REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB No. 1080
(CTA Case No. 7989)

-versus-

OAKWOOD MANAGEMENT SERVICES (PHILS.), INC.,
Respondent.

x---x

OAKWOOD MANAGEMENT SERVICES (PHILS.), INC.,
Petitioner,

CTA EB No. 1083
(CTA Case No. 7989)

-versus-

Present:

Del Rosario, *P.J.,*
Castañeda, Jr.
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas,
and
Ringpis-Liban, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
AUG 1 4 2015
11:58 a.m.

x---x

DECISION

RINGPIS-LIBAN, J.

Before the Court En Banc are two (2) Petitions for Review filed on November 21, 2013 and November 22, 2013 by the Commissioner of Internal Revenue ("CIR") and Oakwood Management Services (Phils.), Inc. ("Oakwood"), respectively.

Both petitions appeal from the *Decision* dated August 8, 2013 and *Resolution* dated October 22, 2013 of this Court's Special Second Division in CTA Case No. 7989 (*Oakwood Management Services (Phils.), Inc, vs Commissioner of Internal Revenue*). The *Decision* cancelled and withdrew the CIR's deficiency income tax assessment and expanded withholding tax assessment for taxable year 2005 against Oakwood for lack of factual and legal basis, but found Oakwood liable for deficiency final withholding of VAT, final withholding tax and VAT in the total amount of PhP3,156,055.89, inclusive of 25% surcharge, plus deficiency interest of 20% per annum and delinquency interest, also at 20% per annum. The assailed *Resolution* denied the CIR's motion for reconsideration and Oakwood's motion for partial reconsideration, both for lack of merit.

On November 28, 2013, the Court En Banc resolved to consolidate the two (2) petitions, pursuant to Section 1, Rule 31 of the Revised Rules of Court.

THE PARTIES

Petitioner CIR is the official of the Republic of the Philippines charged with the duty of assessing and collecting internal revenue taxes, with the power, *inter alia*, to decide disputed assessments. She holds office at the 5th Floor, Bureau of Internal Revenue National Office Building, BIR Road, Diliman, Quezon City.

Respondent Oakwood is a domestic corporation duly organized and existing under the laws of the Philippines, with principal office at the 25th Floor, 88 Corporate Center, 141 Valero St. corner Sedeño St., 1229 Makati City.

FACTUAL AND PROCEDURAL ANTECEDENTS

CTA Case No. 7989 originated from the *Petition for Review* filed on November 4, 2009 by Oakwood against the CIR's assessments for various deficiency taxes. The case was raffled to the First Division. On January 6, 2010, the case was transferred to the Second Division pursuant to CTA Administrative Circular No. 01-2010.[1] The case was deemed submitted for decision by *Resolution* of the Second Division dated August 17, 2012.[2] The Special Second Division promulgated its *Decision* on August 8, 2013.[3]

The assailed *Decision* reduced the deficiency tax assessment made by the CIR from P5,708,153.06 to PhP3,156,055.89, inclusive of 25% surcharge. The Special Second Division set aside the following: assessment of PhP296,747.71 as expanded withholding taxes;[4] disallowance of PhP1,313,379.00 as marketing expenses;[5] disallowance of PhP1,158,331.00 as creditable withholding tax and assessment of deficiency income tax thereon;[6] disallowance of PhP2,364,787.00 as excess tax credits carried over to the succeeding period;[7] liability of Oakwood for deficiency documentary stamp tax (DST) of PhP40,611.30 on the issuance of its subscribed capital stock; deficiency DST on liability of Oakwood "due to an affiliated company" in the amount of PhP674,051.00;[8] and imposition of compromise penalty in the amount of PhP59,400.00.[9]

In its *Motion for Partial Reconsideration*, Oakwood posited that the Special Second Division erred: (1) in finding Oakwood liable for deficiency Final VAT and Final FWT, and (2) in imposing 25% surcharge and in imposing/computing deficiency and delinquency interest.

The CIR's *Motion for Reconsideration*, on the other hand, maintained that the Special Second Division erred in cancelling the deficiency income tax and EWT assessments for taxable year 2005. This in turn adverted to the setting aside of the disallowances, liabilities and impositions enumerated in the next preceding paragraph above.

By *Resolution* promulgated on October 22, 2013, the Special Second Division denied, both for lack of merit, Oakwood's *Motion for Partial Reconsideration* and the CIR's *Motion for Reconsideration.*

Hence, both parties appealed to the Court *En Banc* through their respective *Petitions for Review.*

On November 28, 2013, as stated earlier, the Court *En Banc* resolved to consolidate the two (2) petitions, pursuant to Section 1, Rule 31 of the Revised Rules of Court.

