Resolution dated October 15, 2019[3] which denied his Motion for Reconsideration (On the Decision promulgated on August 6, 2019) for lack of merit.

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[1] *Rollo*, pp. 6-28, with Annexes on pp. 29-60.
[2] *Id.*, pp. 29-53.
[3] *Id.*, pp. 54-57.

The Parties

Petitioner CIR is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) who has the power to decide on 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 of 1997, as amended, (Tax Code) or other laws or portions thereof administered by the BIR. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Respondent FGBC is a domestic corporation, with office address at 865 Sto. Cristo Street City, Binondo, Manila. It is registered with the BIR with Taxpayer Identification No. (TIN) 006-540-832.[4]

The Facts[5]

Fort Palm Spring Condominium Corporation (FPSCC) was organized by several investors for the purpose of buying a lot in Fort Bonifacio, Taguig, and for the construction of a condominium building.[6] These investors all contributed monies for the purchase of the lot and for the construction of the condominium building.[7]

FPSCC appointed Banco De Oro (BDO) as trustee for the monies and the project.[8] BDO then appointed respondent FGBC as Project Manager with the power to select and appoint the structural engineer to construct the building and the architectural engineer for the finishing work.[9]

A Contract to Manage[10] between the individual investors and FGBC was executed.[11]

FPSCC filed a Letter Re: Request for Tax Exemption[12] with the BIR, requesting for confirmation that its conveyance of individual condominium certificate of title under Republic Act (RA) No. 4627 or "the Condominium Act",

[4] Exhibits "P-1", "P-6", and "P-12".
[5] As found by the Special Second Division and as culled from the records of the case.
[6] CTA Case No. 9172, Docket (Vol. III), p. 1138, Joint Stipulation, Common to CTA Case Nos. 9172, 9212, & 9242, par. 1.
[7] *Id.*, par. 2.
[8] *Id.*, par. 3.
[9] *Id.*, par. 4.
[10] Exhibit "P-22".
[11] *Id.* at Note 6, par. 5.
[12] Exhibit "P-23".

in favor of all investors-unit owners co-developer as beneficial owners of said condominium and parking units are not subject to income tax (IT), capital gains tax (CGT), value-added tax (VAT), and documentary stamp tax (DST) under Section 196 of the Tax Code.

Accordingly, the BIR issued BIR Ruling Nos. DA (C-128) 374-2009[13] and DA (C-129) 375-2009[14] on July 15, 2009, confirming that transfers from the trustee to the beneficial owners of the condominium and parking units are not subject to CGT, IT, Withholding Tax, VAT, and DST under the Tax Code.

CTA Case No. 9172

FGBC filed its Income Tax Return[15] for TY 2009 on April 15, 2010.

On February 3, 2015, FGBC received a Preliminary Assessment Notice[16] (PAN) dated January 30, 2015 for its alleged deficiency IT and VAT for TY 2009 in the total amount of ₱64,330,641.80.

FGBC filed its Letter of Protest[17] to the PAN on February 18, 2015.

On February 26, 2015, FGBC received a FAN[18] dated February 23, 2015, assessing it for deficiency taxes in the total amount of ₱64,739,346.12.

On March 26, 2015, FGBC filed a Letter of Protest[19] praying for reconsideration or reinvestigation of the deficiency assessment findings in the FAN. The CIR failed to act on the protest within the mandated 180-day period which prompted FGBC to file a Petition for Review with the Court of Tax Appeals (CTA).

CTA Case No. 9212

FGBC filed its Income Tax Return[20] for TY 2010 on April 15, 2011. It thereafter filed an Amended Income Tax Return[21] on January 9, 2012.

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[13] Exhibit "P-18".
[14] Exhibit "P-19".
[15] Exhibit "P-1" to "P-1-7".
[16] Exhibit "P-2".
[17] Exhibit "P-3".
[18] Exhibit "P-4".
[19] Exhibit "P-5".
[20] Exhibits "P-6" to " P-6-1".
[21] Exhibits "P-7" to "P-7-1".

On April 6, 2015, FGBC received a PAN[22] dated March 30, 2015 for its alleged deficiency IT and VAT for TY 2010 in the total amount of ₱22,399,971.65.

FGBC protested the PAN via Protest Letter[23] dated April 21, 2015.

On April 29, 2015, the CIR issued a FAN[24] dated April 23, 2015 assessing FGBC for deficiency taxes in the total amount of ₱22,579,989.52.

