REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PRIME STEEL MILL, INCORPORATED,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA *EB* NO. 1678
(CTA Case No. 8818)

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COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

PRIME STEEL MILL, INCORPORATED,
Respondent.

CTA *EB* NO. 1680
(CTA Case No. 8818)

Present:

DEL ROSARIO, *P.J.,*
CASTAÑEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, *and*
MANAHAN, *JJ.*

Promulgated:

JAN 03 2019
9:29 a.m.

x- -x

DECISION

MANAHAN, J.:

Before the Court of Tax Appeals *En Banc* are the consolidated Petitions for Review[1] filed on July 7, 2017 and July 28, 2017 with the following prayers:

1. CTA EB No. 1678 (*Prime Steel Mill, Incorporated vs. Commissioner of Internal Revenue*)- to declare the income tax deficiency assessment issued against petitioner for taxable year 2005 cancelled and withdrawn; and,
2. CTA EB No. 1680 (*Commissioner of Internal Revenue vs. Prime Steel Mill, Incorporated*) – to modify the Decision promulgated on January 23, 2017 ordering Prime Steel Mill, Incorporated to pay the amounts of P21,839,435.70, P15,704,207.87 and P100,000.00, as deficiency income tax, value-added tax and compromise penalty, respectively for calendar year 2005 plus 25% surcharge and 20% annual interest from 30 April 2014 until fully paid pursuant to Sections 248 (A) (3) and 249 (C) (3) of the NIRC of 1997, as amended.

We quote portions of the assailed Decision and Resolution, thus:

Decision dated January 23, 2017

> "**WHEREFORE,** premises considered, the instant Petition for Review is **PARTIALLY GRANTED.** The assessment issued by respondent against petitioner for taxable year 2005 covering deficiency value-added tax (P15,754,207.87) is **CANCELLED** and **WITHDRAWN.** However, the assessment issued by respondent against petitioner for taxable year 2005 covering deficiency income tax is **AFFIRMED but with modifications.** Accordingly, petitioner is **ORDERED TO PAY** respondent the amount (sic) THIRTY ONE THOUSAND SEVEN HUNDRED THIRTY-SIX PESOS AND 1/100 (P31,736.01) representing basic deficiency income tax of P25,388.81 and twenty-five percent (25%) surcharge

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[1] EB Docket,pp. 1-9.

of P6,347.20 imposed under Section 248 (A) (3) of the NIRC of 1997, as amended.

In addition, petitioner is **ORDERED TO PAY:**

(A) Deficiency interest at the rate of twenty percent (20) per annum on the basic deficiency income of P25,388.81 computed from April 15, 2006 until full payment thereof pursuant to Section 249 (B) of the NIRC of 1997, as amended; and

(B) Delinquency interest at the rate of 20% per annum on the total amount of P31,736.01 and on the 20% deficiency interest which have accrued as aforestated in (a) computed from May 14, 2014 until full payment thereof pursuant to Section 249 (C) of the NIRC of 1997, as amended.

SO ORDERED.

<u>Resolution dated June 21, 2017</u>

"**WHEREFORE**, premises considered, petitioner's Motion for Partial Reconsideration and respondent's Motion for Partial Reconsideration are **DENIED** for lack of merit.

SO ORDERED."

THE FACTS

The facts, as found by the Court in Division, are as follows:

"Petitioner Prime Steel Mill, Incorporated is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines with office address located at F. Felix Avenue, Cainta, Rizal. It is registered with the Bureau of Internal Revenue (BIR) with Tax Identification No. 000-359-087-000.

On the other hand, respondent is the Commissioner of the Bureau of Internal Revenue, vested by law with authority to perform the duties of said office, including, among others, the power to assess and collect all national internal revenue taxes, fees and charges, and to enforce all forfeitures, penalties, and fines connected therewith. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On January 7, 2009, petitioner received a Preliminary Assessment Notice (PAN) dated December 19, 2008, assessing petitioner for alleged deficiency income, value-added tax (VAT), and expanded withholding tax (EWT) for taxable year 2005. Thereafter, on January 22, 2009, petitioner filed a letter dated January 21, 2009 to protest the PAN.

On February 12, 2009, petitioner received the Formal Letter of Demand (FLD) with Details of Discrepancies and Final Assessment Notices (FAN) dated January 14, 2009 from respondent, assessing petitioner for alleged deficiency income tax, VAT and EWT covering taxable year 2005.

Consequently, petitioner sent a letter dated March 5, 2009 to respondent on March 6, 2009 to dispute the FLD and the FAN.

On April 14, 2014, petitioner received a Final Decision on Disputed Assessment (FDDA) dated April 14, 2014, signed by Jonas DP. Amora, Regional Director of Revenue Region No. 7, maintaining the finding against petitioner for income tax and VAT deficiencies in the aggregate amount of P37,675,379.58, inclusive of interests and compromise penalties for the taxable year 2005. xxx xxx xxx

xxx xxx xxx

In the FDDA, respondent finds that petitioner had unaccounted and undeclared sources of cash receipts that were not subjected to income tax, in the amount of P25,587,799.58. The Details of Discrepancy attached to the FDDA illustrates how the revenue examiners arrived at the following amount:

Xxx xxx xxx

Petitioner filed the instant Petition for Review before this Court on May 14, 2014.

