REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL SECOND DIVISION

FIRST GLOBAL BYO CORPORATION, Petitioner,	**CTA CASE NOS. 9172, 9212 and 9242**
-versus-	**Members:** Castañeda, Jr., *Chairperson,* and, Manahan, *JJ.*
HONORABLE KIM HENARES, in her capacity as the Commissioner of the BUREAU OF INTERNAL REVENUE, Respondent.	**Promulgated:** AUG 06 2019 1:00 p.m.

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DECISION

CASTAÑEDA, JR., *J.*:

STATEMENT OF THE CASE

Before this Court are the three (3) Petitions for Review filed by First Global BYO Corporation docketed as CTA Case Nos. 9172, 9212, and 9242, respectively filed on October 21, 2015,[1] on December 3, 2015,[2] and on January 14, 2016.[3] The present consolidated cases are judicial appeals on the assessments issued against petitioner for its purported deficiency internal revenue taxes for taxable years 2009, 2010, and 2011.

[1] CTA Case No. 9172, docket (Vol. I), pp. 10-32.
[2] CTA Case No. 9212, docket, pp. 10-32.
[3] CTA Case No. 9242, docket, pp. 10-37.

THE PARTIES

Petitioner First Global BYO Corporation is a domestic corporation, with office address at 865 Sto. Cristo Street City, Binondo, Manila. It is registered with the Bureau of Internal Revenue (BIR) with Taxpayer Identification No. (TIN) 006-540-832.[4]

On the other hand, respondent is the duly appointed Commissioner of the Bureau of Internal Revenue who has the power to decide on 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 (NIRC) or other laws or portions thereof administered by the BIR. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

STATEMENT OF THE FACTS

Fort Palm Spring Condominium Corporation (FPSCC) was organized by several investors for the purpose of buying a lot in Fort Bonifacio, Taguig, and for the construction of a condominium building.[5]

The owners of the condominium are the several investors, who all contributed monies for the purchase of the lot and for the construction of the condominium building.[6]

FPSCC appointed Banco De Oro (BDO) as the trustee for the monies and the project.[7] In turn, BDO appointed petitioner as the Project Manager with the power to select and appoint the structural engineer to construct the building and the architectural engineer for the finishing work.[8]

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[4] Exhibits "P-1", "P-6", and "P-12".
[5] Par. 1, Common to CTA Case Nos. 9172, 9212, & 9242, Joint Stipulation, CTA Case No. 9172, docket (Vol. III), p. 1138.
[6] Par. 2, *ibid.*
[7] Par. 3, *id.*
[8] Par. 4, *id.*

A Contract to Manage[9] between the individual investors and petitioner was executed.[10]

Thereafter, a Letter Re: Request for Tax Exemption[11] dated June 26, 2009 was filed by FPSCC with the BIR, requesting for confirmation that FPSCC's conveyance of individual condominium certificate of title under Republic Act (RA) No. 4627 or "the Condominium Act", in favor of all investors-unit owners co-developer as beneficial owner of said condominium and parking unit are not subject to income tax, capital gains tax (CGT), value-added tax (VAT), and documentary stamp tax (DST) under Section 196 of the NIRC of 1997, as amended.

Accordingly, the BIR issued BIR Ruling Nos. DA (C-128) 374-2009[12]and DA (C-129) 375-2009[13] both dated July 15, 2009, confirming that transfers from the trustee to the beneficial owners of the condominium and parking units are not subject to the following taxes under the NIRC of 1997, as amended:

i. Capital Gains Tax under Section 27(D)(5);

ii. Income Tax under Section 27(A);

iii. Withholding Tax under Section 57 and its implementing Revenue Regulations No. 2-98, as amended;

iv. Value-Added Tax under Section 106(A)(1); and,

v. Documentary Stamp Tax under Section 196.

CTA Case No. 9172

On April 15, 2010, petitioner filed its Income Tax Return[14] for taxable year 2009.

On February 3, 2015, petitioner received a Preliminary Assessment Notice[15] (PAN) dated January 30, 2015 for its alleged

[9] Exhibit "P-22".
[10] Par. 5, Common to CTA Case Nos. 9172, 9212, & 9242, Joint Stipulation, CTA Case No. 9172, docket (Vol. III), p. 1138.
[11] Exhibit "P-23".
[12] Exhibit "P-18".
[13] Exhibit "P-19".
[14] Exhibit "P-1" to "P-1-7".
[15] Exhibit "P-2".

deficiency income tax and VAT for taxable year 2009 in the total amount of ₱64,330,641.80.

In reply thereto, petitioner filed a Letter of Protest[16] on February 18, 2015.

Subsequently, on February 26, 2015, petitioner received a Final Assessment Notice[17] (FAN) dated February 23, 2015, assessing petitioner for deficiency taxes in the total amount of ₱64,739,346.12.

On March 26, 2015, petitioner then filed a Letter of Protest[18] of even date, praying for reconsideration or reinvestigation of the deficiency assessment findings in the FAN. However, respondent failed to act on petitioner's protest within the 180-day period prescribed by law. Hence, the instant petition.