FGBC protested the FAN through a Letter of Protest[25] on May 8, 2015, praying for reconsideration or reinvestigation of the deficiency assessment findings. However, the CIR also failed to act on the Letter of Protest within the mandated 180-day period prescribed by law, and FGBC filed its Petition for Review with the CTA.

CTA Case No. 9242

FGBC filed its Income Tax Return[26] for TY 2011 on April 16, 2012.

The CIR issued a PAN[27] dated May 26, 2015 for FGBC's alleged deficiency IT and VAT in the total amount of ₱29,371,244.81.

FGBC filed its Protest Letter[28] to the PAN on June 11, 2015.

On June 16, 2015, the CIR issued a FAN[29] assessing FGBC for deficiency taxes in the total amount of ₱29,667,239.19. The FAN was received by FGBC on June 18, 2015.

On July 10, 2015, FGBC filed a Letter Protest[30] praying for reconsideration or reinvestigation of the deficiency assessment findings in the FAN. The CIR failed to act on the protest within the mandated 180-day period and FGBC subsequently filed a Petition for Review with the CTA.

[22] Exhibit "P-8".
[23] Exhibit "P-9".
[24] Exhibit "P-10".
[25] Exhibit "P-11".
[26] Exhibits "P-12" to "P-12-1".
[27] Exhibit "P-13".
[28] Exhibit "P-14".
[29] Exhibit "P-15".
[30] Exhibit "P-16".

The CIR filed his Answers for CTA Case Nos. 9172, 9212, and 9242 on December 14, 2015[31], on March 2, 2016[32], and on March 15, 2016,[33] respectively.

After FGBC filed *Ex-Parte* Motions for Consolidation[34], CTA Case No. 9212, pending with the CTA First Division, and CTA Case No. 9242, pending with the CTA Third Division were consolidated with CTA Case No. 9172, pending before the CTA Second Division.[35]

FGBC's Pre-Trial Briefs were filed on February 15, 2016[36] for CTA Case No. 9172, and on May 25, 2016 for CTA Case Nos. 9212 and 9242. The CIR filed his Consolidated Pre-Trial Brief[37] through registered mail, on May 18, 2016.

FGBC filed a Motion for Preliminary Hearing on the Issue of Prescription[38] on February 18, 2016 on the ground that the assessments were issued beyond the mandatory three-year prescriptive period under Section 203 of the Tax Code. This was granted by the Court in Division[39] and pre-trial was held in abeyance.

FGBC thereafter presented its external bookkeeper, Mr. Rodrigo M. Intia, as its witness who testified by way of Consolidated Judicial Affidavit[40]. After cross-examination, FGBC filed its Formal Offer of Exhibits[41] in support of its motion to resolve the issue of prescription on June 23, 2016. The Court in Division admitted all of its documentary exhibits and ordered the parties to submit their respective memoranda on the issue of prescription.[42]

FGBC filed a Consolidated Memorandum[43] and the CIR filed his Memorandum[44] both on November 7, 2016.

The Court in Division eventually denied FGBC's Motion for Preliminary Hearing on the Issue of Prescription on February 27, 2017.[45]

[31] CTA Case No. 9172, docket (Vol. I), pp. 87-90.
[32] CTA Case No. 9212, docket, pp. 96-98.
[33] CTA Case No. 9242, docket, pp. 108-111.
[34] *Id.* at Note 32, pp. 83-85.
[35] *Id.*, pp. 94-95.
[36] *Id.*, pp. 97-106.
[37] *Id.*, pp. 296-298.
[38] *Id.*, pp. 110-113.
[39] *Id.*, p. 147, Minutes of the Hearing dated May 26, 2016.
[40] *Id.* at Note 31, pp. 550-566, Exhibit "17".
[41] *Id.*, pp. 425-430.
[42] CTA Case No. 9172, docket (Vol. II), pp. 606-607.
[43] *Id.*, pp. 608-622.
[44] *Id.*, pp. 628-640.
[45] *Id.*, pp. 643-648.

Thereafter, a Notice of Pre-Trial Conference[46] was issued setting the consolidated cases for pre-trial conference on June 22, 2017.

The parties filed their Joint Stipulations[47] via Motion to Admit on August 24, 2017. This was granted and admitted in the Resolution dated September 20, 2017. Hence, the pre-trial was deemed terminated.

