REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-*versus*-

FORT 1 GLOBAL CITY CENTER, INC.,
Respondent.

CTA *EB* NO. 2233
(CTA Case Nos. 9490 & 9503)

Present:

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

Promulgated:

NOV 10 2021 3:41 p.m.

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DECISION

MANAHAN, J.:

Before the Court of Tax Appeals *En Banc* is a Petition for Review filed by the Commissioner of Internal Revenue (CIR) against Fort I Global City Center, Inc. (respondent), seeking the reversal of the Decision dated September 24, 2019 (assailed Decision) and the Resolution dated January 23, 2020 (assailed Resolution) of the Court's Second Division (Court in Division) in CTA Case Nos. 9490 and 9503 entitled *Fort 1 Global City Center, Inc. vs. Hon. Caesar R. Dulay, in His Capacity as Commissioner of the Bureau of Internal Revenue; Fort 1 Global City Center Inc., vs. Hon. Caesar R. Dulay, in his Capacity as Commissioner of the Bureau of Internal Revenue.*

The dispositive portions of the assailed Decision and Resolution are quoted hereunder:

<u>Decision dated September 24, 2019</u>

> "**WHEREFORE,** premises considered, the instant Petitions for Review are **GRANTED.** The PAN and the FAN for taxable years 2009 and 2012 are **CANCELLED.** Accordingly, the deficiency tax assessments against petitioner amounting to P134,099,378.74 and P1,598,860,663.45, for taxable years 2012 and 2009 mentioned in said assessment notices, as well as the FDDA dated October 13, 2016, are likewise cancelled and set aside.
>
> **SO ORDERED."**

<u>Resolution dated January 23, 2020</u>

> "**WHEREFORE**, finding no cogent reason to reverse the Court's ruling, respondent's Motion for Reconsideration (On the Decision promulgated on August 06, 2019) is **DENIED** for lack of merit."
>
> **SO ORDERED."**

THE PARTIES

Petitioner is the duly appointed Commissioner of Internal Revenue (CIR), who holds office at the Bureau of Internal Revenue BIR National Office, Diliman, Quezon City.

Respondent is a corporation duly organized and existing under Philippine laws with office addresss at Unit 2C-B FPS Building, 1st Avenue corner 30th Street, Global City, Taguig.[1]

THE FACTS

The antecedent facts as narrated by the Court in Division are as follows :

[1] Petition for Review, *En Banc* Docket, pp.6 to 26.

"On July 1, 2009, petitioner sent a letter requesting the Bureau of Internal Revenue to issue a ruling to ascertain the taxability of the transfer of condominium and/or parking units from the trustee Fort 1, to the trustor indvidual investors/unit owners of the Fort 1 Global City Center Condominium.

In response to the said letter, the BIR issued Ruling No. DA (129) 375-2009 in favor of petitioner which confirmed that the transfer of condominium units and parking units from the trustee back to the trustor is a non-taxable transaction which is not subject to Capital gains Tax, Income Tax, Value-Added tax, Withholidng Tax, and Documentary Stamp Tax.

Later, respondent issued a Preliminary Assessment Notice (PAN) dated January 24, 2012 , stating that there has been found due from petitioner deficiency Income Tax, Value-Added tax, Withholding Tax-One Time Transaction (ONETT) and Documentary Stamp Tax -ONETT for the year 2009, which petitioner contested in a letter dated February 10, 2012.

Thereafter, petitioner issued a Final Assessment Notice (FAN) for taxable year 2009 dated July 20, 2012.

Petitioner filed a protest to the FAN on July 31, 2012, while respondent issued a Final Decision on Disputed Assessment (FDDA) dated October 13, 2016, informing petitioner that it is still liable to pay deficiency Income Tax, Value-Added Tax, Withholding Tax-One Time Transaction (ONETT) and Documentary Stamp Tax -ONETT for the year 2009, amounting to P691,379,263.88, P637,236,976.22, P66,006,122.14, P171,376,449.58 and P32,861,851.63, respectively.

As to the taxable year 2012, respondent issued a PAN dated February 3, 2016 and later on a FAN dated March 31, 2016. In the FAN, respondent assessed petitioner for deficiency Income Tax and Value-Added Tax for the taxable year 2012, amounting to P95,216,801.41 and P38,882,557.33, respectively.

Thereafter, petitioner filed its Letter Protest to the FAN dated March 31, 2016 on April 1, 2016 but respondent allegedly failed to act on the protest.

On October 28, 2016, petitioner appealed respondent's inaction to the protest on the March 31, 2016 FAN (for taxable year 2012) , docketed as CTA Case No 9490. On the other hand, petitioner filed its judicial appeal on the FDDA dated October 13, 2016 (for taxable year 2009) before this Court on December 5, 2016, docketed as CTA Case No. 9503.

Petitioner later filed an Amended Petition for Review in CTA Case No. 9490 on November 4, 2016.

For his part, respondent separately filed by registered mail his Answers on both appeals on February 14, 2017 for CTA Case No. 9503 and on March 17, 2017, for CTA Case No. 9490, which were later on received by the Court on March 1, 2017 and April 5, 2017, respectively.

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On May 11, 2017, CTA Case No. 9503 was consolidated with CTA Case No. 9490, in conformity with the Resolution dated February 22, 2017 issued by the Third Division of this Court, which granted the consolidation of the abovementioned cases.

The consolidated cases were then set for the Pre-Trial Conference on July 13, 2017, but were later reset to September 28, 2017. Accordingly, the Consolidated Pre-Trial Brief (for the Respondent) was filed on September 4, 2017, while petitioner's Pre-Trial Brief was filed on September 6, 2017.

Thereafter, the parties filed with this Court their Joint Stipulations on October 25, 2017, which was approved in a Resolution dated November 17, 2017. A Pre-Trial Order was then issued by this Court on January 22, 2018, terminating the Pre-Trial.

During trial, petitioner presented the testimony of Florencio Y. Rojas, Jr., petitioner's tax consultant, and Philip Cea, petitioner's independent consultant on legal and business matters.

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Thus, on November 28, 2019, petitioner submitted its Memorandum, while respondent failed to file his memorandum. Accordingly, the consolidated cases were submitted for decision on December 17, 2018.

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The Court in Division promulgated a Decision on September 24, 2019 in CTA Case Nos. 9490 and 9503 granting the Petitions for Review and cancelling the deficiency tax assessments issued against petitioner for taxable years 2009 and 2012 as well as the Final Decision on Disputed Assessment (FDDA) dated October 13, 2016 for taxable year 2009.

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The Commissioner of Internal Revenue (CIR) then posted a Motion for Reconsideration on October 17, 2019.

Fort 1 Global City Center Inc. (herein respondent) posted its Comment (on the Motion for Reconsideration dated October 16, 2019) on November 15, 2019.

A Resolution was issued by the Court in Division on January 23, 2020 denying the CIR's Motion for Reconsideration.

On January 30, 2020, the CIR received the assailed Resolution denying his Motion for Reconsideration.

On February 11, 2020, the CIR filed a Motion for Extension of Time to file Petition for Review requesting for an additional period of fifteen (15) days or until February 29, 2020 to file his Petition for Review with the Court *En Banc.*

In a Minute Resolution dated February 20, 2020, the Court granted petitioner CIR's Motion for Extension of Time and gave him until February 29, 2020 to file his Petition for Review.

On February 28, 2020, the CIR posted his Petition for Review with the Court *En Banc* which was received by the Court on March 5, 2020 docketed as CTA *EB* No. 2233 entitled *Commissioner of Internal Revenue vs. Fort 1 Global City Center, Inc.*

On June 2, 2020, the Court issued a Resolution ordering respondent to file its comment to the Petition for Review, within ten (10) days from notice.

On July 16, 2020, respondent filed its Comment/Opposition (on the Petition for Review).[2]

On August 27, 2020, respondent filed a Manifestation stating that the Bureau of Internal Revenue (BIR) had already issued BIR Ruling No. DA No. (C-129) 375-2009 allegedly finding that the transfer from the trustee to the beneficial owners of condominium and parking units are considered non-taxable transactions, hence are not subject to taxes. A

[2] En Banc Docket, pp. 99-125.

photocopy of BIR Ruling No. DA No (C-129) 375-2009 was attached to said Manifestation.

On September 15, 2020, the Court *En Banc* issued a Resolution referring the abov-captioned case to the Philippine Mediation Center – Court of Tax Appeals (PMC-CTA) for a possible amicable settlement of the case and ordered the representatives of both parties to appear before the PMC-CTA on October 1, 2020.

On October 26, 2020, the PMC-CTA issued a No Agreement to Mediate informing the Court that the parties decided not to have their case mediated before the PMC-CTA.

In a Resolution dated November 10, 2020, the instant case was deemed submitted for decision.

THE ISSUE

Petitioner CIR raises the following sole issue for the resolution of the Court *En Banc:*

> "Whether the Honorable Second Division of the CTA erred in denying herein petitioner's Motion for Reconsideration."

Petitioner assails the Court in Division's declaration that the deficiency assessments for taxable years 2009 and 2012 are void because it was not proven that respondent received them, thus violating its right to due process.

Petitioner disputes the Court in Division's appreciation of the facts and maintains the subject assessment notices were duly served to and received by respondent in the address registered in the BIR-Integrated Tax System (BIR-ITS) which is at 32nd Street corner Bonifacio Blvd., Global City, Taguig City and to two of its other registered addresses. Petitioner aims to correct the contention of respondent that the notices should have been sent to its address provided in its General Information Sheet (GIS) filed with the Securities and Exchange Commission (SEC) and argues that respondent only requested the GIS on January 27, 2016 while all the notices including the Letter of Authority (LOA), the Preliminary Assessment Notice (PAN) and the Final Assessment Notices (FANs) were all served to respondent prior to 2016. Petitioner alleges that respondent acknowledged receipt of said notices in the protest

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letters filed with the BIR because this was its registered address at the time so it cannot now claim that these notices should have been served to respondent's purported new address which is at Unit 2C-B, FPS Building, 1st Avenue corner 30th Street in Taguig City.

Petitioner contends that even if respondent transferred to a new address, the BIR records do not show that respondent filed an update with the BIR for the change of its registered address. Petitioner claims that the data indicated in the BIR-ITS up to the time of the filing of the instant Petition for Review shows that the address of respondent is still at 32nd Street corner Bonifacio Blvd., Global City, Taguig City. Petitioner can only conclude that respondent may be maintaining three (3) office addresses at the same time. All told, petitioner insists that respondent cannot raise the issue that it was not informed of the facts and the law on which the assessments were based because a cursory perusal of the PAN, the FANs and even the Final Decision on Disputed Assessment (FDDA) would show that they all contain the facts and the law on which the assessments were based.

As to the allegation of the lack of authority of the person who received the assessment notices (including the FDDA), petitioner avers that this issue was never raised by respondent in its protest letters and was only mentioned when it elevated an appeal with this Court. Petitioner then invokes the principle of estoppel which prevents a person from maintaining a position inconsistent with the one in which he has acceded to in the administrative level, particularly on the authority of the person who received the subject notices. Petitioner recalls that respondent filed protest letters to the PAN and the FAN and did not contest therein the authority of the person who received said official notices.

Petitioner considers respondent's submission of the PAN, FAN and FDDA for taxable years 2012 and 2009 as evidence in Court, as a judicial admission under Section 4 of Rule 129 of the Revised Rules of Court. As such, these judicial admissions conclusively bind the party making it and can no longer be contradicted.

Lastly, petitioner submits that the instant case is an exception to the period of limitation of assessment and collection of taxes as the findings were based on the best evidence obtainable under Revenue Memorandum Circular

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(RMC) No. 23-2000. Petitioner maintains that respondent failed to submit the documents required under the subpena *duces tecum* so the revenue officers were constrained to issue an assessment based on the best evidence obtainable. According to petitioner, the failure of respondent to substantiate the claimed deductions with the necessary documents resulted to a *prima facie* evidence of a false return thus justifying the application of the ten (10)-year period to assess under Section 222 of the 1997 National Internal Recenue Code (NIRC), as amended. As to its right to collect, petitioner insists that it has not yet prescribed considering that the prescriptive period to assess is ten (10) years , hence it has five (5) years from the time of assessment to collect the tax deficiencies pursuant to said Section 222 of the 1997 NIRC, as amended.

Respondent's Counter-Arguments

Respondent stands firmly behind the ruling of the Court in Division that the LOA, PAN and the FANs for taxable years 2009 and 2012 were served by petitioner to the incorrect address and to an unauthorized person, hence were not properly received depriving it of the right to be apprised of the factual and legal bases of the said PAN and FAN.

