REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 1771** (CTA Case No. 8935)
- versus -	Present: **DEL ROSARIO,** *P.J.*, **CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** *and* **MANAHAN,** *JJ.*
ARTURO E. VILLANUEVA, Respondent.	Promulgated: MAR 13 2019 3:58 p.m.

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DECISION

RINGPIS-LIBAN, *J.*:

The Case

Before the Court is a Petition for Review seeking the nullification of the Decision[1] dated August 18, 2017 ("Assailed Decision") and Resolution[2] dated January 10, 2018 ("Assailed Resolution") of the Court of Tax Appeals First Division ("First Division"), cancelling the assessments Petitioner issued against Respondent for deficiency income tax and value-added tax ("VAT") for taxable year 2006 in the aggregate amount of Php30,723,951.10.

The Facts

The facts as found by the First Division are as follows:

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[1] Penned by Associate Justice Cielito N. Mindaro-Grulla, with Presiding Justice Roman G. del Rosario and Associate Justice Erlinda P. Uy concurring. Docket, pp. 540-560.

[2] Penned by Associate Justice Cielito N. Mindaro-Grulla, with Presiding Justice Roman G. del Rosario and Associate Justice Erlinda P. Uy concurring. *Id.*, pp. 590-593.

"[Respondent] is engaged in the business of providing hauling services under the name Producers Connection Logistics, with registered address at No. 324 Younger St., Balut, Tondo, Manila.

On the other hand, [Petitioner] Commissioner of Internal Revenue is the head of the Bureau of Internal Revenue (BIR), vested under the appropriate laws with the authority to carry out the functions, duties and responsibilities of said office, including the power to decide disputed assessments and cancel and abate tax liabilities pursuant to the provisions of the National Internal Revenue Code (NIRC) of 1997, as amended. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

For taxable year 2006, [Respondent] filed with the Bureau of Internal Revenue his Annual Income Tax Return (ITR) and Quarterly VAT Returns, among other tax returns, on the dates prescribed by law.

On July 11, 2008, [Respondent] received Letter Notice No. 029-WE-I-00-00041 dated June 20, 2008. Meanwhile, on May 14, 2009, he received a follow-up letter (Tax Reconciliation System). Thereafter on June 15, 2009, [Respondent] received Letter of Authority No. 2001-00012853 dated June 8, 2009 and the First Request for Presentation of Records.

[Respondent] then received the 1st Call-up dated May 23, 2011 from Revenue District Office (RDO) No. 29 for the collection of deficiency income tax and VAT in the amounts of [Php]23,349,944.59 and [Php]7,374,006.51, respectively.

On June 21, 2011, [Respondent] received a Final Notice Before Seizure (FNBS) dated June 6, 2011, issued by RDO No. 29 of Revenue Region No. 6-Manila.

On July 13, 2011, [Respondent] sent a reply-letter to RDO No. 29, seeking clarification with regard to the 1st Call-up and FNBS, and requesting a clarification and re-investigation of his case.

On September 6, 2011, [Respondent] received a letter dated August 31, 2011 from the Regional Director of Revenue Region No. 6-Manila.

[Respondent] received a Collection Notice dated October 29, 2012 from the BIR. Petitioner then requested for the revocation of the Collection Notice on November 14, 2012, but the same was denied in a letter issued by [Petitioner] through the Chief of Collection Division of Revenue Region No. 6-Manila.

On December 13, 2013, [Respondent] sent a letter dated December 11, 2013 to the Regional Director of Revenue Region No. 6-Manila, requesting reconsideration of the denial of the request for revocation of the collection notices issued by [Petitioner]. Then, on October 31, 2014, [Respondent] received a letter dated October 14, 2014, issued by the Regional Director of Revenue Region No. 6-Manila, denying [Respondent]'s request for reconsideration and reinvestigation.

