REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

***EN BANC***

| | |
|---|---|
| **COMMISSIONER OF INTERNAL REVENUE,** Petitioner, | **CTA EB NO. 1831** (CTA Case No. 8924) |
| - versus - | Present: **DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA,** *and* **MODESTO-SAN PEDRO,** *JJ.* |
| **FIRST SUMIDEN CIRCUITS, INC.,** Respondent. | Promulgated: FEB 12 2020 3:16 p.m. |

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# DECISION

**RINGPIS-LIBAN, *J.*:**

## The Case

Before the Court *En Banc* is a Petition for Review filed by the Commissioner of Internal Revenue, petitioner, on April 18, 2018 against First Sumiden Circuits, respondent,[1] praying for the partial reversal and setting aside of the Decision dated January 03, 2018[2] and the Resolution dated March 14, 2018[3], both rendered by the Second Division of this Court ("Court in Division") in CTA Case No. 8924 entitled *"First Sumiden Circuits, Inc., Petitioner, versus Commissioner of Internal Revenue, Respondent"*, the dispositive portions of which respectively read:

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1 Rollo, pp. 13 to 27.

2 Penned by Associate Justice Catherine T. Manahan, concurred by both Associate Justice Juanito C. Castañeda, Jr. and Associate Justice Caesar A. Casanova (Retired); *Id.*, pp. 34 to 69.

3 *Id.*, pp. 70 to 74.

<u>**Decision dated January 03, 2018**</u>:

"**WHEREFORE,** premises considered, the instant petition for review is **PARTIALLY GRANTED**. The assessment issued by respondent against petitioner for taxable year 2009 covering deficiency income tax is hereby **AFFIRMED but with modifications**. Accordingly, petitioner First Sumiden Circuits, Inc. is **ORDERED TO PAY** respondent the total amount of **[Php]976,108.23** representing basic deficiency Income Tax and the twenty five percent (25%) surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended, computed as follows:

| | |
|---|---|
| Basic Deficiency Income Tax Due | Php780,886.58 |
| Add: 25% Surcharge | 195,221.65 |
| **Total Tax Due** | **Php976,108.23** |

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

a) Deficiency interest at the rate of 20% per annum on the basic deficiency Income Tax of Php780,886.58 computed from April 15, 2010 until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended;

b) Delinquency interest at the rate of 20% per annum on the total amount of Php976,108.23 and on the 20% deficiency interest which have accrued as aforestated in (a) computed from September 30, 2014 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended.

**SO ORDERED.**"

<u>**Resolution dated March 14, 2018**</u>:

"**WHEREFORE,** respondent's *Motion Partial for Reconsideration (Re: Decision Promulgated on 03 January 2018)* filed on January 17, 2018, is hereby **DENIED.**

**SO ORDERED.**"

## The Parties

Petitioner is the Commissioner of the Bureau of Internal Revenue ("Commissioner"), the government agency charged with, among other powers and duties, the responsibility of collecting all national internal revenue taxes.

Respondent First Sumiden Circuits, Inc. ("First Sumiden") is a corporation duly organized under Philippine law, with principal office at Ampere St. corner Main Avenue, Light Industry Science Park of the Philippines I, Special Export Processing Zone, Bo. Diezmo, Cabuyao, Laguna, Philippines. It is a Philippine Export Processing Zone Authority ("PEZA")-registered Ecozone Export Enterprise engaged in the manufacture of flexible printed circuits, flip chip on flex, flexible printed circuits for 1.8" HDD and car radio, lead-free flexible oriented circuits for industrial image sensor, and flexible circuit assembly using surface mount technology.

## The Facts

On April 14, 2010, First Sumiden filed its Annual Income Tax Return ("ITR") for calendar year 2009, and paid the corresponding income tax due of Php6,681,145.85.

On May 15, 2013, First Sumiden received the Preliminary Assessment Notice ("PAN") dated May 15, 2013. It filed its protest to the PAN on May 30, 2013; supplemental protest to the PAN on June 18, 2013; and, position paper on the PAN on October 22, 2013.

On June 28, 2013, First Sumiden paid a portion of the assessed deficiency tax, inclusive of interest, in the amount of Php5,667,715.55.

Thereafter, First Sumiden received the Formal Letter of Demand ("FLD") on May 19, 2014. The summary of deficiency taxes shows the following, to wit:

| Tax Type | Basic Tax | Interest | Compromise Penalty | Total |
|---|---|---|---|---|
| Income Tax | 21,533,459.00 | 20,637,241.18 | 50,000.00 | 42,220,700.18 |
| Value-added tax (VAT) | - | - | 12,000.00 | 12,000.00 |
| EWT | 4,237,108.43 | 4,793,579.00 | 25,000.00 | 9,055,687.43 |
| Misc – Others | - | - | 75,000.00 | 75,000.00 |
| **Total** | **25,770,567.43** | **25,430,820.18** | **162,000.00** | **51,363,387.61** |

First Sumiden filed its protest on June 18, 2014.

On October 09, 2014, First Sumiden received the Final Decision on Disputed Assessment ("FDDA"). The FDDA contained the following information, to wit:

| | Special Rate 5% | Regular rate 30% |
|---|---|---|
| Taxable income per return | Php317,847,439.00 | Php8,717,173.00 |
| Add: Adjustments | | |
| Unreported sales/revenue | | |
| Discrepancy (sales per ITR vs. sales per VAT returns) | 1,665,752.28 | |
| Discrepancy (sales per SLS vs. SLP/AITIED) | 20,367.42 | |
| Discrepancy – Management Fees per OR register vs. Schedule of Other Income | | 813,577.17 |
| Realized forex gain not subjected to tax | 13,728,945.86 | |
| Disallowed Direct Cost/Deductions | 37,652,012.84 | |
| Unsupported Importations | 164,795,672.00 | |
| Taxable income per audit | Php553,710,189.39 | Php9,530,750.17 |
| Tax Due Special Rate (5%) | Php26,785,509.47 | |
| Less: Paid to Other Agencies (RA 7916/8748) | 6,356,949.00 | |
| Tax Due per BIR under Special Rate (5%) | Php20,428,560.47 | |
| Tax Due to BIR under Regular Rate (30%) | | Php2,859,225.05 |
| Aggregate Income Tax Due | | Php23,287,785.52 |
| Less: Tax payments / Credits per return | Php12,150,574.85 | |
| Less: Disallowed Income Tax Credit | 1,623,753.00 | 10,526,821.85 |
| Basic Deficiency Income Tax | | Php12,760,963.67 |
| Less: Basic Deficiency Tax Paid 6/28/2013 | | 3,458,555.03 |
| | | Php9,302,408.64 |
| Add: Interest – 4/16/2010 to 9/30/2014 | Php8,303,355.44 | |
| Compromise Penalty | 50,000.00 | 8,353,355.44 |
| Interest paid | Php2,219,160.52 | |
| **TOTAL AMOUNT DUE** | | **Php17,655,764.08** |

Within thirty (30) days from receipt of the FDDA, First Sumiden filed a Petition for Review on November 07, 2014 with the Court in Division against the Commissioner docketed as CTA Case No. 8924.

After two extensions of time, the Commissioner filed his Answer on February 04, 2015 in CTA Case No. 8924 interposing, among others, the following special and affirmative defenses: 1) the Commissioner's right to assess for taxable year 2009 did not prescribe; and 2) The Letter of Authority, Notice of Informal Conference, PAN, FLD, Final Assessment Notice ("FAN"), and FDDA were issued in accordance with law, rules and jurisprudence.

Thereafter, First Sumiden filed a Reply in CTA Case No. 8924 on February 20, 2015 alleging that the Commissioner's right to assess First Sumiden for deficiency taxes for taxable year 2009 has already prescribed. Allegedly, Hisahiro Miyake, First Sumiden's President and Chairman of its Board of Directors, could not have validly executed the waivers since a corporation such as First Sumiden, can only act through its board of directors and that it is not estopped from raising the validity of the waivers. It is necessary to raise the issue on the defects of the waivers in order to arrive at a just decision and complete resolution of the case because the same is closely related to the issue of prescription. On the other hand, the Commissioner only made a general denial of its allegations.

After the Pre-trial conference held on March 19, 2015, the parties filed their Joint Stipulation of Facts and Issues on April 16, 2015. The same was approved by the Court in Division in the Pre-Trial Order dated April 30, 2015.

During the trial of CTA Case No. 8924, First Sumiden presented the following witnesses: (1) Ana Liza B. Arciaga, its Finance and Admin Division Head; (2) Liz M. Fernandez, its Senior Accounting Supervisor; (3) Mary Lou M. Cuyo, its Logistics Manager; 4) Arnilda Regarde, its Accounting Specialist; 5) George V. Villaruz – court commissioned ICPA; and 6) Carol M. Defeo-Javid – Licensed Custom Broker of YAS Brokerage, Inc. Thereafter, First Sumiden formally offered its documentary evidence on November 11, 2015.

The Court in Division issued the Resolution dated January 20, 2016, admitting some of First Sumiden's evidence, and denying several exhibits. First Sumiden filed an Omnibus Motion, praying for partial reconsideration, re-opening of the presentation of respondent's evidence, and re-marking of evidence, which the Court granted, despite the Commissioner's Comment/Opposition. Thus, First Sumiden recalled its witnesses: Liz M. Fenandez, Mary Lou Cuyo, and George V. Villaruz.