Respondent points out that the Joint Stipulation of Facts and Issues (JSFI) executed by both parties to this case clearly specified its business address at Unit 2C-B, FPS Building, FPS Avenue corner 30th Street, Global City, Taguig City and that for the entire duration of the trial was never questioned by petitioner. Respondent rebuts the assertion of petitioner on estoppel and reversely alleges that he should be the one to be estopped from questioning the veracity of said address provided in their JSFI. Respondent additionally avers that these official notices were not even served to a person authorized to receive the same which was supposedly evidenced by the failure of the recipient to state his designation and authority to act for and on its behalf.

Aside from the allegations of service of official notices to the wrong address and to an unauthorized person, respondent also questions the authority of the revenue officer who conducted the audit/investigation of its records for the taxable year 2009. Respondent alleges that the revenue officer was armed only with a Memorandum of Assignment (MOA) issued by a Revenue District Officer in contravention of the provisions of Section 13 of the 1997 NIRC, as amended, which specifies that a Revenue Regional Director has the requisite delegated authority to issue an LOA or in this case, a MOA. Respondent then attacks the validity of the ensuing assessment due to the lack of authority of the person who conducted the audit/investigation and who eventually recommended its issuance.

Respondent similarly questions the validity of the assessment for taxable year 2012 for lack of factual bases because the assigned revenue officer allegedly relied on unverified third party computer matching as basis for the assessment in violation of Section 228 of the 1997 NIRC, as amended, which requires that the taxpayer should be informed of the facts on which the assessment is made, making such assessment void and without any effect.

Respondent further postulates that the BIR's right to collect its taxes for taxable year 2009 has already prescribed. It narrates that the FAN was issued on July 20, 2012, thus giving petitioner only until July 12, 2015 to institute an action to collect the assessed taxes

On the substantive merits of the tax assessments, respondent cites BIR Ruling No. DA (C-129) 375-2009 which supposedly ruled in its favor that transfers from the trustee to the beneficial owners are not subject to capital gains tax (CGT); income tax; withholding tax; value added tax and documentary stamp tax (DST), hence the assessments issued by petitioner for taxable years 2009 and 2012 are without any legal basis.

THE RULING OF THE COURT *EN BANC*

We first determine the timeliness of the appeal made by the CIR with the Court *En Banc.*

Records show that the CIR received the assailed Resolution (denying his Motion for Reconsideration) dated January 23, 2020 on January 30, 2020.

The CIR had fifteen (15) days from the date of receipt of the assailed Resolution within which to file his Petition for

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Review with the Court *En Banc* pursuant to Rule 8, Section 3 (b) of the Revised Rules of the Court of Tax Appeals (RRCTA).[3]

Counting fifteen (15) days from January 30, 2020, the petitioner CIR had until February 14, 2020 within which to file his Petition for Review with the Court *En Banc*. However, on February 11, 2020, petitioner posted a Motion for Extension to File Initiatory Pleading requesting for an additional period of fifteen (15) days from February 14, 2020 or until February 29, 2020 within which to file his Petition for Review.

In a Minute Resolution dated February 20, 2020, the Court *En Banc* granted petitioner's motion and gave him until February 29, 2020 to file the Petition for Review.

On February 28, 2020, the CIR posted his Petition for Review, hence, the subject Petition for Review was filed within the extended period granted by the Court.

The foremost issue raised by the petitioner CIR in his Petition for Review is the valid and effective service of the LOA, PAN, FANs and the FDDA to respondent's business address at 32nd Street corner Bonifacio Blvd., Global City, Taguig City which is the address allegedly registered with the BIR-ITS. This is a direct refutation of the claim of respondent that their correct and current business address is at Unit 2C-B, FPS Building, 1st Avenue corner 30th Street, Global City, Taguig City. We quote a portion of the Asssailed Decision narrating the position of respondent (petitioner therein) on the issue of invalid service of the said notices, thus:

> "According to petitioner, during trial of these consolidated cases, it was established through the testimony of respondent's witness, Revenue Officer (RO) Gigette T. Ventura and RO Abdulhalim P. Usman, that all notices including the LOA, PAN and FAN were served to the address 30th Street Bonifacio Global City, Taguig City.

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[3] **Rule 8**
Procedure in Civil Cases
Section 3. *Who may appeal: period to file petition.* –
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(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period within which to file the petition for review.

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> However, it would allegedly be impossible for petitioner to receive the said notices in the said address because petitioner Fort 1's principal office address is at Unit 2C-B, FPS Building, 1st Avenue corner 30th Street, Global City, Taguig City as indicated in its General Information Sheet (GIS) in 2016 submitted to the Securities and Exchange Commission."

In the instant Petition for Review, petitioner CIR views the argument on the correct or incorrect business address as a non-issue because respondent was able to prepare and file the necessary protests to the PAN and the FANs for taxable years 2009 and 2012 in spite of its claim that it never received said notices. This according to petitioner, already cures any possible defects in the service of notices and fulfills the requirement of the law relative to the observance of due process.

We find merit in petitioner's contention.

It is an elementary rule enshrined in the 1987 Constitution that no person shall be deprived of property without due process of law. In balancing the scales between the power of the State to tax and its inherent right to prosecute perceived transgressors of the law on one side, and the constitutional rights of a citizen to due process of law and the equal protection of the laws on the other, the scales must tilt in favor of the individual, for a citizen's right is amply protected by the Bill of Rights under the Constitution.[4]

Basic to a taxpayer's right to due process is the right to be informed in writing of the law and the facts on which the assessment is made as clearly laid out in Section 228 of the 1997 NIRC, as amended, and we quote below the pertinent portions thereof:

> 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:
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> **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.**

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[4] *CIR vs. BASF Coating + Inks, Phils.*, G.R. No. 198677, November 26, 2014.

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> 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 thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations.
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> Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (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." xxx xxx xxx (emphasis supplied)

Procedural due process dictates the indispensability of a written notice informing the taxpayer of the details of the deficiency assessments as succinctly expressed by the Supreme Court in the case of *CIR. vs. Fitness by Design, Inc., (Fitness by Design* case*)* [5] and we quote:

> **"The indispensability of affording taxpayers sufficient written notice of his or her tax liability is a clear definite requirement.** Section 228 of the National Internal Revenue Code and Revenue Regulations No. 12-99, as amended, transparently outline the procedure in tax assessment." (emphasis supplied)

As provided in the afore-quoted Section 228 of the 1997 NIRC., as amended, such written notice must contain the facts and the law on which the assessment is based. The Supreme Court in the *Fitness by Design case* provided the rationale for this requirement, and we quote:

> "The requirement enables the taxpayer to make an effective protest or appeal of the assessment or decision."
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> xxx xxx xxx
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> The purpose of the written notice requirement is to aid the taxpayer in making an intelligent protest, if necessary.

[5] G.R. No. 215957, November 9, 2016.

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Merely notifying the taxpayer of his or her tax liability without details or particulars is not enough."

The records show that the LOA, the PAN, FAN and the FDDA for taxable years 2009 and 2012 were all served by petitioner to respondent *via* personal service. Petitioner (as respondent during the trial of the case before the Court in Division) admitted that the relevant notices were indeed sent to respondent by personal service.

Respondent asserts that these notices were served to the incorrect business address and maintains that their official business address is at Unit 2CB, FPS Building, 1st Avenue corner 30th Street, Global City, Taguig as indicated in its 2016 GIS filed with the SEC. Moreover, respondent submits that these notices were all sent to unauthorized persons, thereby violating the procedural due process requirements prescribed by law and implementing regulations.

To prove its correct business address, respondent offered in evidence its 2016 GIS filed with the SEC.

This Court finds that the GIS is not the proper or competent evidence to prove business address for purposes of service of official notices emanating from the BIR. What the respondent should have offered in evidence is its BIR Certificate of Registration (COR) which clearly indicates the business address of the taxpayer and which is reflected in the BIR-ITS and which in turn serves as a reference of the BIR in service of official notices to taxpayers. Unfortunately, respondent did not offer this in evidence and instead offered its 2016 GIS.[6]

This Court also finds it glaringly obvious that respondent was able to prepare and file the necessary protests to the PANs and the FANs for TY 2009 and 2012 on the following dates:

A. For TY 2009

PAN dated January 24, 2012	Protest was filed on February 10, 2012.	Exhibit "P-3-a"[7]

[6] Exhibit "P-8", Court in Division Docket, Volume I, page 447 and admitted by the Court in Division in the Resolution dated June 19, 2018.
[7] Court in Division Docket, pp. 403-413.

FAN dated July 20, 2012	Request for Reconsideration dated July 31, 2012 and filed with the BIR on August 31, 2012.	Exhibit "P-4-a" [8]

B. For TY 2012

FAN dated March 15, 2016	Protest was filed in the form of a Request for Reconsideration and/or Reinvestigation dated March 31, 2016.	Exhibit "P-6-a"[9]

A perusal of the protests filed by the respondent as well as the Petitions for Review filed in Court reveals that it was properly apprised of the facts and the law on which the deficiency assessments were made as can be seen by the quality of its arguments and disquisitions against the findings of the revenue officers.

Clearly, respondent was able to secure copies of the PANs and the FANs for 2009 and 2012 as well as the FDDA for 2009 to enable it to file timely and intelligent protests.

In the face of its allegations that these notices were sent to the wrong address, it is of record that respondent managed to secure copies of the PANs and the FANs as well as the FDDA.

In respondent's Amended Petition for Review filed with the Court in Division for taxable year 2012,[10] docketed as CTA Case No 9490, it was alleged that a copy of the FAN dated March 15, 2016 was brought to its attention by an "uninterested third party" and we quote:

> "Be that as it may, a copy of the FAN dated March 15, 2016 was brought to the attention of Fort I by a **third party unknown** to them." (emphasis supplied)

[8] Court in Division Docket, Volume I, pp. 424-431.
[9] Court in Division Docket, Volume I, pp. 440-443..
[10] Court in Division Docket, Volume I, pp. 34-47.

In its Memorandum[11] for the consolidated cases (9490 and 9503), respondent alleges as follows:

> "Sometime in the last week of January 2012, a copy of the Preliminary Assessment Notice (PAN) dated January 24, 2012 for the taxable year 2009 was forwarded by **an uninterested third party** to herein petitioner because the same was erroneously delivered to **Fort I Global City Center Building."** (emphasis supplied)

Witness for respondent, Mr. Philip Cea, by way of an amended Judicial Affidavit,[12] testified as follows:

> Q18. What happened after the issuance of BIR Ruling No. DA (129) 375-2009?
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> A. The investors of Fort 1 proceeded with the construction and transfer of the condominium and parking units to their respective names.
>
> Q.19. What other incident happened after that?
>
> A. "Sometime in the last week of January 2012, a copy of a Preliminary Assessment Notice (PAN) dated January 24, 2012 for the taxable year 2009 was forwarded by an **uninterested third** *(sic)* **to herein petitioner**. Thereafter, on July 31, 2012 a Formal Assessment Notice (FAN) dated July 20, 2012 for the taxable year 2009 was again forwarded to herein petitioner **by an uninterested third party."** (emphasis supplied)

Records do not show that respondent identified this "uninterested third party" during trial. In light of its allegations that the official notices for TYs 2009 and 2012 were received by an unauthorized person in one of its offices in Taguig City, we find that it was essential for respondent to present or at least identify this so-called "uninterested third party". This Court cannot merely rely on uncorroborated allegations and testimony for its findings and conclusions. What is clear, however, from the evidence presented by both parties is that respondent was able to file the appropriate protests which negated its allegation that its right to due process was violated.

The Supreme Court in the *Fitness by Design* case, declared that the requirement of informing the taxpayer of the facts and

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[11] Court in Division Docket, Volume I, pp. 504-531.
[1212] Exhibit "P-11", Court in Division Docket, Volume I, pp. 468-481

the law on which the assessment is based should not be applied "mechanically", and we quote:

> "However, the mandate of giving the taxpayer a notice of the facts and laws on which the assessments are based should not be mechanically applied. To emphasize, the purpose of this requirement is to sufficiently inform the taxpayer of the bases for the assessment to enable him or her to make an intelligent protest"

It may be very well said that if the issue pertains to a taxpayer's right to due process in an assessment case, the written notice is deemed sufficient if taxpayer was able to respond adequately and effectively to the findings embodied in the official notices issued by the BIR. We do not intend to depart from the ruling of the Supreme Court in the above-quoted *Fitness by Design* case and the case of *Samar-I Electric Cooperative vs. CIR,*[13] where the Supreme Court ruled, thus:

> "Considering the foregoing exchange of correspondences and documents between the parties, we find that the requirement of Section 228 was substantially complied with. **Respondent had fully informed petitioner in writing of the factual and legal bases of the deficiency taxes assessment, which enabled the latter to file an "effective" protest, much unlike the taxpayer's situation in Enron. Petitioner's right to due process was thus not violated."** (emphasis supplied)

In view of the foregoing premises, this Court finds that respondent's right to due process has not been violated and that the subject deficiency assessments for TYs 2009 and 2012 are valid and should be examined on the merits.

