REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION

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PURATOS PHILIPPINES, INC., Petitioner,	**CTA CASE NO. 6980**
	Members:
- versus -	**ACOSTA,** *Chairperson* **BAUTISTA,** *and* **CASANOVA,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** OCT 04 2010; 9:47 am

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DECISION

BAUTISTA, *J.*:

This Petition for Review seeks to reverse and set aside the Final Decision on Disputed Assessment finding petitioner liable for deficiency income, value-added, expanded withholding, fringe benefit, and documentary stamp taxes and compromise penalty for the year 1999 per Final Assessment Notice dated January 24, 2003.

Puratos Philippines, Inc. (petitioner) is a domestic corporation, organized and existing under Philippine laws. It is represented herein by its

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Importation and Purchasing Manager and by its Finance and Administration Manager as duly authorized by petitioner's Board of Directors.[1]

Respondent Commissioner of Internal Revenue is the head of the Bureau of Internal Revenue (BIR), the government agency tasked with the duties and functions of assessing and collecting all national internal revenue taxes, fees, and charges, and the enforcement of all forfeitures, penalties, and fines connected therewith. Respondent holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

On April 11, 2000, petitioner filed its 1999 Income Tax Return, which indicated its registered address as Tierra Factors Bldg., Electronics Ave., FTI Compound, Taguig, Metro Manila.[2]

On November 19, 2002, petitioner filed its Monthly Value-Added Tax Declaration for October 2002[3] with the BIR Revenue District Office (RDO) No. 44, Taguig, Pateros, stating its new address at Sanaea Bldg. Mangosteen St., FTI Compound, Taguig.

In December 2002, petitioner filed its Monthly Value-Added Tax Declaration for November 2002[4] with the BIR RDO No. 44, Taguig, Pateros, again stating its new address at Sanaea Bldg. Mangosteen St., FTI Compound, Taguig.

Respondent issued a Preliminary Assessment Notice (PAN) dated January 9, 2003 against petitioner for deficiency income tax, value-added tax,

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[1] Par. 1, Stipulation of Facts, Joint Stipulation of Facts and Issues (JSFI), docket, p. 855
[2] Par. 13, Stipulation of Facts, JSFI, docket, p. 857
[3] Exhibits "F" and "F-1"
[4] Exhibits "G" and "G-1"

expanded withholding tax, fringe benefits tax, documentary stamp tax, and penalties for taxable year 1999. Its registered letter no. was "00051".[5]

On January 24, 2003, petitioner was served said Preliminary Assessment Notice together with the Details of Discrepancies.[6]

On January 24, 2003, respondent issued a Formal Assessment Notice (FAN) with Details of Discrepancies.[7]

On January 25, 2003, BIR Revenue Region No. 8 sent by registered mail the said FAN through the Makati Post Office, and assigned as registered letter no. 3263.[8] On January 28, 2003, the Taguig Post Office[9] received the FAN from the Makati Central Post Office.

Letter-carrier Danilo Enriquez, who was assigned to deliver the FAN dated January 24, 2003, forwarded the same to Kilometer 15, South Super Highway, Parañaque[10]; upon reading the address on the envelope stating "Tierra Factors".[11]

On February 3, 2003, the FAN was returned to the Makati Central Post Office.[12]

In a letter dated January 13, 2004, the BIR requested petitioner to submit certain requirements in relation to the re-investigation of petitioner's 1999 internal revenue tax liabilities.[13]

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5 Exhibits "C", "C-1", "C-2", and "C-6-a"
6 Exhibit "E"
7 Exhibits "S" to "S-5"
8 Exhibit "S-6-a"
9 Exhibit "S-6-d"
10 Exhibit "S-6-c"
11 TSN dated January 24, 2006, pages 49-51, 53, and 57-58
12 Exhibit "S-6-e"
13 Exhibits "B" to "B-1"

Respondent issued the Final Decision on Disputed Assessment (FDDA) dated April 5, 2004, denying petitioner's protest of the PAN and added that the assessment is already final and executory. In the same FDDA, respondent stated that a Formal Assessment Notice dated January 24, 2003 was sent through registered mail.[14]

Consequently, petitioner filed the instant Petition for Review before this Court on May 4, 2004.

On February 19, 2008, petitioner availed of the Tax Amnesty Program under Republic Act (R.A.) No. 9480.

On March 14, 2008, petitioner filed an Omnibus Motion seeking, among others, the consideration of this Court to allow petitioner to present additional evidence in relation to its availment of the Tax Amnesty Program. On May 6, 2008, this Court granted petitioner's Omnibus Motion and considered petitioner's Petition for Review filed on May 4, 2004 as withdrawn and the case as closed and terminated. However, on May 22, 2008, petitioner filed a Motion for Reconsideration/Issuance of a Clarificatory Order.

On May 16, 2008, respondent filed his Motion for Reconsideration; while on June 10, 2008, petitioner filed its Comment/Opposition with Motion to Present Additional Evidence.

On August 7, 2008, this Court modified its earlier Resolution and declared that petitioner's Petition for Review is considered withdrawn,

[14] Exhibit "A"

subject to R.A. No. 9480, but only insofar as petitioner's income tax, value-added tax, fringe benefit tax, and documentary stamp tax assessments are concerned. However, petitioner's deficiency withholding tax assessment remains.[15]

On August 28, 2008, petitioner filed an Amended Petition for Review in compliance with this Court's Resolution dated August 7, 2008.