CTA Case No. 9212

On April 15, 2011, petitioner filed its Income Tax Return[19] for taxable year 2010. However, on January 9, 2012, petitioner filed an Amended Income Tax Return[20] for the same taxable year.

On April 6, 2015, petitioner received a PAN[21] dated March 30, 2015 for its alleged deficiency income tax and VAT for taxable year 2010 in the total amount of ₱22,399,971.65.

Petitioner also protested the PAN via Protest Letter[22] dated April 21, 2015.

On April 29, 2015, respondent issued a FAN[23] dated April 23, 2015 against petitioner assessing it for deficiency taxes in the total amount of ₱22,579,989.52. *ju*

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[16] Exhibit "P-3".
[17] Exhibit "P-4".
[18] Exhibit "P-5".
[19] Exhibits "P-6" to "P-6-1".
[20] Exhibits "P-7" to "P-7-1".
[21] Exhibit "P-8".
[22] Exhibit "P-9".
[23] Exhibit "P-10".

Thus, on May 8, 2015, petitioner filed a Letter of Protest[24] dated May 7, 2015, praying for reconsideration or reinvestigation of the deficiency assessment findings in the FAN. Likewise, respondent failed to act on the Letter of Protest within the 180-day period prescribed by law, prompting petitioner to file the instant Petition.

CTA Case No. 9242

On April 16, 2012, petitioner filed its Income Tax Return[25] for taxable year 2011.

On May 29, 2015, a PAN[26] dated May 26, 2015 was issued by respondent for petitioner's alleged deficiency income tax and VAT in the total amount of ₱29,371,244.81.

On June 11, 2015, petitioner filed its Protest Letter[27] to the PAN.

Subsequently, on June 16, 2015, respondent issued a FAN[28] which was received by petitioner on June 18, 2015, assessing the latter for deficiency tax in the total amount of ₱29,667,239.19.

On July 10, 2015, petitioner filed a Letter Protest[29] dated July 9, 2015, likewise praying for reconsideration or reinvestigation of the deficiency assessment findings in the FAN. However, respondent again failed to act on petitioner's protest within the 180-day prescriptive period. Hence, the instant petition.

Thereafter, respondent respectively filed his Answers for CTA Case Nos. 9172, 9212, and 9242 on December 14, 2015[30], on March 2, 2016[31], and on March 15, 2016[32]. Except for specific dates and assessed amounts involved, the Answers interposed the following common special and affirmative defenses:

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[24] Exhibit "P-11".
[25] Exhibits "P-12" to "P-12-1".
[26] Exhibit "P-13".
[27] Exhibit "P-14".
[28] Exhibit "P-15".
[29] Exhibit "P-16".
[30] CTA Case No. 9172, docket (Vol. I), pp. 87-90.
[31] CTA Case No. 9212, docket, pp. 96-98.
[32] CTA Case No. 9242, docket, pp. 108-111.

CTA Case No. 9172

"Respondent reproduces and repleads all the foregoing allegations insofar as they are relevant to her defenses which are discussed hereunder and incorporates them herein by way of reference and, in addition thereto, most respectfully avers THAT:

6. A revenue regulation, the issuance of which is authorized by statute, has the force and effect of law *(Vitug & Accosta, Tax Law and Jurisprudence, 3rd Edition, p. 55)*;

7. Assessments are *prima facie* presumed correct and made in good faith. The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed. *(Aban, Law of Basic Taxation in the Philippines, 1st Edition, p. 109)*;

8. At the outset, the Formal Assessment Notice (FAN) dated February 23, 2015 and its corresponding Details of Discrepancies also dated February 23, 2015, reflect the all internal revenue tax liabilities of the petitioner for the taxable year 2009 and the factual and legal bases of the assessment made against the petitioner, as a result of its failure to pay Income Tax and Value Added Tax in the total amount of Php64,330,641.80 and the resulting compromise penalty/surcharges thereon.

9. Over and above all, petitioner should be reminded that taxes are important because it is the lifeblood of the government and so should be calculated without unnecessary hindrance (Commissioner vs. Algue, Inc. L-28896, 17 February 1988). Taxes are enforced proportional contributions from persons and property levied by the state, thus, no one is considered entitled to recover that which he must give up to another. – **Non videtur quisquam id capere quod ei necesse est alii restitutere**."

CTA Case No. 9212

"Respondent reproduces and repleads all the foregoing allegations insofar as they are relevant to her defenses which are discussed hereunder and incorporates them herein by way of reference and, in addition thereto, most respectfully avers THAT:

6. A revenue regulation, the issuance of which is authorized by statute, has the force and effect of law *(Vitug & Accosta, Tax Law and Jurisprudence, 3rd Edition, p. 55)*;

7. Assessments are *prima facie* presumed correct and made in good faith. The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official

duties, an assessment will not be disturbed. *(Aban, Law of Basic Taxation in the Philippines, 1st Edition, p. 109)*;

8. At the outset, the Formal Assessment Notice (FAN) dated April 23, 2015 and its corresponding Details of Discrepancies also dated April 23, 2015, reflect the all internal revenue tax liabilities of the petitioner for the taxable year 2010 and the factual and legal bases of the assessment made against the petitioner, as a result of its failure to pay Income Tax and Value Added Tax in the total amount of Php22,579,989.52 and the resulting compromise penalty/surcharges thereon.

