REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

ED & F MAN PHILIPPINES, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NOS. 9577 and 9739

Members:

CASTAÑEDA, JR., *Chairperson, and*
BACORRO-VILLENA, *JJ.*

Promulgated:
AUG 05 2020
9:05 a.m.

x - x

DECISION

BACORRO-VILLENA, J.:

At bar are two (2) consolidated Petitions for Review, docketed as CTA Case No. 9577[1] and CTA Case No. 9739[2], respectively, filed by petitioner ED & F Man Philippines, Inc., (**petitioner**) against respondent Commissioner of Internal Revenue (**CIR/respondent**).

Petitioner is a corporation registered with the Securities and Exchange Commission[3] (**SEC**) and the Bureau of Internal Revenue (**BIR**) with Taxpayer's Identification Number (**TIN**) 000-456-541-000[4] to engage in the business of buying, selling and distributing all kinds of

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[1] Filed on 12 April 2017, Division Docket (CTA Case No. 9577), Volume I, pp. 10-33.
[2] Filed on 18 December 2017, Division Docket (CTA Case No. 9739), pp. 10-37.
[3] Exhibit "P-1", Division Docket (CTA Case No. 9577), Volume II. p. 625.
[4] Exhibit "P-2", id., p. 645.

goods, commodities, wares and merchandise, but primarily sugar. It exports and imports sugar as part of its regular business as a sugar trader.

Respondent, on the other hand, is the duly appointed CIR; vested with authority, among others, to assess and collect all national internal revenue taxes, fees and charges, and to enforce all forfeitures, penalties and fines connecting therewith, including approval of compromise settlement and claim for refund.

In CTA Case No. 9577, petitioner seeks the cancellation of the Value-Added Tax (**VAT**) assessment for fiscal year (**FY**) ended 31 October 2008; amounting to ₱723,182,519.50 inclusive of surcharges, interest and penalties. While in CTA Case No. 9739, it prays for the refund of ₱27,610,887.10 representing the fifteen percent (15%) of the compromise settlement applied for; in relation to the VAT assessment for FY 2008 pursuant to Section 229[5] of the National Internal Revenue Code (**NIRC**) of 1997, as amended.

The factual antecedents follow.

Petitioner's books of accounts were subjected to an audit investigation for FY ended 31 October 2008, pursuant to Letter of Authority (**LOA**) No. 00026325. As a result thereof, petitioner opted to settle its deficiency income tax (**IT**) and VAT amounting to ₱600,000.20. As proof of its payment, Regional Director Araceli L. Francisco (**RD Francisco**) issued a Termination Letter[6] dated 16 March 2010 for the audit investigation of petitioner's books of accounts for the said FY 2008.

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5 Sec. 229. ***Recover of Tax Erroneously or Illegally Collected.*** – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however*, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

6 Exhibit "P-4", Division Docket (CTA Case No. 9577), Volume II, p. 646.

Thereafter, petitioner received Letter Notice (**LN**) No. M-077-RLF-08-00-0007, dated 18 April 2011, authorizing the designated examiners to conduct a review/investigation of petitioner's VAT transactions for FY 2008. The examiners were tasked to verify the noted discrepancies arising from the comparison of petitioner's sales reported in its VAT returns *vis-à-vis* the amount reported and submitted by its customers. The discrepancy in the said LN resulted in a deficiency VAT of ₱184,072,580.67.

Upon receipt of the LN, petitioner met with the assigned revenue officers (**ROs**) and explained that the taxable year involved was already subjected to an audit investigation and thus was terminated accordingly. Likewise, the sales discrepancy in the LN was either subject to zero-percent VAT or exempt hence it could not be made liable anew for deficiency VAT (for the same fiscal year).

On 28 June 2013, unswayed by petitioner's justification, Deputy Commissioner–Operations Group Nelson M. Aspe issued a Preliminary Assessment Notice[7] (**PAN**) against petitioner for deficiency VAT and imposition of compromise penalty.

On 26 September 2013, petitioner received the PAN. Consequently or on 18 October 2013, it filed its Protest[8] to the PAN maintaining its stance that the assessment (pursuant to the LN) was already settled in a previous audit investigation by virtue of LOA No. 00026325 as evidenced by a Termination Letter. Furthermore, the sales discrepancy was either subject to zero-percent VAT or exempt from VAT.

On 06 November 2013, petitioner received the Final Assessment Notice (**FAN**) with Details of Discrepancies and Assessment Notices[9], reiterating the assessment in the PAN but with an updated interest rate in the amount of ₱439,422,114.17 and a compromise penalty of ₱25,000.00.

7 Exhibit "P-5", id., pp. 647-648.
8 Exhibit "P-6", id., pp. 651-658.
9 Exhibit "P-7", id., pp. 659-662.

On 14 February 2014, petitioner also received the First Notice[10] of demand for payment of its VAT liabilities as detailed in the FAN. On 28 February 2014, petitioner filed a Reply Letter[11] reiterating its explanation in its Protest (to the PAN).

After several discussions between the parties, the Regional Director of Revenue Region No. 12 - Bacolod City issued a Final Decision[12] on 05 June 2015; upholding the finality of the deficiency VAT assessment of ₱439,442,114.17 for FY 2008 ending 31 October 2008.

On 10 June 2015, through a letter[13], petitioner sought reconsideration of the Final Decision. The Regional Director (**RD**) denied petitioner's plea in a letter[14] dated 07 July 2015. On 16 July 2015, petitioner appealed the enforcement and collection of the deficiency VAT as well as the compromise penalty with the RD.[15]

On 14 August 2015, petitioner received a letter[16] from the Revenue District Officer (**RDO**) demanding payment of deficiency VAT and compromise penalty within ten (10) days from receipt of the notice. Opposing the demand for payment, petitioner filed a reply letter on 24 August 2015.

On 18 December 2015, petitioner likewise filed an application[17] for Compromise Settlement (1st **Compromise**) on the basis of doubtful validity of the assessment for the subject FY 2008. It paid a total of ₱27,610,887.10, representing fifteen percent (15%) of the basic deficiency VAT assessed.

In a Notice of Denial dated 10 March 2017 and received on 13 March 2017, petitioner's application on the 1st Compromise was denied.[18] The Regional Evaluation Board (**REB**) denied the application for compromise settlement for petitioner's failure to pay the minimum

10 Exhibit "P-8", BIR Records, p. 62.
11 Exhibit "P-9", Division Docket (CTA Case No. 9577), Volume II, p. 665.
12 Exhibit "P-13", id., pp. 667-672.
13 Exhibit "P-14". BIR Records, p. 503.
14 Exhibit "P-15", Division Docket (CTA Case No. 9577), Volume II, p. 680.
15 Exhibit "P-16", id., pp. 682-684.
16 Exhibit "P-19", id., p. 697.
17 Exhibit "P-21", id., pp.711-723.
18 Exhibit "P-26". BIR Records, p. 2333.

forty percent (40%) of the basic tax deficiency assessed. Petitioner was then ordered to pay the balance of ₱411,811,227.08 (net of the earlier payment) plus all the increments incident to delinquency.

In continuous disagreement with the basis for the denial of its application, petitioner filed a second application for compromise settlement (**2nd Compromise**) on 10 April 2017 and settled the remaining balance of twenty-five percent (25%) thereof or ₱46,018,145.17.

In the *interim*, on 05 April 2017, the Supreme Court promulgated its decision in *Medicard Philippines, Inc. v. Commissioner of Internal Revenue*[19] (**Medicard**), where it ruled that the absence of an LOA voids an assessment.

On 12 April 2017, petitioner filed before this Court a Petition for Review with Urgent Motion to Suspend Cancellation of Importer Accreditation and Collection of Taxes (for the cancellation of the deficiency VAT assessment for FY 2008 and the nullification of the PAN, FAN and attached Assessment Notices, and the corresponding collection letters and denial of compromise).[20] This was docketed as CTA Case No. 9577.

