REPUBLIC OF THE PHILIPPINES
**COURT OF TAX APPEALS**
QUEZON CITY

**EN BANC**

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| COMMISSIONER OF INTERNAL REVENUE, Petitioner, | C.T.A. EB CASE NO. 872 (CTA Case No. 8128) |
| - versus - | |
| BASF PHILIPPINES, INC., Respondent. | |

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| BASF PHILIPPINES, INC., Petitioner, | C.T.A. EB CASE NO. 903 (CTA Case No. 8128) |
| | Present: |
| - versus - | DEL ROSARIO, *PJ*<br>CASTAÑEDA, JR.,<br>BAUTISTA,<br>UY,<br>CASANOVA,<br>FABON-VICTORINO,<br>MINDARO-GRULLA,<br>COTANGCO-MANALASTAS, *and*<br>RINGPIS-LIBAN, *JJ.* |
| COMMISSIONER OF INTERNAL REVENUE, Respondent. | Promulgated:<br>SEP 12 2013 9:45 a.m. |

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## **D E C I S I O N**

***Fabon-Victorino, J.:***

For determination are the consolidated Petitions for Review filed by the Commissioner of Internal Revenue (CIR) and BASF Philippines, Inc. (BASF) against each other.

The Petition for Review[1] filed by the CIR on March 7, 2012 prays that the Decision[2] dated November 22, 2011 and the Resolution[3] dated February 6, 2012 effectively affirming the assailed Decision, rendered by the Court in Division in CTA Case No. 8128 entitled *BASF Philippines, Inc. vs. Commissioner of Internal Revenue* be set aside and another be rendered ordering BASF Philippines, Inc. to pay the amounts of Php24,278,264.17 and Php75,410,788.26, respectively representing deficiency Value Added Tax (VAT) and Income Tax (IT) for taxable year 2002, plus interest and surcharges pursuant to Sections 248 and 249 of the National Internal Revenue Code (NIRC) of 1997.

The other Petition for Review[4] filed by BASF on May 18, 2012 prays that the Resolution[5] dated April 27, 2012, likewise rendered by the Court in Division in the same case be reversed directing the cancellation and release of the required Surety Bond that it had posted to suspend the collection of the alleged tax liabilities.

## ***<u>THE FACTS AND THE PROCEEDINGS</u>***

The CIR is the head of the Bureau of Internal Revenue (BIR) with the power, among others, to assess and collect all internal revenue taxes, fees and other charges, and to enforce all forfeitures, penalties, and fines connected therewith, with office at BIR National Office Building, BIR Road, Diliman, Quezon City.

BASF, on the other hand, is a duly organized and existing domestic corporation, with principal office at 11th Floor, Hanjinphil Corporation Building, 1128 University Parkway, North Bonifacio, Global City, Taguig, Metro Manila. It is a wholly owned subsidiary of BASF Societas Europaea or BASF SE, the world's leading chemical company, based in Germany.

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[1] *En Banc* docket, pp. 7-24.
[2] *Id.*, pp. 27-48.
[3] *Id.*, pp. 49-53.
[4] *En Banc* docket, pp. 1-27.
[5] *Id.*, pp. 36-39.

With reference to Letter Notice No. 056-1M-02-00-00783, the BIR issued a Preliminary Assessment Notice (PAN) dated October 25, 2005 finding BASF liable for deficiency IT and VAT for taxable year 2002 in the respective amounts of Php75,410,788.26 and Php24,081,747.57.[6]

The PAN indicated that the computerized matching conducted by the BIR using the records from the Bureau of Customs (BOC) and BASF's VAT Returns revealed that BASF had undeclared importations. The Computation Sheet attached to the PAN, however, showed a VAT amount payable of Php1,171,525.82 and IT amount payable of Php207,920.55,[7] which were significantly lower than that stated in the PAN.

BASF claimed that the PAN was received by its accounting staff Villa Tolentino, who did not refer it to her superiors as it was not addressed to a particular BASF officer.[8]

Thereafter, the BIR Assessment Division of Revenue Region No. 9 through Acting Regional Director Merlinda L. Orodoyo issued a Formal Letter of Demand (FLOD) dated November 24, 2005[9] with Assessment Notices[10] for IT and VAT in the amounts of Php76,040,982.68 and Php24,278,264.17, respectively.

