REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-*versus*-

MINDANAO SANITARIUM AND HOSPITAL, INC.,
Respondent.

CTA EB NO. 1147
(CTA Case No. 8108)

Present:

Del Rosario, P.J.
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas, and
Ringpis-Liban, JJ.

Promulgated:

OCT 05 2015
2:26 p.m.

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DECISION

BAUTISTA, J:

The Case

This is a Petition for Review under Section 3(b), Rule 8 of the Revised Rules of the Court of Tax Appeals ("CTA")[1] seeking the nullification of the Decision promulgated on December 16, 2013 and the Resolution promulgated on March 13, 2014 by the First Division

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[1] Rules of Court, Rule 42, sec. 1a
SECTION 3. *Who May Appeal; Period to File Petition*. — xxx
(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 not exceeding fifteen days from the expiration of the original period within which to file the petition for review.

of the CTA ("First Division") in the case of "*Mindanao Sanitarium and Hospital, Inc. v. Commissioner of Internal Revenue*" docketed as CTA Case No. 8108,[2] involving deficiency Income Tax ("IT"), value-added tax ("VAT"), withholding tax on compensation ("WTC") and expanded withholding tax ("EWT") assessment in the total amount of Thirty Seven Million Two Hundred Forty-Five Thousand Twenty-Six Pesos and Sixteen Centavos (Php37,245,026.16) for taxable year 2007.[3]

The Parties

Petitioner Commissioner of Internal Revenue ("CIR"), is a public officer authorized under the 1997 National Internal Revenue Code ("NIRC") to examine any taxpayer including, *inter alia*, the power to issue tax assessments and evaluate and decide upon protests relative thereto, with office address at the BIR National Office Building, Agham Road, Diliman, Quezon City.[4]

Respondent Mindanao Sanitarium and Hospital, Inc., is a corporation duly organized and existing under the laws of the Philippines as non-stock and non-profit, no part of its net income shall inure to the benefit of any of its members, with principal office located at Tibanga, Iligan City.[5]

The Facts

As stated in the Decision dated December 16, 2013,[6] the factual antecedents of this case are as follows:[7]

> Based on [respondent's] Articles of Incorporation, [respondent] was formed for the following purposes, namely: "to advance through medical missionary work the cause and kingdom of Jesus Christ, the Great Physician; to further, by all proper and legitimate agencies and means a better knowledge of the laws of life and true hygiene, the relief of suffering, and the

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[2] *Rollo, CTA EB No. 1147*, p. 6.
[3] *Id*, p. 58.
[4] *Records, CTA Case No. 8108, Joint Stipulation of Facts and Issues ("JSFI")*, p. 114.
[5] *Records, CTA Case No. 8108*, p. 228.
[6] *Id.*, pp. 44-49.
[7] "Petitioner" was changed to "respondent,' and *vice versa*, to reflect the present petitioner and respondent and prevent confusion.

prevention or cure of disease, subject to the condition that purely professional, medical or surgical services in connection therewith shall be performed by duly qualified physicians or surgeons who may or may not be connected with the corporation and who shall be freely and individually contracted by patients; to publish and circulate health literature dealing with diseases; hygiene and kindred subjects; to educate and train nurses; to furnish lecturers and teachers to instruct the people regarding the laws of life and the true methods of living; to do benevolent, charitable, philanthropic, and Christian help work for the good of humanity and the uplift of our fellow men; to receive for the advancement of this work, gifts, legacies and donations, from any source whatever."

xxx xxx xxx

[Petitioner] issued Letter of Authority [("LOA")] No. 00031914 dated June 16, 2008 for purposes of investigating all internal revenue tax liabilities of [respondent] for the year ending December 31, 2007. As a result of said investigation, [respondent] received on November 6, 2009 a Formal Letter of Demand [("FLD")] dated September 25, 2009, with attached annexes described as "Computation of Discrepancies" and "Facts, Laws, Rules and Regulations as basis of the assessment" issued by the Regional Director.

The contents of the [FLD] are quoted below:

"**FORMAL LETTER OF DEMAND**

September 25, 2009

Mindanao Sanitarium and Hospital, Inc.
National Highway, San Miguel, Iligan City

Attention: **Mr. Carlos M. Morente**
The VP-Finance

Gentlemen:

Please be informed that after investigation of your **2007** All Internal Revenue Tax Liabilities by Revenue Officer Jonainah G. Usman pursuant to **Letter of Authority No. 00031914** dated June 16, 2008, it was ascertained that there is still due from you the total amount of Thirty Seven Million Two Hundred Forty Five Thousand Twenty Six Pesos and 16/100 (P37,245,026.16), inclusive of legal increments as shown hereunder:

Assessment No: RR16-101-628-09

	Basic	**Surcharge**	**Interest**	**Compromise**	**Total**
Income Tax on:					
Non-hospital Receipts	P 14,415,659.39	P 3,603,914.85	P 4,324,697.82	-	P 22,344,272.06
Hospital Receipts	3,057, 142.20	764,285.55	917,142.66	-	4,738,570.41
Value-Added Tax	3,884,300.76	971,075.19	1,337,753.18	-	6,193,129.13
Withholding Tax-Comp.	1,296,984.79	324,246.20	446,681.56	-	2,067,912.55
Expanded Withholding Tax	1,054,404.17	263,601.04	363,136.80	25,000.00	1,706,142.01
Others	-	-	-	195,000.00	195,000.00
TOTAL DEFICIENCY	**P 23,708,491.31**	**P 5,927,122.83**	**P 7,389,412.02**	**P 220,000.00**	**P 37,245,026.16**

Please note that the interest and total amount due shall be adjusted if paid beyond 10/16/09.

