REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-*versus*-

TOLEDO POWER COMPANY,
Respondent.

CTA *EB* NO. 2237
(CTA Case No. 9307)

Present:

DEL ROSARIO, P.J.,
CASTAÑEDA, JR.,
UY,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA, *and*
MODESTO-SAN PEDRO, *JJ.*

Promulgated:
JUL 12 2021 3:10 pm

x -- x

DECISION

MODESTO-SAN PEDRO, J.:

The Case

This is a Petition for Review[1] under ***Section 3(b), Rule 8 of the Revised Rules of the Court of Tax Appeals ("RRCTA")***,[2] asking the Court *En Banc* to reverse and set aside the Decision, promulgated on 9 October 2019, and the Resolution, dated 3 February 2020, by the Court of Tax Appeals ("CTA") Second Division ("Court in Division"), and to render a new judgment denying respondent's claim for refund.

The Parties

Petitioner Commissioner of Internal Revenue ("CIR") is the duly appointed Commissioner of the Bureau of Internal Revenue ("BIR") who is vested, among others, with the authority to decide on disputed assessments, and act on and approve claims for refund as provided under the National

[1] Petition for Review; Records, pp. 1-53, with annexes.
[2] A.M. No. 05-11-07-CTA, 22 November 2005.

Internal Revenue Code of 1997, as amended ("Tax Code"). He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Meanwhile, respondent Toledo Power Company is a partnership, duly organized and existing under the laws of the Philippines. It is engaged in the business of acquiring, owning, rehabilitating, maintaining, and operating coal-fired and oil-fired electrical generation facilities.

It was granted by the Energy Regulatory Commission ("ERC") the authority to operate its generation facilities under Certificate of Compliance ("COC") No. 04-06 GXT 61-0066, which was subsequently renewed under COC No. 09-11-GXT-61-0066. Its principal office address is at Sangi, Toledo City, Cebu.

The Facts

On 11 April 2013, respondent received a Letter of Authority ("LOA"), dated 5 April 2013, authorizing the examination of its books of accounts and other accounting records for taxable year 2011.[3]

Subsequently, respondent received a Preliminary Assessment Notice ("PAN") on 30 July 2015. In the PAN, it was assessed, among others, for deficiency Value-Added Tax ("VAT") in the amount of ₱4,025,642.60. The said BIR finding is attributable to respondent's sale of electric power to Carmen Copper Corporation ("CCC"). CCC is registered with the Board of Investments ("BOI") as a manufacturer and 100% exporter of copper concentrate.[4]

On 4 September 2015, respondent paid the amount of ₱6,971,071.10, representing the aforementioned VAT plus interest.[5]

Thereafter, respondent filed with the BIR Large Taxpayers Services ("LTS")-Cebu an administrative claim for refund on 16 October 2015 and 18 March 2016. Respondent alleged that it erroneously paid the deficiency VAT assessment.[6]

Claiming inaction on the part of petitioner, respondent filed the original Petition for Review with the Court in Division on 21 March 2016.[7]

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3 Decision, Annex "A" of the Petition for Review; Records, pp. 17-50.
4 *Ibid.*
5 *Ibid.*
6 Exhibit "P-24"; Division Records Vol. 1, pp. 268-270.
7 Decision, Annex "A" of the Petition for Review; Records, pp. 17-50.

On 6 April 2015, petitioner sent respondent a letter, dated 15 March 2016, denying the refund claim.[8]

On 9 October 2019, the Court in Division promulgated the assailed Decision[9] granting the original Petition for Review. Likewise, it ordered petitioner to refund or issue a tax credit certificate in favor of respondent in the amount of ₱6,971,071.10, representing the erroneously paid VAT for taxable year 2011. The dispositive portion of the assailed Decision is hereby quoted, as follows:

> "**WHEREFORE**, in view of the foregoing, the instant Petition for Review is **GRANTED.** Accordingly, respondent is **ORDERED** to refund or issue a tax credit certificate in favor of petitioner in the amount of ₱6,971,071.10, representing erroneously paid deficiency VAT for TY 2011.
>
> **SO ORDERED.**"

In the assailed Decision, the Court in Division pronounced that respondent was able to file its refund claim within the time prescribed under ***Section 229 of the National Internal Revenue Code of 1997, as amended ("Tax Code").***[10]

Likewise, it found that respondent was able to prove its compliance with the conditions under ***Revenue Memorandum Order ("RMO") No. 9-2000.***[11] On this account, the Court in Division ordered that the sale of respondent to CCC qualifies for VAT zero-rating.[12]