At this point, this Court would like to note that respondent, in its *Comment/Opposition (on the Petition for Review)* in response to the Petition for Review filed by petitioner with the Court *En Banc,* also raised the issue of lack of authority of the revenue examiners due to an alleged defective Memorandum of Assignment (MOA). We find this issue to be belatedly raised as the records do not show that respondent mentioned this in the Petition for Review and in its subsequent Amended Petition for Review filed with the Court in Division. To raise it only in the Comment/Opposition to the Petition for Review (filed with the Court *En Banc)* deprives the petitioner of the opportunity to rebut said allegation. Further, not having raised this issue during trial in the Court in Division,

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[13] G.R. No. 103100, December 10, 2014.

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respondent did not offer the Letter of Authority (LOA) nor the MOA as evidence during trial.[14]

Section 34 of Rule 132 of the Revised Rules of Court provides as follows:

> "Rule 132
>
> Section 34. *Offer of evidence.* – The court shall consider no evidence which has not been formally offered. The purpose for which the evidence is offered must be specified."

This Court cannot invalidate the subject assessment notices on a mere uncorroborated allegation that the revenue officers did not have the requisite authority to examine the books of accounts and other accounting records of respondent for TYs 2009 and 2012. The Supreme Court has provided the rationale of this Rule in the case of *Heirs of Serapio Mabborang, et.al, vs. Hermogenes Mabborang and Benjamin Mabborang,*[15] and we quote:

> "Section 34, Rule 132 of the Rules of Court provides that "the court shall consider no evidence which has not been formally offered." This is to enable the trial judge to know the purpose or purposes for which the proponent is presenting evidence. Also, it allows opposing parties to examine the evidence and object to its admissibility."

We now resolve the substantive merits of the deficiency assessments issued against petitioner for taxable years 2009 and 2012.

Respondent alleges that the government's right to assess TYs 2009 and 2012 has prescribed as they were issued beyond the three-year period prescribed by the law.

We analyze.

Section 203 of the National Internal Revenue Code (NIRC) of 1997 reads:

> "SEC. 203. *Period of Limitation Upon Assessment and Collection.* – Except as provided in Section 222, internal

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[14] See *Formal Offer of Exhibits* of petitioner Fort I Global City Center, Inc., Court in Division Docket, Volume I, pp. 390-398,

[15] G.R. No. 182805, April 22, 2015.

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> revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That in a case where a return is filed beyond period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day."

In connection therewith, Section 222(a) of the same Code provides:

> "SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* –
>
> (a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: *Provided*, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof."

Based on the foregoing provisions, the law prescribes three (3) years from the date the tax return was actually filed or from the last date prescribed by law for the filing of such return, whichever came later, within which the BIR may assess a national internal revenue tax. However, this rule admits of exceptions and lengthens the prescriptive period to assess or to begin a court proceeding for the collection without an assessment to ten (10) years when a false or fraudulent return is filed with the intent of evading the tax or when no return was filed at all. In such cases, the ten-year period begins to run only from the date of discovery by the BIR of the falsity, fraud or omission.[16]

Relative thereto, as to which of the parties have the burden to prove the failure of the taxpayer to file the pertinent tax returns, the Supreme Court, in *Taligaman Lumber Co., Inc. vs. The Collector of Internal Revenue*,[17] held:

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[16] *Commissioner of Internal Revenue vs. Philippine Global Communication, Inc.*, G.R. No. 167146, October 31, 2006.
[17] G.R. No. L-15716, March 31, 1962.

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> "xxx the issue boils down to which of the two parties had the burden of proving such failure to file said returns. It is, however, clear that since prescription is one of the affirmative defenses set up by petitioner herein, **it was incumbent upon the latter, if it wanted to avail itself of the benefits of section 331[18], to prove that it had submitted said returns, and that, having failed to do so, the conclusion must be that no such returns had been filed and that the Government had ten (10) years within which to make the corresponding assessments**, as it did in this case." *(Emphasis added)*

Based on the foregoing jurisprudential pronouncements, for a taxpayer to avail of the benefits of then Section 331 of the old Tax Code, now Section 203 of the 1997 NIRC, as amended, the burden to establish that the pertinent tax returns were filed rests on the taxpayer. In case of failure of the latter, the conclusion would be that no such tax returns have been filed, and the ten (10)-year prescriptive period to assess should be applied.

In this case, there is no indication that respondent herein, in the proceedings *a quo*, offered or presented any of its tax return for taxable years 2009 and 2012, for this Court to determine as to when the same were respectively filed. Such being the case, the ten (10)-year prescriptive period to assess applies.

While respondent herein denies having received the subject FANs, it can be concluded that the same were respectively issued and served within the said ten (10)-year prescriptive period. Records show that the said FANs were issued on July 20, 2012 (for taxable year 2009) and on March 31, 2016 (for taxable year 2012). Even counting from the said taxable periods, respectively, until the filing of the cases *a quo* (respondent's *Petitions for Review*) on October 28, 2016, for CTA Case No. 9490 (for taxable year 2012), and on December 5, 2016, for CTA Case No. 9503 (for taxable year 2009), the respective ten (10)-year prescriptive period had not elapsed.

Such being the case, this Court rules that the subject tax assessments have not prescribed.

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[18] Now, Section 203 of the NIRC of 1997.

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Be that as it may, a study of the records would show that not all of the said tax assessments must be upheld. We provide below, a detailed description of this Court's findings:

There are portions of the subject tax assessments which are not valid impositions, and thus, must be cancelled.

<u>Re: Assessments for taxable year 2012</u>
(CTA Case No. 9490)

In the FAN dated March 15, 2016,[19] respondent was assessed by petitioner for deficiency income tax, and VAT, for taxable year 2012, in the total amount of ₱134,099,378.74, to wit:

Tax Type	Basic Tax	Surcharge	Interest	Total
Income tax	₱ 45,388,706.43	₱ 22,694,353.22	₱ 27,133,741.76	₱ 95,216,801.41
VAT	18,155,482.57	9,077,741.29	11,649,353.47	38,882,577.33
TOTAL	**₱63,544,189.00**	**₱31,772,094.51**	**₱38,783,095.23**	**₱134,099,378.74**

I. DEFICIENCY INCOME TAX

In the said FAN, the deficiency income tax assessment of ₱95,216,801.41 is computed as follows:

Taxable Income per return		₱ -
Add: Adjustments per Audit		
Undeclared Income per Letter Notice (LN) (Schedule 1)	₱149,790,618.93	
Undeclared Income from Unaccounted Expenses (Schedule 2)	1,505,069.17	151,295,688.10
Adjusted Taxable Income		₱151,295,688.10
Basic Income Tax Due		₱ 45,388,706.43
Less: Tax Credits/Payments		-
Basic Deficiency Income Tax		₱ 45,388,706.43

[19] Exhibit "P-6", CTA Case No. 9490, Docket – Vol. I, p. 436.

Add: Surcharge (50%)	₱ 22,694,353.22	-
Interest (from 4/16/13 to 4/11/16)	27,133,741.76	49,828,094.98
TOTAL AMOUNT DUE		**₱95,216,801.41**

Based on the foregoing computation, the deficiency income tax assessment arose from the following items:

a. Undeclared Income per Letter Notice (LN)	₱149,790,618.93
b. Undeclared Income from Unaccounted Expenses	1,505,069.17

Notably, in respondent's *Memorandum* filed in the Court *a quo*,[20] respondent refutes said assessed deficiency income tax, as follows:

> "**As to Income Taxes:**
>
> It is impossible for [respondent] FORT 1 to receive such amount for income as it does not have any actual business activities. To reiterate, [respondent] FORT 1 is merely the trustee to facilitate the orderly issuance of CCTs in favor of the individual unit owners of the F1 Project.
>
> Moreover, if the respondent is referring to income based on sale or transfer of condominium units, the same has no legal and factual basis because [respondent] FORT 1 is not the developer or seller of condominium units.
>
> Furthermore, BIR Ruling No. DA (C-129) 375-2009 specifically states that transfers from the trustee to the trustor without any monetary consideration is a NON-TAXABLE transaction.
>
> It must be noted that the BIR Ruling No. DA (C-129) 375-2009 does NOT grant tax exemptions, but merely confirms that such transactions are NON-TAXABLE."

a. Undeclared Income per LN - ₱149,790,618.93

In the Details of Discrepancies attached to the FAN,[21] petitioner explained this item of assessment as follows:

> "**Undeclared Income, ₱149,790,618.93** – In the partial tally of the computerized matching conducted by this Bureau on the List of Withholding Agents against the amount declared

[20] Docket – Vol. I (CTA Case No. 9490), p. 523.
[21] Exhibit "P-6", Docket – Vol. I (CTA Case No. 9490), p. 438.

in your returns resulted to Undeclared Income amounting to ₱149,790,618.93, as computed hereunder. The said amount was considered as Taxable Income under Section 32 of the NIRC, as amended.

<u>Schedule 1</u>

Income per Alphalist of payees submitted by your customers/withholding agents		₱ 149,539,447.03
Add: Adjustments due to misplacement error in LN		
Should be Income of HSBC Electronic Data Processing (Philippines) Inc.	₱ 102.04	
Should be Income of PRU Life Insurance Corporation of UK	251,070.00	
Subtotal	251,172.04	
Less: Income Payments by HSBC Electronic Data Processing (Philippines) Inc.	0.02	
Income Payments by PRU Life Insurance Corporation of UK	0.12	251,171.90
Adjusted Income Payments by your customers/withholding agents		₱ 149,790,618.93
Less: Gross Sales per ITR		-
Undeclared Income		**₱149,790,618.93**

In respondent's protest letter dated March 31, 2016,[22] it pointed out that:

> "...[t]he assessment of undeclared income was allegedly found by the BIR through third party sources by computerized matching. However, these third-party sources were never revealed, and the alleged documents or receipts were never furnished to [respondent] FGCCI.
>
> Consequently, as of the moment, [respondent] FGCCI have no means to identify the said documents or receipts or verify the truth or authenticity of the allegations in the FAN's Details of Discrepancy."

For failure of the BIR to observe the prescribed procedure and for petitioner to show the basis of the subject item of the assessment, the same should be cancelled.

In *Commissioner of Internal Revenue vs. Philippine Daily Inquirer, Inc.*,[23] the Supreme Court said:

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[22] Exhibit "P-6-a", Docket, pp. 440 to 443.
[23] G.R. No. 213943, March 22, 2017.

> "Reconciliation of Listing for Enforcement (RELIEF) System is an information technology tool used by the BIR to improve tax administration. The system was created –
>
> > x x x to support third party information program and voluntary assessment program of the Bureau through the cross-referencing of third party information form the taxpayers' Summary Lists of Sales and Purchases prescribed to be submitted on a quarterly basis pursuant to Revenue Regulations Nos. 7-95, as amended by RR 13-97, RR 7-99 and RR 8-2002.
>
> > In addition –
>
> > [RELIEF] can detect tax leaks by matching the data available under the Bureau's Integrated Tax System (ITS) with data gathered from third party sources (i.e. Schedules of Sales and Domestic Purchases, and Schedule of Importations submitted by VAT taxpayers pursuant to RR No. 7-95, as amended by RR Nos. 13-97,, 7-99 and 8-2002).
>
> > Through the consolidation and cross referencing of third party information, discrepancy report on sales and purchases can be generated to uncover under declared income and over claimed purchases (goods and services). Timely recognition and accurate reporting of unregistered taxpayers and non-filers can be made possible."

The BIR's RELIEF System has admittedly made the BIR's assessment and collection efforts much easier and faster. However, the ease by which the BIR's revenue generating objectives is achieved is no excuse for its non-compliance with its own administrative issuances.[24]

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[24] Refer to *Medicard Philippines, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 222743, April 5, 2017.