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[1] Records of CTA Case No. 7989, p. 198.
[2] Ibid., p. 608.
[3] Ibid., pp. 610-652.
[4] Decision, p. 26.
[5] Decision, p. 30.
[6] Decision, pp. 34-35.
[7] Decision, p. 35.
[8] Decision, pp. 39-40.
[9] Decision, pp. 40-41.

On February 10, 2014, this Court ordered the parties to file their respective *Comments* within ten days from receipt of the Court's *Resolution* of even date. The parties were notified that upon the filing of their *Comments* or the expiration of the period therefor, the petitions shall be deemed submitted for resolution, unless the Court further requires them to submit memoranda.

On February 27, 2014, the CIR filed a *Motion for Extension of Time to File Comment.* The CIR, admitting that the original period for the filing of its *Comment* would expire on February 28, 2014, sought an extension of up to March 15, 2014. This motion was granted by the Court by *Resolution* dated March 3, 2014.

On February 28, 2014, Oakwood filed its *Comment/Opposition* to the CIR's *Petition for Review.* This filing was well within the 10-day period from its receipt of the *Resolution* dated February 10, 2014 on February 20, 2014.

On May 2, 2014, the Court promulgated a *Resolution* noting that the CIR failed to file her *Comment* despite due notice, but requiring the parties to submit their respective consolidated memoranda within thirty (30) days from receipt of the *Resolution.* Upon the filing of the memoranda or the lapse of the given period, the petitions shall be deemed submitted for resolution.

On June 18, 2014, Oakwood filed its 57-page *Consolidated Memorandum*, having received its copy of the *Resolution* dated May 2, 2014 on May 15, 2014.

On September 10, 2014, the Court, noting that the CIR failed to file her consolidated memorandum within the prescribed period, promulgated a *Resolution* deeming the petitions submitted for decision.

The dispositive portion of the assailed Decision dated August 8, 2013 reads as follows:

> In view of the foregoing, petitioner is liable for deficiency final withholding of VAT, final withholding tax and VAT for the year 2005 in the amount of P3,156,055.89, inclusive of the 25% surcharge imposed under Section 248(A)(3) of the NIRC of 1997, computed as follows:

Tax Type	Basic Tax	Surcharge (25%)	20% Interest	Total
Final VAT	P 600,000.00	P 150,000.00		P 750,000.00
FWT	1,920,000.00	480,000.00		2,400,000.00
VAT	4,000.00	1,000.00		5,000.00
Sub-Total	**2,524,000.00**	**P 631,000.00**		**P 3,155,000.00**
Deficiency Increments for Late Remittance of EWT		1,000.00	P 55.89	1,055.89
TOTAL	**P2,524,000.00**	**P 632,000.00**	**P 55.89**	**P 3,156,055.89**

/m/

In addition, petitioner is likewise liable to pay:

(a) Deficiency interest at the rate of 20% per annum pursuant to Section 249(B) of the NIRC of 1997:
   1) On the deficiency final withholding tax computed from January 15, 2006 until full payment thereof;
   2) On the deficiency final withholding of VAT computed from January 10, 2006 until full payment thereof; and
   3) On the deficiency VAT computed from January 25, 2006 until full payment thereof.

(b) Delinquency interest at the rate of 20% per annum on the total amount due of P3,155,000.00 representing deficiency final withholding tax, final withholding of VAT and deficiency VAT and on the deficiency interest which have accrued as aforestated in (a) computed from February 16, 2009 until full payment thereof, pursuant to Section 249(C) of the NIRC of 1997, as amended; and

(c) Delinquency interest at the rate of 20% per annum on the deficiency increments for late remittance of withholding taxes in the amount of P1,055.89 computed from February 16, 2009 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED.

ISSUES

The sole issue raised by the CIR is whether or not the Special Second Division erred in cancelling and withdrawing the assessments for deficiency income tax and expanded withholding tax issued by the BIR to the respondent for taxable year 2005.

Oakwood, on the other hand, imputed three errors[10] to the Special Second Division:

A. In finding as proper the CIR's disallowance of service fees amounting to PhP6,000,000.00 and holding that Oakwood is liable for deficiency Final VAT and FWT;
B. In failing to consider the allocation of service fees "as provided for in CTA Case No. 6758"; and
C. In imposing the 25% surcharge and the erroneous manner of its imposition/computation of deficiency and delinquency interest.