First Sumiden filed its Amended Formal Offer of Documentary Evidence on August 8, 2016. On September 22, 2016, the Court in Division resolved the Omnibus Motion and Amended Formal Offer of Documentary Evidence, thereby admitting all of First Sumiden's exhibits.

For his part, the Commissioner presented one witness, Revenue Officer Josa C. Gomez, on October 24, 2016, and filed his Formal Offer of Evidence on November 02, 2016. On December 02, 2016, the Court admitted all the offered exhibits.

As directed by the Court in Division, the Commissioner filed his Memorandum on January 04, 2017, while First Sumiden filed its Memorandum on January 09, 2017. Hence, CTA Case No. 8924 was deemed submitted for decision on January 16, 2017.

### *The Ruling of the Second Division*

The Court in Division then rendered the assailed Decision dated January 03, 2018,[4] partially granting the Petition for Review in CTA Case No. 8924.

The Commissioner filed his Motion for Partial Reconsideration (Re: Decision Promulgated on 03 January 2018) on January 17, 2018,[5] seeking to partially reverse the said Decision.

On March 14, 2018, the Court in Division rendered the assailed Resolution,[6] denying the Commissioner's Motion for Partial Reconsideration.

### *The Proceedings in the Court of Tax Appeals En Banc*

On April 03, 2018, the Commissioner filed a Motion for Extension of Time to File Petition for Review before this Court *En Banc*,[7] praying for an extension of fifteen (15) days from April 03, 2018, or until April 18, 2018, to file his Petition for Review. Subsequently, the Commissioner filed an Ex Parte Manifestation and Submission on April 17, 2018,[8] stating that he served and filed through registered mail registered mail his Motion for Extension of Time to File Petition for Review due to time constraint. The Court En Banc granted the Commissioner's Motion for Extension of Time to File Petition for Review, and noted the latter's Manifestation and Submission on April 18, 2018.[9]

On April 18, 2018, the Commissioner filed the instant Petition for Review[10] praying for the partial reversal and setting aside of the Decision dated January 03, 2018[11] and the Resolution dated March 14, 2018[12], both rendered by the Court in Division in CTA Case No. 8924.

In the Resolution dated May 08, 2018,[13] the Court *En Banc* ordered First Sumiden to file its Comment within ten (10) days from notice. Thus, on July 09, 2018, First Sumiden filed the said Comment.[14]

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4 *Id.*, pp. 34 to 69; Docket (CTA Case No. 8924) – Vol. IV, pp. 1570 to 1605.
5 Docket (CTA Case No. 8924) – Vol. IV, pp. 1606 to 1619.
6 Rollo, pp. 70 to 74; Division Docket (CTA Case No. 8924) – Vol. IV, pp. 1643 to 1647.
7 *Id.*, pp. 2 to 5.
8 *Id.*, pp. 7 to 10.
9 *Id.,* Minute Resolution dated April 18, 2018, p. 75.
10 *Id.*, pp. 13 to 28.
11 Penned by Associate Justice Catherine T. Manahan, concurred by both Associate Justice Juanito C. Castañeda, Jr. and Associate Justice Caesar A. Casanova (Retired); *Id.*, pp. 34 to 68.
12 *Id.*, pp. 70 to 74.
13 *Id.*, pp. 77 to 78.
14 *Id.*, pp. 79 to 87.

The Court *En Banc*, in the Resolution dated July 26, 2018,[15] resolved to give due course to the instant Petition for Review, and required the parties to submit their respective memorandum, within a period of thirty (30) days from receipt thereof. The Commissioner filed his Memorandum on September 05, 2018;[16] while First Sumiden file its Memorandum on November 28, 2018.[17]

On January 11, 2019, the instant case was deemed submitted for decision.[18]

Hence, this Decision.

**<u>Assignment of Errors</u>**

The Commissioner raises the following grounds in the instant Petition for Review, to wit:

"I.

> THE HONORABLE COURT SECOND DIVISION ERRED IN RULING THAT RESPONDENT IS NOT LIABLE FOR DEFICIENCY INCOME TAX FOR TAXABLE YEAR 2009 DUE TO:
>
> a. Realized Forex Gain in the amount of Php13,728,945.86;
>
> b. Disallowed expense – Indirect Labor-welfare-retirement fund in the amount of Php3,009,389.54 (the disallowance of the remaining amount of Php63,171.33 was affirmed by the Honorable Court Second Division);
>
> c. Disallowed Expense – Office Supplies in the amount of Php2,691,421.24 (the disallowance of the remaining Php66,811.50 was affirmed by the Honorable Court Second Division);
>
> d. Disallowed Expense – Repairs and Maintenance-Plant-Nonstock in the amount of Php1,250,723.24 (the disallowance of the remaining Php822.50 was affirmed by the Honorable Court Second Division)";

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15 *Id.*, pp. 90 to 91.
16 *Id.*, pp. 92 to 106.
17 *Id.*, pp. 108 to 124.
18 *Id.*, pp. 128 to 129.

e. Disallowed Expense – Minor Equipment in the amount of Php909,406.97;

f. Disallowed Expense – Repairs and Maintenance-Plant Outsourced in the amount of Php6,872,287.81; and

g. Unsupported Importations in the amount of Php149,177,940.47 (the disallowance of the remaining Php15,617,731.53 was affirmed by the Honorable Court Second Division).

II.

THE HONORABLE COURT SECOND DIVISION ERRED IN RULING THAT RESPONDENT IS NOT LIABLE FOR COMPROMISE PENALTY ON DEFICIENCY INCOME TAX IN THE AMOUNT OF Php50,000.00"[19]

## The Arguments of Parties

***Petitioner's arguments:***

The Commissioner, herein petitioner, argues that the Court in Division erred in ruling that First Sumiden, herein respondent, is not liable for deficiency income tax for taxable year 2009 due to the following grounds:

*Cancellation of the assessment for Realized Forex Gain in the amount of Php13,728,945.48*

Petitioner argues that the assessment for realized forex gain is neither a new assessment nor was respondent denied of due process regarding the said assessment. According to petitioner, the realized forex gain was already part of the audit findings on Undeclared Sales and Disallowed Cost of Sales which already was assessed against respondent as early as the issuance of the PAN.

*Cancellation of the assessment due to Disallowed Expenses- Indirect Labor-Welfare-Retirement Fund, Office Supplies, Repairs and Maintenance (Plant-Nonstock, Minor Equipment, Plant Outsourced)*

Petitioner asserts his position that the expenses related to the following expenses such as: retirement fund, office supplies, repairs and maintenance of plant-nonstock, minor equipment and plant

[19] *Id.*, pp. 15 to 16, and 94 to 95.

outsourced are not considered direct costs. These should be disallowed as deductions for purposes of computing the preferential tax based on five percent (5%) of the gross income. Revenue Regulation ("RR") No. 11-2005 provides for the allowable deductions to arrive at gross income for purposes of computing the total five (5%) tax rate imposed and that only includes direct labor.

*Cancellation of the assessment due to Unsupported Importations in the amount of Php149,177,940.47*

Petitioner argues that per the FLD, claimed importations amounting to Php375,500,519.53 were not supported by Import Entry and Internal Revenue Declarations ("IEIRDs"), hence disallowed. In respondent's protest, the latter submitted photocopies of IEIRDs, PEZA Import Permits and commercial invoices to support these importations. However, there were importations in the amount of Php164,795,672.00 which remained unsupported, hence disallowed pursuant to Section 34 of the NIRC of the 1997.

*Compromise Penalty*

Finally, petitioner claims that respondent is liable for compromise penalties in the amount of Php50,0000.00 for the deficiency income tax pursuant to Revenue Memorandum Order ("RMO") No. 19-2007. That the compromise penalty is not only for settlement of criminal liability but for certain violations of the NIRC of 1997 and that RMO No. 19-2007 has not been revoked and no case has been filed to declare it void.

***Respondent's counter-arguments:***

Respondent First Sumiden counter-argues that the Court in Division correctly cancelled the income tax assessment reiterating the Court in Division's stand that the assessment for realized forex gain is an entirely new assessment item raised for the first time in the FDDA.

Moreover, respondent avers that the Court in Division properly cancelled the assessment on disallowed expenses. Allegedly, the disallowed expenses pertain to costs and expenses directly incurred by respondent in pursuing its PEZA-registered activity and that these claimed expenses, even if not included in the list of direct costs under RR No. 11-2005, are allowable deductions from respondent's gross sales.

Furthermore, respondent contends that the Court in Division properly cancelled the assessment arising from the alleged unsupported importations; and that it has adequately substantiated with valid supporting documentations its importations as found in the ICPA's report.

Lastly, respondent claims that the Court in Division appropriately ruled that respondent is not liable for compromise penalty. According to respondent, compromise penalties imply a mutual agreement between the taxpayer and petitioner. Without the consent of the taxpayer to the compromise penalties, its imposition is allegedly illegal and unauthorized.

## The Ruling of the Court

### *Timeliness of Petition*

The Court in Division issued the assailed Resolution, denying the Commissioner's Motion for Partial Reconsideration, on March 14, 2018. Petitioner received said Resolution on March 19, 2018. Pursuant to Rule 4, Section 2(a)(1)[20] in relation to Rule 8, Section 3(b)[21] of the Revised Rules of the Court of Tax Appeals[22] (RRCTA), the Commissioner had fifteen (15) days from date of receipt of the resolution or until April 03, 2018 within which to file his petition for review.

On April 03, 2018, the Commissioner filed a Motion for Extension of Time to File Petition for Review, praying for an extension of fifteen (15) days or until April 18, 2018 within which to file the petition for review. The Court granted the same in a Minute Resolution dated April 18, 2018.