9. Over and above all, petitioner should be reminded that taxes are important because it is the lifeblood of the government and so should be calculated without unnecessary hindrance (Commissioner vs. Algue, Inc. L-28896, 17 February 1988). Taxes are enforced proportional contributions from persons and property levied by the state, thus, no one is considered entitled to recover that which he must give up to another. – **Non videtur quisquam id capere quod ei necesse est alii restitutere**."

CTA Case No. 9242

"Respondent reproduces and repleads all the foregoing allegations insofar as they are relevant to her defenses which are discussed hereunder and incorporates them herein by way of reference and, in addition thereto, most respectfully avers THAT:

6. A revenue regulation, the issuance of which is authorized by statute, has the force and effect of law *(Vitug & Accosta, Tax Law and Jurisprudence, 3rd Edition, p. 55)*;

7. Assessments are *prima facie* presumed correct and made in good faith. The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed. *(Aban, Law of Basic Taxation in the Philippines, 1st Edition, p. 109)*;

8. At the outset, the Formal Assessment Notice (FAN) dated June 16, 2015 and its corresponding Details of Discrepancies also dated June 16, 2015, reflect the all internal revenue tax liabilities of the petitioner for the taxable year 2011 and the factual and legal bases of the assessment made against the petitioner, as a result of its failure to pay Income Tax, Value Added Tax, Expanded Withholding Tax, Improperly Accumulated Earnings Tax and Compromise Penalty in the total amount of PhP29,667,239.19 including interests and surcharges.

9. Over and above all, petitioner should be reminded that taxes are important because it is the lifeblood of the government and so should be calculated without unnecessary hindrance (Commissioner vs. Algue, Inc. L-28896, 17 February 1988). Taxes are enforced proportional

> contributions from persons and property levied by the state, thus, no one is considered entitled to recover that which he must give up to another. – **Non videtur quisquam id capere quod ei necesse est alii restitutere**."

Meanwhile, on December 4, 2015, petitioner filed an *Ex-Parte* Motion for Consolidation[33] praying that CTA Case No. 9212, pending with the CTA First Division, be consolidated with CTA Case No. 9172, pending before the CTA Second Division. Thus, in the Resolution[34] dated February 3, 2016 this Court granted petitioner's Ex-Parte Motion thereby consolidating CTA Case No. 9212 with CTA Case No. 9172, bearing the lower docket number pursuant to Section 1, Rule 31 of the 1997 Rules of Civil Procedure, as amended, and Section 3, Rule IV of Administrative Matter No. 05-11-07-CTA, otherwise known as the *"Additional Amendments to the 2005 Revised Rules of the Court of Tax Appeals, as amended, and Internal Rules of the Court of Tax Appeals"*.

Thereafter, on March 3, 2016, petitioner filed with the CTA Third Division an Ex-Parte Motion for Consolidation[35] requesting to consolidate CTA Case No. 9242 with CTA Case Nos. 9172 and 9212, pending before the CTA Second Division, on the ground that these cases involve the same parties, questions of law and issues. As such, in the Resolution[36] dated April 14, 2016, the said Ex-Parte Motion was likewise granted thereby consolidating CTA Case No. 9242 with CTA Case Nos. 9172 and 9212, bearing the lower docket number.

Then, petitioner's Pre-Trial Briefs were respectively filed on February 15, 2016[37] for CTA Case No. 9172, and on May 25, 2016 for CTA Case Nos. 9212 and 9242. On the other hand, respondent's Consolidated Pre-Trial Brief[38] was filed, through registered mail, on May 18, 2016.

On February 18, 2016, petitioner filed a Motion for Preliminary Hearing on the Issue of Prescription[39] asking this Court to resolve the question of prescription before a full-blown trial ensue. Petitioner anchors its plea on the fact that the assessments were issued beyond the mandatory three-year prescriptive period under Section 203 of the

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[33] CTA Case No. 9212, docket, pp. 83-85.
[34] *Ibid*, pp. 94-95.
[35] CTA Case No. 9242, docket, pp. 101-106.
[36] CTA Case No. 9172, docket (Vol. I), pp. 123-125.
[37] *Ibid*, pp. 97-106.
[38] *Id.*, pp. 296-298.
[39] *Id.*, pp. 110-113.

NIRC of 1997, as amended, and in accordance with its constitutional right to a speedy disposition of cases.

During the hearing[40] on May 26, 2016, the Court granted petitioner's Motion for Preliminary Hearing on the Issue of Prescription, setting petitioner's presentation of evidence in support of its Motion on June 6, 2016 and, in the meantime, this Court held the pre-trial in abeyance.

