REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 1382** (CTA Case No. 8698)
- versus -	
APEX CHEMICAL CORPORATION, Respondent.	

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APEX CHEMICAL CORPORATION Petitioner,	**CTA EB NO. 1387** (CTA Case No. 8698)
- versus -	Present:
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Del Rosario, P.J., Castañeda, Jr., Bautista, Uy, Casanova, Fabon-Victorino, Mindaro-Grulla, and Ringpis-Liban, JJ.
	Promulgated:
	OCT 14 2016 1:20 p.m.

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D E C I S I O N

CASTAÑEDA, JR., *J.*:

In these consolidated Petitions for Review, both Apex Chemical Corporation (Apex) and Commissioner of Internal Revenue (CIR) seek to reverse and set aside the Decision[1] dated August 26, 2015 and the Resolution[2] dated October 30, 2015.

The dispositive portion of the assailed Decision pertinently reads:

> "**WHEREFORE**, the instant Petition for Review is hereby **PARTIALLY GRANTED.**
>
> Petitioner is hereby **ORDERED TO PAY** deficiency Income Tax, Value-Added Tax and Expanded Withholding Tax for the taxable year ended December 31, 2007, in the modified amount of **FOUR HUNDRED TWENTY EIGHT THOUSAND FOUR HUNDRED NINETY PESOS AND 95/100 (Php428,490.95),** inclusive of the 25% surcharge imposed under *Section 248(A)(3) of the 1997 NIRC*, broken down as follows:
>
> xxx xxx xxx
>
> **SO ORDERED.**"

On the other hand, the dispositive portion of the assailed Resolution reads:

> "**WHEREFORE**, respondent's 'Motion for Partial Reconsideration (Decision promulgated on August 26, 2015)' and petitioner's 'Motion for Reconsideration' are hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

THE FACTS

The following are the facts[3] as found by the Court in Division:

> "Revenue District Office 043B West, Pasig City ('RDO 43B') issued Tax Verification Notice ('TVN') 2003-00121406 dated October 22, 2008, with the attached 'First Notice or Request for

[1] Court Division Docket, Vol. 1, pp. 515-549.
[2] Court Division Docket, Vol. 2, pp. 580-591.
[3] See Note 1, pp. 516-525.

Presentation of Records'('1st RPR'), authorizing Revenue Officer Divina Gracia Ramirez and Group Supervisor Melvin Bedania to verify the supporting documents and/or pertinent records covering all internal revenue taxes of petitioner for taxable year 2007.

On November 5, 2008 and December 15, 2008, petitioner was served the undated 2nd RPR and 3rd RPR, respectively.

On December 29, 2009, RDO 43B issued a letter to petitioner informing the latter that Revenue Officer Daniel Barrairo and Group Supervisor Melvin Bedania were authorized to continue with the verification of the books of accounts and other related records of petitioner, pursuant to the TVN.

On January 18, 2010, petitioner sent a letter to RDO 43B, explaining that its records, documents, inventories and equipment were destroyed by Typhoons Ondoy and Pepeng, enclosed therewith are the Affidavit of Inventory Loss and Destruction of Records executed on November 27, 2009 by one Augusto R. Cruz, Managing Director of petitioner; a Certification issued by Manggahan Barangay Council; and a Certification issued on October 13, 2009 by one Atty. Samson J. Juan, the General Manager of Manila Mahogany Marketing Corporation.

In a letter dated March 26, 2010, RDO 43B reassigned the case to Revenue Officer Genaro S. Guevara and Group Supervisor Onofre S. De Guzman.

On May 14, 2010, petitioner received a 'Five (5) Day Notice Before Sub-poena Duces Tecum' dated May 4, 2010, to which it responded through a Reply-Letter on May 17, 2010.

Respondent issued a Notice of Informal Conference ('NIC') dated September 3, 2010, with the following findings:

xxx xxx xxx

In response, petitioner sent a letter dated September 27, 2010 and received by the Revenue Officer on September 28, 2010, submitting its objections to the findings of respondent. ✓

On January 13, 2011, petitioner received a Preliminary Assessment Notice ('PAN'), which provided the following recomputed deficiency taxes:

xxx xxx xxx

On January 17, 2011, petitioner received a Final Assessment Notice ('FAN') and a Formal Letter of Demand ('FLD'), with the updated discrepancies summed up below:

xxx xxx xxx

On January 26, 2011 and February 16, 2011, petitioner filed its 'Protest to the 2007 PAN' and letter protest 'Re: Apex Chemical Corp. (ACC) 2007 FAN', respectively.

On February 22, 2012, the Regional Director sent a letter to petitioner informing the latter that a FAN and a[n] FLD have been issued. On March 21, 2012, petitioner replied that it has already filed a protest letter to the FAN.

