REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

****

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB No. 1054** (CTA Case No. 8345)
	Present:
- versus -	**DEL ROSARIO,** *P.J.*, **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS,** and **RINGPIS-LIBAN,** *JJ.*
AGRINURTURE, INC., Respondent.	**Promulgated:**
	JAN 13 2015 2:50p.m.

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DECISION

UY, *J.*:

The instant Petition for Review[1] was filed by the petitioner Commissioner of Internal Revenue on September 6, 2013 against respondent Agrinurture, Inc., seeking the reversal and setting aside of the Decision dated May 29, 2013[2] and the Resolution dated August 5, 2013[3], both promulgated by the Special Second Division of this Court (or Court in Division) in CTA Case No. 8345, entitled, *"Agrinurture, Inc., Petitioner, vs. Commissioner of Internal Revenue, Respondent"*, the dispositive portions of which respectively read as follows:

[1] EB Docket, pp. 8 to 22.

[2] EB Docket, pp. 23 to 39. The assailed Decision was penned by Associate Justice Juanito C. Castañeda, Jr., Chairperson, and concurred in by Associate Justice Caesar A. Casanova and Associate Justice Cielito N. Mindaro-Grulla.

[3] EB Docket, pp. 40 to 42. The assailed Resolution was likewise penned by the same ponente, and concurred in by the same Associate Justices.

Decision dated May 29, 2013:

"**WHEREFORE,** premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, the assessments for deficiency income tax and deficiency value-added tax against petitioner for taxable year 2007 are hereby **CANCELLED** and **WITHDRAWN.**

SO ORDERED."

Resolution dated August 5, 2013:

"**WHEREFORE,** finding no compelling reason to reverse the ruling of this Court in the assailed Decision, respondent's *Motion for Reconsideration* filed on June 10, 2013 is **DENIED** for lack of merit.

SO ORDERED."

THE FACTS

As found by the Court in Division, the facts of the case are as follows.

Petitioner is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) vested with the authority to carry out the functions, duties and responsibilities of said office, including, *inter alia,* the power to decide disputed assessments, and cancel or abate tax liabilities pursuant to the provisions of the National Internal Revenue Code (NIRC) of 1997 and other tax laws, rules and regulations.

Respondent Agrinurture, Inc. is a publicly listed corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office address at No. 54 National Road, Dampol II-A, Pulilan, Bulacan, Philippines.

Respondent received from petitioner a Preliminary Assessment Notice (PAN) dated August 26, 2010 from the LN Task Force of the BIR, which assessed respondent for alleged deficiency income tax and value-added tax (VAT) for taxable year 2007.

Thereafter, respondent received the Final Assessment Notice dated December 30, 2010, assessing respondent for deficiency income tax and deficiency VAT, inclusive of interest and surcharges, for taxable year 2007, broken down as follows:

TAX	AMOUNT
Value-added Tax	₱ 715,839.15
Income Tax	2,043,335.50
TOTAL	₱ 2,759,174.65

On February 18, 2011, respondent filed its Protest on the Final Assessment Notice, stating that the assessment for alleged deficiency income tax and VAT, predicated solely on the alleged undeclared purchase transaction in the amount of ₱13,572,086.31, should be reconsidered, as there is no factual and/or legal basis for such assessment.

Since no action was taken by petitioner on the protest within 180 days from the filing thereof on February 18, 2011, respondent filed a Petition for Review before the Court in Division on September 16, 2011. The case was docketed as CTA Case No. 8345.

On November 10, 2011, petitioner filed her Answer and interposed the defense, among others, that the deficiency value-added tax (VAT) assessment in the amount of P715,839.15 and the deficiency income tax in the amount of P2,043,335.50 were issued in accordance with law and suffers no infirmity as the same were in accordance with Sections 31, 32, 106 and 108 of the National Internal Revenue Code of 1997 (NIRC of 1997), as well as with Revenue Memorandum Order No. 17-2009 which covers the income and value-added tax liabilities of individual and corporate taxpayers who were issued Letter Notices (LNs) based on Tax Reconciliation System (TRS) and Consolidated RELIEF-SLSP and TPM BOC Data Programs covering taxable year 2007.

