REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

Hon. KIM HENARES in her capacity a[s] Commissioner of Internal Revenue and ESMERALDA TABULE, in her capacity as Revenue Regional Director of Revenue Region No. 10, Legazpi City,
Petitioners,

- *versus* –

LKY PROPERTY HOLDINGS, INC., represented by MR. WILBERT T. LEE,
Respondent.

CTA EB No. 1852
(CTA Case No. 9066)

Present:

Del Rosario, P.J.,
Castañeda, Jr.,
Uy,
Fabon-Victorino,
Mindaro-Grulla,
Ringpis-Liban, and
Manahan, JJ.

Promulgated:

MAR 0 8 2019
2:37 p.m.

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DECISION

CASTAÑEDA, JR., J.:

Before the Court *En Banc* is a Petition for Review[1] which seeks the reversal of the Decision dated December 14, 2017,[2] (Assailed Decision) as well as the Resolution dated April 19, 2018[3] (Assailed Resolution) of the Third Division (Court in Division)[4] of this Court in CTA Case No. 9066.

[1] Court *En Banc's* Docket, pp. 7-22.
[2] *Id.*, pp. 29-43.
[3] *Id.*, pp. 44-48.
[4] Composed of Associate Justice Lovell R. Bautista as Chairperson, Associate Justice Esperanza R. Fabon-Victorino and Associate Justice Ma. Belen M. Ringpis-Liban as members.

The respective dispositive portions of the assailed Decision and Resolution are quoted hereunder:

<u>Assailed Decision</u>:

> "**WHEREFORE**, the Petition for Review dated May 14, 2015 filed by LKY Property Holdings, Inc., is hereby **GRANTED**. Accordingly, the Formal Letter of Demand dated December 3, 2014, finding petitioner liable for deficiency capital gains tax and documentary stamp tax for taxable year 2007 in the total amount of P12,462,256.53, inclusive of surcharge and interest is **CANCELLED** for being a void assessment. Consequently, the Warrant of Distra[i]nt and/or Levy issued in relation thereto is likewise void and hereby ordered **CANCELLED**.
>
> **SO ORDERED**."

<u>Assailed Resolution</u>:

> "**WHEREFORE**, respondents' Motion for Reconsideration dated January 18, 2018 is **DENIED**. The Decision dated December 14, 2017 is **AFFIRMED**.
>
> **SO ORDERED.**"

THE FACTS

As found by the Court in Division in its Decision dated December 14, 2017, the facts of the present case are as follows:[5]

> "Petitioner is a domestic corporation with Securities and Exchange Commission (SEC) Registration No. IS095-000067. Its principal office is located at LKY Central Arcade, Magsaysay Street, Sorsogon City.
>
> On the other hand, respondents Kim Henares and Esmeralda Tabule were, at the time of the filing of the instant case, the Commissioner of Internal Revenue (CIR) and the Regional Director of Revenue Region No. 10, Legazpi City, of

[5] Court *En Banc's* Docket, pp. 30-35 (Citations omitted).

the Bureau of Internal Revenue (BIR), the government agency tasked to assess and collect all national internal revenue taxes, fees and charges.

On May 21, 2007, petitioner and Mayon International Hotel, Inc. (MIHI) executed a Deed of Absolute Sale for the latter's sale of a hotel facility in Legazpi City known as Mayon International Hotel in favor of petitioner.

In the Deed of Absolute Sale, MIHI and petitioner stipulated on the payment of taxes, fees and other charges pertinent to the sale and transfer of the property sold to the petitioner, in this wise:

> 2. That LKY PROPERTY HOLDINGS, INC. shall advance the payment for the corresponding Capital Gains Tax and Documentary Stamp taxes that may fall due by virtue of this sale, and which amount shall be deducted from the said total purchase price; and the expenses of the Registration Fees and Transfer Fees shall be for the account of LKY PROPERTY HOLDINGS, INC.;

The Capital Gains Tax (CGT) Return with PNB BTR-BIR Payment Slip, showing payment of CGT in the amount of P1,394,040.00, and DST Declaration/Return with PNB BTR-BIR Payment Slip, showing payment of DST in the amount of P348,510.00, were filed on October 6, 2008.