The complete details of the aforementioned discrepancies established during the investigation are shown in **Annexes A and B**.

In view thereof, you are requested to pay your aforesaid deficiency internal revenue tax liabilities through the duly authorized agent bank in which you are enrolled within the time shown in the enclosed assessment notice.

Very truly yours,

ESMERALDA M. TABULE, CESO
Regional Director"

On November 27, 2009, [respondent] protested the foregoing FLD by filing a protest letter dated November 25, 2009 with attached supporting documents addressed to Esmeralda M. Tabule, the Regional Director of BIR Revenue Region No. 16, praying that the assessment involving income tax and VAT be withdrawn and the docket be remanded to the District Office for the conduct of examination of the supporting documents involving withholding taxes.

On December 16, 2009, [respondent], through Francisco I. Naputo and Crispulo T. Aguillon, Jr., verbally requested from [petitioner], through Adora L. Sijo, the chief of the Assessment Division of the Cagayan de Oro Regional Office, a copy of the 2007 Final Assessment Notice [("FAN")] that [petitioner] allegedly failed to attach to the FLD dated September 25, 2009. Subsequently, since [petitioner] failed to furnish [respondent] a copy of the FAN despite the said verbal request, [respondent] again made a request for a copy of the FAN via a letter dated April 27, 2010 addressed to the Regional Director of BIR Revenue Region No. 16-Cagayan de Oro.

While [respondent's] protest with the BIR remained unresolved, [respondent] was able to secure a BIR Ruling No. NSNP (S30E-157) 803-2009 dated December 21, 2009 prevention or cure of disease, subject to the condition that purely professional, medical or surgical services in connection therewith shall be performed by duly qualified physicians or surgeons who may or may not be connected with the corporation and who shall be freely and individually contracted by patients; to publish and circulate health literature dealing with diseases; hygiene and kindred subjects; to educate and train nurses; to furnish lecturers and teachers to instruct the people regarding the laws of life and the true methods of living; to do benevolent, charitable, philanthropic, and Christian help work for the good of humanity and the uplift of our fellow men; to receive for the advancement of this work, gifts, legacies and donations, from any source whatever."

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Assessment No: RR16-101-628-09

3. [Respondent's] failure to establish that it is an institution organized and operated exclusively for charitable purposes warrants the payment of deficiency tax assessments;

4. The BIR ruling allegedly issued to [respondent] confirming its exemption from income tax is no longer controlling by express provision of the NIRC of 1997, as amended;

5. The FAN issued against [respondent] is valid and binding as it was issued within the prescriptive period. The FAN and the FLD, both dated September 25, 2009, were served upon [respondent] by registered mail as evidenced by Registry Receipt No. 8889 on October 20, 2009;

6. The administrative protest filed by [respondent] is devoid of any factual and legal basis to support [respondent's] contentions. Hence, by express provisions of law, the administrative protest filed by [respondent] should be considered void and without force and effect;

7. [Respondent] failed to submit all relevant documents in support of its administrative protest within sixty (60) days from its filing, in violation of Section 228 of the NIRC of 1997, as amended and RR No. 12-99; and,

8. This Court has no jurisdiction to try and hear the instant petition for review considering that the deficiency tax assessments issued against [respondent] have become final, executory and unappealable.

During trial, [respondent] presented Crispulo T. Aguillon, Jr.; Atty. Francisco Naputo, [respondent's] legal counsel; Dr. Edgar Claude A. Nadal, [respondent's] President from 2007 to 2010 and former member of the Board of Trustees; Joaquin S. Samaco, [respondent's] external auditor; and Levi B. Baliton, member of [respondent's] Board of Trustees, as its witnesses.

Thereafter, [respondent] filed its Formal Offer of Evidence on June 19, 2012, submitting Exhibits "A" to ["DD,"] inclusive of sub-markings; which this Court admitted in the Resolution dated July 31, 2012, except Exhibits "Y-1" and ["U-1."]

On October 9, 2012, [petitioner] presented her witnesses, BIR Revenue Officers Jonainah G. Usman and Aisah M. Acedillo.

[Petitioner] filed her Formal Offer of Documentary Evidence on November 6, 2012, submitting Exhibits ["1," "5" to "9," "12," "13," and "16," inclusive of sub-markings all of which were admitted in the Resolution dated December 20, 2012. On March 7, 2013, [petitioner] filed her Supplemental Formal Offer of Documentary Evidence, submitting Exhibits "18" and ["19,"] inclusive of sub-markings which this Court admitted in a Resolution dated July 12, 2013.

With the filing of [respondent's] Memorandum on February 6, 2013 and the Memorandum (for the [petitioner]) on March 8, 2013, the case was considered submitted for decision on July 12, 2013."

In the said Decision, the First Division held that:

WHEREFORE, the instant Petition for Review is hereby **GRANTED**. Accordingly, the Formal Letter of Demand dated September 25, 2009 demanding the payment of deficiency income, VAT, Withholding Tax on Compensation, and Expanded Withholding Tax Assessment in the total amount of ₱37,245,026.16 for the period covering taxable year 2007 pursuant to Assessment No. RR16-101-628-09, which is void, is hereby **CANCELLED** and **WITHDRAWN**.

SO ORDERED.[8]

[8] *Rollo, CTA EB No. 1147*, pp. 58-59, penned by Presiding Justice Roman G. Del Rosario, with Associate Justices Erlinda P. Uy and Cielito N. Mindaro-Grulla concurring.