The Court notes that the foregoing issues had been raised by the parties in their respective motions for reconsideration subject of the assailed

[10] Petition for Review of Oakwood filed on November 22, 2013, p. 8.

Resolution promulgated on October 22, 2013, except the second error raised by Oakwood.

DISCUSSION

Prefatorily, the Court sees no compelling reason to deviate from and modify the assailed *Decision* and *Resolution* of the Special Second Division. The 43-page *Decision* discussed the contentions of the parties with thoroughness, while the 12-page *Resolution* disposed of their motions for reconsideration authoritatively, with generous citations of prevailing jurisprudence.

The Court accordingly sees no need to again discuss the issues enumerated above, that had already been sufficiently addressed by the Special Second Division. This holding applies especially to the CIR's *Petition for Review*, which is a mere rehash of its *Motion for Reconsideration* that was properly and convincingly denied by the Special Second Division for lack of merit in its *Resolution* promulgated on October 22, 2013.

How close a rehash? With very minor stylistic changes, the "Arguments/Discussions" from pages 1 to 6 of the CIR's *Motion for Reconsideration* filed on August 29, 2013 were reproduced *verbatim* in pages 4 to 10 of the CIR's instant *Petition for Review.*

It is also noteworthy, and disconcerting, that the CIR, despite notice and directives from this Court, did not bother to file her *Comment* and *Consolidated Memorandum* in the instant case, which nonchalance strikes the Court as a manifestation of lack of interest to prosecute her appeal.

This leaves the second issue raised by Oakwood: that the Special Second Division erred in failing to consider the allocation of service fees "as provided for in CTA Case No. 6758." We shall now proceed to discuss this and related sub-issues.

CTA Case No. 6758 is not the law of the case.

In its assailed Decision, the Special Second Division explained:

> Moreover, since it cannot be ascertained which portion of the assessed amount of P6,000,000.00 pertain to services rendered outside or within the Philippines, the Court is constrained to uphold respondent's final withholding tax and withholding of VAT assessments in its entirety.[11]

[11] Decision, p. 34.

Subsequently, in disposing of Oakwood's Motion for Partial Reconsideration, the Special Second Division elucidated:

> According to petitioner, the Services Fees in the aggregate amount of P6,000,000.00 paid to OAP should not be subject to Final VAT and FWT since they constitute compensation for labor or personal services rendered outside of the Philippines by a non-resident foreign corporation.
>
> However, a thorough scrutiny of the documentary evidence proved otherwise. In fact, it was clearly established that Oakwood Asia Pacific Ltd. (OAP) sent employees to the Philippines in the year 2005 to perform management services for petitioner. Considering that the services were performed within the Philippines, the management services are subject to Philippine income tax and VAT. Consequently, petitioner is responsible to withhold the same from its payment to OAP. For this reason, *We* reiterate our ruling in the Assailed Decision that respondent is correct in disallowing said expense and in assessing petitioner for deficiency income tax. But since it cannot be ascertained which portion of the assessed amount of P6,000,000.00 pertain to services rendered outside or within the Philippines, the Court has no choice but to uphold respondent's final withholding tax and withholding of VAT assessments in its entirety.[12]

Clearly, the Special Second Division indeed did not take into consideration the allocation of service fees "as provided for in CTA Case No. 6758." However, the said Division cannot be faulted therefor, and its failure or refusal to take judicial notice of the allocation made in CTA Case No. 6758 cannot be construed as an error. Generally, courts are not authorized to "take judicial notice of the contents of the records of other cases even when said cases have been tried or are pending in the same court or before the same judge."[13] The power to take judicial notice must be exercised with caution and every reasonable doubt on the subject should be ample reason for the claim of judicial notice to be promptly resolved in the negative.[14]

The CTA Case No. 6758 alluded to is *Oakwood Management Services (Philippines), Inc. vs Commissioner of Internal Revenue*, decided in Oakwood's favor on September 6, 2007 by the Second Division, which subsequently on January 22, 2008 denied the CIR's *Motion for Reconsideration* for lack of merit.[15]

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[12] Resolution promulgated on October 22, 2013, p. 3.

[13] *Land Bank of the Philippines vs Yatco Agricultural Enterprises*, G.R. No. 172551, January 15, 2014, citing *Land Bank of the Philippines vs Sps. Banal*, 478 Phil. 701, at 713 (2004).

[14] *Spouses Latip vs Rosalie Palaña Chua*, G.R. No. 177809, October 16, 2009.

[15] The Resolution in CTA Case No. 6758 forms part of the Records of CTA Case No. 7889, pp. 156-159.