Subsequently, the BIR, through respondent Regional Director Esmeralda Tabule, issued a Preliminary Assessment Notice (PAN) dated November 6, 2014 with Details of Discrepancies (Assessment No. 067-07-004-201-934), assessing petitioner for deficiency CGT of P9,853,482.21 and DST of P2,473,352.24 or the total amount of P12,326,834.45 for the year 2007. Petitioner received the PAN, with attached Details of Discrepancies, on November 29, 2014.

On December 15, 2014, petitioner filed its Protest against the assessment through a Letter dated December 9, 2014.

In a Letter dated January 26, 2015, with attached Formal Letter of Demand (FLD) and Details of Discrepancies, both dated December 3, 2014, and received by petitioner on

February 28, 2015, respondent Tabule denied petitioner's protest against the PAN.

On March 10, 2015, petitioner filed a Request for Reconsideration dated March 5, 2015 addressed to respondent Tabule, again[,] praying for the cancellation and setting aside of subject assessment.

On March 27, 2015, Revenue District Office (RDO) No. 67, Legazpi City, issued a Preliminary Collection Letter against petitioner which it subsequently recalled in a Letter dated April 13, 2015, together with the Warrant of Distraint and/or Levy dated March 27, 2015.

On March 31, 2015, petitioner received the assailed Letter dated March 18, 2015 of respondent Tabule, denying its Request for Reconsideration and demanding anew the payment of the assessed deficiency CGT and DST.

On April 21, 2015, petitioner appealed to respondent CIR the decision of respondent Tabule in a Request for Reconsideration dated April 6, 2015.

On May 13, 2015, petitioner received a Final Notice Before Seizure dated May 12, 2015 issued by RDO No. 67. On even date, petitioner received respondent CIR's Letter dated April 28, 2015, dismissing petitioner's appeal.

Hence, the present Petition for Review.

In their Answer, posted on August 20, 2015 and received by the Court on August 28, 2015, respondents maintain that the assessment for CGT and DST issued against petitioner is correct. While CGT and DST under the law are normally shouldered by the seller, such is subject to exceptions and stipulation by the parties, as in this case. When petitioner purchased the subject hotel from MIHI, the parties stipulated that the CGT and DST would be for the account of petitioner. Hence, petitioner is the proper party to be assessed for any deficiency in CGT and DST arising from the said sale transaction. This and the other factual and legal bases of the assessment were fully expounded in the Preliminary Assessment Notice with attached Details of Discrepancies, as well as in the Formal Letter of Demand with attached Details of Discrepancies issued to petitioner.

Further, as the instant case involves a false or fraudulent return, respondents had ten (10) years to assess petitioner for any deficiency, making the subject assessment timely issued.

Finally, with the presumption of correctness in favor of the assessment, it is incumbent upon petitioner to prove its allegations.

On February 23, 2016, the Court issued a Pre-Trial Order after the parties filed their Joint Stipulation of Facts and Issues thereby terminating the Pre-Trial Conference.

In support of its case, petitioner presented its President and CEO and lone witness, Wilbert T. Lee.

He testified that petitioner and MIHI entered into a contract of sale involving a hotel facility in Legazpi City with petitioner as the buyer and MIHI as the seller. While the parties in the contract stipulated that MIHI shall shoulder the payment of CGT and DST, nonetheless as part of the consideration for the purchase, petitioner would pay in advance to the seller the amount for the payment of CGT and DST. MIHI thereafter made the corresponding declaration, and paid the CGT and DST.

He further declared that on November 29, 2014, or five (5) years after the payments of CGT and DST by MIHI, respondent Tabule issued a PAN assessing petitioner for deficiency CGT and DST. Petitioner protested the PAN in a Letter dated December 9, 2014 but it was denied by respondent Tabule in her Letter dated January 26, 2015, received on February 28, 2015.

Petitioner filed another protest denominated as a Request for Reconsideration, however, it was likewise denied by respondent Tabule.

Before petitioner could appeal the denial of its protest, it received from RDO No. 67 of Legazpi City a Preliminary Collection Letter (PCL) with Warrant of Distraint and/or Levy (WDL) which was later recalled. gr

After the recall of the PCL and WDL, petitioner appealed the denial of its Request for Reconsideration by respondent Tabule to respondent CIR. The said appeal was denied by the latter in her Letter dated April 28, 2015.

On the same day it received the letter of denial, petitioner received a Final Notice Before Seizure in connection with the subject assessment prompting petitioner to elevate the matter to this Court.

After petitioner rested, respondents presented Revenue Officer D'Joanna M. Diamante of the BIR Revenue Region No. 10, Assessment Division in Legazpi City, as their lone witness.