Within the extended time granted by the Court, respondent filed his Answer on July 14, 2014 and interposed the following defenses:

4. The subject assessments are not yet barred by prescription since the same were issued on 14 January 2009, well within the three (3) year period mandated by Section 203 of the National Internal Revenue Code (NIRC) of 1997, as amended.

5. The income and VAT deficiencies for calendar year 2005 has (sic) factual and legal basis.

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> 6. Finally, well-settled is the rule that tax assessments by tax examiners are presumed correct and made in good faith (Cagayan Robina Sugar Milling Co. vs. Court of Appeals, 342 SCRA 671). It is the taxpayer and not the Bureau of Internal Revenue who has the duty of proving otherwise. Equally settled is the rule that in the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed. All presumptions are in favor of tax assessments. Dereliction on the part of petitioner to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notices.
>
> Both the petitioner's Pre-Trial Brief and the respondent's Pre-Trial Brief were filed on October 3, 2014. The Pre-Trial Conference was held on October 9, 2014.
>
> On October 14, 2014, the parties filed their Joint Stipulation of Facts and Issues. This was adopted by the Court in the Pre-Trial Order issued on November 10, 2014, which also pre-terminated the pre-trial.
>
> Upon motion of petitioner, the Court commissioned Mr. Glen Ian D. Villanueva as Independent Certified Public Accountant (ICPA) on January 29, 2015."

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In the assailed Decision promulgated on January 23, 2017, the Court in Division partially granted the Petition for Review and ordered the cancellation and withdrawal of the assessments for deficiency VAT for taxable year 2005 due to prescription but upheld the assessment for deficiency income tax and ordered petitioner to pay Php31,736.01 plus deficiency and delinquency interests and surcharge.

Both parties filed Motions for Partial Reconsideration of the assailed Decision which were both denied by the Court in Division in a Resolution dated June 21, 2017, for lack of merit.

On July 7, 2017, petitioner Prime Steel Mill, Incorporated (Prime Steel) filed a Petition for Review with the Court *En Banc* docketed as CTA EB No. 1678. The Commissioner of Internal Revenue (CIR) also filed a Petition for Review on July 12, 2017 docketed as CTA EB No. 1680. *an*

On August 1, 2017, the Court *En Banc* resolved to consolidate CTA EB No.1680 with CTA EB No. 1678.

On August 18, 2017, the Court issued a Resolution ordering the respondents in CTA EB Nos. 1678 and 1680 to file their respective comments to the Petitions for Review.

On September 15, 2017, respondent Prime Steel filed its Comment in CTA EB No. 1680 while respondent CIR failed to file his Comment in CTA EB No.1678 within the time prescribed by the Court *En Banc.*

On November 27, 2017, the Court issued a Resolution requiring both parties to submit their respective memoranda.

On February 6, 2018, petitioner Prime Steel filed its Memorandum while petitioner CIR failed to file his Memorandum within the time prescribed by the Court.

The consolidated cases were deemed submitted for decision on February 26, 2018.

On October 19, 2018, petitioner Prime Steel filed a *Motion to Admit Supplemental Memorandum (with leave of Court)* requesting admission of the said supplemental memorandum to present additional arguments deserving of the *Court En Banc's* consideration.

This Supplemental Memorandum filed by petitioner Prime Steel was admitted by the Court in a Resolution issued on November 6, 2018.

THE ISSUE

Based on the Petition for Review filed by Prime Steel, the only issue raised before the Court *En Banc* is as follows:

> "Whether the CTA Third Division erred in not finding that the FAN/FLD issued for taxable year 2005 against petitioner representing alleged income and VAT deficiencies and the right of the Government through the Bureau of Internal Revenue to collect such alleged deficiency taxes had prescribed

pursuant to Sections 203 and 222 of the 1997 Tax Code, as amended.

On the other hand, an analysis of the arguments raised by the CIR in his Petition for Review may be synthesized into a single issue, thus:

> Whether or not Prime Steel is liable for deficiency income tax and value-added tax for taxable year 2005.

<u>Prime Steel's Arguments</u>

Prime Steel argues that the CIR's right to collect its deficiency taxes for 2005 had already prescribed based on the provisions of Section 222 (c) of the 1997 National Internal Revenue Code (NIRC). Contrary to the pronouncements made in the assailed Decision, petitioner maintains that the protest letter it filed against the FAN/FLD on March 5, 2009 is not a request for reinvestigation but merely a request for reconsideration which does not have the effect of suspending the running of the five (5) year period to collect.

