REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

Hon. KIM HENARES in her capacity a[s] Commissioner of Internal Revenue and ESMERALDA TABULE, in her capacity as Revenue Regional Director of Revenue Region No. 10, Legazpi City, *Petitioners,*	**CTA EB NO. 1852** (CTA Case No. 9066) Present: Del Rosario, *P.J.*, Castañeda, Jr., Uy, Fabon-Victorino, Mindaro-Grulla, Ringpis-Liban, Manahan, Bacorro-Villena, and Modesto-San Pedro, *JJ.*
- versus –	
LKY PROPERTY HOLDINGS, INC., represented by MR. WILBERT T. LEE, *Respondent.*	Promulgated: SEP 13 2019 3:18 p.m.

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RESOLUTION

CASTAÑEDA, JR., *J.:*

For resolution of the Court *En Banc* is petitioners' *Motion for Reconsideration [of the Decision dated 08 March 2019]*[1] filed on April 1, 2019. Petitioners' *Motion* seeks reconsideration of the Decision of the Court *En Banc* promulgated on March 8, 2019,[2] (the "Assailed Decision") denying their Petition for Review for lack of merit.

[1] Court *En Banc*'s Docket, pp. 156-176.
[2] *Id.*, pp. 134-155.

The CIR moves for reconsideration of the Assailed Decision based on the following grounds:[3]

I.

THE HONORABLE COURT ERRED IN RULING ON AN ISSUE NEVER RAISED BY RESPONDENT, NEVER JOINED BY THE PLEADINGS, NEVER RAISED DURING THE PRE-TRIAL AND NEVER DEFINED BY THE COURT IN THE PRE-TRIAL ORDER. THUS, PETITIONER'S BASIC RIGHT TO FAIR PLAY AND DUE PROCESS WAS VIOLATED WHEN THE COURT RULED TO DENY THE PETITION ON THE GROUND OF WANT OF AUTHORITY OF REVENUE OFFICERS.

II.

ASSUMING THE COURT MAY SUDDENLY DECIDE THE CASE BASED ON AN ISSUE THAT WAS NEVER RAISED BY PETITIONER, NEVER JOINED BY THE PLEADINGS, NEVER RAISED AT THE PRE-TRIAL ORDER (sic), NEVER DEFINED BY THE COURT IN THE PRE-TRIAL ORDER AND NEVER TRIED BY THE PARTIES – STILL THE ASSESSMENT WAS ISSUED PURSUANT TO A VALID LETTER OF AUTHORITY.

III.

THE HONORABLE COURT ERRED IN RULING THAT THE ASSESSMENT IS VOID AS IT LACKS THE DEFINITE AMOUNT OF TAX LIABILITY.

IV.

THE HONORABLE COURT ERRED IN RULING THAT RESPONDENT IS NOT LIABLE FOR THE ASSESSED DEFICIENCY TAXES.

In support of their *Motion*, petitioners assert that their basic right to fair play and due process was violated when this Court ruled on a matter not raised as an issue by respondent in its Petition for Review or Pre-Trial Brief, not joined by the parties, nor defined by the Court in the Pre-Trial Order.[4] Petitioners added that assuming this Court may suddenly decide the case based on an issue that was never raised by respondent, was never joined by the pleadings, never raised at the pre-trial conference, never defined by the court in the pre-trial order and never tried by the parties, still the assessment was issued pursuant to a valid letter of authority.[5] Finally, petitioners

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[3] *Id.*, p. 157.
[4] *Id.*, pp. 158-163.
[5] *Id.*, pp. 164-166.

contend that this Court erred in ruling that respondent is not statutorily liable for the capital gains tax (CGT) and documentary stamp tax (DST) as the latter merely advanced the amount necessary for the payment of the aforesaid taxes.[6]

Respondent LKY Property Holdings, Inc. failed to file its Comment or Opposition to petitioners' *Motion for Reconsideration* despite directive from this Court to do so[7] as per the Records Verification report[8] issued by this Court's Judicial Records Division dated August 5, 2019.

The Court *En Banc* resolves to deny the *Motion for Reconsideration* for lack of merit.