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[20] **Sec. 2.** *Cases within the jurisdiction of the Court en banc.* — The Court *en banc* shall exercise exclusive appellate jurisdiction to review by appeal the following:

(a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Divisions in the exercise of its exclusive appellate jurisdiction over:

xxx xxx xxx

(1) Cases arising from administrative agencies – Bureau of Internal Revenue, Bureau of Customs, Department of Finance, Department of Trade and Industry, Department of Agriculture; x x x

[21] **Sec. 3.** *Who may appeal; period to file petition.* — x x x

(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review. (Rules of Court, Rule 42, sec. 1a)

[22] A.M. No. 05-11-07-CTA, November 22, 2005.

On April 18, 2018, the Commissioner timely filed the present Petition for Review. Hence, the Court *En Banc* validly acquired jurisdiction.

We now proceed to the merits of the case.

At the outset, the Commissioner presents no new argument to persuade Us that it has a meritorious case. In fact, the instant Petition for Review is a reproduction of its Motion for Partial Reconsideration filed before the Court in Division.

Thus, We find the instant Petition for Review devoid of merit.

***The tax deficiency assessment arising from Realized Forex Gain assessed for the first time in the FDDA violated respondent's right to due process***

In the FDDA, petitioner found respondent liable for the discrepancy of Php13,728,945.86 for realized forex gain not subjected to tax. The Court in Division cancelled the assessment on the ground that respondent's right to due process was violated since the assessed item of Realized Forex Gain was not found in the PAN, FAN and FLD, but only in the FDDA.

Petitioner asserts that the assessment for realized forex gain is neither a new assessment, nor was respondent denied due process based on the following: (a) respondent admitted the existence of Realized Forex Gain in its Protest to the FLD dated June 18, 2014; and (b) the PAN includes Realized Forex Gain in the audit findings on undeclared sales and disallowed cost of sales.

On the other hand, respondent claims it was denied due process because it was not given an opportunity to contest the assessment since the assessment of Realized Forex Gain was made only in the FDDA; and that respondent was not given the opportunity to present its case and adduce supporting evidence against the assessment on Realized Forex Gain at the administrative level.

The Court is not persuaded of petitioner's argument.

We agree with the court *a quo* that this assessment item is void for violating respondent's right to due process. The "realized forex gain not subjected to tax" only appears in the FDDA, and is not found in the PAN[23] and FLD[24].

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[23] Docket (CTA Case No. 8924) – Vol. III, Exhibit "P-5", pp. 952 to 962.
[24] *Id.*, Exhibit "P-9", pp. 1083 to 1090.

Section 228[25] of the NIRC of 1997 provides that the taxpayer shall be informed in writing of the law and the facts on which the assessment is made, otherwise, the assessment shall be void.

Since an entirely new assessment item in the form of "realized forex gain not subjected to tax" was included in the FDDA, petitioner was not given the chance to refute within the administrative level the said assessment. It should therefore be cancelled.

***Analysis of petitioner's disallowance of certain expenses as direct costs or cost of sales are valid deductions from respondent's gross income***

At the crux of the controversy in the instant case is whether the disallowed expenses are direct costs or cost of sales which can be considered as valid deductions from petitioner's gross income.

Section 24 of Republic Act ("RA") No. 7916 otherwise known as The Special Economic Zone Act of 1995 states that PEZA-registered enterprises are exempt from paying all local and national taxes, and in lieu thereof, are only subject to the five percent (5%) special tax on gross income, said section reads:

> "SEC. 24. *Exemption from National and Local Taxes.* – Except for real property taxes on land owned by developers, no taxes, local and national, shall be imposed on business establishments operating within the ECOZONE. In lieu thereof, **five percent (5%) of the gross income** earned by all business enterprises within the ECOZONE shall be paid and remitted as follows:
>
> (a) Three percent (3%) to the National Government;
> (b) Two percent (2%) which shall be directly remitted by the business establishments to the treasurer's office of the municipality or city where the enterprise is located."[26]

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[25] 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...

xxx xxx xxx

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

[26] *Emphasis and underscoring supplied.*

Relative thereto, the Implementing Rules and Regulations ("IRR") of RA No. 7916 provides the definition of "Gross Income". Section 2 (nn) of Rule I of the said IRR reads as follows:

> "nn. *'Gross Income'* for purposes of computing the special tax due under Section 24 of the Act refers to gross sales or gross revenues derived from business activity within the ECOZONE, net of sales discounts, sale returns and allowances and minus cost of sales or direct costs but before any deduction is made for administrative expenses or incidental losses during a given taxable period. **The allowable deductions from 'gross income' are specifically enumerated under Section 2, Rule XX of these Rules.**"[27]

Section 2 of Rule XX of the IRR of RA No. 7916 enumerates the allowable deductions, to wit:

> "SECTION 2. *Gross Income Earned; Allowable Deductions.* – For purposes of these Rules, Gross Income earned shall be defined in Section 2 (nn) of Rule I of these Rules, **subject to the following allowable deductions** for specific types of enterprises:
>
> 1. For ECOZONE Export Enterprises, Free Trade Enterprises and Domestic Market Enterprises.
>
> - Direct Salaries, wages or labor expenses
> - Production supervision salaries
> - Raw materials used in the manufacture of products
> - Goods in process (intermediate goods)
> - Finished goods
> - Supplies and fuels used in production
> - Depreciation of machinery and equipment used in production and buildings owned or constructed by an ECOZONE Enterprise
> - Rent and utility charges associated with building, equipment and warehouses, or handling of goods
> - Financing charges associated with fixed assets."[28]

Furthermore, RR No. 11-2005[29] amending RR No. 2-2005,[30] was issued defining gross income earned and what are inclusive as allowable deductions, to wit:

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[27] *Emphasis and underscoring supplied.*
[28] *Emphasis supplied.*
[29] Issued on April 25, 2005.
[30] Issued on February 08, 2005.

> "SECTION 3. *Gross Income Earned.* – For purposes of implementing the tax incentive of registered Special Economic Zone (ECOZONE) enterprises in Section 24 of Republic Act No. 7916, the term '*gross income earned*' shall refer to gross sales or gross revenue derived from business activity within the ECOZONE, net of sales discounts, sales returns and allowances and minus costs of sales or direct costs but before any deduction is made for administrative, marketing, selling and/or operating expenses or incidental losses during a given taxable period.
>
> **For purposes of computing the total five (5%) tax rate imposed, the following direct costs are included in the allowable deductions** to arrive at gross income earned for specific types of enterprises:
>
> 1. ECOZONE Export Enterprises, Free Trade Enterprises and Domestic Market Enterprises:
>
> - Direct salaries, wages or labor expenses
> - Production supervision salaries
> - Raw materials used in the manufacture of products
> - Decrease in Goods in Process Account (Intermediate goods)
> - Decrease in Finished Goods Account
> - Supplies and fuels used in production
> - Depreciation of machinery and equipment used in production, and of that portion of the building owned or constructed that is used exclusively in the production of goods
> - Rent and utility charges associated with building, equipment and warehouses used in production
> - Financing charges associated with fixed assets used in production the amount of which were not previously capitalized."[31]

Pertinently, the term "cost of goods sold" which was mentioned in the case of *Commissioner of Internal Revenue v. Central Luzon Drug Corporation*[32] in the following manner, is instructive:

> "Cost of goods sold is the most commonly used term referring to a particular section in the financial statements, reports, or notes to financial statements of trading or merchandising

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[31] *Emphasis supplied.*
[32] G.R. No. 159647, April 15, 2005.

> concerns. **For a manufacturing business, however, the term used is cost of goods manufactured and sold or cost of goods produced and sold**; for a service enterprise, cost of services; and, in general, cost of sales of a business."[33]

In accounting practice, the term "cost of goods sold" may refer to the purchase price only, or it may include such items as labor, materials, supplies and indirect expenses incident to the production of goods, including freight charges and other costs required to be included under the capitalization rules.[34]

Based on the foregoing, in computing the five percent (5%) preferential tax, gross sales or gross revenue may be reduced only by sales discounts, sales returns and allowances, cost of sales or direct costs or any of the enumerated allowable deductions under RR No. 11-2005. Suppletorily, in determining whether an expense is part of direct cost or cost of goods, said expense may refer to the purchase price only or items such as labor, materials, supplies and indirect expenses incident to the production of goods manufactured and sold or good produced and sold.

Hence, We shall now determine whether the disallowed expenses are direct costs or costs of sales that are allowable deductions under the IRR of RA 7916 for purposes of computing petitioner's gross income.

For easy reference, the reduction in the amount assessed for deficiency income tax was due to the following:

| Findings of the Court in Division | Amount |
|---|---|
| a) Cancellation of the assessment due to disallowed expense - Indirect Labor-Welfare Retirement Fund | Php3,009,389.54 |
| b) Cancellation of the assessment due to disallowed expense - Office Supplies | Php2,691,421.24 |
| c) Cancellation of the assessment due to disallowed expense - Repairs and maintenance-Plant Nonstock | Php1,250,723.24 |
| d) Cancellation of the assessment due to disallowed expense - Repairs and maintenance-Minor equipment | Php909,406.97 |
| e) Cancellation of the assessment due to disallowed expense - Plant outsourced | Php6,872,287.81 |
| f) Cancellation of the assessment due to unsupported importations | Php149,177,940.47 |

[33] *Emphasis supplied.*
[34] Smith, *West's Tax Law Dictionary* (1993), p. 173.