She testified that she reviewed the audit conducted in this case by another revenue officer and she found petitioner liable for deficiency CGT and DST on its purchase of a hotel facility from MIHI.

Her review revealed that the actual zonal value of the property sold, per BIR website, was P5,250.00 per square meter, or P72,564,250.00 and not P50,000,000.00, the tax base used in the computation of the CGT and DST by the taxpayer. She is however not aware of the reason for the use of the P50,000,000.00 in the computation of the CGT and DST nor its details. She further testified that the zonal valuation of P72,564,250.00, should have been the tax base for purposes of computing the taxes due on the transaction as it was higher than the property's selling price of 20 million and its fair market value of P33,234,000.00.

The witness opined that it is the seller, like MIHI, who generally shoulders the CGT and DST as in fact, per BIR Record, it was MIHI who filed the DST Declaration Return with the BIR. However, evident from Deed of Sale executed by the parties that petitioner assumed the payment of the CGT and DST. These facts were written in the Memorandum dated May 19, 2009 which she prepared together with computation sheet.

On November 6, 2014, she issued a Preliminary Assessment Notice (PAN) with Assessment Notice No. 067-07-004-201-934, copies of which were sent to the registered addresses of petitioner reflected in the BIR database, i.e., Sorsogon City and Greenhills, San Juan.

There being no protest filed by petitioner against the PAN, she prepared a Formal Letter of Demand (FLD) dated December 3, 2014 and sent it to the registered address of petitioner in Greenhills, San Juan. However, it was returned by the post office unserved. This prompted her to personally serve another copy of the same FLD at the other registered address of petitioner in Sorsogon City on February 12, 2015. It was received by Agnes E. Pontuquez, who was authorized to receive it in behalf of petitioner. Another copy of the FLD was sent by registered mail under Registry Receipt No. 15-161 to the Sorsogon City address of petitioner and it was received on February 25, 2015 also by Agnes E. Pontuquez.

Respondents formally offered all its exhibits which were admitted in the Resolution dated October 14, 2016.

The case was submitted for decision on December 14, 2016."

On December 14, 2017, the Court in Division rendered the Assailed Decision granting respondent's Petition for Review. The Court in Division cancelled the Formal Letter of Demand dated December 3, 2014 as well as the Warrant of Distraint and/or Levy issued in relation thereto.

Aggrieved, petitioner filed a Motion for Reconsideration dated January 18, 2018 which the Court in Division denied in the assailed Resolution.[6]

Within the extended period granted by this Court,[7] petitioner filed the present Petition for Review on May 25, 2018.

On August 7, 2018, respondent filed its Comment to the Petition for Review.[8]

In a Resolution dated August 22, 2018,[9] the Court *En Banc* gave due course to the present Petition for Review. Accordingly, the Court *En Banc*

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[6] *Id.*, pp. 44-48.
[7] *Id.*, p. 6.
[8] *Id.*, pp. 52-54.
[9] *Id.*, pp. 57-58.

granted the parties a period of thirty (30) days from notice within which to file their Memoranda.

On October 1, 2018, petitioner filed her Memorandum.[10] Respondent, on the other hand, filed its Memorandum[11] on October 10, 2018.

Thus, through the Court *En Banc*'s Resolution[12] dated November 22, 2018, the present case was submitted for decision.

THE ISSUES

Petitioner filed the present Petition for Review on the basis of the following grounds: [13]

I.

THE HONORABLE COURT ERRED [IN] RULING THAT RESPONDENT WAS NOT SERVED WITH THE FINAL ASSESSMENT NOTICE.

II.

THE HONORABLE COURT ERRED IN RULING THAT THE ASSESSMENT IS VOID AND THAT RESPONDENT IS NOT LIABLE FOR THE ASSESSED DEFICIENCY CAPITAL GAINS AND DOCUMENTARY STAMP TAXES.

III.

THE HONORABLE COURT ERRED IN RULING THAT RO DIAMANTE SHOULD BE ARMED WITH A LETTER OF AUTHORITY IN ORDER THAT THE ASSESSMENT BE VALID.