On July 11, 2012, respondent sent petitioner a letter introducing a new set of Revenue Officers to conduct a reinvestigation of its books of accounts and other related records in relation to its tax liabilities for 2007. However, in its letter reply filed on July 23, 2012, petitioner clarified that it did not request for a reinvestigation but questioned the legitimacy of the issuance of the said FAN.

On July 19, 2013, petitioner received a letter from the Regional Director of Revenue Region 7 informing it that due to its failure to submit documents in support of its protest, the case was returned by the investigating officer of RDO 43B recommending the reiteration of the assessments, and stating that the same is their final decision.

Thus, on August 16, 2013, petitioner filed a Petition for Review with the Court, docketed as CTA Case No. 8698.

On October 10, 2013, respondent filed her Answer interposing the following Special and Affirmative Defenses:

> '7. The assessment for calendar year 2007 deficiency Income Tax, Value Added Tax and Expanded Withholding Tax in the amount of **PESOS: SEVEN**

HUNDRED [TWENTY FIVE THOUSAND] TWO HUNDRED SIXTY-ONE [] AND 83/100 (Php725,261.83) was issued in accordance with applicable laws and regulations. The factual and legal bases of the assessments are contained in the [FLD] and [FAN].

8. As alleged by Petitioner in its Petition, it received the Final Decision on July 19, 2013. However, Petitioner failed to submit the required documents in support of its protest within sixty (60) days from the date of filing of its letter of protest, hence, the assessment have already become final, executory and demandable. Consequently, this Honorable Court cannot anymore exercise jurisdiction over Petitioner's Petition for Review.

Section 3.1.5 of Revenue Regulation No. 12-99 provides as follows:

xxx xxx xxx

9. A perusal of the Protest Letter to the [PAN] and [FAN] of the Petitioner does not stand the test as required by the parameters provided under RR 12-99.

10. As to the issue of the validity of the [TVN], it must be noted that the same was duly revalidated on February 23, 2009. Hence, the TVN is still valid and can be used as an authority to make assessment.

11. Further, Section 203 of the [1997 NIRC] provides for the prescriptive period to make assessment, to wit:

xxx xxx xxx

12. The [PAN] with Details of Discrepancy was duly issued on December 17, 2010, hence, issued before the expiration of the three (3) year prescriptive period to make assessment counted from the date of filing of the return which in this case is on April 2008.

13. Therefore, Respondent has the right to make assessment on Petitioners Income tax in the amount of PhP602,284.64, Value Added Tax in the amount of PhP111,072.00 and Expanded Withholding Tax in the amount of PhP11,905.19 for taxable year 2007;

14. Assuming por arguendo that the instant Petition was filed within the period provided by law, the details of discrepancies disclosed the following:

xxx xxx xxx

15. It must be noted that the Petitioner was given an opportunity to dispute the Assessments issued to them when the Respondent granted their request for reinvestigation. However, the same was futile because it failed to submit the documents that would support its allegations and to refute the assessments issued against it.

16. Hence, the failure of the Petitioner to submit substantial documents during the period of reinvestigation to refute the assessments made results in the finality of the assessments made.

xxx xxx xxx'

On December 16, 2013, the parties filed their 'Joint Submission (of the admitted/stipulated facts and issues to be resolved)'('JSFI') and thus a 'Pre-Trial Order' was issued on February 4, 2014.

On March 19, 2014, petitioner filed its 'Formal Offer of Exhibits of Petitioner,' which was resolved by the Court on April 25, 2014.

On the other hand, respondent filed her 'Formal Offer of Evidence' on June 25, 2014, to which petitioner responded with a 'Comment on Respondent's Formal Offer of Evidence' on July 9, 2014.

On July 15, 2014, the Court issued a Resolution admitting the exhibits offered in respondent's 'Formal Offer of Evidence,' as well as granting the parties thirty (30) days from notice, within which to file their respective memoranda.

On August 4, 2014, respondent filed its 'Respondent's Memorandum,' while petitioner filed its 'Memorandum for the Petitioner' on August 27, 2014.

Thus, on September 1, 2014, the Court promulgated a Resolution submitting the case for Decision." Jr

On August 26, 2015, the Court in Division rendered the assailed Decision. On September 10, 2015, the CIR filed his Motion for Partial Reconsideration (Decision promulgated on August 26, 2015).[4] On September 21, 2015, Apex likewise filed its Motion for Reconsideration.[5] Subsequently, on October 30, 2015, the Court in Division rendered the assailed Resolution.