Thus, on June 6, 2016, petitioner presented as witness its external bookkeeper, Mr. Rodrigo M. Intia, who testified by way of Consolidated Judicial Affidavit[41] in lieu of his direct examination. After respondent's cross-examination, petitioner then moved to file its Formal Offer of Evidence on the issue of prescription, which this Court granted.

On June 23, 2016, petitioner filed its Formal Offer of Exhibits[42] in support of its motion to resolve the issue of prescription, offering Exhibits "P-1" to "P-17", inclusive of sub-markings. Hence, in the Resolution[43] dated September 20, 2016, this Court admitted all of petitioner's documentary exhibits and ordered the parties to submit their respective Memoranda within fifteen (15) days, after which, the issue of prescription shall be deemed submitted for resolution.

In compliance, petitioner filed a Consolidated Memorandum[44] while respondent, on the other hand, filed his Memorandum[45] on November 7, 2016.

Accordingly, on February 27, 2017, the Court issued a Resolution[46] denying petitioner's Motion for Preliminary Hearing on the Issue of Prescription. This Court was constrained to deny the motion considering that the arguments stated therein involves factual issues that can be properly threshed out after a full-blown trial ensues. g

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[40] Minutes of the Hearing dated May 26, 2016, *id.*, p. 147.
[41] Exhibit "17"; CTA Case No. 9172, docket (Vol. I), pp. 550-566.
[42] CTA Case No. 9172, docket (Vol. I), pp. 425-430.
[43] CTA Case No. 9172, docket (Vol. II), pp. 606-607.
[44] *Ibid*, pp. 608-622.
[45] *Id.*, pp. 628-640.
[46] *Id.*, pp. 643-648.

Thereafter, a Notice of Pre-Trial Conference[47] was issued by this Court setting the consolidated cases for pre-trial conference on June 22, 2017.

On August 24, 2017, the parties filed their Joint Stipulations[48] via Motion to Admit, which was then granted and admitted in the Resolution dated September 20, 2017. Thus, the pre-trial was deemed terminated.

During the trial, petitioner offered the testimonies, by way of Consolidated Judicial Affidavits, of its tax consultant Mr. Florencio Y. Rojas, Jr.[49], and Assistant to the President, Mr. Abdol Bryan Barte.[50]

Subsequently, on September 4, 2017, petitioner filed its Formal Offer of Exhibits[51] consisting of Exhibits "P-1" to "P-25-1", inclusive of sub-markings. Afterward, in the Resolution[52] dated November 17, 2017, this Court admitted all of petitioner's formally offered exhibits and deemed petitioner to have rested its case.

For his part, respondent presented as witnesses, Revenue Officers Rhodora S. De Villa[53], Gigette T. Ventura[54] and Mohammad-Ali Rande[55], who all testified by way of judicial affidavits in lieu of direct examination.

Then, on May 9, 2018, respondent filed his Formal Offer of Evidence[56] via Motion to Admit, offering Exhibits "R-1" to "R-21-a", inclusive of sub-markings. Thus, in the Resolution[57] dated July 12, 2018, this Court admitted all of respondent's documentary exhibits taking into account that petitioner interposed no object thereto. *Jc*

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[47] *Id.*, pp. 743-744.
[48] CTA Case No. 9172, docket (Vol. III), pp. 1136-1147.
[49] Exhibit "P-24"; CTA Case No. 9172, docket (Vol. II), pp. 1020-1032.
[50] Exhibit "P-25", *ibid*, pp. 1120-1125.
[51] CTA Case No. 9172, docket (Vol. III), pp. 1142-1147.
[52] *Ibid*, pp. 1410-1411.
[53] CTA Case No. 9172, docket (Vol. I), pp. 288-294.
[54] CTA Case No. 9172, docket (Vol. III), pp. 1428-1433.
[55] *Ibid*, pp. 1436-1442.
[56] *Id.*, pp. 1456-1459.
[57] *Id.*, pp. 1506-1509.

On July 3, 2018, petitioner filed its Memorandum (for the Petitioner)[58] while respondent failed to file his as per Records Verification[59] dated August 15, 2018.

Accordingly, in the Resolution[60] dated August 20, 2018, the present consolidated cases were deemed submitted for decision.

THE ISSUES

As stipulated by the parties, the following issues[61] are submitted for this Court's resolution:

1. Whether the BIR Ruling No. (128) 374-2009 and BIR Ruling No. (129) 375-2009 extend to petitioner as agent of the Trustee, BDO-TD?

2. Whether assessments based on Third Party Sources without respondent being confronted with invoices and facts are valid?

3. Whether it is correct for the respondent to base its assessment on the Gross Profit Ratio rather than the actual Sales Invoice?