THE COURT *EN BANC*'S RULING

In the present Petition for Review, petitioner claims that respondent was duly served with the Formal Letter of Demand (FLD) together with the attached Details of Discrepancies and Audit Results/Assessment Notices (BIR Form 0401).[14] Petitioner also insists that the assessment for deficiency capital gains tax (CGT) and deficiency documentary stamp tax (DST) are

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[10] *Id.*, pp. 59-73.
[11] *Id.*, pp. 75-128.
[12] *Id.*, pp. 131-132.
[13] *Id.*, p. 11.
[14] *Id.*

valid.[15] Petitioner argues that in order for a final assessment notice to be valid, what is essential is that the taxpayer was informed in writing of the findings, stating therein the facts and laws on which the assessment is based.[16] Petitioner maintains that the FLD sent to respondent sufficiently complied with such requirements.[17]Moreover, petitioner posits that the FLD indicated the definite tax liability to be paid as well as the due date for the payment of the tax liability.[18]

Petitioner likewise claims that the Court in Division erred in ruling that respondent is not statutorily liable for the deficiency CGT and deficiency DST as the latter merely advanced the amount necessary for the payment of the said taxes.[19]

Lastly, petitioner submits that a Letter of Authority (LOA) issued to Revenue Officer (RO) Diamante is not necessary in order to make the assessment valid.[20]

Respondent, on the other hand, in its *Comment to the Petition for Review* filed on August 7, 2018, avers that it does not accept the statement of matters involved in the Petition for Review.[21] It submits that petitioner has not raised new issues which the Court in Division has not amply discussed in its Decision dated February 18, 2018.[22] Respondent reiterates that it did not receive any final assessment notice and that it is not liable for the deficiency CGT and deficiency DST.[23] Respondent also avers that the Court in Division correctly determined that RO Diamante was not armed with an LOA.[24]

After careful evaluation of the facts, issues, and arguments presented by the parties, the Court *En Banc* finds that the arguments herein raised by the CIR are substantially identical to or mere reiterations of the arguments or matters which had already been sufficiently considered, discussed, and passed upon by the Court in Division in the Assailed Decision and Resolution. Truth be told, the CIR failed to raise any new or substantial matter let alone any compelling reason to warrant the modification much less reversal of the Assailed Division and Resolution. At any rate, if only to put petitioner's mind to rest as well as to reinforce the discussion in the Assailed Decision and Resolution, the Court *En Banc* will address the matters herein raised.

[15] *Id.*, p. 12.
[16] *Id.*, p. 14.
[17] *Id.*
[18] *Id.*, pp. 14-15.
[19] *Id.*, pp. 17-19.
[20] *Id.*, p. 20.
[21] *Id.*, p. 52.
[22] *Id.*, p. 53.
[23] *Id.*
[24] *Id.*

It bears noting that while the issue on want of authority of revenue officer to conduct the audit investigation was not raised by the parties in the proceedings before the Court in Division, nor in the present Petition, the Court *En Banc* is not precluded from taking cognizance of the same, based on the Supreme Court's pronouncement on this matter in the case of *Commissioner of Internal Revenue v. Lancaster Philippines, Inc.*,[25] to wit:

> "On whether the CTA can resolve an issue which was not raised by the parties, we rule in the affirmative.
>
> Under Section 1, Rule 14 of A.M. No. 05-11-07-CTA, or the Revised Rules of the Court of Tax Appeals, the CTA is not bound by the issues specifically raised by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case. The text of the provision reads:
>
> > SECTION 1. *Rendition of judgment.* — x x x
> >
> > In deciding the case, the Court may not limit itself to the issues stipulated by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case.
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> The above section is clearly worded. On the basis thereof, the CTA Division was, therefore, well within its authority to consider in its decision the question on the scope of authority of the revenue officers who were named in the LOA even though the parties had not raised the same in their pleadings or memoranda. The CTA *En Banc* was likewise correct in sustaining the CTA Division's view concerning such matter."

Besides, the authority of a revenue officer to conduct the audit investigation goes into the validity of an assessment. Stated differently, an assessment arising from the conduct of audit and examination of a taxpayer's books of accounts and other accounting records by a revenue officer who is not duly authorized to do so is a complete nullity. A void assessment bears no valid fruit.[26] *gn*

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[25] G.R. No. 183408, July 12, 2017, 831 SCRA 18.

[26] *Commissioner of Internal Revenue v. Azucena T. Reyes*, G.R. No. 159694 & G.R. No. 163581, January 27, 2006, 382 SCRA 480; *Commissioner of Internal Revenue v. Metro Star Superama, Inc.*, G.R. No. 185371, December 8, 2010, 637 SCRA 647; *Commissioner of Internal Revenue v. BASF Coating + Inks Phils., Inc.*, G.R. No. 198677, November 26, 2014, 743 SCRA 126; *Samar-I Electric Cooperative v. Commissioner of Internal Revenue*, G.R. No. 193100, December 10, 2014, 744 SCRA 474.

