Third Division

NEXT MOBILE, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8516

Members:

Bautista, *Chairperson*
Fabon-Victorino, *and*
Ringpis-Liban, *JJ.*

Promulgated:

DEC 22 2015
2:15 p.m.

x -- x

AMENDED DECISION

BAUTISTA, J:

For resolution are:

1. Petitioner's "Motion for Partial Reconsideration (Of the Decision dated 14 October 2015)" filed on November 4, 2015; with respondent's "Comment (Re: Petitioner's Motion for Partial Reconsideration)" filed on December 2, 2015; and

2. Respondent's "Motion for Partial Reconsideration (Re: Decision dated 14 October 2015)" filed on November 5, 2015; with petitioner's "Comment [On Motion for Partial Reconsideration (Re: Decision dated 14 October 2015) dated 4 November 2015]" filed on December 7, 2015.

On October 14, 2015, the Court promulgated a Decision, disposing of the case as follows:

> **WHEREFORE**, in view of the foregoing, the present Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, petitioner is hereby **ORDERED TO PAY**

deficiency Income Tax for the taxable year ended December 31, 2006, in the modified amount of Php41,656,670.93, inclusive of the 25% surcharge imposed under *Section 248(A)(3) of the 1997 NIRC*, computed as follows:

Type of Tax	Basic Deficiency	25% Surcharge	Total
Income Tax	33,325,161.74	8,331,334.19	41,656,670.93

In addition, petitioner is liable to pay:

1. Deficiency interest at the rate of twenty percent (20%) *per annum* pursuant to *Section 249(B) of the 1997 NIRC* on the basic deficiency Income Tax of Php33,325,161.74 computed from April 15, 2007 until full payment thereof; and

2. Delinquency interest at the rate of twenty percent (20%) *per annum* on the total amount due of Php41,656,670.93 (inclusive of 25% surcharge), and on the 20% deficiency interest which have accrued as aforestated in (1), computed from May 17, 2010 until full payment thereof, pursuant to *Section 249(C) of the 1997 NIRC*, as amended.

SO ORDERED.

Petitioner alleges that the Court erred in not declaring the assessment as void for violation of due process, and in not cancelling the assessment as petitioner's operating loss for 2006 should have been considered in the determination of any deficiency, hence, the computation amounted to an arbitrary and wholesale disallowance of operating loss in violation of due process; that respondent issued the Final Assessment Notice ("FAN") without affording petitioner the right to respond to the Preliminary Assessment Notice ("PAN"); and that respondent issued its Final Decision on the protest without considering the documents submitted by petitioner. It counters that respondent's disallowance of rent expense was a naked assessment without factual basis; and that the Court's disallowance of only Php7,240,828.00 for "Rental Inc. Site and Switch per F/S" is consistent with petitioner's right to due process.

Respondent claims that the Court erred in computing the basic deficiency income tax by using the amount of -Php3,875,794.00 as Taxable Income Per Return and in disallowing only the amount of Php7,240,828.00 for the item "Rental Inc. Site and Switch per F/S." She counters that petitioner's Motion is a mere re-hash of its previous allegations and arguments; and that the Court did not commit any error in declaring that its right to procedural due process was not violated and in disregarding its Net Operating Loss in computing the basic deficiency income tax.

After careful review of the facts of the case and the arguments of petitioner, the Court finds that an amendment of the assailed Decision is in order.

In a recent decision[1], this Court, citing Supreme Court cases *Commissioner of Internal Revenue v. Metro Star Superama, Inc.*[2] and *Pilipinas Shell Petroleum Corporation v. Commissioner of Internal Revenue*[3], ruled in the following manner:

> Pursuant to the afore-quoted provisions, it is clearly mandated that a taxpayer is given an opportunity to respond to the PAN within fifteen (15) days <u>from receipt</u> thereof. Upon the lapse of the 15-day period, without any response from the taxpayer, the latter shall be considered in default and the BIR shall issue a formal letter of demand and assessment notices.
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> In the instant case, records show **that petitioner received a copy of the PAN dated December 17, 2010 on <u>January 3, 2011</u>**. Thus, petitioner has fifteen (15) days or until **January 18, 2011** within which to file a reply or protest against the PAN. Prior to the lapse of the fifteen-day period within which petitioner can respond to the PAN, **petitioner received the FLD dated January 7, 2011 and Assessment Notices on January 17, 2011.** Notably, **the BIR did not even wait for petitioner to reply to the PAN before issuing the FLD and the Assessment Notices on January 7, 2011.** Stated differently, the assessment notices were issued by the BIR even before the lapse of the fifteen-day period within which petitioner could file a reply or protest to the PAN.
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> As earlier quoted, Section 228 of the NIRC of 1997, as amended and RR No. 12-99, specifically Section 3.1.2 thereof, prescribe a fifteen (15)-day period from receipt of a PAN within which a taxpayer may respond thereto. Indubitably, the right of the taxpayer to respond to the PAN is an important part of the due process requirement in the issuance of a deficiency tax assessment. In wantonly disregarding petitioner's right to be heard with regard to its positions or arguments against the PAN, the BIR clearly violated petitioner's right to due process as enshrined in Section 228 of the NIRC of 1997, as amended

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[1] *Polymer Products (Phil.), Inc. v. Commissioner of Internal Revenue,* CTA Case No. 8299, January 30, 2015.
[2] G.R. No. 185371, December 8, 2010, 637 SCRA 633.
[3] G.R. No. 172598, December 21, 2007, 541 SCRA 316.

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 FLD and Assessment notices, **the fatal infirmity that attended its issuance prior to the lapse of the period to respond to the PAN is not cured thereby.** In *Pilipinas Shell Petroleum Corporation vs. Commissioner of Internal Revenue,* the Supreme Court 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.** Respondent must be more circumspect in the exercise of his functions, as this Court aptly held in Roxas v. Court of Tax Appeals:
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> > The power of taxation is sometimes called also the power to destroy. Therefore it should be exercised with caution to minimize injury to the proprietary rights of a taxpayer. It must be exercised fairly, equally and uniformly, lest the tax collector kill the "hen that lays the golden egg." And, in the order to maintain the general public's trust and confidence in the Government this power must be used justly and not treacherously."

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

In *A Brown Co., Inc. vs. Commissioner of Internal Revenue,* 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**.

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." *(Emphasis supplied)*

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 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**." *(Emphasis supplied)*

All told, considering the palpable violation of petitioner's right to procedural due process pursuant to Section 228 of the NIRC of 1997, as amended, and the provisions of RR No. 12-99, FLD No. 043A-B319-07 dated January 7, 2011 and the Assessment Notices-- being fatally infirm-- should be considered void. For that reason, their cancellation and withdrawal is therefore warranted. [Emphases supplied]

The above Decision, backed up by decisions of the Supreme Court itself, are applicable to the facts of the case at bar.

In the present case, the PAN was issued on March 25, 2010 and received by petitioner on April 6, 2010.[4] However, even before filing its protest to the PAN, petitioner received the FAN dated April 14, 2015 on April 15, 2010.[5] Therefore, respondent issued and mailed the FAN before considering the protest to the previously-issued PAN, depriving petitioner of its right to due process.

Consequently, the Court finds no need to discuss the other arguments and counter-arguments of both parties for being moot and academic.

In view of the foregoing, respondent's "Motion for Partial Reconsideration (Re: Decision dated 14 October 2015)" is hereby **DENIED** for lack of merit and petitioner's "Motion for Partial Reconsideration (Of the Decision dated 14 October 2015)" is hereby **GRANTED**. Accordingly, the dispositive portion of the Decision promulgated on October 14, 2015 is hereby modified to read as follows:

> **WHEREFORE**, premises considered, the Petition for Review filed on July 13, 2012 by petitioner Next Mobile, Inc. is hereby **GRANTED**. Accordingly, Formal Letter of Demand and Final Assessment Notice No. 32-06-IT-0071 dated April 14, 2010 assessing and demanding from petitioner Next Mobile, Inc. the payment of deficiency income tax, interest and compromise penalty for taxable year 2006 in the aggregate amount of Php79,320,554.30, are hereby **CANCELLED** and **WITHDRAWN**.
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> **SO ORDERED.**

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

[4] *Records, JSFI*, p. 154; pp. 1079-1081; *Exhibit* "GG."
[5] *Id.*, p. 154; p. 1083.

WE CONCUR:

ESPERANZA R. FABON-VICTORINO
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

ATTESTATION

I attest 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.

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

Pursuant to *Section 13 of Article VIII of the Constitution* and the Division's Chairperson's Attestation, 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.

ROMAN G. DEL ROSARIO
Presiding Justice