Finally, the same Court ruled that petitioner's failure to issue the FAN was fatal since it would have constituted the BIR's demand letter to hold respondent liable to pay the assessed tax. Hence, without the FAN, the obligation to pay the assessed amount did not exist.[13]

Considering the aforementioned findings, the Court in Division ruled that the collection of the VAT is erroneous and that respondent is entitled to the refund claim.[14]

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[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] Tax Treatment of Sales of Goods, Properties and Services Made by VAT-registered Suppliers to BOI-registered Manufacturers-Exporters With 100% Export Sales, 2 February 2000.
[12] Decision, Annex "A" of the Petition for Review; Records, pp. 17-50.
[13] *Ibid.*
[14] *Ibid.*

This prompted petitioner to file his Motion for Reconsideration (Re: Decision promulgated on 9 October 2019) on 28 October 2019. Meanwhile, respondent filed its Comment (To Respondent's Motion for Reconsideration dated October 28, 2019) on 21 November 2019.[15]

On 3 February 2020, the Court in Division issued the assailed Resolution denying petitioner's Motion for Reconsideration for lack of merit.[16] Petitioner received the same on 10 February 2020.

Thereafter, petitioner filed the instant Petition for Review on 21 February 2020.[17]

Respondent, on the other hand, filed its Comment/Opposition (Re: 9 October 2019 Petition for Review) on 2 July 2020.[18]

Subsequently, the Court *En Banc* issued a Resolution on 14 July 2020 submitting the case for decision.[19] Hence, this Decision.

The Issue[20]

> WHETHER THE COURT IN DIVISION ERRED IN RULING THAT RESPONDENT IS ENTITLED TO REFUND OF ITS ALLEGED ERRONEOUSLY PAID DEFICIENCY VAT FOR TAXABLE YEAR 2011 IN THE AMOUNT OF ₱6,971,071.10.

Arguments of the Parties

Petitioner's Arguments[21]

Petitioner argues that the Cross Border Doctrine only grants VAT zero-rating on purchases that will eventually form part of the direct cost of the BOI registered manufacturer/producer whose products are 100% exported (hereinafter referred to as "BOI Exporter"). He explains that this privilege does not include the BOI Exporter's purchases for its general and administrative use ("indirect cost"), which he alleges is subject to twelve percent (12%) VAT.

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15 Resolution, Annex "B" of the Petition for Review; Records, pp. 51-53.
16 *Ibid.*
17 Petition for Review; Records, pp. 1-53, with annexes.
18 Comment/Opposition (Re: 9 October 2019 Petition for Review); Records, pp. 57-74.
19 Resolution; Records, pp. 76-77.
20 See Assignment of Error, Petition for Review, p. 3; Records, p. 3.
21 Petition for Review; Records, pp. 1-11.

On this note, he contends that a portion of respondent's sale to CCC which is attributable to the latter's general and administrative use was correctly assessed for 12% VAT, computed as follows:

Power Cost	Amount in Financial Statement	Ratio	Respondent Sales[22]	VAT Rate	VAT Due
Direct Cost	₱ 1,990,055,552.00	98%	₱ 1,643,804,062.86	0%	-
Gen and Admin	32,578,515.00	2%	33,547,021.69	12%	₱4,025,642.60
TOTAL	**₱ 2,022,634,067.00**	**100%**	**₱ 1,677,351,084.55**		**₱4,025,642.60**

Petitioner insists that respondent failed to show proof that his assessment is erroneous. He opines that the Certification issued by CCC stating that the electricity it purchased from respondent was entirely used in its mining and ore processing activities is self-serving and, therefore, lacks probative value.

Further, petitioner stresses that the issuance of the FAN is inconsequential and unnecessary in light of respondent's payment of the assessed deficiency VAT during the PAN stage.

He asserts that the act of respondent voluntarily paying the assessment implies that it had abandoned or waived its right to question the validity of his findings. He explains that the payment made by respondent is tantamount to its acknowledgment and admission that it owes the government the subject deficiency VAT. On this note, he argues that respondent is not entitled to the refund claim.

Respondent's Counter-Arguments[23]

Respondent echoes the findings in the assailed Decision. It reiterates that its sale of electricity to CCC qualifies for VAT zero-rating since it was able to satisfy all the requisites under ***RMO No. 9-2000***.

It also contends that since no FAN was issued in this case, there is no final and executory assessment to speak of. As such, its liability or obligation to pay the VAT ceased to exist. Given the same, it argues that the VAT payment it made was erroneously collected and, thus, refundable.

