REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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DRUGMAKER'S BIOTECH RESEARCH LABORATORIES, INC. (through its representative Drugmakers Laboratories, Inc.), Petitioner,	**CTA Case No. 8664**
	Members:
- versus -	**DEL ROSARIO,** *P.J.*, **UY,** and **MINDARO-GRULLA,** *JJ.*
THE COMMISSIONER OF INTERNAL REVENUE, Respondent.	***Promulgated:*** JAN 05 2018; 4:05 p.m.

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DECISION

UY, *J.*:

Before this Court is a *Petition for Review*[1] filed on June 24, 2013 by Drugmaker's Biotech Research Laboratories, Inc., through its representative Drugmaker's Laboratories, Inc.[2], against the Commissioner of Internal Revenue to seek the cancellation and/or withdrawal of the *Warrant of Distraint and/or Levy* for alleged deficiency income tax and value-added tax (VAT) in the aggregate amount of ₱39,705,067.07 for taxable year 2007.

THE FACTS

Petitioner Drugmaker's Biotech Research Laboratories, Inc. is a domestic corporation duly organized and existing under Philippine laws, with principal office at E & E Industrial Complex, Narra Road, San Pedro, Laguna.[3] It is registered with the Bureau of Internal

[1] Docket – Vol. I. pp. 6 to 21.
[2] Exhibits "P-1163" and "P-1163-a", Docket – Vol. XI. p. 7650.
[3] Exhibit "P-1", Docket – Vol. XI. p. 7473.

Revenue (BIR) with Tax Identification Number (TIN) 204-482-474-000.[4]

On the other hand, respondent in her capacity as the head of the Bureau of Internal Revenue, is authorized and tasked under existing laws and implementing administrative regulations to perform the duties of the said office, including, among others, the power to act upon the withdrawal and/or cancellation of any tax assessment, warrant of distraint/levy, and notice of seizure. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.[5]

On March 29, 2007, the Securities and Exchange Commission (SEC) approved the Plan of Merger dated June 1, 2005 and the Supplemental to the Plan of Merger dated November 20, 2006 executed by and among Drugmaker's Laboratories, Inc. (DLI), as surviving corporation, and petitioner and Biotech Research Laboratories, Inc., as absorbed corporations; whereby the entire assets and liabilities of the latter shall be absorbed by the former.[6]

On July 13, 2009, petitioner received the Letter Notice No. 057-RLF-07-00-00015[7] issued by then Commissioner Sixto Esquivias IV. Thereafter, petitioner received the Letter of Authority (LOA) No. LOA-2009-00016815[8] dated April 30, 2010 issued by the BIR, through its Deputy Commissioner-Operations Group, Nelson Aspe, authorizing the examination of petitioner's books of accounts and other accounting records for taxable year 2007.

Thereafter, a *Preliminary Assessment Notice* (PAN) dated July 27, 2010, with attached Details of Discrepancies was issued by respondent.[9]

On January 31, 2011, petitioner sent a letter addressed to Salina Marinduque, Team Head LN Task Force of the BIR, stating that it has ceased operation as a result of the merger with DLI effective January 6, 2005.[10]

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[4] Par. b, JSFI, Docket – Vol. VII, p. 4444.
[5] Par. c, JSFI, Docket – Vol. VII, p. 4445.
[6] Exhibit "P-1", Docket – Vol. XI. pp. 7467 to 7493.
[7] Exhibits "P-1160-a" and "R-2", BIR Records, p. 80.
[8] Exhibits "P-1159" and "R-1", BIR Records, p. 89.
[9] Exhibit "R-6", BIR Records, pp. 101 to 103.
[10] Exhibits "P-1161", "P-1161-a", and "P-1161-b", Docket – Vol. XI, pp. 7648 to 7649; Par. a, JSFI, Docket – Vol. VII, p. 4444.

Thereafter, respondent issued an Amended PAN with attached *Details of Discrepancies* on April 11, 2011.[11] On May 13, 2011, respondent CIR, thru Deputy Commissioner Nelson M. Aspe, issued a *Final Assessment Notice* (FAN) with attached Assessment Notice Nos. F-057-LNTF-07-VT-068 and F-057-LNTF-07-IT-068, for deficiency VAT, and deficiency income tax.[12]

Petitioner, however, denies receipt of the PAN, Amended PAN, and FAN.[13]

On November 28, 2011, respondent issued a Preliminary Collection Letter to petitioner.[14] Thereafter, a Final Notice Before Seizure was issued by respondent on January 23, 2013.[15]

Subsequently, on April 23, 2013, the BIR, through Revenue District Officer Julio Alcasabas, served a *Warrant of Distraint and/or Levy* to petitioner.[16]

Petitioner filed its *Petition for Review* on June 24, 2013. Respondent then filed his *Answer*[17] through registered mail on September 17, 2013 and received by the Court on September 24, 2013.

Petitioner likewise filed an *Amended Petition for Review*[18] on January 30, 2014. Respondent, in turn, filed an *Amended Answer*[19] through registered mail on February 10, 2014 and received by the Court on February 18, 2014, interposing the following Special and Affirmative Defenses:

> "**SPECIAL AND AFFIRMATIVE DEFENSES**
>
> 4. Respondent hereby reiterates and re-pleads the preceding paragraphs of this *Amended Answer* as part of her Special and Affirmative Defenses.

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[11] Exhibit "R-8", BIR Records, pp. 130 to 132.
[12] Exhibit "R-10", BIR Records, pp. 134 to 139.
[13] Par 15, Statement of the Facts, Petition for Review, Docket – Vol. I, p. 9.
[14] BIR Records, p. 144.
[15] BIR Records, pp. 146.
[16] Exhibit "P-1162", BIR Records, p. 148.
[17] Docket – Vol. I. pp. 182 to 193.
[18] Docket – Vol. I. pp. 471 to 490.
[19] Docket – Vol. I. pp. 588 to 605.

This Honorable Court has no jurisdiction over the instant petition for failure to exhaust all the administrative remedies before elevating this case to the Honorable Court.

5. The instant petition is not warranted for lack of jurisdiction as petitioner failed to exhaust all the administrative remedies before elevating this case to the Honorable Court.

6. Section 1 (j) of Rule 16 of the 1999 Rules of Civil Procedure provides a well-settled rule, to wit:

> 'MOTION TO DISMISS'
>
> Section 1. *Grounds.* — Within the time for but before filing the answer to the complaint or pleading asserting a claim, a motion to dismiss may be made on any of the following grounds:
>
> x x x
>
> (j) That a condition precedent for filing the claim has not been complied with.'

7. Section 228 of the National Internal Revenue Code of 1997 (hereinafter, 'NIRC') sets the period within which a taxpayer may contest an assessment, to wit:

> 'xxxx 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. xxxx'

8. Such form and manner of interposing a protest are further threshed out and provided for in Section 3.1.5 of Revenue Regulation No. 12-99 (hereinafter, 'RR 12-99'), to wit:

> '3.1.5 Disputed Assessment. — The taxpayer or his duly authorized representative may protest administratively against the aforesaid formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof. xxxx
>
> The taxpayer shall submit the required documents in support of his protest within sixty (60) days from date of filing of his letter of protest, otherwise, the assessment shall become final, executory and demandable. xxxx
>
> If the taxpayer fails to file a valid protest against the formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof, the assessment shall become final, executory and demandable.
>
> If the protest is denied, in whole or in part, by the Commissioner, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from date of receipt of the said decision, otherwise, the assessment shall become final, executory and demandable. xxxx
>
> If the Commissioner or his duly authorized representative fails to act on the taxpayer's protest within one hundred eighty (180) days from date of submission, by the taxpayer, may appeal to the Court of Tax Appeals within thirty (30) days from the lapse of the said 180-day

period, otherwise, the assessment shall become final, executory and demandable.'