CTA Case No. 6758 concerned the services of Malaysia/Singapore-based Oakwood Asia employees who went to the Philippines in 2000 and 2001. The decision in that case laid down a formula: divide the annual service fee (under the Service Agreement dated January 15, 2000) by the total number of man-days (number of employees multiplied by 261 working days per year), to obtain the daily rate per employee, and to determine the portion of the service fee that may be allocated to services performed within the Philippines. If Oakwood's submission that the formula in CTA Case No. 6758 were to be accepted in the instant case, then the average daily rate per employee would be only PhP4,597.70,[16] more or less, for the five employees, for a total of only PhP91,954.00 as Final VAT for the twenty (20) days they performed services in the Philippines.

Oakwood submits that the final decision in CTA Case No. 6758 should govern the instant petitions as the "law of the case," inasmuch as they involve the same parties despite the difference in taxable years.

Obviously, the decision in CTA Case No. 6758 cannot be applied to the instant petitions as the "law of the case."

> 'Law of the case' has been defined as the opinion delivered on a former appeal. More specifically, it means that whatever is once irrevocably established as the controlling legal rule of decision between the same parties <u>in the same case</u> continues to be the law of the case, whether correct on general principles or not, <u>so long as the facts on which such decision was predicated continue to be the facts of the case before the court</u>. (21 C.J.S. 330).[17]

We find that Oakwood has not satisfactorily established that the facts in CTA Case No. 6758 and in the appealed case (CTA Case No. 7989) are the same. CTA Case No. 6758 is a case for refund or issuance of a tax credit certificate in the amount of P235,329.65 allegedly representing the amount of surcharges, interests and compromise penalties erroneously paid and remitted for 2000 and 2001 while CTA Case No. 7989 is a case for cancellation of BIR's Formal Assessment Notice (FAN) dated January 14, 2009, assessing petitioner for: (a) deficiency income tax; (b) deficiency value-added tax (VAT); (c) deficiency withholding of VAT (Final VAT); deficiency expanded withholding tax (EWT); (e) deficiency final withholding tax (FWT); deficiency documentary stamp tax (DST) on subscribed capital stock; (g) deficiency stamp tax on petitioner's capital stock; (g) deficiency documentary tax on petitioner's "Due

[16] Petition for Review of Oakwood filed on November 22, 2013, p. 20.

[17] As cited in *People vs Ascension P. Olarte*, G.R. No. L-22465, February 28, 1967, *en banc*, citing *People vs Pinuila*, G.R. No. L-11374, May 30, 1958; 55 O.G. 4228. Underscoring added, for emphasis. Reiterated in *Spouses Manuel Sy and Victoria Sy vs Genalyn D. Young*, G.R. No. 169214, June 19, 2013, citing *Radio Communications of the Phils., Inc. vs CA*, 522 Phil. 267, 273 (2006), citing *Padillo vs Court of Appeals*, 422 Phil. 334 (2001).

to Affiliates"; (h) compromise penalty for violation of Section 255 of the National Internal Revenue Code (NIRC) of 1997, as amended, in relation to petitioner's alleged failure to file certain tax returns.

Findings of commissioned CPA not conclusive upon the Court

By motion dated July 26, 2010, Oakwood prayed that the Second Division commission Jerome Antonio B. Constantino, managing partner of the accounting firm of Constantino Guadalquiver & Co., as independent certified public accountant, to audit and verify voluminous documents. He filed his *Report* with the Court on September 15, 2010.

Oakwood now asserts that the Special Second Division erred in disregarding the findings of the Court-commissioned independent CPA that the OAP employees rendered services in the Philippines for an aggregate of only twenty (20) days, and not 133 days.[18]

Under Section 3, Rule 13 of the Revised Rules of the Court of Tax Appeals (RRCTA), "The findings and conclusions of the independent CPA may be challenged by the parties and *shall not be conclusive upon the Court*, which may, in whole or in part, adopt such findings and conclusions subject to verification."[19]

For the factual findings of the Court-commissioned CPA to be accorded finality, Section 4 of Rule 13 of the RRCTA requires that the parties so stipulate. Oakwood has not alleged, much more shown, that the parties had stipulated that the commissioned CPA's findings of fact shall be final; there is no mention whatsoever of a commissioned CPA in the *Joint Stipulation of Facts and Issues* filed on May 4, 2010 in CTA Case No. 7989.[20]

The *Report* of the independent CPA was submitted by Oakwood as Exhibit "H", in its *Formal Offer of Evidence* filed on June 29, 2011.[21] Inasmuch as the CIR did not file any comment on or opposition to Oakwood's *Formal Offer of Evidence*, Exhibits "A" to "R-1" were admitted by the Second Division, subject to that Court's "final evaluation and/or appreciation of their purposes, materiality, relevancy and probative value to the issues involved."[22]

[18] Ibid., p. 19.
[19] Italics added, for emphasis.
[20] See Records of CTA Case No. 7989, pp. 269-278.
[21] Records of CTA Case No. 7989, pp. 404, 443.
[22] Second Division Resolution promulgated on August 23, 2011, in Records of CTA Case No. 7989, p. 463.