Accordingly, on November 25, 2014, [Respondent] filed the instant Petition for Review before this Court. [Petitioner] filed his Answer thereto on January 13, 2015."[3]

The Ruling of the First Division

On August 18, 2017, the First Division promulgated the Assailed Decision granting the Petition for Review, the dispositive portion of which reads:

"**WHEREFORE**, premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, the assessments against [Respondent], requiring the payment of deficiency income tax and VAT, plus all delinquency increments incident to the tax liabilities of [Respondent] for taxable year 2006 in the aggregate amount of [Php]30,723,951.10 are hereby **CANCELLED** and **WITHDRAWN**.

SO ORDERED."[4]

The Assailed Decision cancelled the deficiency income tax and VAT assessments against Respondent for taxable year 2006 since Petitioner was not able to clearly establish any substantial under-declaration and/or fraud on the part of Respondent's income tax and VAT returns. Hence, the three (3) year period within which to assess internal revenue taxes under Section 203 of the National Internal Revenue Code ("NIRC") of 1997, as amended, has already lapsed when the Formal Letter of Demand ("FLD") was issued on January 24, 2011.

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[3] *Id.*, pp. 541-543.
[4] *Id.*, pp. 559-560.

Aggrieved, Petitioner filed a "Motion for Reconsideration"[5] on September 07, 2017, which the First Division denied in the Assailed Resolution on January 10, 2018, thus:

> "**WHEREFORE**, in view of the foregoing, [Petitioner's] Motion for Reconsideration (Re: Decision promulgated August 18, 2017) is **DENIED** for lack of merit.
>
> **SO ORDERED.**"[6]

In denying Petitioner's Motion for Reconsideration, the First Division reiterated its finding that there was no substantial under-declaration and/or fraud in the instant case, for which the ten (10) year prescriptive period applies.

On January 29, 2018, Petitioner filed the present "Petition for Review"[7].

On February 13, 2018, the Court issued a Resolution[8] which ordered Respondent to comment on the Petition for Review. Consequently, on April 10, 2018, Respondent filed his "Comment/Opposition (Re: Petitioner's Petition for Review)"[9].

On May 04, 2018, the Court issued a Resolution[10] submitting the instant case for decision.

<u>The Issues</u>

Petitioner raises the following grounds in support of its petition:

1) The First Division erred in holding that the assessments are barred by prescription; and

2) The First Division erred in cancelling and withdrawing the assessments despite the fact that the assessments are already final, executory and demandable for failure of Respondent to

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5 *Id.*, pp. 564-569.
6 *Id.*, pp. 592-593.
7 Rollo, pp. 1-11. Record shows that petitioner received the assailed Resolution on January 18, 2018, Docket, p. 588.
8 *Id.*, pp. 46-47.
9 *Id.*, pp. 48-52.
10 *Id.*, pp. 54-55.

file a valid protest within the reglementary period from receipt of the assessments.[11]

The Ruling of the Court

Petitioner claims that Assessment Notice No. 29-06-IT-1217, Assessment Notice No, 29-06-VT-1218 and the FLD, all dated January 24, 2011, were issued and served *via* registered mail to Respondent at his registered address at 324 Younger St., Balut, Tondo, Manila on January 24, 2011, well within the ten (10) year prescriptive period to assess under Section 222(a) in relation to Section 248(B) of the Section 203 of the NIRC of 1997, as amended.

Petitioner maintains that Respondent's Final/Amended Annual Income Tax Return ("AITR") for taxable year 2006 failed to disclose his gross income for the said year amounting to Php31,164,900.67. This under-declaration of more than thirty percent (30%) constitutes fraud. Assuming without conceding that it cannot be considered as fraud, the said AITR falls within the ambit of a false return. Hence, the ten (10) year period of limitation for assessment applies.

Lastly, the subject tax assessments are already final, executory and demandable for failure of Respondent to file a valid protest within thirty (30) days from receipt of the FLD.

Petitioner's arguments must perforce fail.