9. Based on the subject *Petition for Review*, respondent is aware that petitioner only admits of receiving the following documents:

a) Letter Notice No. 057-RLF-07-00-00015;
b) Letter of Authority No. LOA-2009-00016815; and
c) Warrant of Distraint and/or Levy.

10. All of these documents were admittedly sent to Drugmaker's Biotech Research Laboratories, Inc. (DBRLI)'s old office in E&E Industrial Complex, Narra Road, San Pedro Laguna.

11. However, BIR Records show that the following documents were *also* served to petitioner *at the above-mentioned address*, through registered mail, as proven by its corresponding Registry Return Receipts:

a) Notice of Informal Conference (NIC) dated 11 June 2010;
b) PAN with attached Details of Discrepancies dated 27 July 2010;
c) Amended PAN with attached Details of Discrepancies dated 11 April 2011;
d) Final Assessment Notice (FAN) with attached Details of Discrepancies dated 13 May 2011.

12. In the subject *Petition for Review*, it was stated:

'Sometime **early May of 2010**, or more than three (3) years after DBRLI ceased to exist as a corporation, the BIR, through its Deputy Commissioner Nelson Aspe, sent Letter of Authority No. LOA-2009-00016815 dated April 30, 2010. This was later followed by a Letter Notice No. 057-RLF-07-00-00015 from then Commissioner of Internal Revenue Sixto Esquivias IV dated July 13, 2009. **Both were left behind at DBRLI's old office** in E&E Industrial Complex, Narra Road, San Pedro

> Laguna **which by then had already become an office of DMLI**. xxxx
>
> By way of a response and/or answer to the BIR's Letter of authority and Letter Notice, the former president of DBRLI, Eliezer V. Del mundo, **sent a letter dated January 31, 2011** informing the BIR that DBRLI had already ceased operations and that **all of its sales and purchases had already been consolidated with the sales and purchases of surviving corporation DMLI** as early as 2006. x x x x (emphasis supplied)

13. Assuming without conceding that petitioner's assertions are indeed true, respondent finds it questionable that the former president of petitioner responded to the said BIR's Letter of Authority and Letter Notice **only after almost eight (8) months.**

14. If it is true that by then – a) petitioner had already ceased operations and; b) that all of its sales and purchases had already been consolidated with the sales and purchases of surviving corporation DMLI and c) petitioner's old office had already become an office of DMLI. – DMLI should have took the necessary actions to protect the interest of petitioner. After all, the subject of the assessment were sales and purchases of DBRLI which they claim '*had already been consolidated with the sales and purchases of surviving corporation DMLI*'.

15. It is worthy to note that perusal of the subject *Petition for Review* does not even indicate that either of DBRLI and DMLI filed a BIR Form 1905 (Application for Registration Information Update) so as to properly update respondent on its registration information as a taxpayer.

16. Petitioner strongly banks on its claim that a merger took place and that they filed with the BIR an Income Tax Return for the year 2006 reflecting the fact that it was no longer operational.

17. Seemingly, petitioner would like respondent to make the necessary assumptions regarding their registration information update since a merger took place and that they are in a state of 'non-operation'. But that is

not sufficient and there is a proper process that petitioner should have followed.

Petitioner belatedly filed this case to the Honorable Court.

18. In the alternative, should the Honorable Court rule that petitioner's allegations are acceptable, still, petitioner belatedly filed this case to the Honorable Court.

19. Section 7(a) of Republic Act No. 1125 provides for the exclusive appellate jurisdiction of this Honorable Court, to wit:

> SEC. 7. Jurisdiction. The CTA shall exercise:
>
> a. Exclusive appellate jurisdiction to review by appeal, as herein provided:
> 1. Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under the National Internal Revenue Code or other law or part of law administered by the Bureau of Internal Revenue; x x x x

20. On the other hand, Section 9 of R.A. No. 9282 provides:

> 'SEC. 11. Who May Appeal; Mode of Appeal; Effect of Appeal. –
>
> **Any party adversely affected by a decision, ruling or inaction of the Commissioner of Internal Revenue**, the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry or Secretary of Agriculture or the Central Board of Assessment Appeals or the Regional Trial Courts **may file an appeal with the CTA within thirty (30) days** after the receipt of such decision or ruling or after the expiration of the period fixed by law for action as referred

> to in Section 7(a)(2) herein. (emphasis supplied)

21. In paragraph 13 of the subject *Petition for Review*, petitioner asserts:

> 'After more than two (2) years of waiting for the BIR to respond to his letter dated January 31, 2011, DBRLI's former President, Eliezer V. Del Mundo, was all of a sudden surprised to learn that a Warrant of Distraint and/or Levy had been issued against DBRLI without the BIR giving DBRLI a chance to dispute or protest whatever assessment was made which should serve as the basis for the distraint and levy. **The warrant was sent on 23 April 2013**, again, at DBRLI's former office. x x x x (emphasis supplied)

22. Assuming without conceding that petitioner did not receive the assessment notices mentioned in paragraph 11 of this *Amended Answer* and if it is true that the above-mentioned warrant was sent on **23 April 2013** at petitioner's former office, petitioner belatedly filed their case before the Honorable Court since the subject *Petition for Review* was filed only last **23 June 2013**. Petitioner should have filed the necessary appeal to the Honorable Court on or before 23 May 2013 so as to timely appeal the Warrant of Distraint and/or Levy issued against it. But instead, they waited for **more than sixty (60) days** before they formally filed their petition before the Honorable Court.

23. In *RCBC v. CIR*, the Honorable Supreme Court had the occasion to rule on this issue, to wit:

> 'The decisions, rulings or **inaction of the Commissioner are necessary to vest the Court of Tax Appeals with jurisdiction to entertain the appeal, provided it is filed within thirty (30) days after the receipt of such decision or ruling, or within thirty (30) days after the expiration of the 180-day period fixed by law for the Commissioner to act on the disputed assessments.** This 30-day period within which to file an appeal is

> jurisdictional and failure to comply therewith would bar the appeal and deprive the Court of Tax Appeals of its jurisdiction to entertain and determine the correctness of the assessments. **Such period is not merely directory but mandatory and it is beyond the power of the courts to extend the same**.' (emphasis supplied)

The assessment was issued in accordance with law, rules and jurisprudence.

24. The assessment for deficiency income tax and value-added tax for the calendar year 2007 in the aggregate amount of Php39,705,067.07 was issued in accordance with law, rules and jurisprudence.

25. Petitioner was duly informed of the law and facts on which respondent based her assessment and subsequently issued a warrant of distraint and levy.