Under Revenue Memorandum Order (RMO) No. 32-2005 dated November 24, 2005,[25] the following, *inter alia*, are mandated to be done by the BIR, *viz.*:

"IV. POLICIES AND GUIDELINES

1. As provided for under existing Revenue Memorandum Order (RMO) on 'RELIEF' / SLSP System (i.e., RMO No. 30-2003, as amended by RMO Nos. 42-2003 and 24-2004) and RMO on TPM-BOC Data Program (i.e. RMO No. 34-2004, as amended by RMO No. 46-2004), **taxpayers with underdeclaration of sales and/or purchases (domestic or imported) shall be notified of such findings of discrepancy through the issuance of Letter Notices (LNs)** as shown in Annexes 'A' and 'B' hereof.

xxx xxx xxx

8. **In the event a taxpayer who has been issued an LN refutes the discrepancy shown in the LN, the concerned taxpayer will be given an opportunity to reconcile its records with those of the BIR within One Hundred and Twenty (120) days from the date of issuance of the LN.** However, the subject taxpayer shall no longer be entitled to the abatement of interest and penalties after the lapse of the sixty (60) day period from LN issuance.

xxx xxx xxx." (emphasis supplied)

Furthermore, under RMO No. 46-2004 dated September 2, 2004,[26] the following, *inter alia*, are likewise mandated to be done by the BIR, *viz.*:

"II. POLICIES AND GUIDELINES

xxx xxx xxx

4. **In the event a taxpayer who has been issued an LN protests the accuracy of the data provided by third party sources** (as opposed to erroneous encoding of return information in the ITS), **the [Revenue Officer] concerned shall, upon receipt**

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[25] SUBJECT: Prescribing Guidelines and Procedures in Handling Letter Notices for Deployment via the Information Delivery Portal in the Years 2005 Onwards for Audit and Enforcement Purposes.

[26] SUBJECT: Additional Supplement and Guidelines in Handling Letter Notices with Discrepancies Arising from Data Matching Processes as defined in Revenue Memorandum Order (RMO) Nos. 34-2004 and 30-2003, as amended by RMO Nos 42-2003 and 24-2004, which remain Unserved, have been Served but are Without Response, or are Under Protest by Taxpayers.

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> **of the Protest Letter of the taxpayer, evaluate the protest and require the latter to execute a Sworn Statement attesting to the alleged inaccuracies or errors in the [Third Party Information (TPI)]. The TPI provider** (except BOC) **shall also be required to execute a Sworn Statement attesting to the data provided.**
>
> xxx xxx xxx
>
> III. PROCEDURES
>
> xxx xxx xxx
>
> **<u>Action on Protested LNs due to TPI discrepancy</u>**
>
> xxx xxx xxx
>
> 6. **If the taxpayer objects / protests the Sworn Statement of the TPI source –**
>
> xxx xxx xxx
>
> 6.5 **The entire docket of the case must be transmitted to the Assessment Division of the Region, or the equivalent office in the LTS, for review and issuance of Preliminary Assessment Notice (PAN) or Final Assessment Notice (FAN), as the case may be.**
>
> xxx xxx xxx."
>
> (emphasis supplied)

Based on the foregoing provisions, taxpayers with under declaration of sales and/or purchases (domestic or imported) shall be notified of such findings of discrepancy through the issuance of LNs. However, the process does not end with the issuance thereof. The concerned taxpayer must still be given an opportunity to refute the findings via a Protest Letter, and reconcile its records with those of the BIR, within one hundred twenty (120) days from the said issuance. The concerned Revenue Officer (RO) shall then evaluate the protest and require the same taxpayer to execute a Sworn Statement attesting to the alleged inaccuracies or errors in the TPI. The TPI provider shall also be required to execute a Sworn Statement attesting to the data provided. The said RO shall eventually transmit the entire docket of the case to the BIR's Assessment Division or equivalent office in the Large Taxpayers Service (LTS), for review and issuance of a PAN or FAN, as the case may be.

In the present case, petitioner failed to show compliance with the foregoing procedure or process. Specifically, there is no showing that respondent was ever issued an LN as regards the amount of ₱149,790,618.93, the source of which is merely alleged to have been obtained *"Adjusted Income Payments by [respondent's] customers/withholding agents".* Furthermore, even granting that an LN was issued to respondent, there is no indication that respondent was ever given an opportunity to refute the said findings, prior to the issuance of the PAN or FAN, as the case may be.

While the government has an interest in the swift collection of taxes, the BIR and its officers and agents cannot be overreaching in their efforts, but must perform their duties in accordance with law, with their own rules of procedure, and always with regard to the basic tenets of due process.[27]

Moreover, it is likewise significant to note that petitioner never offered any evidence in the Court *a quo* to support the said amount of ₱149,790,618.93. It is true that tax assessments by tax examiners are presumed correct and made in good faith.[28] However, the *prima facie* correctness of a tax assessment does not apply upon proof that an assessment is utterly without foundation, meaning it is arbitrary and capricious. Where the BIR has come out with a "naked assessment", *i.e.*, without any foundation character, the determination of the tax due is without rational basis.[29] As the Court held in *Collector of Internal Revenue vs. Benipayo*,[30] in order to stand judicial scrutiny, the assessment must be based on facts. The presumption of the correctness of an assessment, being a mere presumption, cannot be made to rest on another presumption.[31]

Thus, this Court *En Banc* finds that the supposed Undeclared Income in the amount of ₱149,790,618.93 is determined without rational basis, and must therefore, be cancelled.

b. Undeclared Income from Unaccounted Expenses - ₱1,505,069.17

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[27] *Commissioner of Internal Revenue vs. Avon Products Manufacturing, Inc., et seq.*, G.R. Nos. 201398-99 and 201418-19, October 3, 2018.
[28] *Commissioner of Internal Revenue vs. Bank of the Philippine Islands*, G.R. No. 134062, April 17, 2007.
[29] *Commission of Internal Revenue vs. Hantex Trading Co., Inc.*, G.R. No. 136975, March 31, 2005.
[30] G.R. No. L-13656, January 31, 1962.
[31] *Commission of Internal Revenue vs. Hantex Trading Co., Inc.*, supra.

Petitioner explained the basis of this item of assessment in the same Details of Discrepancies,[32] as follows:

> "**Undeclared Income from unaccounted Expense, ₱1,505,069.17** – Material discrepancy was noted after comparing the amount of the Purchase of Services per ITR against 1601-E. The discrepancy was then treated as unaccounted source of cash which was considered as undeclared income pursuant to Section 32 of the 1997 Tax Code as what has been held in the case of Perez vs. CTA and CIR L-9193 dated May 29, 1957 for it has been held that unreflected sources of funds not accounted for in the taxpayer's tax returns led to the inference that part of his income had not been reported.

Schedule 2

	Income Payments
Per 1601E	₱ 1,505,069.17
Per ITR	-
Undeclared Income from Unaccounted Expense	**₱ 1,505,069.17**

This Court finds the above item of assessment bereft of merit, and that the same should likewise be cancelled.

An *"unaccounted expense"* should not be automatically treated as income, to which income tax should be imposed.

Income in tax law is an amount of money coming to a person within a specified time, whether as payment for services, interest, or profit from investment. It means cash or its equivalent. It is gain derived and severed from capital, from labor or from both combined.[33] Income is profit or gain or the flow of wealth. The determining factor for the imposition of income tax is whether any gain or profit was derived from a transaction.[34]

It is apparent that in incurring expenses, no amount of money come to a taxpayer; instead, money is spent out by the latter. In other words, the said taxpayer does not derive any gain or profit from the transaction.

[32] Exhibit "P-6", CTA Case No. 9490, Docket – Vol. I, p. 438.
[33] *Commissioner of Internal Revenue vs. Court of Appeals, et al.*, G.R. No. 108576, January 20, 1999.
[34] *Commissioner of Internal Revenue vs. Court of Appeals, et al.*, G.R. No. 108576, January 20, 1999.

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More importantly, it must be emphasized that for income tax purposes, a taxpayer is free to deduct from its gross income a lesser amount, or not to claim any deduction at all. What is prohibited by the income tax law is to claim a deduction beyond the amount authorized therein.[35] Thus, even when a taxpayer has not claimed expenses or declared a lesser amount thereof, in the Income Tax Return, such action is allowed, and shall *not* necessarily result in the imposition of income tax on the undeclared deduction or unaccounted expenses.

For sure, petitioner cannot validly invoke the case of *Perez vs. Court of Tax Appeals, et al.*,[36] since nowhere therein did the High Court rule that "unreflected sources of funds not accounted for in the taxpayer's tax returns led to the inference that part of his income had not been reported." Thus, petitioner reliance on the said case is clearly misplaced.

With the foregoing disquisitions, the deficiency income tax in the amount of ₱95,216,801.41 should likewise be cancelled.

II. DEFICIENCY VAT

In the FAN, for TY 2012, petitioner assessed respondent for deficiency VAT in the amount of ₱38,882,577.33, computed as follows:

Vatable Sales per VAT returns		₱ 81,891,194.74
Unsupported Exempt Sales	₱ 249,044.95	
Sales not Subjected to VAT (Schedule 3)	69,155,448.41	69,404,493.36
Adjusted Vatable Sales		₱ 151,295,688.10
Output tax thereon		₱ 18,155,482.57
Less: Input Tax per ITS	₱26,501,983.77	
Less: Unsupported Input Tax	26,501,983.77	-
VAT Due		₱ 18,155,482.57
Less: VAT payments		-
Basic Deficiency Value-added Tax		₱ 18,155,482.57
Add: Surcharge (50%)	₱ 9,077,741.29	
Interest (from 1/26/13 to 4/11/16)	11,649,353.47	20,727,094.76
TOTAL AMOUNT DUE		**₱38,882,577.33**

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[35] *Commissioner of Internal Revenue vs. Phoenix Assurance Co. Ltd., et seq.*, G.R. Nos. L-19727 and L-19903, May 20, 1965.
[36] No. L-9193, May 29, 1957.

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Based on the foregoing information, it is clear that the deficiency VAT assessment arose from the following items, to wit:

a. Unsupported Exempt Sales	₱ 249,044.95
b. Sales not Subjected to VAT	69,155,448.41
c. Unsupported Input Tax	26,501,983.77

Respondent, in its protest letter,[37] alleged that it cannot present any document in support of alleged *Unsupported Exempt Sales*, *Sales not Subjected to VAT*, and *Unsupported Input Tax* in view of the fact that it had no commercial transaction for the year 2012. It reiterated to petitioner that if third party documents show any transaction with respondent, it is apparent that these third parties have committed an error, as it is not respondent but only the hotel manager Berkshire and F'Buffet that transacted with them in the year 2012.

Moreover, in respondent's Memorandum,[38] it maintains that it is not subject to VAT, we quote, thus.:

> "**As to Value Added Tax (VAT):**
>
> [Respondent] FORT 1 is not a developer and/or seller of condominium and parking units. In fact, during the year 2009, it is not engaged in any form of regular business where it would be liable to pay VAT.
>
> It cannot be overemphasized that the F1 Project is completed pursuant to the Build-Your-Own (BYO) System where the actual unit owners act as the developers themselves, and no sale takes place.
>
> This is supported by the BIR Ruling No. DA (C-129) 375-2009 which specifically states that the transfer from the trustee to the beneficial owner is NOT subject to VAT under Section 106 (A) (1) of the NIRC.
>
> Hence, the facts fail to support the allegation of deficiency tax on VAT as against [respondent] FORT 1."

a. Unsupported Exempt Sales - ₱249,044.95

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[37] Exhibit "P-6-a", CTA Case No. 9490, Docket – Vol. I, p. 443.
[38] CTA Case No. 9490, Docket – Vol. I, pp. 523-524.

In the Details of Discrepancies attached to the FAN,[39] petitioner explained this item of assessment as follows:

> "**Unsupported Exempt Sales, ₱249,044.95** – Verification disclosed that you failed to submit documents to support your claimed exempt sales per Value-Added Tax returns, hence the same is subjected to VAT pursuant to Section 108(B) of the Tax Code."

This Court agrees with petitioner that these unsupported exempt sales, which respondent failed to substantiate with necessary documentary evidence, should be considered taxable sales, pursuant to Section 108 (B) of the NIRC of 1997, as amended.

Other than the mere allegation that it is not engaged in any form of regular business where it would be liable to pay VAT, no other evidence was ever adduced by respondent before this Court *a quo*. Thus, this has no way to determine the nature of the exempt sales declared in respondent's VAT return.

b. Sales not Subjected to VAT - ₱69,155,448.41

In the Details of Discrepancies attached to the FAN,[40] petitioner explained this item of assessment as follows:

> "**Sales not subjected to VAT, ₱69,155,448.41** – As previously discussed above under income tax, the undeclared income from undeclared sales in the partial tally and the undeclared income from unaccounted expense are also subject to VAT under Title IV, Section 105 and 106 of the NIRC which state that:
>
> **Section 105** of the NIRC states that "*Any person who, in the course of trade or business, sells, barters, exchanges, leases goods or properties, renders services, and any person who imports goods shall be subject to value added tax (VAT) imposed in Sections 106 and 108 of this Code which reads as follows;...*"
>
> **Section 106 Value-Added Tax on Sale of Goods or Properties**
> (A) Rate and Base of Tax. – There shall be levied, assessed and collected on every sale, barter or exchange of goods or properties, value-added tax equivalent to twelve percent (12%) of the gross selling price or gross value in money of the goods

[39] Exhibit "P-6", CTA Case No. 9490, Docket – Vol. I, p. 439.
[40] *Ibid.*

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or properties sold, bartered or exchanged, such tax to be paid by the seller or transferor.