Not satisfied with the Decision, petitioner filed a Motion for Reconsideration (Re: Decision dated December 16, 2013) on January 24, 2014.[9] Respondent filed its corresponding Comment/Opposition on February 24, 2014.[10]

On March 13, 2014, the First Division issued a Resolution,[11] where it held that:

> **WHEREFORE**, premises considered, [petitioner's] motion for reconsideration is **DENIED** for lack of merit.
>
> **SO ORDERED.**

Upon the denial, petitioner raised the instant case to the Court *En Banc* when it filed a "Petition for Review" on April 21, 2014,[12] praying that:

> **WHEREFORE**, premises considered, it is most respectfully prayed of the Honorable Court that the Decision dated December 16, 2013 and Resolution dated March 13, 2013 be **RECONSIDERED** and **MODIFIED** and an Order be issued declaring the Formal Letter of Demand and Final Assessment Notice (FAN) dated September 25, 2009 valid and binding between the parties and order petitioner to pay the amount of P37,245,026.16 plus 25% surcharge and 20% deficiency and delinquency interest for late payment until fully paid pursuant to Section 248 and 249 of the 1997 NIRC.[13]

On July 21, 2014, respondent filed her "Comment (On the Petition for Review)."[14]

On July 31, 2014, the Court issued a Resolution giving due course to the "Petition for Review," and ordering the parties to file their respective Memoranda within thirty (30) days.[15]

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[9] *Records, CTA Case No. 8108,* pp. 537-563.
[10] *Id.,* pp. 571-573.
[11] *Rollo, CTA EB Case No. 1147,* pp. 60-62.
[12] *Id.,* pp. 6-39.
[13] *Id.,* p. 37.
[14] *Id.,* pp. 69-77.
[15] *Id.,* pp. 79-80.

On September 4, 2014, respondent filed its "Memorandum"[16] while petitioner filed her "Memorandum" [17] on October 7, 2014 through registered mail.

On November 6, 2014, the Court promulgated a Resolution submitting the case for decision.[18]

Hence, this Decision.

The Issues

Based on the "Memorandum"[19] filed by petitioner, the assigned errors/issues of the case are as follows:

> **THE HONORABLE COURT FIRST DIVISION ERRED IN UTILIZING RULES AND JURISPRUDENCE ON THE DISPUTABLE PRESUMPTION OF RECEIPT OF MAIL MATTER *VIS-À-VIS* A DENIAL OF SUCH RECEIPT BY THE ADDRESSEE. EXAMINATION ALONG THESE LINES IS COMPLETELY IRRELEVANT TO THIS CASE;**
>
> **EVIDENCE OF BOTH PETITIONER AND RESPONDENT, CONTEMPORANEOUS OR IMMEDIATE TO THE EVENT IN QUESTION, SHOW THAT THE ASSESSMENTS WERE ENCLOSED WITH THE FLD;**
>
> **IT WAS CLEAR ERROR TO SHIFT THE BURDEN OF PROOF ON PETITIONER. EVIDENCE SHOWS THAT RESPONDENT WAS AWARE OF THE ASSESSMENT ALL ALONG. THUS, THE DENIAL OF RECEIPT WAS CLEARLY AN AFTERTHOUGHT BY RESPONDENT. A BARE DENIAL, UNSUPPORTED BY EVIDENCE CANNOT OPERATE TO OVERCOME A DISPUTABLE PRESUMPTION;**

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[16] *Id.*, pp. 81-94.
[17] *Id.*, pp. 137-169.
[18] *Id.*, p. 173.
[19] *Id.*, p. 140.

RESPONDENT IS LIABLE FOR INCOME TAX PURSUANT TO SECTION 27(B) OF THE 1997 NIRC, AS AMENDED;

RESPONDENT FAILED TO DEMONSTRATE THAT IT IS A RELIGIOUS, NON-PROFIT, NON-STOCK AND CHARITABLE INSTITUTION AND CONTINUES TO REMAIN AS SUCH; AND

THE TAX RULING ALLEGEDLY ISSUED TO RESPONDENT GRANTING EXEMPTION FROM THE PAYMENT OF INCOME TAX IS NO LONGER CONTROLLING BY EXPRESS PROVISION OF THE 1997 NIRC, AS AMENDED, HENCE, SHOULD NO LONGER BE ACCORDED RESPECT.

As to the "Memorandum"[20] filed by respondent, the issues raised are:

WHETHER OR NOT RESPONDENT IS LIABLE TO PAY THE AGGREGATE AMOUNT OF P37,245,026.16, ALLEGEDLY REPRESENTING DEFICIENCY INCOME, VALUE-ADDED TAX, WITHHOLDING TAX ON COMPENSATION, AND EXPANDED WITHHOLDING TAX, INCLUSIVE OF SURCHARGES, INTEREST, AND PENALTIES FOR TAXABLE YEAR 2007;

WHETHER OR NOT [PETITIONER] VIOLATED SECTION 3.1.4 OF REVENUE REGULATIONS 12-99;

WHETHER OR NOT THE 2007 DEFICIENCY TAX ASSESSMENTS AND FORMAL LETTER OF DEMAND DATED SEPTEMBER 25, 2009 HAVE FACTUAL AND LEGAL BASES; AND

WHETHER OR NOT [RESPONDENT] WAS DENIED DUE PROCESS.

The Ruling of the Court En Banc

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[20] *Id.*, p. 83.

The Court *En Banc* finds merit in the instant Petition for Review.