Accordingly, this Court finds the imputation of this particular error to the Special Second Division to be misplaced, for the said Division was not bound by the findings of the commissioned independent CPA.

BIR Ruling ITAD-145-02 does not exempt from Philippine taxation income from services rendered by Oakwood Asia in the Philippines.

Oakwood additionally protested that the Special Second Division's *Resolution* unjustifiably did not apply BIR Ruling DA ITAD-145-02 dated August 21, 2002, which supposedly held that management service fees paid to OAP constituted compensation for labor or personal services rendered outside the Philippines and thus were not subject to Philippine income tax and withholding tax. In its instant *Petition for Review*, Oakwood quoted at length from the said BIR Ruling.[23] However, we find nothing in the quoted excerpts that would absolutely bar the BIR from subjecting to Philippine taxes income from services performed in the Philippines. It must further be noted that the subject BIR Ruling was rendered in 2002, whereas the tax assessments subject of the instant case were for taxable year 2005.

The four-page DA-ITAD-145-02 embodied the opinion of its author, BIR Legal Service Assistant Commissioner Milagros V. Regalado, in response to questions posed by Oakwood's counsel thru a letter dated February 7, 2001. Significantly, on the matter of whether service fees payable to Oakwood Asia are exempt from Philippine income tax, the opinion given was that "non-resident foreign corporations are subject to income tax only on income derived from all sources within the Philippines. Consequently, Oakwood Asia, being a non-resident foreign corporation is not subject to income tax on income derived from sources outside the Philippines."[24] Otherwise stated, income from services performed by OAP in the Philippines is subject to Philippine taxation.

The opinion expressed by BIR Assistant Commissioner Regalado in DA-ITAD-145-02 also ended with this caveat: "This ruling is issued on the basis of the foregoing facts as represented. However, if upon investigation, it shall be disclosed that the facts are different, then this ruling shall be without force and effect insofar as the parties herein are concerned."[25]

Simultaneous imposition of deficiency interest and delinquency interest is based on law; not unconscionable.

[23] See Oakwood's Petition for Review filed on November 22, 2013, pp. 10-12.
[24] Records of CTA Case No. 7989, p. 153. Underscoring added for emphasis.
[25] Ibid., p. 154.

On the matter of simultaneous impositions of deficiency interest and delinquency interest, Oakwood rues that the Special Second Division failed to consider Revenue Regulations No. 12-99.[26]

It appears that Oakwood would have this Court apply RR No. 12-99, an administrative regulation which was issued way back on September 14, 1999, rather than the law.

In support of its position, Oakwood cites the Supreme Court's ruling in *Commissioner of Internal Revenue vs St. Luke's Medical Center, Inc.*[27] Oakwood would have us believe that in the said *St. Luke's* case, the Supreme Court affirmed this Court's application of RR No. 12-99 in the computation of deficiency taxes and delinquency interest thereon.[28] This is **misleading**.

In the *St. Luke's* case, the Supreme Court flatly stated that it had no ground to review factual matters on the payment of surcharge and delinquency interest, inasmuch as the resolution of the therein petitions for review on certiorari under Rule 45 of the Rules of Court was limited to a pure question of law, *i.e.*, the interpretation of certain provisions of the National Internal Revenue Code on the income tax treatment of proprietary non-profit hospitals. Although the Supreme Court did pronounce St. Luke's liable for deficiency income tax but not for surcharges and interest thereon, the non-liability for surcharges and deficiency interest was not on the basis of RR No. 12-99 but of St. Luke's good faith reliance on a BIR letter that St. Luke's is "a corporation for purely charitable and social welfare purposes" and thus exempt from income tax.

It is noteworthy that the Supreme Court's 2012 decision in the *St. Luke's* case has not been reiterated or cited in subsequent decisions of the High Tribunal.

On the other hand, there is a catena of Supreme Court decisions upholding this Court in the simultaneous imposition of deficiency interest and delinquency interest. These include *Philippine Basketball Association vs Court of Appeals, Court of Tax Appeals, and Commissioner of Internal Revenue*[29] in 2000, *Rizal Commercial Banking Corporation vs Commissioner of Internal Revenue*[30] in 2011, and *First Lepanto Taisho Insurance Corporation vs Commissioner of Internal Revenue*[31] in 2012.

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[26] Ibid., p. 23.
[27] G.R. No. 195909, consolidated with G.R. No. 195960, September 26, 2012.
[28] See Oakwood's Petition for Review filed on November 22, 2013, No. 64, p. 25.
[29] G.R. No. 119122, August 8, 2000.
[30] G.R. No. 170257, September 7, 2011.
[31] G.R. No. 197117, April 10, 2013.

It is abundantly clear that under the circumstance laid down by Section 249(c)(3) of the Tax Reform Act of 1997 – *i.e.*, in case of failure to pay a deficiency tax, or any surcharge or interest on such deficiency tax – delinquency interest of 20% per annum shall be assessed and collected. We reiterated this earlier this year in *Philippine Aerospace Development Corporation vs Commissioner of Internal Revenue* (CTA EB Case No. 1035), and much earlier in the case cited by the Special Second Division, *Takenaka Corporation Philippine Branch vs Commissioner of Internal Revenue* (CTA EB Case No. 745, September 4, 2012).

Given these precedents, this Court cannot subscribe to the notion that RR No. 12-99, a mere administrative issuance, can prevail over Section 249(c)(3) of the Tax Reform Act of 1997, a statute. If a discrepancy occurs between the basic law and an implementing rule or regulation, it is the former that prevails, because the law cannot be broadened by a mere administrative issuance — an administrative agency certainly cannot amend an act of Congress.[32] While administrative agencies, such as the Bureau of Internal Revenue, may issue regulations to implement statutes, they are without authority to limit the scope of the statute to less than what it provides, or extend or expand the statute beyond its terms, or in any way modify explicit provisions of the law. Indeed, a quasi-judicial body or an administrative agency for that matter cannot amend an act of Congress. Hence, in case of a discrepancy between the basic law and an interpretative or administrative ruling, the basic law prevails.[33]

WHEREFORE, premises considered, the instant Petitions for Review are **DENIED** for lack of merit. The assailed Decision and Resolution of this Court's Special Second Division in CTA Case No. 7989 are **AFFIRMED** *in toto.*

SO ORDERED.

Ma. Belen S. L.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

dissenting; see dissenting opinion

[32] *Grace M. Grande vs Patricio T. Antonio*, G.R. No. 206248, February 18, 2014, *en banc*.
[33] *Commissioner of Internal Revenue vs The Insular Life Assurance Co. Ltd.*, G.R. No. 197192, June 4, 2014, citing *Fort Bonifacio Development Corporation vs Commissioner of Internal Revenue*, G.R. No. 158885, October 2, 2009, 602 SCRA 159, 167.

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

AMELIA R. COTANGCO – MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Section 13 of Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* 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,

-versus-

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Respondent.

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(CTA Case No. 7989)

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OAKWOOD MANAGEMENT SERVICES (PHIL.), INC.,
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-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1083
(CTA Case No. 7989)

Present:

DEL ROSARIO, *P.J,*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS, *and*
RINGPIS-LIBAN, *JJ.*

Promulgated:

AUG 14 2015
11:58 a.m.

x -- x

DISSENTING OPINION

DEL ROSARIO, PJ.:

In her *ponencia,* my esteemed and learned colleague, the Honorable Associate Justice Ma. Belen M. Ringpis-Liban, denied the present Petitions for Review and affirmed the assailed Decision dated August 8, 2013 and Resolution dated October 22, 2013 of the Special Second Division in CTA Case No. 7989.

With due respect, after a careful examination of the pertinent facts of the case, in relation to applicable laws and jurisprudence, I am, however, of the opinion that Oakwood Management Services (Phil.), Inc. (Oakwood) was deprived of its right to due process and the subject assessments issued against Oakwood are null and void for having been issued in violation of Oakwood's right to due process.

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

> "**SEC. 228. Protesting of Assessment.** - When the Commissioner or his duly authorized representative **finds that proper taxes should be assessed**, he shall **first notify** the taxpayer of his findings: provided, however, That a preassessment notice shall not be required in the following cases:
>
> xxx 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.
>
> **Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.**
>
> Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations.

> Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.
>
> xxx xxx xxx."