4. Whether it is correct for the BIR to disallow the ₱16,497,956.99 because of non-withholding of taxes?

5. Whether the ₱16,497,956.99 pertains to the purchase of marketing materials to be used for advertisement?

THE COURT'S RULING

Petitioner argues that any assessment for taxable years 2009, 2010, and 2011 should have been made within three (3) years from the filing of its tax returns which were respectively filed on April 15,

[58] *Id.*, pp. 1472-1504.
[59] *Id.*, p. 1510.
[60] *Id.*, p. 1511.
[61] Issues, Joint Stipulation, *id.*, pp. 1140-1141.

2010,[62] January 9, 2012[63] and April 16, 2012.[64] Petitioner also insists that respondent's belief that the assessment was made pursuant to Section 222(a) of the NIRC of 1997, on the ground of fraud and/or false returns does not hold water since mere allegation of fraud under the said provision does not ipso facto extend the period of assessment to ten (10) years, without any proof or definite finding that the case involves fraudulent or false return. In fact, a perusal of the FANs show that there is not a single allegation specifically explaining why the BIR considered petitioner's tax returns as fraudulent or false with intention to evade taxes.

With regard to the BIR Rulings issued by respondent, petitioner claims that the tax exemption granted to Banco de Oro under said rulings was extended to petitioner as its project manager.

On the assessments, petitioner contends that the computerized matching based on third-party information sources, considered by the BIR as best evidence obtainable, is not a valid basis in assessing petitioner. These alleged "third-party sources" were never revealed to petitioner and the facts surrounding these alleged sources were never explained in the PAN or the FAN. Further, respondent violated his own issuance since he failed to verify the information stemming from the third-party sources as there were no certifications from them.

Lastly, petitioner claims that respondent wrongfully equated the undeclared or under-declared purchases to undeclared income. However, jurisprudence provides that under-declaration of purchases is not prohibited by law. It goes without saying that petitioner can exercise discretion as to whether or not it will declare a lesser amount of deductions or none at all.

Before proceeding further, this Court shall first determine whether it has jurisdiction over the consolidated Petitions for Review.

Verily, jurisdiction over the subject matter or nature of an action is fundamental for a court to act on a given controversy. It is conferred only by law and not by the consent or waiver upon a court which, otherwise, would have no jurisdiction over the subject matter of an action. Lack of jurisdiction of the court over an action or the subject

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[62] Supra Note 14.
[63] Supra Note 19.
[64] Supra Note 25.

matter of an action cannot be cured by the silence, acquiescence, or even by express consent of the parties. If the court has no jurisdiction over the nature of an action, its only jurisdiction is to dismiss the case. The court could not decide the case on the merits.[65]

Perforce, Section 228 of the NIRC of 1997, as amended, provides the time allotted for protesting an assessment, *viz.*:

> "**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:
>
> 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.
>
> 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.
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> 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."

Detailed below are the pertinent dates in the proper and timely determination of filing the protest and the appeal thereof, *viz.*: 𝒫

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[65] *Nippon Express (Philippines) Corp. s. Commissioner of Internal Revenue*, G.R. No. 185666, February 4, 2015.

Taxable Year	Receipt of FAN	Date of Filing of Protest	Last day of 180-day period	Last day to file Petition for Review
2009	February 26, 2015	March 26, 2015	September 22, 2015	October 22, 2015
2010	April 29, 2015	May 8, 2015	November 4, 2015	December 4, 2015
2011	June 18, 2015	July 10, 2015	January 6, 2016	February 5, 2016

Clearly, the table above shows that petitioner timely filed the three (3) Petitions for Review with this Court on October 21, 2015,[66] on December 3, 2015,[67] and on January 14, 2016.[68] Consequently, this Court has jurisdiction to take cognizance of the same pursuant to Section 7(a)(1)[69] of RA No. 1125, as amended by RA No. 9282.

That having been settled, this Court shall now proceed to resolve the present cases on the merits. Section 203 of the NIRC of 1997, as amended, provides that, save certain exceptional circumstances, the period to assess internal revenue taxes is three (3) years from the last day prescribed by law for filing of the return, to wit:

> "**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*, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day." *(Emphasis supplied)*

More so, Section 77(B) of the NIRC of 1997, as amended, states that the final adjusted Corporate Income Tax Return is due to be filed on or before April 15 of the following calendar year, or on or before

[66] Supra Note 1.
[67] Supra Note 2.
[68] Supra Note 3.
[69] 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 in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;

the fifteenth (15th) day of the fourth (4th) month following the close of the fiscal year, as the case may be, thus:

> "**SEC.** 77. *Place and Time of Filing and Payment of Quarterly Corporate Income Tax.* –
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> x x x
>
> (B) *Time of Filing the Income Tax Return.* –The corporate quarterly declaration shall be filed within sixty (60) days following the close of each of the first three (3) quarters of the taxable year.
>
> The final adjustment return shall be filed on or before the fifteenth (15th) day of April, or on or before the fifteenth (15th) day of the fourth (4th) month following the close of the fiscal year, as the case may be."