In the Decision dated December 16, 2013, the First Division unanimously ruled as follows:

> The Court shall first resolve the issue of whether or not respondent violated the procedure specified under Section 3.1.4 of Revenue Regulations (RR) No. 12-99, specially on the issuance of the Final Assessment Notice (FAN).
>
> Petitioner contends that respondent violated its right to due process when respondent failed to issue the FAN required under Section 228 of the NIRC of 1997, as amended and Section 3.1.4 of RR No. 12-99. As a consequence of respondent's failure to issue the FAN, petitioner argues that the assessment against it is void.
>
> On the other hand, respondent posits that the FAN was valid and binding as it was issued within the prescriptive period. Allegedly, the FLD and the FAN, all dated September 25, 2009, were sent to petitioner by registered mail as evidenced by Registry Receipt No. 8889 on October 20, 2009.
>
> Section 228 of the NIRC of 1997, as amended, which provides for the procedure in issuing and protesting an assessment, states:
>
> > "**SEC. 228**. *Protesting of Assessment.* — When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: Provided, however, That a preassessment notice shall not be required in the following cases:
> >
> > xxx xxx xxx
> >
> > The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.

√

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

Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within 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.

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

To implement the provisions of Section 228 of the NIRC of 1997, as amended, RR No. 12-99 was issued. Section 3.1.4 of RR No. 12-99 reads:

"3.1.4. *Formal Letter of Demand and Assessment Notice.* — The **formal letter of demand and assessment notice shall be issued** by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void. . . . **The same shall be sent to the taxpayer only by registered mail or by personal delivery**. . . ." (*Emphases supplied*)

Clearly, a formal letter of demand **AND** an assessment notice shall be issued by the Commissioner of Internal Revenue (CIR) or his duly authorized representative. **The use of the word "shall" in these legal provisions indicates the mandatory nature of the requirements laid down therein.** Thus, it is mandatory for respondent to demonstrate that both the formal letter of demand and the assessment notice were issued to the taxpayer within the prescriptive period.

Here, petitioner confirms that it received the FLD dated September 25, 2009, with attached Computation of Discrepancies and Facts, Laws, Rules and Regulations as basis of the assessment. It, however, vehemently denies receipt of the FAN. On the other hand, respondent insists that the FLD and the FAN were sent to petitioner by registered mail as evidenced by Registry Receipt No. 8889 on October 20, 2009.

Under the afore-quoted Section of RR No. 12-99, service of the assessment notice to the taxpayer may be by registered mail or by personal delivery. If the assessment is served by registered mail, and the original was not returned to respondent BIR, the presumption is that the taxpayer received the said assessment in the regular course of mail pursuant to Section 3(v), Rule 131 of the Rules of Court.

Thus, the facts to be proven in order to raise this disputable presumption are: (a) that the letter was properly addressed with postage prepaid; and (b) that it was mailed. Once these facts are established, the presumption is that the letter was received by the addressee as soon as it could have been transmitted to him in the ordinary course of the mail.

In *Barcelon, Roxas Securities, Inc. (now known as UBP Securities, Inc.) vs. Commissioner of Internal Revenue*, the Supreme Court ruled that while a mailed letter is deemed received by the addressee in the ordinary course of mail, this is still merely a disputable presumption subject to controversion, and a direct denial of the receipt thereof shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee, as quoted below:

"In *Protector's Services, Inc. v. Court of Appeals,* this Court ruled that when a mail matter is sent by registered mail, there exists a presumption, set forth under Section 3(v), Rule 131 of the Rules of Court, that it was received in the regular course of mail. The facts to be proved in order to raise this presumption are: (a) that the letter was properly addressed with postage prepaid; and (b) that it was mailed. **While a mailed letter is deemed received by the addressee in the ordinary course of mail, this is still merely a disputable presumption subject to controversion, and a direct denial of the receipt thereof shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee.**

In the present case, petitioner denies receiving the assessment notice, and the respondent was unable to present substantial evidence that such notice was, indeed, mailed or sent by the respondent before the BIR's right to assess had prescribed and that said notice was received by the petitioner. The respondent presented the BIR record book where the name of the taxpayer, the kind of tax assessed, the registry receipt number and the date of mailing were noted. The BIR records custodian, Ingrid Versola, also testified that she made the entries therein. . . .

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In this case, the entries made by Ingrid Versola were not based on her personal knowledge as she did not attest to the fact that she personally prepared and mailed the assessment notice. Nor was it stated in the transcript of stenographic notes how and from whom she obtained the pertinent information. Moreover, she did not attest to the fact that she acquired the reports from persons under a legal duty to submit the same. Hence, Rule 130, Section 44 finds no application in the present case. Thus, the evidence offered by respondent does not qualify as an exception to the rule against hearsay evidence.

Furthermore, independent evidence, such as the registry receipt of the assessment notice, or a certification from the Bureau of Posts, could have easily been obtained. Yet respondent failed to present such evidence." (*Emphasis supplied*)

As afore-stated, petitioner vigorously denies receiving the FAN. In support of its claim, petitioner presented Atty. Francisco I. Naputo, Crispulo T. Aguillon, Jr. and Joaquin S. Samaco, who testified by way of their Judicial Affidavits that the FAN was not attached to the FLD; and that petitioner even made repeated verbal and written requests for a copy of the said FAN from respondent. The significant portions of their respective Judicial Affidavits are quoted hereunder:

"JUDICIAL AFFIDAVIT
(Of Petitioner's Witness — Francisco I. Naputo)

xxx xxx xxx

3.Q. Having been aware of the missing 2007 assessment notice, what did you or MSH do about it, if any?

A. On December 15, 2009, we (Mr. Aguillon, Jr. the MSH Treasurer and I) went to see Ms. Adora L. Sijo, Chief of the Assessment Division of the Cagayan de Oro Regional Office to discuss among other things the missing 2007 assessment notice. I requested her to furnish us a copy [of] the said 2007 assessment notice which she agreed to do after reviewing the file-docket of the case.