In his Amended Answer[16] filed on September 12, 2008, respondent alleged the following Special and Affirmative Defenses:

> "5. He reiterates and repleads the preceding paragraphs of this answer as part of his Special and Affirmative Defenses;
>
> 6. The Tax Amnesty availment of petitioner is still subject for evaluation by the BIR within one (1) year period, pursuant to the provisions of RA No. 9480;
>
> 7. The Formal Assessment Notice and Demand Letter dated January 24, 2003, issued by the BIR to petitioner, which was served to petitioner by registered mail on January 25, 2003, at its registered business address located at Tierra Factors Bldg., Electronics Ave., FTI Compound, Taguig, Metro Manila, as appearing in the tax returns it filed for 1999 are valid and binding upon petitioner, pursuant to Section 11 of Revenue Regulations No. 12-85, which provides:
>
> > '**Sec. 11. Change of Address.** – In case of change of address, the taxpayer must give a written notice thereof to the Revenue District Officer or the district having jurisdiction over his former legal residence and/or jurisdiction over his new legal residence or place of business, the Revenue Computer Center and the Receivable Accounts Division, BIR, National Office, Quezon City, and in case of failure to do so, **any communication referred to in these**

[15] Docket, pp. 1482-1486
[16] Docket, pp. 1521-1525

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> **regulations previously sent to his former legal residence or business address as appearing in his tax return for the period involved shall be considered valid and binding for purposes of the period within which to reply.**'

8. The fact that there is no response received by the BIR from petitioner within the prescribed period from the date the said Formal Assessment Notice and Demand Letter dated January 24, 2003 was posted by registered mail on January 25, 2003, the same were considered to have been actually or constructively received by petitioner, pursuant to Section 3.1.7 of Revenue Regulations No. 12-99, which provides:

> '**Section 3.1.7. Constructive Service.** – If the notice to the taxpayer herein required is served by registered mail, and no response is received from the taxpayer within the prescribed period from the date of the posting thereof in the mail, the same shall be considered actually or constructively received by the taxpayer.'

In relation to Section 3 (v), Rule 131 of the Rules of Court, which provides that 'there is a disputable presumption that a letter duly directed and mailed was received in the regular course of mail'.

9. Further, the fact that petitioner was deemed to have actually or constructively received the said Formal Assessment Notice and Demand Letter dated January 24, 2003, its failure to file an administrative protest to the said Formal Assessment Notice and Demand Letter, within the thirty (30) days reglementary period prescribed under Section 228 of the 1997 Tax Code, the said deficiency expanded withholding tax issued by the BIR to petitioner for taxable year 1999 has already became final, executory and demandable. Hence, there is no disputed assessment to speak of, in order that this Honorable Court may acquire jurisdiction over the case. Thus Section 228 of the 1997 Tax Code, provides, viz:

> 'Sec. 228. Protesting of Assessment. – Such assessment may be ***protested***

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> ***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.***' **(Emphasis supplied)**

10. However, assuming without admitting that the deficiency tax assessments issued by the BIR to petitioner has not yet became final, executory and demandable, since petitioner alleged that it has not yet receive the said Formal Assessment Notice and Demand Letter dated January 24, 2003, the filing of the instant appeal by petitioner before this Honorable Court was **premature.**

    Under Section 7 of RA 1125, conferring jurisdiction on the Court of Tax Appeals, what is appealable to this Honorable Court is the decision of the Commissioner of Internal Revenue on the protest of the taxpayer against the Formal Assessment Notice **(CIR vs. Villa, 22 SCRA 3 [1968]).**

    In the instant case, since petitioner alleged that it did not receive the Formal Assessment Notice and Demand Letter dated January 24, 2003 issued by herein respondent, which Assessment Notice was served to it by registered mail on January 25, 2003, at its registered business address located at Tierra Factors Bldg., Electronics Ave., FTI Compound, Taguig, Metro Manila, the appeal made by petitioner before this Honorable Court is clearly premature, as there is no decision yet to speak of on the protest it made on September 26, 2003, considering the fact that the subject Formal Assessment Notice and Demand Letter dated January 24, 2003 was never received by the petitioner.

11. It is worth noting that the questioned **Letter dated April 5, 2004 – 'Final Decision on Disputed Assessment'**, pertains particularly to the decision of the Regional Director, denying the letter-protest dated

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September 26, 2003 of petitioner to the Preliminary Assessment Notice, and not to the Formal Assessment Notice and Demand Letter dated January 24, 2003. Hence, the same cannot be considered as a decision on disputed assessment which is appealable to this Honorable Court, pursuant **to Section 3.1.6 of Revenue Regulations No. 12-99**, which provides:

> '**Sec. 3.1.6. Administrative Decision on a Disputed Assessment. –** The decision of the Commissioner or his duly authorized representative shall state (a) the facts, the applicable laws, rules and regulations, or jurisprudence on which such decision is based, otherwise, the decision shall be void x x x, in which case, the same shall not be considered a decision on disputed assessment and the same is his final decision.

12. It is a settled rule in taxation that an assessment is deemed made for the purpose of giving effect thereto if it is made within the prescribed period and is released, mailed or sent to the taxpayer also within the same period. It is not required that the notice be received by the taxpayer within the prescribed period. But the sending of the notice must be clearly proved. (***Basilan Estate, Inc. vs. CIR, L-22429, Sept. 5, 1967)***

13. Moreover, assuming without conceding that this Honorable Court has jurisdiction over the case, petitioner was assessed for deficiency Expanded Withholding Tax for taxable year 1999 for the reason that it failed to withhold the required expanded withholding on outside services, advertising, royalties, repair & maintenance, and indirect labor, in violation of Section 57 of the Tax Code, as implemented by Revenue Regulations No. 2-98, as amended.

    a. Petitioner failed to pay and/or remit the corresponding taxes withheld on its income payments, enumerated in the following: Outside Services (P1,020,420.00); Advertising (P1,717,731.00); Royalties (P5,770.64); Repair & Maintenance (P918,315.00); Fringe Benefits (P1,135,731.00) and Indirect Labor (P1,210,468.00), in violation of Section 34(K) of

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the Tax Code which provides... 'Any income payment which is deductible under the Tax Code shall be allowed as deduction only if it is shown that the income tax required to be withheld has been paid to the Bureau of Internal Revenue....', hence, the same were disallowed as deductions from its taxable income.