In the present case, the CIR offered Memorandum of Assignment RR10-067-2014 dated October 15, 2014 and 1st Indorsement dated October 20, 2014 both issued by Mr. Cesar R. Balangatan, Revenue District Officer of Revenue District Office (RDO) No. 67-Legazpi City[27] to prove the authority of RO D'Joanna Diamante to continue the audit investigation of respondent's case. In the present Petition for Review, the CIR argues that RO Diamante need not be armed with an LOA because her function was merely to review the report of the investigation conducted by other revenue officers and that it was RO Callope who actually conducted the audit in the present case.[28]

The *Court En Banc* is not convinced.

Whether it was RO Diamante or RO Callope who actually conducted the audit investigation is immaterial since there was no indication whatsoever that a valid LOA was duly issued by the CIR or the Regional Director to authorize the audit of respondent's books of accounts and other accounting records for the relevant period. What is clear based on records is that the authority to conduct the audit investigation in the present case was derived merely from the Memorandum of Assignment RR10-067-2014 dated October 15, 2014 and 1st Indorsement dated October 20, 2014 both issued by Mr. Cesar R. Balangatan, Revenue District Officer of Revenue District Office (RDO) No. 67-Legazpi City.

In the case of *Commissioner of Internal Revenue v. Sony Philippines Inc.*,[29] the Supreme Court emphasizes the necessity of a valid LOA in the conduct of examination by any revenue officers, to wit:

> "**Based on Section 13 of the Tax Code, a Letter of Authority or LOA is the authority given to the appropriate revenue officer assigned to perform assessment functions. It empowers or enables said revenue officer to examine the books of account and other accounting records of a taxpayer for the purpose of collecting the correct amount of tax.** The very provision of the Tax Code that the CIR relies on is unequivocal with regard to its power to grant authority to examine and assess a taxpayer.
>
> SEC. 6. **Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.**

[27] Exhibit "R-1", BIR Records, pp. 167-171.
[28] Court *En Banc* Docket, p. 20.
[29] G.R. No. 178697, November 17, 2010, 635 SCRA 242-243.

> (A) Examination of Returns and Determination of Tax Due. - After a return has been filed as required under the provisions of this Code, the Commissioner or his duly authorized representative **<u>may authorize the examination of any taxpayer and the assessment of the correct amount of tax:</u>** *Provided, however*, That failure to file a return shall not prevent the Commissioner from **<u>authorizing the examination of any taxpayer.</u>** x x x [Emphases supplied]
>
> **Clearly, there must be a grant of authority before any revenue officer can conduct an examination or assessment. Equally important is that the revenue officer so authorized must not go beyond the authority given. In the absence of such an authority, the assessment or examination is a nullity**." *(Emphasis supplied and citation omitted)*

On the basis of this ground alone, the cancellation of the deficiency assessments is warranted.

The Court *En Banc* also concurs with the Court in Division in finding that under the Deed of Absolute Sale between the respondent and Mayon International Hotel, Inc. (MIHI) dated May 21, 2007, it was agreed that the burden of paying the corresponding CGT and DST due on the transaction shall be the responsibility of the seller, MIHI, and that respondent, as the buyer, shall merely advance the amount necessary for the payment thereof. The amount to be advanced by respondent for the payment of CGT and DST shall be deducted from the total purchase price.

A court's purpose in examining a contract is to interpret the intent of the contracting parties, as objectively manifested by them.[30] The intent of the parties to an instrument is embodied in the writing itself, and when the words are clear and unambiguous the intent is to be discovered only from the express language of the agreement.[31] If the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, the literal meaning of its stipulations shall control.[32]

As provided under Article 1306 of the Civil Code, the contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy. Viewed in light of this provision, the

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[30] *Benguet Corporation, et. al. v. Cabildo*, G.R. No. 151402, August 22, 2008, 563 SCRA 37 citing *Abad v. Goldloop Properties, Inc.*, G.R. No. 168108, April 13, 2007, 521 SCRA 131, 143.

[31] Norton Resources and Development Corporation v. All Asia Bank Corporation, G.R. No. 162523, November 25, 2009, 605 SCRA 376 citing *Benguet Corporation, et. al. v. Cabildo*, G.R. No. 151402, August 22, 2008, 563 SCRA 37.