Schedule 3

Undeclared Income per LN	₱ 149,790,618.93
Undeclared Income from Unaccounted Expense	1,505,069.17
Total Sales	₱ 151,295,688.10
Less: Sales per VAT returns	82,140,239.69
Sales not subjected to VAT	**₱ 69,155,448.41**

Having found that the supposed *Undeclared Income* in the amount of ₱149,790,618.93 is without rational basis, as this Court earlier discussed, regarding the income tax assessment, the VAT assessment thereon should likewise fail, on the same ground.

Moreover, just as no income tax should be imposed on the *Unaccounted Expense* in the amount of ₱1,505,069.17, no VAT should likewise be imposed thereon.

VAT is a tax on transactions, imposed at every stage of the distribution process on the sale, barter, exchange of goods or property, and on the performance of services, even in the absence of profit attributable thereto.[41] It is a tax imposed on each sale of goods or services in the course of trade or business, or importation of goods as they pass along the production and distribution chain.[42] The VAT is a tax on consumption, an indirect tax that the provider of goods or services may pass on to his/her customers.[43] The seller is the one statutorily liable for the payment of the VAT.[44] In other words, the party directly liable for the payment of the tax is the seller.[45]

For sure, when one incurs an expense, such person is deemed the buyer of the goods and/or services, not the seller, nor the provider, thereof. Such being the case, no VAT should be imposed on respondent's *Unaccounted Expense* in the amount of ₱1,505,069.17.

c. Unsupported Input Tax - ₱26,501,983.77

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[41] *Commissioner of Internal Revenue vs. Court of Appeals, et al.*, G.R. No. 125355, March 30, 2000.
[42] *Team Energy Corporation vs. Commissioner of Internal Revenue, et seq.*, G.R. Nos. 197663 and 197770, March 14, 2018.
[43] *Panasonic Communications Imaging Corporation of the Philippines vs. Commissioner of Internal Revenue*, G.R. No. 178090, February 8, 2010.
[44] Section 4.105-2, Revenue Regulations No. 16-2005.
[45] *Commissioner of Internal Revenue vs. Benguet Corporation*, G.R. Nos. 134587 & 134588, July 8, 2005

Petitioner disallowed the said input tax for failure of the respondent to present evidence or documents, *viz:*[46]

> "**Unsupported Input Tax, ₱26,501,983.77** - Verification disclosed that you have not presented evidences or documents to support your claimed Input Taxes in order to determine whether the said Input Taxes were in fact issued by VAT-registered entities. Hence, the same have been disallowed in accordance with the provision of Section 110 of the NIRC, in relation to Sections 113 and 237 of the same Code."

This Court sustains this finding of the BIR.

Sections 110 (A) and 113 (A) and (B) of the 1997 NIRC, as amended, and as implemented by Sections 4.110-1, 4.110-8 and 4.113.1 (A) and (B) of RR No. 16-2005, explicitly state that any input tax may be creditable against the output tax provided that the same is supported by VAT invoice (for purchase of goods) or VAT official receipt (for purchase of services) containing the required information under the VAT law and regulations.

Since respondent did not submit the corresponding VAT invoices or official receipts, as the case may be, the disallowance of the input tax of ₱26,501,983.77 should remain.

In view of the foregoing, this Court finds that respondent is liable for basic deficiency VAT for taxable year 2012, in the reduced amount of ₱9,856,828.76, computed as follows:

Vatable Sales per VAT returns		₱ 81,891,194.74
Unsupported Exempt Sales	₱ 249,044.95	
Sales not Subjected to VAT	-	249,044.95
Adjusted Vatable Sales		₱ 82,140,239.69
Output tax thereon		₱ 9,856,828.76
Less: Input Tax credit *(No Input Tax credit due to disallowance as discussed above)*		-
DEFICIENCY VAT		**₱ 9,856,828.76**

[46] *Ibid.*

Re: Assessments for taxable year 2009
(CTA Case No. 9503)

In the FDDA dated October 13, 2016,[47] respondent was assessed by petitioner for deficiency income tax, VAT, Expanded Withholding Tax (EWT), Withholding Tax (WT) – ONETT, and Documentary Stamp Tax (DST) – ONETT, for taxable year 2009, in the total amount of ₱1,598,860,663.45, to wit:

Tax Type	Basic	Surcharge	Interest	Total
Income tax	₱ 297,236,079.29	-	₱ 394,143,184.59	₱ 691,379,263.88
VAT	268,891,903.26	-	368,345,072.96	637,236,976.22
EWT	27,788,044.50	-	38,218,077.64	66,006,122.14
WT - ONETT	59,545,363.25	₱ 29,772,681.63	82,058,404.70	171,376,449.58
DST - ONETT	13,802,734.00	-	19,059,117.63	32,861,851.63
TOTAL	**₱667,264,124.30**	**₱29,772,681.63**	**₱901,823,857.52**	**₱1,598,860,663.45**

I. DEFICIENCY INCOME TAX

In the said FDDA,[48] the deficiency income tax assessment in the amount of ₱691,379,263.88 is computed as follows:

Taxable Income (Loss) per Return		₱ 217,565.50
Add: Adjustments		
Disallowed expenses due to best evidence rule – 50% (Schedule 1)	₱ 2,350,693.74	
Disallowed expenses due to non-withholding of EWT (Schedule 2)	938,606,349.90	
Disallowed expenses due to limit - 5% (Schedule 3)	2,193,596.73	
Unsupported interest expenses	47,636,290.60	990,786,930.96
Adjusted Taxable Income		₱ 991,004,496.46
Income Tax Due		₱ 297,301,348.94
Less: Tax Credits/Payments		
Payments per Return		65,269.65
Deficiency Income Tax		₱ 297,236,079.29
Add: Interest (4/16/10 to 11/29/16)		394,143,184.59
TOTAL AMOUNT STILL DUE		**₱691,379,263.88**

[47] Exhibit "R-14", BIR Records, pp. 368 to 372.
[48] Exhibit "R-14", BIR Records, p. 372.

In the Details of Discrepancies,[49] attached to the FDDA, the BIR explained the legal and factual bases of the adjustments made as follows:

> "**Best Evidence Obtainable** - In the absence of accounting records or other documents necessary for the proper determination of the taxpayer's internal revenue tax liability, Section 6 (B) of the NIRC requires that the assessment of the tax be determined based on the 'Best Evidence Obtainable,' as follows:
>
> > '*When a report required by law as a basis for the assessment of any national internal revenue tax shall not be forthcoming within the time fixed by laws or any such report is false, incomplete, or erroneous, the Commissioner shall assess the proper tax on the best evidence obtainable.*'
>
> The said failure and refusal of the taxpayer to make certain records available per issued Subpoena Duces Tecum dated October 28, 2010 resulted in the subsequent filing of criminal complaint.
>
> ➢ **Disallowed Expenses based on Best Evidence Obtainable, ₱2,350,693.74** – Verification disclosed that you have not provided any supporting documents or evidence to support your claimed deductions in violation of Sec. 34(A)(1)(b) of the Tax Code which states that '*xxx No deductions from gross income shall be allowed under this Subsection (A) hereof, unless the taxpayer shall substantiate with sufficient evidence, such as official receipts or adequate records; (1) the amount of expense being deducted ... xxx*'
>
> Since the following expenses constitute the deductions in conducting a business there having been no means by which to ascertain the correctness and accuracy of the said expense, 50% of the various expenses claimed were disallowed following the Mariano Zamora vs. Collector of Internal Revenue. Sec. 2.4(c) of RMC 23-2000 states that '*... if there is a showing that expenses have been incurred but the exact amount thereof cannot be ascertained due to absence of documentary evidence, it is the duty of the BIR to make an estimate of deduction that may be allowable in computing the taxpayer's taxable income bearing heavily against the taxpayer whose inexactitude is of his own making ...*'

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[49] Exhibit "R-14", BIR Records, pp. 369 to 370.

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Schedule 1

Expense Accounts	***Per Financial Statements***	***Multiplied by***	***Amount Disallowed***
	₱		
Taxes and licenses	3,328,185.22	50%	₱ 1,664,092.61
Office supplies	218,840.55	50%	109,420.28
Promo, publication, magazines and periodicals	348,307.23	50%	174,153.62
Notarial and documentation	4,900.00	50%	2,450.00
Commissar food and beverage	154,957.60	50%	77,478.80
Gas and fuel	97,380.57	50%	48,690.29
Telephone and telecom	95,850.20	50%	47,925.10
Light and water	452,966.10	50%	226,483.05
Seminars and meeting	10,700.00	50%	5,350.00
Board and lodging	9,400.00	50%	4,700.00
Membership and fund contribution	327,798.65	50%	163,899.33
Tolls and parking	1,007.00	50%	503.50
Miscellaneous expenses	100,000.00	50%	50,000.00
Total	**₱5,150,293.12**		**₱2,350,693.74**

➢ **<u>Income payments not subjected to expanded withholding tax, ₱938,606,349.90</u>** – Comparison of your income payments subject to withholding tax claimed per financial statement/income tax return as against per BIR Form No. 1601-E disclosed that you have not subjected to withholding tax the hereunder expenses hence disallowed pursuant to Section 34 (K) of the NIRC, as amended.

Schedule 2

Income Payments	***Per FS/ITR***	***Per 1601E***	***Not subjected to EWT***	***EWT Rate***	***Deficiency EWT***
Commission expenses	₱ 26,803,824.04	-	₱ 26,803,824.04	10%	₱ 2,680,382.40
Payments to contractors					
Construction cost	₱ 1,053,684,447.93				
Security services	66,920.00				
Advertisement and promotions	2,112,729.21				
Repair and maintenance	37,144.00				
Total	₱ 1,055,901,241.14	₱ 196,957,265.88	858,943,975.26	2%	17,178,879.51
Management fees					
Incentives expenses	₱ 5,222,260.00				
Managerial services	47,636,290.60				

Total	₱ 52,858,550.60	-	52,858,550.60	15%	7,928,782.59
TOTAL	**₱1,135,563,615.78**	**₱196,957,265.88**	**₱938,606,349.90**		**₱27,788,044.50**

xxx xxx xxx

> ➢ **<u>Disallowed donations due to limit, ₱2,193,596.73</u>** – Investigation of your records reveal that you claimed donations as allowable deductions in violation of the limit provided by Section 34(H)(1) of the NIRC, as amended, providing a five percent (5%) limit on donations made by corporations, hence disallowed.

<u>Schedule 3</u>

Sponsorship and donations per FS		₱ 2,320,500.00
Less: Allowed deduction as per NIRC		
Taxable income after sponsorship and donations	₱ 217,565.50	
Add back: Sponsorship and donations per FS	2,320,500.00	
Taxable income before sponsorship and donations	2,538,065.50	
Multiply by: Limit rate (5%)	5%	126,903.28
Disallowed sponsorship and donations - due to limit		**₱2,193,596.73**

> ➢ **<u>Unsupported interest expenses, ₱47,636,290.60</u>** – Verification of your income tax return filed reveal that you have claimed interest expense that are not substantiated and hence disallowed pursuant to Section 34(B) of the NIRC, as amended.

This Court *En Banc* finds the foregoing findings to be in order, and thus, the corresponding assessment is affirmed.

It is settled that all presumptions are in favor of the correctness of tax assessments. The good faith of tax assessors and the validity of their actions are presumed. They will be presumed to have taken into consideration of all the facts to which their attention was called.[50] The burden of proof is upon the complaining party to show clearly that the assessment is erroneous. Failure to present proof of error in the assessment will justify the judicial affirmance of said assessment.[51]

In the present case, respondent focuses on its position that the transactions between itself and the investors and/or

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[50] *CIR vs. Construction Resources of Asia,* 145 SCRA 671. (1986)
[51] *Marcos II vs. Court of Appeals, et al.*, G.R. No. 120880, June 5, 1997.

unit owners are considered non-taxable pursuant to the Build-Your-Own (BYO) System where the actual unit owners act as the developers themselves, and no sale takes place, which is allegedly supported by the BIR Ruling No. DA (C-129) 375-2009. Thus, no documentary evidence was ever adduced before this Court to controvert the assessment made by the petitioner as itemized above.

