REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	CTA EB NO. 1697 (CTA Case No. 9072)
	Present:
- versus -	DEL ROSARIO, *P.J.*, CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, *JJ.*
TRUSTMARK HOLDINGS CORPORATION, Respondent.	Promulgated: JAN 31 2019 4:07 p.m.

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DECISION

Fabon-Victorino, J.:

Assailed in this Petition for Review[1] filed by petitioner Commissioner of Internal Revenue on August 24, 2017 are the Decision[2] dated May 19, 2017 and the Resolution[3] dated July 21, 2017, both rendered by the Court in Division in CTA Case No. 9072 entitled *Trustmark Holdings Corporation vs. Commissioner of Internal Revenue*. The dispositive portion of the assailed Decision and Resolution read as follows:

Assailed Decision dated May 19, 2017:

> **WHEREFORE**, premises considered, the instant Petition for Review is hereby

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[1] *En Banc* docket, pp. 6-17.
[2] *En Banc* docket, pp. 21-50.
[3] *En Banc* docket, pp. 51-54.

> **GRANTED**. Accordingly, respondent's imposition of surcharge and interests arising from the deficiency DST assessment is **DELETED**. Consequently, respondent's Formal Letter of Demand dated October 28, 2014 and Assessment Notice No. ELTAD-II-DS-09-0019, essentially assessing petitioner for surcharge and interests, are **CANCELLED**.
>
> **SO ORDERED**.

Assailed Resolution dated July 21, 2017:

> **WHEREFORE**, premises considered, respondent's **Motion for Reconsideration (RE: Decision dated May 19, 2017)** is **DENIED** for lack of merit.
>
> **SO ORDERED**.

Petitioner seeks to reverse and set aside the foregoing adverse Decision and Resolution and for the Court *En Banc* to direct respondent Trustmark Holdings Corporation to pay the assessed deficiency interests and surcharge pursuant to Sections 248 and 249 of the National Internal Revenue Code (NIRC) of 1997, as amended.

The following facts as established during the trial are undisputed.

Petitioner is the Commissioner of Internal Revenue with the power to decide disputed assessments, cancel and abate tax liabilities in accordance with the provisions of the NIRC of 1997, as amended. He holds office at the 5th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City.

Respondent, on the other hand, is a domestic corporation registered with the Securities and Exchange Commission (SEC) with SEC Reg. No. A200009678, whose primary purpose is to be a holding corporation, without, however, engaging as a stockbroker or as dealer of securities.[4] It is registered with the Bureau of Internal Revenue (BIR) with Taxpayer's Identification Number (TIN) 207-483-528-000.[5]

In May 2010, respondent received from petitioner a Letter of Authority (LOA-124-2010-00000086)[6] dated May 14, 2010, authorizing the examination of its books of accounts and other accounting records for all internal revenue taxes for the period covering January 1, 2009 to December 31, 2009. The said tax examination was continued by another revenue officer by virtue of a Memorandum of Assignment[7] dated December 1, 2014.

Subsequently, respondent received a Notice of Informal Conference[8] (NIC) dated October 19, 2011, requesting it to appear for an informal conference within fifteen (15) days from such receipt at the BIR National Office Building, Diliman, Quezon City.

On November 25, 2011, respondent filed a letter[9] with petitioner, stating its willingness to pay the basic taxes due upon receipt of the corresponding Preliminary Assessment Notice (PAN) with reservation of its right to apply for an abatement of the penalties pursuant to Section 204 (B) of the NIRC of 1997, as amended, and its implementing regulations.

On December 23, 2011, respondent received the PAN[10] with Details of Discrepancies dated December 1, 2011, assessing it for deficiency Documentary Stamp Tax (DST), computed as follows:

Transactions subject to DST:	
Advances to Affiliates	5,391,387,600.00
Advances from Affiliates	28,760,767,675.00
Payable - Others	136,000,000.00
Notes Payable	20,936,804.00
Total Amount subject to DST	34,309,092,079.00

[4] Exhibit P-1.
[5] Exhibit P-2.
[6] Exhibit P-4; Exhibit R-1.
[7] Exhibit R-5.
[8] Exhibit P-5; Exhibit R-7.
[9] Exhibit P-7.
[10] Exhibits P-6 and P-6-a; Exhibit R-9.

DST Due Thereon		171,545,463.00
Add: 25% Surcharge for failure to file DST Return and pay corresponding tax due	42,886,365.75	
20% Interest p.a. until December 31, 2011	150,762,445.67	193,648,811.42
Total Amount due		**365,194,274.42**

On December 28, 2011, petitioner paid the basic DST due amounting to ₱171,545,463.00.[11]

On April 18, 2012, respondent sent a letter[12] to petitioner informing him of its payment of the basic DST under the PAN with a request to waive the surcharge and interest on the ground that the late payment of DST was due to difficulty in the interpretation of the law.

On June 25, 2012, respondent filed an *Application for Abatement or Cancellation of Tax, Penalties and/or Interest*[13] imposed amounting to ₱193,648,811.42 grounded on *"non-compliance due to difficult interpretation of the law."*

On October 28, 2014, respondent received the Formal Letter of Demand[14] (FLD) dated October 28, 2014, with the Details of Discrepancies and Assessment Notice No. ELTAD-II-DS-09-0019, finding it liable for deficiency DST, computed as follows:

Total Deficiency Tax Per PAN	365,194,274.42
Less: Amount Paid on Dec. 28, 2011	171,545,463.00
Deficiency DST	193,648,811.42
Add: Interest	
20% p.a. (Dec. 28, 2011 to Dec. 31, 2014)	116,613,722.60
TOTAL AMOUNT DUE	310,262,534.02

Respondent protested[15] the FLD on November 27, 2014.

On May 21, 2015, respondent received the Final Decision on Disputed Assessment[16] (FDDA) dated March 31,

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[11] Exhibits P-8 to P-8-a.
[12] Exhibit P-9.
[13] Exhibit P-10.
[14] Exhibits P-3 to P-3-c; Exhibits R-11 and R-11-a.
[15] Exhibit P-11.

2015, denying its protest for failure to adduce evidence to overthrow the validity of petitioner's findings.

On June 19, 2015, respondent elevated its case before the Court in Division *via* a Petition for Review[17].

In his Answer[18] filed on September 9, 2015, petitioner mainly argued that the assessment issued was valid and that respondent was liable to pay deficiency DST in the amount of ₱310,262,534.02.

Trial ensued during which the parties presented their respective documentary and testimonial evidence.

In the assailed Decision of May 19, 2017, the Court in Division tilted the scale of justice in favor of respondent and granted its Petition for Review on the ground that respondent was in good faith in believing that intercompany advances were not subject to DST prior to July 19, 2011 when the Supreme Court promulgated its decision in *CIR vs. Filinvest Development Corporation*[19] (*Filinvest case*). The Court in Division explained that a taxpayer could not be faulted for relying in good faith on the rulings[20] of the BIR and the Court of Tax Appeals/Court of Appeals issued prior to *Filinvest* case that intercompany advances covered by board resolution, office memo, instructional letter and/or cash and journal vouchers or similar documents are not subject to DST. Citing *Michel J. Lhuillier Pawnshop, Inc. vs. CIR*,[21] the Court in Division ruled that **good faith and honest belief that one is not subject to tax on the basis of previous interpretation of government agencies tasked to implement the tax law, are sufficient justification to delete the imposition of surcharges and interest.**

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[16] Exhibit P-12; Exhibit R-14.
[17] Court in Division docket, pp. 10-33.
[18] Court in Division docket, pp. 104-120.
[19] G.R. Nos. 163653 and 167689.
[20] BIR Ruling Nos. DA-696-06 dated December 11, 2006, DA-701-07 dated December 28, 2007, DA-016-08 dated January 17, 2008, and DA-(C-035) 127-08 dated August 8, 2008; *APC Group, Inc. vs. CIR*, CTA Case No. 6155, March 11, 2002; *CIR vs. APC Group, Inc.*, CA-G.R. SP No. 69869 dated November 29, 2002; *Filinvest Development Corporation and Filinvest Alabang, Inc. vs. CIR*, CTA Case No. 6182, September 10, 2002; *CIR vs. Filinvest Development Corporation and Filinvest Alabang, Inc.*, CA-G.R. No. SP No. 74510, January 26, 2005.
[21] G.R. No. 166786, September 11, 2006.

Aggrieved, petitioner moved for reconsideration[22] of the assailed Decision but the same was denied in the equally assailed Resolution of July 21, 2017.

Hence, the instant Petition for Review filed on August 24, 2017, anchored on the sole ground that:

> THE HONORABLE COURT ERRED IN CANCELLING THE FORMAL LETTER OF DEMAND DATED OCTOBER 28, 2014 AND ASSESSMENT NOTICE NO. ELTAD-II-DS-09-0019, ASSESSING RESPONDENT FOR SURCHARGE AND INTEREST ARISING FROM DEFICIENCY DOCUMENTARY STAMP TAX (DST).

Petitioner contends that the Court in Division erred in finding respondent not liable to pay the assessed surcharge and interest because it relied in good faith on the BIR Rulings cited in the assailed Decision since they were not issued in its favor, invoking the principle enunciated in *Commissioner of Internal Revenue vs. Filinvest Development Corporation*.[23]

Petitioner points out that the imposition of surcharge and interest was due to petitioner's failure to file and pay the correct tax due on time. Petitioner opines that such kind of imposition is not penal but compensatory in nature meant to discourage delay in the payment of taxes due the government.

In its *Comment*[24], respondent avers that contrary to petitioner's assertion, the assailed Decision and Resolution were not only anchored on its reliance in good faith on the cited BIR Rulings. It states that the Court in Division, in cancelling the assessment on surcharge and interest issued against it, elucidated on three significant points in support of its ruling, to wit: (1) respondent not only relied in good faith on BIR Rulings but also on court decisions pertaining to the non-imposition of DST on intercompany advances; (2)

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[22] Court in Division docket, pp. 397-401.
[23] G.R. Nos. 163653 and 167689, July 19, 2011.
[24] *En Banc* docket, pp. 61-69.

petitioner's issuance of an invalid DST assessment which included transactions not covered by the Letter of Authority issued for taxable year 2009 only; and (3) the Supreme Court decisions declaring that good faith and honest belief are sufficient justification to delete the imposition of the surcharges and interests arising from the deficiency DST assessment issued against it.

In addition, the wide publication of the BIR Rulings, although not directed to it, generated an impression that other taxpayers similarly situated might rely on such Rulings as it did. Thus, it should not be faulted for relying in good on said BIR Rulings thus failed to pay the DST on intercompany advances on the prescribed date of payment.

In closing, respondent submits that petitioner failed to raise any issue not resolved by the Court in Division in the assailed Decision and Resolution.

On January 28, 2018, respondent filed its Memorandum in compliance with the Court's directive. Petitioner however failed to file any per the Report of the Judicial Records Division dated January 22, 2018. The instant Petition for Review was submitted for decision on February 5, 2018.[25]

The Court *En Banc's* Ruling

The instant Petition for Review must fail.

Indeed, petitioner merely mimics all its previous arguments raised in its pleadings filed with the Court in Division. There is nothing in his main pleading before the Court *En Banc* that was not discussed and resolved by the Court in Division in the assailed Decision which was effectively affirmed in the similarly assailed Resolution. This finding is provoked by the fact that petitioner, who initiated the present case, did not even bother to file the required memorandum giving birth to an impression that he had nothing more to invoke.

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[25] Resolution dated February 5, 2018; En Banc docket, pp. 87-88.

In any event and if only to put petitioner's mind to rest, the Court *En Banc* shall discuss the highlight of the assailed Decision.

Contrary to petitioner's contention, the Court in Division's ruling ordering the deletion of the imposed surcharges and interests arising from the deficiency DST assessment and the consequent cancelation of the FLD and Assessment Notice No. ELTAD-II-DS-09-0019, was not solely based on respondent's reliance in good faith on the numerous BIR Rulings that intercompany advances covered by board resolution, inter-office memo, instructional letter and/or cash and journal vouchers or similar documents are not subject to DST.

In the assailed Decision of May 19, 2017, the Court in Division emphasized that prior to the 2011 *Filinvest case*, there were conflicting BIR Rulings on the imposition of DST on intercompany advances covered by board resolution, office memo, instructional letter and/or cash and journal vouchers.

In BIR Ruling No. 116-98 dated July 30, 1998, the BIR held that "*inter-office memo evidencing lendings/borrowings which is neither a form of promissory note nor a certificate of indebtedness issued by the corporation-affiliate,*" **is not subject to DST**. For the BIR, inter-office memo is "being prepared for accounting purposes only in order to avoid the co-mingling of funds of the corporate affiliates."

However, in BIR Ruling No. 108-99 dated July 15, 1999, the BIR had a change of heart and modified its earlier ruling holding that <u>inter-office memo covering the advances granted by a corporation affiliate company is in the nature of a promissory note</u> **subject to DST**.

About six (6) months thereafter, the BIR again had a change of heart and reverted back to its earlier position. In BIR Ruling No. DA-666-A-99 dated December 3, 1999, the BIR ruled that <u>since inter-company advances are not covered by loan agreements, promissory notes, debit and credit memos nor by inter-company loan memos and since the only documents relating to the inter-company advances are the</u>

board resolutions of the lenders and the cash vouchers issued by the lenders which are acknowledged by the borrowers, **the said inter-company advances are not subject to DST**. Significantly, this ruling was echoed in BIR Ruling Nos. DA-696-06 dated December 11, 2006, DA-701-07 dated December 28, 2007, DA-016-08 dated January 17, 2008, and DA-(C-035) 127-08 dated August 8, 2008.

Indeed, with the numerous rulings issued by the BIR, respondent had reason enough to sustain a belief that its intercompany advances were not subject to DST. With the constant change in the BIR Ruling, no clear and definite stance was established on the matter prior to the 2011 *Filinvest case* upon which respondent could lean on.

While it may be true that the BIR Rulings were not specifically addressed to respondent, there were other rulings of the same tenor[26] issued by this Court as well as the Court of Appeals (CA) to the effect that board resolutions, inter-office memoranda, letters of instructions, journal or cash vouchers evidencing lending/borrowings are not subject to DST. The Court *En Banc* agrees with the Court in Division when it held, thus:

> xxx. Applying the foregoing, the Court is convinced that petitioner acted in good faith when it believed that intercompany advances are not subject to DST prior to the 2011 *Filinvest* case. **After all, it was based on numerous rulings of the BIR that intercompany advances are not subject to DST. Moreover, the CA and CTA, the specialized body handling tax cases, also had similar rulings. Hence, petitioner cannot be faulted if it relied in good faith on these rulings**. (*Citations omitted; emphasis supplied*)

It must also be pointed out that respondent is not disputing the application of the *Filinvest* ruling to its case but

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[26] *APC Group, Inc. vs. CIR*, CTA Case No. 6155, March 11, 2002, *CIR vs. APC Group, Inc.*, CA-G.R. SP No. 69869 dated November 29, 2002 and *Filinvest Development Corporation and Filinvest Alabang, Inc. vs. CIR*, CTA Case No. 6182, September 10, 2002, *CIR vs. Filinvest Development Corporation and Filinvest Alabang, Inc.*, CA-G.R. No. SP No. 74510, January 26, 2005.

rather seeks the cancellation of the surcharge and interests imposed against it explaining that due to good faith and honest belief that intercompany advances covered by board resolution, inter-office memo, instructional letter and/or cash and journal vouchers or similar documents during the relevant period were not subject to DST, it was unable to pay its tax obligation during the prescribed period.

No less than the Supreme Court declared that **good faith and honest belief that one is not subject to tax on the basis of previous interpretations of government agencies tasked to implement the tax law are sufficient justification to delete the imposition of surcharges and interest**. [27]

Premium must also be given to the fact that petitioner acted beyond the scope of his authority when he issued the subject deficiency DST assessment. The record reveals that the LOA issued by petitioner authorized the audit or examination of respondent's books of accounts and other accounting records for TY 2009 only. However, perusal of the breakdown of the deficiency DST assessment shows that TYs 2000, 2006, 2007 and 2008 were included. Amazingly, no DST was even assessed for 2009 - the year covered by the LOA. For ready reference, below is the breakdown of the basic deficiency DST assessment lifted from *Annex A* of the Details of Discrepancies of the FLD:

Particular	Total	DST Rate	DST Due
Advances to Affiliates			
Total - 2008	5,391,387,600.00	0.005	26,956,938.00
Advances from Affiliates			
Total - 2000	251,033,996.00	0.005	1,255,170.00
Total - 2006	23,117,262,225.00	0.005	115,586,312.00
Total - 2007	1,083,854.00	0.005	5,420.00
Total - 2008	5,391,387,600.00	0.005	26,956,938.00
Total - 2009	(2,189,123,581.00)		
Total	26,571,644,094.00		
Payables – Others			
Total - 2008	136,000,000.00	0.005	680,000.00

[27] *Michel J. Lhuillier Pawnshop, Inc. vs. Commissioner of Internal Revenue*, G. R. No. 166786, September 11, 2006; *Antam Pawnshop Corporation vs. Commissioner of Internal Revenue*, G.R. No.167962, September 19, 2008; and *Tambunting Pawnshop, Inc. vs. Commissioner of Internal Revenue*, G. R. No. 179085, January 21, 2010.

Notes Payable			
Total - 2008	20,936,804.00	0.005	104,685.00
			171,545,463.00

Thus, even assuming that respondent could not rely in good faith on the rulings issued by the BIR, CA, and this Court, still, the subject deficiency DST assessment is null and void justifying the cancellation of the same.

In *Commissioner of Internal Revenue vs. Sony Philippines, Inc.*,[28] the Supreme Court pertinently ruled that:

> "xxx 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.
>
> As earlier stated, LOA 19734 covered 'the period 1997 and unverified prior years.' **For said reason, the CIR acting through its revenue officers went beyond the scope of their authority because the deficiency VAT assessment they arrived at was based on records from January to March 1998 or using the fiscal year which ended in March 31, 1998**. As pointed out by the CTA-First Division in its April 28, 2005 Resolution, the CIR knew which period should be covered by the investigation. Thus, **if the CIR wanted or intended the investigation to include the year 1998, it should have done so by including it in the LOA or issuing another LOA**."

In fine, the revenue officers who conducted the tax examination went beyond the scope of their authority as the deficiency DST assessment was arrived based on record from TYs 2000 to 2008, which were not covered by the issued LOA. On this point alone, the subject deficiency DST

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

assessment for 2000, 2006, 2007 and 2008 should be disallowed since the LOA issued by petitioner covered only the period January 1, 2009 to December 31, 2009.

WHEREFORE, the *Petition for Review* filed by petitioner Commissioner of Internal Revenue on August 24, 2017 is hereby **DENIED**, for lack of merit. Accordingly, the assailed Decision and Resolution dated May 19, 2017 and July 21, 2017, respectively, are **AFFIRMED.**

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

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

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

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

Ma. Belen S. ~
MA. BELEN RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII 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,	**CTA EB NO. 1697** (CTA Case No. 9072)
	Present:
- versus -	**DEL ROSARIO**, *PJ*, **CASTAÑEDA**, JR., **UY**, **FABON-VICTORINO**, **MINDARO-GRULLA**, **RINGPIS-LIBAN**, and **MANAHAN**, *JJ.*
TRUSTMARK HOLDINGS CORPORATION, Respondent.	Promulgated: JAN 31 2019 9:07 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 (CIR).

In addition to the *ponencia*'s findings, I submit that the Final Assessment Notice (FAN) dated October 28, 2014 is void for **failure to demand payment of the deficiency Documentary Stamp Tax (DST) and interest within a specific period**.

While the Formal Letter of Demand (FLD) dated October 28, 2014 (which made reference to the FAN dated October 28, 2014) incorporates the following statement:

> "Xxx, you are requested to pay your aforesaid deficiency documentary stamp tax liability through the duly authorized agent bank in which you are enrolled within the time shown in the enclosed assessment notice."

the <u>space for the due date</u> in the FAN dated October 28, 2014 was conspicuously left blank.

Since there was no assessment notice which properly indicated the due date when the deficiency taxes must be paid, no proper demand thereof within a specific period was made.

In ***Commissioner of Internal Revenue vs. Pascor Realty and Development Corporation***[1] and ***Commissioner of Internal Revenue vs. Fitness By Design,***[2] the Supreme Court emphasized that a FAN without a definite due date for payment is not valid because it negates the demand for payment. Pertinent parts of the Supreme Court's ruling in ***Fitness By Design*** are quoted hereunder:

> "**The disputed Final Assessment Notice is not a valid assessment.**
>
> xxx xxx xxx
>
> **Second, there are no due dates in the Final Assessment Notice. This negates petitioner's demand for payment.** Petitioner's contention that April 15, 2004 should be regarded as the actual due date cannot be accepted. The last paragraph of the Final Assessment Notice states that the due dates for payment were supposedly reflected in the attached assessment:
>
>> In view thereof, you are requested to pay your aforesaid deficiency internal revenue tax liabilities through the duly authorized agent bank in which you are enrolled within the time shown in the enclosed assessment notice.
>
> However, based on the findings of the Court of Tax Appeals First Division, the enclosed assessment pertained to remained unaccomplished.
>
> Contrary to petitioner's view, April 15, 2004 was the reckoning date of accrual of penalties and surcharges and not the due date for payment of tax liabilities. The total amount depended upon when respondent decides to pay. The notice, therefore, did not contain a definite and actual demand to pay."

In other words, a FAN must not only indicate the legal and factual bases of the assessment **but must also state a clear and categorical demand for payment of the computed tax liabilities**

[1] G.R. No. 128315, June 29, 1999.
[2] G.R. No. 215947, November 9, 2016.

within a specific period. Absent such demand, as in this case, the FAN is fatally infirm.

All told, I vote to: (i) **DENY** the Petition for Review filed by the Commissioner of Internal Revenue; and, (ii) **CANCEL** the Final Assessment Notice dated October 28, 2014 assessing respondent for deficiency DST for the period January-December 2009 for being void.

ROMAN G. DEL ROSARIO
Presiding Justice