Thereafter, the case was set for pre-trial conference on December 8, 2011. On January 17, 2012, the parties filed their Joint Stipulation of Facts and Issues with the Court in Division, and the same was approved in the Resolution dated January 19, 2012. In the same Resolution, the Court in Division considered the pre-trial terminated and ordered the parties to proceed with the trial on the merits presenting only evidence not covered by their Joint Stipulation of Facts.

During trial, both parties presented their respective documentary and testimonial evidence. Respondent presented as its witnesses, Ma. Lizette B. Navea, respondent's Comptroller since October 2010, and Rafaelito M. Soliza, respondent's former Auditor General from February 2009 until April 2010. On the other hand, petitioner presented as her sole witness Jocelyn P. Hernandez, Chief of the Assessment Section of Revenue District Office No. 28, Novaliches and formerly occupying the position of Revenue Officer II from 1995.

The case was submitted for decision on March 14, 2013, considering petitioner's Memorandum filed on February 22, 2013 and respondent's Memorandum filed through registered mail on March 4, 2013.

In the assailed Decision, the Court in Division granted the Petition for Review, thereby ordering the cancellation and withdrawal of the assessments for deficiency income tax and deficiency VAT for taxable year 2007 against respondent.

Aggrieved, petitioner filed a Motion for Reconsideration on June 10, 2013,[4] to which respondent filed its Comment on July 4, 2013.[5] For lack of merit, the said Motion was denied by the Court in Division in the assailed Resolution dated August 5, 2013.

Petitioner then filed before the Court *En Banc,* a Motion for Extension of Time to File Petition for Review on August 22, 2013.[6] The said Motion was granted by the Court *En Banc* and petitioner was given a final and non-extendible period of fifteen (15) days from August 23, 2013, or until September 7, 2013, within which to file her Petition for Review.[7]

Petitioner filed the instant Petition for Review on September 6, 2013,[8] praying for the reversal and setting aside of the Decision dated May 29, 2013 and Resolution dated August 5, 2013, and that a new one be rendered, ordering respondent to pay the amounts of ₱2,043,335.50 as deficiency income tax, plus 25% surcharge and 20% deficiency and delinquency interest for late payment from December 31, 2010 (due date indicated in the Final Assessment Notice), until fully paid, pursuant to Sections 248 and 249 of the NIRC of 1997.

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[4] Division Docket (CTA Case No. 8345), pp. 432 to 437.
[5] Division Docket (CTA Case No. 8345), pp. 440 to 450.
[6] EB Docket, pp. 1 to 6.
[7] EB Docket, p. 7.
[8] EB Docket, pp. 8 to 22.

Without necessarily giving due course to the instant Petition for Review, respondent was ordered by the Court *En Banc* to file its Comment thereon.[9] Correspondingly, respondent filed its Comment/ Opposition on November 18, 2013.[10]

Considering the issues raised by both parties in their respective pleadings, the Court *En Banc* resolved to give due course to the Petition for Review, and required the parties to submit their respective Memorandum.[11]

On January 9, 2014, petitioner filed a Manifestation,[12] manifesting that she is adopting the arguments raised in the instant Petition for Review as her Memorandum. The Court *En Banc* took note of the said Manifestation.[13] For its part, respondent filed its Memorandum on February 6, 2014.[14] Thereafter, this case was submitted for decision on February 26, 2014.[15]

Hence, this Decision.