[32] Article 1370, Civil Code.

Court in Division correctly concluded that the agreement between respondent and MIHI is in accord with Section 27(D)(5) of National Internal Revenue Code of 1997, as amended (1997 NIRC) which implicitly imposes upon the seller the liability to pay the CGT on the gains presumed to have been realized from the sale, exchange or disposition of lands and/or buildings treated as capital assets.[33]

The Court in Division likewise properly held that pursuant to Section 173 of the 1997 NIRC in relation to Revenue Regulations (RR) No. 9-2000, any of the parties to a taxable transaction may be liable for the corresponding DST but the parties may agree as to who, between them, shall take the burden of paying the same, except when one of the parties is exempt from DST in which case the party not exempt shall be liable therefor.

Finally, the Court *En Banc* adheres to the findings of the Court in Division that the subject deficiency assessments are void due to absence of a valid Final Assessment Notice (FAN). In this regard, the Court *En Banc* quotes with approval the pertinent disquisition by the Court in Division in the Assailed Decision, to wit:[34]

> "Under Section 228 of the Tax Code, the taxpayer must be informed in writing of the law and the facts on which the assessment is made, lest the assessment is void. x x x It is clear from the foregoing that a taxpayer must be informed in writing of the legal and factual bases of the tax assessment made against him. The use of the word 'shall' in the legal provision indicates the mandatory nature of the requirements laid down therein.
>
> Thus, it is elementary under the due process requirement that the taxpayer must be informed in writing of the law and the facts upon which a tax assessment is based; otherwise, the assessment is void.
>
> Undeniably, a PAN was issued in this case.
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> Section 3.1.1 of RR No. 12-99, as amended by RR No. 18-2013, provides that '[I]f 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 Final Assessment Notice (FLD/FAN) shall be

[33] Court *En Banc* Docket, pp. 38-39.
[34] *Id.*, pp. 36-41 (Citations omitted).

issued calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.'

By virtue of the above provision and the requirements of due process in Section 228 of the National Internal Revenue Code (NIRC), as amended, it is mandatory that a final assessment notice (FAN) be issued after the issuance of the PAN.

While the FLD, with Details of Discrepancies, was issued on December 3, 2014 and received by petitioner, no FAN was ever received by petitioner.

Thus, in the absence of a FAN, the subject assessment for CGT and DST against petitioner is void.

It may be argued that the FLD issued and received by petitioner may be deemed as the final assessment in compliance with the due process requirements of Section 228 of the NIRC, as amended. However, in the case of *Commissioner of Internal Revenue vs. Fitness by Design, Inc.*, the Supreme Court elucidated on what a formal assessment notice must contain, to wit:

> The formal letter of demand and assessment notice shall state the facts, jurisprudence, and law on which the assessment was based; otherwise, these shall be void. x x x
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> II
>
> The word 'shall' in Section 228 of the National Internal Revenue Code and Revenue Regulations No. 12-99 means the act of informing the taxpayer of both the legal and factual bases of the assessment is mandatory. The law requires that the bases be reflected in the formal letter of demand and assessment notice. This cannot be presumed. Otherwise, the express mandate of Section 228 and Revenue Regulations No. 12-99 would be nugatory. The requirement enables the taxpayer to make an effective protest or appeal of the assessment or decision.
>
> xxx xxx xxx
>
> A final assessment notice provides for the amount of tax due with a demand for payment. This is to determine the amount of tax due to a taxpayer. However, due process requires that taxpayers be informed in writing of the facts and

law on which the assessment is based in order to aid the taxpayer in making a reasonable protest. To immediately ensue with tax collection without initially substantiating a valid assessment contravenes the principle in administrative investigations 'that taxpayers should be able to present their case and adduce supporting evidence.'

xxx xxx xxx

The issuance of a valid formal assessment is a substantive prerequisite for collection of taxes. Neither the National Internal Revenue Code nor the revenue regulations provide for a 'specific definition or form of an assessment.' However, the National Internal Revenue Code defines its explicit functions and effects. **An assessment does not only include a computation of tax liabilities; it also includes a demand for payment within a period prescribed. Its main purpose is to determine the amount that a taxpayer is liable to pay.**

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A final assessment is a notice 'to the effect that the amount therein stated is due as tax and a demand for payment thereof.' This demand for payment signals the time 'when penalties and interests begin to accrue against the taxpayer and enabling the latter to determine his remedies[.]' Thus, it must be 'sent to and received by the taxpayer, and must demand payment of the taxes described therein within a specific period.'