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

> "3.1.2 *Preliminary Assessment Notice (PAN).* – If after review and evaluation by the Assessment Division or by the Commissioner or his duly authorized representative, as the case may be, **it is determined that there exists sufficient basis to assess the taxpayer** for any deficiency tax or taxes, the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing in detail, the facts and law, rules and regulations, or jurisprudence on which the proposed assessment is based….. **If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN**, he shall be considered in default, in which case, **a formal letter of demand and assessment notice shall be caused to be issued** by the said Office, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.
>
> xxx xxx xxx"

Pursuant to the above provisions, the procedure pertaining to the issuance of an assessment is as follows:

> First – The Commissioner of Internal Revenue (CIR) or his duly authorized representative makes an initial determination that "there exists sufficient basis to assess the taxpayer";
>
> Second – The Bureau of Internal Revenue (BIR) issues a PAN, giving the taxpayer fifteen (15) days within which to respond; and,
>
> Third – If no response is made, the taxpayer is "considered in default" in which case, a formal letter of demand and assessment notice (FAN) is caused to be issued against the taxpayer.

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[1] dated September 6, 1999.

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The right of the taxpayer to respond to a PAN carries with it the correlative duty on the part of the BIR to consider the response. The procedure is intrinsic in the taxpayer's right to be heard. To be sure, the issuance of a FAN without even hearing the side of the taxpayer is anathema to the cardinal principles of due process.

Otherwise stated, to sustain the validity of the FAN despite glaring violation of the procedure mandated by law would render meaningless the clear and categorical requirement of "hearing" a taxpayer before he is subjected to an assessment – the recall or cancellation of which, entails long, tedious and expensive process.

Worse, any precedent that upholds the validity of a FAN as long as the taxpayer is able to file a protest is fraught with mischievous consequences. Parenthetically, it would in essence encourage the unscrupulous practice of issuing a FAN even without prior compliance with the procedure no less prescribed by law, which includes: first – the requirement for the issuance of a PAN; and, second for the BIR to consider the taxpayer's response thereto. There is nothing more devious than the scenario where government ignores as much its own rules as the taxpayer's constitutional right to due process.

In the instant case, **records show that petitioner received a copy of the PAN on January 6, 2009**. Petitioner has fifteen (15) days or until **January 21, 2009** within which to file a reply or protest against the PAN. Prior to the lapse of the fifteen-day period within which petitioner can respond to the PAN, **petitioner received a copy of the Final Assessment Notice (FAN) on January 16, 2009. The BIR did not wait for petitioner to reply to the PAN[2] before issuing the assessment notices on January 14, 2009.**

As aforestated, the right of the taxpayer to respond to the PAN is an important part of the due process requirement in the issuance of a deficiency tax assessment. In wantonly disregarding Oakwood's right to be heard with regard to its positions or arguments against the PAN, the BIR clearly violated Oakwood's right to due process as enshrined in Section 228 of the Tax Code and RR No. 12-99.

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[2] Petitioner filed its reply to the PAN on January 21, 2009.

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In *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.*,[3] the Supreme Court emphasized the importance of complying with the requirement to send a PAN to the taxpayer as an integral part of due process in the issuance of a deficiency tax assessment. It then declared in no uncertain terms that **the failure of the CIR to strictly comply with the requirements laid down by law and its own rules** is a denial of Metro Star's right to due process. Undeniably, providing the taxpayer with a copy of the PAN is meaningless to the concept of due process if, after all, his right to respond to it within the prescribed period would be ignored.

Although Oakwood was given ample opportunity to contest the FAN and assessment notices, **the fatal infirmity that attended its issuance prior to the lapse of the period to respond to the PAN is not cured thereby**. In *Pilipinas Shell Petroleum Corporation vs. Commissioner of Internal Revenue,*[4] the Supreme Court ruled that the non-compliance with statutory and procedural due process renders the final assessment notice as null and void, *viz*:

> "**While PSPC indeed protested the formal assessment, such does not denigrate the fact that it was deprived of statutory and procedural due process to contest the assessment before it was issued.** Respondent must be more circumspect in the exercise of his functions, as this Court aptly held in Roxas v. Court of Tax Appeals:
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>> The power of taxation is sometimes called also the power to destroy. Therefore it should be exercised with caution to minimize injury to the proprietary rights of a taxpayer. It must be exercised fairly, equally and uniformly, lest the tax collector kill the "hen that lays the golden egg." **And, in the order to maintain the general public's trust and confidence in the Government this power must be used justly and not treacherously**."

Notably, the Court has declared void any assessment that fails to comply with the due process requirement.