Records of the present consolidated case steadily reveal that petitioner filed its Annual Income Tax Return on the following dates:

Taxable Year	**Date of Filing of ITR**	**Three years from filing of ITR**	**Date of FAN**
2009	April 15, 2010	April 15, 2013	February 23, 2015
2010	January 9, 2012*	January 9, 2015	April 23, 2015
2011	April 16, 2012	April 16, 2015	June 16, 2015

**Amended Income Tax Return*

However, respondent insists that the ten-year assessment period under Section 222(a) of the NIRC of 1997, as amended, should apply on the basis that petitioner failed to file the Withholding Tax Remittance Return and the Documentary Stamp Tax Return. Also, the BIR Rulings heavily relied on by petitioner are contrary to law and regulations since petitioner's Contract to Manage and Execute the Construction of the Fort Palm Springs Condominium constitute a taxable sale, exchange or disposition of real property.

This Court is not convinced.

Indeed, Section 222(a) of the NIRC of 1997, as amended, provides exceptions to the three-year prescriptive period, extending the period to assess from three (3) to ten (10) years, counted from the discovery of the falsity, fraud or omission, thus:

> "**SEC. 222.** *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* –

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

In relation thereto, Section 248(B) of the same Code provides for a *prima facie* evidence of what constitutes a false or fraudulent return, *viz.*:

> "**SEC. 248.** *Civil Penalties.* –
>
> 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,* That a substantial underdeclaration of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, shall constitute prima facie evidence of a false or fraudulent return: *Provided, further,* That failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding (30%) of actual deductions, shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions, as mentioned herein."

Based on the provision, substantial under-declaration of taxable sales, receipts or income, or a substantial overstatement of deductions exceeding thirty percent (30%) of that declared per return shall constitute *prima facie* evidence of a false or fraudulent return.

However, in the case of *Commissioner of Internal Revenue vs. Fitness by Design, Inc.*,[70] the Supreme Court made the following guide when fraud is alleged:

> "Fraud is a question of fact that should be alleged and duly proven. The willful neglect to file the required tax return

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

or the fraudulent intent to evade the payment of taxes, considering that the same is accompanied by legal consequences, cannot be presumed. Fraud entails corresponding sanctions under the tax law. Therefore, it is indispensable for the Commissioner of Internal Revenue to include the basis for its allegations of fraud in the assessment notice."

Moreover, in the case of *Commissioner of Internal Revenue vs. Philippine Daily Inquirer, Inc.*,[71] the Supreme Court held that:

"The CIR alleges that PDI filed a false or fraudulent return. As such, Section 222 of the NIRC should apply to this case and the applicable prescriptive period is 10 years from the discovery of the falsity of the return. The CIR argues that the ten-year period starts from the time of the issuance of its Letter Notice on 10 August 2006. As such, the assessment made through the Formal Letter of Demand dated 11 March 2008 is within the prescriptive period.
We do not agree.

Under Section 203 of the NIRC, the prescriptive period to assess is set at three years. This rule is subject to the exceptions provided under Section 222 of the NIRC. The CIR invokes Section 222(a) which provides:

'SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* –

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

In *Commissioner of Internal Revenue v. Javier*, this Court ruled that fraud is never imputed. The Court stated that it will not sustain findings of fraud upon circumstances which, at most, create only suspicion. The Court added that the mere understatement of a tax is not itself proof of fraud for the purpose of tax evasion. The Court explained:

'xxx. The fraud contemplated by law is actual and not constructive. It must be intentional fraud, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some legal right.

[71] G.R. No. 213943, March 22, 2017.

> Negligence, whether slight or gross, is not equivalent to fraud with intent to evade the tax contemplated by law. It must amount to intentional wrongdoing with the sole object of avoiding the tax. xxx.'"

Evidently, it is a well-entrenched rule that fraud is not presumed – it must be proved by clear and convincing evidence.[72] Fraud is never imputed and the courts never sustain findings of fraud upon circumstances which, at most create only suspicion and the mere understatement of a tax is not itself proof of fraud for the purpose of tax evasion.[73]

Going back to the present consolidated cases, perusal of the FANs show that respondent imposed a fifty percent (50%) surcharge for petitioner's failure to report receipts in an amount exceeding thirty percent (30%) of that declared per return. While it is true that such under-declaration constitutes *prima facie* evidence of a false or fraudulent return pursuant to the provisions of Section 248(B) of the NIRC of 1997, as amended, such is only a presumption. As held on numerous occasions by the Supreme Court, the allegation of fraud must be duly proven.