THE ISSUE

Petitioner raises the following issue for resolution, to wit:

> "WHETHER OR NOT THE SPECIAL SECOND DIVISION OF THE HONORABLE COURT ERRED WHEN IT CANCELLED THE DEFICIENCY VALUE-ADDED TAX (VAT) AND INCOME TAX ASSESSMENTS."[16]

Petitioner's Arguments

Petitioner contends that the subject assessments were never based on mere presumptions, and that the undeclared purchase by respondent was discovered thru third party information, particularly from the sale of merchandise by Florence Foods Corporation to respondent, in the amount of ₱14,000,000.00. The said discrepancy,

[9] Resolution dated October 8, 2013, EB Docket, pp. 47 to 48.
[10] EB Docket, pp. 61 to 70.
[11] Resolution dated December 18, 2013, EB Docket, pp. 80 to 81.
[12] EB Docket, pp. 82 to 85.
[13] EB Docket, p. 86.
[14] EB Docket, pp. 87 to 102.
[15] Resolution dated February 26, 2014, EB Docket, pp. 104 to 105.
[16] EB Docket, p. 14.

or more specifically, non-declaration found in respondent's tax return allegedly arose from the Reconciliation of Listing for Enforcement System (RELIEF), Tax Reconciliation System (TRS), and Third Party Matching – Bureau of Customs (TPM-BOC) Data Program, which resulted in the following:

Purchases per LN TPI RELIEF Per Summary List of Sales submitted by respondent's suppliers	₱ 14,180,337.89
Purchases per returns filed	608,251.58
Under-declaration on purchases	₱ 13,572,086.31

From the testimony of petitioner's witness, Ms. Jocelyn Hernandez, the discrepancy/under-declaration was due to the undeclared purchases for canning equipment from such particular supplier – Florence Foods Corporation (FFC). However, respondent allegedly failed to present proof of the purported sale of equipment, apart from mere allegations of biased witnesses and some pictures of the alleged machinery.

Moreover, petitioner maintains that respondent did not submit accounting records necessary for the proper determination of its tax liability. A reply-letter was sent to respondent on 25 November 2010 and a follow-up letter on 26 May 2011 requiring it to submit the additional documents to support its protest. However, according to petitioner, respondent failed to submit the required documents, much more failed to appear and present documentary evidence. Thus, for failure of respondent to submit the required invoices/official receipts and schedule of purchases, the discrepancies noted in the Letter Notice (LN) were not reconciled.

According to petitioner, it is a basic accounting principle that all expenses have to be recorded. Respondent made an unrecorded purchase of merchandise which was discovered thru third party information as confirmed by the declaration in the returns of the seller FFC, and by FFC thru a Letter dated 12 July 2011 in the amount of P14,000,000.00. Since the purchase of merchandise did not appear in respondent's returns nor reflected in its inventory or capital expenditures, there can only be one necessary conclusion – that this undeclared purchase of merchandise from a food manufacturing company was eventually sold. Thus, absent any showing that it was a capital expense or part of inventory, then the same can only be an unreported sale or unreported purchased merchandise.

Finally, petitioner stresses that all presumptions are in favor of the correctness of tax assessments and the failure to present proof of error in the assessment will justify judicial affirmation of said assessment.

Respondent's Counter-arguments

For its part, respondent counter-argues that the instant Petition should be dismissed outright for failing to comply with the requirements for its filing, specifically, to attach the documents referred to therein as required by Section 6, in relation to Section 7 of Rule 43 of the Rules of Court.

Respondent points out that the instant Petition for Review refers to the following documents:

a. Motion for Reconsideration
b. Reply-Letter allegedly sent to Petitioner on 25 November 2010
c. Letter allegedly sent on 26 May 2011
d. Letter dated 12 July 2011
e. Judicial Affidavit of Mr. Soliza executed on 30 October 2012
f. Financial Statement for 2007

However, while material portions of the foregoing documents were referred to in the Petition for Review, such documents were not attached thereto as required by Section 6, Rule 43 of the Rules of Court. Hence, the failure of petitioner to attach the foregoing documents is cause to dismiss the instant Petition for Review outright.

Additionally, respondent asserts that the Decision of the Court in Division is already final and executory, considering that the Motion for Reconsideration filed by the petitioner in CTA Case No. 8345, did not toll the period to file the instant Petition for Review for being *pro forma*. Allegedly, a perusal of petitioner's said motion will readily show that it fails to tender issues not previously set forth and passed upon by the Honorable Court; that the arguments raised therein are exact reiterations of the very same grounds, arguments and authorities previously passed upon by the Court in Division in rendering the assailed Decision.