4.Q. After that December 15, 2009 meeting, did the BIR actually furnish you or MSH a copy of the 2007 assessment notice?

A. As of the third week of April, 2010, both MSH and myself (sic) have not received any copy of the 2007 assessment notice from BIR — Cagayan de Oro Regional Office.

5.Q. With this turn of events, what did you do?

A. I sent a letter dated April 27, 2010 of the BIR Regional

Director of Cagayan de Oro City (which was previously marked as petitioner's Exhibit 'G'), requesting for a copy of the 2007 Final Assessment Notice that should have been attached or enclosed to the BIR's Formal Letter of Demand dated September 25, 2009.

A. I sent a letter dated April 27, 2010 of the BIR Regional Director of Cagayan de Oro City (which was previously marked as petitioner's Exhibit 'G'), requesting for a copy of the 2007 Final Assessment Notice that should have been attached or enclosed to the BIR's Formal Letter of Demand dated September 25, 2009.

6.Q. Did the BIR Regional Director of Cagayan de Oro make any response to your 27 April 2010 letter?

A. None so far at least as of June 18, 2010. Significantly, it was on June 18, 2010 that MSH lodged a Petition for Review with the Honorable Court of Tax Appeals which is now the case at bar. Noteworthy is the fact that since our visit to the Chief of the Assessment Division of BIR Cagayan de Oro City on December 15, 2009, up until MSH filed a Petition for Review with CTA on June 18, 2010, the BIR simply ignored our request for a copy of the 2007 Assessment Notice."

"JUDICIAL AFFIDAVIT
(Of Petitioner's Witness — Crispulo T. Aguillon, Jr.)

xxx xxx xxx

3.Q. What is the time shown in the assessment notice for 2007?

A. Unfortunately there is no time period to speak of because the assessment notice was nowhere enclosed to the FLD. In other words, with the missing 2007 assessment notice, we at MSH were at a loss when deficiency taxes as shown in the FLD were due and collectible.

4.Q. Given the missing 2007 assessment notice, what did MSH do?

A. First, MSH emphasized in the opening statement of its letter-protest dated November 25, 2009, the receipt of the FLD from the BIR, omitting on purpose the mention of assessment notice because it was not in fact appended to the FLD. Second, on December 15, 2009, we (MSH tax lawyer and I) went to the Cagayan de Oro Regional Office to discuss the missing 2007 assessment notice and request a copy thereof. There, we talked about this matter with Ms. Adora L. Sijo, Chief of the Assessment Division, and our lawyer requested for a copy of the missing 2007 assessment notice. She agreed to give MSH a copy of the said 2007 assessment notice after going over the file-docket of the case.

5.Q. Did the BIR actually furnish MSH a copy of the 2007 assessment notice after the December 15, 2009 meeting?

A. No, nothing of that sort happened at least as of the third week of April, 2010. MSH has not received the aforesaid 2007 assessment notice from BIR up until that time.

6.Q. With this development, what did MSH do?

A. We notified our tax lawyer on BIR's failure to furnish MSH a copy of the assessment notice for 2007.

7.Q. What then was the reaction of your lawyer to this piece of information?

A. He told us that he will take appropriate action on the matter.

8.Q. And what specifically was the action taken by your lawyer?

A. He sent a letter dated April 27, 2010 to the BIR Regional Director of Cagayan de Oro City requesting for a copy of the Final Assessment Notice (FAN) or assessment notice that should have been attached or enclosed to the BIR's FLD dated September 25, 2009.

9.Q. What was the response of the BIR Regional Director of Cagayan de Oro to this 27 April 2010 letter of the MSH lawyer that you mentioned, if any?

A. As of June 18, 2010, there was still no response by the BIR Regional Director of Cagayan de Oro to the 27 April 2010 letter of MSH lawyer. Incidentally, on June 18, 2010, MSH lodged the instant case with the Honorable Court of Tax Appeals via a Petition for Review. In other words, since our visit to the Chief of the Assessment Division of BIR Cagayan de Oro City on December 15, 2009 up to MSH's filing of its Petition for Review with CTA on June 18, 2010, the BIR did not lift a finger vis-à-vis the request of MSH lawyer for a copy of the 2007 FAN."

"JUDICIAL AFFIDAVIT
(Of Petitioner's Witness — Joaquin S. Samaco)

xxx xxx xxx

8.Q. Could you please tell us what particular defects did you notice in the FLD while in the course of your consultation and which you eventually pointed out to your client (MSH)?

A. Firstly, I noticed the obvious absence of Assessment Notice that should have been appended or enclosed to the FLD, that is if we go by the last paragraph of the said FLD explicitly stating in the last line the phrase — 'enclosed assessment notice'. . . ."

The testimony of Francisco I. Naputo remains uncontroverted and is given credence specifically since respondent never cross-examined him. Moreover, even on cross-examination, witness Crispulo T. Aguillon, Jr. never wavered from his declaration that petitioner did not receive the FAN; while Joaquin S. Samaco was not cross-examined by respondent on the aspect of the non-existence of the FAN.

In addition thereto, petitioner submitted in evidence its letter dated April 27, 2010 requesting a copy of the FAN, addressed to respondent, through the Regional Director of BIR Revenue Region No. 16-Cagayan de Oro City.

A careful scrutiny of the said testimonies and the letter dated April 27, 2010 sufficiently established that petitioner did not receive the FAN that respondent claims to have been mailed or sent, together with the FLD, to petitioner.