22 Based on respondent's total zero-rated sales to CCC in the amount of ₱1,677,351,084.55.
23 Comment/Opposition (Re: 9 October 2019 Petition for Review); Records, pp. 57-74.

The Ruling of the Court

Respondent's sale of electricity to CCC is subject to zero percent (0%) VAT.

Petitioner does not dispute the findings of the Court in Division ruling that the refund claim of respondent was timely filed in accordance with ***Section 229 of the Tax Code***. Neither does he question the findings in the assailed Decision stating that respondent was able to prove its compliance with the requirements set forth under ***RMO No. 9-2000***.

Instead, petitioner argues that by virtue of the Cross Border Doctrine, only those purchases that will form part of the exported product's direct cost may be subjected to VAT zero-rating. His contention is without merit.

The appreciation of the Cross Border Doctrine should be read in conjunction with the applicable laws and rules and regulations pertinent to VAT zero-rated transactions.

The relevant provision herein is ***Section 106(A)(2)(a)(5) of the Tax Code***, which subjects those "considered export sales" under the ***Omnibus Investment Code of 1987***[24] to VAT zero-rating, to wit:

> "SECTION 106. Value-added Tax on Sale of Goods or Properties. - (A) Rate and Base of Tax. -
>
> xxx xxx xxx
>
> (2) The following sales by VAT-registered persons shall be subject to zero percent (0%) rate:
>
> (a) Export Sales. - The term 'export sales' means: x x x x
>
> (5) **Those considered export sales under Executive Order No. 226, otherwise known as the Omnibus Investment Code of 1987, and other special laws** x x x."[25]

RMO No. 9-2000 then interpreted the foregoing provision to include those goods, properties, or services supplied by a VAT-registered person to a BOI Exporter. This was also subsequently reiterated in ***Revenue Regulation No. 16-2005***,[26] to wit:

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[24] Executive Order No. 226, 16 July 1987.
[25] Emphasis supplied.
[26] Consolidated Value-Added Tax Regulations of 2005, 1 September 2005.

> "For purposes of zero-rating, the export sales of registered export traders shall include commission income. The exportation of goods on consignment shall not be deemed export sales until the export products consigned are in fact sold by the consignee; and **Provided, finally, that sales of goods, properties or services made by a VAT-registered supplier to a BOI registered manufacturer/producer whose products are 100% exported are considered export sales.** A certification to this effect must be issued by the Board of Investment (BOI) which shall be good for one year unless subsequently re-issued by the BOI."[27]

In order to qualify for VAT zero-rating under the aforementioned legal pronouncements, both the supplier and the BOI Exporter need to satisfy certain conditions imposed under ***Section 3 of RMO No. 9-2000***, to wit:

> "SECTION 3. **Sales of goods, properties or services made by a VAT-registered supplier to a BOI registered exporter shall be accorded automatic zero-rating,** i.e., without necessity of applying for and securing approval of the application for zero-rating as provided in Revenue Regulations No. 7-95, **subject to the following conditions**:
>
> **(1) The supplier must be VAT-registered,**
>
> **(2) The BOI-registered buyer must likewise be VAT-registered;**
>
> **(3) The buyer must be a BOI-registered manufacturer/producer whose products are 100% exported. For this purpose a Certification to this effect must be issued by the Board of Investments (BOI) and which certification shall be good for one year unless subsequently re-issued by the BOI;**
>
> **(4) The BOI-registered buyer shall furnish each of its suppliers with a copy of the aforementioned BOI Certification which shall serve as authority for the supplier to avail of the benefits of zero-rating for its sales to said BOI-registered buyers; and;**
>
> **(5) The VAT-registered supplier shall issue for each sale to BOI-registered manufacturer/exporters a duly-registered VAT invoice with the words "zero-rated" stamped thereon in compliance with Sec. 4.108-1(5) of RR 7-95. The supplier must likewise indicate in the VAT invoice the name and BOI-registry number of the buyer**."[28]

Based on the foregoing, it is clear and admits no exception that all the purchases of a BOI Exporter, regardless of whether the same forms part of the exported product's direct or indirect costs, are subject to zero percent (0%) VAT as long as the foregoing conditions are satisfied.

Truly, if the intention of the said issuances were to limit the imposition of VAT zero-rating on certain types of purchases, then it should have been clearly stated in the said conditions.

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[27] Emphasis supplied.
[28] *Id.*

To the mind of the Court *En Banc*, to discriminate the portion of the BOI's Exporter's purchases pertaining to those which will form part of its indirect cost and subjecting the same to 12% VAT runs contrary to the Cross Border Doctrine.

The Cross Border Doctrine mandates that "no VAT shall form part of the cost component of products which are destined for consumption outside the territorial border of the Philippines".[29] Evidently, since the BOI Exporter's products are 100% exported, it then follows that all costs it incurs will eventually translate into the said manufactured or produced product. Considering the same, there is no point in differentiating the treatment on the purchases made by the BOI Exporter.

However, assuming *arguendo* that the Court *En Banc* subscribes to the contention of petitioner, still, his case will not stand.

Here, respondent submitted into evidence a notarized Certification from CCC's Vice President and Resident Manager, Mr. Rodrigo C. Cal. In the Certification, he confirmed that CCC purchased from respondent 32.34 megawatts of electricity which was entirely used in the company's mining and ore production. The Certification is produced to wit:

"CERTIFICATE

I, RODRIGO C. CAL, Filipino, of legal age, with business address at Carmen Copper Complex, Barangay Don Andres Soriano, Toledo City, Cebu, after being sworn in accordance with law, state as follows:

1. I am the duly appointed Vice President and Resident Manager of Carmen Copper Corporation ("Carmen Copper"), a corporation organized under the laws of the Philippines with principal office at Quad Alpha Centrum, 125 Pioneer Street, Mandaluyong City.
2. Based on the records of Carmen Copper and on information of which I have personal knowledge, I confirm that:
   a. In 2011, Carmen Copper purchased an hourly average of 37.50 megawatts (MW) of electric power from various electric power producers and distributors (the "Power Purchases"). The details of such purchase are contained in the table below.

SUPPLIER	AMOUNT OF ELECTRIC POWER SUPPLIED IN MW
Cebu Electric Cooperative	3.52
Korea Electric Power Corporation	1.08
Toledo Power Company	**32.34**
Wholesale Electricity Spot Market	0.56
TOTAL	**37.50**

   b. Carmen Copper allocated the Power Purchase for its various operating activities as follows:

[29] RMO No. 9-2000, 2 February 2000.

ACTIVITY	AMOUNT OF ELECTRIC POWER SUPPLIED IN MW
Mining and Ore Processing	36.94
Administration (for office and camp facilities)	0.56

c. **Toledo Power Company (TPC) is Carmen Copper's principal supplier of electric power for its mining and ore processing operation.**

d. **The entire amount of electric power that was supplied by TPC in 2011 was used by Carmen Copper for mining and ore processing activities.**

IN WITNESS WHEREOF, I have affixed my signature below on 9 Oct 2015 in Toledo City.

Sign
RODRIGO C. CAL

SUBSCRIBED AND SWORN to before me this 9 Oct 2015 in Toledo City by RODRIGO C. CAL whose identity I have verified through his Philippine Passport with number EB5776199 issued on June 27, 2012 in Cebu City, Philippines.

Doc No. 332
Page No. 67
Book No. XII
Series of 2015."[30]

CATHERINE CABALSE FONTANOZA
Notary Public
xxx

Being a notarized document, the Certification enjoys the presumption of regularity and, thus, is entitled to full faith and credit. In order to break this presumption, the party assailing the validity of the document must show strong, complete, and conclusive proof of its falsity. This is consistent with the ruling of the High Court in the case of ***Rodriguez v. Your Own Home Development Corporation***,[31] to wit:

> **"A notarized document is presumed valid, regular, and genuine. It carries evidentiary weight with respect to its due execution. As such, it need not be proven authentic before it is admitted into evidence. On its face, it is entitled to full faith and credit, and is deemed to be in full force and effect.**
>
> xxx xxx xxx
>
> **To nullify a notarized document on account of flaws and defects, there must be a strong, complete, and conclusive proof of its falsity. The required quantum of proof is a clear, strong, and convincing evidence**:
>
> xxx xxx xxx
>
> The rationale for this rule is to maintain public confidence in the integrity of notarized documents."[32]

[30] Emphasis supplied.
[31] G.R. No. 199451, 15 August 2018
[32] Emphasis supplied.

In order to dissuade the Court *En Banc* from considering the Certification, petitioner argues that the said document is self-serving on the ground that the burden of paying the VAT will ultimately pass on to CCC as buyer/consumer.

Further, he explains that the Certification is contradicted by respondent's own pieces of evidence, including, CCC's 2011 Audited Financial Statements ("AFS"), where it is indicated that a portion of electricity purchased by CCC was utilized for its general and administrative use; and respondent's Summary List of Sales ("SLS"), where it is shown that CCC paid output VAT amounting to ₱690,100.98. For these reasons, he opines that the Court should not give credence to CCC's Certification.

The Court *En Banc* is not persuaded.

Contrary to petitioner's position, CCC's AFS does not contradict and, in fact, even supports CCC's Certification.

A close scrutiny of CCC's AFS[33] proves that CCC incurred Power and Other Utilities expenses in the total amount of ₱2,022,634,067.00, a portion of which was used for its general and administrative needs in the amount of ₱32,578,515.00.

Succinctly, CCC's attestations in its AFS run consistent with the Certification where CCC acknowledged that it indeed purchased electricity for its general and administrative use. However, CCC also clarified in the Certification that the same was not supplied by respondent but by other power producers.

As for the output VAT paid by CCC as reflected in respondent's SLS,[34] petitioner failed to establish much less explain the nature of this transaction and is thus unable to refute the presumption of the Certification's validity and truthfulness.

Given the foregoing, the Court *En Banc* sees no error in the assailed Decision finding respondent to have established its compliance with the conditions laid down under ***Section 3 of RMO No. 9-2000*** and, thus, proving its entitlement to zero percent (0%) VAT on its sales to CCC for taxable year 2011.

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33 Exhibit "P-30", pp. 34-35; Division Records, pp. 719-720.
34 Exhibit "R-2"; BIR Records, p. 21.

The non-issuance of the FAN rendered the collection of the VAT erroneous.

Apart from establishing that it is not liable to pay the VAT, respondent was also able to prove that petitioner did not issue the FAN.

In an attempt to downplay the importance of the said assessment, petitioner contends that he need no longer issue the FAN in light of respondent's payment of the alleged deficiency VAT. He posits that respondent's act of voluntarily paying the said tax implies its intention to abandon or waive its right to question the validity of the assessment.

Again, petitioner's argument is unmeritorious and has already been addressed by this Court in ***CIR v. 3M Philippines, Inc.***,[35] where the Court *En Banc* ruled that the issuance of the FAN is a substantive prerequisite to tax collection. As such, non-issuance of the same will render the collection efforts of petitioner invalid. The relevant portion of the said Decision is quoted, to wit:

> "**As already intimated, an assessment in the context of the NIRC or a FAN is necessary. This is so because as soon as it is served, an obligation arises on the part of the taxpayer concerned to pay the amount assessed and demanded. Simply put, for the tax liability to arise, an assessment has to be issued and served to the taxpayer.**
>
> **In addition, the issuance of a valid formal assessment is a substantive prerequisite to tax collection. Due process requires that it must be served on and received by the taxpayer, to enable the taxpayer to determine the remedies thereon.**
>
> **Thus, petitioner's non-issuance of a FAN against respondent is fatal.**"[36]

This finds support in the Supreme Court case of ***CIR v. Fitness by Design, Inc., (hereinafter referred to as "Fitness Case")***[37] where the High Court ruled:

> "**The issuance of a valid formal assessment is a substantive prerequisite for collection of taxes**. Neither the National Internal Revenue Code nor the revenue regulations provide for a "specific definition or form of an assessment." However, the National Internal Revenue Code defines its explicit functions and effects." **An assessment does not only include a computation of tax liabilities; it also includes a demand for payment within a period prescribed.** Its main purpose is to determine the amount that a taxpayer is liable to pay. *l*

[35] CTA *EB* Case No. 1330, 21 November 2016.
[36] Emphasis supplied.
[37] G.R. No. 215957, 9 November 2016.

> **A pre-assessment notice "do[es] not bear the gravity of a formal assessment notice." A pre-assessment notice merely gives a tip regarding the Bureau of Internal Revenue's findings against a taxpayer for an informal conference or a clarificatory meeting**.
>
> **A final assessment is a notice "to the effect that the amount therein stated is due as tax and a demand for payment thereof." This demand for payment signals the time "when penalties and interests begin to accrue against the taxpayer and enabling the latter to determine his remedies[.]" Thus, it must be "sent to and received by the taxpayer, and must demand payment of the taxes described therein within a specific period."**"[38]

As discussed in the foregoing case, the FAN is not only a necessary requirement of due process; it also serves as petitioner's letter of demand to the taxpayer calling for the payment of the deficiency tax and the instrument where the basis of assessment is explained. Without the FAN, the tax liability of the taxpayer ceases to arise.

The PAN[39] in this case cannot be considered as an assessment within the context of the Tax Code since it does not contain a demand for the payment of the VAT. This is evident from the wording of the said document, which states:

> "Pursuant to the provision of Section 228 of the aforesaid Code and its implementing revenue regulations, you are hereby given the opportunity to present in writing your side of the case to the Office of the Assistant Commissioner at Rm. 307, BIR National Office Building, BIR National Office Building, BIR Road, Diliman, Quezon City within fifteen (15) days from receipt hereof.
>
> However, if you are amenable, **you may pay the above assessment** using the BIR Payment Form (BIR Form 0605) through eFPS. Afterwards, submit proof of payment thereof to our Office located at 8th Flr. Pag-ibig Fund-WT Corporate Tower, Cebu Busn. Park, Cebu City for updating of your records and cancellation of the herein PAN, if warranted.
>
> **If we fail to hear from you within the said period, you shall be considered in default, in which case, a formal letter of demand and assessment notice shall be issued by this Office calling for payment of your aforesaid deficiency taxes, inclusive of civil penalty and interest**."[40]

As can be gleaned above, the PAN did not demand the payment of the VAT but only encouraged its settlement. This is consistent with the phrase "may pay the above assessment" stated on the document. Likewise, it is written in the PAN that the BIR is yet to issue its formal letter of demand to call for the payment of the assessment through the FAN. Considering these,

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[38] Emphasis supplied.
[39] Exhibit "P-19", Division Records, pp. 256-262.
[40] Emphasis added and omitted.

there is no contest that respondent's obligation to pay the VAT had not yet materialized.

Having established that respondent is not liable to pay VAT on its sale of electricity to CCC for taxable year 2011 and that the payment it made is considered invalid for the non-issuance of the FAN, it then follows that petitioner has no legal basis to collect the VAT. Hence, respondent is entitled to the refund of the said erroneously collected tax.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the Court in Division's Decision promulgated on 9 October 2019 and the Resolution dated 3 February 2020 are hereby **AFFIRMED**.

SO ORDERED.

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO – I join the opinion of Justice Villena
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

(With Separate Concurring Opinion)
JEAN MARIE A. BACORRO-VILLENA
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

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MODESTO-SAN PEDRO, *JJ.*

Promulgated:
JUL 12 2021 3:10pm

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SEPARATE CONCURRING OPINION

BACORRO-VILLENA, J.:

I concur with the denial of petitioner Commissioner of Internal Revenue's (**petitioner**'s) present Petition for Review, as respondent Toledo Power Company (**respondent**) has amply proven its entitlement to the claim for refund.

With all due respect, however, I am constrained to withhold my concurrence with the *ponencia* on its discussion that the non-issuance of the Final Assessment Notice (**FAN**) rendered the collection of the value-added tax (**VAT**) erroneous.

To my mind, petitioner's non-issuance of FAN, especially after respondent's payment subsequent to its receipt of the Preliminary Assessment Notice (**PAN**), is not determinative of whether or not there was erroneously or illegally collected tax from the latter.

An "erroneous or illegal tax" is defined as one levied without statutory authority, or upon property *not subject to taxation* or by some officer having no authority to levy the tax, or one which is some other similar respect is illegal.[1]

As such, the question of entitlement to a claim for refund is dependent only on whether or not there was one levied without any statutory authority.

Here, the same has already been answered when the Court ruled that respondent's sale of electricity was correctly subjected to zero percent (0%) VAT; hence, 12% VAT should not have been imposed upon it.

In addition, it would be absurd to require petitioner to issue a FAN when respondent has already paid the tax subject of the PAN. As emphasized in the *ponencia*, as assessment does not only include a computation of tax liabilities; **it also includes a demand for payment within a period prescribed**.

Thus, to require petitioner to issue FAN despite payment would, in effect, be another demand for payment which, in the first place, had already been made.

With the above, I vote for the denial of the present Petition for Review for lack of merit.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

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1 *Commissioner of Internal Revenue v. Pilipinas Shell Petroleum Corporation*, G.R. No. 188497, 25 April 2012.

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
Quezon City

<u>EN BANC</u>

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TOLEDO POWER COMPANY, Respondent.	Promulgated: JUL 12 2021 3:10pm

x - x

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Thus, to require petitioner to issue FAN despite payment would, in effect, be another demand for payment which, in the first place, had already been made.

With the above, I vote for the denial of the present Petition for Review for lack of merit.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

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