On 17 May 2017, petitioner filed a Supplemental Motion to Suspend the Cancellation of Importer Accreditation and Collection of Taxes. Petitioner then presented evidence supporting its motion.

Meanwhile, on 14 September 2017, respondent filed his Motion to Admit Attached Answer, which the Court granted in a Resolution dated 12 February 2018.[21] Accordingly, the Answer was admitted as part of the records.

In his Answer, respondent assailed the absence of jurisdiction on the part of the Court on the following grounds: (1) petitioner failed to file a timely protest to the FAN/Formal Letter of Demand (**FLD**) within 30 days from its receipt hence the assessment had attained finality and

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19 G.R. No. 222743.
20 Division Docket (CTA Case No. 9577), Volume I, pp. 10-88.
21 Id., pp. 297-298.

therefore, executory; (2) assuming its 18 October 2013 protest to the FAN was the administrative protest contemplated by law, petitioner still failed to adduce competent documentary evidence pursuant to Section 228 of the NIRC of 1997, as amended; and, (3) all presumptions are in favor of the correctness of the tax assessment.[22]

In its 02 August 2018[23] Resolution, the Court granted partially petitioner's Urgent Motion to Suspend Cancellation of Importer Accreditation and Collection of Taxes. The Court found it appropriate to suspend the collection of taxes subject to the posting of the bond; however, it denied petitioner's prayer for the suspension of the cancellation of the importer accreditation. The Court held that the same is under the authority of the Commissioner of Customs pursuant to Republic Act (**RA**) No. 10863 or the Customs Modernization and Tariff Act.

On 22 October 2018, petitioner deposited a surety bond.[24]

On 18 December 2017, petitioner filed an administrative claim[25] for refund of payment made on 18 December 2015 on the 1st Compromise totalling to ₱27,610,887.10. On even date, it likewise filed before this Court a <u>Petition for Review for the judicial claim for refund</u> (pursuant to Section 229 of the NIRC of 1997, as amended). This was docketed as <u>CTA Case No. 9739</u>.

On 22 June 2018, petitioner sought to consolidate CTA Case No. 9739 with CTA Case No. 9577. Prior to the order of consolidation, which the Court issued on 13 July 2018, respondent filed an "Opposition with Motion to Dismiss" lamenting the absence of cause of action on the part of petitioner. He likewise sought the dismissal of the refund case on the ground of splitting a single cause of action and *litis pendencia*. On 08 October 2018[26], the Court denied respondent's Motion to Dismiss.

22 Id., pp. 196-203.
23 Id., pp. 302-312.
24 Id., Volume II, pp. 411-414.
25 Exhibits "P-34" and "P-35", id., Volume II, pp. 731-743.
26 See Resolution, id., Volume I, pp. 402-406.

After several resettings, the pre-trial conference for these consolidated cases pushed through on 31 January 2019. Petitioner filed its Pre-Trial Brief[27] on 03 December 2018, whereas respondent filed his Consolidated Pre-Trial Brief[28] on 28 January 2019.

During the pre-trial conference, respondent manifested that he will no longer present any evidence and will submit the case for the Court's decision, purely on legal issues. Thereafter or on 15 February 2019, the parties submitted their Joint Stipulation of Facts and Issues (**JSFI**)[29], which the Court approved and adopted in the Pre-Trial Order[30] dated 13 March 2019.

Trial ensued thereafter wherein petitioner presented as witnesses the Court-commissioned Independent Certified Public Accountant (**ICPA**) Krista V. Bambao (**Bambao**)[31] and its Financial Controller, Cesar Amposta (**Amposta**).

On the witness stand, ICPA Bambao testified on the documents she examined as well as the procedures observed in formulating her ICPA Report (for both the assessment and petitioner's entitlement to the refund claim). She declared to have also found out that there was no LOA or Notice of Informal Conference (**NIC**) issued during the conduct of the investigation. She also testified that, while petitioner filed a written protest to the PAN, petitioner failed to file its protest to the FAN.

ICPA Bambao likewise testified that, based on the examination of the documents, the discrepancy in VAT arose from the comparison of petitioner's sales *per* BIR-RPS (Returns Processing System of the BIR Integrated Tax System) and the filed VAT returns. When she reconciled the discrepancy, she found out that majority of petitioner's undeclared sales were either subject to VAT at zero-percent or exempt from VAT.

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27 Id., Volume II, pp. 483-497.
28 Id., pp. 524-528.
29 Id., pp. 545-552.
30 Id., pp. 565-570.
31 Judicial Affidavit marked as Exhibit "P-36", id., pp. 574-605.

During cross-examination, ICPA Bambao confirmed that she only examined the bills of lading and commercial sales invoices relating to the zero-rated sales. On her statement that petitioner was deprived of an opportunity to present its side after the BIR failed to issue an NIC, she pointed out that Revenue Regulations (**RR**) 12-99[32] supports her conclusion.[33]

On re-direct examination, ICPA Bambao mentioned that she came across a Termination Letter referring to specific internal revenue taxes (including VAT for FY 2008). However, this letter was not mentioned in the PAN, which was issued beyond the three-year prescriptive period. She also stated that the FAN was issued beyond the three-year prescriptive period.

On re-cross examination, it was confirmed that petitioner did not file any protest to the FAN that was received on 06 November 2013.

The second and final witness for petitioner was its Financial Controller, Amposta. He testified as to the nature of petitioner's business, its registration with SEC and the BIR. He also stated that he was aware of the filing of petitioner's VAT returns and the subsequent petitions for review (with this Court) contesting the assessment and claiming for refund. Amposta likewise identified several documents supporting petitioner's claims.

On cross-examination, Amposta likewise confirmed that petitioner did not file any protest to the FAN.[34]

Later, upon further inquiry from the Court, Amposta was adamant that (1) the FAN was void from the beginning simply because there was already a previous investigation for FY 2008 and such investigation was terminated as evidenced by the Termination Letter;

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[32] Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interests and the Extra-Judicial Settlement of a Taxpayer's Criminal Violation of the Code Through Payment of Suggested Compromise Penalty

[33] At this point during the cross-examination, she was presented a copy of Revenue Memorandum Order (**RMO**) 42-2003 where she read in part item no. 5 "The LN shall serve as a discrepancy notice to the taxpayer similar to a Notice of Informal Conference to the concerned taxpayer…"; see TSN dated 03 April 2019, p. 10.

[34] TSN dated 03 April 2019, pp. 16-17.

(2) the FAN was issued beyond the three-year prescriptive period; and, (3) the BIR had no authority to issue the FAN as the Letter Notice was not converted into an LOA.[35]

On re-direct examination, it was stated that petitioner applied for a compromise settlement because, at that time, it was in the process of renewing their Importer Clearance Certificate (**ICC**) with the BIR. If it did not pay the compromise amount, it would have a delinquent account and will not be able to renew its ICC.

After the testimony of its last witness, on 08 April 2019, petitioner filed its Formal Offer of Evidence (**FOE**).[36] In a Resolution[37] dated 04 June 2019, the Court admitted most of petitioner's exhibits except for Exhibits "P-38"[38], "P-39"[39], "P-40"[40], "P-46" to "P-77"[41], "P-80" to "P-81"[42], "P-103"[43], "P-163"[44], "P-167"[45], "P-173" to "P-174"[46], "P-202"[47], "P-204" to "P-206"[48], "P-211" to "P-212"[49] and "P-221"[50] for petitioner's failure to present originals for comparison.

Following respondent's manifestation that he will no longer present evidence, the Court ordered the parties to submit their respective memoranda. Accordingly, petitioner filed its Memorandum[51] on 22 July 2019 while respondent filed his Memorandum[52] on 20 August 2019.