14. The deficiency expanded withholding tax issued by the BIR to petitioner, for taxable year 1999, covered under Formal Assessment Notice No. WE-3997-99-03-219, dated January 24, 2003 was made in accordance with law and regulations.

15. All presumptions are in favor of the correctness of tax assessments."

On the other hand, petitioner filed its Reply (to Amended Answer)[17] on September 26, 2008, with the following counter-arguments:

"1. The Petitioner specifically denies paragraph 2 and paragraph 6 of the *Amended Answer*, the truth of the matter being that Section 4 of Republic Act No. 9480 provides that the Statement of Assets and Liabilities and Networth (SALN) submitted by the taxpayer, which is the basis of the amnesty tax due, is presumed or considered true and correct, and may disproved only through proceedings initiated by parties other than the Bureau of Internal Revenue (BIR) or its agents, within one year following the date of the filing of the tax amnesty return and the SALN.

2. The Petitioner specifically denies paragraphs 1, 7 and 12 of the *Amended Answer*, the truth of the matter being that that the Petitioner's address at Mangosteen St., corner DBP Avenue, FTI Complex, Taguig, Metro Manila is located right across respondent's office in Taguig. In fact, Respondent's officers have frequently visited the Petitioner's offices at the aforementioned address to examine books and for other purposes. Hence the Respondent cannot deny knowledge of the Petitioner's address.

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[17] Docket, pp. 1527-1533

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2.1 More importantly, the Petitioner has constantly received all other notices, letters. etc. from the BIR even if the same were sent to the previous address by registered mail. This is because the current address and previous address are located within the same compound. In fact the postman would see the large water tank painted with the company name and logo on his way to the old address. If the Respondent has indeed sent the Formal Assessment Notice through registered mail, there is no reason why this particular communication was not received by the Petitioner.

2.2 Moreover, the Petitioner has in fact filed several documents with the Respondent containing their current office address in Mangosteen Road before the Formal Assessment Notice was issued on January 24, 2003. Attached herein are copies of the Petitioner's Monthly Value Added Tax Declaration, received by the BIR on November 2002 [Annex 'A'] and the Monthly Value Added Tax Declaration, received by the BIR on December 2002 [Annex 'B'].

2.3 Respondent alleges that the service of the Formal Assessment Notice on the Petitioner's former business address is valid. However, since the alleged service made to the Petitioner's former address was made despite the fact of the Respondent's knowledge of the Petitioner's new business address, service of the formal assessment notice by registered mail to the Petitioner's former address is improper. It has been held that where there is undisputed evidence showing its actual knowledge of the taxpayer's new address, the BIR's feeble protestations that it had sufficiently complied with the requirements of the law will not justify the absence of proper service on the new address of the taxpayer. [Carnation Philippines, Inc. vs. CIR, CTA Case No. 4834, January 16, 1996]

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2.4 It should be reiterated that on April 19, 2004, Petitioner, through undersigned counsel, wrote a letter addressed to Regional Director Anselmo Adriano of Revenue Region No. 8, informing him that the Formal Assessment Notice has not yet been served on the Petitioner. [Annex 'C']. The matter was referred to Ms. Miriam P. Aguila, Chief of the Assessment Division and the latter disclosed records showing that the Formal Assessment Notice was mailed by the BIR but that it was *'Returned to Sender'*. This fact was reiterated in a letter to the Respondent dated May 4, 2004. [Annex 'D']

2.5 Finally, it should be reiterated that the Preliminary Assessment Notice dated January 9, 2003 was served on the Petitioner only on January 24, 2003, which is the date the subject Formal Assessment Notice was issued. Hence, the Formal Assessment Notice is void *ab initio.*

3. Petitioner specifically denies paragraph 8 of the *Amended Answer*, the truth of the matter being that the Petitioner directly denies receipt of Formal Assessment Notice and Demand Letter dated January 24, 2003, which was allegedly posted on January 25, 2003. Moreover, the disputable presumption that a mailed letter is deemed received by an addressee is subject to controversion and a direct denial thereof shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee [Republic v. Court of Appeals 149 SCRA 351, 355 (1987)]

4. Petitioner specifically denies paragraph 9 of the *Amended Answer*, the truth of the matter being that the Formal Assessment Notice and Demand Letter dated January 24, 2003 could not be deemed to have become final as it could not have been constructively received as already explained in the foregoing paragraphs. Hence the 30-day reglementary period prescribed under Section 228 of the 1997 Tax Code have not yet began to run.