Prime Steel narrates that it received the FAN/FLD on February 12, 2009, thus the five (5) year period to collect should have ended on February 12, 2014. Between the date of issuance of the FAN and FLD and the filing of the Petition for Review with the Court in Division on May 14, 2014, petitioner asserts that the CIR did not issue a Warrant of Distraint and/or Levy nor institute any judicial proceedings to collect the alleged deficiency taxes, thus the right to collect is already barred by prescription.

To illustrate its point, petitioner contends that the protest letter it filed on March 5, 2009 (against the FAN) did not offer any additional documents to instigate a request for reinvestigation but merely submitted the same documents it attached in the protest letter it filed against the Preliminary Assessment Notice (PAN) so said protest letter (filed against the FAN) could not be construed as a request for reinvestigation. In addition, petitioner avers that the provisions of Section 222 (c) of the 1997 NIRC mandates that the request for reinvestigation must also be granted, either expressly or impliedly, by the Bureau of Internal Revenue (BIR) for said request for reinvestigation to toll the running of the prescriptive period.

Prime Steel maintains that the BIR neither expressly or impliedly granted such request.

Prime Steel additionally pointed out more defects in the procedural aspects of the issuance of the FAN/FLD in its *Supplemental Memorandum* filed on October 19, 2018. We enumerate the perceived defects alleged by Prime Steel as follows:

1. No Letter of Authority (LOA) was offered in evidence by the CIR during trial and the absence of the said LOA to conduct an audit renders the FAN void;
2. The FAN was issued prior to the lapse of the fifteen (15) – day period given to a taxpayer to protest the PAN hence violating its right to due process;
3. The FAN/FLD did not set and fix the tax liability because a close perusal of these documents reveals that the interest and total tax due are still subject to modification, depending on the date of payment. The failure to fix a definite tax liability makes the FAN/FLD legally infirm and subject to cancellation for being void.

CIR's Arguments

The CIR raises the following grounds to support his Petition for Review; thus:

1. Prime Steel has unaccounted source of cash in the amount of P25,587,799.58 for the year 2005.
2. Prime Steel is liable to pay deficiency income tax, value-added tax and compromise penalty in the aggregate amount of P37,675,379.58 for the year 2005.
3. The FAN and FLD issued for taxable year 2005 against Prime Steel representing income and VAT deficiencies and the right of the government through the BIR to collect the deficiency taxes have not yet prescribed pursuant to Sections 203 and 222 of the 1997 NIRC, as amended.
4. Revenue Regulations (RR) No. 16-2005 dated 19 October 2005 can be applied retroactively.

The CIR maintains that Prime Steel has unaccounted source of cash in the amount of P25,587,799.58 for the year 2005 giving rise to deficiency income and VAT deficiencies. For the deficiency income tax, the CIR alleges that verification of

Prime Steel's records discloses that there were discrepancies which led to the inference that part of the income of Prime Steel has not been declared.

As to the findings of VAT deficiency, the CIR likewise attributes this to the unaccounted/undeclared source of cash which should be subjected to VAT. The VAT deficiency also stems from the disallowed deductions to Prime Steel's VAT liability due to violations of invoicing requirements set forth in Section 113 (A) of the 1997 NIRC, as amended in relation to RR No. 16-2005. The CIR added that, contrary to the Court ruling in the assailed Decision, the provisions of RR 16-2005 may be applied retroactively.

The CIR also disagrees with the assailed Decision as regards prescription of his right to assess the deficiency VAT of Prime Steel for the first to third quarter of taxable year 2005 and maintains that the FAN and the FLD were issued within the time prescribed under Sections 203 and 222 of the 1997 NIRC. As regards the right to collect, respondent also claims that this has not yet prescribed.

RULING OF THE COURT EN BANC

We shall first resolve the issue raised by Prime Steel (in CTA EB No. 1678 that the CIR's right to collect the deficiency income tax and VAT had already prescribed, hence it could no longer be held liable for the alleged tax deficiencies.

In its narration of the facts of the case[2], Prime Steel provided a timeline of events relative to the issuance of the FAN and FLD as follows:

Document	Date Received	End of Five (5) year Period to Collect
Final Assessment Notice	February 12, 2009	February 12, 2014
Formal Letter of Demand	February 12, 2009	February 12, 2014

[2] EB Docket, CTA EB No. 1678, paragraph 7 of the Petition for Review, page 7.

Based on the above timeline, Prime Steel theorizes that the five-year period provided under Section 222 (c) of the 1997 NIRC, as amended, is reckoned from the date of receipt/issuance of the FAN and FLD and since the two documents were received by Prime Steel on February 12, 2009, the five year period to collect lapsed on February 12, 2014. Moreover, since no warrant of distraint and/or levy was issued nor any court action was filed by the CIR up until the filing of the Petition for Review with the Court in Division on May 14, 2014, the right to collect the deficiency income tax and VAT has prescribed.

It should be made clear that Prime Steel no longer contests the timeliness of the issuance of the FAN/FLD as regards its income tax deficiency for taxable year 2005 but only the prescriptive period on the right to collect said deficiency taxes.