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35 Id., pp. 17-18.
36 Division Docket (CTA Case No. 9577), Volume II, pp. 608-624.
37 Id., pp. 782-783.
38 Proof of Payment (BIR Form No. 0605) – ₱308,406.20
39 Proof of Payment (BIR Form No. 0605) – ₱241,514.00
40 Proof of Payment (BIR Form No. 0605) – ₱50,000.00
41 Bill of Lading ("P-46" to "P-58"), Commercial Sales Invoice ("P-59" to "P-72"), Invoices of sale of raw sugar ("P-73" to "P-77").
42 Invoices of sale of raw sugar.
43 Id.
44 Id.
45 Id.
46 Id.
47 Id.
48 Id.
49 Invoices of sale of Quedans.
50 Id.
51 Division Docket (CTA Case No. 9577), Volume II, pp. 796-827.
52 Id., pp. 834-845.

In its 27 August 2019 Resolution, the Court submitted the case for decision.[53]

ISSUES

The parties failed to adopt a common issue for the Court's resolution. Instead, petitioner and respondent submitted, respectively, the following issues as shown in their JSFI[54]:

I. For Petitioner:

A. WHETHER THE RIGHT OF RESPONDENT TO ASSESS THE VALUE ADDED TAX (VAT) LIABILITY FOR THE TAXABLE YEAR 2008 HAS ALREADY PRESCRIBED.

B. EVEN ASSUMING FOR THE SAKE OF ARGUMENT THAT THE ASSESSMENTS WERE ISSUED WITHIN THE PRESCRIPTIVE PERIOD, WHETHER THERE IS ANY FACTUAL AND LEGAL BASIS FOR PETITIONER'S ALLEGED LIABILITY FOR DEFICIENCY VAT, MORE SPECIFICALLY:

a. Whether respondent has a right to assess petitioner despite the issuance of the Termination Letter dated 16 March 2010 which includes the payment for taxable year ending October 2008.
b. Whether respondent has a right to issue assessment, which covers the same alleged VAT deficiency for the same taxable year, solely on the basis of a Letter Notice.
c. Whether the alleged discrepancies noted in the FAN pertain to export sales and sales of raw sugar which are VAT zero-rated sales and exempt sales, respectively.

C. WHETHER PETITONER IS ENTITLED TO A TAX REFUND/CREDIT CERTIFICATE IN THE TOTAL AMOUNT OF ₱27,610,887.10 REPRESENTING FIFTEEN PERCENT (15%) OF THE ERRONEOUS COMPROMISE PAYMENT, WHERE SUCH ERRONEOUS PAYMENT IS PREMISED ON THE FOLLOWING:

a. Prescription of the assessment;
b. Issuance of a Termination Letter;
c. Assessment was issued without a Letter of Authority; and,

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53 Id., p. 846.
54 Id., pp. 545-551.

d. The discrepancies noted in the assessment pertain to export sales and sales of raw sugar which are VAT zero-rated sales and exempt sales, respectively.

II. <u>For respondent:</u>

A. WHETHER THE HONORABLE COURT HAS JURISDICTION TO RULE ON THE VALIDITY OF THE NOTICE OF DENIAL OF THE COMPROMISE APPLICATION.

B. WHETHER THE HONORABLE COURT HAS JURISDICTION TO RULE ON THE CASE OF REFUND.

In the alternative that the Honorable Court will assume jurisdiction,

C. WHETHER THE HONORABLE COURT HAS JURISDICTION TO RULE ON THE VALIDITY OF THE VAT DEFICIENCY ASSESSMENT FOR TAXABLE YEAR 2008 CONSIDERING THAT THE ASSESSMENT HAS ALREADY BECOME FINAL AND DEMANDABLE.

D. WHETHER SECTION 229 OF THE 1997 NATIONAL INTERNAL REVENUE CODE, AS AMENDED, APPLIES.

<u>ARGUMENTS</u>

Petitioner proffered a two-tiered argument to support its stand in these consolidated cases.

First, on the legality and validity of the VAT assessment for FY 2008. Petitioner argued vehemently that the VAT assessment and the imposition of compromise penalty were made without authority hence, void. It maintained that the ROs' audit was invalid absent the required LOA. Petitioner cited, among others, the Supreme Court ruling in the case of *Medicard*[55] and *Commissioner of Internal Revenue v. Sony Philippines, Inc.*[56] (**Sony**).

Claiming to have taken its cue from the above cases, petitioner contended that the basis for the second assessment was merely the LN (which was not later on converted into a LOA upon finding of

55 Supra at note 19.
56 G.R. No. 178697, 17 November 2010.

discrepancies). Aside from the absence of a LOA, petitioner likewise pointed out that no NIC was issued. In not complying with the procedural rules, particularly BIR's own RR 12-99, its right to due process should result in a void assessment. In turn, the collection letters should be struck down as they were issued without authority.

Assuming *arguendo* that the assessment was made with authority, petitioner also claimed that it will remain ineffective and unenforceable for having been issued beyond the three-year prescriptive period. Herein, there could be no viable justification to apply the exception or the 10-year period for false or fraudulent returns.

More importantly, as petitioner argued insistently, there was already a prior assessment that included VAT and that the same was already terminated.

Second, its entitlement to refund is hinged on Section 229[57] of the NIRC of 1997, as amended, or the refund of erroneously paid taxes. Petitioner anchored its claim for refund on the premise that the VAT assessment was void, hence the fifteen percent (15%) paid as compromise settlement was similarly without basis. There being no right on the part of the BIR to collect the same, upon the principle of *solutio indebiti*, the latter must refund.

Petitioner reiterated that it was constrained to pay the compromise penalty only to facilitate the renewal of its Importer's Clearance Certificate (**ICC**).

On the other hand, respondent countered that the Court has no jurisdiction over the refund case as the petition stated no cause of action. Likewise, upon the denial of the application for compromise settlement, the outstanding liabilities should be paid and there was no provision stating that the amount paid can be refunded. In addition, respondent contended that the assessment (subject of CTA Case No. 9577) has become final and executory for petitioner's failure to file a protest to the FAN. It was utter error for it to have waited response to its protest to the PAN.

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57 Supra at note 5.

Respondent added that, assuming the Court has jurisdiction, petitioner's claim for refund was a mere afterthought and run counter to petitioner's actuation in applying for a compromise settlement. For respondent, it was petitioner's choice to avail of the compromise settlement therefore, it could not claim that it was done with the end view of refunding the amount.

RULING OF THE COURT

For an orderly discussion of the parties' issues, the Court consolidates these main and essential points for its resolution:

I.
WHETHER THE COURT HAS JURISDICTION OVER THE CASES;

II.
WHETHER THE PERIOD TO ASSESS PETITIONER FOR TAXABLE YEAR 2008 HAS PRESCRIBED;

III.
WHETHER THE SUBJECT ASSESSMENT FOR VALUE-ADDED TAX WAS VALID; and,

IV.
WHETHER PETITIONER IS ENTITLED TO A REFUND.

COURT'S JURISDICTION OVER THE CASES

We shall discuss the Court's jurisdiction separately for each case.

To reiterate, respondent is of the view that the Court is bereft of jurisdiction over the cases based on these grounds: (1) the compromise settlement was disapproved and petitioner paid its tax liability; (2) the claim for refund was a mere afterthought; and, (3) the assessment for FY 2008 has become final after petitioner failed to file its protest to the FAN.

In **CTA Case No. 9577** which seeks the cancellation of the assessment, collection letters as well the Notice of Denial of the Compromise Settlement, petitioner reckoned the filing of the Petition for Review within thirty (30) days *from* its receipt of the Notice of Denial of the (Application for) Compromise Settlement or on 13 March 2017, while at the same time invoking Section 228[58] of the NIRC of 1997, as amended.

The disparity in the allegations in CTA Case No. 9577 is too glaring to ignore when petitioner, in its arguments, makes out *an appeal of an assessment* but refers to the Notice of Denial of its compromise settlement application in reckoning the date to show the timeliness of the petition. The assessment being disputed by petitioner and the Notice of Denial are two different matters that could not be merged without convoluting the issue of jurisdiction further.

Notably, petitioner stated in CTA Case No. 9577 that it received a copy of the subject Notice of Denial on 13 March 2017 and pursuant to Section 228 of the Tax Code, it had thirty (30) days from receipt thereof or until 12 April 2017, within which to file its Petition for Review.[59]

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58 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:

...

The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment is 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. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

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 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.

59 Paragraphs 4 and 5, Statement of the Case, Timeliness of the Appeal and Manifestation, Petition for Review, Division Docket (CTA Case No. 9577), Volume I, p. 12.

Section 228 of the NIRC of 1997, as amended, is however clear that what is appealable before this Court is either the decision or the inaction of the CIR or his duly authorized representative on a *disputed assessment,* and not the assessment itself. To dispute the assessment, it is the FLD and Assessment Notice that must be administratively protested within thirty (30) days and not the PAN.[60] The word "decision" has been interpreted to mean the decision of the CIR on the protest of the taxpayer against the assessment.[61]

It is elementary that jurisdiction is conferred by law and determined by the allegations in the complaint which comprise a concise statement of the ultimate facts constituting the plaintiff's cause of action. In *Padlan v. Elenita Dinglasan*[62], the Supreme Court opined, *viz:*

> ...
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> ...Basic as a hornbook principle is that jurisdiction over the subject matter of a case is conferred by law and determined by the allegations in the complaint which comprise a concise statement of the ultimate facts constituting the plaintiff's cause of action. The nature of an action, as well as which court or body has jurisdiction over it, is determined based on the allegations contained in the complaint of the plaintiff, irrespective of whether or not the plaintiff is entitled to recover upon all or some of the claims asserted therein. The averments in the complaint and the character of the relief sought are the ones to be consulted. Once vested by the allegations in the complaint, jurisdiction also remains vested irrespective of whether or not the plaintiff is entitled to recover upon all or some of the claims asserted therein.
>
> What determines the jurisdiction of the court is the nature of the action pleaded as appearing from the allegations in the complaint. The averments therein and the character of the relief sought are the ones to be consulted.
>
> ...

If this Court were to rely on petitioner's allegations in CTA Case No. 9577 that make out an appeal to the assessment, the lack of jurisdiction on our part becomes evident. Since it received the FAN on 06 November 2013, that should have been its cue to take on the appeal

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60 *Allied Banking Corporation v. Commissioner of Internal Revenue,* G.R. No. 175097, 05 February 2010.

61 Id.

62 G.R. No. 180321, 20 March 2013.

before this Court within the prescribed period. Obviously, that period had long closed on petitioner.

Consequently, having lost the remedy of appeal to Us, petitioner's deficiency assessment had attained finality and became executory. In one case[63], the Supreme Court held:

> ...
> ... [A] taxpayer's failure to file a petition for review with the Court of Tax Appeals within the statutory period rendered the disputed assessment final, executory and demandable, **thereby precluding it from interposing the defenses of legality or validity of the assessment and prescription of the Government's right to assess**. Indeed, any objection against the assessment should have been pursued following the avenue paved in Section 229 (now Section 228) of the NIRC on protests on assessments of internal revenue taxes.
> ...

It is worthy to note that, while the right to appeal an administrative decision is merely a statutory remedy, nevertheless the requirement that it must be brought within thirty (30) days after receipt of the decision or ruling is jurisdictional. If a statutory remedy provides as a condition precedent that the action to enforce it must be commenced within a prescribed time, such requirement is jurisdictional and failure to comply therewith is fatal.[64]

As to the questioned Notice of Denial on 13 March 2017, this way passed the assessment stage since there was already a prior final demand to pay the deficiency VAT. Is the Court similarly preluded in assuming jurisdiction if it were the Notice of Denial (of the application for compromise settlement) that is questioned? To this, the Court is constrained to respondent in the same manner.

As already stated earlier, petitioner's allegations in CTA Case No. 9577 mentioned the Notice of Denial *yet* it referred to Section 228 of the NIRC of 1997, as amended, as well. Hence, while indeed this Court

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63 *Commissioner of Internal Revenue v. Hon. Raul M. Gonzalez, et al.*, G.R. No. 177279, 13 October 2010; Emphasis supplied.

64 *Ker and Company, Ltd. v. The Court of Tax Appeals and The Collector of Internal Revenue*, G.R. No. L-12396, 31 January 1962, citing *Callahan v. Chespeake & Ohio*, 407 Supp. 323, mentioned on p. 175, Moran's Rules of Court, Vol. 1, 1952 Ed.

may take on "other matters" arising from the NIRC of 1997[65], as amended, petitioner's issues in CTA Case No. 9577 nevertheless all go back to the finality of the assessment that it failed to dispute. Thus, in reality, the petition is a belatedly-filed "disguised protest" (which protest or remedy it had long foregone).

In **CTA Case No. 9739** seeking the refund or issuance of Tax Credit Certificate (**TCC**) of the amount paid, this Court, however, finds differently. Section 3(a)(2), Rule 4 on Jurisdiction of the Revised Rules of the Court of Tax Appeals (**RRCTA**), as amended provides:

> ...
> Sec. 3. *Cases within the jurisdiction of the Court in Division.* – The Court in Division shall exercise:
>
> ...
>
> (2) Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code, or other laws administered by the Bureau of Internal Revenue where the National Internal Revenue Code or other applicable law provides a specific period for action: ... ***Provided, still further,*** **that in the case of claims for refund of taxes erroneously or illegally collected, the taxpayer must file a petition for review with the Court prior to the expiration of the two-year period under Section 229 of the National Internal Revenue Code**[.][66]
>
> ...

Section 204 of the NIRC of 1997, as amended, likewise provides:

> ...
> **Sec. 204.** *Authority of the Commissioner to Compromise, Abate, and Refund of Credit Taxes.* – The Commissioner may –
>
> ...
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good

---

65 See Section 3 (a) (1) of Rule 4 of the Revised Rules of the Court of Tax Appeals (RRCTA).
66 Emphasis supplied.

> condition by the purchaser, and in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. **No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty**: *Provided, however,* That a return filed showing an overpayment shall be considered as a written claim for credit or refund.[67]
>
> ...

Section 204 above must be correlated with Section 229 of the NIRC of 1997, as amended, to wit:

> ...
>
> **Sec. 229.** *Recovery of Tax Erroneously or Illegally Collected.* – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> **In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment**: *Provided, however,* That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.[68]
>
> ...

Petitioner filed with respondent an application for compromise and paid an amount equivalent to fifteen percent (15%) of the alleged basic VAT deficiency (that is, ₱27,610,887.10) on 18 December 2015.[69] However, on 13 March 2017, respondent issued the Notice of Denial.[70]

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67 Emphasis supplied.
68 Emphasis supplied.
69 Exhibit "P-21" and "P-22", Division Docket (CTA Case No. 9577), Volume II, pp. 711-716.
70 Exhibit "P-26", attached as Annex "C-1", Petition for Review, id., Volume I, p. 35.

On 18 December 2017, petitioner filed an administrative claim for refund with respondent.[71] On the same day, petitioner filed a judicial claim for refund with the Court.[72]

In *Commissioner of Internal Revenue, et al. v. Primetown Property Group, Inc.*,[73] the Supreme Court held that, in counting a year as between the Civil Code (which provides that a year is equivalent to 365 days) and the Administrative Code of 1987 (which states that a year is composed of 12 calendar months), it is the latter that must prevail following the legal maxim, *lex posteriori derogat priori*:

> ...
>
> Both Article 13 of the Civil Code and Section 31, Chapter VIII, Book I of the Administrative Code of 1987 deal with the same subject matter — the computation of legal periods. Under the Civil Code, a year is equivalent to 365 days whether it be a regular year or a leap year. Under the Administrative Code of 1987, however, a year is composed of 12 calendar months. Needless to state, under the Administrative Code of 1987, the number of days is irrelevant.
>
> There obviously exists a manifest incompatibility in the manner of computing legal periods under the Civil Code and the Administrative Code of 1987. For this reason, we hold that Section 31, Chapter VIII, Book I of the Administrative Code of 1987, being the more recent law, governs the computation of legal periods. *Lex posteriori derogat priori.*
>
> Applying Section 31, Chapter VIII, Book I of the Administrative Code of 1987 to this case, the two-year prescriptive period (reckoned from the time respondent filed its final adjusted return on April 14, 1998) consisted of 24 calendar months, computed as follows:
>
> **Year 1**- 1st calendar month April 15, 1998 to May 14, 1998
> 2nd calendar month May 15, 1998 to June 14, 1998
> 3rd calendar month June 15, 1998 to July 14, 1998
> 4th calendar month July 15, 1998 to August 14, 1998
> 5th calendar month August 15, 1998 to September 14, 1998
> 6th calendar month September 15, 1998 to October 14, 1998
> 7th calendar month October 15, 1998 to November 14, 1998
> 8th calendar month November 15, 1998 to December 14, 1998
> 9th calendar month December 15, 1998 to January 14, 1999
> 10th calendar month January 15, 1999 to February 14, 1999

71 Exhibit "P-34", id., Volume II, pp. 731-740.
72 *See* Petition for Review, Division Docket (CTA Case No. 9739), pp. 10-37.
73 G.R. No. 162155, 28 August 2007, 531 SCRA 436.

11th calendar month February 15, 1999 to March 14, 1999
12th calendar month March 15, 1999 to April 14, 1999

Year 2 -13th calendar month April 15, 1999 to May 14, 1999
14th calendar month May 15, 1999 to June 14, 1999
15th calendar month June 15, 1999 to July 14, 1999
16th calendar month July 15, 1999 to August 14, 1999
17th calendar month August 15, 1999 to September 14, 1999
18th calendar month September 15, 1999 to October 14, 1999
19th calendar month October 15, 1999 to November 14, 1999
20th calendar month November 15, 1999 to December 14, 1999
21st calendar month December 15, 1999 to January 14, 2000
22nd calendar month January 15, 2000 to February 14, 2000
23rd calendar month February 15, 2000 to March 14, 2000
24th calendar month March 15, 2000 to April 14, 2000

We therefore hold that respondent's petition (filed on April 14, 2000) was filed on the last day of the 24th calendar month from the day respondent filed its final adjusted return. Hence, it was filed within the reglementary period.

...

Applying the above to CTA Case No. 9739, We find that petitioner *timely* filed an administrative claim with respondent CIR and a judicial claim for refund with the Court on 18 December 2017, which is the last day of the 24th calendar month from the day petitioner filed and paid the compromise settlement of ₱27,610,887.10.

It is noted that while We hold that we are precluded from going into the merits of CTA Case No. 9577 because of lack of jurisdiction (as it was in reality a belatedly-filed appeal to the assessment), We could do so in CTA Case No. 9739 given that it was timely filed hence the Court could assume jurisdiction over the same. Accordingly, the Court could look into the regularity of the assessment process.

Likewise, the Court is placed in a rather unique position to still revisit the assessment proceedings to determine whether petitioner is entitled to its claim for refund. For we can only decide properly on petitioner's claim for refund if we are certain on respondent's right, or the lack thereof, to collect deficiency taxes from petitioner.

After a thorough review of the pieces of evidence, and considering the novel circumstances of this case, We find petitioner's claim for refund meritorious. Otherwise stated, respondent had no right to collect deficiency taxes from petitioner.

Incidentally, assuming for the sake of argument that the Court could assume jurisdiction in CTA Case No. 9577 and that the Notice of Denial is viewed to be falling within "other matters" in Section 3 (a) (1) of Rule 4 of RRCTA[74], the Court, in its resolution thereof, would nevertheless consider the similar serious attacks against respondent's right to assess based on prescription and against the invalidity of his assessment in CTA Case No. 9739.

THE PERIOD TO ASSESS PETITIONER HAS PRESCRIBED

Based on the records, it would appear that the second assessment for FY 2008 was issued beyond the three-year prescriptive period. Section 203 of the NIRC of 1997, as amended, provides:

> ...
> **SEC. 203.** *Period of Limitation Upon Assessment and Collection.* – Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided,* That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.
> ...

[74] SEC. 3. *Cases within the jurisdiction of the Court in Division.* — The Court in Division shall exercise:
(a) Exclusive original over or appellate jurisdiction to review by appeal the following:
(1) **Decisions of the Commissioner of Internal Revenue in cases involving** disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or **other matters arising under the National Internal Revenue Code** or other laws administered by the Bureau of Internal Revenue...

To not apply the three-year period, the circumstances of the cases must fall under the stated exceptions in Section 222 of the NIRC of 1997, as amended. They are as follows:

> ...
>
> **Sec. 222.** *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* -
>
> (a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: *Provided*, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.
>
> (b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.
>
> ...

As there was no indication that the parties here executed a waiver on the statute of limitations, We therefore look into whether there was false or fraudulent return to consider the application of the 10-year period.

The period to assess the quarterly VAT for FY 2008 are as follows:

VAT Return[75]	Date of Filing/Deadline for Filing, whichever is later	Last day to Assess
1st Quarter	25 February 2008	25 February 2011
2nd Quarter	25 May 2008	25 May 2011
3rd Quarter	25 August 2008	25 August 2011
4th Quarter	25 November 2008	25 November 2011

75 Exhibits "P-41" to "P-44".

After a careful review, the Court does not find basis to conclude that petitioner filed false or fraudulent VAT returns for FY 2008 to warrant the application of the 10-year period.

First, in the first assessment (conducted within the three-year period), there was no finding of fraud, actual or *prima facie*, for gross under-declaration of sales. The records show that the first audit investigation ended with petitioner paying the deficiency income tax and VAT.

Second, in the subsequent assessment, although the surcharge applied was 50%[76], signaling a false or fraudulent return[77], there was no explanation for claiming the same or any allegation of fraud or falsity.

As the 10-year prescriptive period is the exception and even more so for a second assessment covering the same taxable year, respondent should have alleged and proved that petitioner filed false or fraudulent returns. Respondent miserably failed to do so and left petitioner to presume that it filed false or fraudulent returns.

It is settled that fraud is a question of fact that should be alleged and duly proven. The willful neglect to file the required tax return or the fraudulent intent to evade the payment of taxes, considering that the same is accompanied by legal consequences, cannot be presumed. Fraud entails corresponding sanctions under the tax law. Therefore, it is indispensable for the CIR to include the basis for its allegations of fraud in the assessment notice.[78]

---

[76] As shown in the PAN and FAN.

[77] **Sec. 248.** – *Civil Penalties.*

...

(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.

...

[78] *Commissioner of Internal Revenue v. Fitness by Design, Inc.*, G.R. No. 215957, 09 November 2016.

Accordingly, with no factual or legal mooring on which to base the 10-year period to make assessment, respondent's (second) assessment of petitioner had already prescribed.

In *Bank of the Philippine Islands v. Commissioner of Internal Revenue*[79], the Supreme Court elucidated:

> ...
>
> Though the statute of limitations on assessment and collection of national internal revenue taxes benefits both the Government and the taxpayer, it principally intends to afford protection to the taxpayer against unreasonable investigation. The indefinite extension of the period for assessment is unreasonable because it deprives the said taxpayer of the assurance that he will no longer be subjected to further investigation for taxes after the expiration of a reasonable period of time. As aptly explained in *Republic of the Philippines v. Ablaza*-
>
> The law prescribing a limitation of actions for the collection of the income tax is beneficial both to the Government and to its citizens; to the Government because tax officers would be obliged to act promptly in the making of assessment, and to citizens because after the lapse of the period of prescription citizens would have a feeling of security against unscrupulous tax agents who will always find an excuse to inspect the books of taxpayers, not to determine the latter's real liability, but to take advantage of every opportunity to molest peaceful, law-abiding citizens. Without such a legal defense taxpayers would furthermore be under obligation to always keep their books and keep them open for inspection subject to harassment by unscrupulous tax agents. The law on prescription being a remedial measure should be interpreted in a way conducive to bringing about the beneficent purpose of affording protection to the taxpayer within the contemplation of the Commission which recommend the approval of the law.
>
> ...

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79 G.R. No. 139736, 17 October 2005; Citations omitted.

THE SECOND ASSESSEMENT FOR OR VALUE ADDED TAX FOR FY 2008 IS VOID

The second VAT assessment for FY 2008 pursuant to a LN No. M-077-RLF-08-00-00007[80] is likewise marred with substantive and procedural defects that the Court could not ignore.

As petitioner invoked repeatedly, there was a prior assessment for FY 2008 pursuant to an LOA for *all internal revenue taxes,* including IT and VAT. Respondent, based on its investigation, already found petitioner liable for deficiency IT and VAT previously. Petitioner did not contest the said finding and immediately settled its deficiency taxes. Such payment hence prompted the issuance of the Termination Letter[81] by RD Francisco that reads:

> ...
>
> TL No. 12-77-0004-2010
>
> **TERMINATION LETTER**
>
> March 16, 2010
>
> **ED & F MAN PHILIPPINES, INC.**
> #10 Zamora St., Silay City
> Negros Occidental
>
> **Sir/Madam/Gentlemen:**
>
> With reference to the investigation of your books of accounts and other accounting records for Income and all other Internal Revenue Tax Liabilities purposes, **for the calendar/fiscal year(s) ending October 31, 2008** conducted by Garingalao/ Mirasol/ Lapu-os/ Torrechiva/ Belarmino under Letter of Authority No. 00026325 dated June 18, 2009, I would like to inform you that same resulted to the following deficiency (ies), to wit:

Kind of Tax	Amount
Income Tax	308,486.20
Value-Added Tax	241,514.00
Penalty (Income Tax)	5,000.00

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80 Referred to in the PAN and FAN.

81 Exhibit "P-4", Division Docket (CTA Case No. 9577), Volume II, p. 646; Emphasis and underscoring in the original text.

Penalty (VAT)	40,000.00
Penalty (Withholding Tax)	5,000.00
Total	**600,000.20**

In view of your payment of the aforestated deficiency taxes in the total amount of ₱600,000.20 under BTR BIR Deposit Slip dated October 14, 2009 issued/validated at BDO (Bacolod Branch), the records for case/s covered by the above-mentioned Letter of Authority will now be filed for future reference.

Very truly yours,
(signed)
Araceli L. Francisco, CESO VI
Regional Director

...

Undoubtedly, respondent already sifted through petitioner's books of accounts and thus had ample opportunity to make a complete assessment, and come up with the findings of deficiency taxes. Surprisingly, sometime in 2013, it undertook another assessment for VAT for FY 2008 that reached petitioner. The supposed discrepancy that gave rise to the second assessment was based on the declared Sales per BIR-RPS *vis-à-vis* the Sales per VAT Returns, as follows:

...

Sales per BIR-RPS	2,191,278,520.00
Sales per VAT Returns Filed	(657,340,347.75)
Under-declaration on Sales	₱1,533,938,172.25

...

While petitioner admitted that it indeed omitted the sales that were subject to zero-percent VAT and exempt sales in its VAT returns, it explained that there was no intent to under-declare the sales, as the total sales were accurately reported in its income tax return (**ITR**). Also, the omitted sales had no effect on the VAT payable.

The records of the cases support petitioner's claim that it declared all its sales in its ITR[82] and audited financial statements[83] (**AFS**). The sales, per BIR-RPS as shown above, matched with the sales declared in the ITR and AFS (filed with the BIR). There was no

[82] Appended to the Reply to PAN, Exhibit "P-6".
[83] Exhibit "P-45".

showing that petitioner amended either its ITR or VAT returns subsequent to the first assessment. Hence, the relevant documents showing petitioner's total sales were readily available to respondent at the time of the first assessment.

Considering that respondent assessed petitioner for *all* internal revenue taxes, particularly IT and VAT for FY 2008, the glaring discrepancy between the actual sales reported in its ITR and the sales in its VAT returns could not have escaped its scrutiny. Curiously enough, when respondent made a computation of petitioner's deficiency IT and VAT (in the first assessment), he failed to consider the obvious mismatch of reported sales in the ITR and VAT returns, when all of these documents were subjected to investigation.

While all presumptions are in favor of the correctness of a tax assessment,[84] it would be unfair to subject a taxpayer to another audit and assessment especially if the second assessment is already beyond the prescribed period to assess. In *Commissioner of Internal Revenue v. B.F. Goodrich Phils., Inc., et al.*[85], the Supreme Court held:

> ...
>
> For the purpose of safeguarding taxpayers from any unreasonable examination, investigation or assessment, our tax law provides a statute of limitations in the collection of taxes. Thus, the law on prescription, being a remedial measure, should be liberally construed in order to afford such protection. As a corollary, the exceptions to the law on prescription should perforce be strictly construed.
>
> Sec. 15 of the NIRC, on the other hand, provides that "[w]hen a report required by law as a basis for the assessment of any national internal revenue tax shall not be forthcoming within the time fixed by law or regulation, or when there is reason to believe that any such report is false, incomplete, or erroneous, the Commissioner of Internal Revenue shall assess the proper tax on the best evidence obtainable." Clearly, Section 15 does not provide an exception to the statute of limitations on the issuance of an assessment, by allowing the initial assessment to be made on the basis of the best evidence available. **Having made its initial assessment in the manner prescribed, the commissioner could not have been authorized**

---

84 *Commissioner of Internal Revenue v. Hon. Raul M. Gonzalez, et al.*, G.R. No. 177279, 13 October 2010.

85 G.R. No. 104171, 24 February 1999.

> **to issue, beyond the five-year prescriptive period, the second and the third assessments under consideration before us.**[86]
>
> ...

Notably likewise, the second assessment issued in 2013, pursuant to an LN, made no reference to the first assessment. It was made to appear that petitioner's book of accounts were subjected to audit investigation for the first time. Despite petitioner's insistence that there was already a prior terminated audit investigation involving VAT, respondent feigned ignorance to the same and went ahead with the second assessment.

THE ABSENCE OF A LETTER OF AUTHORITY RENDERS THE ASSESSMENT VOID AND DENIES TAXPAYER OF DUE PROCESS

Under the Revenue Memorandum Order (**RMO**) No. 12-98[87], one LOA for each taxable year should be issued. The issuance of an LOA for a taxable year is counted as one audit.[88] Respondent cannot circumvent such limitation by carrying out the assessment only by virtue of an LN and giving the latter the effect of an LOA. It is settled that the absence of an LOA is tantamount to a denial of petitioner's right to due process. Such absence is a substantive and an incurable defect that renders the second assessment void *ab initio*.

The importance of the issuance of an LOA as an element of due process cannot be overemphasized. In *Medicard*,[89] the Supreme Court highlighted the indispensability of the LOA in an audit investigation:

> ...
>
> An 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. An LOA is premised on the fact that the

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86 Emphasis supplied.
87 Audit Program for 1998.
88 Annex C-1, RMO 12-98.
89 Supra at note 19; Emphasis and underscoring in the original text.

examination of a taxpayer who has already filed his tax returns is a power that statutorily belongs only to the CIR himself or his duly authorized representatives. Section 6 of the NIRC clearly provides as follows:

SEC. 6. *Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement. –*

(A) **Examination of Return 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 may authorize the examination of any taxpayer** and the assessment of the correct amount of tax: Provided, however, That failure to file a return shall not prevent the Commissioner from authorizing the examination of any taxpayer.

...

With the advances in information and communication technology, the Bureau of Internal Revenue (BIR) promulgated RMO No. 30-2003 to lay down the policies and guidelines once its then incipient centralized Data Warehouse (DW) becomes fully operational in conjunction with its Reconciliation of Listing for Enforcement System (RELIEF System). This system can detect tax leaks by matching the data available under the BIR's Integrated Tax System (ITS) with data gathered from third-party sources. Through the consolidation and cross-referencing of third-party information, discrepancy reports on sales and purchases can be generated to uncover under declared income and over claimed purchases of [g]oods and services.

...

Under this policy, even without conducting a detailed examination of taxpayer's books and records, if the computerized/manual matching of sales and purchases/expenses appears to reveal discrepancies, the same shall be communicated to the concerned taxpayer through the issuance of LN. The LN shall serve as a discrepancy notice to taxpayer similar to a Notice for Informal Conference to the concerned taxpayer. Thus, under the RELIEF System, a revenue officer may begin an examination of the taxpayer even prior to the issuance of an LN or even in the absence of an LOA with the aid of a computerized/manual matching of taxpayers': documents/records. Accordingly, under the RELIEF System, the presumption that the tax returns are in accordance with law and are presumed correct since these are filed under the penalty of perjury are easily rebutted and the taxpayer becomes instantly burdened to explain a purported discrepancy.

Noticeably, both RMO No. 30-2003 and RMO No. 42-2003 are silent on the statutory requirement of an LOA before any investigation or examination of the taxpayer may be conducted. As provided in the RMO No. 42-2003, the LN is merely similar to a Notice for Informal Conference. However, for a Notice of Informal Conference, which generally precedes the issuance of an assessment notice to be valid, the same presupposes that the revenue officer who issued the same is properly authorized in the first place.

With this apparent lacuna in the RMOs, in November 2005, RMO No. 30-2003, as supplemented by RMO No. 42-2003, was amended by RMO No. 32-2005 to fine tune existing procedures in handing assessments against taxpayers' issued LNs by reconciling various revenue issuances which conflict with the NIRC. Among the objectives in the issuance of RMO No. 32-2005 is to prescribe procedure in the resolution of LN discrepancies, conversion of LNs to LOAs and assessment and collection of deficiency taxes.

IV. POLICIES AND GUIDELINES

x x x x

> **8. In the event a taxpayer who has been issued an LN refutes the discrepancy shown in the LN**, the concerned taxpayer will be given an opportunity to reconcile its records with those of the BIR within One Hundred and Twenty (120) days from the date of the issuance of the LN. However, the subject taxpayer shall no longer be entitled to the abatement of interest and penalties after the lapse of the sixty (60)-day period from the LN issuance.
>
> **9. In case the above discrepancies remained unresolved at the end of the One Hundred and Twenty (120)-day period, the revenue officer (RO) assigned to handle the LN shall recommend the issuance of [LOA] to replace the LN.** The head of the concerned investigating office shall submit a summary list of LNs for conversion to LAs (using the herein prescribed format in Annex "E" hereof) to the OACIR-LTS I ORD for the preparation of the corresponding LAs with the notation "This LA cancels LN __________ No."

...

The Court cannot convert the LN into the LOA required under the law even if the same was issued by the CIR himself. Under RR 12-2002, LN is issued to a person found to have underreported sales/receipt per data generated under the RELIEF System. Upon receipt of the LN, a taxpayer may avail of the BIR's Voluntary Assessment and Abatement Program. If a taxpayer fails or refuses to avail of the said program, the BIR may avail of administrative and criminal remedies, particularly closure, criminal action, or audit and investigation. Since the law specifically requires an LOA and RMO No. 32-2005 requires the conversion of the previously issued LN to an LOA, the absence thereof cannot be simply swept under the rug, as the CIR would have it. In fact Revenue Memorandum Circular No. 40-2003 considers an LN as a notice of audit or investigation only for the purpose of disqualifying the taxpayer from amending his returns.

The following differences between an LOA and LN are crucial. First, an LOA addressed to a revenue officer is specifically required under the NIRC before an examination of a taxpayer may be had while an LN is not found in the NIRC and is only for the purpose of notifying the taxpayer that a discrepancy is found based on the BIR's RELIEF System. Second, an LOA is valid only for 30 days from date of issue while an LN has no such limitation. Third, an LOA gives the revenue officer only a period of 10 days from receipt of LOA to conduct his examination of the taxpayer whereas an LN does not contain such a limitation. Simply put, LN is entirely different and serves a different purpose that an LOA. Due process demands, as recognized under RMO No. 32-2005, that after an LN has serve its purpose, the revenue officer should have properly secured an LOA before proceeding with the further examination and assessment of the petitioner. Unfortunately, this was not done in this case.

...

The BIR's RELIEF System has admittedly made the BIR's assessment and collection efforts much easier and faster. The ease by which the BIR's revenue generating objectives is achieved is no excuse however for its non-compliance with the statutory requirement under Section 6 and with its own administrative issuance. In fact, apart from being a statutory requirement, an LOA is equally needed even under the BIR's RELIEF System because the rationale of requirement is the same whether or not the CIR conducts a physical examination of the taxpayer's records: to prevent undue harassment of a taxpayer and level the playing field between the government's vast resources for tax assessment, collection and enforcement, on the one hand, and the solitary taxpayer's dual need to prosecute its business while at the same time responding to the BIR exercise of its statutory powers. The balance between these is achieved by ensuring that any examination of the taxpayer by the BIR's revenue officers is properly authorized in the first place by those to whom the discretion to exercise the power of examination is given by the statute.

...

Moreover, considering the peculiarity of the case at bar, petitioner's failure to file the protest to the FAN did not make valid the otherwise void second assessment. Petitioner's lapses cannot overshadow the nullity of respondent's action of carrying out a second assessment pursuant to a mere LN. As ratiocinated by the Supreme Court in *Commissioner of Internal Revenue v. Metro Star Superama, Inc.*[90]:

> ...
>
> **The Court need not belabor to discuss the matter of Metro Star's failure to file its protest, for it is well-settled that a void assessment bears no fruit.**
>
> It is an elementary rule enshrined in the 1987 Constitution that no person shall be deprived of property without due process of law. In balancing the scales between the power of the State to tax and its inherent right to prosecute perceived transgressors of the law on one side, and the constitutional rights of a citizen to due process of law and the equal protection of the laws on the other, the scales must tilt in favor of the individual, for a citizen's right is amply protected by the Bill of Rights under the Constitution. Thus, while "taxes are the lifeblood of the government," the power to tax has its limits, in spite of all its plenitude. Hence in *Commissioner of Internal Revenue v. Algue, Inc.*, it was said –
>
>> Taxes are the lifeblood of the government and so should be collected without unnecessary hindrance. On the other hand, such collection should be made in accordance with law as any arbitrariness will negate the very reason for government itself. It is therefore necessary to reconcile the apparently conflicting interests of the authorities and the taxpayers so that the real purpose of taxation, which is the promotion of the common good, may be achieved.
>
> xxx xxx xxx
>
> It is said that taxes are what we pay for civilized society. Without taxes, the government would be paralyzed for the lack of the motive power to activate and operate it. Hence, despite the natural reluctance to surrender part of one's hard-earned income to taxing authorities, every person who is able to must contribute his share in the running of the government. The government for its part is expected to respond in the form of tangible and intangible benefits intended to improve the lives of the people and enhance their moral

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[90] G.R. No. 185371, 08 December 2010; Citations omitted, emphasis in the original and supplied.

and material values. This symbiotic relationship is the rationale of taxation and should dispel the erroneous notion that it is an arbitrary method of exaction by those in the seat of power.

But even as we concede the inevitability and indispensability of taxation, it is a requirement in all democratic regimes that it be exercised reasonably and in accordance with the prescribed procedure. If it is not, then the taxpayer has a right to complain and the courts will then come to his succor. For all the awesome power of the tax collector, he may still be stopped in his tracks if the taxpayer can demonstrate x x x that the law has not been observed.

...

THE COMPROMISE SETTLEMENT HAS NO LEGAL BASIS

Having established that the second assessment is void, it necessarily follows that there is no basis for the compromise settlement. The ruling in *CIR v. Azucena T. Reyes*[91] applies in the case at bar, *viz*:

...

Under the present provisions of the Tax Code and pursuant to elementary due process, taxpayers must be informed in writing of the law and the facts upon which a tax assessment is based; otherwise the assessment is void. Being invalid, the assessment cannot in turn be used as a basis for the perfection of a tax compromise.

...

It would be premature for this Court to declare that the compromise on the estate tax liability has been perfected and consummated, considering the earlier determination that the assessment against the estate was void. Nothing has been settled or finalized. Under Section 204(A) of the Tax Code, where the basic tax involved exceeds one million pesos or the settlement offered is less than the prescribed minimum rates, the compromise shall be subject to the approval of the NEB composed of the petitioner and four deputy commissioners.

...

91 G.R. No. 159694, 27 January 2006.

The next question query should bring us to the issue of refund in CTA Case No. 9739 - *is petitioner entitled to refund of the compromise settlement or compromise penalty paid*?

With the earlier disquisition, the Court could only reply in the affirmative. Section 204 of the NIRC of 1997, as amended, provides:

> ...
>
> **Sec. 204.** *Authority of the Commissioner to Compromise, Abate, and Refund of Credit Taxes.* - The Commissioner may –
>
> ...
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: *Provided, however,* That a return filed showing an overpayment shall be considered as a written claim for credit or refund.
>
> ...

Section 204 above must be read in conjunction with Section 229 of the NIRC of 1997, as amended, to wit:

> ...
>
> **Sec. 229.** *Recovery of Tax Erroneously or Illegally Collected.* – No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without any authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however,* That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.
>
> ...

From the foregoing provisions and jurisprudence, the following are the requisites for the refund of taxes erroneously or illegally paid by taxpayers:

1. The taxpayer should **file a written claim for refund or tax credit with the BIR Commissioner within two (2) years from the date of payment of the tax or penalty**, non-compliance with which the latter is precluded from exercising his authority thereon;[92]

2. **If denied or not acted upon within said period, the petition for refund be filed with the CTA within 30 days from receipt of the denial AND within said two (2)-year period from the date of payment of the tax or penalty regardless of any supervening cause**, otherwise, the claim for refund shall have prescribed;[93]

3. The claim for refund must be a **categorical demand for reimbursement**;[94]

4. There must be proof of payment of the erroneously or illegally collected taxes;[95] and,

5. No refund shall be given resulting from availment of incentives granted pursuant to special laws for which no actual payment was made.

As exhaustively discussed above, petitioner complied with the first two requisites and timely filed the administrative and judicial claims for refund.

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92 *Vda. De Aguinaldo v. Commissioner of Internal Revenue, et al.*, 13 SCRA 269 (1965).
93 *Gibbs v. Commissioner of Internal Revenue*, 107 Phil. 232 (1960).
94 *Bermeho v. Collector of Internal Revenue*, 87 Phil. 96 (1950).
95 *Aguilar v. Commissioner of Inernal Revenue*, CA-G.R. SP-16432, 30 March 1990.

As to the third, fourth and fifth requisites, it is also undisputed that petitioner made a categorical demand for refund to respondent as evidenced by petitioner's letter dated 18 December 2017.[96] In addition, to prove the erroneous or illegal payment made, petitioner submitted the Tax Payment Details,[97] Payment Form (BIR Form No. 0605),[98] and Compromise Settlement Payment Form (BIR Form No. 0608)[99] that were stamped received by respondent on 18 December 2015.

Clearly then, petitioner has sufficiently proved its entitlement to its claim for refund representing the fifteen percent (15%) of the amount paid as compromise settlement. To not refund under the circumstances would be unjust enrichment on the part of the government, entitling it to retain a taxpayer's money even in the clear absence of a legal right to do so. Such is the principle of *solutio indebiti.*

Substantial justice, equity and fair play are on the side of petitioner. Technicalities and legalisms, however exalted, should not be misused by the government to keep money not belonging to it, thereby enriching itself at the expense of its law-abiding citizens. Under the principle of *solutio indebiti*, the BIR received something "when there [was] no right to demand it", and thus, it has the obligation to return it.[100] Heavily militating against respondent is the ancient principle that no one, not even the State, shall enrich oneself at the expense of another. Indeed, simple justice requires the speedy refund of the wrongly held taxes.[101]

Lastly, respondent insists that petitioner split its causes of action. The Court, however, could not subscribe to this position. While undeniably the issues are intertwined, the adjudication on the issue of cancellation of assessment in CTA Case No. 9577, *assuming* the Court did successfully acquire jurisdiction over it, does not automatically result in *res judicata* of the claim for refund. The appeal praying for the nullity of the assessment (in CTA Case No. 9577) and the claim for refund under Section 229 of the NIRC (in CTA Case No. 9739) have

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[96] Exhibit "P-34", Division Docket (CTA Case No. 9577), Volume II, pp. 731-740.
[97] Exhibit "P-23", id., BIR Records, p. 93.
[98] Exhibit "P-24", id., p. 94.
[99] Exhibit "P-25", id., p. 95.
[100] See Article 2154, Civil Code of the Philippines.
[101] *State Land Investment Corporation v. Commissioner of Internal Revenue*, G.R. No. 171956, 18 January 2008.

different requirements thus both cases entail presentation of varying pieces of evidence to support each claim.[102]

WHEREFORE, premises considered, petitioner ED and F MAN's Petition for Review, docketed as CTA Case No. 9577, is **DISMISSED** for lack of jurisdiction; whereas its Petition for Review, docketed as CTA Case No. 9739, is **GRANTED**. Accordingly, respondent Commissioner of Internal Revenue is hereby **ORDERED** to refund or issue a tax credit certificate to petitioner in the amount of **Twenty Seven Million Six Hundred Ten Thousand Eight Hundred Eighty Seven Pesos and Ten Centavos (₱27,610,887.10)** representing the fifteen percent (15%) of the compromise settlement.

SO ORDERED.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

I CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

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102 See *Riviera Golf Club, Inc. v. CCA Holdings, B.V.*, G.R. No. 173783, 17 June 2015, where the Supreme Court ruled that the test of identity of causes of action rests on whether the same evidence would support the cause of action in both the first and the second cases.

Although both petitions here have been consolidated for trial, each retains its separate character and requires the entry of a separate judgment. This type of consolidation does not merge the suits into a single action or cause the parties to one action to be parties to the other. *See Republic of the Philippines v. Sandiganbayan (Fourth Division), et al.*, G.R. No. 152375, 16 December 2011, 662 SCRA 152, 190; citing Wright and Miller, Federal Practice and Procedure, Civil 2d Sec. 2381, p. 427.

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the cases were assigned to the writer of the opinion of the Court's Division.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
2nd Division Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the cases were assigned to the writer of the opinion of the Court's Division.

ROMAN G. DEL ROSARIO
Presiding Justice