This Court *En Banc* finds that the mere allegation of the respondent is unavailing. Regardless of whether this Court *En Banc* would rule in favor of respondent on the issue on the valid revocation of BIR Ruling No. DA (C-129) 375-2009, the above items of assessment may still be validly made, since the bases thereof were the fact of failure to provide supporting documents or evidence, under-withholding of EWT, and over-claiming of donations. Respondent can easily prove that the assessments are incorrect by providing the related documentary evidence and by showing that it withheld the correct taxes before the Court *a quo*. Unfortunately, respondent failed to do so.

Correspondingly, the assessed basic deficiency income tax in the amount of ₱297,236,079.29 must be upheld.

II. DEFICIENCY VAT

In the subject FDDA,[52] the deficiency VAT in the amount of ₱637,236,976.22 is computed as follows:

Gross Receipts per VAT returns			₱1,190,907,265.00
Output Tax Due			₱ 142,908,871.80
Less: Input Tax Credits			
Input Tax carried over from succeeding quarter		₱ 96,974.82	
Input Tax - current per VAT return		126,442,133.65	
Total		₱126,539,108.47	
Less: Disallowed input tax	₱126,442,133.65		
Input tax carried over to succeeding quarter	126,539,108.48	252,981,242.13	(126,442,133.66)
VAT Due			₱ 269,351,005.46
Less: Payments per Return			459,102.20
Deficiency VAT			₱ 268,891,903.26
Add: Interest (1/26/10 to 11/29/16)			368,345,072.96
TOTAL AMOUNT STILL DUE			**₱637,236,976.22**

[52] Exhibit "R-14", BIR Records, p. 372.

Based on the above computation, the deficiency VAT assessment primarily arose from the following items:

a. Gross Receipts per VAT returns subjected to VAT	₱1,190,907,265.00
b. Disallowed input tax and input tax carried over to succeeding quarter	252,981,242.13

a. On the Gross Receipts per VAT returns subjected to VAT - ₱1,190,907,265.00

The assessed deficiency VAT on respondent's gross receipts should be cancelled.

As mentioned in the early part of the discussion, Section 228 of the 1997 NIRC, as amended, requires that the taxpayer shall be informed of the law and facts on which the assessment is based.

Relative thereto, Section 3.1.5 of Revenue Regulations (RR) No. 12-99, as amended by RR No. 18-2013, reads:

> "3.1.5. Final Decision on a Disputed Assessment (FDDA). – The decision of the Commissioner or his duly authorized representative shall state the (i) facts, the applicable law, rules and regulations, or jurisprudence on which such decision is based, otherwise, the decision shall be void (see illustration in ANNEX 'C' hereof), and (ii) that the same is his *final decision.*"

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/her. The use of the word *"shall"* in these legal provisions indicates the mandatory nature of the requirements laid down therein.[53] The rationale behind the requirement that taxpayers should be informed of the facts and law on which the assessments are based conforms with the constitutional mandate that no person shall be deprived of his or her property without due process of law.[54]

In the present case, based on the computation of the deficiency VAT, it would show that respondent had vatable

[53] *Commissioner of Internal Revenue vs. United Salvage and Towage (Phils.), Inc.*, G.R. No. 197515, July 2, 2014.
[54] *Commissioner of Internal Revenue vs. Fitness by Design, Inc.*, G.R. No. 215957, November 9, 2016.

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transactions upon which the VAT payment of ₱459,102.20 was arrived at. If the said amount is grossed-up, respondent's vatable gross receipts would be ₱3,825,851.67[55]. Thus, the assessment made by petitioner was actually on the amount of ₱1,187,081,413.33[56]. However, the basis of the assessment was not explained by the BIR in the FDDA,[57] nor in the attached Details of Discrepancies. Parenthetically, no explanation was likewise stated in the PAN,[58] and in the FAN,[59] as well in their respective Details of Discrepancies. Thus, for failure of the petitioner to state the facts and the law on which the assessment was made as required by Section 228 of the NIRC of 1997 renders the subject item of VAT assessment void.

b. Disallowed input Tax and Input Tax carried over to succeeding quarter - ₱252,981,242.13

The basis of the disallowed input taxes was explained in the *Details of Discrepancies* [60] attached to the FDDA as follows:

- **<u>Disallowed Input Tax Credits, ₱126,442,133.65</u>** – Verification disclosed that your input taxes claimed per VAT returns amounting to a total of ₱126,442,133.65 were not supported with sufficient evidence in violation of Section 107(A), Section 110(A), Section 113 and Section 237 of the NIRC, as amended.

- **<u>Input tax carried over to succeeding period/quarter, ₱126,539,108.48</u>** – The excess input tax amounting to ₱126,539,108.48 was not applied against the allowable input tax in computing deficiency value added tax since this shall be carried over to the next succeeding period/quarter(s) as provided under Section 110(B) of the NIRC, as amended.

The Court, upon careful examination of the subject assessment, notes that petitioner erroneously made a double disallowance on respondent's input taxes. As shown in the computation of deficiency VAT, respondent's total input taxes of ₱126,539,108.47[61]comprised of *"Input Tax carried over from succeeding quarter - ₱96,974.82"* and *"Input Tax – current per VAT return - ₱126,442,133.65".* Petitioner disallowed the latter or the input taxes incurred in the current period of taxable year

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[55] ₱459,102.20 divided by 12%.
[56] ₱1,190,907,265.00 less ₱3,825,851.67.
[57] Exhibit "R-12", BIR Records, pp. 368 to 372.
[58] Exhibit "R-8", BIR Records, pp. 127 to 131.
[59] Exhibit "R-12", BIR Records, pp. 224 to 233.
[60] Exhibit "R-14", BIR Records, p. 369.
[61] Exhibit "R-14", BIR Records, p. 372.

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2009 on the ground that the same were not supported with sufficient evidence. However, petitioner likewise disallowed respondent's total input tax of ₱126,539,108.47[62] on the ground that the same was carried over to the succeeding period/quarter, thus disallowing the amount of ₱126,442,133.65 twice.

Nonetheless, while this Court agrees with the petitioner that the "Input Tax – current per VAT return" in the amount of ₱126,442,133.65 should be disallowed for failure of the respondent to substantiate the same with documentary evidence, the disallowance of ₱126,539,108.47 on the ground that the same was carried over to the succeeding period/quarter should, however, be cancelled. To be sure, the disallowance of excess tax credits carried over to the succeeding year is improper because it would already involve a period beyond the coverage of the assessment; and any tax benefit derived by respondent from the carry-over of the said amount redounds to the succeeding year, not the taxable year under consideration.

In any event, notwithstanding the disallowance of respondent's input taxes, this Court finds that respondent is not liable for any deficiency VAT since the assessment on respondent's gross receipts is void, as above shown, for failure of the petitioner to state the facts and the law on which the assessment was made, as required by Section 228 of the 1997 NIRC, as amended, and Section 3.1.5 of RR No. 12-99, as amended. Correspondingly, the assessed deficiency VAT amounting to ₱637,236,976.22 should be cancelled.

III. DEFICIENCY EWT

In the FDDA[63], the deficiency EWT of ₱66,006,122.14 is computed as follows:

Deficiency Expanded Withholding Tax (Schedule 2)	₱ 27,788,044.50
Add: Interest (1/16/10 to 11/29/16)	38,218,077.64
TOTAL AMOUNT STILL DUE	**₱66,006,122.14**

[62] With ₱0.01 difference per FDDA.
[63] Exhibit "R-14", BIR Records, p. 371.

The basis of the deficiency EWT was explained by the BIR in the Details of Discrepancies attached to the FDDA,[64] as follows:

> "**Basic Tax Due, ₱27,788,044.50** – There has been found deficiency EWT amounting to ₱27,788,044.50, after verification disclosed that you failed to subject to expanded withholding tax income payments amounting to ₱938,606,349.90, previously disallowed as deduction from gross income, hence, the same was assessed for deficiency EWT pursuant Section 2.57.2 of Revenue Regulation No. 2-98, as amended by Revenue Regulations No. 17-2003. Refer to Schedule 2 above."

In relation to the above discussion regarding the propriety of the deficiency income tax, the computed basic deficiency EWT of ₱27,788,044.50 should likewise remain.

IV. DEFICIENCY WT and DST - ONETT

In the FDDA dated October 13, 2016,[65] the deficiency WT - ONETT of ₱171,376,449.58 was computed as follows:

Deficiency Withholding Tax - ONETT (Schedule 4)		₱ 59,545,363.25
Add: Surcharge (50%)	₱29,772,681.63	
Interest (1/11/10 to 11/29/16)	82,058,404.70	111,831,086.33
TOTAL AMOUNT STILL DUE		**₱171,376,449.58**

And as regards the deficiency DST - ONETT of ₱32,861,851.63, per the same FDDA,[66] the said amount was determined as follows:

Deficiency Documentary Stamp Tax (Schedule 5)	₱ 13,802,734.00
Add: Interest (1/16/10 to 11/29/16)	19,059,117.63
TOTAL AMOUNT STILL DUE	**₱32,861,851.63**

Relative to the foregoing assessments, in accordance with the Details of Discrepancies attached to the said FDDA,[67] the following findings, *inter alia*, are stated, to wit:

> "**IV. WITHHOLDING TAX – ONE TIME TRANSACTIONS**

[64] Exhibit "R-14", BIR Records, p. 369.
[65] Exhibit "R-14", BIR Records, p. 371.
[66] Exhibit "R-14", BIR Records, p. 371.
[67] Exhibit "R-14", BIR Records (CTA Case No. 9503), pp. 368 to372.

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- **<u>Basic Tax Due, P59,545,363.25</u>** – Verification disclosed that you failed to file the Withholding Tax Remittance Return (BIR Form 1606) and pay the corresponding basic withholding tax on the transfer of the real properties in violation [o]f Section 2.58 of Revenue Regulations No. 2-1998 which provides that 'the withholding tax return whether creditable or final shall be filed and payments should be made within ten (10) days after the end of each month, except for taxes withheld for the month of December each year, which shall be filed on or before January 15 of the following year.' (emphasis ours)

  Since your buyers failed to remit to the Bureau the corresponding withholding tax due on the transactions and instead paid you the entire contract price inclusive of the five percent (5%) withholding tax, you are found liable to pay the same inclusive of increments on the said transfer, pursuant to 2.57.2(J) of the Revenue Regulations No. 2-1998[.]

  <u>Schedule 4:</u>

Gross Sales subject to withholding tax - ONETT	P	1,190,907,265.00
Multiply by: Withholding tax rate (5%)		5%
Basic Withholding tax – ONETT due	**P**	**59,545,363.25**

II. <u>DOCUMENTARY STAMP TAX – ONE TIME TRANSACTIONS</u>

- **<u>Basic Tax Due, P13,802,734.00</u>** – Verification disclosed that you failed to pay Documentary Stamp Tax amounting to P13,802,734.00 in violation of Section 200(B) of the NIRC, as amended, implemented by Revenue Memorandum Circular No. 1-1998, and amended by Revenue Regulations NO. 6-2001.

  <u>Schedule 5:</u>

Gross Sales subject to documentary stamp tax (DST) - ONETT	P 1,190,907,265.00
Multiply by: Documentary stamp tax rate (P15/P1,000)	1.50%
DST – ONETT due	17,863,609.00
Less: Payments per Integrated Tax System	4,060,875.00
Basic Documentary stamp tax – ONETT due	**P 13,802,734.00**

VI. <u>NULLIFICATION OF BIR RULINGS ISSUED TO SIMILAR ACTIVITIES</u>

In a **Memorandum dated April 28, 2009**, the Commission[er] of Internal Revenue has effectively nullified the BIR Rulings exempting the transfer of condominium units to unit owners under the so-called *co-development/build-to-own/build-your-own and similar* schemes, and directed to

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> conduct investigation of involved taxpayers." *(Emphases added)*

Notably, as already intimated, the BIR, through Mr. James H. Roldan, the then Assistant Commissioner for the Legal Service, has issued, in favor of petitioner, BIR Ruling No. DA (C-129) 375-2009 dated July 15, 2009,[68] wherein the former ruled as follows:

> "...please be informed that all sales, exchanges or other dispositions of real property located in the Philippines, classified as capital assets, including pacto de retro sales and other forms of conditional sales, by individuals, including estates and trusts, are subject to a final tax of six percent (6%) based on the gross selling price or current fair market value, as determined in accordance with Section 6 (E) of the Tax Code of 1997, as amended, whichever is higher. **Accordingly, if represented, the investors are the real owners of the aforesaid condominium and parking units, and that the respective transfer thereof in their favor is without any monetary consideration, the said transaction, therefor, is not a taxable transaction; hence, the transfers from the trustee to the 'cestui que trust' or beneficial owners of the condominium and parking units are not subject to CGT imposed under Section 27 (D)(5) of the Tax Code of 1997, as amended, income tax imposed under Section 27 (A) of the same Code, and consequently, to the withholding tax imposed under Revenue Regulations No. 2-98, as amended, implementing Section 57 of the Tax Code.** (BIR Ruling Nos. DA-245-05 dated June 7, 2005, DA-(C-050) 177-08 dated August 27, 2008, DA-103-07 dated February 16, 2007, DA-455-07 dated August 17, 2007, DA-459-05 dated November 10, 2005 and DA-662-99 dated November 29, 1999)
>
> **Moreover, the said transfers are not subject to VAT imposed under Section 106 (A) (1) of the same Tax Code, the same not being a sale transaction and not made in the regular course of trade or business. Further, the deeds conveying said condominium and parking units are not subject to documentary stamp tax imposed under Section 196 of the Tax Code of 1997** (BIR Ruling No. 662-99 dated November 29, 1999 citing UN-072 dated February 22, 1994). However, the documentary stamp tax on certificates in the amount of Fifteen Pesos (P15.00) imposed by Section 188 of the Tax Code of 1997, as amended, shall be collected.
>
> This ruling is being issued on the basis of the foregoing facts as represented. However, if upon investigation, it will be disclosed that the facts are different, then this ruling shall be considered null and void." (emphasis supplied)

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[68] Exhibit "P-2", Docket, pp. 401 to 402.