In contrast, respondent was unable to present substantial evidence that the FAN was indeed mailed or sent and that the same was received by petitioner. Records reveal that respondent merely alleges that the FLD and the FAN both dated September 25, 2009 were sent to petitioner by registered mail as purportedly evidenced by Registry Receipt No. 8889 on October 20, 2009. She failed, however, to present independent evidence, such as the said Registry Receipt No. 8889, or a certification from the Bureau of Posts, which could have easily been obtained. It is basic in the rule of evidence that bare allegations, unsubstantiated by evidence, are not equivalent to proof.

In *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.,* the Supreme Court made a pronouncement that failure to strictly comply with the notice requirements prescribed under Section 228 of the NIRC of 1997, as amended, and RR No. 12-99 amounts to a denial of due process and makes the assessment void, *viz.*:

> "From the provision quoted above, it is clear that the sending of a PAN to taxpayer to inform him of the assessment made is but part of the "due process requirement in the issuance of a deficiency tax assessment," the absence of which renders nugatory any assessment made by the tax authorities. The use of the word "shall" in subsection 3.1.2 describes the mandatory nature of the service of a PAN. The persuasiveness of the right to due process reaches both substantial and procedural rights and the failure of the CIR to strictly comply with the requirements laid down by law and its own rules is a denial of Metro Star's right to due process. **Thus, for its failure to send the PAN stating the facts and the law on which the assessment was made as required by Section 228 of R.A. No. 8424, the assessment made by the CIR is void.**
>
> The case of *CIR v. Menguito* cited by the CIR in support of its argument that only the non-service of the FAN is fatal to the validity of an assessment, cannot apply to this case because the issue therein was the non-compliance with the provisions of R.R. No. 12-85 which sought to interpret Section 229 of the old tax law. RA No. 8424 has already amended the provision of Section 229 on protesting an assessment. The old requirement of merely notifying the taxpayer of the CIR's findings was changed in 1998 to informing the taxpayer of not only the law, but also of the facts on which an assessment would be made. Otherwise, the assessment itself would be invalid. The regulation then, on the other hand, simply provided that a notice be sent to the respondent in the form

> prescribed, and that no consequence would ensue for failure to comply with that form.
>
> **The Court need not belabor to discuss the matter of Metro Star's failure to file its protest, for it is well-settled that a void assessment bears no fruit.** (*Emphases supplied; Citations omitted*)

If the failure to send a Preliminary Assessment Notice (PAN) to the taxpayer was considered a violation of due process warranting the declaration that the assessment is void, with more reason that the failure to send the FAN itself to petitioner would render the assessment against it also void following the rationale laid down by the High Court in *Metro Star Superama, Inc.*

In *Commissioner of Internal Revenue vs. Azucena T. Reyes*, the Supreme Court declared that **if there is no valid notice sent, the assessment is void**, and the reason is that the "*law imposes a substantive, not merely a formal, requirement. To proceed heedlessly with tax collection without first establishing a valid assessment is evidently violative of the cardinal principle in administrative investigations: that taxpayers should be able to present their case and adduce supporting evidence.*"

The failure of respondent to prove that the FAN was mailed or sent to petitioner and that said FAN was received by petitioner leads to the conclusion that no FAN was issued against petitioner. In the absence of a valid FAN, there is no basis for respondent to issue the FLD dated September 25, 2009 demanding payment of discrepancy taxes, inclusive of legal increments, for year 2007 in the amount of P37,245,026.16, as contained in the alleged in FAN.

Truth to tell, a void assessment bears no fruit and it cannot give rise to an obligation to pay deficiency taxes. Consequently, there is no legal basis for the CIR to formally demand the payment or to collect the deficiency taxes which are not covered by a valid FAN.

After a careful consideration of the factual circumstances of the case, the Court *En Banc* partially agrees with the First Division's ruling.

The Court *En Banc* finds the disputable presumption of receipt of mail matter in the regular course of mail inapplicable to this case.

On one hand, respondent asserts that *Section 3(v) of Rule 131 of the Revised Rules of Court* ("RROC") applies to the receipt of the FAN. On the other hand, petitioner alleges that due to respondent's admission of receipt of the FLD and Annexes A and B, *Section 2(a) of Rule 131* of the same Rules, applies instead.

Sections 2 and 3 of Rule 131 of the RROC, which provide the meaning of "presumption," read as follows:

> SECTION 2. *Conclusive presumptions.* — The following are instances of conclusive presumptions:
>
> (a) Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it;
>
> (b) The tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation of landlord and tenant between them.
>
> SECTION 3. *Disputable presumptions.* — The following presumptions are satisfactory if uncontradicted, but may be contradicted and overcome by other evidence:
>
> xxx xxx xxx
>
> (v) That a letter duly directed and mailed was received in the regular course of the mail; xxx [Emphases ours]

Presumptions come in two kinds: first are the conclusive presumptions, which are final and cannot be refuted by evidence to the contrary; second are the disputable presumptions, which are generally considered definite, unless proven otherwise.