> 25.1 Petitioner anchors its claim on what Section 228 of the 1997 National Internal Revenue Code (NIRC) and Section 3 of Revenue Regulations No. 12-99 (RR 12-99) prescribed, to wit:
>
> '**SEC. 228.** Protesting of Assessment.
>
> x x x x
>
> 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.
>
> x x x x'
>
> '**SEC. 3.** Due Process Requirement in the Issuance of a Deficiency Tax Assessment. —
>
> 3.1 Mode of procedures in the issuance of a deficiency tax assessment:

3.1.1 Notice for informal conference. — The Revenue Officer who audited the taxpayer's records shall, among others, state in his report whether or not the taxpayer agrees with his findings that the taxpayer is liable for deficiency tax or taxes. If the taxpayer is not amenable, based on the said Officer's submitted report of investigation, the taxpayer shall be informed, in writing, by the Revenue District Office or by the Special Investigation Division, as the case may be (in the case Revenue Regional Offices) or by the Chief of Division concerned (in the case of the BIR National Office) of the discrepancy or discrepancies in the taxpayer's payment of his internal revenue taxes, for the purpose of 'Informal Conference,' in order to afford the taxpayer with an opportunity to present his side of the case. x x x x

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

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

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25.2 Contrary to what petitioner claims, it was informed in writing of the law and the facts on which the assessment was made. A Preliminary Assessment Notice (PAN) with attached Details of Discrepancies dated 27 July 2010 was sent to the petitioner through registered mail, part of which states:

> 'Verification disclosed that the following discrepancy resulted from the Reconciliation of Listing for Enforcement (RELIEF) and Third Party Matching – BOC Data Program as declared in your tax returns, hence assessed in accordance with Section 31, 32, 106 and 108 of the 1997 NIRC, as amended and RMO No. 17-2009.'

25.3 Respondent complied with the due process requirement in the issuance of a deficiency tax assessment, as provided under Section 3 of RR 12-99. As previously stated, *Registry Return Receipts*, attached in this *Amended Answer*, shows that each of the following documents were duly served to petitioner through registered mail:

a) Notice of Informal Conference (NIC) dated 11 June 2010;
b) PAN with attached Details of Discrepancies dated 27 July 2010;
c) Amended PAN with attached Details of Discrepancies dated 11 April 2011;
d) Final Assessment Notice (FAN) with attached Details of Discrepancies dated 13 May 2011.

Respondent validly issued the subject assessment.

26. Respondent can issue a valid assessment for petitioner's unpaid income tax and value added tax for taxable year 2007.

26.1 Petitioner alleges that it was no longer operational as early as 2006.

26.1.1 It attached in its Petition for Review its Income Tax Return (ITR) for the year 2006 to show its state of non-operation. However, said ITR is <u>immaterial and irrelevant</u> since it does not necessarily prove that petitioner had no operations for the year 2007.

26.1.2 Also, petitioner alleges the Securities and Exchange Commission (SEC) approval of its Plan of Merger to prove the cessation of its separate juridical existence and cited certain provisions of which to support its allegation that it did not need any further approval from the respondent in order for its merger with Drugmakers Laboratories, Inc. (DMLI) to take place. Nevertheless, SEC approval of a Plan of Merger and the corresponding *cessation* of separate juridical existence per se do not mean that respondent is necessarily informed regarding such matter or that petitioner can no longer be assessed for deficiency taxes.

26.1.3 Petitioner should have filed BIR Form 1905 (Application for Registration Information Update) formally *informing* respondent of its *cessation of registration*, attaching the alleged SEC approval of its Plan of Merger. Petitioner should have not relied solely on the alleged SEC approval of the Plan of Merger.

26.2 Banking on their allegation of cessation of their corporate existence, petitioner insists that it does not have the '*capacity* to be assessed taxes.'

26.3 Unfortunately for the petitioner, its tax liability does not depend on its corporate existence.

26.3.1 The pertinent provision for <u>value added tax (VAT)</u> provides:

'**SEC. 105. Persons Liable.** - 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 the value-added tax (VAT) imposed in Sections 106 to 108 of this Code.
>
> The value-added tax is an indirect tax and the amount of tax may be shifted or passed on to the buyer, transferee or lessee of the goods, properties or services. This rule shall likewise apply to existing contracts of sale or lease of goods, properties or services at the time of the effectivity of Republic Act No. 7716.
>
> The phrase **'in the course of trade or business'** means the regular conduct or pursuit of a commercial or an economic activity, including transactions incidental thereto, by any person regardless of whether or not the person engaged therein is a nonstock, nonprofit private organization (irrespective of the disposition of its net income and whether or not it sells exclusively to members or their guests), or government entity.
>
> The rule of regularity, to the contrary notwithstanding, services as defined in this Code rendered in the Philippines by nonresident foreign persons shall be considered as being course of trade or business.'

The said provision does **not** limit VAT liability to those with corporate legal personality or those corporations duly-registered in accordance with Philippine law.

26.3.2 For <u>income tax</u>, petitioner discussed Section 22(A), (B) and (N) of the NIRC, all quoted hereunder for easy reference:

> '**SEC. 22. Definitions** - When used in this Title:

(A) The term **'person'** means an individual, a trust, estate or corporation.

(B) The term **'corporation'** shall include partnerships, no matter how created or organized, joint-stock companies, joint accounts (cuentas en participacion), association, or insurance companies, but does not include general professional partnerships and a joint venture or consortium formed for the purpose of undertaking construction projects or engaging in petroleum, coal, geothermal and other energy operations pursuant to an operating consortium agreement under a service contract with the Government. **'General professional partnerships'** are partnerships formed by persons for the sole purpose of exercising their common profession, no part of the income of which is derived from engaging in any trade or business.

x x x x

(N) The term **'taxpayer'** means any person subject to tax imposed by this Title.'

The cited definitions does **not** in any way limit corporate income 'taxpayers' as only those with corporate legal personality or those corporations duly-registered in accordance with Philippine law.

26.4 Lack of corporate personality does *not* guarantee a defense against any liability. In fact, an example of a situation where it cannot be used as a defense is Section 21 of the Corporation Code of the Philippines, which provides:

'**Section 21.** *Corporation by estoppel.* – All persons who assumed to act as a corporation knowing it to be without authority to do so shall be liable as general partners for all debts, liabilities and damages incurred or

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> arising as a result thereof: Provided, however, That when any such ostensible corporation is sued on any transaction entered by it as a corporation or on any tort committed by it as such, it shall **not** be allowed to use as a defense its **lack** of corporate personality.' (Emphasis and underscoring supplied)

26.5 Assuming without conceding that petitioner lacks corporate legal personality, it will rather fall within the concept of corporation by estoppel.

26.6 In G.R. No. 156759, the Honorable Supreme Court said,

> Nor can we sustain petitioners' contention that Abante Tonite could not be sued as a defendant due to its not being either a natural or a juridical person. In rejecting their contention, the CA *(Court of Appeals)* categorized Abante Tonite as a corporation by estoppel as the result of its having represented itself to the reading public as a corporation despite its not being incorporated.' *(Insert and Underscoring supplied)*

26.7 Corporation by estoppel is founded on principles of equity and is designed to prevent injustice and unfairness. It applies when persons assume to form a corporation and exercise corporate functions and enter into business relations with third persons.

26.8 Hence, a defense of lack of corporate personality may not be used to ignore the discrepancy that resulted from the Reconciliation of Listing for Enforcement (RELIEF) and Third Party Matching – BOC Data Program. Since said matching showed that certain suppliers sold goods to petitioner, it may not be allowed to use as defense its lack of corporate personality to avoid the tax liability sued out of such transaction.

26.9 Furthermore, petitioner's argument that *it lost its power to defend itself* is unacceptable. Otherwise, in escaping liability, entities with no corporate personality or those which are not registered in accordance with law will be in a much better position than those duly registered.

Respondent's assessment has not prescribed.

27. Respondent's assessment for deficiency Income Tax of Php29,328,569.20 and for deficiency Value Added Tax of Php10,376,497.87 both for the year 2007 has not prescribed.

27.1 Petitioner relies its defense of prescription on Section 203 of the NIRC of 1997, as amended, which provides:

'**SEC. 203. *Period of Limitation Upon Assessment and Collection.***

Except as provided in Section 222, internal 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 xxx'

27.2 However, this case falls under Section 222 and 248(B) which covers the exceptions to Section 203 of the NIRC, to wit:

'**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 <u>failure to file a return</u>, 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.' *(Underscoring supplied)*

'**SEC. 248. - Civil Penalties. –**

x x x x

(B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case, any payment has been made on the basis of such return before the discovery of the falsity or fraud: Provided. x x x x'

27.3 Therefore, a civil penalty was also imposed to petitioner, as shown in the issued PAN, amended PAN and FAN, to quote:

> 'The 50% surcharge has been imposed pursuant to the provisions of Section 248(B) of the National Internal Revenue Code of 1997.'

27.4 Petitioner alleges that *it was not anymore under any legal obligation* in 2007 *to submit any return* or report since it was already non-operational and its corporate legal personality had already ceased to exist. But then, to reiterate, the alleged cessation of corporate legal personality is not enough. Rather, petitioner should have filed BIR Form 1905 (Application for Registration Information Update) formally *informing* respondent of its cessation of registration.

27.5 'The period within which to assess tax in cases of fraudulent returns, false returns and **failure to file a return** is ten years from discovery of the fraud, falsification or omission'. *(Emphasis supplied)*

27.6 Since the instant case involves deficiency taxes for the year 2007, the Final Assessment Notice (FAN) with attached Details of Discrepancies (dated 13 May 2011) and received on 27 May 2011) was issued well-within the 10-year prescriptive period for assessment.

Inapplicability of the 'best evidence obtainable' rule is a misplaced argument.

28. Petitioner puts in issue the inapplicability of the 'best evidence obtainable' rule which is rather a misplaced argument. The deficiency tax assessment issued to petitioner is not based on evidence gathered through the 'best evidence obtainable' rule. Instead, it was issued due to the discrepancy found out through the *Reconciliation of Listing for Enforcement (RELIEF)* system, under Revenue Memorandum Order No. 30-2003.

28.1 Petitioner cited Section 6(B) of the NIRC:

> '(B) Failure to Submit Required Returns, Statements, Reports and other Documents. – 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 rules and regulations or when there is reason to believe that any such report is false, incomplete or erroneous, the Commissioner shall assess the proper tax on the best evidence obtainable.'

28.2 Assuming without conceding that respondent indeed used the said rule, respondent is justified to do so since petitioner is being assessed precisely because of the fact that it *failed* to file the required return despite having transactions with certain suppliers, as found out through the use of *RELIEF system*.

28.3 Petitioner's argument that *it was not anymore under any legal obligation to submit a return* is unacceptable. Otherwise, as earlier mentioned, in escaping liability, entities with no

> corporate personality or those which are not registered in accordance with law will be in a much better position than those duly registered.

The *Taxpayer's Suppliers' Records* are not erroneous.

29. As its last issue, petitioner asserts that 'BURS' assessment against DBRLI for deficiency Income Tax and deficiency VAT for the year 2007, which was based on its Taxpayer's Suppliers' Records, is erroneous because the the Taxpayer's Suppliers' Records is equally erroneous. Respondent humbly disagrees.

> 29.1 To reiterate, the deficiency tax assessment issued to petitioner resulted from the discrepancy found out through the *Reconciliation of Listing for Enforcement (RELIEF)* system, under Revenue Memorandum Order No. 30-2003.
>
> 29.2 Through the *RELIEF* System, the Summary List of Sales and Purchases (SLSP) of a certain company were being matched with the Summary List of Sales and Purchases of its customers and suppliers.
>
> 29.3 As stated under Revenue Memorandum Order No. 30-2003, the RELIEF system 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 <u>submitted</u> 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 reports in sales and purchases can be generated to uncover under declared income and over claimed purchases (goods and services). Thus, timely recognition and accurate reporting of unregistered taxpayers and non-filers can be made possible.
>
> 29.3 For petitioner's case, a discrepancy was found out after a comparison was made between the data gathered from declaration made by its

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suppliers and that of the VAT returns that should have been filed by the petitioner.

29.4 Per the *Taxpayer's Suppliers' Records*, it can be shown that for the year 2007 these particular suppliers conducted transactions with a taxpayer a) with TIN No. 204-482-474 and b) with an address of E&E Industrial Complex, Narra Road, San Pedro Laguna – which **are details pertaining to petitioner**.

29.5 On the other hand, there is a Certification dated 17 August 2009 stating that petitioner has no record of income tax return/value added tax return on file for taxable year 2007.

29.4 Having been based on data submitted by VAT taxpayers, it is incorrect for petitioner to aver that the *Taxpayer's Suppliers' Records* used were erroneous.

30. Based on all of the foregoing, the finding of deficiency tax liabilities against petitioner is proper in all respects. It is a well-settled principle that:

> 'Tax assessments by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner, and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments.'

Dereliction on the part of petitioner to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notices."

The Pre-Trial Conference was scheduled on March 21, 2014[20] but was reset to April 11, 2014[21]. Thereafter, the parties filed their

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[20] Notice of Pre-Trial Conference, Docket – Vol. I. p. 616.
[21] Resolution dated March 13, 2014, Docket – Vol. I. p. 618.

Joint Stipulation of Facts and Issues on May 16, 2014[22] and Supplement to Joint Stipulation of Facts and Issues on June 6, 2014, [23] which were approved by the Court in its Resolution dated June 11, 2014.[24] Correspondingly, the Court issued a Pre-Trial Order on July 9, 2014. [25]

During trial, the parties presented their respective testimonial and documentary evidence.

Petitioner filed its Formal Offer of Evidence on November 26, 2015. [26] Respondent filed his Comment [Re: Petitioner's Formal Offer of Evidence dated 26 November 2015] on December 16, 2015. [27] In the Resolution dated March 16, 2016, the Court admitted petitioner's documentary evidence except for Exhibits "P-118", "P-386", and "P-387". [28]

On the other hand, respondent's Formal Offer of Evidence was filed on August 11, 2016, [29] offering Exhibits "R-1", "R-2", "R-3", "R-4", "R-5", "R-6", "R-7", "R-8", "R-9", "R-10", "R-11", "R-12", "R-13", and "R-13-1". Petitioner filed its Comment/Opposition to Respondent's Formal Offer of Evidence on August 30, 2016. [30] The Court admitted all of respondent's exhibits in the Resolution dated October 13, 2016.[31]

Respondent's Memorandum was filed on December 16, 2016;[32] while petitioner's Memorandum was filed through registered mail on December 16, 2016 and was received by the Court on December 27, 2016.[33] The case was then declared submitted for decision on January 6, 2017.[34]

Hence, this Decision.

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[22] Docket – Vol. VII, pp. 4444 to 4448.
[23] Docket – Vol. VII, pp. 4457 to 4491.
[24] Docket – Vol. VII, p. 4493.
[25] Docket – Vol. VII, pp. 4543 to 4575.
[26] Docket – Vol. XI. pp. 7424 to 7466.
[27] Docket – Vol. XI. pp. 7670 to 7674.
[28] Docket – Vol. XI. pp. 7692 to 7695.
[29] Docket – Vol. XI. pp. 7722 to 7730.
[30] Docket – Vol. XI. pp. 7738 to 7746.
[31] Docket – Vol. XI. pp. 7752 to 7753.
[32] Docket – Vol. XI. pp. 7773 to 7793.
[33] Docket – Vol. XI. pp. 7794 to 7824.
[34] Resolution dated January 6, 2017, Docket – Vol. XI. p. 7827.

THE ISSUE

The parties submitted a following sole issue for this Court's resolution, to wit:[35]

> "Whether or not petitioner is liable to pay the total amount of ₱39,705,067.07 as deficiency income tax and VAT for taxable year 2007."

Petitioner's arguments:

Petitioner argues that it did not receive any PAN or FAN for the subject deficiency tax assessment. According to petitioner, respondent failed to duly inform it of the law and facts of the assessment which forms basis for the issuance of the Warrant of Distraint and/or Levy. Petitioner likewise claims that the Warrant of Distraint and/or Levy does not contain any explanation as to how the deficiency income tax and deficiency VAT were arrived at.

Petitioner contends that without the PAN or any other document that properly informs the taxpayer of the law and the alleged facts upon which the assessment is made, the assessment and any subsequent act to enforce such assessment including the Warrant of Distraint and/or Levy is void and will not bear fruit.

In the case of *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.*, the Supreme Court ruled that absent any proof that the taxpayer duly received the PAN required under Revenue Regulation No. 12-99 which would have otherwise properly informed the taxpayer of the law and the facts upon which the deficiency assessment was made, any assessment made is considered to be void.

Petitioner likewise argues that respondent cannot issue a valid assessment for unpaid income tax and VAT for taxable year 2007 considering that petitioner was no longer operational as early as 2006 and its corporate existence had already ceased to exist as early as March 29, 2007.

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[35] JSFI, Docket – Vol. VII, pp. 4445.

Moreover, petitioner claims that respondent's assessment for deficiency income tax and VAT for the year 2007 had already prescribed.

According to petitioner, respondent is not legally justified in using the Taxpayer's Suppliers' Records pursuant to the "best evidence obtainable" rule under Section 6(B) of the NIRC. It was allegedly no longer a taxpayer within the contemplation of the NIRC by March 29, 2007 inasmuch as its very legal existence had already been terminated by law. As such, it could not have very well continued filing tax returns when its mandate to exist as a corporation had already been revoked and/or cancelled.

Finally, petitioner argues that respondent's basis for the assessment is erroneous. The purchases listed in the Details of Taxpayer's Suppliers Record attached to Letter Notice No. 057-RLF-07-00-00015, which is the basis of the instant VAT and income tax assessment, are purchases of DMLI, the surviving corporation, that were incorrectly reported by the suppliers as purchases of petitioner. Such being the case, petitioner submits that there is no legal or factual basis for the subject tax assessment inasmuch as the transactions upon which the assessment is based are not the transactions entered into by petitioner.

Respondent's counter-arguments:

Respondent counter-argues that the Court has no jurisdiction over the instant petition for failure of petitioner to file a protest on the FAN. According to respondent, the FAN with attached Details of Discrepancies was duly served upon petitioner on May 27, 2011 by registered mail as evidenced by the Registry Return Receipt[36] and the Certification[37] issued by the Philippine Postal Corporation.

Further, respondent contends that assuming without conceding that petitioner did not receive the assessment notices, petitioner nevertheless belatedly filed the present Petition. According to respondent, considering that the Warrant of Distraint and/or Levy was sent on April 23, 2013, respondent argues that petitioner should have filed the Petition on or before May 23, 2013. In this case, however, the petition was filed on June 23, 2013. As such, the assessment

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[36] Exhibit "R-11", BIR Records, p. 140.
[37] Exhibit "R-12", Docket – Vol. XI, p. 7735.

against petitioner never became disputed and that this Court is left only with one power to exercise, that is to dismiss the instant petition.

Respondent likewise argues that the assessment was issued in accordance with law, rules and jurisprudence. According to respondent, petitioner was duly informed of the law and facts on which respondent based his assessment and subsequently issued a Warrant of Distraint and/or Levy.

Contrary to petitioner's assertion, respondent claims that the subject assessment has not prescribed because the present case falls under Section 222 and 248 (B) which covers fraudulent returns, false returns and failure to file a return. As such, the FAN with attached Details of Discrepancies was issued well-within the 10-year prescriptive period for assessment.

Respondent also contends that petitioner's argument regarding the inapplicability of the "best evidence obtainable" rule is a misplaced argument. According to respondent, the deficiency tax assessment issued to petitioner is not based on evidence gathered through the best evidence obtainable rule. Rather, it was issued due to the discrepancy found out through the Reconciliation of Listing for Enforcement (RELIEF) system, under Revenue Memorandum Order No. 30-2003. Further, assuming that respondent indeed used the said rule, respondent is justified to do so since petitioner is being assessed precisely because of its failure to file the required return despite having transactions with certain suppliers, as found out through the use of the RELIEF system.

Finally, respondent claims that the Taxpayer's Suppliers' Records are not erroneous. Allegedly, the deficiency tax assessment issued to petitioner resulted from the discrepancy found out through the RELIEF system where the Summary List of Sales and Purchases (SLSP) of a certain company are matched with the SLSP of its customers and suppliers. Having been based on data submitted by VAT taxpayers, it is incorrect for petitioner to aver that the Taxpayer's Supplier's Records used were erroneous.

THE COURT'S RULING

We grant the instant *Petition for Review.*

Before going into the merits of the case, the Court deems it necessary to determine first whether the assessment is valid and consequently whether respondent may validly collect the subject deficiency taxes.

Respondent failed to prove that the PAN, Amended PAN and FAN were actually received by petitioner.

Petitioner denies receiving any preliminary assessment or final assessment for the subject deficiency income tax and VAT assessment for taxable year 2007. Hence, petitioner argues that without these notices, the tax assessment and any subsequent act to enforce such assessment including the Warrant of Distraint and/or Levy is void and will not bear fruit.

Respondent, however, claims that the PAN, Amended PAN and FAN were duly served upon petitioner through registered mail.

We find for the petitioner.

Section 228 of the NIRC of 1997, as amended, provides for the procedure and manner on which tax deficiency assessments should be issued, viz:

> "SECTION 228. Protesting of Assessment. — **When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings**: Provided, however, That a preassessment notice shall not be required in the following cases:
>
> (a) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the face of the return; or
>
> (b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or

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(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.

XXX XXX XXX"
(Emphasis supplied)

To implement the provisions of Section 228 of the NIRC of 1997, as amended, Revenue Regulation (RR) No. 12-99 was issued which specify the due process requirement to be observed in issuing deficiency tax assessments. Pertinent portions of Section 3 of RR No. 12-99 reads:

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

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

xxx xxx xxx

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

xxx xxx xxx

3.1.4 Formal Letter of Demand and Assessment Notice. — **The formal letter of demand and assessment notice <u>shall</u> be issued by the Commissioner or his duly authorized representative.** The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void (see illustration in ANNEX B hereof). **<u>The same shall be sent to the taxpayer only by registered mail or by personal delivery.</u>** If sent by personal delivery, the taxpayer or his duly authorized representative shall acknowledge receipt thereof in the duplicate copy of the letter of demand, showing the following: (a) His name; (b) signature; (c) designation and authority to act for and in behalf of the taxpayer, if acknowledged received by a person other than the taxpayer himself; and (d) date of receipt thereof." *(Emphasis and underscoring supplied)*

Based on the foregoing, if there exists sufficient basis to assess the taxpayer, the CIR or his authorized representative is mandated to issue a PAN. Thereafter, a formal letter of demand and an assessment notice shall be issued by the 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 essential for respondent to establish and prove that the requisite assessment notices were duly served to the taxpayer within the prescriptive period.

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In *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.*,[38] the Supreme Court ruled 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 is tantamount to denial of due process. The Supreme Court further emphasized that the absence of PAN will render nugatory any assessment made by the tax authorities. The Court wrote:

> "**Indeed, Section 228 of the Tax Code clearly requires that the taxpayer must first be informed that he is liable for deficiency taxes through the sending of a PAN.** He must be informed of the facts and the law upon which the assessment is made. 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.
>
> xxx xxx xxx
>
> **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." (Emphasis supplied)

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[38] G.R. No. 185371, December 8, 2010.

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Further, in *Commissioner of Internal Revenue vs. Menguito*,[39] the Supreme Court ruled that "the issuance of a valid formal assessment is a substantive prerequisite to tax collection, for it contains not only a computation of tax liabilities but also a demand for payment within a prescribed period, thereby signaling the time when penalties and interests begin to accrue against the taxpayer and enabling the latter to determine his remedies therefor. Due process requires that it must be served on and received by the taxpayer."

Based on the foregoing, the issuance of a valid formal assessment is a substantive prerequisite to tax collection. Accordingly, respondent must prove the issuance of a valid assessment for it to be able to enforce payment of deficiency taxes from petitioner.

Respondent claims that the PAN, Amended PAN and the FAN were duly served to petitioner by registered mail. Under the above-quoted Section 3.1.4 of RR 12-99, in case of service through registered mail, the same Section 3.1.4 is plain that it must be sent to the taxpayer, not to any other person. Thus, if the taxpayer is an individual, the assessment notices must be sent to him or her alone. However, in the case of a corporate taxpayer, the assessment notices must be, in all cases, received by its individual representative(s). This is so because the physical acts of the corporation, like the signing of documents, can be performed only by natural persons duly authorized for the purpose by corporate by-laws or by a specific act of the board of directors.[40]

In *Commissioner of Internal Revenue vs. GJM Philippines Manufacturing, Inc.*,[41] the Supreme Court discussed the requisite proof to show the fact of mailing of assessment notices, to wit:

> "If the taxpayer denies having received an assessment from the BIR, it then becomes incumbent upon the latter to prove by competent evidence that such notice was indeed received by the addressee. Here, the onus probandi has shifted to the BIR to show by contrary evidence that [the taxpayer] indeed received the assessment in the due course of mail. It has been settled that while a mailed letter is deemed received by the addressee in the course

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[39] G.R. No. 167560, September 17, 2008, citing *Roxas Securities, Inc. v. Commissioner of Internal Revenue*, G.R. No. 157064, August 7, 2006, 498 SCRA 126 and *Commissioner of Internal Revenue v. Pascor Realty & Devt. Corp.*, 368 Phil. 714 (1999).

[40] *Swedish Match Philippines, Inc. vs. The Treasurer of the City of Manila*, G.R. No. 181277, July 3, 2013.

[41] G.R. No. 202695, February 29, 2016.

of the mail, this is merely a disputable presumption subject to controversion, the direct denial of which shifts the burden to the sender to prove that the mailed letter was, in fact, received by the addressee.

To prove the fact of mailing, it is essential to present the registry receipt issued by the Bureau of Posts or the Registry return card which would have been signed by the taxpayer or its authorized representative. And if said documents could not be located, the CIR should have, at the very least, submitted to the Court a certification issued by the Bureau of Posts and any other pertinent document executed with its intervention. The Court does not put much credence to the self-serving documentations made by the BIR personnel, especially if they are unsupported by substantial evidence establishing the fact of mailing. While it is true that an assessment is made when the notice is sent within the prescribed period, the release, mailing, or sending of the same must still be clearly and satisfactorily proved. Mere notations made without adequate supporting evidence cannot suffice. Otherwise, the defenseless taxpayer would be unreasonably placed at the mercy of the revenue offices." (Emphasis and underscoring supplied)

Applying the foregoing, considering that petitioner categorically denies receipt of the assessment notices, it is incumbent upon respondent to prove that the notices were indeed received by the taxpayer. Further, in proving the fact of mailing, it is essential for respondent to present the registry receipt issued by the Bureau of Posts or the Registry return card which would have been signed by the taxpayer or its authorized representative.

Relative thereto, respondent presented and offered the following documents to prove the service of the assessment notices:

a. Registry Return Receipt for the service by registered mail of the PAN with attached Details of Discrepancies dated 27 July 2010;[42]

b. Registry Return Receipt for the service by registered mail of the Amended PAN with attached Details of Discrepancies dated 11 April 2011;[43]

c. Registry Return Receipt for the service by registered mail of the FAN with attached Details of Discrepancies dated 13 May 2011;[44]

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[42] Exhibit "R-7", BIR Records, p. 108.
[43] Exhibit "R-9", BIR Records, p. 133.
[44] Exhibit "R-11", BIR Records, p. 140.

d. Certification issued by the Philippine Postal Corporation.[45]

Respondent also presented Revenue Officer (RO) Sion S. Catelo who testified by way of Judicial Affidavit,[46] that the PAN, Amended PAN and FAN were served to petitioner, to wit:

"21Q:
What happened after the issuance of the NIC?

21A:
The taxpayer failed to settle its tax liabilities so I recommended for the issuance of Preliminary Assessment Notice (PAN). A preliminary assessment Notice with attached Details of Discrepancies was then issued to the Petitioner.

22Q:
I am showing you a document denominated as Preliminary Assessment Notice (PAN) with attached Details of Discrepancies dated 27 July 2010, found in pages 103-105 of the BIR Records and marked as Exhibit "R-6" for the respondent. What is the relation of this document to the notice you mentioned?

22A:
This is the PAN with attached Details of Discrepancies that I mentioned earlier.

23Q:
Do you have proof that such notice and its attachment was duly served?

23A:
The registry return receipt corresponding to it was sent back to us.

24Q:
I have with me a document denominated as registry return receipt, attached in page 108 of the BIR Records and marked as Exhibit "R-7" for the respondent, what relation does this document have to the registry return receipt that you mentioned earlier?

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[45] Exhibit "R-12", Docket – Vol. XI, p. 7735.
[46] Judicial Affidavit of Revenue Officer Sion S. Catelo, Exhibit "R-13", Docket – Vol. 1, pp. 383 to 390.

24A:
This is the registry return receipt I mentioned earlier.

25Q:
What happened after the issuance and service of the PAN?
25A:
There were adjustments made to the computation of the assessment so we issued an Amended PAN with attached Details of Discrepancies.

26Q:
I am showing you a document denominated as Amended Preliminary Assessment Notice (Amended PAN) with attached Details of Discrepancies dated 11 April 2011, found in pages 135-137 of the BIR Records and marked as Exhibit "R-8" for the respondent. What is the relation of this document to the amended PAN you mentioned?

26A:
This is the amended PAN with attached Details of Discrepancies that I mentioned earlier.

27Q:
Do you have proof that such amended PAN was duly served to petitioner?

27A:
The registry return receipt corresponding to the amended PAN was sent back to us.

28Q:
I have with me a document denominated as registry return receipt, attached in page 137 of the BIR Records and marked as Exhibit "R-9" for the respondent, what relation does this document have to the registry return receipt that you mentioned earlier?

28A:
This is the receipt I mentioned earlier.

29Q:
What happened after the issuance of the Amended PAN?

29A:
A Final Assessment Notice with attached Details of Discrepancies and its corresponding Assessment Notices was issued to the petitioner.

30Q:
I am showing you a document denominated as Fina Assessment Notice (PAN) dated 11 April 2011 with attached Details of Discrepancies, found in pages 138-142 of the BIR Records and marked as Exhibit "R-10" for the respondent. What is the relation of this document to the Final Assessment Notice with attached Details of Discrepancies and Assessment Notices you earlier mentioned?

30A:
These are the documents I mentioned earlier.

31Q:
Do you have proof that such notices were duly served?

31A:
The registry return receipt corresponding to the FAN and its attachments was sent back to us.

32Q:
I have with me a document denominated as registry return receipt, attached in page 142 of the BIR Records and marked as Exhibit "R-11" for the respondent, what relation does this document have to the registry return receipt that you mentioned earlier?

32A:
This is the registry return receipt I mentioned earlier.

33Q:
Aside from the registry return receipts that you mentioned, do you have proof that the notices mentioned above were mailed to petitioner?

33A:
Yes. The Officer-in-Charge of the Philippine Postal Corporation located at the BIR Extension Post Office issued a Certification regarding the mailing of the Registry Return Receipts that I identified a while ago.

34Q:
I have with me a Certification signed by the Officer-I Charge of the Philippine Postal Corporation- BIR Extension Post Office and marked as Exhibit "R-12" for the respondent, what relation does this document have to the certification that you mentioned earlier?

34A:
This is the certification I mentioned earlier."

After careful consideration of the above pieces of evidence, the Court finds that these evidence do not satisfactorily prove that the PAN, Amended PAN and FAN were actually received by petitioner's authorized representative.

Respondent failed to prove that the signatures of the recipients of the registry return receipts belong to petitioner's authorized representative. During the cross-examination of respondent's sole witness, RO Castelo, she admitted that she is not the person in charge of mailing the correspondence and that she does not know the persons who signed the registry return cards. Pertinent portions of her testimony are quoted as follows:[47]

"**ATTY. LIM**:
Q. Now, you mentioned also that you cited certain documents, more particularly the registry return card, as proof that the Preliminary Assessment Notice and the Amended Preliminary Assessment Notice and the Final Assessment Notice to show that they were actually received by the petitioner. My question is this; do you know who are the persons who signed those registry return cards?

MS. CASTELO:
A. Attorney, I am not the one in charged in mailing the correspondence to the taxpayers. It is the office, the secretariat of the LN Task Force who is assigned to do such thing.

ATTY. LIM:
You are not answering my question, Madam Witness. I am sorry. I will have to repeat the question.

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[47] Transcript of Stenographic Notes (TSN) during the hearing held on May 3, 2016, pp. 21 to 22.

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Q. Do you know the persons who received or whose signatures are indicated in the registry return card? I think it is answerable by simple yes or no, ma'am.

MS. CASTELO:
A. No, Attorney.

ATTY. LIM:
Q. Again?

MS. CASTELO:
A. No.

ATTY. LIM:
Q. The answer is no?

MS. CASTELO:
A. My answer is no.

ATTY. LIM:
Q. So, you also can confirm that because you do not know the persons who received these registry return cards, you also do not know what are their respective positions in the organization of Drugmakers Biotech Research Laboratories, Inc. Am I not correct?

MS. CASTELO:
A. You are correct."

Clearly, the foregoing testimony shows that RO Castelo has no personal knowledge on the fact of mailing the assessment notices. Moreover, RO Castelo likewise failed to confirm whether the recipients indicated on the registry return receipts were the authorized employees of petitioner. It is to be noted that respondent did not present any other witness to establish that the notices were indeed mailed and received by petitioner or his authorized representative.

Further, a perusal of the Registry Return Receipts for the PAN, amended PAN and FAN show that the said receipts were not properly filled out. The registry return receipts do not show the registry return receipt number and as such the receipts cannot be properly identified.

As for the Certification issued by the Philippine Postal Service Corporation, the same failed to prove the fact of service and receipt of the assessment notices. It merely shows that certain documents were mailed to petitioner without specifying what the documents are. In view thereof, the Certification failed to sufficiently establish that the PAN, amended PAN and FAN were mailed to petitioner. Further, since the Registry Return Receipts presented by respondent failed to indicate the registry receipt number, the said receipts cannot be properly matched with the registry receipt number shown on the Certification.

All told, respondent failed to prove that the assessment notices were indeed served by registered mail to petitioner. Accordingly, the subject deficiency tax assessment for taxable year 2007 must be declared void, for having been issued in violation of the due process requirements under the law and RR No. 12-99. Consequently, considering that there is no valid assessment to begin with, the Warrant of Distraint and/or Levy issued by respondent to petitioner, in so far as it seeks to collect from petitioner the aforesaid delinquent income tax and VAT for calendar year 2007 is likewise void.

As to respondent's argument that the Court has no jurisdiction to entertain the present Petition for failure of petitioner to file a protest on the FAN, suffice it to state that a "void assessment bears no valid fruit."[48] As such, there is no factual and legal basis for respondent to demand the payment or to collect the subject deficiency taxes.

Considering the foregoing, the Court deems it unnecessary to discuss the other issues raised by the parties.

WHEREFORE, in light of the foregoing considerations, the instant *Petition for Review* is hereby **GRANTED**. Accordingly, the assessment for deficiency income tax and VAT and the Warrant of Distraint and/or Levy issued against petitioner for taxable year 2007 is hereby **CANCELLED** and **SET ASIDE**.

SO ORDERED.

ERLINDA P. UY
Associate Justice

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[48] G.R. No. 185371, December 8, 2010.

WE CONCUR:

(With Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

CIELITO N. MINDARO-GRULLA
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's Division.

ROMAN G. DEL ROSARIO
Presiding Justice
Chairperson, 1st Division

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

FIRST DIVISION

DRUGMAKER'S BIOTECH RESEARCH LABORATORIES, INC. (through its representative Drugmakers Laboratories, Inc.), Petitioner,	**CTA CASE NO. 8664**
	Members:
- versus -	Del Rosario, *P.J., Chairperson* Uy, and Mindaro-Grulla, *JJ.*
THE COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: JAN 05 2018 ; 4:05 p.m.

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DISSENTING OPINION

DEL ROSARIO, P.J.:

With utmost respect, I hesitate to give my assent to the *ponencia* of my learned colleague, the Honorable Associate Justice Erlinda P. Uy, which granted the Petition for Review and cancelled and set aside the deficiency income tax and value-added tax (VAT) assessment and the Warrant of Distraint and/or Levy (WDL) issued against petitioner for taxable year 2007.

The *ponencia* declared that the pieces of evidence do not satisfactorily prove that the Preliminary Assessment Notice (PAN), the Amended PAN and the Final Assessment Notice (FAN) were actually received by petitioner's authorized representative; and respondent failed to prove that the assessment notices were indeed served by registered mail to petitioner. The *ponencia* concluded that the deficiency tax assessment for taxable year 2007 is void for having been issued in violation of the due process requirements under the law and Revenue Regulations No. 12-99; and that there being no valid assessment, the WDL seeking to collect from petitioner the said delinquent income tax and VAT is likewise void.

As to respondent's argument that the Court has no jurisdiction to entertain the Petition for failure of petitioner to file a protest on the FAN, the *ponencia* stated that a void assessment bears no valid fruit, and, as such, there is no factual and legal basis for respondent to demand the payment or to collect the subject deficiency taxes.

It is interesting to note, however, that respondent further pleaded for the dismissal of the present case on ground that petitioner belatedly filed the Petition for Review with this Court on June 23, 2013 *(sic)*. Allegedly, the Petition should have been filed on or before May 23, 2013 considering that the WDL was served and received by petitioner on April 23, 2013. This issue has not been addressed.

I submit that petitioner's failure to appeal the WDL within the thirty (30)-day reglementary period, **reckoned from the date of receipt of WDL on April 23, 2013,** prevented the Court from acquiring jurisdiction over the case and consequently, from reviewing the validity and correctness of the FAN and WDL issued against petitioner.

To begin with, the Rules of Court apply suppletorily to the Revised Rules of the Court of Tax Appeals (RRCTA), as amended,[1] particularly, the applicable provisions of Rules 42, 43, 44 and 46 of the Rules of Court.[2]

Examination of the Petition for Review as well as the Amended Petition for Review shows that the same failed to indicate the specific material dates that may confirm the timeliness of their filing, contrary to the mandate of Sec. 2, Rule 42[3] and Sec. 6, Rule 43[4] of the Rules

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[1] Sec. 3, Rule 1 of RRCTA.
[2] Sec. 1, Rule 7 of RRCTA.
[3] Section 2. *Form and contents.* — **The petition** shall be filed in seven (7) legible copies, with the original copy intended for the court being indicated as such by the petitioner, and **shall** (a) state the full names of the parties to the case, without impleading the lower courts or judges thereof either as petitioners or respondents; (b) **indicate the specific material dates showing that it was filed on time**; (c) set forth concisely a statement of the matters involved, the issues raised, the specification of errors of fact or law, or both, allegedly committed by the Regional Trial Court, and the reasons or arguments relied upon for the allowance of the appeal; (d) be accompanied by clearly legible duplicate originals or true copies of the judgments or final orders of both lower courts, certified correct by the clerk of court of the Regional Trial Court, the requisite number of plain copies thereof and of the pleadings and other material portions of the record as would support the allegations of the petition.
[4] Section 6. *Contents of the petition.* — The petition for review shall (a) state the full names of the parties to the case, without impleading the court or agencies

of Court. This omission by itself constitutes a fatal infirmity that warrants the dismissal of the petition pursuant to Sec. 3, Rule 42,[5] and Sec. 7, Rule 43[6] of the Rules of Court.

To be sure, both the Petition for Review and the Amended Petition for Review, merely allege the following:

Petition for Review:

> "12. After more than two (2) years of waiting for the BIR to respond to his letter dated January 31, 2011, DBRLI's former President, Eliezer V. Del Mundo, was all of a sudden surprised to learn that a Warrant of Distraint and/or Levy had been issued by the BIR against DBRLI without the BIR giving DBRLI a chance to dispute or protest whatever assessment had presumably been made which assessment should have served as the basis for the distraint and levy. **The warrant was sent on 23 April 2013, again, at DBRLI's former office**. Based on this warrant, the BIR is collecting from DBRLI the amount of P29,328,569.20 allegedly in the form of unpaid deficiency Income Tax for the period 2007 and the amount of P10,376,497.87 in the form of unpaid deficiency Value Added Tax also for 2007. Attached herewith as Annex 'I' is a copy of the Warrant of Distraint and/or Levy."

xxx xxx xxx

Amended Petition for Review:

> "13. After more than two (2) years of waiting for the BIR to respond to his letter dated January 31, 2011, DBRLI's former President, Eliezer V. Del Mundo, was all of a sudden surprised to learn that a Warrant of Distraint and/or Levy had been issued against DBRLI without the BIR giving DBRLI a chance to dispute or

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either as petitioners or respondents; (b) contain a concise statement of the facts and issues involved and the grounds relied upon for the review; (c) be accompanied by a clearly legible duplicate original or a certified true copy of the award, judgment, final order or resolution appealed from, together with certified true copies of such material portions of the record referred to therein and other supporting papers; and (d) contain a sworn certification against forum shopping as provided in the last paragraph of section 2, Rule 42. **The petition shall state the specific material dates showing that it was filed within the period fixed herein**.

[5] Section 3. *Effect of failure to comply with requirements.* — **The failure of the petitioner to comply with any of the foregoing requirements regarding** the payment of the docket and other lawful fees, the deposit for costs, proof of service of the petition, and **the contents of** and the documents which should accompany the petition shall be sufficient ground for the dismissal thereof.

[6] Section 7. *Effect of failure to comply with requirements.* — **The failure of the petitioner to comply with any of the foregoing requirements regarding** the payment of the docket and other lawful fees, the deposit for costs, proof of service of the petition, and **the contents of** and the documents which should accompany the petition shall be sufficient ground for the dismissal thereof.

> protest whatever assessment was made which should serve as the basis for the distraint and levy. **The warrant was sent on 23 April 2013, again, at DBRLI's former office.** Based on this warrant, the BIR is collecting from DBRLI the amount of P29,328,569.20 allegedly in the form of unpaid deficiency Income Tax for the period 2007 and the amount of P10,376,497.87 in the form of unpaid deficiency Value Added Tax also for 2007. Attached herewith as Annex 'I' is a copy of the Warrant of Distraint and/or Levy." *(Boldfacing and underscoring supplied)*

At any rate, the Service of the Warrant portion of the WDL clearly reflects that a copy thereof was served to the taxpayer thru its authorized representative on April 23, 2013, and that a certain Fernando C. Rey acknowledged the same by affixing his name and signature above the portion of Taxpayer/his Authorized Representative.[7] Petitioner never questioned the authority of Fernando C. Rey in acknowledging the service of the WDL nor even denied receipt of the WDL.

It is well-settled that jurisdiction over the subject matter is fundamental for a court to act on a given controversy. It is conferred by law, not by consent of the parties. It can be challenged at any stage of the proceedings and for lack of it, a court can dismiss a case *ex mero motu*. To inquire into the existence of jurisdiction over the subject matter is the primary concern of a court, for thereon would depend the ability of its entire proceedings.[8]

Relatedly, **perfection of appeal** in the manner and within the period laid down by law is **not only mandatory but also jurisdictional**. The failure to perfect an appeal as required by the rules has the effect of defeating the right to appeal of a party and **precluding the appellate court from acquiring jurisdiction over the case.** The right to appeal is not a natural right nor a part of due process. It is merely a statutory privilege, and may be exercised only in the manner and in accordance with the provisions of the law.[9] The thirty (30)-day period within which to file an appeal with the CTA is **jurisdictional and failure to comply therewith would bar the appeal and deprive the CTA of its jurisdiction.**[10]

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[7] Exhibit P-1162, BIR Records, p. 148.
[8] CIR vs. Villa, G.R. No. L-23988, January 2, 1968.
[9] CIR vs. Fort Bonifacio Development Corporation, G.R. No. 167606, August 11, 2010.
[10] Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue, G.R. No. 168498, June 16, 2006.

Considering its receipt of the WDL on April 23, 2013, petitioner had thirty (30) days, or until **May 23, 2013** to file the Petition for Review before this Court as aforestated. Since the Petition for Review was filed only on **June 24, 2013**, the same was clearly filed beyond the thirty (30)-day reglementary period. Consequently, the Court is deprived of its jurisdiction to act on the Petition for Review and to review the correctness and validity of the FAN and the WDL issued against petitioner. **For want of jurisdiction, the Court is precluded from cancelling the deficiency Income Tax and VAT assessment and WDL.**

All told, I **VOTE** to **DISMISS** the Petition for Review, for lack of jurisdiction.

ROMAN G. DEL ROSARIO
Presiding Justice