***1) Indirect labor - welfare retirement fund (Php3,009,389.54)***

Petitioner contends that the expenses related to the retirement fund are considered indirect-labor that should be disallowed as a deduction for purposes of computing the preferential tax based on five percent (5%) of the gross income. According to petitioner, the allowable deductions in RR No. 11-2005 applies only to direct labor costs. Hence, petitioner prays that the disallowance of the entire Indirect Labor-Retirement Benefits as a deduction for purposes of determining respondent's deficiency income tax liabilities should be upheld.

We do not subscribe to petitioner's contention.

A plain reading of Section 4 of Rule XX of the IRR of RA No. 7916 would reveal that among those enumerated allowable deductions merely states "Direct Salaries, wages or **labor expenses**". In other words, nowhere is it stated in the above-quoted Section 4 of Rule XX of the IRR of RA No. 7916 that the labor expenses should be direct or indirect. It is a basic principle in statutory construction that where the law does not distinguish, none must be made. *Ubi lex non distinguit nec nos distingere debemos.*[35]

Hence, there is no legal basis for petitioner's stand that the law contemplates only direct labor costs.

***2) Office supplies (Php2,691,421.24)***

Based on the ICPA Report, it was established that the amount of Php2,691,421.42 was part of respondent's cost of goods sold. The said amount pertains to photocopying charges of work orders and other forms that are being used for production and planning purposes, while other supplies were used for quality control procedures of products being manufactured, thus, are deductible. Clearly, this falls under the allowable deductions under "Supplies used in production" found in RR No. 11-2005.

***3) Repairs and Maintenance – Plant Nonstock (Php1,250,723.24)***

The amount of Php1,250,723.24 was likewise correctly allowed as deductible items as they refer to supplies used in production such as pipes, tubes, bushings, halogen lamps, angle bars, and nickel nodes. The same will fall under the allowable deductions under "Supplies used in production" found in RR No. 11-2005. Said supplies were utilized for the repairs, maintenance and machineries in the production department.

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[35] The Commissioner of Internal Revenue v. The Commission on Audit, G.R. No. 101976, January 29, 1993; Tirso B. Savellano v. The Commission on Audit, G.R. No. 102258, January 29, 1993.

***4) Plant Outsourced (Php6,872,287.81)***

With respect to this item, the Court in Division ruled that respondent's direct cost should not be subjected to deficiency income tax considering that respondent still had an overpayment of Php337,385.73. We quote with approval the discussion of the Court in Division in the assailed Decision, to wit:

> "...[P]etitioner has overpaid its deficiency income tax since Supplies amounting to Php6,872,287.81 was not included in the BIR's FLD, but was included in the amounts upon which petitioner's payment was based.
>
> It is noted that per PAN, respondent disallowed petitioner's Repairs & Maintenance-Plant Outsourced amounting to Php73,776,450.20 which includes the amount of Php55,495,795.15 pertaining to supplies. However, per FLD, the said supplies account was no longer included in the assessment. Nevertheless, petitioner already paid a portion of the assessment on the said Supplies amounting to Php6,872,287.81.
>
> Thus, upon initial settlement of its deficiency Income Tax on June 28, 2013, it paid in excess of the assessed items in this specific amount based on the FLD issued by respondent on May 19, 2014, which may be applied against the total disallowed direct cost/deductions as determined by this Court.
>
> In fine, petitioner's direct cost should not be subjected to deficiency income tax considering that it still had an overpayment of Php337,385.73..."

***4) Unsupported Importations (Php149,177,940.47)***

Petitioner contends that there are still importations in the amount of Php164,795,672.00 which remained unsupported, hence disallowed pursuant to Section 34 of the NIRC of 1997.

Contrary to petitioner's allegations, respondent has properly substantiated its importations pursuant to Section 34(A)(1)(b). As ascertained by ICPA, respondent presented other documents in lieu of the IERDs, to substantiate its importations such as Authority to Release Goods (ATRIG), Official Receipt from the Bureau of Customs evidencing the importation and payment of the attendant tariffs and taxes, PEZA import permits, PEZA certification, commercial invoices, airway bills, packing list and application for foreign remittances, as well as General Ledger Entries. In this case, petitioner failed to show error in the said findings. Hence, the findings of the Court in Division are affirmed.

***A compromise penalty is in the nature of a mutual agreement***

Petitioner further insists that respondent is liable for compromise penalties in the amount of Php50,000.00 for the deficiency income tax. The imposition of the compromise penalties was pursuant to RMO No. 19-2007. The compromise penalty is not only for settlement of criminal liability but for certain violations of the NIRC of 1997. Allegedly, RMO No. 19-2007 has not been revoked and no case has been filed to declare it void.

We do not agree.

A compromise penalty is a certain amount of money which the taxpayer pays to compromise a tax violation. This is usually paid in lieu of a criminal prosecution.[36]

The nature of a compromise penalty is explained in the case of *Commissioner of Internal Revenue v. Armando L. Abad*[37], to wit:

> "**a compromise implies agreement. One party cannot impose it upon the other**. If an offer of compromise is rejected by the taxpayer, as in this case, the Commissioner of Internal Revenue should file a criminal action if he believes that the taxpayer is criminally liable for violation of the tax law as the only way to enforce a penalty. As penalty can be imposed only on a finding of criminal liability."[38]

Based on the foregoing, the nature of a compromise penalty implies a mutual agreement between the parties and it cannot be imposed without the consent of the other.

A closer look at paragraphs 4 and 5 of Part III (Guidelines and Instructions) of RMO No. 19-2007[39] reads as follows:

> "4. Although all amounts of compromise penalties incident to violations shall be itemized in the assessment notice and/or

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[36] Aban, *Law of Basic Taxation in the Philippines* (2001), p. 237.
[37] G.R. No. L-19627, June 27, 1968.
[38] *Emphasis supplied.*
[39] The Consolidated Revised Schedule of Compromise Penalties for Violations of the National Internal Revenue Code.

demand letter, **the same should not form part of assessment notice that reflects deficiency basic tax, surcharge and interest but should appear in a separate assessment notice/demand letter as the amount suggested to the taxpayer to pay in lieu of criminal prosecution**. If paid, the compromise penalties shall be collected and accounted for under the usual procedures, as internal revenue collection.

5. **Since compromise penalties are only amounts suggested in settlement of criminal liability, and may not therefore be imposed or exacted on the taxpayer**, the violation shall be referred to the appropriate office for criminal action in the event that a taxpayer refuses to pay the suggested compromise penalty."[40]

A plain reading of the regulations says that compromise penalties are amounts suggested in settlement of criminal liability, and may not therefore, be imposed or exacted from the taxpayer.

In the instant case, there is no showing that respondent consented to the compromise penalty. Hence, its imposition should be deleted.

Moreover, the case of *Commissioner of Internal Revenue v. Filinvest Development Corporation*[41] ("*Filinvest* case") as relied by herein petitioner, is not applicable, since the facts and issues are not on all-fours with the instant case. The discussion in the *Filinvest* case deals with the imposition of income tax, documentary stamp taxes and interest to the advances extended by Filinvest Development Corp to its affiliates.

Thus, the Court *En Banc* finds no basis for petitioner's imposition of compromise penalty.

**WHEREFORE**, premises considered, the Petition for Review filed with the Court *En Banc* on April 18, 2018 is **DENIED** for lack of merit. Accordingly, the January 03, 2018 Decision and March 14, 2018 Resolution in CTA Case No. 8924 are **AFFIRMED with modifications**. Respondent is **ORDERED TO PAY THREE MILLION TWO HUNDRED SEVENTY THOUSAND FIVE HUNDRED NINETY-THREE AND 48/100 PESOS (Php3,270,593.48)** representing deficiency income tax for taxable year 2009, inclusive of twenty-five percent (25%) surcharge imposed under Section 248(B) of the NIRC of 1997, as amended, and twenty percent (20%) deficiency interest and twenty percent (20%) delinquency interest imposed under Sections 249(A) and (B), respectively, of the same Code, computed until December 31, 2017, which is prior to its amendment under Republic Act No. 10963, otherwise known as the "Tax Reform for Acceleration and Inclusion (TRAIN) Law", thus:

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40 *Emphasis and underscoring supplied.*
41 G.R. Nos. 163653 & 167689, July 29, 2011.

| | Special Rate 5% | Regular Rate 30% |
|---|---|---|
| Taxable Income per Return | Php317,847,439.00 | Php8,717,173.00 |
| Add: Adjustment | | |
| Unsupported Importations | 15,617,731.53 | |
| Taxable Income per Audit | Php333,465,170.53 | Php8,717,173.00 |
| | | |
| Tax Due Special Rate (5%) | Php16,673,258.53 | |
| Less: Paid to Other Agencies (RA 7916/8748) | 6,356,949.00 | |
| Tax Due to BIR under Special Rate (5%) | Php10,316,309.53 | |
| Tax Due to BIR under Regular Rate (30%) | | Php2,615,151.90 |
| | | |
| Aggregate Income Tax Due | | Php12,931,461.43 |
| Less: Tax Payments/Credits per returns | | 12,150,574.85 |
| Basic Deficiency Income Tax | | Php780,886.58 |
| Add: 25% Surcharge | | 195,221.64 |
| 20% Deficiency Interest from April 16, 2010 to September 30, 2014 | | |
| *[Php780,886.58 x 20% x 1629/365 days]* | | 697,021.50 |
| **Total Amount Due, September 30, 2014** | | **Php1,673,129.72** |
| Add: 20% Deficiency Interest from October 1, 2014 to December 31, 2017 | | |
| *[Php780,886.58 x 20% x 1188/365 days]* | | 508,325.07 |
| 20% Delinquency Interest from October 1, 2014 to December 31, 2017 | | |
| [Php1,673,129.72 x 20% x 1188/365 days] | | 1,089,138.69 |
| **Total Amount Due, December 31, 2017** | | **Php3,270,593.48** |

In addition, respondent is **ORDERED TO PAY** delinquency interest at the rate of twelve percent (12%), which is double the legal interest rate for loans or forbearance of any money, on the total amount due as of October 01, 2014 in the amount of **Php1,673,129.72**, as determined above, computed from January 01, 2018 until full payment thereof pursuant to Section 249(C) of the NIRC of

1997, as amended by RA No. 10963 and implemented by Revenue Regulations No. 21-2018.