In the present case, the mail matter being referred to by respondent are the FLD and its annexes. It must be noted that with or without the enclosed FAN, respondent consistently and categorically admitted receipt of the said mail matter, as follows:

1. Protest to the FAN dated November 25, 2009;[21]

2. Letter to the BIR dated April 27, 2010, requesting for a copy of the FAN;[22]

3. "Petition for Review" in CTA Case No. 8108, filed in CTA Case No. 8108 on June 18, 2010;[23]

4. "Joint Stipulation of Facts and Admissions" in CTA Case No. 8108, filed by both parties on December 28, 2010;[24]

5. Testimony of witnesses, namely: Atty. Francisco I. Naputo[25], Mr. Crispulo T. Aguillon, Jr.[26], and Joaquin S. Samaco[27]; who all testified in CTA Case No. 8108, that respondent received the FLD;

6. "Formal Offer of Evidence" filed on June 19, 2012 in CTA Case No. 8108, with attached Exhibits "E" (FLD with date of receipt on November 6, 2009), "E-2" (Annex A attached to the FLD, showing the Computation of Discrepancies), and "E-3" (Annex B attached to the FLD, showing the Facts, Laws, Rules & Regulations as bases of the assessment);[28]

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[21] *Records, CTA Case No. 8108*, pp. 262-267.
[22] *Id.*, p. 270.
[23] *Id.*, pp. 1-6.
[24] *Id.*, pp. 144-147.
[25] *Id.*, pp. 281-282.
[26] *Id.*, pp. 283-286.
[27] *Id.*, pp. 306-307.
[28] *Id.*, pp. 220, 251-261.

7. "Memorandum" in CTA Case No. 8108, filed on February 6, 2013;[29]

8. "Motion for Reconsideration" in CTA Case No. 8108, filed on January 24, 2014;[30]

9. "Comment (On the Petition for Review)" in the present case, filed on July 21, 2014;[31] and

10. "Memorandum" in the present case, filed by registered mail on October 7, 2014.

Considering that the mail was indeed received by respondent, the Court finds that instead of the disputable presumption of receipt of mail matter under *Section 3(v) of Rule 131 of the RROC*, the conclusive presumption of estoppel under *Section 2(a), Rule 131 of the RROC* applies instead.

Section 2(a), Rule 131 of the RROC should be read in connection with the meaning of "Estoppel" under *Article 1431 of the New Civil Code, viz.*:

> ARTICLE 1431. Through estoppel an admission or representation is rendered conclusive upon the person making it, and cannot be denied or disproved as against the person relying thereon.

As a result of respondent's numerous admissions that it received the FLD and its annexes, whether or not a separate assessment notice was enclosed thereto, petitioner cannot be faulted for having relied thereon and respondent is estopped from saying that it did not receive the same. Being a conclusive presumption, the fact of receipt of the mail cannot be rebutted by other evidence.

The Court *En Banc* finds that there is no valid assessment against respondent.

[29] *Id.*, pp. 404-425.
[30] *Id.*, pp. 537-563.
[31] *Rollo, CTA EB No. 1147*, pp. 69-77.

Having established that respondent received the FLD and its annexes, we now delve into the issue of whether or not there was a valid assessment.

Petitioner claims that evidence provided by both parties show that the FAN was enclosed with the FLD, while respondent denies receiving the FAN.

To prove that it did not receive the said FAN, respondent presented the following in evidence:

1. Letter request for a copy of the FAN dated April 27, 2010;[32] and

2. Testimony of witnesses, namely: Atty. Francisco I. Naputo[33], Mr. Crispulo T. Aguillon, Jr.[34], and Joaquin S. Samaco[35].

Claiming that it appended the FAN to the FLD, petitioner offered the following in evidence:

1. FLD and FANs, all with a receiving stamp of the Admin, Mailing Section[36] received on October 15 2009;

2. Memorandum[37] dated Decmeber 11, 2009 from Regional Director Tabule to the Revenue District Officer of Revenue District No. 101, informing the latter that the PAN and FLD were sent to the taxpayer; and

3. Testimony of witness Jonainah G. Usman[38].

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[32] *Records, CTA Case No. 8108*, p. 270.
[33] *Id.*, pp. 281-282.
[34] *Id.*, pp. 283-286.
[35] *Id.*, pp. 306-307.
[36] *BIR Records*, pp. 799-802, 813.
[37] *Id.*, p. 822.
[38] *Records, CTA Case No. 8108*, pp. 361-362.

A careful scrutiny of the FLD filed by petitioner as Exhibit "8"[39] and by respondent as Exhibit "E"[40] will reveal the following discrepancies:

1. Exhibit "8" bears no BIR letterhead and logo, while Exhibit "E" has both letterhead and logo;

2. In Exhibit "8," in the place where the receiving stamp of respondent dated November 6, 2009 can be found *per* Exhibit "E" is the receiving stamp of the "Admin, Mailing Section" with the date October 15, 2009;

3. The signature of Regional Director Esmeralda M. Tabule are different in both documents; and

4. Exhibit "8" has signatures in the initials portion found in the lower left part of the page, while Exhibit "E" has none; the same initials can be found on each and every page of Annexes "A" and the last page of Annex "B" as attached to Exhibit "8", while Annexes "A" and "B" of Exhibit "E" have no such signatures.

Therefore, it is clear that Exhibits "8" and "E," while both being entitled "Formal Letter of Demand," dated September 25, 2009 and the same in substance; are different documents and only one of which can be considered the document actually transmitted to respondent by mail. However, in order to determine which of the said exhibits were actually mailed to respondent, it is important to inspect both of the FLDs presented by both parties.

The Court finds that Exhibit "E" is the document mailed by petitioner and received by respondent for the following logical reasons:

1. Respondent would have noted the absence of the BIR letterhead and logo if it received Exhibit "8" instead of Exhibit "E;"

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[39] *BIR Records*, p. 813.
[40] *Records, CTA Case No. 8108*, p. 251.