At the outset, Petitioner presents no new argument to persuade Us that it has a meritorious case. In fact, the instant Petition for Review is a mere reproduction of the "Motion for Reconsideration" filed by Petitioner on September 07, 2017 before the Court in Division, the issues have been extensively addressed by this Court in the Assailed Decision and Assailed Resolution. Nevertheless, we will discuss at length, once again, the demerits of Petitioner's arguments which may serve as a guidepost in deciding issues of similar nature in the future.

For violating Petitioner's right to due process, the subject assessment is void

As there is an allegation that the FLD was not received by Respondent in its "Comment/Opposition (Re: Petitioner's Petition for Review)", the Court deems it proper to resolve this before delving into the other matters.

[11] *Id.*, p. 4.

The requirement of informing the taxpayer of the assessment is mandatory in nature as provided in Section 228 of the NIRC of 1997, as amended, and Section 3 of Revenue Regulations (RR) No. 12-99, the pertinent portions of which are quoted hereunder for ready reference:

> "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:
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> 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.
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> 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.
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> If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable."[12]
>
> "SECTION 3. *Due Process Requirement in the Issuance of a Deficiency Tax Assessment.* –

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[12] *Emphasis supplied.*

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

xxx xxx xxx

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* (see illustration in ANNEX B hereof). 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: (a) His name; (b) signature; (c) designation and authority to act for and in behalf of the taxpayer, if acknowledged received by a person other than the taxpayer himself; and (d) date of receipt thereof."

Section 228 of the NIRC of 1997, as amended, provides that taxpayers must be informed of the facts and the law upon which the assessment was made; otherwise, the assessment will be void. In addition, the taxpayer is granted the opportunity to protest the assessment within thirty (30) days from receipt thereof and if the protest is denied or not acted upon by Petitioner within a given period of time, the taxpayer is given another remedy of filing an appeal before this Court.

Furthermore, Section 3 of RR No. 12-99, which laid down the due process requirement in the issuance of a deficiency tax assessment, clearly requires the sending of the FLD by Petitioner and the receipt thereof by the taxpayer as part of due process in the issuance of assessments.

After a careful scrutiny of the records, the Court finds that there was no valid service of the FLD to Respondent in this case.

Let it be stressed that it is imperative for Petitioner to satisfactorily prove the release, mailing or sending of the FLD. This was the pronouncement of the Supreme Court in the case of *Barcelon, Roxas Securities Inc. vs. Commissioner of Internal Revenue*[13], citing the case of *Nava vs. Commissioner of Internal Revenue*[14], the pertinent portion of which reads:

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[13] G.R. No. 157064, August 07, 2006.
[14] G.R. No. L-19470, January 30, 1965.

> "While we have held that an assessment is made when sent within the prescribed period, even if received by the taxpayer after its expiration, **this ruling makes it the more imperative that the release, mailing or sending of the notice be clearly and satisfactorily proved. Mere notations made without the taxpayer's intervention, notice or control, without adequate supporting evidence cannot suffice**; otherwise, the taxpayer would be at the mercy of the revenue offices, without adequate protection or defense."[15]

On this matter, Petitioner's witness, Mr. Armando C. Macatangay, Administrative Assistant III, Records Section, BIR Revenue Region No. 6 Manila, testified that he mailed the subject Assessment Notices and FLD.[16] As proof thereof, Respondent presented Registry Receipt No. 903220 dated January 24, 2011[17].

In this regard, it must be noted that Section 3(v) of Rule 131 of the Rules of Court provides that a letter duly directed and mailed is deemed received in the regular course of the mail.

However, 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 proven, 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.[18]

In view of the Registry Receipt Card and the testimony of Mr. Macatangay, the Court finds that the Assessment Notices and the FLD were properly mailed.

Nevertheless, while it can be said that Petitioner has established the presumption 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, the same is merely a disputable presumption.

In the case of *Republic of the Philippines vs. The Court of Appeals and Nielson & Co., Inc.*[19] and in *Barcelon, Roxas Securities, Inc. (now known as UBP Securities, Inc.) vs. Commissioner of Internal Revenue*[20], the Supreme Court held that a direct denial of the receipt of the mail shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee.