**SO ORDERED.**

**MA. BELEN M. RINGPIS-LIBAN**
Associate Justice

**WE CONCUR:**

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

**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

*(With Concurring and Dissenting Opinion)*
**ERLINDA P. UY**
Associate Justice

**ESPERANZA R. FABON-VICTORINO**
Associate Justice

**CIELITO N. MINDARO-GRULLA**
Associate Justice

**CATHERINE T. MANAHAN**
Associate Justice

*(With Concurring and Dissenting Opinion)*
**JEAN MARIE A. BACORRO-VILLENA**
Associate Justice

*(With Concurring Opinion)*
**MARIA ROWENA 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 the Court.

**ROMAN G. DEL ROSARIO**
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

## ***EN BANC***

| | |
|---|---|
| **COMMISSIONER OF INTERNAL REVENUE**, *Petitioner*, | **CTA EB NO. 1831** (CTA Case No. 8924) |
| | Present: |
| -versus- | **DEL ROSARIO,** *P.J.*, **CASTANEDA, JR.**, **UY**, **FABON-VICTORINO**, **MINDARO-GRULLA**, **RINGPIS-LIBAN**, **MANAHAN**, **BACORRO-VILLENA,** and **MODESTO-SAN PEDRO**, *JJ.* |
| **FIRST SUMIDEN CIRCUITS, INC.**, *Respondent.* | Promulgated: FEB 12 2020 3:56 p.m. |

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## CONCURRING AND DISSENTING OPINION

***DEL ROSARIO, P.J.:***

I concur with the *ponencia* in affirming the assailed Decision and Resolution but only in so far as they sustain the deficiency income tax assessment arising from respondent's unsupported importations. With due respect, however, I am constrained to withhold my assent anent the deficiency income tax assessment arising from respondent's realized foreign exchange gain.

In the assailed Decision, the Court in Division ruled that the right of respondent to due process was violated when petitioner, for the first time in the Final Decision on Disputed Assessment (FDDA), assessed it for deficiency income tax by subjecting its realized foreign exchange gain in the amount of P13,728,945.86 to 5% special income tax rate. The Court in Division found that this item of assessment does not appear in the Preliminary Assessment Notice (PAN) and Formal Letter of Demand (FLD). Thus, it considered this item as an "entirely new assessment" and held that since respondent was not given the opportunity to dispute the same, the aforesaid item of assessment should be cancelled.

I submit that the income tax assessment on respondent's realized foreign exchange gain in the amount of P13,728,945.86 is not an "entirely new assessment".

As aptly pointed out by petitioner in his Petition for Review, the assessment on respondent's realized foreign exchange gain was part of the audit findings on Unreported Sales and Disallowed Cost of Sales which were already **assessed as early as the issuance of the PAN.[1] In truth, the FLD likewise contains the audit findings on Unreported Sales and Disallowed Cost.[2]**

In respondent's protest to the FLD, respondent was even categorical in controverting the taxability of its realized foreign exchange gain. Pertinent portion of respondent's protest to the FLD reads:

> **"3) Disallowed Cost of Sales – P11,400,466.34**
>
> In the FLD, the examiner determined a discrepancy of P11,400,466.34 which was disallowed as cost of sales. We respectfully request for the reinvestigation of this item of assessment and submit that the amount of P11,400,466.34 was due to the erroneous offsetting of the Realized Forex Gain account in the Cost of Sales. The Realized Forex Gain in the amount of P100,880,987.30 is included in the Non-Operating & Taxable Other Income (P55,269,797.00) under Line 18A&B of the ITR (cf **Annex E**), broken down as follows:

| Account No. | Description | Amount |
|---|---|---|
| **83100** | **Foreign exchange gain – realized** | **P100,880,987.30** |
| 81130 | Other interest income | 430,895.85 |
| 82110 | Gain or loss from sale of property | 268,495.16 |
| 82120 | Other miscellaneous income | 8,017,782.27 |
| Subtotal | | P109,598,160.58 |
| Less: | Non-Operating & Taxable Other Income Attributable to Exempt Sales | 54,328,363.58 |
| Non-Operating & Taxable Other Income per ITR | | P55, 269, 797.00 |

> Thus, as an item of income, the realized forex gain should not be deducted from the cost of sales. Instead, the difference between the cost of sales per trial balance (P1,079,316,430.30) and cost of sales per ITR (P989,835,909.00) in the amount of P89,480,

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[1] Petition for Review, EB Docket, p. 19; Exhibit P-5, Division Docket, p. 952.

[2] Exhibit P-9, Division Docket, p. 1083.

> 522.34 (cf. **Annex C, letter "f"**) should be offset against the Cost of Sales. This amount represents cost of sales attributable to FSCI's exempt sales which was not claimed as deductible expense in FSCI's ITR as shown in Annex C. Since the amount of P89,480,522.34 was not claimed as a deduction, FSCI's actual cost of sales should be accordingly reduced by this amount and which will now be equal to the cost of sales per ITR (P3,395,221,535.00) (cf. **Annex C** and **Annex E**). Considering that there is no discrepancy in the amount of cost of sales claimed as deduction in FSCI's ITR, we respectfully submit that this item of assessment should be cancelled for lack of legal and factual bases."[3]

Revenue Officer Josa Gomez elucidated that in the FLD, there was an assessment based on Undeclared Sales and Disallowed Cost of Sales. She further explained that the analysis of the documents <u>submitted by respondent</u> showed that petitioner's computed foreign exchange gain amounted to P40,599,417.29 only as compared to respondent's computation of P54,328,636.16, thus there is discrepancy of P13,728,945.86.[4] Petitioner found that this amount of P13,728,945.86 should be subjected to the special tax rate of 5%.

Evidently, the item of assessment in the amount of P13,728,955.86, representing realized foreign exchange gain not subjected to tax as appearing in the FDDA, resulted from respondent's own submissions and explanations as contained in its protest to the FLD. Thus, after considering respondent's protest and supporting documents, petitioner issued the FDDA containing, among others, the remaining items in the deficiency income tax assessment.

Truth to tell, the entire assessment process allows respondent to dispute the item on realized foreign exchange gain by filing a motion for reconsideration of the FDDA with petitioner himself or by filing a Petition for Review before this Court and offering evidence to dispute said item of assessment. While respondent chose to appeal the FDAA before this Court, it failed to present an iota of evidence that would warrant the cancellation of the aforesaid item of assessment.

All told, I VOTE to: (i) PARTIALLY GRANT the Petition for Review; (ii) AFFIRM with MODIFICATION the assailed Decision and Resolution of the Court in Division, by upholding the deficiency income tax assessment on the realized foreign exchange gain in the

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[3] Exhibit P-10, Division Docket, pp. 1117 to 1118.
[4] Exhibit R-19-A, Division Docket, p. 174.

amount of P13,728,945.86; and, (iii) ORDER respondent to pay the basic deficiency income tax due in the amount of P1,467,333.87,[5] plus 25% surcharge, plus deficiency and delinquency interests, to be computed in accordance with law.

**ROMAN G. DEL ROSARIO**
Presiding Justice

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| | **Special Rate 5%** | **Regular Rate 30%** |
|---|---|---|
| Taxable Income per Return | P317,847,439.00 | P8,717,173.00 |
| Add: Adjustments | | |
| Unsupported Importations | 15,617,731.53 | |
| Realized Forex Gain Not Subjected to Tax | 13,728.945.86 | |
| Taxable Income per Audit | P347,194,116.39 | P8,717,173.00 |
| | | |
| Tax Due Special Rate (5%) | 17,359,705.82 | |
| Less: Paid to Other Agencies (RA 7916/8748) | 6,356,949.00 | |
| Tax Due under Special Rate (5%) | P11,002,756.82 | |
| Tax Due under Regular Rate (30%) | | 2,615,151.90 |
| Total Income Tax Due [tax due under special rate (5%) plus tax due under regular rate (30%)] | | P13,617,574.85 |
| Less: Tax Payments/Credits per Returns | | 12,150,574.85 |
| Basic Deficiency Income Tax Due | | P1,467,333.87 |

**REPUBLIC OF THE PHILIPPINES**
**COURT OF TAX APPEALS**
**QUEZON CITY**

***EN BANC***
*********

**COMMISSIONER OF INTERNAL REVENUE,**
Petitioner,

**CTA EB No. 1831**
(CTA Case No. 8924)

Present

**DEL ROSARIO,** P.J.,
**CASTAÑEDA, JR.,**
**BAUTISTA,**
**UY,**
**CASANOVA,**
**FABON-VICTORINO,**
**MINDARO-GRULLA,**
**RINGPIS-LIBAN,**
**MANAHAN,**
**BACORRO-VILLENA,** *and*
**MODESTO-SAN PEDRO,** JJ.