In any event, respondent further alleges that the Court in Division correctly cancelled the subject tax assessments for being void and without legal and factual basis.

Finally, respondent contends that the Letter Notice dated May 26, 2011, purportedly requiring petitioner to submit additional documents, was not only sent to the wrong address, but also inadmissible for not having been formally offered during trial.

THE COURT EN BANC'S RULING

The instant Petition for Review lacks merit. Nevertheless, We find it necessary to address some of the procedural issues raised by respondent.

Petitioner has attached the required documents in the instant Petition for Review.

According to respondent, the instant Petition for Review should be dismissed for petitioner's failure to comply with Section 6 in relation to Section 7, both of Rule 43 of the 1997 Rules of Civil Procedure, which provide as follows:

> "SEC. 6. *Contents of the petition.*— The petition for review shall (a) state the full names of the parties to the case, without impleading the court or agencies either as petitioners or respondents; (b) contain a concise statement of the facts and issues involved and the grounds relied upon for the review; (c) **be accompanied by** a clearly legible duplicate original or a certified true copy of the award, judgment, final order or resolution appealed from, **together with certified true copies of such material portions of the record referred to therein and other supporting papers**; and (d) contain a sworn certification against forum shopping as provided in the last paragraph of section 2, Rule 42. The petition shall state the specific material dates showing that it was filed within the period fixed herein.
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> SEC. 7. *Effect of failure to comply with requirements.*— **The failure of the petition to comply with any of the foregoing requirements regarding** the payment of the docket and other lawful fees, the deposit for costs, proof of service of the petition, and the contents

> of and **the documents which accompany the petition shall be sufficient ground for the dismissal thereof**." *(Emphases supplied by respondent)*

In relation thereto, respondent points to Section 1, Rule 7 of the Revised Rules of the Court of Tax Appeals (RRCTA), to wit:

> "SECTION 1. *Applicability of the Rules of Court on procedures in the Court of Appeals, exception.*— The procedure in the Court *en banc* or in Division in original and in appealed cases shall be the same as those in petitions for review and appeals before the Court of Appeals pursuant to the applicable provisions of Rules 42, 43, 44 and 46 of the Rules of Court, **except as otherwise provided for in these Rules.**" *(Emphasis ours)*

Particularly, respondent contends that while material portions of the following documents were referred to in the instant Petition for Review, the same were not attached thereto, as required by the aforequoted Section 6, namely:

1) Motion for Reconsideration;
2) Reply-Letter allegedly sent to petitioner on 25 November 2010;
3) Letter allegedly sent on 26 May 2011;
4) Letter dated 12 July 2011;
5) Judicial Affidavit of Mr. Soliza executed on 30 October 2012; and
6) Financial Statement for 2007.

We disagree with respondent.

As aforequoted, it is clearly provided under Section 1, Rule 7 of the RRCTA that the procedures in this Court, whether En banc or in Divisions, in original and in appealed cases shall be the same as those in petitions for review and appeals before the Court of Appeals pursuant to the applicable provisions of Rules 42, 43, 44 and 46 of the Rules of Court, **<u>except as otherwise provided for in the Revised Rules of the Court of Tax Appeals</u>**. In other words, the rules provided under Rule 43, *inter alia*, of the 1997 Rules of Civil Procedure shall be applicable, or resorted to, only when the RRCTA is silent on a particular matter.

The necessary attachments to a petition for review filed before this Court is provided under Section 2 of Rule 6 of the RRCTA, to wit:

> "**SEC. 2. *Petition for review; contents.***— The petition for review shall contain allegations showing the jurisdiction of the Court, a concise statement of the complete facts and a summary statement of the issues involved in the case, as well as the reasons relied upon for the review of the challenged decision. The petition shall be verified and must contain a certification against forum shopping as provided in Section 3, Rule 46 of the Rules of Court. **A clearly legible duplicate original and certified true copy of the decision appealed from shall be attached to the petition.**" *(Emphasis supplied)*

In this case, petitioner was able to attach a certified true copy of both the assailed Decision and assailed Resolution, duly certified by Atty, Michael Benedick V. Aleta, then Executive Clerk of Court II of the Court of Tax Appeals.