In *A Brown Co., Inc. vs. Commissioner of Internal Revenue*,[5] the CTA ruled that an assessment is void because of the multiple violations of due

[3] G.R. No. 185371, December 8, 2010.
[4] G.R. No. 172598, December 21, 2007.
[5] CTA Case 6357, June 7, 2004, penned by Presiding Justice Ernesto P. Acosta and concurred by Justice Juanito C. Castañeda and Justice Lovell R. Bautista.

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process committed by the BIR. The violations include, among others: (1) **issuance of the final assessment only four (4) days after the issuance of the PAN**; and, (2) **the lack of opportunity given to the taxpayer to reply to the PAN within fifteen (15) days from its receipt**.

Similarly, in *Puratos Philippines, Inc. vs. Commissioner of Internal Revenue,*[6] the Court ruled that:

> "**Given that the FAN was issued on the same day petitioner received the PAN, it is evident that respondent violated the provisions of Section 228 of the NIRC of 1997, as well as of the provisions of Revenue Regulations Nos. 12-85 and 12-99 and Revenue Memorandum Order No. 37-94, which give the taxpayer a period of fifteen days within which to reply to the PAN**. Even assuming that there was an Informal Conference that took place between petitioner and respondent, and that during the conference and even thereafter, petitioner, through its counsel, requested a copy of the FAN, the fact remains that as indicated in the FAN, it was issued on the same day the PAN was received by petitioner. Clearly, petitioner was denied of its right to due process." *(Emphasis supplied)*

The above rulings were reiterated in *Yumex Philippines Corporation vs. Commissioner of Internal Revenue*[7] wherein the assessments were cancelled on the ground of non-observance by the CIR of the 15-day period

Finally, in the recent case of *Polymer Products (Phil.), Inc. vs. Commissioner of Internal Revenue,*[8] the Court ruled that:

> "As earlier quoted, Section 228 of the NIRC of 1997, as implemented by RR No. 12-99, specifically Section 3.1.2 thereof, prescribes a fifteen (15)-day period from receipt of a PAN within which a taxpayer may respond thereto. Indubitably, **the right of the taxpayer to respond to the PAN is an important part of the due process requirement in the issuance of a deficiency tax assessment.** In wantonly disregarding petitioner's right to be heard with regard to its positions or arguments against the PAN, the BIR clearly violated petitioner's right to

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[6] CTA Case No. 6980, October 4, 2010, penned by Associate Justice Lovell R. Bautista and concurred by Presiding Justice Ernesto D. Acosta and Associate Justice Caesar A. Casanova.

[7] CTA Case No. 8331, 28 November 2013, penned by Associate Justice Cielito N. Mindaro-Grulla and concurred by Associate Justice Juanito C. Castañeda, Jr. and Associate Justice Caesar A. Casanova.

[8] CTA Case No. 8299, January 30, 2015, penned by Presiding Justice Roman G. Del Rosario and concurred by Associate Justice Erlinda P. Uy.

> due process as enshrined in Section 228 of the Tax Code and RR No. 12-99. **To be sure, procedural due process is not satisfied with the mere issuance of a PAN, *sans* giving the taxpayer an opportunity to respond thereto.**"

In closing, the admonition of the Supreme Court as early as in 1962 to an agency of government similar to the BIR is apropos:

> "The Public Service Commission is an agency of the government, and should at all times, maintain a due regard for the constitutional rights of parties litigant. Also, the Commissioners (who are not judges in the true sense) would do well to ponder the implications of Article 32, No. 6, of the New Civil Code on the individual responsibility of public officers and employees who impair a person's right against deprivation of property without due process of law."[9]

For the reasons afore-stated, I VOTE to:

1) DENY the Petition for Review filed by Commissioner of Internal Revenue in CTA EB No. 1080; and,

2) GRANT the Petition for Review filed by Oakwood Management Services (Phil.), Inc. in CTA EB No. 1083; REVERSE and SET ASIDE the Decision dated August 8, 2013 and Resolution dated October 22, 2013; and, accordingly, DECLARE NULL and VOID Assessment Notice Nos. IT-46254-05-09-0140, VT-46254-05-09-0140, WG-46254-05-09-0140, WE-46254-05-09-0140, WF-46254-05-09-0140, DS-46254-05-09-0140 (amounting to ₱81,418.68), DS-46254-05-09-0140 (amounting to ₱2,079.27) and MC-46254-05-09-0140.

ROMAN G. DEL ROSARIO
Presiding Justice

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[9] *Danan vs. Aspillera,* G.R. No. L-17305, November 28, 1962.