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4.1 Indeed said Formal Assessment Notice is of no effect having been issued on the same date that the Preliminary Assessment Notice dated January 9, 2003 was served on the Petitioner. Furthermore, the alleged failure to protest a questioned assessment within the 30-day period provided under Section 228 of the 1997 Tax Code does not remove it from the jurisdiction of the Court of Tax Appeals on the ground that only 'seasonably' disputed assessments may be reviewed by this Honorable Court. [FMF Development Corporation v. CIR, CA-GR SP No. 73973, February 23, 2004]

4.2 Moreover, even after the Formal Assessment Notice was allegedly sent to the petitioner, the Revenue District Officer had continually visited and contacted the Petitioner in connection with the reinvestigation of the Preliminary Assessment Notice of January 9, 2003. Just prior to the issuance of the assailed *Final Decision*, the Respondent issued a letter dated January 13, 2004 in connection with the said reinvestigation without informing the Petitioner that the Formal Assessment Notice had already been issued. [Annex 'E']

4.3 In fact, as late as May 6, 2004 or after the instant Petition for Review was already filed with this Honorable Court, the Revenue District Officers wrote Petitioner in connection with the reinvestigation of the petitioner's alleged tax liabilities for the year 1999 [Annex 'F']. This letter (sic) constitutes an admission by the Respondent that the formal assessment notice has not been properly served.

4.4 Understandably confused, the Petitioner wrote Respondent to seek clarification in this regard to seek clarification of Respondent's stand and to withdraw the Final Decision on the Disputed Assessment dated April 5, 2004. [Annex 'G'] To date there has been no response to said letter.

5. Petitioner specifically denies paragraphs 10 and 11 of the *Amended Answer*, the truth of the matter being that the basis of the Final Decision on Disputed Assessment dated April 5, 2004 is the alleged finality of the Formal Assessment Notice and Demand Letter dated January 24, 2003. Hence, the fact that the petitioner did not receive the Formal Assessment Notice and Demand Letter dated January 24, 2003 cannot render the instant case as premature. Moreover, Respondent's arguments are untenable, as the Court of Appeals has already held in ***FMF Development Corporation vs. CIR***:

> Petitioner's alleged failure to protest the questioned assessment within the 30-day period provided under Section 228 of the NIRC will not remove it from the Tax Court's jurisdiction on the ground that only seasonably 'disputed' assessments may be reviewed by said court under Republic Act No. 1125, Section 7 of the said law provides:
>
> Sec. 7. Jurisdiction. – The Court of Tax Appeals shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided –
>
> (1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under the National Internal Revenue Code or other laws or part of law administered by the Bureau of Internal Revenue,...
>
> **The phrase 'other matters arising under the National Internal Revenue Code' is broad and encompassing enough to include the issue of prescription raised by petitioner. Besides, before the appellate courts, there is no other better or more competent forum**

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> **before which petitioner can challenge the questioned assessment, other than the Court of Tax Appeals which has developed the expertise to pass upon tax matters.** (emphasis supplied)

From the foregoing it is unmistakable that the Court of Tax Appeals has jurisdiction to take cognizance of the instant case.

6. Petitioner specifically denies paragraphs 13 and 14 of the *Amended Answer*, the truth of the matter is that, as explained in paragraphs 17 to 20 of the Amended Petition for Review, the assessment by the Respondent on the expanded withholding tax was made on expenses that were not covered by the tax, and expenses for which the tax was already paid. Hence, there is no basis to disallow these expenses as deductions and to add them back in order to re-compute taxable income.

7. Petitioner specifically denies paragraphs 14 and 15 of the *Amended Answer*, the truth of the matter being as stated in the preceding paragraphs of this *Reply*. Moreover, the assessments were incorrectly made and the Formal Assessment Notice and Demand Letter dated January 24, 2004, and hence, the Final Decision on Disputed Assessment dated April 5, 2004, are null and void."

During trial, the parties presented their respective documentary and testimonial evidence.

On September 17, 2009, the case was submitted for decision upon petitioner's submission of its Memorandum on August 6, 2009, without respondent's Memorandum. However, on September 22, 2009[18], respondent filed a Manifestation and Motion, stating that he is adopting all his arguments

[18] Posted on September 8, 2009

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and affirmative defenses found in his Amended Answer filed on September 12, 2008, the Final Decision on Disputed Assessment dated April 5, 2004, the other documents found in the BIR records of this case, and the testimonies of respondent's witnesses as part of his Memorandum.

On October 12, 2009, the Court issued a Resolution noting respondent's Manifestation and Motion and declaring the case submitted for decision.

The issues[19], as jointly stipulated by the parties, are the following:

> "1. Whether or not the Formal Assessment Notices for deficiency income tax, VAT, expanded withholding tax, fringe benefit tax and documentary stamp tax issued by the BIR, for taxable year 1999 were validly served to petitioner.
>
> 2. Whether or not the Formal Assessment Notices for deficiency income tax, VAT, expanded withholding tax, fringe benefit tax and documentary stamp tax issued by the BIR to petitioner has already became final and executory, pursuant to Section 228 of the 1997 Tax Code.
>
> 3. Whether or not the Final Decision on the Disputed Assessment dated April 5, 2004 and the Formal Assessment Notices for deficiency income tax, VAT, expanded withholding tax, fringe benefit tax and documentary stamp tax issued by the BIR to petitioner, for taxable year 1999 are null and void.
>
> 4. Whether or not the filing of the instant Petition for Review was premature.
>
> 5. Whether or not petitioner is liable to pay the assessed deficiency Income Tax for taxable year 1999 on the following grounds:

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[19] Docket, pp. 858-860

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a. That petitioner per comparison of its cash receipt book and sales reported on its financial statement has an undeclared sales in the amount of P5,773,832.64, in violation of Section 32 of the Tax Code.

b. That petitioner failed to pay and/or remit the taxes withheld on the following income payments – Outside services (P1,020,420.00); Advertising (P1,717,731.00); Royalties (P5,770.64); Repairs & Maintenance (P918,315.00); Fringe Benefits (P1,135,731.00) and Indirect Labor (P1,210,468.00), in violation of Section 34(K) of the Tax Code.

c. That petitioner's income tax return for taxable year 1999 showed a taxable income of P11,782,268.28, instead of break-even. Accordingly, the Minimum Corporate Income Tax in the amount of P692,968.00 has already been forwarded to the succeeding periods, pursuant to Section 27(E) of the NIRC, hence, the same should be disallowed.