Thus, the Court *En Banc* finds that mere failure to attach copies of the pleadings and other material portions of the record as would support the allegations of the petition for review is not fatal as to warrant the outright dismissal of a petition for review, because the Revised Rules of the CTA only mandates that clearly legible duplicate originals or certified true copies of the judgments or final orders are attached to the petition for review.

***Petitioner's Motion for Reconsideration of the assailed Decision is not* pro forma.**

In this case, respondent avers that the Motion for Reconsideration filed by petitioner before Court in Division was *pro forma,* thereby making the Decision dated May 29, 2013 final and executory.

Again, We are not convinced.

It must be noted that the issue of finality before the Court in Division was never raised in the Comment[17] filed by respondent in CTA Case No. 8345 to the Motion for Reconsideration filed by petitioner in the said case.

To entertain the belated introduction of this issue in the instant

[17] Division Docket (CTA Case No. 8345), pp. 440 to 450.

Petition for Review, would not only cause undue prejudice to herein petitioner, it would likewise be inappropriate, considering the doctrine that issues not previously ventilated, cannot be raised for the first time on appeal.[18]

Additionally, jurisprudentially speaking[19], a motion for reconsideration is not *pro forma* just because it reiterated the arguments earlier passed upon and rejected by the court. A movant may raise the same arguments, precisely to convince the court that its ruling was erroneous.

In fact, the Supreme Court, in the case of *Marikina Valley Development Corporation v. Flojo,*[20] has underscored the destructive effect of the literal application of the *pro forma* doctrine, to wit:

> "xxx xxx because the doctrine relating to *pro forma* motions for reconsideration impacts upon the reality and substance of the statutory right of appeal, that doctrine should be applied reasonably, rather than literally. The right to appeal, where it exists, is an important and valuable right. Public policy would be better served by according the appellate court an effective opportunity to review the decision of the trial court on the merits, rather than by aborting the right to appeal by a literal application of the procedural rules relating to *pro forma* motions for reconsideration."

Therefore, in the absence of a showing that the Motion for Reconsideration filed by the petitioner before the Court in Division was merely intended for delay, the same cannot be considered outright as *pro forma*. Such being the case, the assailed Decision and Resolution of the Court in Division must be maintained. Hence, We find no reason to dismiss the instant Petition for Review.

The subject assessments have no leg to stand on.

To justify the subject assessments, petitioner faults the

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[18] *Zenaida Polanco, et al. vs. Carmen Cruz, etc.,* G.R. No. 182426, February 13, 2009.

[19] *Security Bank and Trust Company, Inc. vs. Rodolfo M. Cuenca*, G.R. No. 138544, October 3, 2000; *Department of Agrarian Reform, etc. vs. Vicente K. Uy,* G.R. No. 169277, February 9, 2007; *MCC Industrial Sales Corporation vs. Ssangyong Corporation*, G.R. No. 170633, October 17, 2007.

[20] G.R. No. 110801, December 8, 1995.

respondent for its failure to submit the supposed required invoices/official receipts and schedule of purchases. According to petitioner, the discrepancies noted in the subject Letter Notice were not reconciled.

We do not agree.

Petitioner cannot feign ignorance of respondent's records. It is a well settled jurisprudential principle that **petitioner ought to know the records of all taxpayers**.[21] To the mind of the Court *En Banc*, the said principle springs from the fact that the Office of the Commissioner of Internal Revenue has been vested with ample powers to know the records of taxpayers and assess the correct amount of taxes. The most remarkable of said powers is found in Section 5 of the NIRC of 1997, to wit:

> "SEC. 5. *Power of the Commissioner to Obtain Information, and to Summon, Examine, and Take Testimony of Persons.*— In ascertaining the correctness of any return, or in making a return when none has been made, or in determining the liability of any person for any internal revenue tax, or in collecting any such liability, or in evaluating tax compliance, the Commissioner is authorized:
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> (A) To examine any book, paper, record, or other data which may be relevant or material to such inquiry;
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> (B) To obtain on a regular basis from any person other than the person whose internal revenue tax liability is subject to audit or investigation, or from any office or officer of the national and local governments, government agencies and instrumentalities, including the Bangko Sentral ng Pilipinas and government-owned or –controlled corporations, any information such as, but not limited to, costs and volume of production, receipts or sales and gross incomes of taxpayers, and the names, addresses, and financial statements of corporations, mutual fund companies, insurance companies, regional operating headquarters of multinational companies, joint accounts, associations, joint ventures or consortia and registered partnerships, and their members;

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[21] *BPI-Family Savings Bank, Inc. vs. Court of Appeals, et al.*, G.R. No. 122480, April 12, 2000; and *Commissioner of Internal Revenue vs. Ironcon Builders and Development Corporation*, G.R. No. 180042, February 8, 2010.

(C) To summon the person liable for tax or required to file a return, or any officer or employee of such person, or any person having possession, custody, or care of the books of accounts and other accounting records containing entries relating to the business of the person liable for tax, or any other person, to appear before the Commissioner or his duly authorized representative at a time and place specified in the summons and to produce such books, papers, records, or other data, and to give testimony;

(D) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry; and

(E) To cause revenue officers and employees to make a canvass from time to time of any revenue district or region and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care, management or possession of any object with respect to which a tax is imposed.

The provisions of the foregoing paragraphs notwithstanding, nothing in this Section shall be construed as granting the Commissioner the authority to inquire into bank deposits other than as provided for in Section 6(F) of this Code."

To add more teeth to the power of petitioner under Section 5(C), the law imposes a penalty for failure to obey summons issued by the BIR, *viz*:

"SEC. 266. *Failure to Obey Summons.*—Any person who, being duly summoned to appear to testify, or to appear and produce books of accounts, records, memoranda or other papers, or to furnish information as required under the pertinent provisions of this Code, neglects to appear or to produce such books of accounts, records, memoranda or other papers, or to furnish such information, shall, upon conviction, be punished by a fine of not less than Five thousand pesos (₱5,000) but not more than Ten thousand pesos (₱10,000) and suffer imprisonment of not less than one (1) year but not more than two (2) years."

In addition, it is noteworthy that the Letter of Authority (LOA) numbered 2009-00016681 and dated April 30, 2010 was issued by the BIR against respondent.[22] Needless to state, such LOA empowers or enables certain Revenue Officers to examine the books of account and other accounting records of a taxpayer for the purpose of collecting the correct amount of tax.[23]

Thus, with the said powers, coupled with the fact that a Letter of Authority was issued, petitioner could have easily obtained the required information for the reconciliation of any discrepancy that has arisen under the circumstances. Such being the case, petitioner cannot excuse herself by arguing that due to the failure of respondent to submit the required invoices/official receipts and schedule of purchases, the supposed discrepancies were not reconciled.

Petitioner likewise argues against the testimony of respondent's witness, Rafaelito Soliza, in his Judicial Affidavit dated October 30, 2012,[24] that the supposed ₱14,000,000.00 unrecorded purchase was included in the additional acquisition of respondent for the year 2007 in the amount of ₱21,497,020.00, and that this particular item was detailed in Note 6 of its Financial Statement for 2007.

The contention of petitioner is not tenable.