At the outset, it bears noting that petitioners merely recycled the arguments they previously raised in their *Motion for Reconsideration* as these matters had already been thoroughly discussed and resolved by the Court *En Banc* in the Assailed Decision. To put it bluntly, there is nothing in their *Motion for Reconsideration* that was not sufficiently passed upon by the Court *En Banc* in the Assailed Decision. Petitioners utterly failed to raise any new or substantial matter let alone any compelling reason to warrant the modification much less reversal of the Court *En Banc*'s findings.

At any rate, the Court *En Banc* takes this occasion to emphasize that it stands by its ruling that while the issue on want of authority of revenue officer to conduct the audit investigation was not raised by the parties in the proceedings before the Court in Division, nor in the present Petition, the Court *En Banc* is not precluded from taking cognizance of the same, based on the Supreme Court's pronouncement on this matter in the case of *Commissioner of Internal Revenue v. Lancaster Philippines, Inc.*[9] The Supreme Court already definitively settled such issue. Needless to say, this Court has no other option but to faithfully uphold and apply the same. The Supreme Court, by tradition and in our system of judicial administration, has the last word on what the law is. It is the final arbiter of any justiciable controversy. There is only one Supreme Court from whose decisions all other courts should take their bearings.[10]

As regards petitioner's insistence that the subject assessments were issued pursuant to a valid letter of authority, the Court *En Banc* reiterates its view that there was no indication whatsoever that a valid LOA was duly issued by the CIR or the Regional Director to authorize the audit of respondent's books of accounts and other accounting records for the relevant

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[6] *Id.*, pp. 172-174.
[7] Resolution dated April 22, 2019; Court *En Banc*'s Docket, pp. 179-180.
[8] Court *En Banc*'s Docket, p. 183.
[9] G.R. No. 183408, July 12, 2017, 831 SCRA 18.
[10] *Commissioner of Internal Revenue v. Michel J. Lhuillier Pawnshop, Inc.*, G.R. No. 150947, July 15, 2003, 406 SCRA 178.

period. What is clear based on evidence is that the authority to conduct the audit investigation in the present case was derived merely from the Memorandum of Assignment RR10-067-2014 dated October 15, 2014 and 1st Indorsement dated October 20, 2014 both issued by Mr. Cesar R. Balangatan, Revenue District Officer of Revenue District Office (RDO) No. 67-Legazpi City. While it may be assumed that the said document could be found in the BIR Records, it is still cannot be considered in resolving the present case because it was not formally offered as evidence. On this point, the following ruling of the Supreme Court in *Pilipinas Shell Petroleum Corporation v. Commissioner of Customs*[11] is, *mutatis mutandis*, instructive:

> "**As a matter of fact, even if the aforesaid documentary evidence was included as part of the BOC Records submitted before the CTA in compliance with a lawful order of the court, this does not permit the trial court to consider the same in view of the fact that the Rules prohibit it.** The reasoning forwarded by the CTA in Division in its Resolution dated 24 February 2009, that the apparent purpose of transmittal of the records is to enable it to appreciate and properly review the proceedings and findings before an administrative agency, is misplaced. **Unless any of the party formally offered in evidence said Memorandum, and accordingly, admitted by the court *a quo*, it cannot be considered as among the legal and factual bases in resolving the controversy presented before it.**" *(Emphasis supplied and citations omitted)*

The Court *En Banc* remains convinced that the subject deficiency assessments are void due to absence of a valid Final Assessment Notice (FAN). In this regard, the Court *En Banc* quotes with approval the pertinent disquisition by the Court in Division in the Assailed Decision, to wit:[12]

> "Under Section 228 of the Tax Code, the taxpayer must be informed in writing of the law and the facts on which the assessment is made, lest the assessment is void. x x x It is clear from the foregoing that a taxpayer must be informed in writing of the legal and factual bases of the tax assessment made against him. The use of the word 'shall' in the legal provision indicates the mandatory nature of the requirements laid down therein.
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> Thus, it is elementary under the due process requirement that the taxpayer must be informed in writing of the law and the

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[11] G.R. No. 195876, December 5, 2016, 812 SCRA 1, 47-48.
[12] Court *En Banc*'s Docket, pp. 36-41 (Citations omitted).

facts upon which a tax assessment is based; otherwise, the assessment is void.