At the onset, respondent claims to have used the best evidence obtainable based on third-party information as basis in computing petitioner's deficiency taxes. He continues that Sections 5 and 6 of the NIRC of 1997, as amended, give him the power to assess based on the best evidence obtainable, *viz.*:

> "**SEC. 5.** *Power of the Commissioner to Obtain Information and to Summon, Examine, and Take Testimony of Persons.* – In ascertaining the correctness of any return, or in making a return when none has been made, or in determining the liability of any person for any internal revenue tax, or in collecting any such liability, or in evaluating tax compliance, the Commissioner is authorized:
>
> (A) To examine any book, paper, record, or other data which may be relevant or material to such inquiry;
>
> (B) To obtain on a regular basis from any person other than the person whose internal revenue tax liability is subject to audit or investigation, or from any office or officer of the national and local governments, government agencies and instrumentalities, including the *Bangko Sentral ng Pilipinas* and government-owned or -controlled

[72] *Spouses Nilo Ramos and Eliadora Ramos v. Raul Obispo and Far East Bank and Trust Company*, G.R. No. 193804, February 27, 2013.
[73] *Commissioner of Internal Revenue v. Melchor Javier, Jr., et al.*, G.R. 78953, July 31, 1991.

corporations, any information such as, but not limited to, costs and volume of production, receipts or sales and gross incomes of taxpayers, and the names, addresses, and financial statements of corporations, mutual fund companies, insurance companies, regional operating headquarters of multinational companies, joint accounts, associations, joint ventures or consortia and registered partnerships, and their members;

(C) To summon the person liable for tax or required to file a return, or any officer or employee of such person, or any person having possession, custody, or care of the books of accounts and other accounting records containing entries relating to the business of the person liable for tax, or any other person, to appear before the Commissioner or his duly authorized representative at a time and place specified in the summons and to produce such books, papers, records, or other data, and to give testimony;

(D) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry; and

(E) To cause revenue officers and employees to make a canvass from time to time of any revenue district or region and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care, management or possession of any object with respect to which a tax is imposed.

The provisions of the foregoing paragraphs notwithstanding, nothing in this Section shall be construed as granting the Commissioner the authority to inquire into bank deposits other than as provided for in Section 6(F) of this Code."

"**SEC. 6.** *Power of the Commissioner to Make Assessments and Prescribe additional Requirements for Tax Administration and Enforcement.* –

x x x

(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.

In case a person fails to file a required return or other document at the time prescribed by law, or willfully or otherwise files a false or fraudulent return or other document, the Commissioner shall make or amend the return from his own knowledge and from such information as he can obtain through testimony or otherwise, which shall be prima facie correct and sufficient for all legal purposes."

However, in the case of *Commissioner of Internal Revenue vs. Hantex Trading Co. Inc.*,[74] the Supreme Court elaborated on the power of the BIR Commissioner to assess a taxpayer based on the best evidence obtainable pursuant to Sections 5 and 6 of the NIRC of 1997, to wit:

> "The law allows the BIR access to all relevant or material records and data in the person of the taxpayer. It places no limit or condition on the type or form of the medium by which the record subject to the order of the BIR is kept. The purpose of the law is to enable the BIR to get at the taxpayer's records in whatever form they may be kept. Such records include computer tapes of the said records prepared by the taxpayer in the course of business. In this era of developing information-storage technology, there is no valid reason to immunize companies with computer-based, record-keeping capabilities from BIR scrutiny. *The standard is not the form of the record but where it might shed light on the accuracy of the taxpayer's return.*
>
> In *Campbell, Jr. v. Guetersloh*, the United States (U.S.) Court of Appeals (5th Circuit) declared that it is the duty of the Commissioner of Internal Revenue to investigate any circumstance which led him to believe that the taxpayer had taxable income larger than reported. Necessarily, this inquiry would have to be outside of the books because they supported the return as filed. He may take the sworn testimony of the taxpayer; he may take the testimony of third parties; he may examine and subpoena, if necessary, traders' and brokers' accounts and books and the taxpayer's book accounts. The Commissioner is not bound to follow any set of patterns. The existence of unreported income may be shown by any practicable proof that is available in the circumstances of the particular situation. Citing its ruling in *Kenney v. Commissioner*, the U.S. appellate court declared that where the records of the taxpayer are manifestly inaccurate and incomplete, the Commissioner may look to other sources of information to establish income made by the taxpayer during the years in question.
>
> x x x
>
> The rule is that in the absence of the accounting records of a taxpayer, his tax liability may be determined by estimation. The petitioner (Commissioner of Internal Revenue) is not required to compute such tax liabilities with mathematical exactness. Approximation in the calculation of the taxes due is justified. To hold otherwise would be tantamount to holding that skillful concealment is an invincible barrier to proof. **However, the rule does not apply where the estimation is arrived at arbitrarily and capriciously**." (*Emphasis supplied*)

Clearly, while Section 5, in relation to Section 6, of the NIRC of 1997, as amended, gives respondent the power to assess the taxpayer

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[74] G.R. No. 136975, March 31, 2005.

on best evidence obtainable, such power, however, should not be used arbitrarily and capriciously in computing the taxes due. In order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption.[75]

In the Details of Discrepancies[76] in the FANs, respondent derived the deficiency income tax and VAT assessments based on the computerized matching system on third-party information sources. Respondent stated that comparing the sales submitted by the suppliers of petitioner against the purchases declared in petitioner's tax returns would show an understatement of purchases resulting in undeclared income and undeclared sales.

However, during the cross-examination of respondent's witness Revenue Officer Rhodora S. De Villa, the third-party information sources were not verified by the revenue officers who conducted the examination or assessment, to wit:[77]

"ATTY. MONTILLA:
Q. Did you verify aside from the matching previous clients?