The disputed Final Assessment Notice is not a valid assessment.

First, **it lacks the definite amount of tax liability for which respondent is accountable. It does not purport to be a demand for payment of tax due, which a final assessment notice should supposedly be.** An assessment, in the context of the National Internal Revenue Code, is a 'written notice and demand made by the [Bureau of Internal Revenue] on the taxpayer for the settlement of a due tax liability that is there definitely set and fixed.' **Although the disputed notice provides for the computations of respondent's tax liability, the amount remains indefinite. It only provides that the tax due is still subject to modification, depending on the date of payment.** Thus:

> The complete details covering the aforementioned discrepancies established during the investigation of this case are shown in the accompanying Annex 1 of this Notice. The 50%

> surcharge and 20% interest have been imposed pursuant to Sections 248 and 249 (B) of the [National Internal Revenue Code], as amended. Please note, *however, that the interest and the total amount due will have to be adjusted if prior or beyond April 15, 2004.* (Emphasis Supplied)
>
> Second, **there are no due dates in the Final Assessment Notice. This negates petitioner's demand for payment**. Petitioner's contention that April 15, 2004 should be regarded as the actual due date cannot be accepted. The last paragraph of the Final Assessment Notice states that the due dates for payment were supposedly reflected in the attached assessment:
>
> > In view thereof, you are *requested to pay* your aforesaid deficiency internal revenue tax liabilities through the duly authorized agent bank in which you are enrolled *within the time shown in the enclosed assessment notice.* (Emphasis in the original)
>
> However, based on the findings of the Court of Tax Appeals First Division, the enclosed assessment pertained to remained unaccomplished.
>
> Contrary to petitioner's view, April 15, 2004 was the reckoning date of accrual of penalties and surcharges and not the due date for payment of tax liabilities. The total amount depended upon when respondent decides to pay. The notice, therefore, did not contain a definite and actual demand to pay.
>
> Compliance with Section 228 of the National Internal Revenue Code is a substantive requirement. It is not a mere formality. Providing the taxpayer with the factual and legal bases for the assessment is crucial before proceeding with tax collection. Tax collection should be premised on a valid assessment, which would allow the taxpayer to present his or her case and produce evidence for substantiation. *(Emphasis supplied, citations omitted)*

As discussed above, a final assessment should contain the law and the facts upon which the assessment is based, as well as the exact amount due and demandable, with demand for payment within a prescribed period. In the cited case, the final assessment was invalidated for not containing the definite amount of tax liability for which the taxpayer is accountable, and there is no demand for payment of the tax due. Not only was there no due date for the payment of the tax, but there was also a statement that 'the tax due is still subject to modification, depending on the date of payment,' further emphasizing the lack of due date and that the assessed amount is not final.

A careful scrutiny of the subject FLD revealed that it is not a valid final assessment as it lacks the definite amount of tax liability for which petitioner is accountable, and a date certain for payment of the alleged tax liability by the taxpayer.

The subject FLD reads as follows:

> *Please note that the interest and the total amount due will have to be adjusted if paid beyond 1-5-2015.

Thus, the FLD in this case lacks a definite amount of tax liability for which petitioner is accountable, as the amount due may still be adjusted depending on the date of payment.

Without a definite amount of tax due, the FLD cannot be regarded as a demand for payment, which a final assessment notice should contain. Although the FLD provides for the computation of petitioner's tax liabilities, the amount remains indefinite for it still subject to modification.

Moreover, the subject FLD has no due dates rendering respondents' alleged demand for payment inutile. The last paragraph of the subject FLD states:

> In view thereof, you are requested to pay your aforesaid deficiency capital gains and documentary stamp tax liabilities through the duly authorized agent bank in which you are enrolled **within the time shown in the enclosed assessment notice**. *(Emphasis supplied)*

Although the subject FLD indicates that the due dates for payment of the taxes are shown in the enclosed assessment notice, the alluded assessment notice or FAN was not served on petitioner.

Without a valid final assessment, the requirements of due process were not complied with, making the subject assessment for CGT and DST issued against petitioner void. *ju*

> The issuance of a valid formal assessment is a substantive prerequisite to tax collection, for it contains not only a computation of tax liabilities but also a demand for payment within a prescribed period, thereby signalling the time when penalties and interests begin to accrue against the taxpayer and enabling the latter to determine his remedies therefor. Due process requires that it must be served on and received by the taxpayer."

