REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	CTA EB No. 1515 (CTA Case No. 8724)
-versus-	Present: DEL ROSARIO, *PJ*; CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, *JJ*.
LINDE PHILIPPINES, INC. (formerly, CONSOLIDATED INDUSTRIAL GASES, INC.), Respondent.	Promulgated: MAR 07 2018 3:58 p.m.

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DECISION

Fabon-Victorino, J.:

In this Petition for Review dated September 23, 2016, petitioner Commissioner of Internal Revenue assails the Decision and Resolution dated May 4, 2016 and August 25, 2016, respectively, rendered by the Court in Division: 1) cancelling the income tax (IT) and value-added tax (VAT) assessment plus increments he issued against respondent Linde Philippines, Inc. for calendar year (CY) 2009 in the total amount of ₱16,230,296.09; and 2) ordering petitioner to refund the total amount of ₱18,567,731.69 representing respondent's erroneously paid IT and VAT for CY 2009, inclusive of surcharges; compromise penalties and adjusted interest until January 16, 2015.

Petitioner is the Commissioner of Internal Revenue legally vested with the power to act on national internal revenue tax assessments, with office address at the Bureau of Internal Revenue (BIR), National Office Building, Diliman, Quezon City.

Respondent Linde Philippines, Inc., formerly known as Consolidated Industrial Gases, Inc., is a domestic corporation, registered with Securities and Exchange Commission (SEC) with Company Registration No. 89492. It is engaged in the manufacture, production, purchase, importation, sale and trade at wholesale of all kinds of liquids and gases and special gases and other chemicals, among others.

Respondent filed its Quarterly VAT Returns (BIR Form No. 2550-Q) for CY 2009 on the following dates:

Tax Return	**Date of Actual Filing**
VAT 1st Quarter	April 28, 2009
VAT 2nd Quarter	July 22, 2009
VAT 3rd Quarter	October 21, 2009
VAT 4th Quarter	January 22, 2010

On June 21, 2011, respondent received a Letter of Notice (LN) No. 116-TRS-09-00-00036 from petitioner, about alleged discrepancies discovered after computerized matching of information/data reflected in the BIR's Tax Reconciliation System (TRS) with respondent's declarations in its income/ VAT/ percentage/ withholding tax returns. The information was reiterated in the Second LN dated February 9, 2012, which respondent contested via a Letter dated March 8, 2012.

On June 20, 2012, respondent again received from petitioner a letter dated June 18, 2012, requiring it to reply or submit necessary records/documents to counter the discrepancies indicated in LN No. 116-TRS-09-00-00036.

On November 19, 2012, respondent received from petitioner a Notice of Informal Conference (NIC) dated November 5, 2012.

On December 27, 2012, respondent received an undated formal assessment notice (FAN) with attached detail of discrepancies for deficiency IT and VAT for CY 2009, including interest and compromise penalties in the aggregate amount of ₱46,589,889.54.

On January 2, 2013, respondent received from petitioner a preliminary assessment notice (PAN) giving it a period of fifteen (15) days from receipt to present its defense in writing.

On January 25, 2013, respondent protested the undated FAN.

On October 2, 2013, respondent received the Final Decision on Disputed Assessment (FDDA), finding it liable for IT and VAT for CY 2009, inclusive of increments in the reduced amount of ₱16,230,296.09, broken down as follows:

Kind of Tax	Basic Tax	Interest	Compromise Penalty	Total
Income Tax	₱ 3,870,305.03	₱ 2,714,631.94	₱ 25,000.00	₱ 6,609,936.97
VAT	5,464,093.13	4,106,265.99	50,000.00	9,620,359.11
Total	₱ 9,334,398.16	₱ 6,820,897.93	₱ 75,000.00	₱ 16,230,296.09

On November 4, 2013, respondent filed a Petition for Review before the Court in Division, for the cancellation of the questioned assessment.

In his answer, petitioner alleged that he complied with the due process requirement in the issuance of assessment against respondent in accordance with Section 228 of the National Internal Revenue Code (NIRC), as amended, and as implemented by Revenue Regulations (RR) No. 12-99. He caused the timely service of PAN on December 6, 2012 via registered mail as indicated in Registry Receipt No. 3715 and bolstered by respondent's admission of its receipt of the PAN, FAN and FDDA. Further, the subject assessment was based on the comprehensive audit procedure and examination by authorized revenue officers. Besides, respondent failed to overcome the presumption of correctness of the subject assessment. Also, the subject assessments were timely issued within the extraordinary ten-year prescriptive period under Section 222(a) of the NIRC, as amended. All these justify conclusion that respondent is liable to pay the amount of ₱16,230,296.09, representing deficiency IT and VAT for CY 2009.

Meanwhile, on January 8, 2015, or while the case was pending decision, respondent paid the aggregate amount of ₱18,567,731.69, for the alleged deficiency IT and VAT for CY 2009, inclusive of compromise penalties and interests.

On January 21, 2015, respondent filed an administrative claim for refund, on the ground that the amount of ₱18,567,731.69 was erroneously and illegally collected by petitioner as the assessment was void.

On February 5, 2015, respondent moved to admit its Amended Petition for Review before the Court in Division allegedly to include the fact of its payment under protest with prayer for the refund of the same. Per Resolution dated March 27, 2015, the Court in Division admitted respondent's Amended Petition for Review.

In the Resolution dated May 14, 2015, the Court in Division denied petitioner's Motion for Reconsideration of the March 27, 2015 Resolution.

In his answer to the Amended Petition for Review, petitioner raised the same arguments discussed in his original answer. He claimed that respondent was not entitled to refund as he failed to comply with Sections 204(C) and 229 of the NIRC, as amended. Respondent violated the rule on prior exhaustion of administrative remedies by instituting a judicial claim for refund prior to filing of an administrative claim before the BIR, foreclosing his right to evaluate the merits of its claim. Respondent likewise failed to prove that the amount of ₱18,567,731.69 sought for refund had been duly paid. Further, respondent failed to file its administrative and judicial claims for refund within the two (2)-year prescriptive period. Finally, respondent radically changed its cause of action from invalidation of the assailed assessment to an action for refund which is proscribed under Section 3, Rule 10 of the Rules of Court and existing jurisprudence.[1]

On May 4, 2016, the Court in Division rendered a Decision,[2] disposing the controversy as follows:

> **WHEREFORE**, the instant Amended Petition for Review is hereby **GRANTED**. Accordingly, the assessments for deficiency income tax and value-added tax, including their respective interest and compromise penalties for the year 2009 in the total amount of Sixteen Million Two Hundred Thirty Thousand Two Hundred Ninety Six and 9/100 (₱16,230,296.09) are hereby **CANCELLED AND WITHDRAWN**. Further, (petitioner) is hereby ordered to **REFUND** in favor of (respondent) the aggregate amount of Eighteen Million Five Hundred Sixty Seven Thousand Seven Hundred Thirty One and 69/100 (₱18,567,731.69) representing (respondent's) deficiency income tax and value-added tax assessment as per the undated FDDA, inclusive of interest and surcharges with the interest adjustment and compromise penalties up to January 16, 2015.
>
> **SO ORDERED**.

Aggrieved, petitioner moved for reconsideration of the adverse decision but it was denied in the equally assailed Resolution[3] of August 25, 2016. Hence, the present recourse.

On matters of procedure, petitioner ascribes error in the admission of the Amended Petition for Review by the Court in Division, saying that an amendment substantially altered the cause of action or defense[4] since the original action was an action to nullify an assessment which was amended to become one for refund. Such action violated Section 3, Rule 10 of the Rules of Court as it would inevitably cause delay in the proceedings.

On the substantive aspect of the case, petitioner believes that the Court in Division erred in holding that he

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[1] *Gulang vs. Nadayag, et al.,* G.R. No. 82630, September 30, 1992.
[2] *Rollo,* pp. 28-68.
[3] Ibid. at pp. 69-76.
[4] See Note 1, *supra.*

transgressed respondent's right to due process. He puts premium on both testimonial[5] and documentary[6] evidence showing that the PAN was served to respondent on December 6, 2012, while the FAN was received by the latter on December 27 of even year. Allegedly, the twenty-one (21)-day gap between the service of the PAN and respondent's receipt of the FAN is equivalent to, if not more than the fifteen (15)-day period granted to a taxpayer to refute his preliminary findings in the PAN. The fact that the PAN was served prior to respondent's receipt of FAN, coupled with a sufficient period for the latter to contest the PAN constitute substantial compliance with the procedure mandated in Section 228 of the NIRC, as amended and RR No. 12-99. With all the foregoing, his assessment for IT and VAT with increments covering CY 2009 should be sustained by the Court.

Petitioner further points out that the amount for refund are not illegal or erroneous taxes as it was collected on the strength of an assessment compliant with the due process requirement under Section 228 of the NIRC, as amended, and as implemented by RR No. 12-99. In any event, even if the amount for refund are erroneous/illegal taxes, respondent's filing of the original Petition for Review with the Court in Division on November 15, 2013, or more than a year before it lodged its administrative claim for refund on January 21, 2015, already contravenes the clear mandate of Sections 204(C) and 229 of the NIRC, as amended, which requires the filing of an administrative claim for refund before going to court on appeal.

The same action by respondent was also not in accord with the doctrine of exhaustion of administrative remedies, since it effectively deprived him of the opportunity to evaluate the merits of respondent's claim for refund at his level.

By way of Comment,[7] respondent points out that the issues raised by petitioner in the instant petition are a mere

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[5] Respondent's witnesses Elizabeth J. Ormillon and Aurora R. Silvestre declared in open court that the PAN was served to respondent before its receipt of the FAN (TSN dated March 24 and April 21, 2014 respectively).

[6] Registry receipt no. 3715 attached to the PAN (Exhibit R-9).

[7] *Rollo,* at pp. 83-100.

repetition of the arguments he set forth in his Motion for Reconsideration dated May 18, 2016 which had been amply addressed and passed upon by the Court in Division in the challenged Resolution of August 24, 2016.

In any event, respondent counters that no procedural lapse was committed when it amended its Petition for Review, since there was no substantial change in the cause of action/defense in the proceedings below. Both the original and the Amended Petition for Review were hinged on the same contested assessment, with respondent raising the same arguments anchored on the same legal principles in the pursuit of its cause. Even the defenses invoked in both Petitions were essentially the same. Respondent merely opted to include in the Amended Petition for Review its subsequent payment under protest of the subject assessment which it sought to be refunded. Respondent firmly believes that such amendment would not cause damage or prejudice to petitioner as he was equally granted the opportunity to advance his additional defenses via his amended answer to the Amended Petition for Review. Besides, the resolution on the propriety of petitioner's assessment together with its refund claim will practically result in a speedy disposition of the case. In fine, the Court in Division correctly admitted its Amended Petition for Review, says respondent.

Respondent also claims that the assessment is void since petitioner did not comply with the due process requirement in the issuance of impugned assessment as mandated in Section 228 of the NIRC, as amended, and as implemented by RR No. 12-99. Under the law, a taxpayer has fifteen (15) days from receipt of the PAN to file a response or reply thereto, lest the assessment is void. Thus, it had until January 17, 2013, or fifteen (15) days, reckoned from receipt of the PAN on January 2, 2013 to contest petitioner's preliminary findings. Since it received the undated FAN on December 27, 2012, or six (6) days prior to receipt of the PAN, the opportunity to refute the PAN was rendered inutile.

Since the assessment is void, any amount collected as a result thereof is an illegal or erroneous tax which must be returned to the taxpayer pursuant to Sections 204(C) and

229 of the NIRC, as amended. Otherwise stated, the amount respondent paid under protest, i.e., ₱18,567,731.69 which was clearly based on a void assessment must correspondingly be refunded to it.

Contrary to petitioner's contention, respondent filed its administrative claim for refund before it sought judicial intervention right after it made payment under protest in compliance with Sections 204(C) and 229 of the NIRC, as amended.

Finally, respondent did not defy the rule on prior exhaustion of administrative remedies as claimed by petitioner who was granted ample opportunity to evaluate its claim for refund based on the same assessment he issued in 2012, or prior to the institution of the original petition before the Court in Division.

THE RULING OF THE COURT *EN BANC*

The instant petition lacks merit, hence, must be denied.

A second hard look at the instant petition reveals that the issues advanced by petitioner are a replica of his invocations in his answer to the Amended Petition for Review filed with the Court in Division, all of which were weighed and found wanting to justify modification, much more reversal of the challenged Decision and Resolution dated May 4 and August 25, 2016, respectively. Nevertheless, the Court *En Banc* shall discuss them anew if only to reinforce the earlier disquisition of the Court in Division.

Petitioner claims that the admission of respondent's Amended Petition for Review is erroneous as it allegedly altered drastically the latter's cause of action and caused inordinate delay in the resolution of the case, in violation of Section 3, Rule 10 of the Rules of Court and settled jurisprudence.

The Court is not persuaded.

Section 3, Rule 10[8] of the Rules of Court and case law[9] explicitly allow substantial amendment to a pleading provided that leave of court is obtained and intent to delay is absent on the part of the movant.

It appears from respondent's original Petition for Review that it prayed for the cancellation of the disputed assessment, which relief is inextricably interwoven with its prayer for refund in its Amended Petition for Review. Both pleadings impugn the assessment issued by petitioner on the ground of non-observance of the due process requirement. Irrefragably, the controversy laid down in the two pleadings germinated from the same facts, issues and parties, necessitating presentation of the same pieces of evidence to substantiate the complaint. Thus, the determination of the case which sprung from the same cause of action,[10] will not only hasten the resolution of the controversy but will also prevent multiplicity of suits.[11]

Petitioner also asserts that the FAN served upon respondent is valid as it complied with the requirements of the due process in the issuance thereof as demonstrated by the following: his issuance of the PAN on December 6, 2012, or prior to respondent's receipt of the FAN on December 27, 2012; the 21-day interval between the PAN and FAN's respective issuance and receipt, or more than the fifteen (15)-day period for respondent to reply on the PAN. Hence, the amount paid by respondent emanating from the assessment he issued cannot be deemed erroneous/illegal tax within the contemplation of Sections 204(C)[12] and 229[13] of the Tax Code, therefore, should not be refunded.

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[8] **Section 3.** *Amendments by leave of court.* — xxx substantial amendments may be made only upon leave of court. But such leave may be refused if it appears to the court that the motion was made with intent to delay. Orders of the court upon the matters provided in this section shall be made upon motion filed in court, and after notice to the adverse party, and an opportunity to be heard. (underscoring supplied)

[9] *Philippine Ports Authority vs. William Gothong & Aboitiz [WG&A], Inc.,* G.R. No. 158401, January 28, 2008.

[10] A cause of action is the act or omission by which a party violates the right of another. See Section 2, Rule 2 of the Rules of Court; and *Virra Mall Tenants Association, Inc. vs. Virra Mall Greenhills Association*, G.R. No. 182902, October 5, 2011.

[11] See *Chu vs. Spouses Cunanan,* G.R. No. 156185, September 12, 2011.

[12] *SEC. 204. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.* – xxx

(C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are

The assertion is untenable.

Section 228 of the NIRC, as amended, provides the parameters in the issuance of a PAN for the proposed assessment against a taxpayer who must be accorded the opportunity to take appropriate action in response thereto within the period prescribed, and only upon the taxpayer's failure to respond that CIR or his duly authorized representative may issue an assessment based on his findings, thus:

> SEC. 228. Protesting of Assessment. - When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, <u>he shall first notify the taxpayer of his findings</u>: xxx
>
> xxx xxx xxx
>
> The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.
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> <u>Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice.</u> If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings. xxx (underscoring supplied)

To implement the above provision, RR No. 12-99 was promulgated, the pertinent portions of which read as follows:

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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.

[13] *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, of any sum alleged to have been excessively or in any manner wrongfully 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. xxx

SECTION 3. Due Process Requirement in the Issuance of a Deficiency Tax Assessment. —

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

xxx xxx xxx

3.1.2 *Preliminary Assessment Notice (PAN)*. — If after review and evaluation by the Assessment Division or 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, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing 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). <u>If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN</u>, he shall be considered in default, in which case, a formal letter of demand and assessment notice shall be caused to be issued by the said Office, 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. xxx (emphasis supplied)

Thus, for the FAN to be compliant with the due process requirement, the taxpayer must be granted fifteen (15) days from receipt of the PAN to file its response thereon. Only after the lapse of the fifteen (15)-day period without any action on the part of the taxpayer would petitioner be legally allowed to issue a FAN. Simply stated, petitioner's right to issue a FAN begins when the period to respond on the PAN ends.

A *summa contrario* with petitioner's posture, the fifteen (15)-day period to take action on the PAN starts to run *not* from its issuance by petitioner, but from the taxpayer's <u>receipt</u> thereof. While there is no denying that petitioner issued the PAN on December 6, 2012,[14] respondent received it only on January 2, 2013.[15] Counting fifteen (15) days from the receipt of the PAN, respondent had until January 17, 2013 to refute petitioner's findings as contained in the PAN. However, petitioner prematurely issued the undated FAN on December 27, 2012,[16] or six (6) days before respondent received the PAN resulting in the denial of sufficient opportunity for respondent to present its position or defense against the assessment indicated in the PAN.

To this end, Article 5 of the Civil Code provides that acts executed against provisions of mandatory or prohibitory laws shall be void except when the law itself authorizes its validity.[17] Petitioner's failure to pass the benchmark of due process on assessment enunciated in Section 228 of the NIRC, as amended, as implemented by RR No. 12-99 renders the FAN invalid and without any legal consequences.

Petitioner is therefore divested of any authority to retain the tax he collected from respondent for a void assessment bears no valid fruit.[18] A right cannot spring in favor of a person from his own void or illegal act.[19] *Ergo*, the amount of ₱18,567,731.69 which respondent paid under protest is an erroneously or illegally collected tax[20] by virtue of Sections 204(C) and 229 of the NIRC, as amended. In other words, the foregoing sum is a proper subject of a refund claim.

Finally, petitioner also complains that respondent erroneously filed its judicial claim for refund ahead of its administrative claim thereby breaching the requirement

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[14] Exhibit R-9, BIR Record, p. 202.

[15] Answer to Question No. 33, Judicial Affidavit (JA) of Aurora R. Silvestre, docket (CTA Case No. 8724), p. 219; and TSN dated April 21, 2014, p. 18.

[16] Answer to Question No. 29, JA of Aurora R. Silvestre, docket (CTA Case No. 8724), p. 219; and TSN dated April 21, 2014, pp. 18-19.

[17] See *Harte-Hanks Philippines, Inc. vs. Commissioner of Internal Revenue,* G.R. No. 205721, September 14, 2016.

[18] See *Samar-I Electric Cooperative vs. Commissioner of Internal Revenue,* G.R No. 193100, December 10, 2014; *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.,* G.R. No. 185371, December 8, 2010; and *Commissioner of Internal Revenue vs. Reyes,* G.R. Nos. 159694 and 163581, January 27, 2006.

[19] See Article 2254, Civil Code of the Philippines; *Commissioner of Internal Revenue vs. Team Sual Corporation (formerly Mirant Sual Corporation),* G.R. No. 194105, February 5, 2014.

[20] An illegal or erroneous tax is one levied without statutory authority. See *Commissioner of Internal Revenue vs. Philippine National Bank,* G.R. No. 161997, October 25, 2005, citing Black's Law Dictionary 8th Ed., pp. 1496-1497.

under Sections 204(C) and 229 of the NIRC, as amended and the doctrine of exhaustion of administrative remedies, both of which mandate the filing of an administrative claim for refund before seeking judicial intervention.

Petitioner's complaint is more apparent, than real.

A revisit of the record shows that respondent's administrative claim for refund was filed with petitioner on January 21, 2015,[21] or prior to its institution of a judicial claim before the Court in Division on February 5, 2015[22] *a fortiori*, compliant with Sections 204(C) and 229 of the NIRC, as amended. The discussion of the Court in Division on this matter is hereby quoted with approval, thus:

> xxx it bears stressing that when (respondent) filed the petition for review on November 4, 2014, nowhere in the said petition can it be discerned that (respondent) categorically prayed for the grant of a tax refund. (Respondent), in the said petition, only prayed to set aside the assessment for deficiency income tax and value-added tax; and, the cancellation and withdrawal of the assessments for compromise penalties.
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> Contrary to (petitioner's) assertion, on January 21, 2015, (respondent) filed with (petitioner) a written administrative protest requesting the (former) for a tax refund or credit of the allegedly erroneously and illegally collected deficiency income tax, VAT and compromise penalty in the aggregate amount of ₱18,567,731.69. Thereafter, (respondent's) judicial claim was filed on February 5, 2015 through its Motion for Leave to File Amended Petition (with Motion for Leave to Present Additional Evidence) with attached Amended Petition for Review. It was only in the amended petition for review that (respondent) included an additional prayer for refund. Thus, the administrative claim with (petitioner) was filed ahead of (respondent's) judicial claim.

Neither did respondent violate the doctrine of prior exhaustion of administrative remedies. Jurisprudence[23] teaches us that one of the exceptions to the foregoing legal

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[21] Exhibit P-69, docket (CTA Case No. 8724), vol. 9, pp. 4013-4048.
[22] Docket (CTA Case No. 8724), vol. 8, pp. 3485-3666.
[23] See *Go vs. Distinction Properties Development and Construction, Inc.,* G.R. No. 194024, April 25, 2012.

precept is when the controverted acts violate due process. As discussed earlier, the fact that petitioner blatantly infringed respondent's right to due process in the issuance of assessment removes this case from the application of the same.

All said, respondent has complied with all the requisites to justify the grant of its refund claim in the aggregate amount of ₱18,567,731.69, representing illegally collected taxes.

In conclusion, taxes are the lifeblood of the government and so should be collected without unnecessary hindrance.[24] 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, as it has here, that the law has not been observed.[25]

WHEREFORE, the Petition for Review dated September 23, 2016, filed by the Commissioner of Internal Revenue is **DENIED**, for lack of merit. The assailed Decision and Resolution dated May 4, 2016 and August 25, 2016 respectively, both rendered by the Court in Division are **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

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[24] *Lascona Land Co., Inc. vs. Commissioner of Internal Revenue,* G.R. No. 171251, March 5, 2012.

[25] See *Commissioner of Internal Revenue vs. BASF Coating + Inks Phils., Inc.,* G.R. No. 198677, November 26, 2014, citing *Commissioner of Internal Revenue vs. Algue, Inc.,* G.R. No. L-28896, February 17, 1988.

We Concur:

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

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ON LEAVE
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

LINDE PHILIPPINES, INC.
(formerly, Consolidated Industrial Gases, Inc.),
Respondent.

CTA EB NO. 1515
(CTA Case No. 8724)

Present:

DEL ROSARIO, *PJ*,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, and
MANAHAN, *JJ.*

Promulgated:

MAR 07 2018 3:58 p.m.

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CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* in denying the Petition for Review filed by the Commissioner of Internal Revenue for lack of merit.

As eloquently discussed in the *ponencia*, the Final Assessment Notice (FAN) issued against respondent is void for having been issued in violation of respondent's right to due process. Indeed, the right of a taxpayer to respond to a Preliminary Assessment Notice (PAN) is an important part of the due process requirement in the issuance of a deficiency tax assessment. In wantonly disregarding respondent's right to be heard with regard to its positions or arguments against the PAN, petitioner clearly violated respondent's right to due process as enshrined in Section 228 of the National Internal Revenue Code (NIRC) of 1997, as amended and Revenue Regulations (RR) No. 12-99. To be sure, procedural due process is not satisfied with the mere issuance of a PAN, *sans* giving the taxpayer an opportunity to respond thereto.

I further submit that the FAN should be invalidated for having been issued without a valid letter of authority (LOA).

Records disclose that the assessment arose from Letter Notice (LN) No. 116-TRS-09-00-00036 based on the alleged discrepancies in respondent's reported sales for the taxable year 2009. **No LOA was, however, issued relative to the continuance of audit and examination of respondent's records** to verify the alleged discrepancies as stated in the LN. The authority of the revenue officers (ROs) to conduct further audit and examination emanates only from Memorandum of Assignment dated March 4, 2013 and Memorandum of Assignment dated May 3, 2013.

While respondent failed to raise the issue of lack of a valid LOA, the Court is not precluded from considering this issue as its absence renders an assessment intrinsically void. A void assessment bears no fruit,[1] and it is settled that estoppel cannot operate to give an effect to an assessment which is *void ab initio*.

In ***Commissioner of Internal Revenue vs. Lancaster Philippines, Inc.***,[2] the Supreme Court reiterated that the Court of Tax Appeals (CTA) can resolve the issue on the authority of the ROs to conduct the audit, albeit the same was not raised by the parties in their pleadings or memoranda, *viz.*:

> "On whether the CTA can resolve an issue which was not raised by the parties, we rule in the **affirmative**.
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> xxx xxx xxx
>
> xxx xxx xxx, **the CTA Division was, therefore, well within its authority to consider in its decision the question on the scope of authority of 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." (Boldfacing supplied)

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[1] *Metro Star Superama, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 185371, December 8, 2010.
[2] G.R. No. 183408, July 12, 2017.

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For want of a valid LOA, ***Lancaster*** ultimately resolved to declare the assessment void.

In ***Medicard Philippines Inc. vs. Commissioner of Internal Revenue***[3] the Supreme Court emphasized the vital significance of an LOA to the validity of an assessment, albeit the assessment was made pursuant to an LN:

> "'Xxx 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.
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> 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, <u>conversion of LNs to LOAs</u> and assessment and collection of deficiency taxes.**
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> xxx xxx xxx
>
> In this case, there is no dispute that **no LOA was issued prior to the issuance of a PAN and FAN against MEDICARD**. Therefore no LOA was also served on MEDICARD. **The LN that was issued earlier was also <u>not converted into an LOA</u> contrary to the above quoted provision**. xxx xxx xxx.
>
> xxx xxx xxx
>
> **The Court cannot convert the LN into the LOA required under the law even if the same was issued by the CIR himself.** Xxx xxx xxx. **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. Xxx xxx xxx.
>
> xxx xxx xxx
>
> Xxx xxx xxx. **Simply put, LN is entirely different and serves a different purpose than an LOA**. Due process demands,

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[3] G.R. No. 222743, April 5, 2017.

> 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.
>
> xxx xxx xxx
>
> **That the BIR officials herein were not shown to have acted unreasonably is beside the point because the issue of their lack of authority was only brought up during the trial of the case. What is crucial is whether the proceedings that led to the issuance of VAT deficiency assessment against MEDICARD had the prior approval and authorization from the CIR or her duly authorized representatives. Not having authority to examine MEDICARD in the first place, the assessment issued by the CIR is inescapably void**." *(Citations omitted; boldfacing and underscoring supplied)*

The issuance of an LOA prior to the conduct of an examination of a taxpayer's books and other accounting records by any revenue officer is indispensable to the validity of an assessment. *Commissioner of Internal Revenue vs. Sony Philippines, Inc.*[4] declares:

> "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."** (Boldfacing supplied)

Since the assessment arose from a mere LN, without an audit being conducted pursuant to a valid LOA, the assessment that resulted therefrom is a nullity.

Unless and until modified by the Supreme Court *En Banc*, the doctrines laid down in *Medicard, Lancaster* and *Sony* should be applied in determining the validity of assessments issued against taxpayers *sans* any LOA. Indeed, the Supreme Court, by tradition and in our system of judicial administration, has the last word on what the law is; it is the final arbiter of any justiciable controversy. There is only one Supreme Court from whose decisions all other courts should take their bearings.

[4] G.R. No. 178697, November 17, 2010.

All told, I **VOTE** to: **DENY** the Petition for Review filed by the Commissioner of Internal Revenue for lack of merit; and, (ii) **AFFIRM** the assailed Decision and Resolution of the Court in Division.

ROMAN G. DEL ROSARIO
Presiding Justice