Apparently, it can be discerned that the above-stated deficiency WT assessment amounting to ₱59,545,363.25, and DST in the amount of ₱13,802,734.00, arose because of the supposed nullification by petitioner of "BIR Rulings exempting the transfer of condominium units to unit owners under the so-called co-development/build-to-own/build-your-own and similar schemes" in his Memorandum dated April 28, 2009.

It must be noted, however, that petitioner never presented or offered, in the proceedings *a quo*, the said Memorandum dated April 28, 2009, for this Court to determine whether the supposed nullification of the subject BIR Rulings was properly made, and whether it provided a legal basis for the subject tax assessments.

But even granting that Memorandum dated April 28, 2009 truly existed, and that indeed, petitioner therein "effectively nullified the BIR Rulings exempting the transfer of condominium units to unit owners under the so-called co-development/build-to-own/build-your-own and similar schemes", the same is of no moment. This is simply because BIR Ruling No. DA (C-129) 375-2009 dated July 15, 2009 was issued subsequent to, or after, the issuance of the said Memorandum. It would be illogical to conclude that an earlier memorandum of petitioner has revoked or modified future or subsequent BIR Rulings.

Thus, the said Memorandum dated April 28, 2009 of petitioner cannot be used as legal basis to support the above-stated deficiency WT and DST assessments.

In any event, this Court *En Banc* recognizes that BIR Ruling No. DA (C-129) 375-2009 dated July 15, 2009 has been revoked by petitioner. The filing of petitioner's Answer before the Court *a quo* in CTA Case No. 9503, challenging respondent's appeal over the subject tax assessments effectively serves as a revocation of the said BIR Ruling.[69]

The revocation could *not* have been effected by the Regional Director, Mr. Jonas DP. Amora, via the issuance of the

[69] Refer to *Commissioner of Internal Revenue vs. Burmeister And Wain Scandinavian Contractor Mindanao, Inc.*, G.R. No. 153205, January 22, 2007.

subject FDDA dated October 13, 2016.[70] This is so because the said BIR official is not empowered to reverse, revoke or modify BIR Ruling No. DA (C-129) 375-2009 dated July 15, 2009, or any BIR Ruling, for that matter. Precisely, the power to revoke BIR Rulings may not be delegated by petitioner, pursuant to Section 7(b) of the 1997 NIRC, as amended, to wit:

> "SEC. 7. Authority of the Commissioner to Delegate Power. – The Commissioner may delegate the powers vested in him under the pertinent provisions of this Code to any or such subordinate officials with the rank equivalent to a division chief or higher, subject to such limitations and restrictions as may be imposed under rules and regulations to be promulgated by the Secretary of Finance, upon recommendation of the Commissioner: Provided, however, That the following powers of the Commissioner shall <u>not</u> be delegated:
>
> xxx xxx xxx
>
> (b) The power to issue rulings of first impression or to reverse, revoke or modify any existing ruling of the Bureau;"

Thus, the power to reverse, revoke or modify any existing ruling of the BIR rests exclusively with petitioner, and to no other BIR official. As a corollary, petitioner is the only BIR official, who can revoke BIR Ruling No. DA (C-129) 375-2009 dated July 15, 2009.

Be that as it may, well-entrenched is the rule that rulings and circulars, rules and regulations promulgated by petitioner would have no retroactive application if to so apply them would be prejudicial to the taxpayers.[71]

Section 246 of the 1997 NIRC, as amended, reads:

> "SEC. 246. *Non-Retroactivity of Rulings.* – Any revocation, modification or reversal of any of the rules and regulations promulgated in accordance with the preceding Sections or **any of the rulings** or circulars **promulgated by the Commissioner shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers**, except in the following cases:

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[70] Exhibit "R-14", BIR Records (for CTA Case No. 9503), pp. 368 to 372.

[71] *Commissioner of Internal Revenue vs. Benguet Corporation*, G.R. Nos. 134587 & 134588, July 8, 2005; *Commissioner of Internal Revenue vs. Court of Appeals, et al.*, G.R. No. 117982, February 6, 1997.

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> (a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;
>
> (b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or
>
> (c) Where the taxpayer acted in bad faith."

Based on the foregoing provision, there is no question, therefore, as to the prohibition against the retroactive application of the revocation, modification or reversal, as the case may be, of previously established BIR Rulings when the taxpayer's interest would be prejudiced thereby. But even if prejudicial to a taxpayer, retroactive application is still allowed where: (a) a taxpayer deliberately misstates or omits material facts from his return or any document required by the BIR; (b) where subsequent facts gathered by the BIR are materially different from which the ruling is based; and (c) where the taxpayer acted in bad faith.[72]

In *Commissioner of Internal Revenue vs. Benguet Corporation*,[73] the Supreme Court held as follows:

> "...Respondent should not be faulted for relying on the BIR's interpretation of the said laws and regulations. **While it is true**, as petitioner alleges, **that government is not estopped from collecting taxes which remain unpaid on account of the errors or mistakes of its agents and/or officials and there could be no vested right arising from an erroneous interpretation of law, these principles must give way to exceptions based on and in keeping with the interest of justice and fairplay**, as has been done in the instant matter. **For, it is primordial that every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.**" (emphasis supplied)

Moreover, in *Commissioner of Internal Revenue vs. Philippine Health Care Providers, Inc.*,[74] the Supreme Court held as follows:

> "In *ABS-CBN Broadcasting Corp. v. Court of Tax Appeals*,[75] this Court held that under Section 246 of the 1997

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[72] *Commissioner of Internal Revenue vs. Benguet Corporation*, G.R. No. 145559, July 14, 2006.
[73] G.R. Nos. 134587 & 134588, July 8, 2005.
[74] G.R. No. 168129, April 24, 2007.
[75] G.R. No. L-52306, October 12, 1981.

Tax Code, **the Commissioner of Internal Revenue is precluded from adopting a position contrary to one previously taken where injustice would result to the taxpayer.** Hence, where an assessment for deficiency withholding tax income taxes was made, three years after a new BIR Circular reversed a previous one upon which the taxpayer had relied upon, such an assessment was prejudicial to the taxpayer. **To rule otherwise, opined the Court, would be contrary to the tenets of good faith, equity, and fair play.**

This Court has consistently reaffirmed its ruling in *ABS-CBN Broadcasting Corp.* in the later cases of *Commissioner of Internal Revenue v. Burroughs, Ltd.*,[76] *Commissioner of Internal Revenue v. Mega Gen. Mdsg. Corp.*[77] *Commissioner of Internal Revenue v. Telefunken Semiconductor (Phils.) Inc.*,[78] and *Commissioner of Internal Revenue v. Court of Appeals.*[79] The rule is that the **BIR rulings have no retroactive effect where a grossly unfair deal would result to the prejudice of the taxpayer**, as in this case.

More recently, in *Commissioner of Internal Revenue v. Benguet Corporation*,[80] wherein the taxpayer was entitled to tax refunds or credits based on the BIR's own issuances but later was suddenly saddled with deficiency taxes due to its subsequent ruling changing the category of the taxpayer's transactions for the purpose of paying its VAT, this Court has ruled that applying such ruling retroactively would be prejudicial to the taxpayer." (emphasis supplied)

Needless to state, the retroactive application of petitioner's revocation of BIR Ruling No. DA (C-129) 375-2009 dated July 15, 2009 would result to an injustice and prejudice on the part of respondent. Since there is no indication that respondent's case fell under any of the exceptions stated in Section 246 of the 1997 NIRC, as amended, to justify the retroactive application of petitioner's revocation, the tax exemptions confirmed in BIR Ruling No. DA (C-129) 375-2009 dated July 15, 2009 must be respected and given effect in this case.

Thus, for the above reasons, the deficiency basic WT assessment amounting to ₱59,545,363.25, and the deficiency basic DST assessment amounting to ₱13,802,734.00, plus the incremental impositions, must be both struck down.

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[76] G.R. No. L-66653, June 19, 1986.
[77] G.R. No. L-69315, September 30, 1988.
[78] G.R. No. 103915, October 23, 1995.
[79] G.R. No. 117982, February 6, 1997.
[80] G.R. Nos. 134587-88, July 8, 2005.

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At any rate, it must be pointed out that even if the retroactive application of the revocation of BIR Ruling No. DA (C-129) 375-2009 dated July 15, 2009 may be validly made, the same is of no consequence, insofar as the deficiency WT assessment amounting to ₱59,545,363.25 is concerned.

Section 2.57.3 of Revenue Regulations (RR) No. 2-98[81], as amended by RR No. 17-2003[82], provides, in part, as follows:

> "Sec. 2.57.3. Persons required to deduct and withhold. – The following persons are hereby constituted as withholding agents for purposes of the creditable tax required to be withheld on income payments enumerated in Section 2.57.2:
>
> xxx xxx xxx
>
> (B) An individual, with respect to payments made in connection with his trade or business.
>
> However, insofar as taxable sales, exchanges or transfers of real property are concerned, the buyers, whether or not engaged in trade or business, are constituted as withholding agents. xxx."

Relative thereto, Section 4 of RR No. 5-2009[83] reads, in part, as follows:

> "SEC. 4. TIME AND PLACE OF PAYMENT OF CREDITABLE WITHHOLDING TAX (CWT) AND DOCUMENTARY STAMP TAX (DST) ON THE SALE, EXCHANGE OR DISPOSITION OF REAL PROPERTIES CLASSIFIED AS ORDINARY ASSETS. – **Creditable withholding taxes (CWT) deducted and withheld by the withholding agent/buyer on the sale, transfer or exchange of real property classified as ordinary asset, shall be paid by the withholding agent/buyer upon filing of the CWT Return (BIR Form No. 1606) with the AAB located within**

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[81] SUBJECT: Implementing Republic Act No. 8424, "An Act Amending The National Internal Revenue Code, as amended" relative to the Withholding on Income subject to the Expanded Withholding Tax and Final Withholding Tax, Withholding of Income Tax on Compensation, Withholding of Creditable Value-Added Tax and Other Percentage Taxes.

[82] SUBJECT: Amending Further Pertinent Provisions of Revenue Regulations No. 2-98, as Amended, Providing for Additional Transactions Subject to Creditable Withholding Tax; Re-Establishing the Policy that the Capital Gains Tax on the Sale, Exchange or other Disposition of Real Property Classified as Capital Assets Shall be Collected as a Final Withholding Tax, Thereby Further Amending Revenue Regulations Nos. 8-98 and 13-99, as Amended by Revenue Regulations No. 14-2000; and for Other Purposes.

[83] SUBJECT: REVERTING THE VENUE FOR THE FILING OF RETURNS AND PAYMENT OF CAPITAL GAINS TAX, CREDITABLE WITHHOLDING TAX AND DOCUMENTARY STAMP TAX DUE ON SALE, TRANSFER OR EXCHANGE OF REAL PROPERTY OF LARGE TAXPAYERS TO THE PLACE WHERE THE PROPERTY IS LOCATED

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> **the RDO having jurisdiction over the place where the property being transferred is located** within ten (10) days following the end of the month in which the transaction occurred subject, however, to the specific rules prescribed by RR 2-98, as amended, and the rules prescribed under the EFPS regulations, in case the taxpayer is an EFPS taxpayer.
>
> xxx xxx xxx
>
> **The above rules apply whether the seller/transferor thereof is large taxpayer or a non-large taxpayer."** (emphasis supplied)

Based on the foregoing provisions, for taxable sales, exchanges or transfers of real property classified as ordinary asset, the buyers, whether or not engaged in trade or business are constituted as withholding agents. As such, they are mandated to deduct from their income payments arising from the said transaction, and to remit the withheld amount to the BIR.