***- versus -***

**FIRST SUMIDEN CIRCUITS, INC.,**
Respondent.

**Promulgated:**

FEB 12 2020 3:56 p.m.

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# CONCURRING AND DISSENTING OPINION

**UY, J.:**

I **CONCUR** with the *ponencia's* disquisition with respect to the analysis of petitioner's disallowance of certain expenses as direct costs or cost of sales considered as valid deductions from respondent's gross income.

However, with all due respect to my esteemed colleagues, I dissent with the majority opinion of this Court, and therefore, vote to **PARTIALLY GRANT** the instant *Petition for Review* on the ground that respondent's right to due process was not violated from the tax deficiency assessment arising from the Realized Forex Gain for the first time in the Final Decision on Disputed Assessment (FDDA).

I respectfully disagree with the majority opinion in this case that the tax deficiency assessment arising Realized Forex Gain assessed for the first time in the FDDA violated respondent's right to due process. In my humble opinion, I agree with petitioner that respondent was not denied due process.

Due process is usually violated where arbitrary or oppressive methods are used in assessing and collecting taxes.[1] Arbitrariness, in turn, presupposes inexcusable or obstinate disregard of legal provisions.[2]

In this case, insofar as the finding of *"Realized forex gain not subjected to tax"* in the amount of ₱13,728,945.86 is concerned, I see no arbitrary or oppressive method which respondent used in assessing income tax in relation to the said finding. Thus, petitioner has not violated respondent's right to due process.

In the FLD dated May 19, 2014,[3] part of the income tax assessment issued against petitioner is the *"Disallowed Cost of Sales"* in the amount of ₱11,400,466.34. The *Details of Discrepancies* attached thereto explain the said disallowance as follows:

> "<u>Disallowed Cost of Sales, P11,400,466.34</u>
>
> Comparison made between the Cost of Sales per ITR of P3,395,221,536.00 and Cost of Sales per Trial Balance/General Ledger Accounts (TB/GL) of P3,222,732,365.47 showed a discrepancy of P172,489,170.53 per PAN. Per your protest dated 30 May 2013, 18 June 2013 and 22 October 2013, you pointed out that the Cost of Sales of P3,222,732,365.47 pertains to the standard cost of sales and not the actual cost. Based on the documents you have submitted, there was still a remaining discrepancy of P11,400,466.34 which was disallowed pursuant to Section 34 of the NIRC,

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[1] *Pepsi-Cola Bottling Company of the Philippines, Inc. vs. Municipality of Tanauan, Leyte, et al.*, G.R. No. L-31156, February 27, 1967.

[2] *Victorias Milling Co., Inc. vs. Commissioner of Internal Revenue, et al.*, G.R. Nos. L-24769 and L-24779, February 25, 1967.

[3] Exhibit "P-9", Division Docket (CTA Case No. 8924) – Vol. III, pp. 1083 to 1106.

as amended, the details of which is shown in the attached *Schedules 5 and 5.1* hereof."[4]

The said discrepancy in the amount of ₱11,400,466.34 is determined in the said Schedule 5.1[5] as follows:

| | |
|---|---|
| **Actual Cost of Sales per TB/GL** | **₱3,596,871,448.42** |
| Unallowable Deductions per ITR | (112,169,391.46) |
| Realized Forex Gain | (100,880,987.30) |
| **Cost of Sales per Audit** | **₱3,383,821,069.66** |
| Less: Cost of Sales per ITR | 3,395,221,536.00 |
| **Discrepancy** | **₱ 11,400,466.34** |

In its protest letter thereto,[6] respondent, in requesting for a reinvestigation of the above-quoted finding, said:

"3) Disallowed Cost of Sales – P11,400,466.34

In the FLD, the examiner determined a discrepancy of P11,400,466.34 which was disallowed as cost of sales. We respectfully request for the reinvestigation of this item of assessment and submit that the amount of P11,400,466.34 was due to the erroneous offsetting of the Realized Forex Gain account in the Cost of Sales. **<u>The Realized Forex Gain in the amount of P100,880,987.30 is included in the Non-Operating & Taxable Other Income</u>** (P55,269,797.00) under Line 18A&B of the ITR (cf Annex E), broken down as follows:

| Account No. | Description | Amount |
|---|---|---|
| 83100 | Foreign exchange gain-realized | P100,880,987.30 |
| 81130 | Other interest income | 430,895.85 |
| 82110 | Gain or loss from sale of property | 268,495.16 |
| 82120 | Other miscellaneous income | 8,017,782.27 |
| Subtotal | | P109,598,160.58 |
| Less: | Non-operating & Taxable Other Income Attributable to Exempt Sales | 54,328,363.58 |
| Non-operating & Taxable Other Income per ITR | | P55,269,797.00 |

**<u>Thus, as an item of income, the realized forex gain should not be deducted from the cost of sales.</u>**

[4] Division Docket (CTA Case No. 8924) – Vol. III, pp. 1087.
[5] Division Docket (CTA Case No. 8924) – Vol. III, pp. 1096.
[6] Exhibit "P-10", Division Docket (CTA Case No. 8924) – Vol. III, pp. 1197 to 1121, at pp. 1117 to 1118.

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> Instead, the difference between the cost of sales per trial balance (P1,079,316,430.30) and cost of sales per ITR (P989,835,909.00) in the amount of P89,480,522.34 (cf. **Annex C, letter "f")** should be offset against the Cost of Sales. This amount represents cost of sales attributable to FSCI's exempt sales which was not claimed as deductible expense in FSCI's ITR as shown in **Annex C**. Since the amount of P89,480,522.34 was not claimed as a deduction, FSCI's actual cost of sales should be accordingly reduced by this amount and which will now be equal to the cost of sales per ITR (P3,395,221,535.00) (cf. **Annex C** and **Annex E**). Considering that there is no discrepancy in the amount of cost of sales claimed as deduction in FSCI's ITR, we respectfully submit that this item of assessment should be cancelled for lack of legal and factual bases." (Emphases and Underscoring Supplied)

As a consequence, in the FDDA dated October 9, 2014,[7] petitioner made a determination to the existence of respondent's realized forex gain, to wit:

> "Realized Forex Gain, P13,728,945.86
>
> Analysis of the reconciliations and documents submitted in support of the assessment on Undeclared Sales of P35,152,158.76 and Disallowed Cost of Sales of P11,400,466.34 per FLD showed that there was realized forex gain in the amount of P100,880,987.30. Out of this amount, P54,328,363.16 was offset against cost of sales. According to FSCI, this pertains to transactions covered by its ITH. However, FSCI can no longer substantiate in detail how the same was arrived at except for the GL Code identifying the gain per business area. Because of this, the realized forex gain covered by ITH was recomputed using the ratio of the exempt sales over total sales per month. The computed realized forex gain with ITH per audit amounted to P40,599,417.29 as compared to FSCI's computation of P54,328,363.16 or a discrepancy of P13,728,945.86 as shown in ***Schedule 4*** below & in the attached ***Schedule 4.1*** hereof. This discrepancy was assessed and subjected to 5% special

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[7] Exhibit "P-11", Division Docket (CTA Case No. 8924)- Vol. III, pp. 1122 to 1128, at p. 1125.

income tax rate pursuant to Section 32 of the NIRC, as amended and RR No. 2-20085

| | |
|---|---|
| Schedule 4 – Realized Forex Gain Offset Against Cost of sales | |
| Total Forex Gain | P100,880,987.30 |
| Less: Realized Forex Gain subjected to 5% Declared per ITR | 46,552,624.15 |
| Realized Forex Gain with ITH Offset Against Cost Sales per TB | 54,328,363.15 |
| Realized Forex Gain with ITH per Audit | 40,599,417.29 |
| Discrepancy/Forex Gain Subject to 5%-Schedule 4.1 | 13,728,945.86 |

Finding that there was an admission of respondent that it has earned *"an item of income"* or *"realized forex gain"*, petitioner would be remiss of his duties in assessing and collecting taxes, if the said item of income would not be considered as part of respondent's income tax liabilities.

It must be emphasized that a *request for reinvestigation* refers to a plea for re-evaluation of an assessment on the basis of **newly-discovered or additional evidence** that the taxpayer intends to present in the reinvestigation.[8] For sure, a reinvestigation entails the reception and evaluation of **additional evidence**.[9] As a logical outgrowth of receiving and evaluating additional evidence, there is a probability that the tax assessment will be modified, either by reducing or increasing the same. In fact, due process requires the Bureau of Internal Revenue to consider the defenses and evidence submitted by the taxpayer and to render a decision based on these submissions.[10] Thus, it has already been jurisprudentially recognized that a taxpayer's request for reinvestigation may eventually result in the issuance of an *amended* assessment,[11] or *another* assessment.[12]

In turn, petitioner's action in response to a taxpayer's request for reconsideration or **reinvestigation** of the assessment constitutes the decision, the receipt of which will start the 30-day period to

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[8] Refer to *Bank of the Philippine Islands vs. Commissioner of Internal Revenue*, G.R. No. 139736, October 17, 2005.
[9] *Ibid.*
[10] *Commissioner of Internal Revenue vs. Avon Products Manufacturing,* G.R. No. 201398-99, October 3, 2018.
[11] *Ibid.*
[12] *Republic of the Philippines vs. Acebedo*, G.R. No. L-20477, March 29, 1968; *Republic of the Philippines vs. Lopez*, G.R. No. L-18007, March 30, 1963; and *Commissioner of Internal Revenue vs. Sison, et al.*, G.R. No. L-13739, April 30, 1963.

appeal.[13] Specifically, the High Court has already recognized, *inter alia*, that a letter from petitioner which stated the result of the reinvestigation requested by the taxpayer and the consequent *modification* of the assessment, is appealable to this Court.[14]

Here, the act of respondent in the FDDA was made after hearing respondent's side which confirms the fact that there has been no violation of due process and that respondent was acting in response to the claim presented by the taxpayer to refute the assessment. As a corollary, it would be absurd on the part of petitioner to go back to the initial assessment stage and issue another FLD and assessment notices, instead of simply issuing an FDDA. As a rule, the law does not intend an absurdity or that an absurd consequence shall flow from its enactment.[15]

In light of the foregoing, I submit that respondent's right to due process was not violated. Hence, I vote to **PARTIALLY GRANT** the instant *Petition for Review*.