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15 *Emphasis supplied.*
16 Docket, Judicial Affidavit of Revenue Officer Armando C. Macatangay, pp. 105-108.
17 Exhibit "R-10".
18 Barcelon, Roxas Securities, Inc. v. Commissioner of Internal Revenue, G.R. No. 157064, August 7, 2006.
19 G.R. No. L-38540, April 30, 1987.
20 G.R. No. 157064, August 07, 2006.

Respondent, Mr. Arturo E. Villanueva, Jr. himself, testified that he did not receive any Assessment Notice or FLD for the alleged deficiency taxes for taxable year 2006 from Petitioner.[21] Respondent's denial of the receipt of the FLD was also mentioned in his letter to Petitioner dated December 11, 2013, stating that it never received the FLD.[22]

Since there is a direct denial of the receipt of the mail, the said denial shifts the burden upon Petitioner to prove that the mailed letter was indeed received by Respondent.

However, a scrutiny of the pieces of evidence presented by Petitioner reveals that the same are insufficient to prove that the FLD was indeed received by Respondent in accordance with law and pertinent jurisprudence.

Petitioner mainly presented the alleged FLD and Registry Receipt as proof that said mail matter was received.

In this regard, it bears stressing that mere presentation of the Registry Receipt is not enough to prove that the subject notices were indeed received. Receipts for registered letters and return receipts do not prove themselves; they must be properly authenticated in order to serve as proof of receipt of the letters.[23]

As already mentioned, Mr. Macatangay identified the Registry Receipt. However, as admitted by Mr. Macatangay during the re-cross examination, he merely presumed that the FLD was received.[24]

In the case of *Estate of the Late Juliana Diez Vda. De Gabriel vs. Commissioner of Internal Revenue*[25], the Supreme Court held that it is a requirement of due process that the taxpayer must actually receive the assessment, to wit:

> ". . . the foregoing rule requires that the notice be sent *to the taxpayer*, and not merely to a disinterested party. Although there is no specific requirement that the taxpayer should receive the notice within the said period, due 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:

[21] Docket, Judicial Affidavit of Arturo E. Villanueva, Jr., pp. 152-159.
[22] *Id.*, Exhibit "P-26", p. 442.
[23] *Resterio vs. People of the Philippines*, G.R. No. 177438, September 24, 2012, citing *Ting vs. Court of Appeals*, G.R. No. 140665, November 13, 2000.
[24] Transcript of Stenographic Notes of the May 03, 2016 Hearing, p. 10.
[25] G.R. No. 155541, January 27, 2004.

> 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.**"[26]

Considering that Petitioner failed to discharge the burden of proving that the FLD dated January 24, 2011 was actually received by Respondent or his duly authorized agent, the FLD is deemed to have not been issued by Petitioner.

The subject assessment is not yet final and executory

Following the discussion above, Petitioner's allegation that the FLD dated January 24, 2011 already attained finality for failure to protest the same is devoid of merit since Respondent cannot be expected to protest the FLD without first receiving the same.

Having failed to establish that Respondent's tax returns for 2006 was false or fraudulent, the three (3) year prescriptive period under Section 203 of the NIRC of 1997 applies

Finally, on the issue of the prescriptive period within which to assess Respondent's taxes, Petitioner claims that since Respondent has under-declared sales per Letter Notice No. 029-WE-I-06-00-00041 dated June 29, 2008 in an amount exceeding thirty percent (30%) of that declared per return, such substantial under-declaration rendered Respondent's tax return filed for taxable year 2006 as a false or fraudulent return under Section 248(B) of the NIRC of 1997, as amended. The same creates a *prima facie* evidence of a false or fraudulent return for which the ten (10) year prescriptive period under Section 222 of the NIRC of 1997, as amended, applies.

The Court *En Banc* is not persuaded.

Petitioner failed to establish that Respondent has undeclared sales amounting to Php31,671,388.34. In fact, Respondent declared total sales of Php31,164,900.67 in his AITR. Consequently, Respondent's tax return cannot be construed as false or fraudulent.