In a reply letter to Acting Director Orodoyo dated December 13, 2005, [11] filed on December 22, 2005, Tolentino requested a list of undeclared importations stated in the FLOD for verification purposes.[12]

In a letter dated February 15, 2006 [13] sent to the attention of Tolentino, OIC Regional Director Corazon C. Pangcog provided the requested list of importations

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[6] *Rollo*, p. 609.
[7] *Rollo*, p. 6.
[8] *Id.*
[9] *Rollo*, pp. 607-608.
[10] Exhibit "B"
[11] Exhibit "C"
[12] *Id.*, p. 610.
[13] Exhibit "D"

denominated as Details of Importation with Return Information Matching (DIRIM).[14]

In a letter to Director Corazon C. Pangcog dated April 21, 2006, [15] Tolentino requested for revalidation of the deficiencies claiming that BASF settles its import taxes and duties with the BOC when its import shipments are being process for release. Attached to the letter were a Certification from the Philippine Bonded Warehouse Services, Inc., Memorandum from the Port of Manila dated August 27, 2001, and 3rd Indorsement dated August 24, 2001 from the Port of Manila with its Annexes.[16]

On July 3, 2006, BASF received a letter dated June 26, 2006 addressed to Tolentino signed by Oscar A. Aguilar, OIC Chief, Legal Division, Revenue Region No. 9, stating that it should settle its tax deficiencies in the amount of Php100,319,246.85.[17]

On June 17, 2010, BASF's Senior Manager for Finance and Accounting Antoinette Molleno received two subpoenas from the Department of Justice (DOJ) - one dated April 30, 2010 and the other May 21, 2010 [18] - for a preliminary investigation on a Complaint dated March 18, 2010[19] filed by the BIR for alleged violation of Section 255 of the National Internal Revenue Code (NIRC) by BASF's due to non-payment of IT and VAT deficiencies for taxable year 2002. The complaint based on the Affidavit of Oscar Aguilar alleged that the subject tax assessments were final and demandable because no timely protest was filed by BASF against the deficiency tax assessments arising from the Letter Notice No. 056-1M-02-00-00783.

BASF considered the criminal complaint dated March 18, 2010, signed by Commissioner of Internal Revenue Joel Tan-Torres and filed against Antoinette Molleno, as the constructive denial of its protest dated July 18, 2006 and August 25, 2010.

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[14] *Rollo*, p. 608.
[15] Exhibit "E"
[16] *Rollo*, p. 608.
[17] *Id.*, p. 610.
[18] Exhibit "L"
[19] Exhibit "L-1"

On July 6, 2010, BASF filed with the Court in Division a Petition for Review[20] with Urgent Motion for Suspension of the Collection of Tax docketed as CTA Case No. 8128, in view of the Indorsement dated June 3, 2010, for the issuance of a Warrant of Distraint and Levy/Garnishment against it for the amount of Php100,319,246.85.

In her Answer[21] filed on September 17, 2010, the CIR claimed that BASF was afforded due process and ample opportunity to contest the BIR's assessment but failed. Based on a computerized matching conducted by the BIR using the BOC's importation data and the BASF's VAT returns, the latter had undeclared importations for taxable year 2002. BASF received the FLOD with attached assessment notices on November 24, 2005, thus, it had until December 24, 2005 within which to file a protest pursuant to Section 228 of the NIRC of 1997. For failure to seasonably file a protest, LN No. 056-IM-02-00-00783 became final, executory and demandable.

During the trial, the parties presented their evidence in support of their respective theories.

On November 22, 2011, the Court in Division promulgated the assailed Decision ruling that the assessment notices issued against BASF were not valid. The information in the assessment notices were not sufficient to afford BASF the opportunity to intelligently answer the assessment and prepare sufficient evidence in support of its protest. In other words, the assessment notices failed to state the legal and factual bases of the assessment for deficiency IT and VAT arising from the alleged undeclared importation. The decretal portion of the assailed decision reads as follows:

> **WHEREFORE**, the Petition for Review is hereby **GRANTED**. Accordingly, the deficiency Value-Added Tax (VAT) and Income Tax assessments issued against petitioner for taxable year 2002 in the

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[20] *Rollo*, pp. 4-27.
[21] *Id.*, pp. 196-206.