MS. DE VILLA:
A. Sir, I have to inform you that this is actually a re-assignment. The case was re-assigned to me in 2013. This was originally handled by another RO. When it was re-assigned to me, the instruction was clear that it was actually from the... there was a Memorandum from Legal directing me to assess on best evidence.

JUSTICE CASTAÑEDA:
Q. Your best evidence is the computer matching?

MS. DE VILLA:
A. Yes.

JUSTICE CASTAÑEDA:
Q. Actually, what the previous examiner does is he conducted an examination based on the docket of the case?

MS. DE VILLA:
A. At the time sir that the original RO passed the document, the docket of the case to Legal, endorsed by Legal, I believe there was no assessment yet because she was unable to meet an assessment for lack of documents.

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[75] *Collector of Internal Revenue v. Benipayo*, G.R. No. L-13656, January 31, 1962.
[76] Exhibits "P-4", "P-10", and "P-15".
[77] Transcript of Stenographic Notes (TSN) dated January 17, 2018, pp. 9-10.

JUSTICE CASTAÑEDA:
Q. So in effect, there was actually no verification made by the suppliers?

MS. DE VILLA:
A. Yes, Your Honors."

Likewise, in cases where confirmation letters were received by respondent from the suppliers, such letters were not provided to petitioner. [78]

In the present cases, respondent chose to resort to presumptions by relying on the results of the unverified third-party matching in estimating petitioner's sales and tax liabilities. Since the assessments were based on presumptions, respondent failed to prove by clear and convincing evidence that petitioner committed fraud.

As to the issue that there was undeclared or under-declaration of purchases, such does not result in the automatic imposition of income tax and VAT as held in the case of *Commissioner of Internal Revenue vs. Agrinurture, Inc.*[79] The three (3) elements in the imposition of income tax are: (1) there must be gain or profit; (2) that the gain or profit is realized or received, actually or constructively; and (3) it is not exempted by law or treaty from income tax. Income tax is assessed on income received from any property, activity or service. In the instant cases, respondent failed to prove the existence of the three elements.

Also worth noting, during the preliminary hearing on the issue of prescription, respondent argued that the ten-year prescriptive period should apply since petitioner failed to file a Withholding Tax Remittance Return and Documentary Stamp Tax Declaration/Return on the transfer of the subject condominium units. He also asserted that the Contract to Manage and Execute the Construction of Fort Palm Spring would constitute a taxable sale, exchange or disposition of real property, which is subject to Expanded Withholding Tax (EWT) and DST.

However, based on the examination of the subject assessments, this Court observes that the allegation of non-filing of the EWT and

[78] TSN dated April 2, 2018, pp. 8-10.
[79] CTA EB No. 1054 (CTA Case No. 8345), January 13, 2015.

DST Returns was not indicated therein. Such allegation was only raised during the preliminary hearing. This violates petitioner's right to due process, as the law requires that the taxpayer must be informed of the facts and the laws from which the assessment is based, as held by the Supreme Court in *Commissioner of Internal Revenue vs. Reyes*,[80] to wit:

> "... A void assessment bears no valid fruit.
>
> 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. In the instant case, respondent has not been informed of the basis of the estate tax liability. Without complying with the unequivocal mandate of first informing the taxpayer of the government's claim, there can be no deprivation of property, because no effective protest can be made. The haphazard shot at slapping an assessment, supposedly based on estate taxation's general provisions that are expected to be known by the taxpayer, is utter chicanery.
>
> Even a cursory review of the preliminary assessment notice, as well as the demand letter sent, reveals the lack of basis for – not to mention the insufficiency of – the gross figures and details of the itemized deductions indicated in the notice and the letter. This Court cannot countenance an assessment based on estimates that appear to have been arbitrarily or capriciously arrived at. Although taxes are the lifeblood of the government, their assessment and collection 'should be made in accordance with law as any arbitrariness will negate the very reason for government itself.'"

Hence, the argument on the application of the ten-year prescriptive period due to the non-filing of the EWT and DST Returns is bereft of merit.

Finally, since respondent failed to clearly prove that petitioner filed a fraudulent or false return to warrant the application of the ten-year prescriptive period, the regular period of three years within which to assess must therefore apply.

Considering that the FANs issued for taxable years 2009, 2010, and 2011 are void for being issued beyond the three-year period to assess, the Court finds it no longer necessary to discuss the other issues raised.

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[80] G.R. No. 159694 and G.R. No. 163581, January 27, 2006.

WHEREFORE, premises considered, the instant Petitions for Review are hereby **GRANTED**. Accordingly, the Final Assessment Notices dated February 23, 2015, April 23, 2015, and June 16, 2015 respectively issued for taxable years 2009, 2010, and 2011 are hereby **CANCELLED** and **SET ASIDE**.

SO ORDERED.

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

I CONCUR:

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the cases were assigned to the writer of the opinion of the Court's Division.

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

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the cases were assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice