REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA *EB* NO. 2237** *(CTA Case No. 9307)*
	Present:
-versus-	**DEL ROSARIO, P.J., CASTAÑEDA, JR., UY, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, MODESTO-SAN PEDRO, REYES-FAJARDO,** *and* **CUI-DAVID,** *JJ.*
TOLEDO POWER COMPANY, *Respondent.*	Promulgated: MAR 0 4 2022 2:35 pm

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RESOLUTION

MODESTO-SAN PEDRO, J.:

For resolution is petitioner's ***Motion for Reconsideration (Re: Decision promulgated 12 July 2021)*** ("Motion"), filed on 28 July 2021,[1] with respondent's ***Comment/Opposition (on Petitioner's Motion for Reconsideration dated July 21, 2021)*** ("Comment"), filed on 22 November 2021.[2]

In his Motion, petitioner insists that the assessment issued against respondent is valid. He explains that respondent's sale of electricity to Carmen Copper Corporation ("CCC") is subject to value-added tax ("VAT"), considering that it was for the latter's general and administrative use.

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[1] *EB* Records, pp. 117-125; Petitioner filed his Motion within 15 days from its receipt of the assailed Decision on 15 July 2021. Hence, this Motion was timely filed.
[2] *Id.*; pp. 129-147.

He argues that respondent's act of paying the assessed deficiency VAT signifies its concurrence with the validity of the assessment. He also contends that since the said payment was made during the Preliminary Assessment Notice ("PAN") stage, the issuance of the Final Letter of Demand and Assessment Notices ("FLD/FAN") is deemed superfluous.

Meanwhile, respondent, in its Comment, states that its sale of electricity to CCC is subject to VAT zero-rating having satisfied all the conditions under ***Revenue Memorandum Order ("RMO") No. 9-2000***[3] and the Cross-Border Doctrine. It also opines that the tax payments were erroneous since the BIR did not issue an FLD/FAN, which is mandatory in all assessment cases.

After careful review of the foregoing contentions, the Court *En Banc* finds the Motion bereft of merit.

Unfortunately for petitioner, it failed to present any meritorious argument for the Court *En Banc* to reconsider the assailed Decision. Based on respondent's pieces of evidence, its customer, CCC, is a BOI registered entity and a 100% exporter of copper concentrate. Since all of CCC's products are destined for consumption abroad, no VAT may be imposed thereon, consistent with the ***Cross Border Doctrine***, ***Section 106(A)(2)(a)(5) of the Tax Code***, and ***Section 3 of RMO No. 9-2000***.

Furthermore, respondent was able to present a notarized Certification from CCC certifying that the electricity it purchased from respondent was entirely used in its mining and ore processing operations and not for its general and administrative use. Being a notarized document, the Certification enjoys the presumption of validity, which petitioner has failed to overturn.

As for the lack of an FLD/FAN, the Court *En Banc* reminds petitioner of the functions of the PAN vis à vis the FLD/FAN as provided under ***Section 228 of the Tax Code*** as implemented in ***Revenue Regulations No. 18-13***,[4] to wit:

> "SEC. 228. Protesting of Assessment. - When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, **he shall first notify the taxpayer of his findings**: Provided, however, That a **pre-assessment notice** shall not be required in the following cases:
>
> (a) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the face of the return; or

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[3] Tax Treatment of Sales of Goods, Properties and Services Made by VAT-registered Suppliers to BOI-registered Manufacturers-Exporters With 100% Export Sales, 2 February 2000.

[4] Amending Certain Sections of Revenue Regulations No. 12-99 Relative to the Due Process Requirement in the Issuance of a Deficiency Tax Assessment, 28 November 2013.

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

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

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

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

The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.

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

Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within 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 one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable"

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"SEC. 3. Due Process Requirement in the Issuance of a Deficiency Tax Assessment. —

3.1 Mode of procedure in the issuance of a deficiency tax assessment:

3.1.1 Preliminary Assessment Notice (PAN). — If after review and evaluation by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, the said Office shall issue to the taxpayer a **<u>Preliminary Assessment Notice (PAN) for the proposed assessment.</u>** It shall show in detail the facts and the law, rules and regulations, or jurisprudence **<u>on which the proposed assessment is based</u>** (see illustration in ANNEX "A" hereof).

If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN, he shall be considered in default, in which case, a **Formal Letter of Demand and Final Assessment Notice (FLD/FAN) shall be issued calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.**

If the taxpayer, within fifteen (15) days from date of receipt of the PAN, responds that he/it disagrees with the findings of deficiency tax or taxes, an FLD/FAN shall be issued within fifteen (15) days from filing/submission of the taxpayer's response, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.

3.1.2 Exceptions to Prior Notice of the Assessment. — Pursuant to Section 228 of the Tax Code, as amended, a PAN shall not be required in any of the following cases:

(i) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax appearing on the face of the tax return filed by the taxpayer; or

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

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

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

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

In the above-cited cases, a FLD/FAN shall be issued outright.

3.1.3 Formal Letter of Demand and Final Assessment Notice (FLD/FAN). — **The Formal Letter of Demand and Final Assessment Notice (FLD/FAN) shall be issued by the Commissioner or his duly authorized representative. The FLD/FAN 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 assessment shall be void** (see illustration in ANNEX "B" hereof)."
(Emphasis and underscoring supplied.)

Based on the foregoing, the issuance of the FLD/FAN is at all times required under the Tax Code and BIR Regulations. The FLD/FAN not only constitutes the BIR's demand for payment; it also establishes the taxpayer's basic deficiency tax liability. In short, the right to collect the deficiency taxes on the part of the BIR and the liability of the taxpayer accrues or ripens only upon the issuance of the FLD/FAN.

The PAN cannot replace the FLD/FAN since the same is merely a pre-assessment or a "proposed assessment." The function of the PAN is hinged on due process, specifically, to inform the taxpayer of the proposed findings of the BIR and to give the same a chance to dispute the findings before the BIR finalizes the assessment and determines the liability of the taxpayer. This is why a Protest or Reply to a PAN is not required under BIR Regulations; only an FLD/FAN is essential in cases when the taxpayer's tax liability is apparent (e.g. mathematical error, incorrect withholding) because the purpose of the PAN is to merely inform the taxpayer of the BIR's initial findings, not establish the taxpayer's liability.

Contrary to petitioner's claim, the issuance of an FLD/FAN, in this case, is not tantamount to double demand since as stated earlier, without the said issuance, there is no demand nor an established tax liability to speak of. The payment of respondent does not forego the need for an FLD/FAN. No law or regulations support this assertion. Furthermore, there are instances where the taxpayer settles the assessment in advance in order to stop the continuous accrual of interest charges. In this case, the Court still upheld the need to issue an FLD/FAN.[5]

All told, the Court *En Banc* finds no cogent reason to modify or reverse the assailed Decision.

WHEREFORE, premises considered, petitioner's **Motion for Reconsideration (Re: Decision promulgated 12 July 2021)** is hereby denied for lack of merit.

SO ORDERED.

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

WE CONCUR:

(I reiterate my concurrence to the Separate C.O. of Justice Villena in the assailed Decision)
ROMAN G. DEL ROSARIO
Presiding Justice

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[5] CIR v. 3M Philippines, Inc, CTA *EB* Case No. 1330, 21 November 2016.

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

ERLINDA P. UY
Associate Justice

Ma. Belen

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

ON LEAVE
JEAN MARIE A. BACORRO-VILLENA
Associate Justice

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

LANEE S. CUI-DAVID
Associate Justice