Undeniably, a PAN was issued in this case.

Section 3.1.1 of RR No. 12-99, as amended by RR No. 18-2013, provides that '[I]f the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN, he shall be considered in default, in which case, a Formal Letter of Demand and Final Assessment Notice (FLD/FAN) shall be issued calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.'

By virtue of the above provision and the requirements of due process in Section 228 of the National Internal Revenue Code (NIRC), as amended, it is mandatory that a final assessment notice (FAN) be issued after the issuance of the PAN.

While the FLD, with Details of Discrepancies, was issued on December 3, 2014 and received by petitioner, no FAN was ever received by petitioner.

Thus, in the absence of a FAN, the subject assessment for CGT and DST against petitioner is void.

It may be argued that the FLD issued and received by petitioner may be deemed as the final assessment in compliance with the due process requirements of Section 228 of the NIRC, as amended. However, in the case of *Commissioner of Internal Revenue vs. Fitness by Design, Inc.*, the Supreme Court elucidated on what a formal assessment notice must contain, to wit:

> The formal letter of demand and assessment notice shall state the facts, jurisprudence, and law on which the assessment was based; otherwise, these shall be void. x x x
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> The word 'shall' in Section 228 of the National Internal Revenue Code and Revenue Regulations No. 12-99 means the act of informing the taxpayer of both the legal and factual bases of the assessment is mandatory. The law requires that the bases be reflected in the formal letter of demand and assessment notice. This cannot be presumed.

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Otherwise, the express mandate of Section 228 and Revenue Regulations No. 12-99 would be nugatory. The requirement enables the taxpayer to make an effective protest or appeal of the assessment or decision.

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A final assessment notice provides for the amount of tax due with a demand for payment. This is to determine the amount of tax due to a taxpayer. However, due process requires that taxpayers be informed in writing of the facts and law on which the assessment is based in order to aid the taxpayer in making a reasonable protest. To immediately ensue with tax collection without initially substantiating a valid assessment contravenes the principle in administrative investigations 'that taxpayers should be able to present their case and adduce supporting evidence.'

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The issuance of a valid formal assessment is a substantive prerequisite for collection of taxes. Neither the National Internal Revenue Code nor the revenue regulations provide for a 'specific definition or form of an assessment.' However, the National Internal Revenue Code defines its explicit functions and effects. **An assessment does not only include a computation of tax liabilities; it also includes a demand for payment within a period prescribed. Its main purpose is to determine the amount that a taxpayer is liable to pay.**

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A final assessment is a notice 'to the effect that the amount therein stated is due as tax and a demand for payment thereof.' This demand for payment signals the time 'when penalties and interests begin to accrue against the taxpayer and enabling the latter to determine his remedies[.]' Thus, it must be 'sent to and received by the taxpayer, and must demand payment of the taxes described therein within a specific period.'

The disputed Final Assessment Notice is not a valid assessment.

First, **it lacks the definite amount of tax liability for which respondent is accountable. It does not purport to be a demand for payment of tax due, which a final assessment notice should supposedly be.** An assessment, in the context of the National Internal Revenue Code, is a 'written notice and demand made by the [Bureau of Internal Revenue] on the taxpayer for the settlement of a due tax liability that is there definitely set and fixed.' **Although the disputed notice provides for the computations of respondent's tax liability, the amount remains indefinite. It only provides that the tax due is still subject to modification, depending on the date of payment.** Thus:

> The complete details covering the aforementioned discrepancies established during the investigation of this case are shown in the accompanying Annex 1 of this Notice. The 50% surcharge and 20% interest have been imposed pursuant to Sections 248 and 249 (B) of the [National Internal Revenue Code], as amended. Please note, *however, that the interest and the total amount due will have to be adjusted if prior or beyond April 15, 2004.* (Emphasis Supplied)

Second, **there are no due dates in the Final Assessment Notice. This negates petitioner's demand for payment**. Petitioner's contention that April 15, 2004 should be regarded as the actual due date cannot be accepted. The last paragraph of the Final Assessment Notice states that the due dates for payment were supposedly reflected in the attached assessment:

> In view thereof, you are *requested to pay* your aforesaid deficiency internal revenue tax liabilities through the duly authorized agent bank in which you are enrolled *within the time shown in the enclosed assessment notice.* (Emphasis in the original)

However, based on the findings of the Court of Tax Appeals First Division, the enclosed assessment pertained to remained unaccomplished.