> aggregate amount of P100,319,246.85 are cancelled and considered withdrawn for lack of legal and factual basis. Respondent is permanently enjoined from collecting said assessments.
>
> **SO ORDERED.**

Shortly thereafter or on December 2, 2011, BASF filed an Urgent Motion to Release Surety Bond followed by a Supplement to the Urgent Motion to Release Surety Bond on December 6, 2011.

On the other hand, the CIR filed a Motion for Reconsideration (Re: Decision promulgated on November 22, 2011) on December 5, 2011, to which BASF filed Comment on December 28, 2011.

Acting on both incidents, the Court in Division rendered the assailed Resolution of February 6, 2012 denying (i) BASF's Urgent Motion to Release Surety Bond and its Supplement as well as the (ii) CIR's Motion for Reconsideration, in this wise:

> **WHEREFORE**, premises considered, petitioner's "URGENT MOTION TO RELEASE SURETY BOND" filed on December 2, 2011 and the "SUPPLEMENT TO URGENT MOTION TO RELEASE SURETY BOND" filed on December 6, 2011 and respondent's "MOTION FOR RECONSIDERATION (Re: Decision promulgated 22 November 2011)" filed on December 5, 2011 are hereby **DENIE**D for lack of merit.
>
> **SO ORDERED.**

On February 28, 2012, BASF filed a Motion for Reconsideration of the denial of its Urgent Motion to Release

Surety Bond and its Supplement. However, it was denied in the Resolution dated April 27, 2012, for lack of merit.

Hence, the present recourse docketed as CTA EB No. 872 which was consolidated with CTA EB No. 903 on May 24, 2012, pursuant to Section 1, Rule 31 of the Revised Rules of Court.

## ***THE ISSUES***

CIR claims that:

I. THE SECOND DIVISION OF THE HONORABLE COURT ERRED WHEN IT HELD THAT THE PRELIMINARY ASSESSMENT NOTICE AND THE FINAL ASSESSMENT NOTICE ISSUED AGAINST RESPONDENT IS (sic) VOID AB INITIO.

II. THE SECOND DIVISION OF THE HONORABLE COURT ERRED WHEN IT HELD THAT RESPONDENT IS NOT LIABLE FOR DEFICIENCY VAT AND IT IN THE RESPECTIVE AMOUNTS OF P24,278,264.17 AND P75,410,788.26 FOR TAXABLE YEAR 2002.

On the other hand, BASF submits that:

I. The Honorable Second Division of the Court of Tax Appeals erred in ruling that Decision is not yet final and executory for the sole reason that respondent filed a Petition for Review to the Honorable Court en banc; consequently, the Surety Bond cannot yet be released and cancelled.

II. The Honorable Second Division of the Court of Tax Appeals erred in ruling that Section VII of Supreme Court Circular A.M. No. 04-7-02-SC (the "Guidelines on Corporate Surety Bonds") applies to the Surety Bond posted by petitioner to suspend the collection of the void assessments.

The CIR claims that the ruling that the PAN and the FAN issued against BASF are void *ab initio* hence, BASF is not liable for deficiency IT and VAT in the respective amounts of Php24,278,264.17 and Php75,410,788.26 for taxable year 2002 is flawed.

Contrary to the Court's ruling, the BIR considered BASF's right to due process when it issued the PAN and FAN. Moreover, estoppels had set in thus BASF can no longer impugn the validity of the assessments. Besides, the deficiency IT and VAT assessments were determined through computerized matching of records in accordance with the existing laws, rules and regulations.

For its part, BASF argues that the Decision of November 22, 2011 became final and executory since the Motion for Reconsideration filed by the CIR was *pro-forma.* That being the case, it did not toll the running of the period of appeal, thus, the Surety Bond can now be cancelled and released. Assuming that the Decision is not yet final and executory, Section VII of Supreme Court Circular A.M. No. 04-7-02-SC should not be applied to determine the lifetime of the subject Surety Bond posted to enjoin the collection of taxes given that the Revised Rules of the Court of Tax Appeals is clearly and expressly states that the SC Circular shall only serve as a guide in the "selection and qualification of surety companies." Further assuming that the Decision of November 22, 2011 is not yet final and executory and that Section VII of the SC Circular applies to the suspension of collection of taxes, the present case calls for a relaxation of the rules given that a strict application of the rules will result in grave injustice and oppression to BASF.

## ***RULING OF THE COURT EN BANC***

The two Petitions for Review are bereft of merit.

Perusal of the arguments set forth by the CIR in her Petition for Review readily shows that they are mere restatement of her arguments in her previous pleadings which were exhaustively considered and discussed by the

Court in Division in the assailed Decision of November 22, 2011 and affirmed in the subsequent Resolution of February 6, 2012. The Court *En Banc* sees no compelling reason to deviate from the findings of the Court in Division that the assessment notices issued against BASF are not valid as to justify collection of alleged taxes. The ruling based on the evidence presented is in consonance with the law and jurisprudence on the matter. The Court *En Banc* quotes with approval the disquisition of the Court in Division on the matter, to wit:

> Section 228 of the NIRC of 1997 specifically provides that:
>
> > '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: Provided, however, That a pre-assessment notice shall not be required in the following cases:
> >
> > xxx xxx xxx
> >
> > The taxpayer shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.'
> >
> > xxx xxx xxx
>
> To implement this provision, the BIR issued Revenue Regulations (RR) No. 12-99, Section 3 of which states:
>
> > 'Section 3. Due Process Requirement in the Issuance of a Deficiency Tax Assessment. —
> >
> > xxx xxx xxx

3.1.2. Preliminary Assessment Notice (PAN). — If after review and evaluation by the Assessment Division or by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing in detail, the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based...

xxx xxx xxx

3.1.4. Formal Letter of Demand and Assessment Notice. — The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence, on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void..."

It is clear from the foregoing that a taxpayer must be informed in writing of the legal and factual bases of the tax assessment made against him. The use of the word 'shall' in these legal provisions indicates the mandatory nature of the requirements laid down therein.

A review of the records of the case would reveal that respondent did not inform petitioner in writing of the law and facts on which the assessments of the deficiency VAT and Income Tax were made.

In the Preliminary Assessment Notice as well as the Formal Letter of Demand with Details of Discrepancies and Assessment Notice issued against petitioner, respondent merely stated that 'per computerized matching conducted by the Bureau, you have an undeclared importation for the year, which is a result of comparing your importation per Bureau of Customs (BOC) records as against your importation per tax return'. Further, there is an alarming discrepancy in the amounts specified in the PAN vis-à-vis the amounts appearing in the computation sheet attached to the PAN. For that alone, it would already be difficult for petitioner to determine how the deficiency assessments for VAT and Income Tax were arrived at by respondent.

Moreover, as correctly pointed out by petitioner, respondent failed to provide petitioner with the list of the alleged undeclared importations which has given rise to the deficiency assessments issued against it. In fact, it is undisputed that the list of importations called as Details of Importation with Return Information Matching (DIRIM) had only become available to petitioner after its former employee, Ms. Tolentino, wrote and requested for a copy from Acting Regional Director Merlinda L. Orodoyo, after having received the PAN.

Based on the foregoing, this Court is convinced that the assessment notices issued against petitioner are not valid. The details stated therein are not sufficient to afford petitioner the opportunity to intelligently answer the assessment as well as prepare documentary evidence for its

> protest. Said notices failed to state the legal and factual bases of the assessment for deficiency VAT and income tax arising from the alleged undeclared importation of petitioner.
>
> As held by the Supreme Court in the case of Commissioner of Internal Revenue vs. Enron Subic Power Corporation, to wit:
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> > 'The law requires that the legal and factual bases of the assessment be stated in the formal letter of demand and assessment notice. Thus, such cannot be presumed. Otherwise, the express provisions of Article 228 of the NIRC and RR No. 12-99 would be rendered nugatory. The alleged 'factual bases' in the advice, preliminary letter and 'audit working papers' did not suffice. There was no going around the mandate of the law that the legal and factual bases of the assessment be stated in writing in the formal letter of demand accompanying the assessment notice.'
>
> Finally, a void assessment cannot give rise to an obligation to pay deficiency taxes, and it divests the taxing authority of the right to collect them. (*Citations omitted*)

As declared by the Highest Tribunal in *Commissioner of Internal Revenue vs. Reyes,* [22] "(u)nder the present provisions of the Tax Code and pursuant to elementary due process, taxpayers must be informed in writing of the law and the facts upon which a tax assessment is based; otherwise, the assessment is void." Further, "(t)he law imposes a substantive, not merely a formal, requirement. To proceed heedlessly with tax collection without first establishing a valid assessment is evidently violative of the

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[22] G.R. Nos. 159694 and 163581, January 27, 2006.

cardinal principle in administrative investigations: that taxpayers should be able to present their case and adduce supporting evidence." Moreover, the legal and factual bases of the assessment cannot be presumed.[23]

Anent BASF's petition, it is evident that the same is likewise a mere rehash of its *Motion for Reconsideration (of the Resolution dated 6 February 2012)*[24] filed with the Court in Division on February 28, 2012. No reason of significant and compelling import have been advanced to alter, modify much more reverse the observation and conclusion of the Court in Division that the lifetime of any bond shall be from the time of its approval by the Court until the case is finally decided, resolved or terminated. In fact, the assailed Decision of November 22, 2011 is the subject of appeal before the Court *En Banc*. In other words, it is not yet final and executory. Hence, there is no reason for this Court to disagree with the conclusion reached by the Court in Division delivered in the fallowing fashion, thus:

> To reiterate, Section VII of Circular No. 04-970-SC (A.M. No. 04-7-02-SC), otherwise known as "Guidelines on Corporate Surety Bonds", provides:
>
> > 'VII. LIFETIME OF BONDS IN CRIMINAL AND CIVIL ACTIONS/SPECIAL PROCEEDINGS
> >
> > Unless and until the Supreme Court directs otherwise, the lifetime or duration of the effectivity of any bond issued in criminal and civil actions/special proceedings, or in any proceeding or incident therein shall be from its approval by the court, until the action or proceeding is finally decided, resolved or terminated. This condition must be incorporated

[23] *Commissioner of Internal Revenue vs. Enron Subic Power Corporation*, G.R. No. 166387, January 19, 2009.
[24] *Rollo*, pp. 1229-1241.

> in the terms and condition of the bonding contract and shall bind the parties notwithstanding their failure to expressly state the same in the said contract or agreement.'

Contrary to petitioner's contention, the application of the aforementioned Circular to tax cases is not limited to the selection and qualification of surety companies. While Section 7, Rule 10 of the 2005 Revised Rules of Court of Tax Appeals, expressly states that, with respect to the selection and qualification of surety companies, the parties and the Court shall be guided by Supreme Court Circular A.M. No. 04-7-02-SC, there is nothing in the said Circular which states that the provisions in Section 7 is not applicable to tax cases since there was no distinction made. In fact the said provision clearly indicates that it is applicable to 'bonds issued in criminal and civil actions/special proceedings, or in any proceeding or incident therein'. The scope of the said Circular is broad enough to cover tax cases which may either be classified as a civil or criminal case.

Applying the doctrine "*Ubi lex non distinguit, nec nos distinguire debemos*", We cannot sustain petitioner's view. In other words, if the law does not distinguish, so We must not distinguish.

Thus, this Court is constrained not to release the surety bond posted by petitioner in view of the fact that the lifetime of any bond shall be from the time of its approval by the Court until the case is finally decided, resolved or terminated. The case attains its conclusion when there is judgment stating that the Court's Decision is final and executory. As held in the case of City of Manila vs. Court of Appeals et al.,:

> A judgment becomes 'final and executory' by operation of law. Finality of judgment becomes a fact upon the lapse of the reglementary period to appeal if no appeal is perfected. In such a situation, the prevailing party is entitled to a writ of execution, and issuance thereof is a ministerial duty of the court. (*Citations omitted*)

Moreover, the fact that the arguments raised in the petition are mere reiteration of those in the motion for reconsideration does not by itself make the Motion for Reconsideration filed by the CIR with the Court in Division *pro forma,* thus, would not interrupt the reglementary period to appeal and render the Decision of November 22, 2011 final and executory. In the first place, the filing of a motion for reconsideration is a condition *sine qua non* to the filing of an appeal before the Court *En Banc* as provided in Section 1, Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals, as amended.

Further, settled is the rule that although a motion for reconsideration may merely reiterate issues already passed upon by the Court, that by itself does not make it *pro forma* and is immaterial because what is essential is compliance with the requisites of the rules.[25]

Under established jurisprudence, the mere fact that a motion for reconsideration reiterates arguments already passed upon by the court, does not, by itself, make it a *pro forma motion.* Among the ends to which a motion for reconsideration is addressed is precisely to convince the court that its ruling is erroneous and improper, contrary to the law or evidence, and in so doing, the movant has to dwell of necessity on issues already passed upon. If a motion for reconsideration may not discuss those issues, the consequence would be that after a decision is rendered, the

[25] *Philippine National Bank v. Hon. Jose G. Paneda*, G. R. No. 149236, February 14, 2007, citing *Marina Properties Corporation v. Court of Appeals,* 355 Phil. 705 (1998).

losing party would be confined to filing only motions for reopening and new trial.[26]

**WHEREFORE**, the Petitions for Review filed on March 7, 2012 and May 18, 2012 by the Commissioner of Internal Revenue and BASF Philippines, Inc., respectively, are hereby **DENIED** for lack of merit.

**SO ORDERED.**

ESPERANZA R. FABON-VICTORINO
Associate Justice

*We Concur:*

*(with Concurring and Dissenting Opinion)*
ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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

(On Leave)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

Ma. Belen Ringpis-Liban
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

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[26] Republic of the Philippines v. ICC, G.R. No. 141667, July 17, 2006.

## CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* 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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| **COMMISSIONER OF INTERNAL REVENUE ,** **Petitioner,** | **CTA EB NO. 872 (CTA CASE NO. 8128)** |
| **- versus -** | |
| **BASF PHILIPPINES, INC.,** **Respondent.** | |

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|---|---|
| **BASF PHILIPPINES, INC.,** **Petitioner,** | **CTA EB NO. 903 (CTA CASE NO. 8128)** |
| **- versus -** | **Members:** **DEL ROSARIO, *PJ,*** **CASTAÑEDA, JR.,** **BAUTISTA,** **UY,** **CASANOVA,** **FABON-VICTORINO,** **MINDARO-GRULLA,** **COTANGCO-MANALASTAS, *and*** **RINGPIS-LIBAN, *JJ.*** |
| **COMMISSIONER OF INTERNAL REVENUE,** **Respondent.** | **Promulgated:** SEP 12 2013 |

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# CONCURRING AND DISSENTING OPINION

***DEL ROSARIO, PJ.:***

In the Decision (assailed Decision) promulgated on November 22, 2011, the former Second Division of the Court of Tax Appeals (CTA-Second Division) granted BASF Philippines, Inc.'s (BASF) petition for review and ruled that the deficiency Value-Added Tax (VAT) and Income Tax assessments issued against BASF for taxable year 2002 are void on the ground that the Commissioner of Internal Revenue (CIR) failed to inform BASF, in writing, of the legal and factual bases of the tax assessments issued against it. The decretal portion of which reads:

> "**WHEREFORE**, the *Petition for Review* is hereby **GRANTED**. Accordingly, the deficiency Value-Added Tax (VAT) and Income Tax assessments issued against petitioner for taxable year 2002 in the aggregate amount of P100,319,246.85 are cancelled and considered withdrawn for lack of legal and factual basis. Respondent is permanently enjoined from collecting said assessments.
>
> **SO ORDERED**."[1]

In the Resolution dated February 6, 2012 (assailed Resolution), the CTA-Second Division denied the following:

1. BASF's "URGENT MOTION TO RELEASE SURETY BOND" filed on December 2, 2011;
2. BASF's "SUPPLEMENT TO URGENT MOTION TO RELEASE SURETY BOND" filed on December 6, 2011; and
3. CIR'S "MOTION FOR RECONSIDERATION (Re: Decision promulgated 22 November 2011)," with BASF's "COMMENT (To Motion for Reconsideration dated 2 December 2011)".

The dispositive portion of the assailed Resolution is as follows:

> "**WHEREFORE**, premises considered, petitioner's "URGENT MOTION TO RELEASE SURETY BOND" filed on December 2, 2011 and the "SUPPLEMENT TO URGENT MOTION TO RELEASE SURETY BOND" filed on December 6, 2011 and respondent's "MOTION FOR RECONSIDERATION (Re: Decision promulgated 22 November 2011)" filed on December 5, 2011 are hereby **DENIED** for lack of merit.
>
> **SO ORDERED**."[2]

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[1] Annex "A", *Rollo*, p. 47.
[2] Annex "B", *Rollo*, p. 53.

I concur in the *ponencia* of my esteemed colleague, the Honorable Associate Justice Esperanza R. Fabon-Victorino, in so far as it denies the Petition for Review filed by BASF on May 18, 2012 docketed as CTA EB No. 903. Since the assailed Decision is not yet final and executory, it will be *premature* to release the surety bond posted by BASF in relation to the suspension of the collection of the subject deficiency VAT and Income Tax assessments.

On the other hand, with utmost respect, I dissent in the *ponencia* when it affirms the assailed Decision of the CTA-Second Division and denies the Petition for Review filed by the CIR in CTA EB No. 872.

Under Section 228[3] of the National Internal Revenue Code (NIRC) of 1997, a taxpayer shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment is void. Moreover,

[3] SECTION 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: Provided, however, That a preassessment notice shall not be required in the following cases:

(a) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the face of the return; or

(b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or

(c) When a taxpayer who opted to claim a refund or tax credit of excess creditable withholding tax for a taxable period was determined to have carried over and automatically applied the same amount claimed against the estimated tax liabilities for the taxable quarter or quarters of the succeeding taxable year; or

(d) When the excise tax due on excisable articles has not been paid; or

(e) When an article locally purchased or imported by an exempt person, such as, but not limited to, vehicles, capital equipment, machineries and spare parts, has been sold, traded or transferred to non-exempt persons.

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.

Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.

Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable. (NIRC of 1997)

Sections 3.1.2 and 3.1.4 of Revenue Regulations (RR) No. 12-99, implementing Section 228 of the NIRC of 1997, provide that:

> " 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).
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> xxx xxx xxx
>
> 3 3.1.4 Formal Letter of Demand and Assessment Notice. — The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. **The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void** (see illustration in ANNEX B hereof)." (Emphases supplied)

Based on the foregoing, it is not enough for the CIR to just notify the taxpayer of her findings. The taxpayer must be informed of the law and the facts on which the assessment is based as it is more in accord with the constitutional guarantee of due process.

Here, it is undisputable that BASF received both the Preliminary Assessment Notice[4] (PAN) dated October 25, 2005 and the Formal Letter of Demand[5] dated November 24, 2004 with attached Assessment Notices (FLD/FAN). A perusal of the PAN and the FLD/FAN shows that the factual and legal bases of the deficiency VAT and Income Tax assessments are indicated therein. Both the PAN and FLD/FAN state the following:

> "DETAILS OF DISCREPANCIES
>
> Verification disclosed that per computerized matching conducted by the Bureau, you have an undeclared importation for the year, which is a result of comparing your importation per Bureau of Customs (BOC) records as against your importation per tax return, thus assessed pursuant to RMO No. 40-2003. The Details of Importation with Return Information Matching (DRIM) from BOC showed that you

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[4] Exhibit "A", *Division Docket*, Volume II, p. 683.
[5] Exhibit "B", *Id.*

> have a total importation of P550,413,703.00 against P163,448,456.30 as reflected in your returns. Hence, the discrepancy of P386,965,246.70."[6]

Since the PAN and FLD/FAN contain Details of Discrepancies that specify the legal and factual bases of the deficiency Income Tax and VAT assessments, I humbly submit that the PAN and the FLD/FAN are valid as they comply with the explicit requirements of Section 228 of the NIRC of 1997 and Sections 3.1.2 and 3.1.4 of RR No. 12-99.

It is my view that any claim against the validity of the PAN and FLD/FAN is a matter which should be the proper subject of a protest. BASF's assertion that the PAN and FLD/FAN lack legal and factual bases does not by itself justify BASF's disregard of the procedure under Section 228 of the NIRC of 1997 and Section 3.1.5[7] of RR No. 12-99 on the manner

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[6] *Id. (note 3 and 4).*

[7] "Section 3.1.5 Disputed Assessment. — The taxpayer or his duly authorized representative may protest administratively against the aforesaid formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof. If there are several issues involved in the formal letter of demand and assessment notice but the taxpayer only disputes or protests against the validity of some of the issues raised, the taxpayer shall be required to pay the deficiency tax or taxes attributable to the undisputed issues, in which case, a collection letter shall be issued to the taxpayer calling for payment of the said deficiency tax, inclusive of the applicable surcharge and/or interest. No action shall be taken on the taxpayer's disputed issues until the taxpayer has paid the deficiency tax or taxes attributable to the said undisputed issues. The prescriptive period for assessment or collection of the tax or taxes attributable to the disputed issues shall be suspended.

The taxpayer shall state the facts, the applicable law, rules and regulations, or jurisprudence on which his protest is based, otherwise, his protest shall be considered void and without force and effect. If there are several issues involved in the disputed assessment and the taxpayer fails to state the facts, the applicable law, rules and regulations, or jurisprudence in support of his protest against some of the several issues on which the assessment is based, the same shall be considered undisputed issue or issues, in which case, the taxpayer shall be required to pay the corresponding deficiency tax or taxes attributable thereto.

The taxpayer shall submit the required documents in support of his protest within sixty (60) days from date of filing of his letter of protest, otherwise, the assessment shall become final, executory and demandable. The phrase "submit the required documents" includes submission or presentation of the pertinent documents for scrutiny and evaluation by the Revenue Officer conducting the audit. The said Revenue Officer shall state this fact in his report of investigation.

If the taxpayer fails to file a valid protest against the formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof, the assessment shall become final, executory and demandable.

If the protest is denied, in whole or in part, by the Commissioner, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from date of receipt of the said decision, otherwise, the assessment shall become final, executory and demandable.

In general, if the protest is denied, in whole or in part, by the Commissioner or his duly authorized representative, the taxpayer may appeal to the Court of Tax Appeals in which an assessment, which is otherwise presumed correct, should be assailed.

Stated differently, BASF's declaration that the PAN and FLD/FAN are invalid for want of legal and factual bases is not in itself sufficient to invalidate the assessments. BASF should have protested the assessments in the manner provided by law and regulations. Unless and until declared void or invalid by proper authorities, the PAN and FLD/FAN issued against BASF are presumed valid and made in good faith.

In the case of **Central Metro Trade Distributors, Inc. vs. Hon. Commissioner Guillermo T. Parayno, Jr., Hon. Estrella Martinez,**[8] this Court *En Banc*, citing Section 3.1.5 of RR No. 12-99, emphasized the consequence of a taxpayer's failure to protest a tax assessment, *viz.*:

> "The above-quoted Revenue Regulation explicitly requires that the protest should state the facts and law upon which it is based, otherwise, as in the instant case the protest shall be considered void and without force and effect.
>
> Thus, **there being no protest on the assessments issued by respondent, the same has attained finality by mere lapse, of time and is no longer open to dispute and discussion. Any objection against the assessments should have been pursued in accordance with Section 228 of the NIRC**." (Emphasis supplied)

The Supreme Court has also ruled that "the fact that an assessment has become final for failure of the taxpayer to file a protest within the time allowed only means that the validity or correctness of the assessment may no longer be questioned on appeal.[9]"

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within thirty (30) days from date of receipt of the said decision, otherwise, the assessment shall become final, executory and demandable: Provided, however, that if the taxpayer elevates his protest to the Commissioner within thirty (30) days from date of receipt of the final decision of the Commissioner's duly authorized representative, the latter's decision shall not be considered final, executory and demandable, in which case, the protest shall be decided by the Commissioner.

If the Commissioner or his duly authorized representative fails to act on the taxpayer's protest within one hundred eighty (180) days from date of submission, by the taxpayer, of the required documents in support of his protest, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from the lapse of the said 180-day period, otherwise, the assessment shall become final, executory and demandable." (RR No. 12-99)

[8] CTA EB CASE NO. 179, January 3, 2007 (CTA Case No. 7171), penned by the Honorable Associate Justice Caesar A. Casanova.

[9] Commissioner of Internal Revenue vs. Hambrecht & Quist Philippines, Inc. G.R. No. 169225, November 17, 2010.

Here, records show that BASF never filed any protest against the FLD/FAN within the thirty-day period provided under Section 228 of the NIRC of 1997 and Section 3.1.5 of RR No. 12-99. In view thereof, the FLD/FAN issued against BASF had become final, executory and demandable. Thus, the CTA is deprived of any authority to rule on its validity.[10]

In light of the foregoing principles herein stated, I vote to **DENY** the Petition for Review filed by BASF in CTA EB No. 903 and to **GRANT** the Petition for Review filed by the CIR in CTA EB No. 872. Accordingly, the assailed Decision of the CTA-Second Division should be set aside. BASF should be ordered to pay the deficiency VAT and Income Tax assessments for the year 2002 as stated in the FLD/FAN.

**ROMAN G. DEL ROSARIO**
Presiding Justice

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[10] *Supra*, note 8.