Trial ensued and FGBC presented as witnesses its tax consultant Mr. Florencio Y. Rojas, Jr.[48], and Assistant to the President, Mr. Abdol Bryan Barte.[49]

Subsequently, on September 4, 2017, FGBC filed its Formal Offer of Exhibits[50] consisting of Exhibits "P-1" to "P-25-1", inclusive of sub-markings. The Court in Division admitted all the formally offered exhibits and deemed FGBC to have rested its case on November 17, 2017.[51]

The CIR, in turn, presented as witnesses, Revenue Officers Rhodora S. De Villa[52], Gigette T. Ventura[53] and Mohammad-Ali Rande[54].

On May 9, 2018, the CIR filed his Formal Offer of Evidence[55] via Motion to Admit, offering Exhibits "R-1" to "R-21-a", inclusive of sub-markings. The Court in Division admitted all of his documentary exhibits on July 12, 2018, noting that FGBC had no objections thereto.[56]

On July 3, 2018, FGBC filed its Memorandum (for the Petitioner)[57] while the CIR failed to file his memorandum, despite due notice.[58]

On August 20, 2018, the consolidated cases were deemed submitted for decision.[59]

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[46] *Id.*, pp. 743-744.
[47] CTA Case No. 9172, docket (Vol. III), pp. 1136-1147.
[48] Exhibit "P-24"; CTA Case No. 9172, docket (Vol. II), pp. 1020-1032.
[49] Exhibit "P-25", ibid, pp. 1120-1125.
[50] *Id.* at Note 6, pp. 1142-1147.
[51] *Id.*, pp. 1410-1411.
[52] *Id.* at Note 31, pp. 288-294.
[53] *Id.* at Note 6, pp. 1428-1433.
[54] *Id.*, pp. 1436-1442.
[55] *Id.*, pp. 1456-1459.
[56] *Id.*, pp. 1506-1509.
[57] *Id.*, pp. 1472-1504.
[58] *Id.*, p. 1510.
[59] *Id.*, p. 1511.

On August 6, 2019, the Court in Division issued the assailed Decision[60], the dispositive portion of which reads as follows:

> "**WHEREFORE**, premises considered, the instant Petitions for Review are hereby **GRANTED**. Accordingly, the Final Assessment Notices dated February 23, 2015, April 23, 2015, and June 16, 2015 respectively issued for taxable years 2009, 2010, and 2011 are hereby **CANCELLED** and **SET ASIDE.**
>
> **SO ORDERED."**

On August 22, 2019, the CIR filed his Motion for Reconsideration (On the Decision promulgated on August 6, 2019) through registered mail which the Court received on August 29, 2019. The CIR responded by filing his Comment/Opposition (to the Motion for Reconsideration dated 19 August 2020) on September 27, 2019.

On October 15, 2019, the Court in Division issued the assailed Resolution[61] which denied the CIR's motion for reconsideration for lack of merit. The dispositive portion of the assailed Resolution reads as follows:

> "**WHEREFORE,** premises considered, respondent's **Motion for Reconsideration (On the Decision promulgated on August 6, 2019) is DENIED** for lack of merit.
>
> **SO ORDERED."**

Within an extended period of time[62] granted by the Court *en banc*,[63] the CIR timely posted his Petition for Review[64] on November 22, 2019 which the CTA *en banc* received on December 17, 2019.

On January 14, 2020, FGBC was ordered to file its Comment thereto.[65] In that same Resolution, one of the CIR's counsels, Atty. Wilmer B. Dekit, was also directed to pay a fine of ₱2,000.00 for his failure to indicate his MCLE Compliance Number for the 6th compliance period and to submit a copy of the same.

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[60] *Id.* at Note 2.
[61] *Id.* at Note 3.
[62] *Id.* at Note 1, pp. 1-3.
[63] *Id.*, p. 5.
[64] *Id.* at Note 1.
[65] *Id.*, pp. 64-65.

On January 24, 2020, FGBC filed its Comment/Opposition (on the Petition for Review).[66]

On February 5, 2020, the CIR filed a Motion for Reconsideration (of the Resoluion *[sic]* dated 14 January 2020)[67] on the ground that the MCLE Certificate of Compliance of Atty. Dekit had not yet been issued and delivered to him at the time of the filing of the Petition for Review.