2. It is impossible for the same FLD to bear the "Admin, Mailing Section" stamp as well as the receiving stamp of respondent on the same portion (below the date, at the right side of respondent's address and above the body of the FLD) at the same time;

3. It is more logical to believe that respondent received the FLD without the "Admin, Mailing Section" stamp since the said portion of the FLD is also the most convenient portion to place respondent's own receiving stamp. Therefore, finding the said portion is vacant upon receipt, respondent placed its stamp thereon; and

4. It is impossible to think that respondent received the FLD with the stamp and erased it, because at that time it did not have any idea that the presence of the said stamp will be in issue later on and as indicated in Exhibit "E," it is a faithful reproduction of the original document. Meaning, petitioner's counsel had the chance to inspect the original of the said document and noting that the copy is a faithful copy of the original, raised no objections. Should the "Admin, Mailing Section" have been erased, petitioner's counsel should have spotted it and mentioned this concern.

Based on the foregoing, the Court *En Banc* agrees with the First Division that no such FAN was enclosed to the FLD and its annexes, as claimed by respondent; and whoever prepared Exhibit "8" went to great lengths to ensure that the FLD and FANs will appear to be mailed together just to cover the fact that no FAN was indeed mailed along with Exhibit "E."

Consequently, we look into the documents actually received by respondent (FLD and the Annexes) to determine whether there is still a valid assessment, despite non-receipt by the respondent of the FAN.

The relevant provision is *Paragraph 2 of Section 228 of the 1997 NIRC*, which states that "taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void." This was implemented by *Section 3.1.4 of Revenue Regulations No. 12-99*, which provides as follows:

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

A valid assessment contains not only a computation of tax liabilities but also a demand for payment within a prescribed period.[41] The ultimate purpose thereof is to ascertain the amount that the taxpayer has to pay.[42] It signals the time when penalties and interests begin to accrue against the taxpayer, and enables the taxpayer to determine his remedies thereon.[43]

From the foregoing, it can be gathered that the elements of a valid assessment are: *(1)* a computation of tax liabilities; *(2)* a demand for payment within the prescribed period; and *(3)* a statement of the legal and factual basis/bases used.

A cursory reading of the FLD[44] and its Annexes,[45] as admittedly received by respondent, will prove that the first and third requirements are present in the documents admittedly received by respondent, *viz.*:

> 1. The FLD provides the total amount due, as well as a table which breaks down the basic taxes, surcharges, interests, compromise penalties and the total amounts *per* tax type. Moreover, the "Computation of Discrepancies" (Annex A) gives a detailed computation of the assessments *per* tax type; and

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[41] *Commissioner of Internal Revenue v. Menguito*, G.R. No. 167560, September 17, 2008, 461 SCRA 565; *Tupaz v. Ulep*, G.R. No. 127777, October 1, 1999, 316 SCRA 118; *Commissioner of Internal Revenue v. Pascor Realty and Development Corporation, et.al.*, G.R. No. 128315, June 29, 1999, 309 SCRA 402.
[42] *Tupaz v. Ulep*, G.R. No. 127777, October 1, 1999, 316 SCRA 118.
[43] *Commissioner of Internal Revenue v. Menguito*, G.R. No. 167560, September 17, 2008, 461 SCRA 565; *Commissioner of Internal Revenue v. Pascor Realty and Development Corporation, et.al.*, G.R. No. 128315, June 29, 1999, 309 SCRA 402.
[44] *Records, CTA Case No. 8108*, p. 251.
[45] *Id.*, pp. 252-261.

2. The "Facts, Laws, Rules & Regulations as basis of the assessment" (Annex B) provides the factual and legal bases of the assessment.

As to the second requirement, records reveal that the FLD states that "[i]n view thereof, you are requested to pay your aforesaid deficiency internal revenue tax liabilities through the duly authorized agent bank in which you are enrolled within the time shown in the enclosed assessment notice[;]" and "[p]lease note that the interest and total amount due shall be adjusted if paid beyond 10/16/09."

The subject FLD did not make a clear and categorical demand for payment of the alleged tax liabilities for it contains merely a request for payment.[46] Also, the date "10/16/09" cannot be considered a deadline for payment of the alleged tax liabilities as the FLD itself refers to the enclosed assessment notice for the due date.[47] It merely states that the amount of interest indicated therein runs only up to October 16, 2009 and payment beyond the said date will require an adjustment of the interest and, consequently, the total amount due.

Based on the records, the Court *En Banc* finds that there is no valid assessment for failure to issue the required FAN to the taxpayer. The use of the word "shall" under *Paragraph 2 of Section 228 of the 1997 NIRC*, as implemented by *Section 3.1.4 of Revenue Regulations No. 12-99*, underscores a mandatory, imperative and compulsory character; it is a word of command.[48] Due process requires service and receipt thereof by the taxpayer.[49]

The Court *En Banc* has no choice but to dismiss the instant Petition for Review.

WHEREFORE, the assailed Decision promulgated on December 16, 2013 and the Resolution dated March 13, 2014 are hereby **AFFIRMED**.

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[46] *Commissioner of Internal Revenue v. Fitness by Design, Inc.*, CTA *EB* Case No. 970, July 14, 2014.
[47] *Id.*
[48] *Enriquez, et.al. v. Enriquez, et. al.*, G.R. No. 139303, August 25, 2005, 468 SCRA 77; citing *Lacson v. Lacson*, G. R. No. L-23482, August 30, 1968, 24 SCRA 848.
[49] *Commissioner of Internal Revenue v. Menguito*, G.R. No. 167560, September 17, 2008, 461 SCRA 565; *Commissioner of Internal Revenue v. Pascor Realty and Development Corporation, et.al.*, G.R. No. 128315, June 29, 1999, 309 SCRA 402.

J

SO ORDERED.

LOVELL R. BAUTISTA
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

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

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

CERTIFICATION

Pursuant to *Section 13 of Article VIII of the Constitution,* it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of this Court.

ROMAN G. DEL ROSARIO
Presiding Justice