6. Whether or not petitioner is liable to pay the assessed deficiency Value-added Tax for taxable year 1999 on the following grounds:

a. That petitioner per analysis of its cash receipt book and sales reported per VAT returns has an undeclared sales in the amount of P110,901.04, in violation of Section 106 of the Tax Code.

b. That petitioner has an overclaimed input tax in the amount of P1,812,257.78, per comparison of the schedules it submitted and claimed per VAT returns, in violation of Section 110 of the tax Code.

c. That the input taxes claimed by petitioner in the amount of P1,845,152.28 should be disallowed for its non-compliance of invoicing and accounting requirements for VAT-registered persons pursuant to Section 113 of the Tax Code.

7. Whether or not petitioner is liable to pay the assessed deficiency Expanded Withholding Tax for taxable year 1999 for failure to withhold the required expanded withholding tax on its income payments for outside services, advertising, royalties, repairs & maintenance

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and indirect labor, in violation of Section 57 of the Tax Code, as implemented by Revenue Regulations No. 2-98, as amended.

8. Whether or not petitioner is liable to pay the assessed deficiency Fringe Benefit Tax for taxable year 1999 for failure to subject to tax the fringe benefit it claimed, in violation of Section 34(A) of the Tax Code, and Revenue Regulations No. 3-98.

9. Whether or not petitioner is liable to pay the assessed deficiency Documentary Stamp Tax for taxable year 1999 for failure to present proof of payment of DST on its Capital Stock Subscribed prior to 1998, in violation of Section 175 of the Tax Code.

10. Whether or not petitioner is liable to pay the assessed penalties for its failure to file on time their VAT returns for the month of May, June and September, 1999."

In resolving the issues submitted for resolution, this Court shall discuss the same jointly and simultaneously. However, in view of petitioner's availment of the Tax Amnesty Program, some of the above-mentioned issues are no longer applicable. Hence, as stated in petitioner's Amended Petition for Review, the issues[20] are modified as follows:

"I.

THE ASSESSMENT IS NULL AND VOID SINCE:

- THE PETITIONER HAS NOT BEEN SERVED A FORMAL ASSESSMENT NOTICE, AND
- THE FORMAL ASSESSMENT NOTICE IS VOID AB INITIO HAVING BEEN ISSUED ON THE DAY THE PRELIMINARY NOTICE WAS RECEIVED BY PETITIONER.

[20] Docket, p. 1493

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II.

SINCE NO VALID ASSESSMENT HAS BEEN MADE, THE THREE-YEAR PERIOD FOR ASSESSMENT UNDER SECTION 203 OF THE NATIONAL INTERNAL REVENUE CODE HAS PRESCRIBED.

III.

THE ASSESSMENT MADE BY THE RESPONDENT IN ITS PRELIMINARY ASSESSMENT MADE AS REGARDS THE DEFICIENCY WITHHOLDING TAX IS WITHOUT LEGAL OR FACTUAL BASIS"

Assessment is null and void since petitioner was not served a Formal Assessment Notice

Petitioner alleges that it has not been served a Formal Assessment Notice. On the other hand, respondent claims that the said FAN was sent to petitioner through registered mail on January 25, 2003.[21]

First and foremost, a careful perusal of the records of this case would reveal that the FAN dated January 24, 2003 was sent by registered mail by BIR Revenue Region No. 8, through the Makati Central Post Office, on January 25. 2003. Subsequently, it was dispatched to the Taguig Central Post Office on January 27, 2003. However, on February 3, 2003, the said FAN was returned to Makati Central Post Office and post-marked as "Return to Sender: Addressee refused to receive."[22]

In support of its claim, petitioner's witness, letter-carrier of Taguig Post Office, Danilo Enriquez, testified that he forwarded the said FAN to

[21] Exhibit "15-a"
[22] Exhibit "15-b"

Kilometer 15, South Super Highway, Parañaque, upon reading the address on the envelope, which read Tierra Factors, to wit:

"ATTY. COCHINGYAN:

Okay, your Honors.

Q. Mr. Witness, meron po akong ipapakita sa inyong isang envelope on page 432 of the BIR docket and marked as Exhibit 'S-6' meron ditong nakasulat FRWD to Kilometer 15 SS Hi-way Parañaque, tapos RTS-Refuse to Receive sino po ang nagsulat nito?

MR. ENRIQUEZ:

A. Ako na po ang nagsulat ng Forward to Kilometer 15 South Super Hi-way.

ATTY COCHINGYAN:

Q. So itong FRWD to Kilometer 15 SS Hi-way, PQUE, ang tinutukoy nito ay forward to Kilometer 15 South Super Hi-way, Parañaque?

MR. ENRIQUEZ:

A. Opo

xxx xxx xxx

ATTY. COCHINGYAN:

All right.

Q. Bakit sinabi niyong 'forwarded to Kilometer 15'?

MR. ENRIQUEZ:

A. Kasi po dinala ko po ito sa Puratos Philippines, nakita ko lang po wala itong Tierra Factors Building, kasi po hindi naman sa kanila ang Puratos, kasi ang Puratos naka-address doon sa Mangustin Corner DBP, kasi dati po Tierra Factor ang naka-building doon talaga, wala na po itong Tierra Factor na ito, kasi tatlong taon na po akong nag-deliver sa FTI kaya alam ko po.