**ERLINDA P. UY**
Associate Justice

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[13] *People of the Philippines vs. Sandiganbayan, et al.*, G.R. No. 152532, August 16, 2005; *Commissioner of Internal Revenue vs. Villa, et al.*, G.R. No. L-23988, January 7, 1968; and *St. Stephen's Association vs. Collector of Internal Revenue*, G.R. No. L-11238, August 22, 1958.

[14] *Surigao Electric Co., Inc. vs. Court of Tax Appeals, et al.*, G.R. No. L-25289, June 28, 1974, and *Pangasinan Transportation Co. vs. Blaquera*, G.R. No. L-13101, April 29, 1960.

[15] *Corsico, Jr. vs. NLRC,* G.R. No. 118432, May 23, 1997.

REPUBLIC OF THE PHILIPPINES
**COURT OF TAX APPEALS**
QUEZON CITY

***EN BANC***

**COMMISSIONER OF INTERNAL REVENUE,**
*Petitioner,*

- versus -

**FIRST SUMIDEN CIRCUITS, INC.,**
*Respondent.*

**CTA EB NO. 1831**
(CTA Case No. 8924)

*Present:*

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

Promulgated:

FEB 12 2020
3:56 p.m.

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## CONCURRING AND DISSENTING OPINION

***BACORRO-VILLENA, J.:***

I concur with the *ponencia* of our esteemed colleague, Honorable Justice Ma. Belen M. Ringpis-Liban, on the cancellation of the assessment due to a disallowed expense - Indirect Labor - Welfare Retirement Fund.

The *ponencia* finds fault in petitioner Commissioner of Internal Revenue's (**petitioner's/CIR's**) insistence that the allowable deductions in Revenue Regulation No. 11-2005 applies only to direct labor costs. Furthermore, since the Implementing Rules and

Regulations (**IRR**) of Republic Act (**RA**) No. 7916[1] did not distinguish the labor expenses allowed as deduction, then both direct and indirect labor costs are to be deemed deductible. From this portion of the *ponencia*, I respectfully forward the disquisition below.

Section 3 of Revenue Regulation No. 11-2005 dated April 2005, in implementing RA 7916[2] provided a list of allowable deductions from gross income as follows:

> ...
> For purposes of computing the total five percent (5%) tax rate imposed, ***the following direct costs are included*** in the allowable deductions to arrive at gross income earned for specific types of enterprises:
>
> 1. ECOZONE Export Enterprises, Free Trade Enterprises and Domestic Market Enterprises:
>
> - Direct salaries, wages or ***labor expenses***
> - Production supervision salaries
> - Raw materials used in the manufacture of products
> - Decrease in Goods in Process Account (Intermediate goods)
> - Decrease in Finished Goods Account
> - Supplies and fuels used in production
> - Depreciation of machinery and equipment used in production, and of that portion of the building owned or constructed that is used exclusively in the production of goods
> - Rent and utility charges associated with building, equipment and warehouses used in production
> - Financing charges associated with fixed assets used in production the amount of which were not previously capitalized.[3]
>
> ...

In order to identify the cost of sales or direct costs which may be deducted from gross revenues to compute the gross income, Article 24 of Executive Order No. 226, otherwise known as the Omnibus Investment Code of the Philippines (**OICP**), provides that:

> ...
> Art. 24. *Production cost* shall mean the total of the cost of **direct labor, raw materials, and manufacturing overhead**, determined in accordance with **generally accepted accounting principles**,

1 The Special Economic Zone Act of 1995.
2 Id.
3 Emphasis supplied.

> which are incurred in manufacturing or processing the products of a registered enterprise.[4]
>
> ...

Indubitably, the provisions of the OICP are applicable to PEZA-registered enterprises. Section 23 of RA 7916 further states:

> ...
> SEC. 23. *Fiscal Incentives.* – Business establishments operating within the ECOZONES shall be entitled to the fiscal incentives as provided for under Presidential Decree No. 66, the law creating the Export Processing Zone Authority, or those provided under Book VI of Executive Order No. 226, otherwise known as the Omnibus Investment Code of 1987.
>
> ...

In this jurisdiction, the generally accepted accounting principles (**GAAP**) in determining the cost of a product/inventory are embodied in Philippine Accounting Standard No. 2 (PAS/IAS 2). Paragraph 10 of PAS/IAS 2 states:

> ...
> 10. The cost of inventories shall comprise all costs of purchase, **costs of conversion** and other costs incurred in bringing the inventories to their present location and condition.[5]
>
> ...

Paragraph 12 of the same PAS/IAS likewise states:

> ...
> 12. The costs of conversion of inventories include costs directly related to the units of production, such as **direct labor**. They also include a systematic allocation of fixed and variable production overheads that are incurred in converting materials into finished goods. Fixed production overheads are those indirect costs of production that remain relatively constant regardless of the volume of production, such as depreciation and maintenance of factory buildings and equipment, and the cost of factory management and administration. Variable production overheads are those indirect costs of production that vary directly, or nearly directly, with the volume of production, such as indirect materials and **indirect labor.**[6]

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4 Emphasis supplied.
5 Emphasis supplied.
6 Emphasis supplied.

...

From the foregoing, indirect labor cost forms part of cost of conversion which is ultimately included in the cost of goods manufactured and sold. Thus, the indirect labor costs related to production are deductible in addition to direct labor costs for purposes of applying the 5% tax on gross income.

Considering that the retirement costs herein were indirect production labor costs of employees under Facilities Engineering, Engineering – IE, and Quality Assurance Department, all of which are under the registered activity of respondent, as elucidated by this Court in the assailed Decision, petitioner BIR erred in disallowing such for the purpose of the 5% tax on gross income.

As for respondent's realized foreign exchange gain, I join the Dissenting Opinion of the Honorable Presiding Justice Roman G. Del Rosario as he opines that the deficiency income tax assessment arising from respondent's realized foreign exchange gain cannot be considered as a "new assessment item".

As the records show that respondent's realized foreign exchange gain has been a part of the audit findings on Unreported Sales and Disallowed Cost of Sales (which were already raised as early as the issuance of the PAN, likewise in the FLD, and ultimately in the FDDA), respondent then had a chance to refute the same and to prove that its realized foreign exchange gain of ₱54,328,636.16 was properly treated as income exempt from tax. In fact, it was the respondent who raised the realized foreign exchange gain in its protest without submitting documents proving the exemption thereof.

With the foregoing, I vote to affirm with modification the assailed Decision and Resolution of the Court in Division, and uphold the deficiency income tax assessment on respondent's realized foreign exchange gain.

**JEAN MARIE A. BACORRO-VILLENA**
Associate Justice

**REPUBLIC OF THE PHILIPPINES**
***Court of Tax Appeals***
**QUEZON CITY**

***En Banc***

| | |
|---|---|
| **COMMISSIONER OF INTERNAL REVENUE,** <br> *Petitioner,* | **CTA *EB* NO. 1831** <br> *(CTA Case No. 8924)* |
| *-versus-* | Present: <br> **DEL ROSARIO, P.J.,** <br> **CASTAÑEDA, JR.,** <br> **UY,** <br> **FABON-VICTORINO,** <br> **MINDARO-GRULLA,** <br> **RINGPIS-LIBAN,** <br> **MANAHAN,** <br> **BACORRO-VILLENA,** *and* <br> **MODESTO-SAN PEDRO,** *JJ.* |
| **FIRST SUMIDEN CIRCUITS, INC.,** <br> *Respondent.* | Promulgated: <br> **FEB 12 2020** 3:56 p.m. |

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## *CONCURRING OPINION*

***MODESTO-SAN PEDRO, J.:***

I concur with the Decision penned by my esteemed colleague, honorable Associate Justice *Ma. Belen M. Ringpis-Liban*, denying the instant Petition for Review for lack of merit. However, I would like to emphasize my assent to the cancellation of the assessment on Realized Forex Gain.

In the Petition for Review, petitioner alleged that the assessment for Realized Forex Gain is neither a new assessment item nor was respondent denied due process regarding the said assessment.[1] According to petitioner, the assessment on Realized Forex Gain was already part of the audit findings on "Undeclared Sales" and "Disallowed Cost of Sales" which were already assessed against respondent as early as the issuance of the Preliminary Assessment Notice ("PAN").[2] Furthermore, respondent allegedly admitted the existence of the Realized Forex Gains in its protest to the Final Letter of Demand ("FLD") / Final Assessment Notice ("FAN"); and was given the

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[1] Petition for Review, *En Banc* Docket, p. 18.
[2] Petition for Review, *En Banc* Docket, p. 19.

opportunity to substantiate in detail the non-taxability of said Realized Forex Gains but failed to do so.[3]

*I disagree.*

***A taxpayer must be adequately notified of its tax liability.***

The importance of providing the taxpayer adequate written notice of his tax liability is undeniable. ***Section 228 of the NIRC*** declares that an assessment is void if the taxpayer is not notified in writing of the facts and law on which it is made.[4] The purpose of notifying a taxpayer of his tax liability, and its factual and legal bases, is to allow a taxpayer to prepare an intelligent protest against the FLD/FAN and a well-crafted appeal in the Court of Tax Appeals.