In a Resolution dated February 10, 2020, FGBC's Comment/Opposition was noted and the case was referred to mediation.[68] However, the parties decided not to have their case mediated by the Philippine Mediation Center Unit-CTA on July 30, 2020.[69]

On February 27, 2020, the Court *en banc* denied the CIR's motion for reconsideration and held that since the 6th compliance period for MCLE ran from April 15, 2016 to April 14, 2019 and Atty. Dekit filed his Compliance Report only on November 30, 2019, at the time the Petition for Review was filed on November 22, 2019, Atty. Dekit was non-compliant with his MCLE for the said compliance period.

On September 24, 2020, the case was submitted for decision.[70]

On even date, the Court *en banc* issued another Resolution directing Atty. Dekit to pay the ₱2,000.00 fine imposed upon him within five (5) days from notice.[71]

The Assignment of Errors

Petitioner CIR claims that the Special Second Division erred in granting FGBC's Petition for Review and ordering the cancellation of the FANs dated February 23, 2015, April 23, 2015, and June 16, 2015, respectively issued for TYs 2009, 2010, and 2011.

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[66] *Id.*, pp. 65-80.
[67] *Id.*, pp. 84-88.
[68] In accordance with A.M. No. 11-1-S-SC-PHILJA dated January 18, 2011 issued by the Supreme Court, "Interim Guidelines for Implementing Mediation in the Court of Tax Appeals".
[69] *Id.* at Note 1, p. 94.
[70] *Id.*, pp. 97-98.
[71] *Id.*, pp. 100-101.

The Arguments of the Parties

The CIR argues that the subject FANs should not have been cancelled by the Court in Division because 1) the PAN and the FAN with the attached details of discrepancies included an assessment on deficiency EWT and DST; 2) FGBC did not file with the BIR the required withholding tax remittance return and DST Declaration/Return on its transfer of the subject condominium units; 3) FGBC's contract to manage and execute the construction of the condominium constitute a taxable sale, exchange or disposition of real property, hence, subject to EWT and DST assessments; 4) the recommendation for assessment based on Best Evidence Obtainable justifies the application of the ten (10)-year prescriptive period to assess; and 5) FGBC failed to comply with the requirement of the Subdivision and Condominium Buyer's Protective Decree or Presidential Decree (PD) 957 when it failed to obtain a License to Sell from the Housing and Land Use Regulatory Board (HLURB) for the sale of condominium units.

On the other hand, FGBC asserts that the PANs and FANs issued against it are null and void for being issued beyond the prescriptive period and for having violated FGBC's right to due process.

The Ruling of the Court

The CIR's arguments fail to persuade.

At the outset, *We* note that the arguments advanced by the CIR are merely rehashed from his previous pleadings before the Court in Division. The issues raised have been amply discussed and sufficiently determined and passed upon in both the assailed Decision and Resolution. Thus, the Court *en banc* sees no compelling reason to modify much more deviate from the ruling of the Special Second Division.

No Basis for Extraordinary Prescription to Apply

The CIR contends that FGBC's concept of pooling funds to be used for the construction of condominium units on behalf of the fund owners constitutes a taxable sale, exchange or disposition of real properly subject to EWT and DST. Since FGBC failed to file the required Withholding Tax and DST returns and failed to report receipts in an amount exceeding thirty percent (30%) of that declared per return, this is *prima facie* evidence that the returns are false and/or fraudulent. Moreover, since FGBC failed to submit not only the returns, but also the required accounting records and documents pursuant to the Subpoena Duces

Tecum issued by the CIR, this justifies the imposition of the ten-year prescriptive period and the issuance of the assessment based on the Best Evidence Obtainable.

The general rule as laid out in Section 203 of the Tax Code[72] is that taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return. Section 222(a) of the Tax Code[73], however, provides exceptions to the three-year prescriptive period, extending the period to assess from three (3) to ten (10) years, counted from the discovery of the falsity, fraud or omission. Section 248(B) of the Tax Code, on the other hand, provides that substantial under-declaration of taxable sales, receipts or income, or a substantial overstatement of deductions exceeding thirty percent (30%) of that declared per return shall constitute *prima facie* evidence of a false or fraudulent return.

The Court in Division found that FGBC filed its Annual Income Tax Return on the following dates:

Taxable Year	Date of Filing of ITR	Three years from filing of ITR	Date of FAN
2009	April 15, 2010	April 15, 2013	February 23, 2015
2010	January 9, 2012*	January 9, 2015	April 23, 2015
2011	April 16, 2012	April 16, 2015	June 16, 2015

**Amended Income Tax Return*

As can be gleaned from the above, the FANs subject of this case were all issued beyond the three-year prescriptive period. The CIR justifies the application of extraordinary prescription by claiming that fraud can be presumed since FGBC failed to report receipts in an amount exceeding thirty percent (30%) of that declared per return for which the CIR imposed a fifty percent (50%) surcharge, evident in the FANs.

[72] **SEC. 203.** *Period of Limitation Upon Assessment and Collection.* - Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: Provided, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.

[73] **SEC. 222.** *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* -

(a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof. x x x

However, we have previously held in the case of *Commissioner of Internal Revenue v. Agrinurture, Inc.*[74] that **a finding of under-declaration of purchase does not itself result in the imposition of income tax and VAT.**

There are three (3) elements for the imposition of income tax. *First,* there must be gain or profit. *Second,* the gain or profit is realized or received, actually or constructively. *And third,* it is not exempted by law or treaty from income tax. Income tax is assessed on income received from any property, activity or service.[75] Such being the case, in the imposition or assessment of income tax, it is not when there is an undeclared purchase, but only when there was an income, and such income was received or realized by the taxpayer.[76]

In the same vein, no deficiency VAT assessment should arise from an undeclared purchase. Instead, Section 105 of the Tax Code imposes VAT on the ***seller*** of the goods, to wit:

> "SEC. 105. **Persons Liable.** - Any person who, in the course of trade or business, sells, barters, exchanges, leases goods or properties, renders services, and any person who imports goods shall be subject to the value-added tax (VAT) imposed in Sections 106 to 108 of the Code."

Section 106(A) of the Tax Code further states that the VAT is assessed on the "gross selling price or gross value in money of the goods or properties sold" which is "to be paid by the seller or transferor." In this connection, the law defines "gross selling price" as:

> " . . . the total amount of money or its equivalent which the purchaser pays or is obligated to pay to the seller in consideration of the sale, barter or exchange of the goods or properties, excluding the value-added tax. The excise tax, if any, on such goods or properties shall form part of the gross selling price."[77]

From the provisions above, what is critical to be shown in the imposition or assessment of VAT in the sale of goods or properties, is that the taxpayer is paid or ought to be paid in an amount of money or its equivalent in consideration of such sale, and not when said taxpayer purchases or disburses an amount of money to purchase goods or properties. Simply put, the VAT is imposed when

[74] CTA EB No. 1054 (CTA Case No. 8345), January 13, 2015.
[75] *Commissioner of Internal Revenue v. Court of Appeals*, G.R. No. 108576, January 20, 1999.
[76] *Id.* at Note 74.
[77] National Internal Revenue Code of 1997, Section 106(A)(1).

one sells, not when one purchases.[78]

Thus, the Court *en banc* finds that the assessments were not based on undeclared income actually received by FGBC. It is apparent that the CIR merely presumed that the alleged undeclared purchases were part of FGBC's cost which translated into profit or income. Moreover, since there is no basis for Withholding Taxes or VAT to be imposed, the Court *en banc* likewise finds the allegation of fraud to be untenable.

We agree with the discourse of the Court in Division on the subject of fraud, to wit:

> "In *Commissioner of Internal Revenue v. Javier*, this Court ruled that fraud is never imputed. The Court stated that it will not sustain findings of fraud upon circumstances which, at most, create only suspicion. The Court added that the mere understatement of a tax is not itself proof of fraud for the purpose of tax evasion. The Court explained:
>
>> 'xxx. The fraud contemplated by law is actual and not constructive. It must be intentional fraud, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some legal right. Negligence, whether slight or gross, is not equivalent to fraud with intent to evade the tax contemplated by law. It must amount to intentional wrongdoing with the sole object of avoiding the tax. xxx.'"
>
> Evidently, it is a well-entrenched rule that fraud is not presumed - it must be proved by clear and convincing evidence.[79] Fraud is never imputed and the courts never sustain findings of fraud upon circumstances which, at most create only suspicion and the mere understatement of a tax is not itself proof of fraud for the purpose of tax evasion.[80]"

The CIR likewise argues that because FGBC was unable to submit its accounting records and other documents pursuant to the *subpoena duces tecum* and its failure to file the required returns, his assessment based on Best Evidence

[78] *Id.* at Note 74.
[79] *Spouses Nilo Ramos and Eliadora Ramos v. Raul Obispo and Far East Bank and Trust Company*, G.R. No. 193804, February 27, 2013.
[80] *Commissioner of Internal Revenue v. Melchor Javier Jr.*, et al., G.R. No. 78953, July 31, 1991.

Obtainable justifies the application of the ten (10)-year prescriptive period to assess.

Section 6(B) of the Tax Code authorizes the CIR to make an assessment on the Best Evidence Obtainable, thus:

> "**SEC. 6.** *Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.* - x x x
>
> (B) *Failure to Submit Required Returns, Statements, Reports and other Documents.* - When a report required by law as a basis for the assessment of any national internal revenue tax shall not be forthcoming within the time fixed by laws or rules and regulations or when there is reason to believe that any such report is false, incomplete or erroneous, the Commissioner shall assess the proper tax on the best evidence obtainable.
>
> In case a person fails to file a required return or other document at the time prescribed by law, or willfully or otherwise files a false or fraudulent return or other document, the Commissioner shall make or amend the return from his own knowledge and from such information as he can obtain through testimony or otherwise, which shall be *prima facie* correct and sufficient for all legal purposes."

Indubitably, the power to make assessments on the basis of the Best Evidence Obtainable is indeed granted to the CIR through the aforequoted section. However, whatever evidence obtained through this method is still ultimately subject to judicial scrutiny to determine whether the weight of the evidence can substantiate the assessment.

On this score, the Court in Division found that the CIR derived the deficiency income tax and VAT assessments based on the computerized matching system on third-party information sources. The CIR compared the sales submitted by the suppliers of FGBC against the purchases declared in its tax returns and concluded that there was an understatement of purchases resulting in undeclared income and undeclared sales. This as much is indicated in the Details of Discrepancies[81] in the FANs.

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[81] Exhibits "P-4", "P-10", and "P-15".

However, the Court in Division also found that third-party information sources were not verified by the revenue officers who conducted the examination. The cross-examination of the CIR's witness, Revenue Officer Rhodora S. De Villa revealed the following:

> "ATTY. MONTILLA:
> Q. Did you verify aside from the matching previous clients?
>
> MS. DE VILLA:
> A. Sir, I have to inform you that this is actually a re-assignment. The case was re-assigned to me in 2013. This was originally handled by another RO. When it was re-assigned to me, the instruction was clear that it was actually from the... there was a Memorandum from Legal directing me to assess on best evidence.
>
> JUSTICE CASTANEDA:
> Q. Your best evidence is the computer matching?
>
> MS. DE VILLA:
> A. Yes.
>
> JUSTICE CASTANEDA:
> Q. Actually, what the previous examiner does is he conducted an examination based on the docket of the case?
>
> MS. DE VILLA:
> A. At the time sir that the original RO passed the document, the docket of the case to Legal, endorsed by Legal, I believe there was no assessment yet because she was unable to meet an assessment for lack of documents.
>
> JUSTICE CASTANEDA:
> Q. **So in effect, there was actually no verification made by the suppliers?**
>
> MS. DE VILLA:
> A. **Yes, Your Honors.**" *(Emphasis supplied)*

The aforequoted testimony confirms that the CIR relied on unverified information obtained from third-party matching when he estimated FGBC's sales and tax liabilities. In other words, the assessments were based on presumed facts and not actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption.[82] Thus, the Court in Division committed no error in declaring that the CIR failed to prove by clear and convincing evidence that petitioner committed fraud.

The CIR also alleges that under Revenue Memorandum Order (RMO) No. 15-95, FGBC's failure to keep or make certain records available raises the presumption that the returns filed are *prima facie* false or fraudulent, which in turn justifies the use of the Best Evidence Obtainable in making the subject assessments.

FGBC, on other hand, points out that it was under no obligation to preserve its accounting records and other documents beyond the three-year period within which the CIR was supposed to have made its assessment under Section 235 of the Tax Code.

We agree.

Section 235 of the Tax Code states:

> "**SEC. 235.** *Preservation of Books and Accounts and Other Accounting Records.* - All the books of accounts, including the subsidiary books and other accounting records of corporations, partnerships, or persons, **shall be preserved by them for a period beginning from the last entry in each book until the last day prescribed by Section 203 within which the Commissioner is authorized to make an assessment.** The said books and records shall be subject to examination and inspection by internal revenue officers: *Provided*, That **for income tax purposes, such examination and inspection shall be made only once in a taxable year, except in the following cases**:
>
> (a) Fraud, irregularity or mistakes, as determined by the Commissioner;
>
> (b) The taxpayer requests reinvestigation;
>
> (c) Verification of compliance with withholding tax laws and regulations;
>
> (d) Verification of capital gains tax liabilities; and
>
> (e) In the exercise of the Commissioner's power under

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[82] *Collector of Internal Revenue v. Benipayo*, G.R. No. L-13656, January 31, 1962.

> Section 5(B) to obtain information from other persons in which case, another or separate examination and inspection may be made. x x x."

Given the foregoing, FGBC was obliged to keep its records open for inspection by the CIR until April 15, 2013 for TY 2009, January 9, 2015 for TY 2010, and April 16, 2015 for TY 2011. However, as previously discussed, the subject FANs were issued long after those dates, presumably on the basis of fraud. It is also worth mentioning that the *proviso* wherein "fraud" is made an exception refers to the once a year examination and inspection that may be made in connection with income tax; that in case any of the listed exceptions are present, examination and inspection may be made **more frequently than once a year**. The "fraud" *proviso* in no way extends the obligation of the taxpayer to keep records beyond the three-year period.

Seeing how the allegation of fraud has only been imputed by the CIR but not proven, it necessarily follows that the application of the ten-year period for extraordinary prescription cannot apply to the subject assessments. The periods to assess have already prescribed.

Observance of Due Process is Necessary for Valid Assessments

There is another reason why the subject assessments must be invalidated. At this juncture, it must perforce be said that assessments issued by the BIR that fail to comply with due process requirements are void.

Section 228 of the Tax Code provides the due process requirements in the issuance of a deficiency tax assessment, as follows:

> **Sec. 228.** *Protesting of Assessment.* - When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: ...
>
> x x x x x x x x x
>
> **The taxpayer shall be informed in writing of the law and facts on which the assessment is made; <u>otherwise, the assessment shall be void</u>.**
>
> Within a period to be prescribed by the 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. x x x *(Emphasis supplied)*

We uphold the findings of the Court in Division that a perusal of the FANs shows that there is not a single allegation specifically explaining why the BIR considered FGBC's tax returns as fraudulent or false with intention to evade taxes.

As pointed out by FGBC, the alleged non-withholding of taxes as stated in the PANs and FANs refers to the rental, salaries and wages of FGBC. Nowhere on the face of the documents was it indicated that the alleged deficiency assessments were based on the transfer of condominium units. Neither does the deficiency DST and the non-filing of DST returns appear in the subject assessments. In fact, the Court in Division found that the allegation of non-filing of the EWT and DST Returns was only raised during the preliminary hearing on the issue of prescription.

This is clearly violative of FGBC's right to due process since the law requires that the taxpayer must be informed of the facts and the laws from which the assessment is based. The CIR ought to have informed FGBC the basis for why it considered its returns fraudulent and why the extraordinary prescriptive period was being applied in their case when he issued the subject assessments. This, the CIR failed to do, hence, the subject assessments are likewise void for lack of due process.

As held by the Supreme Court in *Commissioner of Internal Revenue vs. Reyes*,[83] to wit:

> "... A void assessment bears no valid fruit.
>
> The law imposes a substantive, not merely a formal, requirement. **To proceed heedlessly with tax collection without first establishing a valid assessment is evidently violative of the cardinal principle in administrative investigations: that taxpayers should be able to present their case and adduce supporting evidence.** 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

[83] G.R. No. 159694 and G.R. No. 163581, January 27, 2006.

> 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." *(Emphasis supplied)*

All told, the subject assessments are null and void for lack of due process. Had due process been observed, the subject assessments would still be cancelled since they have prescribed, having been issued beyond the three-year prescriptive period and having shown no valid justification for extraordinary prescription to apply.

The Court, therefore, sees no error committed by the Court in Division in the assailed Decision and Resolution.

WHEREFORE, premises considered, the Petition for Review is **DENIED**. The assailed Decision dated August 6, 2019 and the Resolution dated October 15, 2019 of the Special Second Division in CTA Case Nos. 9172, 9212, and 9242 are **AFFIRMED.**

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

ERLINDA P. UY
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA G. MODESTO- SAN PEDRO
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 this Court.

ROMAN G. DEL ROSARIO
Presiding Justice