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Ito pong Tierra Factor na ito naglagay po doon sa may pintuan ang nakalagay doon Forward to Kilometer 15 South Super Hi-way Parañaque, kaya doon ko po ito pinorward."[23]

Upon cross-examination, the counsel for respondent failed however to dislodge the perception of letter-carrier Danilo Enriquez that the FAN was intended for an addressee by the name "Tierra Factors", and in fact emphasized it even more, to wit:

"ATTY ARPON:

Okay.

Q. Sinabi mo kanina na doon naman sa isang sulat na may number 3263 na hindi na-receive ng Puratos Philippines, Inc.?

MR. ENRIQUEZ:

A. Opo

ATTY. ARPON:

Q. At saka ipinoward mo sa?

MR. ENRIQUEZ:

A. Kasi nakalagay po doon ang Tierra Factors, eh, kasi po wala na 'yan eh, kaya po nung nag-deliver ako diyan nakita ko sa may pintuan doon na 'Forward to Kilometer 15 South Super Hi-way Parañaque.'

ATTY. ARPON:

Q. Sinabi mo kanina na hindi ito na-receive itong letter, mail envelope with number 3263 ng Puratos Philippines, Inc.?

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[23] TSN dated January 24, 2006, pages 42-46

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MR. ENRIQUEZ:

A. Kasi wala na po doon 'yung Tierra Factors.

ATTY. ARPON:

Q. Tierra Factors?

MR. ENRIQUEZ:

A. Opo

xxx xxx xxx

MR. ENRIQUEZ:

A. Opo kasi nga po Puratos Philippines nga angkaso nga po ang nakalagay na address Tierra Factors.

ATTY. ARPON:

Q. Sabi mo kanina may note doon sa may entrance?

MR. ENRIQUEZ:

A. Opo, doon sa may pintuan.

ATTY. ARPON:

Q. Ano ba 'yung note na 'yun na nakalagay sa entrance?

MR. ENRIQUEZ:

A. Nakalagay po doon 'Forward to Kilometer 15 South Super Hi-way Parañaque.

ATTY. ARPON:

Q. Ano 'yung ipo-forward doon sa Kilometer 15?

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MR. ENRIQUEZ:
A. Ito po 'yung, kung ano daw po itong Tierra Factor na ito."[24]

Based on the above testimony of letter-carrier Danilo Enriquez, it is clear that the FAN with attached Details of Discrepancies dated January 24, 2003 was not actually served on petitioner because it was returned to the Makati Central Post Office, since it was addressed to Tierra Factors.

Petitioner also claims that after respondent sent a letter to petitioner dated January 13, 2004, requesting petitioner to submit certain requirements in relation to the re-investigation of its 1999 internal Revenue tax liabilities, several revenue officers have visited its new office at Mangosteen Road to examine its books and records in connection with the reinvestigation. In fact, petitioner further avers that Revenue Officer Maribeth Feliciano testified that she went to petitioner's new office to personally serve the notice of Informal Conference dated October 28, 2002.[25] Moreover, petitioner states that on April 19, 2004, its counsel wrote a letter addressed to the Regional Director of Revenue Region No. 8 to inform him that the FAN was never served on petitioner.

On the other hand, respondent alleges that the service of the FAN on petitioner at its former business address is valid and binding upon petitioner.

This Court does not agree.

In assessment cases, it has been consistently ruled that in case a taxpayer denies receiving an assessment from the BIR, the latter has the

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[24] TSN dated January 24, 2006, pages 58-61
[25] TSN dated January 29, 2009, pages 11-15

burden of proving that indeed a copy of the assessment was sent to the taxpayer.

In the case of **Barcelon, Roxas Securities, Inc. (now known as UBP Securities, Inc.) vs. Commissioner of Internal Revenue**[26], the Supreme Court, citing the earlier ruling of this Court, held that:

> "Jurisprudence is replete with cases holding that if the taxpayer denies ever having received an assessment from the BIR, it is incumbent upon the latter to prove by competent evidence that such notice was indeed received by the addressee. The onus probandi was shifted to respondent to prove by contrary evidence that the Petitioner received the assessment in the due course of mail. The Supreme Court has consistently held that while a mailed letter is deemed received by the addressee in the course of mail, this is merely a disputable presumption subject to controversion and a direct denial thereof shifts the burden to the party favored by the presumption to prove that the mailed letter was indeed received by the addressee *(Republic vs. Court of Appeals, 149 SCRA 351).* Thus as held by the Supreme Court in *Gonzalo P. Nava vs. Commissioner of Internal Revenue,* 13 SCRA 104, January 30, 1965:
>
> > 'The facts to be proved to raise this presumption are (a) that the letter was properly addressed with postage prepaid, and (b) that it was mailed. Once these facts are proved, the presumption is that the letter was received by the addressee as soon as it could have been transmitted to him in the ordinary course of the mail. But if one of the said facts fails to appear, the presumption does not lie. (VI, Moran, Comments on the Rules of Court, 1963 ed, 56-57 citing *Enriquez vs. Sunlife Assurance of Canada,* 41 Phil 269).'
>
> xxx xxx xxx

[26] G.R. No. 157064, August 7, 2006

> The failure of the respondent to prove receipt of the assessment by the Petitioner leads to the conclusion that no assessment was issued. Consequently, the government's right to issue an assessment for the said period has already prescribed. (*Industrial Textile Manufacturing Co. of the Phils., Inc. vs. CIR CTA Case 4885*, August 22, 1996)."