On November 11, 2015, the CIR filed his Petition for Review,[6] while on November 24, 2015, Apex also filed its Petition for Review, both before this Court.[7] On May 2, 2016, the Court *En Banc* required the parties to submit their Memoranda.[8] Consequently, on August 8, 2016,[9] the case was deemed submitted for Decision. Hence, this Decision.

THE ISSUES

The parties raised the following issues before this Court: (1) Whether Apex is not required to submit additional documents to support its request for reinvestigation; (2) Whether the assessment for deficiency Value Added Tax (VAT) for the 3rd quarter of taxable year 2007 had already prescribed; and (3) Whether Apex is liable for deficiency income tax, VAT and Expanded Withholding Tax (EWT) for the year ended December 31, 2007. Significantly, Apex likewise asserts that the assessment is void due to non-observance of its right to due process.

THE RULING

We rule in favor of Apex.

Non-observance of the 15-day period to protest the PAN and the issuance of the FANs prior to the taxpayer's receipt of the PAN violates its right to due process

In this regard, the Court in Division found that:

> "On the matter of the FAN being issued ahead of the protest to the PAN, a perusal of the records reveal that the PAN was indeed issued by respondent on December 17, 2010 and

[4] Court in Division Docket, Vol. 1, pp. 550-558.
[5] Court in Division Docket, Vo. 2, pp. 559-564.
[6] Court *En Banc* Docket, CTA EB. No. 1382, pp. 1-11.
[7] Court *En Banc* Docket, CTA EB No. 1387, pp. 1-12.
[8] Court *En Banc* Docket, CTA EB No. 1382, pp. 71-73.
[9] Court *En Banc* Docket, CTA EB No. 1382, pp. 104-105.

> received by petitioner on January 13, 2011, to which petitioner filed its protest on January 26, 2011. While on January 7, 2011, respondent issued a[n] FD and its FANs, which were received by petitioner on January 17, 2011 and protested to by the latter on February 16, 2011."[10]

However, the Court in Division concluded that:

> "It must be emphasized that due process in our jurisdiction refers to the right of the taxpayer to be informed of the legal and factual findings of the BIR as regards the former's deficiency taxes, and the opportunity to be heard through protest. A PAN is preparatory to the issuance of a FAN, and is not, legally speaking, an assessment even if it contains a computation of the tax liabilities of a taxpayer and a demand for payment of the computed tax. *Section 228 of the 1997 NIRC* clearly refers to the FAN, which should be formally protested to by the taxpayer before it becomes final and executory.
>
> Hence, the protest against PAN, unlike the protest against the FAN, is not indispensable. A PAN may or may not even be protested to by the taxpayer, and non-protest thereof shall not make it final and non-appealable. Thus, the issuance of the FAN before the lapse of the fifteen (15)-day period for the taxpayer to file its protest to the PAN, inflicts no prejudice on the taxpayer as the latter is properly served a FAN, which it was able to intelligently contest by filing a protest letter thereto within the period provided by law."[11]

The Court in Division's ruling is anchored on the pronouncement of this Court's Second Division in the case of *Medtex Corporation v. Commissioner of Internal Revenue.*[12] In that case, respondent CIR issued a PAN against petitioner on August 18, 2011 which was received by petitioner on September 9, 2011. On September 23, 2011, petitioner filed a protest against the PAN. Consequently, on February 22, 2012, respondent CIR issued a revised PAN, which petitioner received on March 9, 2012. Thus, petitioner filed a protest against the revised PAN on March 23, 2012. On the same date, or on March 23, 2012, however, respondent CIR issued an FLD with Details of Discrepancies and Audit Results/Assessment Notices. In view of the said factual findings, this Court's Second Division ruled in *Medtex* that:

> "Records revealed that petitioner successfully protested the Preliminary Assessment Notice dated August 18, 2011 Je

[10] See Note 1, p. 528.
[11] Id., pp. 528-529.
[12] CTA Case No. 8508, September 1, 2014.

> assessing petitioner for deficiency taxes for calendar year 2006 in the amount of ₱45,832,137.62. As a result, respondent revised the Preliminary Assessment Notice on February 22, 2012, assessing petitioner for deficiency taxes in the reduced amount of ₱539,624.41. Considering the foregoing, petitioner was clearly afforded due process."[13]

However, *We* find that *Medtex* is not on all fours with the present case.

In *Medtex*, the protest of the taxpayer was considered by the CIR which resulted in the issuance of a revised PAN. Therefore, notwithstanding the issuance of FAN on the same date the taxpayer filed its protest against the revised PAN, the taxpayer's right to due process was not disregarded considering that its prior protest was considered by the CIR. Thus, the taxpayer was afforded the opportunity to be heard through its protest to the first PAN.

Contrary to *Medtex*, Apex' right to be heard was altogether disregarded by the CIR. Here, Apex was, indeed, deprived of its right to be heard with respect to the PAN when the FAN was issued before the lapse of the 15-day period to protest the PAN. The CIR had no reasonable opportunity to consider Apex' protest to the PAN, unlike in *Medtex* which even resulted in a revision of the PAN.

In the more recent ruling of this Court, *We* ruled that the 15-day period afforded to a taxpayer to protest a PAN is an important part of the due process requirement in the issuance of a deficiency tax assessment.

In *Commissioner of Internal Revenue v. Hermano (San) Miguel Febres Cordero Medical Education Foundation (De La Salle – Health Science Institute), Inc.*,[14] this Court extensively discussed the importance of the 15-day period to protest the PAN, as follows:

> "As oft-repeated, Section 228 of the NIRC of 1997, as amended and RR No. 12-99, specifically Section 3.1.2 thereof, prescribed a fifteen (15)-day period from receipt of a PAN within which a taxpayer may respond thereto. It is well-settled that 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 respondent's right to be heard with regard to its positions or arguments against the PAN, the BIR clearly violated

[13] Id., pp. 14-15.
[14] CTA EB No. 1151, February 17, 2015, penned by Presiding Justice Roman G. Del Rosario.

respondent's right to due process as enshrined in Section 228 of the NIRC of 1997, as amended 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 *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.*, 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 petitioner was given ample opportunity to contest the Formal Letter of Demand dated January 9, 2009 and Assessment Notice No. 54-2005, **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*, the Supreme Court categorically ruled that the non-compliance with statutory and procedural due process renders the final assessment notice as null and void, *viz*:

> 'In short, respondent merely relied on the findings of the Center which did not give PSPC ample opportunity to air its side. 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. xxx
>
> xxx xxx xxx'

It is worthy to note that, in a number of cases, the Court of Tax Appeals (CTA) has declared void any assessment that fails to comply with the due process requirement.

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

Similarly, in *Puratos Philippines, Inc. vs. Commissioner of Internal Revenue*, 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.'

The above rulings were reiterated in *Yumex Philippines Corporation vs. Commissioner of Internal Revenue* wherein the assessments were cancelled on the ground of non-observance by the CIR of the 15-day period granted to the taxpayer to respond to the PAN, *viz:*

> 'Respondent violated Section 228 of the NIRC of 1997, as amended, and the provisions of Revenue Regulations No. 12-99, which give the taxpayer a period of fifteen days within which to reply to the PAN. **In view of respondent's violation of petitioner's right to due process, the assessment would thus be considered void**.'

In view of the palpable violation of respondent's right to procedural due process pursuant to Section 228 of the NIRC of 1997, as amended, and the provisions of RR 12-99, the Formal Letter of Demand dated January 9, 2009 and Assessment Notice No. 54-2005- - being fatally infirmed - - should be considered void.

Truth to tell, a void assessment bears no fruit and it cannot give rise to an obligation to pay deficiency taxes. In the absence of a valid assessment, there is no legal basis for petitioner to collect from respondent, through the Preliminary Collection Letter dated March 4, 2010, the deficiency EWT in the aggregate amount of Php3,531,893.24 (inclusive of interest and compromise penalty) for fiscal year ending May 31, 2005." *ju*

Moreover, this Court notes that not only did the CIR fail to observe Apex'15-day period to file a protest against the PAN, the CIR likewise issued the FANs as early as January 7, 2011, or even before Apex received the PAN on January 13, 2011. In other words, the CIR already prejudged that Apex is liable to pay the subject deficiency taxes, which further violates Apex' right to due process.

Hence, *We* find that the subject assessments are void, for failure of the CIR to observe the 15-day period of Apex to file a protest to the PAN, and for issuing the FANs where the PAN is yet to be received by Apex, which is tantamount to a prejudgment that Apex is liable to pay the said deficiency taxes and is therefore violative of its right to due process. Consequently, considering that the subject assessments are void, this Court need not resolve the other issues raised by the parties.

WHEREFORE, petitioner Apex Chemical Corporation's Petition for Review in CTA EB No. 1387 is **GRANTED**. On the other hand, petitioner Commissioner of Internal Revenue's Petition for Review in CTA EB No. 1382 is **DENIED**, for lack of merit. Accordingly, the Decision dated August 26, 2015 is modified as follows:

> "**WHEREFORE**, the instant Petition for Review is **GRANTED**. Accordingly, Assessment Notices with Demand No. 043B-B060-07 are **CANCELLED**."

SO ORDERED.

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

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding 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 Associate Justice	**MA. BELEN M. RINGPIS-LIBAN** Associate Justice

CERTIFICATION

Pursuant to Section 13 of Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice