Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 1521** (CTA Case No. 8707)
-versus-	Present: DEL ROSARIO, P.J., CASTAÑEDA, JR. BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, JJ.
MISSOURI SQUARE, INC., Respondent.	Promulgated: JAN 24 2018 2:05 p.m.

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a Petition for Review for the Court *En Banc* under Rule 4, Section 2(a)(1), in relation to Rule 8, Section 4(b) of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA)[1], as amended, of the Decision[2]

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[1] Sec. 2. *Cases within the jurisdiction of the Court en banc.*- The Court en banc shall exercise exclusive appellate jurisdiction to review by appeal the following:

(a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Division in the exercise of its exclusive appellate jurisdiction over:

(1) Cases arising from administrative agencies- Bureau of Internal Revenue, Bureau of Customs, Department of Finance, Department of Trade and Industry, Department of Agriculture;

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Sec. 4. *Where to appeal; mode of appeal.*-
(a) xxx.
(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.
(c) xxx.

[2] En banc Docket, pp. 18-28.

dated July 12, 2016, rendered by the Second Division of this Court in CTA Case No. 8707, and its Amended Decision[3] dated September 8, 2016, the dispositive portions of which, respectively, read as follows:

Decision dated July 12, 2016:

> "***WHEREFORE,*** *premises considered, the instant Petition for Review is hereby* ***DENIED*** *for lack of jurisdiction.*
>
> ***SO ORDERED.***"

Amended Decision dated September 8, 2016:

> "***WHEREFORE,*** *the instant Motion for Reconsideration is* ***GRANTED****. The Decision, dated July 12, 2016, is* ***REVERSED****.*
>
> *Accordingly, the Final Assessment Notice and Formal Letter of Demand assessing petitioner for deficiency income tax and VAT, in the amount of P1,618,397.77 and P247,281.58, respectively, inclusive of interest, for taxable year 2009 are* ***CANCELLED****.*
>
> ***SO ORDERED.***"

Petitioner Commissioner of Internal Revenue (CIR) assailed the Amended Decision.

The pertinent facts as narrated by this Court in Division in its Decision read as follows:

> *"Petitioner[4] Missouri Square, Inc. is a corporation duly organized and existing under and by virtue of the laws of the Philippines, with office address at No. 101 Connecticut St. corner Missouri St., Greenhills, San Juan.*
>
> *On the other hand, respondent[5] is the Commissioner of the Bureau of Internal Revenue (BIR), vested by law with authority to assess national internal revenue taxes.*

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[3] En banc Docket, pp. 29-32.
[4] Missouri Square, Inc. was the petitioner before the Court in Division and thereafter the respondent before this Court en banc.
[5] Commissioner of Internal Revenue (CIR) was the respondent before the Court in Division and thereafter the petitioner before this Court en banc.

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She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On January 14, 2013, petitioner received a Preliminary Assessment Notice (PAN) dated January 8, 2013 from respondent, finding petitioner liable for deficiency income tax in the amount of P1,589,085.10 and VAT in the amount of P242,924.19, for taxable year ending December 31, 2009.

Thereafter, on January 21, 2013, petitioner received a Final Assessment Notices (FAN) and Formal Letter of Demand (FLD), with attached Details of Discrepancies from respondent, assessing petitioner for deficiency income tax and VAT, in the amount of P1,618,397.77, and P247,281.58, respectively, inclusive of interest, for taxable year 2009.

On January 23, 2013, petitioner wrote to respondent, indicating that the letter should be considered as its protest letter regarding the result of the audit and examination of its books for the year 2009 based on the PAN.

On August 15, 2013, petitioner received respondent's Preliminary Collection Letter, demanding for the payment of petitioner's alleged deficiency income tax and VAT for taxable year 2009 in the total amount of P1,865,679.35, inclusive of interests.

Then, on September 4, 2013, petitioner received the Final Notice before Issuance of Warrant of Distraint and Levy.

Accordingly, petitioner filed the instant Petition for Review before this Court on September 12, 2013.

In her Answer filed on November 4, 2013, respondent interposed Special and Affirmative Defenses, alleging among others, that following the periods provided for in Section 228 of the National Internal Revenue Code (NIRC) of 1997, as amended, from January 23, 2013 (the date of petitioner's filing of protest), it had until March 24, 2013 to submit relevant documents and from March 24, 2013, the Commissioner had until September 20, 2013 to issue her decision. As admitted by petitioner, the protest remained unacted by the Commissioner of Internal Revenue. Therefore, it had until October 20, 2013 within which to elevate the case to this court. Moreover, petitioner filed a protest against the PAN, not the FAN, contrary to Revenue Regulations (RR) No. 12-99. As provided in Section 228, the failure of a taxpayer to appeal from an assessment on

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time rendered the assessment final, executory and demandable. Consequently, petitioner is precluded from disputing the correctness of the assessment.

The case was set for a pre-trial conference on March 13, 2014. Thus, both parties filed their Pre-Trial Briefs on March 7, 2014.