In the case at bar, respondent failed to discharge such duty. It was not able to present substantial evidence to prove that the FAN dated January 24, 2003 was validly sent to and served on petitioner. Based on the foregoing, it is clear that petitioner had not been served a copy of the said FAN, despite the fact that respondent had been informed that petitioner has yet to receive a copy of the FAN. Likewise, based on the evidence presented by petitioner, this Court finds that respondent was actually informed of the new address of petitioner, which is located at Mangosteen St., corner DBP Avenue, FTI Complex, Taguig, Metro Manila, not only through the October and November 2002 VAT Returns filed by petitioner but also due to the fact that respondent's officers have actually visited the new office of petitioner in the course of their re-investigation.

Considering the aforementioned circumstances, it can therefore be concluded that no FAN was validly served on petitioner.

Assessment is null and void for having been issued on the day the PAN was received by petitioner

Petitioner likewise asserts that the FAN is void *ab initio* having been issued on the day the PAN was received by petitioner.

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Records show that the PAN dated January 9, 2003 was received by petitioner on January 24, 2003.[27] On the other hand, the FAN was issued on January 24, 2003.[28]

Petitioner contends that the fact that the FAN was issued on the same day the PAN was received by petitioner is a patent violation of the procedural due process afforded to taxpayers. Petitioner further avers that it was not given any opportunity to dispute the PAN.

This Court agrees with petitioner's contention.

Section 228 of the NIRC of 1997, as amended, and Revenue Regulations Nos. 12-85 and 12-99, and Revenue Memorandum Order No. 37-94 provide for the procedural requirements that must be followed in order for an assessment to be valid. For easy reference, Section 228 of the NIRC of 1997 is hereunder quoted, to wit:

> "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 pre-assessment 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**

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[27] Exhibits "D" and "E"
[28] Exhibit "14"

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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, executory and demandable." *(Emphasis supplied)*

The pertinent provisions of Revenue Regulations No. 12-85 state as follows:

"SECTION 3. *Time to reply. – Venue for filing reply. –*

(a) Regional Office cases - The taxpayer shall reply within a period of fifteen (15) days from receipt of the pre-assessment notice. In meritorious cases and upon written request of the taxpayer an extension may be granted within which to respond, but in no case shall the extension exceed a total of ten (10) days.

xxx xxx xxx

SECTION 5. *Failure to reply to the pre-assessment notices; issuance of assessment.* – In the event the taxpayer fails to respond to the pre-assessment notice within the above prescribed period, or when the Commissioner or his duly authorized representative finds the response to be without merit, he should be informed of such fact and the report of investigation shall be given due course."

Section 3 of Revenue Regulations No. 12-99 is quoted as follows:

"SECTION 3. *Due Process Requirement in the Issuance of a Deficiency Tax Assessment.* –

3.1 Mode of procedures in the issuance of deficiency tax assessment:

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3.1.1 *Notice for informal conference.* – The Revenue Officer who audited the taxpayer's records shall, among others, state in his report whether or not the taxpayer agrees with his findings that the taxpayer is liable for deficiency tax or taxes. If the taxpayer is not amenable, based on the said Officer's submitted report of investigation, the taxpayer shall be informed, in writing, by the Revenue District Office or by the Special Investigation Division, as the case may be (in the case Revenue Regional Offices) or by the Chief of Division concerned (in the case of the BIR National Office) of the discrepancy or discrepancies in the taxpayer's payment of his internal revenue taxes, for the purpose of '**Informal Conference**,' in order to afford the taxpayer with an opportunity to present his side of the case. If the taxpayer fails to respond within fifteen (15) days from date of receipt of the notice for informal conference, he shall be considered in default, in which case, the Revenue District Officer or the Chief of the Special Investigation Division of the Revenue Regional Office or the Chief of Division in the National Office, as the case may be, shall endorse the case with the least possible delay to the Assessment Division of the Revenue Regional Office or to the Commissioner or his duly authorized representative, as the case may be, for appropriate review and issuance of a deficiency tax assessment, if warranted.

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 the law, rules and regulations, or jurisprudence on which the proposed assessment is based xxx. 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

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3.1.4 *Formal Letter of Demand and Assessment Notice.* – The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence, on which the assessment is based, *otherwise, the formal letter of demand and assessment notice shall be void* xxx. The same shall be sent to the taxpayer only by registered mail or by personal delivery. If sent by personal delivery, the taxpayer or his duly authorized representative shall acknowledge receipt thereof in the duplicate copy of the letter of demand, showing the following: xxx" *(Emphasis supplied)*

Revenue Memorandum Order No. 37-94 further provides:

"C. *Review of Reports of Investigation and Service of Pre-assessment Notices.* –

xxx xxx xxx

2. The aforementioned reviewing offices, after having reviewed the report of investigation, shall send a pre-assessment notice to the taxpayer, indicating therein the basis of the assessment, and a definite time frame within which he may protest the same if he is not agreeable. If the taxpayer files his protest within the period prescribed in the aforesaid notice, the same reviewing offices shall likewise decide whether the protest conforms with existing requirements and whether or not to give due course to the protest. The reviewing office shall then inform the taxpayer in writing of the result of the resolution of his protest.

If the pre-assessment notice is not protested within the prescribed period, the reviewing office shall then issue a letter of demand and assessment notice to the taxpayer."

The foregoing provisions of law and regulations clearly illustrate the process to be followed in assessment cases in order that the taxpayer shall be afforded due process. In summary, after the Revenue Officer conducts a re-investigation of the records of a taxpayer for alleged deficiency tax liability,

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the taxpayer shall be notified in writing of the findings for purposes of an Informal Conference. If there exists a sufficient basis to assess the taxpayer of deficiency tax, a Pre-Assessment Notice shall be issued and sent to the taxpayer. The taxpayer is then given fifteen days to make a Reply and is also permitted to examine the records and present his arguments in writing. If the taxpayer fails to respond to the PAN, the taxpayer shall then be sent a Formal Letter of Demand and Assessment Notice, which shall state the facts and the law on which the assessment was based. The taxpayer may file a protest based on such assessment within thirty days. After filing the protest, the taxpayer must submit the relevant supporting documents within sixty days, otherwise the assessment shall become final.