It is imperative to lay down three basic premises propounded by Prime Steel to better clarify the issues raised, thus:

Premise Number 1 - The prescriptive period to collect is five (5) years from the date of issuance of the deficiency tax assessments.

Premise Number 2 - The counting of the prescriptive period to collect deficiency taxes is reckoned from receipt (by the taxpayer) of the FAN/FLD, based on the timeline provided by Prime Steel.

Premise Number 3 – It is only a request for reinvestigation embodied in a protest letter (and not a request for reconsideration) that has the effect of suspending the five (5)-year period to collect deficiency taxes.

We find Prime Steel's Premise No. 1 in accord with existing jurisprudence although the law itself is quite vague in so far as the period to collect is concerned. The five (5) year period to collect finds its basis in Section 222 of the 1997 NIRC, as amended which provides as follows:

> Section 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: Provide, That in a fraud assessment, which has become final and executory, the act of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

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(c) Any internal revenue tax which has been assessed within the period of limitation as prescribed in paragraph (a) hereof may be collected by distraint or levy or by a proceeding in court **within five (5) years following the assessment of the tax.** (emphasis supplied)

From an analysis of the afore-quoted provisions, it would seem that the five (5) year period would only apply if the assessment is issued within the extraordinary period of ten (10) years in cases of fraud or falsity of tax returns because it forms part of the provisions on exceptions to the period of limitations, but then again there is no other proviso other than the aforequoted Section 222 (c) which fixes a period to collect taxes, hence jurisprudence and time honored practice have dictated that the five (5) - year period equally applies to assessments issued within the three-year ordinary period.

As to Premise No. 2, Prime Steel seems to have reckoned the counting of the period to collect from the date the taxpayer receives the assessment.

We find this to be an erroneous premise.

The afore-quoted section 222 (c) is clear when it states that the collection of the tax is counted five years "following the assessment of the tax" hence should be counted from its issuance and not from receipt by the taxpayer. Settled is the rule that an assessment is deemed made for purposes of counting the relevant prescriptive periods, when such assessment is "released, mailed or sent" to the taxpayer.[3] We quote the pertinent portions of the decision of the Supreme

[3] Barcelon Roxas Securities, Inc. vs. CIR, G.R. No, 157064, August 7, 2006; CIR vs. Pascor Realty and Development Corporation, et.al., G.R. No. 128315, June 29, 1999.

Court in the case of *Barcelon Roxas Securities, Inc. vs. CIR*[4], thus:

> "Under Section 203 of the National Internal Revenue Code (NIRC), respondent had three (3) years from the last day for the filing of the return to send an assessment notice to petitioner. In the case of *Collector of Internal Revenue vs. Bautista,* **this Court held that an assessment is made within the prescriptive period if notice to this effect is released, mailed or sent by the CIR** to the taxpayer within the said period." (emphasis supplied)

In the case of *CIR vs. Pascor Realty and Development Corporation, et.al.*[5], the Supreme Court said that an 'assessment is deemed made only when the Collector of Internal Revenue releases, mails or sends such notice to the taxpayer."

Although the above-cited Decisions pertain to the prescriptive period in the issuance of an assessment, this Court believes that the concept equally applies to the counting of the prescriptive period on the right to collect. Either way, it would seem that the reckoning period of the right to collect in the instant case is earlier than the receipt by the taxpayer as it starts from the moment such assessment is released, mailed or sent to the taxpayer.

Court records do not show when the FAN/FLD were released, mailed or sent to the taxpayer but they do show that Prime Steel received the FAN/FLD on February 12, 2009 and that both official documents were dated January 14, 2009.[6] Be that as it may, and all things considered, the five year period to collect will be reckoned earlier than the date of receipt so it would seem that the issue raised by Prime Steel on whether the protest it filed against the FAN/FLD is a request for reconsideration or a request for reinvestigation is worthy of discussion. As argued by Prime Steel and mentioned in Premise No. 3, it is only a request for reconsideration which has the effect of suspending the right to collect pursuant to the provisions of Section 223 of the 1997 NIRC, as amended (and not Section 222 (c) as cited by Prime Steel).

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[4] Id.
[5] Id.
[6] Exhibit "P-8", Court Docket, Volume I, pp. 284-285; Exhibit "P-9", Court Docket, Volume I, pp. 289-288. *au*

For purposes of intellectual discourse, Section 223 of the 1997 NIRC is quoted as follows:

> "Section 223. *Suspension of Running of Statute of Limitations.* – The running of the Statute of Limitations provided in Sections 203 and 222 on the making of an assessment and **the beginning of distraint or levy or a proceeding in court for collection,** in respect of any deficiency, **shall be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or levy or a proceeding in court and for sixty days thereafter;** when **the taxpayer requests for a reinvestigation which is granted by the Commissioner**; when the taxpayer cannot be located in the address given by him in the return filed upon which a tax is being assessed or collected: xxx xxx xxx (emphasis supplied)

Jurisprudence has established that it is only a request for reinvestigation that has the effect of suspending the right to collect deficiency taxes. In *CIR vs. Philippine Global Communications, Inc. vs. CIR (Philippine Global),*[7] the Supreme Court had the occasion to differentiate a request for reconsideration and a request for reinvestigation and its implications on suspending the running of the prescriptive period, and we quote:

> "The main difference between these two types of protests lies in the records or evidence to be examined by internal revenue officers, whether these are existing records or newly discovered or additional evidence. **A re-evaluation of existing records which results from a request for reconsideration does not toll the running of the prescription period for the collection of an assessed tax.**
>
> xxx xxx xxx

Based on the parameters set by the Supreme Court in the *Philippine Global* case, the provisions of Section 223 of the 1997 NIRC, as amended and the records of this case, We are inclined to disagree with the contention of Prime Steel that the protest letter it filed against the FAN/FLD dated March 5, 2009[8] is a mere request for reconsideration and not a request for reinvestigation.

The pieces of evidence show that, although the arguments propounded by Prime Steel against the FAN/FLD merely echoed

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[7] G.R. No. 167146, October 31, 2006.
[8] Exhibit "P-10", Court Docket, Volume I, pp. 291-294.

those which were presented in its protest letter against the PAN, it is obvious that Prime Steel submitted documents to support its protest hoping for a fresh and new perspective in the way the revenue examiners appreciated the documents they examined during their investigation. We quote certain portions of the protest against the FAN/FLD dated March 5, 2009, thus:

> " (c) Disallowed Bad Debts (P1,663,925.40)
>
> We are submitting herewith the **copy of affidavit issued under penalty of perjury by our collecting agent certifying that the accounts receivable listed therein are totally uncollectible."** (emphasis supplied)
>
> (d) Unsupported Purchase (P36,363,704.13)
>
> **Enclosed herewith are the xerox copy of the invoices** issued to us by South Lotus Business Corp with BIR Permit No. 3AU0000365276 10-18-2004 as well as their BIR Certificate of Registration. The examiner may have missed the invoices while verifying our purchases." (emphasis supplied)

In response to the issued FDDA, Prime Steel, in a letter dated May 5, 2014,[9] acknowledged that it submitted supporting documents to show that the assessment was without basis, and we quote portions of said letter, to wit:

> "Please be informed that we are saddened by your issuance of the said FDDA because after **all the explanations and supporting documents submitted** to show that the assessment was without basis in fact, none of these have been considered by RDO 046, Cainta Revenue District Office." xxx xxx xxx(emphasis supplied)

In our analysis of the words used by Prime Steel in its protest letter against the FAN/FLD and the tenor of its request plus the type of documents it presented, we again look to the leading case of *Philippine Global* to re-affirm our conclusion that it partakes the nature of a request for reinvestigation and not a mere request for reconsideration.

As quoted above, the Supreme Court in the *Philippine Global case* delineated the difference between a request for reconsideration from a request for reinvestigation when there is no new or additional evidence presented in the case of the

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[9] Exhibit "P-12", Court Docket, Volume I, pp. 300-302.

former and the presentation of new and/or additional evidence as in the latter. For instance, an affidavit submitted to support that the "accounts receivable therein were totally uncollectible" partakes the nature of additional evidence that could not have been passed upon by the examiners during their investigation and re-examination of the records of taxpayer. This affidavit provides a new perspective on the part of the revenue examiners in appreciating the records of Prime Steel which may consequently lead to an amended assessment notice, which was what happened in the instant case.

The fact that the request for reinvestigation was partially granted and more importantly, amended assessment notices[10] were consequently issued, all the more supports our conclusion. We quote the first portion of the FDDA as follows:

> "Referring to your letter dated November 26, 2012, please be informed that your protest against our calendar year 2005 deficiency income tax, value-added tax and expanded withholding tax, the subject matter of the Formal Letter of Demand dated January 14, 2009, **is hereby reduced in consideration of the documents presented** xxx xxx" (emphasis supplied)

We therefore conclude that the CIR's right to collect the deficiency taxes for taxable year 2005 had not yet prescribed and that the prescriptive period of five (5) years to collect starts to run from the date the amended assessment notices were made. The Supreme Court in the case of *Bank of the Philippine Islands vs. CIR* tends to support our conclusion,[11] and we quote:

> **"In all these cases, the request for reinvestigation of the assessment filed by the taxpayer was evidently granted and actual reinvestigation was conducted by the BIR, which eventually resulted in the issuance of an amended assessment**. On the basis of these facts, this Court ruled in the same cases that the period between the request for reinvestigation and the revised assessment should be subtracted from the total prescriptive period for the assessment of the tax; **and once the assessment had been reconsidered at the taxpayer's instance, the period for collection should begin to run from the date of the reconsidered or modified assessment."** (emphasis supplied)

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[10] Exhibits "P-11-A", "P-11-B", P-11-C", Volume I, pp. 297-299.
[11] G.R. No. 139736, October 17, 2005.

We proceed to resolve the CIR's Petition for Review.

A careful perusal of the arguments propounded by the CIR in his Petition for Review does not compel us to make any exhaustive discussion on its merits primarily because it merely echoed its defenses against the original Petition for Review lodged with the Court in Division and which have been exhaustively discussed and disposed of in the assailed Decision dated January 23, 2017. Even his allegations that Prime Steel has unaccounted sources of cash for the year 2005 was a mere statement unsupported by substantial ratiocinations that do not deserve a second look by the Court *En Banc* but even elicits a reminder that filing a Petition for Review, particularly with the Court *En Banc*, is not a right but a mere prerogative that should be taken seriously based on solid merits and should not be lodged frivolously or on a whim. Be that as it may, this Court would like to focus on the contention of the CIR that the provisions of RR 16-2005 may be applied retroactively to the instant case as regards the invoicing requirements on invoices issued between January to July 2005. It may be recalled that RR 16-2005 became effective only on November 1, 2005.

We find CIR's contention without merit.

We quote with approval, the Decision of the Court in Division when it ruled, thus:

> The Court emphasizes that the determination of petitioner's compliance with the substantiation requirements **should be based on the existing law and revenue regulations at the time it claimed its input VAT."** (emphasis supplied)

Rightly so because it would be unjust and illogical to impose requirements /conditions that were non-existent at the time the invoices (source of the input VAT) were issued.

As regards the *Supplemental Memorandum* filed by Prime Steel only on October 19, 2018, we observed that this contains additional arguments which have not been raised during trial, hence not disposed of by the Court in Division. While we acknowledge that it is within the authority of the Court to consider related issues even if not stipulated by the parties, such issues should be dealt with, based not only on substantive law but in light of the relevant rules of evidence. Well-settled is the rule that one who alleges a fact has the burden of proving it.[12]

In its *Supplemental Memorandum*, Prime Steel alleges that the audit examination was conducted without a validly issued Letter of Authority (LOA), hence the assessments issued are deemed void. Prime Steel even points to the exhibits offered by the CIR and claims that none of these exhibits prove that an LOA was ever issued to authorize an audit.

The burden of proving the lack of authority of the revenue examiners to conduct an investigation lies with the party asserting the same, i.e., Prime Steel and not with the CIR. Prime Steel errs in imposing such burden upon the CIR. It must be borne in mind that public officers such as the CIR and his representatives have in their favor the presumption of regularity in the performance of official duties and this presumption prevails until it is overcome by clear and convincing evidence.[13]

Prime Steel, not having raised this particular issue of lack of authority, be it in the administrative level nor in its pleadings filed before the Court in Division, has not satisfactorily destroyed this presumption by proof to the contrary, thus the presumption of regularity in conducting an audit prevails.

As to the lack of due process additionally raised by Prime Steel in its *Supplemental Memorandum*, we also find this without merit.

The claim of violation of its right to due process stems from the allegation of Prime Steel that the CIR issued the FAN/FLD prior to the lapse of the fifteen (15)- day period to file a protest against the PAN, thus not giving it ample time to respond to the PAN in violation of the provisions of Section 228 of the 1997 NIRC, as amended and RR 12-99.

The records of this case belie the claim of Prime Steel.

The evidence shows that Prime Steel received the PAN for its alleged tax deficiencies for taxable year 2005 on January 7,

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[12] Ricardo Portuguez vs. GSIS Family Bank and the Court of Appeals, G.R. No. 169570, March 2, 2007; Ernesto Galang and Olga Jasmin Chen vs. Boie Takeda Chemicals, G.R. No. 183934, July 20, 2016.
[13] Anuncio C. Bustillo, Emilio Sumilhig, Jr., and Agustin Billedo, Jr. vs. People of the Philippines, G.R. No. 160718, May 12, 2010.

2009[14] which it protested on January 22, 2009[15]. The FAN/FLD was received by Prime Steel on February 12, 2009[16]

Based on the dates of receipt by Prime Steel of the PAN and the lapse of time before the FAN/FLD were received, it cannot be said that Prime Steel was not given an ample opportunity to respond to the PAN.

It must be remembered that part of the essence of the due process clause enshrined in the 1987 Philippine Constitution is the right of a person to be given an opportunity to be heard and in tax cases, it is the right to dispute or present its arguments against a tax assessment. This is part of the procedural due process in the administrative level. In this case, Prime Steel was able to prepare and file its protest letter against the PAN, as can be seen from its well-prepared protest letter dated January 21, 2009 and received by the BIR on January 22, 2009.[17]

Lastly in its *Supplemental Memorandum,* Prime Steel challenges the form of the FAN/FLD for not fixing a definite amount of tax liability because it is still subject to modification or adjustment as indicated, thus rendering the assessment void.