The Court *En Banc* finds the above-quoted discussion by the Court in Division as sound, accurate, and sufficient in addressing the particular matter raised by petitioner. There is no need to add to, much less modify or reverse the same.

WHEREFORE, the present Petition for Review is **DENIED** for lack of merit.

SO ORDERED.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

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

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

Ma. Belen S. - L
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in 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

HON. KIM HENARES in her capacity a[s] Commissioner of Internal Revenue and ESMERALDA TABULE, in her capacity as Revenue Regional Director of Revenue Region No. 10, Legazpi City,
Petitioners,

-versus-

LKY PROPERTY HOLDINGS, INC. represented by MR. WILBERT T. LEE,
Respondent.

CTA EB NO. 1852
(CTA Case No. 9066)

Present:

DEL ROSARIO, *P.J.,*
CASTANEDA, JR.,
UY,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, and
MANAHAN, *JJ.*

Promulgated:
MAR 08 2019
2:37 p.m.

x - x

CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur in the denial of the Petition for Review for lack of merit.

In addition to the points discussed in the *ponencia* which led to the denial of the Petition for Review, I submit that the **Formal Letter of Demand (FLD) and Final Assessment Notices (FAN) dated December 3, 2014, subject of the present controversy, are null and void for having been issued in violation of respondent's right to due process.**

Pursuant to Section 228[1] of the National Internal Revenue Code (NIRC) of 1997, as amended, and as implemented by Section

[1]"**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:

3.1.2 of Revenue Regulations (RR) No. 12-99, as amended by RR No. 18-13,[2] a taxpayer shall be required to respond to the Preliminary Assessment Notice (PAN) within fifteen (15) days from receipt thereof. Upon the lapse of the 15-day period, the taxpayer is considered in default and the Bureau of Internal Revenue (BIR) shall issue a formal letter of demand and assessment notice.

In the case at bar, respondent **received a copy of the Preliminary Assessment Notice (PAN) dated November 6, 2014 on <u>November 29, 2014</u>**. Respondent, therefore, had **fifteen (15) days** or until **<u>December 14, 2014</u>** within which to file a reply or protest against the PAN.

Interestingly, **the BIR prepared the FLD and FAN on December 3, 2014 or barely four (4) days after respondent received the PAN**. Evidently, the BIR did not wait for respondent to reply to the PAN. The FLD and FAN were prepared by the BIR as early as December 3, 2014 or way before the lapse of the fifteen (15)-day period within which respondent could file a reply or protest to the PAN.

The right of the taxpayer to respond to the PAN is an important part of the due process. In wantonly disregarding respondent's right to be heard with regard to its positions or arguments against the PAN, the BIR clearly violated respondent's right to due process. To be

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xxx

The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.

Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.

Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations." (Boldfacing supplied)

[2] "SEC. 3. Due Process Requirement in the Issuance of a Deficiency Tax Assessment. —

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

3.1.1 Preliminary Assessment Notice (PAN). — If after review and evaluation 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 a Preliminary Assessment Notice (PAN) for the proposed assessment. It shall show in detail the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based (see illustration in ANNEX "A" hereof).

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 Final Assessment Notice (FLD/FAN) shall be issued calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.

If the taxpayer, within fifteen (15) days from date of receipt of the PAN, responds that he/it disagrees with the findings of deficiency tax or taxes, an FLD/FAN shall be issued within fifteen (15) days from filing/submission of the taxpayer's response, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties."

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.*,[3] the Supreme Court 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 respondent received the FLD and FAN on February 28, 2015 or after it filed its protest to the PAN on December 15, 2014, **the fatal infirmity that attended its issuance prior to the lapse of the period to respond to the PAN is not cured thereby**. In *Pilipinas Shell Petroleum Corporation vs. Commissioner of Internal Revenue,*[4] the Supreme Court 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." (Boldfacing and underscoring supplied)

In view of the palpable violation of respondent's right to procedural due process, the FLD and FAN - - being fatally infirm - - should be considered void.

All told, I **CONCUR** in the result.

ROMAN G. DEL ROSARIO
Presiding Justice

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[3] G.R. No. 185371, December 8, 2010.
[4] G.R. No. 172598, December 21, 2007.