A careful perusal of the records shows that respondent failed to comply with the procedural requirements in assessing petitioner. Specifically, the records indicate that petitioner received the PAN dated January 9, 2003 on January 24, 2003. However, on the same day, respondent issued a FAN, which was sent through registered mail to petitioner's former address at Tierra Factors Building, Electronics Avenue, FTI Compound, Taguig, Metro Manila. As the records would reveal, the said FAN was not received and was returned instead to respondent.

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

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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.

Due process requires that petitioner must actually receive the Pre-Assessment Notice and the Final Assessment Notice. In the case of **Estate of the Late Juliana Diez Vda. De Gabriel vs. Commissioner of Internal Revenue**[29], the Supreme Court ruled:

> "**(D)ue process requires at the very least that such notice actually be received.** In *Commissioner of Internal Revenue v. Pascor Realty and Development Corporation*, we had occasion to say:
>
> > An assessment contains not only a computation of tax liabilities, but also a demand for payment within a prescribed period. It also signals the time when penalties and interests begin to accrue against the taxpayer. To enable the taxpayer to determine his remedies thereon, **due process requires that it must be served on and received by the taxpayer**.
>
> In *Republic v. De le Rama*, we clarified that, when an estate is under administration, notice must be sent to the administrator of the estate, since it is the said administrator, as representative of the estate, who has the legal obligation to pay and discharge all debts of the estate and to perform all orders of the court. In that case, legal notice of the assessment was sent to two heirs, neither one of whom had any authority to represent the estate. We said:

[29] G.R. No. 155541, January 27, 2004

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> The notice was not sent to the taxpayer for the purpose of giving effect to the assessment, and said notice could not produce any effect. In the case of *Bautista and Corrales Tan v. Collector of Internal Revenue* . . . this Court had occasion to state that 'the assessment is deemed made when the notice to this effect is released, mailed or sent to the taxpayer for the purpose of giving effect to said assessment.' **It appearing that the person liable for the payment of the tax did not receive the assessment, the assessment could not become final and executory**. xxx" *(Emphasis supplied)*

In **BPI Data Systems Corporation (formerly Filipinas Management and Leasing Services, Inc.) vs. Commissioner of Internal Revenue**[30], this Court ruled against respondent when he failed to give the taxpayer a chance to respond to a PAN before issuing an assessment, to quote:

> "One of the most basic and fundamental precept of law enshrined in the Constitution is that no person shall be deprived of his property without due process of law (Sec. 1, Art. III, 1987 Constitution). The pervasiveness of the right to due process reaches out to both substantive and procedural rights, regardless of their source, be it the constitution, or only a statute or a rule of court *(Tupas vs. Court of Appeals,* 193 SCRA 597). The procedures granted by law under Sec. 229 of the National Internal Revenue Code is a *statutory right of the taxpayer* which cannot be wantonly disregarded without violating the taxpayer's right to due process.
>
> In the observance of procedural due process, this Court is always mindful that a taxpayer being made liable with his property be given an opportunity to be heard which is one of its essential elements *(Banco Español vs. Palanca,* 37 Phil. 921). **With the failure of the respondent to strictly comply with the procedure prescribed by law and for the failure of the petitioner to receive a copy of the alleged assessment, the latter was not afforded its**

[30] CTA Case No. 4530, January 12, 1994

> **right to be heard for it was denied the opportunity to protest or dispute the alleged assessment.** The respondent utterly failed to establish that the assessment it has conducted is a disputed assessment whereby 'the taxpayer questions an assessment and asks the Collector to reconsider or cancel the same because he believes he is not liable therefor'. *(Morales vs. Collector of Internal Revenue*, 17 SCRA 1018).
>
> Had the taxpayer been given the opportunity to dispute the questioned assessment, then the same may have been given due consideration. **In the absence of any showing that administrative remedies granted by law has been properly exhausted or that petitioner has failed to file a protest on the assessment within the prescribed period despite receipt thereof, this Court could not bestow the presumption of correctness on the said assessment**. xxx" *(Emphasis supplied)*

As there was no Final Assessment Notice sent to petitioner, the subject assessment is void. The High Tribunal in the case of **Commissioner of Internal Revenue vs. Azucena T. Reyes**[31] held that if there is no valid notice sent, the assessment is void, and the reason is that the "law imposes a substantive, not merely a formal, requirement. To proceed heedlessly with tax collection without first establishing a valid assessment is evidently violative of the cardinal principle in administrative investigations: that taxpayers should be able to present their case and adduce supporting evidence."

To reiterate, a void assessment cannot give rise to an obligation to pay deficiency taxes, and it divests the taxing authority of the right to collect them.[32]

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[31] G.R. Nos. 159694 and 163581, January 27, 2006
[32] BASF Coatings Inks Philippines, Inc. vs. Commissioner of Internal Revenue, citing FMF Development Corporation vs. Commissioner of Internal Revenue, CA-G.R. SP No. 73973, February 23, 2004

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In view of the foregoing, the resolution of the other issues is no longer necessary.

WHEREFORE, the Amended Petition for Review is hereby **GRANTED**. Accordingly, the subject assessment is hereby **CANCELLED** and **SET ASIDE**.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

CAESAR A. CASANOVA
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's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division

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