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[26] *Emphasis supplied.*

Thus, the Court *En Banc* agrees with the First Division in disposing the issue in the following fashion:

> "Section 248 (B) of the NIRC of 1997, as amended, provides, among others, that a substantial under-declaration of taxable sales, receipts or income, or a substantial overstatement of deductions shall constitute *prima facie* evidence of a false or fraudulent return. It states:
>
> > 'SEC. 248. Civil Penalties. —
> >
> > xxx xxx xxx
> >
> > (B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud: ***Provided*, That a substantial underdeclaration of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, shall constitute *prima facie* evidence of a false or fraudulent return. *Provided*, further, That failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding thirty percent (30%) of actual deductions, shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions, as mentioned herein.** (*Emphasis supplied*)'
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> From the foregoing, it is noteworthy that such substantial under-declaration or failure to report sales or income in an amount exceeding 30% of that declared per return, merely operates as a *prima facie* evidence of fraud, which can still be contradicted by other evidence.

> *Prima facie* evidence is defined as evidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient. *Evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue it supports, but which may be contradicted by other evidence.*
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> In the present case, [Respondent] was able to establish through evidence that he did not willfully or fraudulently conceal his interest income with intent to evade taxes, as he in fact declared correct income in his Annual ITR. Records show, and as pointed out by petitioner, on the 'Tentative' Annual ITR filed on April 7, 2007, he declared total sales in the amount of P31,164,900.67. While Item No. 29 of the Tentative Annual ITR was left blank or without any amount, Item No. 53 contains the amount of P31,164,900.67 as Net Sales/Receipts/Revenues/Fees.
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> In his Final/Amended Annual ITR for taxable year 2006, there was no amount stated in Item Nos. 29 and 53. However, a scrutiny of said ITR would reveal that the Net Income, Taxable Income, and Tax Due declared were in accordance with the financial statements submitted by [Respondent]'s company, showing the amount of P31,164,900.67 as Gross Income. Hence, while the Total Sales was without any amount, there can be no under-declaration of sales because the amounts for Net Income, Taxable Income and Tax Due were properly indicated in petitioner's ITR. Clearly, [Petitioner] failed to demonstrate that petitioner had filed a fraudulent return with the intent to evade tax.
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> Since there is no substantial under-declaration and/or fraud to speak of, Section 203 of the NIRC of 1997, as amended, will apply and the prescriptive period of three years will govern.
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> Records show that [Respondent] filed his Final/Amended ITR for the year 2006 on June 12, 2007. Counting three years from [Respondent]'s filing of the ITR, the BIR had until June 12, 2010. For VAT, the BIR had the following dates within which to assess petitioner for taxable year 2006: (a) 1st Quarter— April 26, 2009; (b) 2nd Quarter—July 26, 2009; (c) 3rd Quarter— October 26, 2009; and (d) 4th Quarter— January 26, 2010. **Nonetheless, in the present case, [Petitioner] admitted that the BIR sent to [Respondent]** the PAN on December 28, 2010 and **the FAN on January 24, 2011, <u>which are beyond the period for assessment</u>.**

> Considering the foregoing, the assessments are indeed barred by prescription. Hence, [Petitioner]'s deficiency assessments for taxable year 2006 are null and void."[27]

WHEREFORE, the Assailed Decision dated August 18, 2017 and Assailed Resolution dated January 10, 2018 are **AFFIRMED**. Accordingly, the Petition for Review filed with the Court *En Banc* on January 29, 2018 is **DENIED** for lack of merit.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

(With Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

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[27] Docket, pp. 557-559; *Emphasis and underscoring supplied.*

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA EB NO. 1771** *(CTA Case No. 8935)*
	Present:
-versus-	**Del Rosario, *P.J.*, Castañeda, Jr., Uy, Fabon-Victorino, Mindaro-Grulla, Ringpis-Liban, and Manahan, *JJ.***
ARTURO D. VILLANUEVA, *Respondent.*	**Promulgated:** MAR 13 2019 3:58 p.m.