This last argument deserves scant consideration by the Court *En Banc* but for purposes of putting the issue to rest and of enlightening the counsel of Prime Steel, the amounts indicated in the FAN/FLD are subject to modification/adjustment because the amount of deficiency and delinquency interests will vary depending on the date of payment of the tax deficiencies. It is well to review the provisions of Sections 249 of the 1997 NIRC, as amended and the applicable provisions of RA 10963 or the Tax Reform for Acceleration and Inclusion Law (TRAIN Law) and its relevant implementing regulations on the matter. The increments (deficiency and delinquency interests) and not the amount of the tax will vary resulting to a modification of the total amount to be paid depending on the date of actual payment of the tax. This does not make the assessments legally infirm contrary to the contention of Prime Steel.

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[14] Exhibit "P-6", Court Docket, Volume I, pp 277-279.
[15] Exhibit "P-7", Court Docket, Volume I, pp.281283.
[16] Exhibits "P-8" and "P-9", Court Docket, Volume I, pp. 284-290.
[17] Exhibit "P-7", Court Docket, Volume I, pp.281-283.

WHEREFORE, in light of the foregoing considerations, the Petitions for Review are hereby **DENIED** for lack of merit. Accordingly, the Decision dated January 23, 2017 and the Resolution dated June 21, 2017, all promulgated by the Third Division of the Court of Tax Appeals are hereby **AFFIRMED.**

SO ORDERED.

CATHERINE T. MANAHAN
Associate Justice

WE CONCUR:

(See Concurring and Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation with the members of the Court *En Banc* before these cases were assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

PRIME STEEL MEEL, INCORPORATED, *Petitioner,* -versus- **COMMISSIONER OF INTERNAL REVENUE,** *Respondent.*	**CTA EB NO. 1678** (CTA Case No. 8818)
x---x	
COMMISSIONER OF INTERNAL REVENUE, *Petitioner,* -versus- **PRIME STEEL MILL, INCORPORATED,** *Respondent.*	**CTA EB NO. 1680** (CTA Case No. 8818) Present: **DEL ROSARIO,** *P.J.,* **CASTANEDA, JR.,** **UY,** **FABON-VICTORINO,** **MINDARO-GRULLA,** **RINGPIS-LIBAN,** and **MANAHAN**, *JJ.* Promulgated: JAN 03 2019 9:29 a.m.

x - x

CONCURRING AND DISSENTING OPINION

DEL ROSARIO, P.J.:

I concur in the denial of the Petition for Review (CTA EB No. 1680) filed by the Commissioner of Internal Revenue (CIR) for lack of merit.

Anent the Petition for Review (CTA EB No. 1678) filed by Prime Steel Mill, Incorporated (Prime Steel), with due respect to the *ponencia* of my learned colleague, the Honorable Associate Justice Catherine T. Manahan, I submit that it must be granted. For the reasons stated hereunder, I am of the humble view that the **Formal Letter of Demand (FLD) and Final Assessment Notices (FAN) dated January 14, 2009 assessing Prime Steel of deficiency taxes for taxable year 2005 are null and void for having been issued in violation of Prime Steel's right to due process.**

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

> "**SEC. 228. Protesting of Assessment.** - When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: provided, however, That a preassessment notice shall not be required in the following cases:
>
> 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." (Boldfacing supplied)

Corollary thereto, Section 3.1.2 of Revenue Regulations No. 12-99[1] provides:

> "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 law, rules and regulations, or jurisprudence on which the proposed assessment is based..... If the taxpayer fails

[1] Dated September 6, 1999.

> 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.
>
> xxx xxx xxx"

Pursuant to the above-cited provisions, it is clearly mandated that a taxpayer shall be required to respond to the Preliminary Assessment Notice (PAN) within fifteen (15) days from receipt of the PAN. Upon the lapse of the 15-day period, the taxpayer is considered in default and the Bureau of Internal Revenue shall issue a formal letter of demand and assessment notice.

In the case at bar, **Prime Steel received a copy of the PAN dated December 19, 2008 on <u>January 7, 2009</u>**. Pursuant to RR No. 12-99, Prime Steel has **fifteen (15) days** or until **<u>January 22, 2009</u>** within which to file a reply or protest against the PAN. Prime Steel filed its protest to the PAN on **<u>January 22, 2009</u>**.

Meanwhile, **the BIR prepared the FLD and FAN on January 14, 2009 or barely seven (7) days after Prime Steel received the PAN**. Evidently, the BIR did not wait for Prime Steel to reply to the PAN nor consider the arguments raised in Prime Steel's protest thereto. The FLD and FAN were already prepared by the BIR as early as January 14, 2009 or way before the lapse of the fifteen-day period within which petitioner could file a reply or protest to the PAN.

As oft-repeated, Section 228 of the NIRC of 1997, as amended and RR No. 12-99, specifically Section 3.1.2 thereof, prescribe a fifteen (15)-day period from receipt of the PAN within which a taxpayer may respond thereto. It is well-settled that the right of the taxpayer to respond to the PAN is an important part of the due process requirement in the issuance of a deficiency tax assessment. In wantonly disregarding Prime Steel's right to be heard with regard to its positions or arguments against the PAN, the BIR clearly violated Prime Steel's right to due process. To be sure, procedural due process is not satisfied with the mere issuance of a PAN, *sans* giving the taxpayer an opportunity to respond thereto.