While it may be true that the amount of ₱14,000,000.00 was not detailed in the Financial Statements for 2007, the fact remains that the amount of ₱21,497,020.00, which represents *"Additions"* to petitioner's *"Machinery and Equipment"* for the year 2007, covers the said amount of ₱14,000,000.00. Moreover, the inclusion of the latter amount is testified to by respondent's auditor, Mr. Soliza, whose credibility was not at all destroyed by petitioner at the proceedings in the Court *a quo*. In fact, it is herein noted that petitioner's counsel chose not to cross examine Mr. Soliza on the subject testimony.[25] Furthermore, the purchase of equipment by respondent representing the amount of ₱14,000,000.00 was confirmed by FFC, *i.e.*, from whom the BIR obtained the information regarding the supposed "undeclared purchase".[26] More importantly, considering that the BIR had the opportunity to verify the composition of the said amount of

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[22] Exhibit "1", BIR Records, p. 101.
[23] *Commissioner of Internal Revenue vs. Sony Philippines, Inc.*, G.R. No. 178697, November 17, 2010.
[24] Exhibit "J", Division Docket (CTA Case No. 8345), pp. 307 to 310.
[25] Minutes of the hearing in CTA Case No. 8345 held on November 28, 2012, Division Docket (CTA Case No. 8345), p. 357; and Transcript of Stenographic Notes for the said hearing, pp. 8 and 9.
[26] Exhibit "27", BIR Records, p. 157.

₱21,497,020.00 via the above-stated LOA, it could have easily disproven respondent's claim that the amount of ₱14,000,000.00 is included therein.

With the foregoing circumstances, the arguments of petitioner fails to persuade the Court *En Banc* from ruling that the subject purchase is undeclared.

But even granting that there was an under-declaration of purchase on the part of respondent, the same is of no consequence. We fully agree with the Court in Division that a finding of under-declaration of purchase does not by itself result in the imposition of income tax and VAT.

The three (3) elements for the imposition of income tax are: (1) there must be gain or profit, (2) that the gain or profit is realized or received, actually or constructively, and (3) it is not exempted by law or treaty from income tax.[27] Income tax is assessed on income received from any property, activity or service.[28]

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.

In this case, said elements are not present. The BIR merely imposed income tax on respondent simply because there was *"[u]nder-declaration on purchases"*,[29] nothing more.

Furthermore, it must be emphasized that for income tax purposes, a taxpayer is free to deduct from its gross income a lesser amount, or not claim any deduction at all. What is prohibited by the income tax law is to claim a deduction beyond the amount authorized therein.[30] Hence, even granting that there is an undeclared purchase, the same is not prohibited by law.

Bearing in mind that an under-declaration of purchases is not

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[27] *Commissioner of Internal Revenue vs. Court of Appeals, et al.*, G.R. No. 108576, January 20, 1999.

[28] *Supra.*

[29] Exhibit "C" (Details of Discrepancy),

[30] *Commissioner of Internal Revenue vs. Phoenix Assurance Co. Ltd.*, G.R. No. L-19727, May 20, 1965.

prohibited by law, it goes without saying that respondent can exercise its discretion on whether or not it will declare a lesser amount of deductions or none at all. Thus, in simply relying on the fact that there is an under-declaration of purchase, petitioner's imposition or assessment of the subject income tax does not hold water and therefore, the subject deficiency income tax assessment must perforce be cancelled.

In the same vein, no deficiency VAT assessment should arise from the said *"under-declared purchase"*.

It must be remembered that the VAT is imposed on the seller of the goods, pursuant to Section 105 of the NIRC of 1997, 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.
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> xxx xxx xxx." *(Emphases supplied)*

Furthermore, the VAT is assessed on the *"gross selling price or gross value in money of the goods or properties sold"* and is *"to be paid by the seller or transferor."*[31] In this connection, the law defines *"gross selling price"* as follows:

> "...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."[32] *(Emphasis supplied)*

Thus, 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 one sells, not when one purchases.

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[31] Section 106(A), NIRC of 1997.
[32] *Supra.*

Correspondingly, VAT should not be imposed on the supposed *"under-declared purchase"* of respondent. Hence, the subject deficiency VAT assessment must likewise be cancelled.

WHEREFORE, premises considered, the Petition for Review is hereby **DENIED** for lack of merit. The Decision dated May 29, 2013 and the Resolution dated August 5, 2013, issued by the Court in Division in CTA Case No. 8345 is hereby **AFFIRMED**.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
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 before the case was assigned to the writer of the opinion of the Court *En Banc*.

ROMAN G. DEL ROSARIO
Presiding Justice