In the case at bar, the assessment for Realized Forex Gains was allegedly included in the audit findings for "Undeclared Sales" and "Disallowed Cost of Sales" which were assessed as early as the PAN. This method of assessing deficiency taxes is not compliant with the requirement for written notice of tax liabilities pursuant to ***Section 228 of the NIRC.*** Even if the assessment for Realized Forex Gains can be traced in the audit findings for "Undeclared Sales" and "Disallowed Cost of Sales", respondent was still not notified that it was being assessed for Realized Forex Gains, and not informed of the legal and factual bases for such assessment. As such, respondent was not given an opportunity to prepare an intelligent protest against the assessment for Realized Forex Gains. Audit findings are mere findings of discrepancies between a taxpayer's tax returns and audited financial statements ("AFS") which a taxpayer is requested to explain or reconcile. Without particularly identifying the actual assessment items causing the discrepancies, and the factual and legal bases for such assessment items, audit findings, standing alone, cannot serve as written notification to a taxpayer of his tax liabilities, as required by ***Section 228 of the NIRC.***

***A taxpayer is entitled to administrative due process in deficiency tax assessments.***

Moreover, if the assessment for Realized Forex Gains was really part of the audit findings for "Undeclared Sales" and "Disallowed Cost of Sales"

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[3] Petition for Review, *En Banc* Docket, p. 19.

[4] Commissioner of Internal Revenue v. Liquigaz Philippines Corporation, G.R. No. 215534, 18 April 2016.

assessed as early as the PAN, as claimed by petitioner, then petitioner should have immediately identified this particular assessment item in the PAN or in the FAN/FLD. Respondent should not have waited until the Final Decision on Disputed Assessment ("FDDA") before particularly identifying the assessment on Realized Forex Gains. This resulted in respondent losing its chance to dispute such deficiency tax assessment in the administrative level.

Revenue Regulation No. 12-99, as amended[5] ***("RR 12-99")*** clearly provides that the petitioner, Commissioner of Internal Revenue ("CIR"), or his duly authorized representative can only delve upon the issues raised in the Protest (*i.e.,* disputed assessment items) in issuing an FDDA. He cannot add another assessment item aside from those laid down in the FLD/FAN. Indeed, ***RR 12-99*** provides, as follows:

> "3.1.4 Disputed Assessment. — The taxpayer or its authorized representative or tax agent may protest administratively against the aforesaid FLD/FAN within thirty (30) days from date of receipt thereof. The taxpayer protesting an assessment may file a written request for reconsideration or reinvestigation defined as follows:
>
> (i) **Request for reconsideration** — refers to a plea of re-evaluation of an assessment on the basis of existing records without need of additional evidence. It may involve both a question of fact or of law or both.
>
> (ii) **Request for reinvestigation** — refers to a plea of re-evaluation of an assessment **on the basis of newly discovered or additional evidence that a taxpayer intends to present in the reinvestigation.** It may also involve a question of fact or of law or both.
>
> The taxpayer shall state in his protest (i) the nature of protest whether reconsideration or reinvestigation, specifying newly discovered or additional evidence he intends to present if it is a request for reinvestigation, (ii) date of the assessment notice, and (iii) the applicable law, rules and regulations, or jurisprudence on which his protest is based, otherwise, his protest shall be considered void and without force and effect.
>
> xxx xxx xxx
>
> For requests for reinvestigation, the taxpayer shall submit all relevant supporting documents in support of his protest within sixty (60) days from date of filing of his letter of protest, otherwise, the assessment shall become final. The term "relevant supporting documents" refer to those documents necessary to support the legal and factual bases in disputing a tax assessment as determined by the taxpayer. The sixty (60)-day period for the submission of all relevant

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[5] Amendments introduced by Revenue Regulation No. 18-13, 28 November 2013.

supporting documents shall not apply to requests for reconsideration. Furthermore, the term "the assessment shall become final" shall mean the taxpayer is barred from disputing the correctness of the issued assessment by introduction of newly discovered or additional evidence, and the FDDA shall consequently be denied.

xxx xxx xxx

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

xxx xxx xxx

3.1.5 Final Decision on a Disputed Assessment (FDDA). — The decision of the Commissioner or his duly authorized representative shall state the (i) facts, the applicable law, rules and regulations, or jurisprudence on which such decision is based, otherwise, the decision shall be void (see illustration in ANNEX "C" hereof), and (ii) that the same is his final decision."

(Emphasis, Ours)

Further, Revenue Memorandum Circular No. 11-2014[6] was issued by petitioner, CIR, stating in paragraph 5 therein the following:

"(5) RR 12-99, as amended by RR 18-2013, provides that '[f]or requests for reinvestigation, the taxpayer shall submit all relevant supporting documents in support of his protest within sixty (60) days from date of filing of his letter of protest, otherwise, the assessment shall become final.' The term 'the assessment shall become final' means that the failure of the taxpayer who requested for a reinvestigation to submit all relevant supporting documents within the sixty (60)-day period shall render the FLD/FAN 'final' by operation of law. He/it shall be barred from disputing the correctness of the FLD/FAN by the introduction of newly discovered or additional evidence because he/it is deemed to have lost his/its chance to present these evidence. **The BIR shall then deny the request for reinvestigation through the issuance of an FDDA.**"

(Emphasis, Ours)

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6 18 February 2014.

Based on the foregoing, after a FLD/FAN is received, the taxpayer may file a protest letter, which may either request for a reconsideration (*i.e.,* re-evaluation of an assessment on the basis of existing records without need of additional evidence), or a reinvestigation (*i.e.*, re-evaluation of an assessment on the basis of newly discovered or additional evidence that a taxpayer intends to present in the reinvestigation.). Upon filing of the protest letter, the FLD/FAN becomes a "disputed assessment."

Petitioner, CIR, or his duly authorized representative shall then render a decision over the taxpayer's protest in accordance with Section 3.1.5 of ***RR 12-99*** through the issuance of a FDDA. If the FDDA was issued by petitioner CIR's duly authorized representative, the taxpayer may elevate the FDDA to petitioner CIR **but only for a request for reconsideration** and only the issues raised in the FDDA of petitioner CIR's duly authorized representative shall be entertained by petitioner CIR.

"From this, it can only be understood that the FDDA of [petitioner CIR] or his duly authorized representative shall only delve on the disputed items in the FLD/FAN. [Petitioner CIR] is precluded from incorporating a new assessment in the FDDA which was not part of the disputed items in the protest letter of the taxpayer, nor in the FLD/FAN. Taking from the name of the document itself — Final Decision on Disputed Assessment — the FDDA shall only refer to respondent's decision over the disputed assessment, which is the FLD/FAN, and nothing more."[7]

In the present case, the assessment for Realized Forex Gains appeared for the first time in the FDDA. Since said assessment only arose in the FDDA, respondent can no longer fully avail of the remedies to effectively dispute it since requests for reinvestigation are no longer allowed at this stage pursuant to Section 3.1.4 of ***RR 12-99.*** As a consequence, respondent can no longer submit newly discovered or additional evidence to refute the new assessment even if it is still capable or willing to do so.

To allow petitioner CIR to incorporate new assessments in the FDDA would deprive respondent of its right to due process and would put the latter at the mercy of the former. Due process in deficiency tax assessments is not solely confined in proceedings before this courts but is equally afforded to taxpayers in the *BIR* administrative level.

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7 Metro Rail Transit Corp. v. Commissioner of Internal Revenue, CTA Case No. 9016, 8 January 2019

***To allow a new assessment item to be introduced in the FDDA will provide petitioner CIR an avenue to introduce new assessment items beyond the period of limitation.***

***Section 203 of the NIRC*** provides a three (3) year period to assess deficiency taxes, *viz:*

> "**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."
> (Emphasis, Ours)

The term "assessed" in the provision above refers to the FLD/FAN. Hence, if a FLD/FAN has not been received by a taxpayer within three (3) years from the filing of a tax return or from the last day prescribed by law for the filing of such return, petitioner CIR is already precluded from issuing deficiency tax assessments against the taxpayer and collecting the same.[8]

If new assessment items are allowed to be introduced in the FDDA (which is issued after the FLD/FAN), it creates a loophole to the mandatory period of limitation; such that if petitioner CIR issued a FLD/FAN on time, he may still add new assessment items in the FDDA even though these were not previously contained in the FLD/FAN. Allowing new assessment items in the FDDA gives petitioner CIR unlimited time to assess deficiency taxes provided a FLD/FAN has been issued within the period of limitation.

Premises considered, I therefore vote to deny the instant Petition for Review, and affirm the Decision dated 3 January 2018 and the Resolution dated 14 March 2018.

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[8] Commissioner of Internal Revenue v. Transitions Optical Philippines, Inc., G.R. No. 227544, 22 November 2017.

Respectfully submitted.

**MARIA ROWENA MODESTO-SAN PEDRO**
**Associate Justice**