In *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.*,[2] the Supreme Court emphasized the importance of complying with the requirement to send a PAN to the taxpayer as an integral

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

part of due process in the issuance of a deficiency tax assessment. It then declared in no uncertain terms that **<u>the failure of the CIR to strictly comply with the requirements laid down by law and its own rules</u>** is a denial of Metro Star'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.

Although Prime Steel received the FLD and FAN on February 12, 2009 or after it filed its protest to the PAN on January 21, 2009, **the fatal infirmity that attended its issuance <u>prior</u> to the lapse of the period to respond to the PAN is not cured thereby**. In *Pilipinas Shell Petroleum Corporation vs. Commissioner of Internal Revenue,* [3] the Supreme Court categorically ruled that the non-compliance with statutory and procedural due process renders the final assessment notice as null and void, *viz.*:

> "In short, respondent merely relied on the findings of the Center which did not give PSPC ample opportunity to air its side. **<u>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</u>**. Xxx." (Boldfacing and underscoring supplied)

It is worthy to note that, in the past, the Court of Tax Appeals (CTA) has declared void any assessment that fails to comply with the due process requirement.[4] In the recent case of *Roca Security and Investigation Agency, Inc. vs. Commissioner of Internal Revenue*,[5] the Court *En Banc*, through the *Honorable Associate Justice Esperanza R. Fabon-Victorino*, elucidated on the importance of observing the fifteen (15)-day period within which a taxpayer may respond to the PAN before the BIR may issue the FAN and the consequence of the latter's failure to comply therewith, *viz.*:

> "Thus, a taxpayer has fifteen (15) days from receipt of the PAN to respond or file a protest thereto. It is only upon the lapse of this 15-day period, with or without a response/protest from the taxpayer, that the CIR or his legally authorized representative may issue the FLD or final assessment notice.

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[3] G.R. No. 172598, December 21, 2007.
[4] *A Brown Co., Inc. vs. Commissioner of Internal Revenue,* CTA Case No. 6357, June 7, 2004; *Puratos Philippines, Inc. vs. Commissioner of Internal Revenue,* CTA Case No. 6980, October 4, 2010; *Yumex Philippines Corporation vs. Commissioner of Internal Revenue,* CTA Case No. 8331, 28 November 2013; Commissioner of Internal Revenue vs. Linde Philippines, Inc., CTA EB No. 1515, March 7, 2018.
[5] CTA EB No. 1523, March 7, 2018, penned by Associate Justice Esperanza R. Fabon-Victorino and concurred by Presiding Justice Roman G. Del Rosario and Associate Justices Juanito C. Castañeda, Jr. Lovell R. Bautista, Caesar A. Casanova, Cielito N. Mindaro-Grulla, Ma. Belen M. Ringpis-Liban and Catherine T. Manahan; Associate Justice Erlinda P. Uy was on leave.

> In this case, the PAN was issued on March 25, 2013, and received by petitioner on April 3, 2013. Hence, petitioner had 15 days or until April 18, 2013, to file its protest to the PAN.
>
> Record however reveals that respondent issued the FLD with assessment notices 6 days before the 15-day period to file protest expired, or on April 12, 2013. Evidently, the FLD was prematurely issued in violation of petitioner's right to due process.
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> It cannot also be denied that with the premature issuance of the FLD on April 12, 2013, **any argument or evidence adduced by petitioner in support of its protest against the PAN was pointless, if not moot, for at that time, respondent was already dead-set or bent on upholding the assessment as contained in the PAN. This indubitably constitutes denial of due process as petitioner was not given the opportunity to dispute and present evidence against the PAN, before the final assessment was issued.**
>
> xxx
>
> Finally, between the power of the State to tax and an individual's right to due process, the scale favors the right of the taxpayer to due process.
>
> With the FLD having been issued in violation of petitioner's right to due process, the assessment contained therein is therefore void. Xxx." (Boldfacing supplied)

In view of the palpable violation of Prime Steel's right to procedural due process pursuant to Section 228 of the NIRC of 1997, as amended, and the provisions of RR No. 12-99, the FLD and FAN - - being fatally infirm - - should be considered void.

All told, I VOTE to: (i) DENY the Petition for Review (CTA EB No. 1680) filed by the Commissioner of Internal Revenue for lack of merit; (ii) GRANT the Petition for Review (CTA EB No. 1678) filed by Prime Steel Mill, Incorporated; (iii) REVERSE and SET ASIDE the assailed Decision and Resolution of the Court in Division; and, ultimately (iv) CANCEL the Formal Letter of Demand and Final Assessment Notices dated January 14, 2009 issued against Prime Steel Mill, Incorporated for the taxable year 2005 for being void.

ROMAN G. DEL ROSARIO
Presiding Justice