It must be emphasized that the liability of the withholding agent is distinct and separate from the tax liability of the income earner. It is premised on its duty to withhold the taxes paid to the payee. Should the withholding agent fail to deduct the required amount from its payment to the payee, it is liable for deficiency taxes and applicable penalties.[84]

Correspondingly, since respondent is not the duly designated withholding agent, as it is in fact the seller or income earner in this case, it cannot be assessed with the subject deficiency WT assessment amounting to ₱59,545,363.25.

This Court therefore finds as follows:

For CTA Case No. 9490, the assessment issued by petitioner against respondent for taxable year 2012, covering the deficiency income tax should be **CANCELLED,** while the deficiency VAT, for the same taxable year, should be **PARTIALLY UPHELD.**

For CTA Case No. 9503, the assessment issued by petitioner against respondent for taxable year 2009, covering the deficiency VAT, WT-ONETT, and DST-ONETT should be

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[84] *Commissioner of Internal Revenue vs. La Flor Dela Isabela, Inc.*, G.R. No. 211289, January 14, 2019.

CANCELLED, while the deficiency income and EWT, for the same taxable year, should be **UPHELD**.

Accordingly, we find respondent to be liable to pay the aggregate amount of ₱1,126,604,672.27 [85], representing deficiency VAT (CTA Case No. 9490), and deficiency income tax and EWT (CTA Case No. 9503), inclusive of twenty-five percent (25%) surcharge imposed under Section 248(A)(3) of the 1997 NIRC, as amended, twenty percent (20%) deficiency interest and 20% delinquency interest imposed under Section 249(B) and (C) of the same Code, respectively, computed until December 31, 2017, which is prior to its amendment under Republic Act (RA) No. 10963, also known as Tax Reform for Acceleration and Inclusion (TRAIN), computed as follows:

CTA Case No. 9490 (Taxable year 2012)	
Basic Deficiency VAT	₱ 9,856,828.76
Surcharge (25%)	2,464,207.19
Deficiency Interest (20%) until April 15, 2016 [86]	
01/26/2013 to 04/15/2016 (₱9,856,828.76 x 20% x 1,176 days / 365 days)	6,351,578.42
Total Amount Due - April 15, 2016	**₱18,672,614.37**
Deficiency Interest (20%) from April 16, 2016 to December 31, 2017	
04/16/2016 to 12/31/2017 (₱9,856,828.76 x 20% x 625 days / 365 days)	3,375,626.29
Delinquency Interest (20%) from April 16, 2016 to December 31, 2017	
04/16/2016 to 12/31/2017 (₱18,672,614.37 x 20% x 625 days / 365 days)	6,394,730.95
Total Amount Due as of December 31, 2017	**₱28,442,971.61**

CTA Case No. 9503 (Taxable year 2009)			
	Income tax	**EWT**	**TOTAL**
Basic Deficiency Tax	₱ 297,236,079.29	₱ 27,788,044.50	₱ 325,024,123.79
Surcharge (25%)	74,309,019.82	6,947,011.13	81,256,030.95
Deficiency Interest (20%) until November 14, 2016 [87]			
For income tax - 04/16/2010 to 11/14/2016 (₱297,236,079.29 x 20% x 2,405 days / 365 days)	391,700,148.32		
For EWT - 01/11/2010 to 11/14/2016 (₱27,788,044.50 x 20% x 2,500 days / 365 days)		38,065,814.38	429,765,962.70

[85] Sum of ₱28,442,971.61 and ₱1,098,161,700.66.
[86] Exhibit "R-26", BIR Records, p. 112.
[87] Exhibit "R-14", BIR Records, p. 371.

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Total Amount Due - November 14, 2016	**₱ 763,245,247.43**	**₱72,800,870.01**	**₱836,046,117.44**
Deficiency Interest (20%) from November 15, 2016 to December 31, 2017			
For income tax - 11/15/2016 to 12/31/2017 (₱297,236,079.29 x 20% x 412 days / 365 days)	67,102,062.83		
For EWT - 11/15/2016 to 12/31/2017 (₱27,788,044.50 x 20% x 412 days / 365 days)		6,273,246.21	73,375,309.04
Delinquency Interest (20%) from November 15, 2016 to December 31, 2017			
For income tax - 11/15/2016 to 12/31/2017 (₱763,245,247.43 x 20% x 412 days / 365 days)	172,305,228.46		
For EWT - 11/15/2016 to 12/31/2017 (₱72,800,870.01 x 20% x 412 days / 365 days)		16,435,045.72	188,740,274.18
Total Amount Due as of December 31, 2017	**₱1,002,652,538.73**	**₱95,509,161.94**	**₱1,098,161,700.66**

In addition, we find respondent liable to pay petitioner delinquency interest at the rate of 12% on the total unpaid deficiency VAT due of **₱18,672,614.37**, as of April 15, 2016 for taxable year 2012, and deficiency income tax and EWT due of **₱836,046,117.44**, as of November 14, 2016 for taxable year 2009, as determined above, or equivalent to the amount of **₱281,003.42**[88] per day, computed from January 1, 2018 until full payment thereof, pursuant to Section 249(C) of the 1997 NIRC, as amended by RA No. 10963 (TRAIN) and as implemented by RR No. 21-2018.

However, Section 2 of Republic Act No. 1125, as amended by Republic Act No. 9503, provides:

"Section 2. *Sitting En Banc or Division; Quorum; Proceedings.*

xxx xxx xxx

The affirmative vote of five (5) members of the Court En Banc shall be necessary to reverse a decision of a Division but a simple majority of the Justices present necessary to promulgate a resolution or decision in all other cases or two (2) members of a Division, as the case

[88] Sum of ₱18,672,614.37 and ₱836,046,117.45 times 12% divided by 365 days.

> may be, shall be necessary for the rendition of a decision or resolution in the Division level." (emphasis supplied)

Likewise, Section 3, Rule 2 of the Revised Rules of the Court of Tax Appeals (RRCTA) states that the presence at the deliberation and the affirmative votes of at least five (5) members of the Court *En Banc* shall be necessary to reverse a decision of a Division. Where the necessary majority vote cannot be had in appealed cases, the judgment or order appealed from shall stand affirmed, thus:

> Section 3. *Court en banc; quorum and voting.* – The presiding justice or, if absent, the most senior justice in attendance shall preside over the sessions of the Court *en banc*. The attendance of five (5) justices of the Court shall constitute a quorum for its session *en banc*. **The presence at the deliberation and the affirmative vote of five (5) members of the Court *en banc* shall be necessary to reverse a decision of a Division xxx Where the necessary majority vote cannot be had, the petition shall be dismissed; in appealed cases, the judgment or order appealed from shall stand affirmed; and on all incidental matters, the petition or motion shall be denied.** (emphasis supplied)

In the deliberation of the instant case, only Presiding Justice Roman G. del Rosario, Justice Erlinda P. Uy and Justice Maria Rowena Modesto-San Pedro concurred with the opinion of the ponente that the Petition for Review filed by the CIR docketed as CTA *EB* No. 2233 should be granted and that the case be decided on its merits.

WHEREFORE, considering that the required affirmative votes of five (5) members of the Court *En Banc* was not obtained in the instant case, pursuant to Section 2 of Republic Act No. 1125, as amended by Republic Act No. 9503 in relation to Section 3 of Rule 2 of the RRCTA, the Petition for Review filed by the CIR is instead **DENIED** and the Decision of the Court in Division promulgated on September 24, 2019 and the Resolution dated January 23, 2020 are deemed **AFFIRMED.**

SO ORDERED.

CATHERINE T. MANAHAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

ERLINDA P. UY
Associate Justice

Ma. Belen M. Ringpis-Liban
(With Separate Opinion)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

Marian Ivy F. Reyes-Fajardo
MARIAN IVY F. REYES-FAJARDO
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

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 2233** (CTA Case Nos. 9490 & 9503)
- versus -	Present: **DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., UY, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, MODESTO-SAN PEDRO,** *and* **REYES-FAJARDO,** *JJ.*
FORT 1 GLOBAL CITY CENTER INC., Respondent.	Promulgated: NOV 10 2021 3:41 p.m.

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SEPARATE OPINION

RINGPIS-LIBAN, *J.*:

With all due respect, it is my humble belief that that Respondent's right to due process has been violated and that the subject deficiency assessments for taxable years 2009 and 2012 are invalid and should not be examined on the merits.

Section 3 of Revenue Regulations No. 12-99[1] enumerates the procedural due process requirement in the issuance of a deficiency tax assessment. Particularly, it is required that the Bureau of Internal Revenue ("BIR") issue the Preliminary Assessment Notice ("PAN") and the Final Assessment Notice ("FAN") in writing to the taxpayer. Moreover, the assessment must be actually received by the taxpayer. In other words, the tenets of due process mandate

1 Implements the provisions of the National Internal Revenue Code of 1997 governing the rules on assessment of national internal revenue taxes, fees and charges, September 14,1999

that an assessment should be properly served by the BIR on the taxpayer, otherwise the same is void.[2]

Section 3.1.4 states that service of the FAN may be made by registered mail or *via* personal delivery. Under the rules on personal delivery, service of the FAN must only be made **to the taxpayer <u>or</u> his duly authorized representative**; the keyword being the "[the taxpayer's] duly authorized representative". Service upon any person, other than the taxpayer, will only be valid if it is shown such other person is empowered to do so. The rationale for this is to avoid service to a person who does not know what to do with the BIR notice of assessment and one who will let the period to protest lapse.

Thus, Section 3.1.4 further provides that the duly authorized representative shall acknowledge receipt of the FAN by showing his or her designation and authority to act for and in behalf of the taxpayer.

In the case at bar, Respondent denies having received both the PAN and FAN for taxable years 2009 and 2012. Respondent further maintained that those who allegedly received the notices did not have the authority to do so. Indeed, there is a danger of entertaining Respondent's blanket denial of receipt of the notices served upon it by personal service. And yet, it is also incumbent upon Petitioner to prove that such personal service was done properly and that the notices were received by the taxpayer or the taxpayer's authorized representative. This, Petitioner failed to do. Even the testimony of his witnesses show uncertainty about how the personal deliveries were made and whether they ascertained that the notices were being served upon Respondent's authorized representative.

It therefore appears that the BIR notices of assessment were received by individuals who are unauthorized to do so, and as such, their receipt of these notices cannot be deemed as receipt by Respondent.

Additionally, it is of no consequence that Respondent later protested the PAN and FAN for taxable years 2009 and 2012. To presume, though impliedly, that a taxpayer cannot file a protest to the assessment without receipt from the BIR of the PAN or FAN is a dangerous precedent. This is because filing a protest does not correlate to being validly notified under the rules. These are two separate matters.

In the first place, the taxpayer's right to be notified of the assessment is different from the taxpayer's right to protest the assessment. The former is an obligation by the BIR as part of the procedural due process requirement in the issuance of a deficiency tax assessment, while the latter is a remedy of the

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2 Commissioner of Internal Revenue v. Metro Star Superama, Inc., G.R. No. 185371, December 08, 2010; Barcelon Roxas Securities, Inc. v. Commissioner of Internal Revenue, G.R. No. 157064, August 07, 2006.

taxpayer once an assessment is issued. Not only that, the former is mandatory, while the latter is voluntary.

Furthermore, physical procurement of a copy of the PAN and/or FAN is not equal to valid service of the assessment by the BIR. There may be instances where a taxpayer submits a protest when he or she obtains knowledge of an assessment from a third party or source other than the BIR. Simply put, a taxpayer's acquisition of a copy of the PAN and/or FAN may or may not come from the BIR. And whether or not the copy thereof originated from the BIR, the service of the assessment notice may or may not be validly made under the rules.

Lastly, the Supreme Court in the recent case of *Commissioner of Internal Revenue v. Yumex Philippines Corporation*[3], without any reservation, emphasized that the taxpayer's filing of a protest does not detract the fact that there was violation of the right to due process.

From all the foregoing, I vote to **AFFIRM** the Decision dated September 24, 2019 and Resolution dated January 23, 2020 of the Second Division.

Ma. Belen T L

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

[3] G.R. No. 222476, May 05, 2021.