On July 4, 2014, the parties filed their Joint Stipulation of Facts and Issues; which was adopted by the Court in the Pre-Trial Order dated July 10, 2014.

During trial, petitioner presented the following witnesses: (1) Ms. Ma. Milagros F. Padernal - Independent Certified Public Accountant (CPA); and (2) Ms. Myliene S. Breis - petitioner's accountant.

Petitioner formally offered its documentary evidence on November 11, 2014, with a Supplemental Formal Offer of Evidence filed on April 15, 2015, which the Court admitted in the Resolution dated December 1, 2014 and June 23, 2015 except for Exhibits "P-6-a-3", P-6-a-3-a", "P-6-h", "P-6-h-1", P- 6-d-3", "P-6-g", "P-6-g-1", "P-6-g-5", "P-6-g-6" and "P-6-g-7".

On the other hand, respondent presented the following witnesses during trial: (1) Revenue Officer Maritess M. Aseo; and (2) Revenue Officer Ellen T. Espiritu. Moreover, she filed her Formal Offer of Evidence on February 12, 2015, which the Court admitted in the Resolution dated April 7, 2015 except for Exhibits "R-7" to "R-10".

As directed by the Court, petitioner and respondent filed their Memoranda on July 22, 2015 and on July 31, 2015, respectively.

Consequently, the case was declared submitted for decision on August 4, 2015."

On July 12, 2016, this Court in Division rendered a Decision, denying respondent corporation's petition for lack of jurisdiction. This Court in Division found that respondent corporation's failure to file its administrative protest within the 30-day statutory period would bar the appeal and deprive this Court of its jurisdiction to entertain and determine the correctness of the assessment. Respondent corporation filed a Motion for Reconsideration. Said motion was granted in the Amended Decision dated September 8,

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2016 which cancelled the Final Assessment Notice and Formal Letter of Demand.

Petitioner CIR did not file a Motion for Reconsideration. Instead, the present petition was filed.

Petitioner CIR raised the sole issue that:

> THE HONORABLE SECOND DIVISION ERRED IN REVERSING ITS DECISION THAT THERE WAS VIOLATION OF RESPONDENT'S RIGHT TO DUE PROCESS.

Petitioner CIR claims that the filing of the Reply (to the PAN) after the FAN did not dispense with the requirement that a protest letter should be filed. Petitioner CIR argued that the Court in Division erred in holding that that there was a violation of respondent's right to due process. Petitioner CIR maintains that there was no disputed assessment to speak of since the assessment subject of this case had already become final, executory and demandable.

In its Comment, respondent raised the following grounds for the dismissal of petitioner's appeal, to wit:

"I

> THE INSTANT PETITION FOR REVIEW WAS NOT PRECEDED BY A TIMELY FILED MOTION FOR RECONSIDERATION ON THE PART OF THE PETITIONER AS MANDATED BY THE RULES WHICH WARRANTS THE OUTRIGHT DISMISSAL OF THE SAME

II

> THE VERIFICATION AND CERTIFICATION AGAINST FORUM SHOPPING ATTACHED TO THE INSTANT PETITION IS FATALLY DEFECTIVE WHICH WARRANTS THE OUTRIGHT DISMISSAL OF THE PETITION

III

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THE SUBJECT ASSESSMENT IS NULL AND VOID FOR FAILURE OF PETITIONER TO COMPLY WITH THE STRICT PROVISIONS OF THE LAW AND RULES WHICH WARRANTS THE CANCELLATION THEREOF AND THE DISMISSAL OF THE INSTANT PETITION"

In the Resolution dated December 16, 2016, the parties were directed to file their respective memoranda. Both parties complied. Respondent filed its memorandum on January 27, 2017. Petitioner filed its memorandum on February 6, 2017. Thereafter, in the Resolution dated February 20, 2017, the case was deemed submitted for decision.

We resolve.

At the outset, petitioner's non-filing of a motion for reconsideration of the Amended Decision dated September 8 2016 is fatal to the petition for review at hand. Section 1, Rule 8 of the 2005 RRCTA, as amended, clearly provides that cases falling under the exclusive appellate jurisdiction of the Court *en banc* must be preceded by the filing of a timely motion for reconsideration, to wit:

"RULE 8

PROCEDURE IN CIVIL CASES

Section 1. Review of cases in the Court en banc. - In cases falling under the exclusive appellate jurisdiction of the Court en banc, the petition for review of a decision or resolution of the Court in Division must be preceded by the filing of a timely motion for reconsideration or new trial with the Division."

Evidently, before an appeal may be filed with the Court *en banc* by an aggrieved party, the appeal must be preceded by the filing of a timely motion for reconsideration or new trial with the Division that rendered the questioned decision. Corollary, an amended decision which modifies or reverses a decision, is a new and different decision, thus, is a proper subject of a motion for reconsideration[6].

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[6] Asiatrust Development Bank, Inc. vs. Commissioner of Internal Revenue, G.R. Nos. 20130 & 201680-81, April 19, 2017.

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Concomitantly, a petition for review before the Court En Banc of the decision of the Court in Division without the filing of a timely motion for reconsideration thereof is a ground for the dismissal of the petition. The Supreme Court in the case of *Asiatrust*[7] instructively ruled as follows:

> *"Thus, in order for the CTA En Banc to take cognizance of an appeal via a petition for review, a timely motion for reconsideration or new trial must first be filed with the CTA Division that issued the assailed decision or resolution. Failure to do so is a ground for the dismissal of the appeal as the word "must" indicates that the filing of a prior motion is mandatory, and not merely directory.*
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> *The same is true in the case of an amended decision. Section 3, Rule 14 of the same rules defines an amended decision as "[a]ny action modifying or reversing a decision of the Court en banc or in Division." As explained in CE Luzon Geothermal Power Company, Inc. v. Commissioner of Internal Revenue, an amended decision is a different decision, and thus, is a proper subject of a motion for reconsideration.*
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> *In this case, the CIR's failure to move for a reconsideration of the Amended Decision of the CTA Division is a ground for the dismissal of its Petition for Review before the CTA En Banc. Thus, the CTA En Banc did not err in denying the CIR's appeal on procedural grounds.*
>
> *Due to this procedural lapse, the Amended Decision has attained finality insofar as the CIR is concerned. The CIR, therefore, may no longer question the merits of the case before this Court. Accordingly, there is no reason for the Court to discuss the other issues raised by the CIR."*

Based on the records, the Court in Division rendered a Decision dated July 12, 2016. Petitioner did not file a motion for reconsideration, rather, respondent moved for a reconsideration of the July 12, 2016 Decision, which was granted in the Amended Decision dated September 8, 2016. However, the petition for review before this Court en banc of the Amended Decision dated September 8, 2016 of the Court in Division was not preceded by the filing of a timely motion for reconsideration. Petitioner CIR did not file a motion for reconsideration of the amended decision. Instead, petitioner filed a petition before the Court en banc. On that basis, the petition for review should be dismissed

[7] Ibid.

considering that the Amended Decision dated September 8, 2016 has attained finality in so far as petitioner CIR is concerned pursuant to Section 1, Rule 8 of the 2005 RRCTA, and the *Asiatrust* Case.

Furthermore, it is undisputed that respondent received the Preliminary Assessment Notice[8] (PAN) on January 14, 2013, and seven (7) days thereafter, respondent received the Final Assessment Notice[9] (FAN) on January 21, 2013. Section 3 of Revenue Regulations (RR) No. 12-99[10], provides the due process requirements in the issuance of a deficiency tax assessment. In particular, Section 3.1.2 refers to the due process requirements for the issuance of the PAN and the subsequent issuance of the formal letter of demand and final assessment notice, to wit:

> *"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). **If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN, he shall be considered in default, in which case, a formal letter of demand and 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."*** *(Emphasis Supplied)*

Evidently, respondent's receipt of the FAN, seven (7) days after the receipt of the PAN is a violation of the due process requirements in the issuance of a deficiency tax assessment.

Upon receipt of the PAN, the taxpayer has fifteen (15) days within which to respond, otherwise, he shall be considered in default and FAN shall be issued. Petitioner CIR's failure to

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[8] Exhibit "P-4" Division Docket, pp. 369-372.

[9] Exhibit "P-5" and "P-5-a", Division Docket, pp. 373-374.

[10] Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes,Civil Penalties and Interest and the Extra-judicial Settlement of a Taxpayer's Criminal violation of the Code Through Payment of a Suggested Compromise Penalty.

strictly comply with the requirements laid down by law and its own rules is a denial of the taxpayers right to due process.[11] Thus, the Court in Division aptly held in the Amended Decision that the FAN was void, to wit:

> *"It is settled doctrine that the essence of due process in administrative proceedings is the opportunity to explain one's side or seek a reconsideration of the action or ruling complained of. As long as the parties are given the opportunity to be heard before judgment is rendered, the demands of due process are sufficiently met. The standard of due process that must be met in administrative tribunals allows a certain degree of latitude as long as fairness is not ignored.*
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> *In this case, fairness was ignored by respondent when no opportunity to contest the issued PAN was granted to petitioner. For lack of said opportunity, there was a violation of petitioner's right to due process.*
>
> *Considering that the FAN is void for violation of petitioner's right to due process, the absence of a protest does not render the FAN final and executory. A void FAN bears no fruit."*

In sum, not only is the petition procedurally infirm but also the arguments raised to support the petition were likewise bereft of merit. Hence, there is no compelling reason to disturb the findings and conclusion of the Court in Division as it is supported by the evidence on record. It is well-settled that a void assessment bears no fruit[12].

WHEREFORE, the Petition for Review is **DENIED,** for lack of merit. Accordingly, the Amended Decision dated September 8, 2016 is **AFFIRMED**. No pronouncement as to costs.

SO ORDERED.

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

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[11] Commissioner of Internal Revenue vs. Metro Star Superama, Inc., G.R. No. 185371, December 8, 2010.
[12] Ibid.

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

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.

ROMAN G. DEL ROSARIO
Presiding Justice