Contrary to petitioner's view, April 15, 2004 was the reckoning date of accrual of penalties and surcharges and not the due date for payment of tax liabilities. The total amount depended upon when respondent decides to pay. The notice, therefore, did not contain a definite and actual demand to pay.

Compliance with Section 228 of the National Internal Revenue Code is a substantive requirement. It is not a mere formality. Providing the taxpayer with the factual and legal bases for the assessment is crucial before proceeding with tax collection. Tax collection should be premised on a valid assessment, which would allow the taxpayer to present his or her case and produce evidence for substantiation. *(Emphasis supplied, citations omitted)*

As discussed above, a final assessment should contain the law and the facts upon which the assessment is based, as well as the exact amount due and demandable, with demand for payment within a prescribed period. In the cited case, the final assessment was invalidated for not containing the definite amount of tax liability for which the taxpayer is accountable, and there is no demand for payment of the tax due. Not only was there no due date for the payment of the tax, but there was also a statement that 'the tax due is still subject to modification, depending on the date of payment,' further emphasizing the lack of due date and that the assessed amount is not final.

A careful scrutiny of the subject FLD revealed that it is not a valid final assessment as it lacks the definite amount of tax liability for which petitioner is accountable, and a date certain for payment of the alleged tax liability by the taxpayer.

The subject FLD reads as follows:

> *Please note that the interest and the total amount due will have to be adjusted if paid beyond 1-5-2015.

Thus, the FLD in this case lacks a definite amount of tax liability for which petitioner is accountable, as the amount due may still be adjusted depending on the date of payment.

Without a definite amount of tax due, the FLD cannot be regarded as a demand for payment, which a final assessment notice should contain. Although the FLD provides for the computation of petitioner's tax liabilities, the amount remains indefinite for it still subject to modification.

Moreover, the subject FLD has no due dates rendering respondents' alleged demand for payment inutile. The last paragraph of the subject FLD states:

> In view thereof, you are requested to pay your aforesaid deficiency capital gains and documentary stamp tax liabilities through the duly authorized agent bank in which you are enrolled **within the time shown in the enclosed assessment notice**. *(Emphasis supplied)*

> Although the subject FLD indicates that the due dates for payment of the taxes are shown in the enclosed assessment notice, the alluded assessment notice or FAN was not served on petitioner.
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> Without a valid final assessment, the requirements of due process were not complied with, making the subject assessment for CGT and DST issued against petitioner void.
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> The issuance of a valid formal assessment is a substantive prerequisite to tax collection, for it contains not only a computation of tax liabilities but also a demand for payment within a prescribed period, thereby signalling the time when penalties and interests begin to accrue against the taxpayer and enabling the latter to determine his remedies therefor. Due process requires that it must be served on and received by the taxpayer."

Finally, the Court *En Banc* finds no merit in petitioners' contention that respondent should be held liable for the deficiency CGT and DST. The Court *En Banc* already explained in the Assailed Decision that under the Deed of Absolute Sale between the respondent and Mayon International Hotel, Inc. (MIHI) dated May 21, 2007, it was agreed that the burden of paying the corresponding CGT and DST due on the transaction shall be the responsibility of the seller, MIHI, and that respondent, as the buyer, shall merely advance the amount necessary for the payment thereof. The amount to be advanced by respondent for the payment of CGT and DST shall be deducted from the total purchase price. The particular provision of the Deed of Absolute Sale as precisely pointed out by petitioners is clear on this matter and needs no further interpretation.

In sum, the Court *En Banc* finds no plausible reason to deviate from its ruling in the Assailed Decision.

WHEREFORE, petitioners' *Motion for Reconsideration* is **DENIED** for lack of merit.

SO ORDERED.

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

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

(On Leave)
ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice