REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

FRESH N' FAMOUS FOODS, INC.,
Respondent.

CTA EB No. 1632
(CTA CASE No. 8173)

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

Promulgated:
AUG 14 2018 1:40 p.m.

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a Petition for Review for the Court *En Banc* under *Section 4(b), Rule 8*[1] *of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA), as*

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[1] SEC. 4. *Where to appeal; mode of appeal. –*

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(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court en banc shall act on the appeal.

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amended, of the Decision dated December 15, 2016[2] and the Resolution dated March 22, 2017[3] rendered by the Third Division of this Court, the dispositive portions of which, respectively, read as follows:

> Decision dated December 15, 2016:
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> "**WHEREFORE,** premises considered, the instant Petition for Review is hereby **GRANTED**. Thus, the assailed Decision of respondent dated August 17, 2010 upholding the Final Assessment Notice dated January 23, 2004 is **REVERSED** and **SET ASIDE**. Accordingly, the assessment against petitioner for deficiency income tax, deficiency value-added tax, deficiency expanded withholding tax, deficiency documentary stamp tax, and compromise penalty for taxable year 2000 is hereby **CANCELLED**.
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> **SO ORDERED.**"
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> Resolution dated March 22, 2017:
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> "**WHEREFORE,** finding no compelling reason to reverse the ruling of the Court in the assailed Decision, respondent's Motion for Reconsideration (Decision dated 15 December 2016) is hereby **DENIED** for lack of merit.
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> **SO ORDERED.**"

The facts of the case, as recited by the Third Division in its Decision,[4] read as follows:

> "Petitioner Fresh N' Famous Foods, Inc. is a corporation duly organized and existing under the laws of the Philippines. It was formerly called Chowking Food Corporation before changing its

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[2] Penned by Associate Justice Ma. Belen M. Ringpis-Liban, concurred in by Associate Justice Lovell R. Bautista and Associate Justice Esperanza R. Fabon-Victorino, *En Banc* Docket, pp. 14-29.
[3] Penned by Associate Justice Ma. Belen M. Ringpis-Liban, concurred in by Associate Justice Lovell R. Bautista and Associate Justice Esperanza R. Fabon-Victorino, *En Banc* Docket, pp. 31-35.
[4] *Supra* note 2.

corporate name in November 2006. Petitioner is the surviving entity after it merged with Greenwich Pizza Corporation and Baker Fresh Foods Philippines, Inc. on November 10, 2006.

Petitioner is registered with the Bureau of Internal Revenue (BIR) under Tax Identification Number 000-333-173-000. During the period relevant to this case, Greenwich Pizza Corporation was still an independent juridical entity with Tax Identification Number 003-934-003-000.

On the other hand, respondent is the duly appointed Commissioner of the Bureau of Internal Revenue, vested with authority to act as such, including, among others, to decide disputed assessments of internal revenue taxes and penalties imposed against taxpayers pursuant to the provision of the National Internal Revenue Code (NIRC). He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

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The BIR Collection Division furnished petitioner on April 16, 2004 with a copy of the Preliminary Assessment Notice (PAN) relating to the Preliminary Collection Notice.

On May 19, 2004, petitioner flied its letter protest to the PAN with the BIR Regional District Office No. 40.

Petitioner availed of the government's Tax Amnesty Program under Republic Act (RA) No. 9480 on March 5, 2008.

On August 17, 2010, respondent rendered the assailed Decision upholding the assessment against petitioner in the total amount of P124,880,805.60. Petitioner received said Decision on September 6, 2010, and filed a Petition for Review before the Court on October 6, 2010.

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Petitioner alleges that respondent failed to properly and timely serve a valid final assessment of deficiency income tax, deficiency value-added tax, deficiency expanded withholding tax, deficiency documentary stamp tax, and compromise penalty for taxable year 2000 within the three (3)-year period prescribed under the law.

Respondent, on the other hand, claims that the Final Assessment Notice (FAN)/Final Demand Letter (FLD) No. 40456 dated January 23, 2004 for taxable year 2000 against petitioner was issued in compliance with the provisions of Section 228 of the NIRC of 1997, as amended, and in accordance with existing Rules and Regulations relative to the right of petitioner to be informed of the factual and legal bases upon which the assessment was made.

Respondent maintains that the FAN, the FLD, and the Details of Discrepancies were all sent at the same time to petitioner, which allegedly contained, in detail, the manner of computation, the facts on which the assessment was based, and the provisions of law used in arriving at such deficiency assessment.

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The Third Division ruled that there was no valid service of FAN, FLD, and/ or Details of Discrepancies to Fresh N' Famous Foods, Inc. (FNF) in this case. While the CIR alleges that there was proper service of the FAN with the FLD and the Details of Discrepancies, FNF directly denies receipt thereof. Thus, the burden of proof shifts to the CIR as to the receipt of the FAN, FLD, and/ or Details of Discrepancies. Albeit the CIR's allegation that the BIR was not informed of the new address of FNF, records disclose that the audit of FNF's books of account was conducted in FNF's new address, thus it cannot be said that the mail matter was properly addressed. The CIR also failed to present adequate supporting evidence to prove the fact of mailing of the alleged FAN, FLD, and Details of Discrepancies for FNF's alleged deficiency taxes for taxable year 2000.

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Moreover, the FAN attached to the Preliminary Collection Letter does not include the alleged FLD and Details of Discrepancies of the tax assessment for taxable year 2000. This was also mentioned in the assailed Decision, the CIR noting that FNF received the FAN together with the Collection Letter, *sans* the Details of Discrepancies. Thus, the requirement of informing the taxpayer of the facts and the law on which the assessment was based, was not satisfied by the CIR. Since FNF cannot be expected to protest the FAN without receiving the same and being properly informed of the basis of the assessment, the Third Division cancelled the same.

The CIR's Motion for Reconsideration[5] was filed on January 24, 2017. The CIR asserts that the Petition for Review was filed out of time since the alleged date of receipt of his Decision, which was on September 6, 2010 was a mere allegation and was not proven to be true by FNF. CIR claims that he specifically denied such allegation. Such Motion for Reconsideration was denied *via* the assailed Resolution, hence, this Petition was filed.

The CIR reiterates in his Petition for Review that the date of receipt of his Decision was a mere allegation not proven before this Court and that he specifically denies such statement in his Answer,[6] which states:

> "xxx but specifically denies the date of actual receipt of the said Decision by the petitioner for lack of knowledge sufficient to form a belief as to the truth thereof."

Moreover, applying Section 11 of the Revenue Regulations No. 12-85,[7] the CIR claims that FNF failed to properly inform the BIR of its change of address.

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[5] *Division Docket*, Vol. V, pp. 2378-2383.
[6] *Division Docket*, Vol. I, pp. 208-211.
[7] Section 11. Change of address. - In case of change of address, the taxpayer must give written notice thereof to the Revenue District Officer or the district having jurisdiction over his former legal residence and/or place of business, copy furnished the Revenue District Officer having jurisdiction over his new legal residence or place of business, the Revenue Computer Center and the Receivable Accounts Division, BIR, National Office, Quezon City, and in case of failure to do so, any communication referred to in these regulations previously sent to his former legal residence or business address as appearing in his tax return for the period involved shall be considered valid and binding for purposes of the period within which to reply.

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We rule to DENY the Petition for Review.

At the outset, FNF prays in its Comment[8] for the dismissal of the instant Petition for Review for failure to provide a statement of facts and issues as required by the Rules of Court[9] and the Revised Rules of Court of Tax Appeals.[10]

Rule 43, Section 6 of the Rules of Court provides that the petition for review shall contain a concise statement of the facts and issues involved and the grounds relied upon for the review. Non-compliance with this requirement is sufficient ground for the dismissal of the Petition, pursuant to Section 7 of the same Rule, which reads:

> "Section 7. Effect of failure to comply with requirements. — The failure of the petitioner to comply with any of the foregoing requirements regarding the xxx contents of and the documents which should accompany the petition shall be sufficient ground for the dismissal thereof."

In not a few cases, the Supreme Court has ruled that the right to appeal is neither a natural right nor a part of due

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[8] *En Banc* Docket, pp. 52-66.

[9] Rule 43

Section 6. Contents of the petition. — The petition for review shall xxx contain a concise statement of the facts and issues involved and the grounds relied upon for the review xxx

Section 7. Effect of failure to comply with requirements. — The failure of the petitioner to comply with any of the foregoing requirements regarding the payment of the docket and other lawful fees, the deposit for costs, proof of service of the petition, and the contents of and the documents which should accompany the petition shall be sufficient ground for the dismissal thereof.

[10] Rule 6

Pleadings Filed with Court

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Sec. 2. Petition for review; contents. - The petition for review shall contain allegations showing the jurisdiction of the Court, a concise statement of the complete facts and a summary statement of the issues involved in the case, as well as the reasons relied upon for the review of the challenged decision. xxx

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process; it is a mere statutory privilege that may be exercised only in the manner and strictly in accordance with the provisions of law allowing the appeal.[11] The party who seeks to appeal must comply with the requirements of the law and the rules; failure to comply leads to the dismissal and the loss of the right to appeal.[12]

However, while the Supreme Court has so ruled, it recognizes nonetheless that the right to appeal is an essential part of the system of judicial processes, and courts should proceed with caution in order not to deprive a party of the right to appeal. Thus:

> "xxx. We invariably made this recognition due to our overriding concern that every party-litigant be given the amplest opportunity to ventilate and secure the resolution of his cause, free from the constraints of technicalities. This line of rulings is based, no less, on the Rules of Court which itself calls for a liberal construction of its provisions, with the objective of securing for the parties a just, speedy and inexpensive disposition of every action and proceeding. In this line of rulings, we have repeatedly stressed that litigation is not merely a game of technicalities. The law and jurisprudence grant to courts *in the exercise of their discretion along the lines laid down by this Court* the prerogative to relax compliance with procedural rules of even the most mandatory character, mindful of the duty to reconcile both the need to put an end to litigation speedily and the parties right to an opportunity to be heard."[13] (Italics in the Original; Citations Omitted.)

Also, FNF prays for the dismissal of this instant Petition for failure on the part of the CIR to attach the required affidavit of service in his Petition for Review.

Section 13, Rule 13 of the Rules of Court provides:

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[11] *Sps. Heber & Charlita Edillo vs. Sps. Norberto & Desideria Dulpina,* G.R. No. 188360, Janaury 21, 2010, citing *Colby Construction and Management Corporation vs. National Labor Relations Commission,* G.R. No. 170099, November 28, 2007, 539 SCRA 159, 168; *De Guzman vs. People,* G.R. No. 167492, March 22, 2007, 518 SCRA 767, 771-772; *Balgami vs. Court of Appeals*, 487 Phil. 102, 115 (2004).
[12] *Ibid.*
[13] *Ibid.*

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> "Sec. 13. Proof of service. Proof of personal service shall consist of a written admission of the party served, or the official return of the server, or the affidavit of the party serving, containing a full statement of the date, place and manner of service. If the service is by ordinary mail, proof thereof shall consist of an affidavit of the person mailing of facts showing compliance with section 7 of this Rule. If service is made by registered mail, proof shall be made by such affidavit and the registry receipt issued by the mailing office. The registry return card shall be filed immediately upon its receipt by the sender, or in lieu thereof the unclaimed letter together with the certified or sworn copy of the notice given by the postmaster to the addressee."

With respect to the non-attachment of the affidavit of service, such is not fatal to the petition since the registry receipt[14] attached to the petition clearly shows that FNF was served copies of the petition.[15] The demands of substantial justice were satisfied by the actual receipt of the petition.[16] In fact, FNF filed its comment thereon.

As to the denial of the actual receipt of the CIR's Decision by FNF, in the case of *Fernando Medical Enterprises, Inc. vs. Wesleyan University Philippines, Inc.*,[17] the Supreme Court held that "denials based on lack of knowledge or information of matters clearly known to the pleader, or ought to be known to it, or could have easily been known by it are insufficient, and constitute ineffective or sham denials."[18] The Petition for Review averred the date of receipt of the CIR Decision that the CIR ought to know or could have easily known, but the answer did not specifically deny such material averment. Other than his bare allegations, the CIR failed to present evidence that the CIR Decision was received by FNF on a date other than

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[14] *En Banc* Docket, p. 2.

[15] *Philippine Amusement and Gaming Corporation vs. Marita A. Angara and Beatriz T. La Victoria*, G.R. NO. 142937, November 15, 2005, citing *Gutierrez vs. Secretary of DOLE*, G.R. No. 142248, December 16, 2004, and *Aonuevo vs. Court of Appeals*, G.R. No. 152998, September 23, 2003, 411 SCRA 621.

[16] *Ibid.*

[17] G.R. No. 207970, January 20, 2016.

[18] Citing *J.P. Juan & Sons, Inc. vs. Lianga Industries, Inc.*, G.R. No. L-25137, July 28, 1969, 28 SCRA 807, 809-812 and *Manufacturer's Bank & Trust Co. vs. Diversified Industries, Inc.,* G.R. No. 33695, May 15, 1989, 173 SCRA 357, 364.

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September 6, 2010. Mere allegations without hard evidence cannot be considered as clear and convincing proof.[19]

Moreover, a perusal of the Joint Stipulation of Facts and Issues[20] reveals that it is nowhere stated in the issues for consideration the date of actual receipt of the CIR's Decision. If the CIR really specifically denies such date of receipt, it could have been easily raised as an issue. In short, it was a mere afterthought on the part of the CIR to raise this as an issue.

As to the service of mail matter to the old address of FNF, this issue is not new as this Court has already discussed the same in the case of *Commissioner of Internal Revenue vs. Yukon General Manpower Services Corp.*,[21] which provides:

> "While it may be true that respondent filed an Application for Registration Information Update on March 31, 2009 to inform the BIR of its change of address, the same was however filed with the wrong RDO - RDO 29 San Nicolas-Tondo - instead of the RDO, Pasig City where respondent moved its office. Petitioner considers this a violation of RR No. 11-08 which provides that an Application for Registration Information Update should be filed with both its former and new RDO. In the mind of petitioner, respondent's old address found in the BIR computer system is still its valid and correct address.
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> Further, when the 2006 tax docket of respondent was forwarded by RDO 30 Binondo to the BIR Assessment Division on July 2, 2008 for review and issuance of the PAN and the FAN, respondent's registered address as verified from the BIR computer

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[19] *United Claimants Association Of Nea (UNICAN),represented by its representative Bienvenido R. Leal, in his official capacity as its President and in his own individual capacity, Eduardo R. Lacson, Orencio F. Venida, Jr., Thelma V.Ogena, Bobby M. Caranto,Marilou B. De Jesus, Edna G. Raa, and Zenaida P. Oliquino, in their own capacities and in behalf of all those similarly situated officials and employees of the National Electrification Administration, vs. National Electrification Administration (Nea), NEA Board Of Administrators (NEA BOARD), Angelo T. Reyes as Chairman of the NEA Board of Administrators, Editha S. Bueno, Ex-Officio Member and NEA Administrator, and Wilfred L. Billena, Jospeph D. Khonghun, and Fr. Jose Victor E. Lobrigo, Members, NEA Board*, G.R. No. 187107, January 31, 2012.
[20] *Division Docket,* Vol. I, pp. 277-281.
[21] CTA EB No. 1444, July 24, 2017.

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system was still 1104 Federal Tower Condominium, Dasmarinas Street, Binondo, Manila. For petitioner, this constitutes respondent's "representation" that at that time, it was still a registered taxpayer of RDO, hence, the PAN and FAN sent through registered mail at respondent's address reflected in the BIR record were binding on the latter, who, in addition, is already estopped from claiming that the PAN and FAN were sent to the wrong address.

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xxx [T]he change of respondent's address was reflected in its Certificate of Registration dated May 25, 2009 issued by BIR RDO 43A, the new RDO of respondent in its new location. The said Certificate of Registration also clearly indicated the transfer by respondent from RDO 30 Binondo to RDO 43A Pasig City. In other words, respondent substantially complied xxx by informing both the old and the new RDO of its change of address. In fine, petitioner has only himself to blame for the *faux pas* on the service of assessment notices as he obviously failed to verify his own record.

Significantly, it has been held that if the BIR is already aware of the new location of the taxpayer, even in the absence of any formal application for change of address, the BIR cannot simply pretend lack of knowledge of the change of address and is bound to send any issuances or notices to such new location of the taxpayer. This was the ruling of the Supreme Court in the case of *Commissioner of Internal Revenue v. BASF Coating +Inks Phils., Inc.*, thus:

> xxx. In addition, Section 11 of Revenue Regulation No. 12-85 states that, in case of change of address, the taxpayer is required to give a written notice thereof to the Revenue District Officer or the district having jurisdiction over his former legal residence and/or place of business. However, this Court agrees with both the CTA Special First Division and the CTA En Banc in their ruling that the abovementioned provisions on the suspension of the three year period to

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> assess apply only if the BIR Commissioner is not aware of the whereabouts of the taxpayer.
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> In the present case, petitioner, by all indications, is well aware that respondent had moved to its new address in Calamba, Laguna, as shown by the following documents which form part of respondent's records with the BIR:
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> The above documents, all of which were accomplished and signed by officers of the BIR, clearly show that respondent's address is at Carmelray Industrial Park, Canlubang, Calamba, Laguna. The CTA also found that BIR officers, at various times prior to the issuance of the subject FAN, conducted examination and investigation of respondent's tax liabilities for 1999 at the latter's new address in Laguna as evidenced by the following, in addition to the above mentioned records:
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> xxx xxx xxx
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> Hence, despite the absence of a formal written notice of respondent's change of address, the fact remains that petitioner became aware of respondent's new address as shown by documents replete in its records." (Italics in the original; Underlining Supplied.)

The change of address of FNF was made known to the Bureau of Internal Revenue (BIR) through the following documents:

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a.) Certificate of Registration,[22] reflecting the address of FNF as "Jollibee Center Condo San Miguel Ave Pasig City 1600" as of December 31, 2001;

b.) Annual Income Tax Return for 2002,[23] showing the address of Petitioner at Jollibee Center, San Miguel Avenue, Ortigas Center, Pasig City;

c.) Preliminary Collection Notice[24] dated April 13. 2004 issued by the BIR.

In fact, the audit of FNF for taxable year 2000 was conducted at its new address at Jollibee Center, San Miguel Avenue, Ortigas Center, Pasig City. Ms. Marifloss Alilio testified[25] thus:

"13Q: What is your basis for saying that the BIR failed to serve Greenwich with a complete final assessment notice?

A: We did not receive any copy of the alleged final assessment notice at our office. Also, I was the one who attended to the BIR Examiners from day one of the audit, and I did not receive any copy of the alleged final assessment notice.

"14. Q: Where did the BIR Examiners conduct its audit for taxable year 2000?

A: The BIR Examiners conducted the audit at the Company's head office at the Jollibee Center, San Miguel Avenue, Ortigas Center, Pasig.

"15. Q: Was there ever a time when the BIR Examiners conducted their audit for taxable year 2000 at the old address of Greenwich at 140 N. Domingo St. Cubao, Quezon City?

A: No.

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[22] Exhibit "HH," *Division Docket,* Vol. I, p. 415.
[23] Exhibit "H," *Division Docket,* Vol. I, p. 357.
[24] Exhibit "10," *BIR Records*, p. 1257.
[25] Sworn Statement of Ms. Marifloss S. Alilio, October 9, 2012, p. 3, Exhibit "XX", *Division Docket*, Vol. II, pp. 668-673.

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"16. Q: How would you know that?

A: Before the audit started, Greenwich had already transferred to San Miguel Avenue, Ortigas Center, Pasig City. Had the BIR Examiners proceeded to the old address of Greenwich at 140 N. Domingo St. Cubao, Quezon City at that time, they would have found the place empty."

The foregoing testimony was confirmed by the CIR's witness, Mr. Wilfredo G. Ablola (Mr. Ablola).[26] Mr. Ablola testified that he conducted the audit of FNF for the taxable year 2000 at Jollibee Center, San Miguel Avenue, Ortigas Center, Pasig City, and not in its former address at Cubao, Quezon City.

The CIR's witness, Mr. Florido Saso,[27] likewise affirmed that the BIR was aware of the transfer of address of Fresh N' Famous, as he indicated "Jollibee Center, San Miguel Avenue, Ortigas Center, Pasig City" as the address of FNF when he prepared the Preliminary Collection Notice.

Without receipt of the PAN, FAN and FLD, FNF was deprived of due process required under Section 228[28] of the National Internal Revenue Code (NIRC) of 1997, as amended. Compliance with Section 228 of the NIRC is a substantive requirement.[29] It is not a mere formality.[30] Consequently, the subject assessment is deemed null and void.

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[26] Judicial Affidavit dated November 6, 2014, *Division Docket,* Vol. IV, p. 2191, Q14.
[27] Transcript of Stenographic Notes taken on July 13, 2015, pp. 12-15.

[28] 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: xxx

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<u>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</u>.

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[29] *Supra,* note 21.
[30] *Ibid.*

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With no other points of error alleged in the Petition for Review, there is no reason for this Court to disturb the findings of the Third Division.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED**. Accordingly, the Decision and Resolution dated December 15, 2016 and March 22, 2017 respectively are hereby **AFFIRMED**.

SO ORDERED.

CIELITO N. MINDARO-GRULLA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(took no part)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
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 *En Banc.*

ROMAN G. DEL ROSARIO
Presiding Justice