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CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* in denying the Petition for Review for lack of merit.

As elucidated in my Concurring Opinion on the assailed Decision, an assessment **may neither attain finality nor be the subject of a lawful execution in situations where the assessment was issued without authority, such as when the Commissioner of Internal Revenue's (CIR) right to assess has prescribed,** or when there is a violation of the taxpayer's right to due process. Thus, in *Metro Star Superama, Inc. vs. Commissioner of Internal Revenue*,[1] the Supreme Court did not **"belabor to discuss the matter of Metro Star's failure to file its protest"** on the ground that **"a void assessment bears no fruit."**

[1] G.R. No. 185371, December 8, 2010.

The Final Assessment Notice (FAN) issued against respondent, having been issued beyond the three-year prescriptive period for the respondent to assess it for deficiency income tax and Value-Added Tax (VAT), is void *ab initio* and without legal effect. Despite respondent's failure to protest the **void FAN** within thirty (30) days from receipt thereof, **it has not attained finality and it does not give rise to an enforceable tax liability against respondent**.

Interestingly, in his Petition for Review, petitioner argues that the ten (10)-year prescriptive period to assess is applicable in this case as there was 100% underdeclaration of income by respondent which is more than the 30% threshold provided in Section 248(B) of the National Internal Revenue Code (NIRC) of 1997, as amended.

Petitioner's argument is specious.

In ***Commissioner of Internal Revenue vs. Asalus Corporation***,[2] the application of the ten (10)-year prescriptive period to assess was applied therein on the basis of the following rationalization:

(1) Pursuant to ***Aznar vs. CTA***,[3] the mere filing of false returns by a taxpayer, **notwithstanding the absence of intent to defraud**, is sufficient to warrant the application of the ten (10) year prescriptive period under Section 222 of the National Internal Revenue Code (NIRC);

(2) Under Section 248(B) of the NIRC, there is ***prima facie* evidence of a false return** if there is substantial underdeclaration of taxable sales, receipt or income in an amount exceeding 30% of what is declared in the returns. When there is a showing that the taxpayer underdeclared its sales, receipt or income, there is a presumption that a false return was filed and the CIR is not required to present evidence to support the falsity of the return, unless the taxpayer overcomes the presumption against it;

(3) The **mere failure of the taxpayer to overcome the presumption of the "falsity of the returns" warrants the application of the ten (10)-year prescriptive period** to assess; and,

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[2] G.R. No. 221590, February 22, 2017.
[3] 157 Phil. 510 (1974).

(4) Most importantly, there was **substantial compliance with the due process requirement of Section 228 of the NIRC**[4] **as the application of the extraordinary period of ten (10) years was <u>categorically stated</u> in the PAN which was cited in subsequent communications of the CIR to the taxpayer**. Thus, the taxpayer was able to file a protest addressing the issue on prescription in its supplemental protest to the FAN.

Thus, in applying the ten-year prescriptive period to assess, the Supreme Court in ***Asalus***, ultimately declared as follows:

> "Considering the **<u>existing circumstances</u>**, the assessment was timely made because the applicable prescriptive period was the ten (10)-year prescriptive period under Section 222 of the NIRC. To reiterate, **there was a *prima facie* showing that the returns filed by Asalus were false, which it failed to controvert**. Also, **it <u>was adequately informed</u> that it was being assessed within the extraordinary prescriptive period.**" (Boldfacing and underscoring supplied)

The doctrinal pronouncement in *Asalus* highlights the following vital circumstances: **<u>one</u>, there was *prima facie* showing that the returns filed by Asalus were false; and, <u>two</u>, Asalus was adequately informed that it was being assessed within the ten (10)-year prescriptive period**.

In the present case, records disclose that **there is nothing in the Preliminary Assessment (PAN) and FAN issued against respondent or in any subsequent communications from petitioner which stated or even suggested that the ten (10)-year prescriptive period to assess respondent for deficiency taxes for the year 2006 was being applied**. While petitioner imposed 50% surcharge on the basic deficiency income tax and on VAT in the Formal Letter of Demand (FLD) and in the FAN, **the existence of fraud / falsity in respondent's tax returns to justify the applicability of the ten (10)-year period to assess was only raised by petitioner in his Memorandum filed with the Court in Division**. If petitioner truly had valid reason to apply the ten (10)-year prescriptive period to assess respondent, then he should have **adequately informed respondent**

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[4] SECTION 228. Protesting of Assessment. — When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: xxx xxx

xxx 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. xxx xxx of such fact at the earliest possible opportunity, or at the very least, at the time of the issuance of the PAN, consistent with the doctrine laid down in ***Asalus***. Due process demands no less.

Anent respondent's argument that the ten (10)-year prescriptive period is applicable as petitioner failed to rebut the *prima facie* showing that its returns were false due to the 100% underdeclaration of income by respondent which is more than the 30% threshold provided in Section 248(B) of the NIRC of 1997, as amended, **I submit that the mere purported existence of *prima facie* evidence of the falsity of tax returns is not sufficient to warrant the application of the ten (10)-year prescriptive period to assess.**

To be sure, when *Asalus* was promulgated on February 22, 2017, it made reference to the doctrine laid down in *Aznar* which states that **"false return implies deviation from the truth, whether intentional or not"**. Thus, *Asalus* declared that:

> "Thus, a mere showing that the returns filed by the taxpayer were false, **notwithstanding the absence of intent to defraud**, is sufficient to warrant the application of the ten (10) year prescriptive period under Section 222 of the NIRC." (Boldfacing supplied)

Since there was a deviation from the truth on the part of the taxpayer, **whether it was intentional or not**, the Supreme Court in *Asalus* found the application of the ten-year prescriptive period warranted.

One (1) month after ***Asalus*** was promulgated, however, the same Division of the Supreme Court made a clarification in ***Commissioner of Internal Revenue vs. Philippine Daily Inquirer***,[5] **declaring that mere entry of wrong information in tax returns due to mistake, carelessness, or ignorance, without intent to evade tax, does not constitute a false return,** *viz.*:

> "Thus, while the filing of a fraudulent return necessarily implies that the act of the taxpayer was intentional and done with intent to evade the taxes due, **the filing of a false return can be intentional or due to honest mistake**. In *CIR v. B.F. Goodrich Phils., Inc.*, the Court stated that **the entry of wrong information due to mistake, carelessness, or ignorance, without intent to evade tax, does not constitute a false return**. In this case, we do not find enough evidence to prove fraud or intentional falsity on the part of PDI." (Boldfacing supplied; citation omitted)

[5] G.R. No. 213943, March 22, 2017.

In light of the pronouncement in ***Philippine Daily Inquirer***, I submit that in applying the ten (10)-year prescriptive period to assess, it is not sufficient that the returns filed by the taxpayer be false but **there must be sufficient evidence to prove that the taxpayer intended to evade tax.**

As applied to the present controversy, while there may be evidence of substantial underdeclaration of income, the *prima facie* presumption that arose therefrom does not extend to the existence of an intent to evade tax that may characterize the return as "false". Otherwise stated, **notwithstanding the *prima facie* evidence of falsity, intent to evade tax is not presumed. It remains indispensable for petitioner to prove that the falsity was done with intent to evade tax.** Thus, to warrant the application of the ten (10)-year prescriptive period to assess, it is incumbent upon petitioner to establish that the filing of the false returns was intentional and not due to honest mistake.

Consistent with ***Philippine Daily Inquirer*, the ten (10)-year prescriptive period could not be applied in this case *sans* any showing that the false returns were filed by petitioner with intent to evade tax.**

On the basis of the foregoing, the FAN issued against respondent, having been issued beyond the three (3)-year prescriptive period for petitioner to assess respondent for deficiency income tax and VAT, is void *ab initio* and without legal effect.

All told, I CONCUR in the result.

ROMAN G. DEL ROSARIO
Presiding Justice