REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

CLARK WATER CORPORATION,
Respondent.

CTA *EB* NO. 2379
(CTA Case No. 9519)

Present:

DEL ROSARIO, *PJ,*
UY,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA,
MODESTO-SAN PEDRO,
REYES-FAJARDO,
CUI-DAVID, *and*
FERRER-FLORES, *JJ.*

Promulgated:
FEB 17 2023 11:42am

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DECISION

CUI-DAVID, J.:

Before the Court *En Banc* is a *Petition for Review*[1] filed by petitioner Commissioner of Internal Revenue (CIR) on December 7, 2020, assailing the Decision[2] dated June 17, 2020 (assailed Decision), and the Resolution[3] dated October 30, 2020 (assailed Resolution), promulgated by the Court's Second Division (Court in Division) in CTA Case No. 9519, entitled *Clark Water Corporation v. Commissioner of Internal Revenue.* The dispositive portions of the assailed Decision and Resolution read:

[1] *En Banc* (*EB*) Docket, pp. 1-23.
[2] *EB* Docket, pp. 36-53; Division Docket – Vol. II, pp. 479-496.
[3] *EB* Docket, pp. 31-35; Division Docket – Vol. II, pp. 549-553.

Assailed Decision of June 17, 2020:

> **WHEREFORE**, in light of the foregoing considerations, the assailed subject assessment and FDDA holding petitioner liable for deficiency VAT in the amount of ₱4,366,648.49, inclusive of surcharge, interests and compromise penalty for CY 2014 is **CANCELLED** and **SET ASIDE**.
>
> **SO ORDERED.**

Assailed Resolution of October 30, 2020:

> **WHEREFORE**, premises considered, respondent's Motion for Reconsideration is **DENIED** for lack of merit.
>
> **SO ORDERED**.

Petitioner prays that the assailed Decision and Resolution be reversed and set aside; and that a new one be rendered ordering respondent Clark Water Corporation to pay the amount of ₱4,366,648.49 representing its deficiency value-added tax (VAT) for calendar year (CY) 2014, as well as 25% surcharge, 20% deficiency, and delinquency interest under Sections 248 and 249 of the National Internal Revenue Code of 1997, as amended (1997 NIRC or Tax Code) for the period until December 31, 2017, and 12% interest starting from January 1, 2018, until full payment under Section 249 of the Tax Reform for Acceleration and Inclusion (TRAIN) law.

THE PARTIES

Petitioner is the duly appointed CIR vested under relevant laws with authority to carry out the functions, duties, and responsibilities of his office, including, *inter alia*, the power to decide disputed assessments, cancel and abate tax liabilities under the provisions of the 1997 NIRC, as amended, and other laws, rules, and regulations.[4] His principal office is at the Bureau of Internal Revenue (BIR) National Office Building, Agham Road, Diliman, Quezon City.[5]

Respondent is a domestic corporation duly organized and existing under Philippine laws, with a registered principal office at Depot 1901, Bicentennial Hill, Clark Freeport Zone (CFZ), Clark Field, Pampanga.[6]

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[4] Par. 2, Stipulated Facts, *Joint Stipulation of Facts and Issues* (JSFI), Division Docket — Vol. I, p. 214.
[5] Par. 2, The Parties, *Petition for Review*, Division Docket — Vol. I, p. 11.
[6] Par. 1, Stipulated Facts, *JSFI*, Docket — Vol. I, p. 214.

THE FACTS

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

> On August 3, 2015, [respondent][7] received the *Letter of Authority* (LOA) No. 21A-2015-00000162/eLA201100064214 from BIR-RDO No. 21A-North Pampanga, authorizing Revenue Officer (RO) Amor Canlas and Group Supervisor Jose Gil Reyes to examine [respondent's] books of accounts and other accounting records for all internal revenue taxes including Documentary Stamp Tax, other taxes (miscellaneous tax) for the period from January 1, 2014 to December 31, 2014.
>
> Subsequently, [respondent] received a copy of the *Preliminary Assessment Notice (PAN)* dated July 7, 2016, assessing it of deficiency Income Tax (IT), VAT, and Expanded Withholding Tax (EWT) for CY 2014 in the aggregate amount of ₱3,827,590.31, inclusive of interest, penalties, and surcharge.
>
> On July 27, 2016, [respondent] filed its *protest letter to the PAN*, disputing only the findings on deficiency VAT. Atty. Jethro M. Sabariaga acknowledged the receipt of the proof of payment on the deficiency IT and EWT in the respective amounts of ₱299,905.90 and ₱40,031.33 in his letter dated August 15, 2016.
>
> On October 5, 2016, [respondent] received [petitioner's] [8] *Formal Letter of Demand* (FLD) and *Final Assessment Notice* (FAN) dated September 19, 2016, assessing [respondent] of deficiency VAT for CY 2014 in the total amount of ₱4,406,648.49.
>
> [Respondent] filed its *protest letter* to the FLD and FAN on November 4, 2016.
>
> On December 16, 2016, [respondent] received [petitioner's] *Final Decision on Disputed Assessment (FDDA)* dated December 6, 2016, denying its protest to the FLD and FAN.
>
> **PROCEEDINGS BEFORE [THE COURT IN DIVISION]**
>
> [Respondent] filed the instant *Petition for Review* on January 16, 2017.

[7] Clark Water Corporation was the petitioner before the Court in Division and is now the respondent before this Court.
[8] The CIR is the respondent before the Court in Division and is now the petitioner before this Court.

[Petitioner] filed [his] *Answer* on April 7, 2017, interposing the following defenses, to wit:

> "5.1 Income generated by [respondent] from its sales in customs territory is subject to VAT.
>
> 5.2 The Formal Letter of Demand dated September 19, 2016 informed [respondent] of its liability for deficiency value-added tax (VAT) for taxable year 2014. The Details of Discrepancies expressly provides:
>
> > 'Verification of your records disclosed that your receipts amounting to ₱22,984,353.84 are sales in the customs territory or outside the zone, thus, subjected to 12% VAT pursuant to Revenue Memorandum Circular No. 50-2007.'
>
> 5.3 [Petitioner] holds that [respondent] is liable for deficiency VAT on its sales transactions within the customs territory (or outside Ecozone or Freeport) for taxable year 2014.
>
> 5.4 It was clearly explained in the Letter dated December 6, 2016 issued by Revenue Region No. 4-San Fernando, Pampanga that:
>
> > 'Section 5 of Department Order No. 3-08 provides that for purposes of implementing the special 5% tax on Gross Income Earned, in lieu of national and local taxes, granted to Ecozone Enterprises and Freeport Enterprises in SSEZ, SFZ, CFZ, PPFZ, and MSEZ, gross income earned shall refer to gross sales or gross revenue derived from **business activities within the subject Ecozone and Freeport**, net of sales discounts, sales returns and allowances minus cost of sales or direct costs but before any deduction for administrative, marketing, selling, and/or operating expenses or incidental losses during a given taxable year. Thus, the 5% preferential tax rate is only applicable to the income earned by registered enterprises within the zone. Logically, any income earned from sources within the customs

> territory shall be subject to the internal revenue taxes and rates imposed for enterprises in the customs territory, including VAT.

5.5 Further, the Philippine VAT System adheres to the Cross Border Doctrine, according to which, no VAT shall be imposed to form part of the cost of the goods destined for consumption outside of the territorial border of the taxing authority. Hence, actual export of goods and services from the Philippines to a foreign country must be free of VAT; while **those destined for use or consumption within the Philippines shall be imposed with twelve percent (12%) VAT**. (*CIR vs. Toshiba Information Equipment, G.R. No. 150154, August 9, 2005.*)

5.6 Revenue Memorandum Circular (RMC) No. 50-2007 specifically provides that:

'Freeport Zone-registered enterprises may generate income from sources within the Customs Territory of up to thirty (30%) of its total income from all sources; provided, that should a Freeport Zone-registered enterprise's income from sources within the Customs Territory exceed thirty percent (30%) of its total income from all sources, then it shall be subject to income tax laws of the Customs Territory; provided further, that in any case, customs duties and taxes must be paid with respect to transactions, receipts, income and sales of articles to the Customs Territory and in the Customs Territory.' (Emphasis supplied)

5.7 Clearly, [respondent's] receipts amounting to ₱22,984,353.84 are sales in the customs territory or outside the zone, thus, subjected to 12% VAT pursuant to Revenue Memorandum Circular No. 50-2007.

5.8 Section 2 of RMC No. 50-2007 clarifies tax treatment of sales transactions within [the] customs territory, viz.:

Generally, products manufactured or produced within the SFZ, CFZ, and PPFZ are destined for export to foreign countries. While such products under certain conditions, may also be sold to buyers in the customs territory, such sales are technically considered as importations by such buyers from the customs territory. Since

these Freeport Zones, as defined by law, are considered as separate customs territories, the buyer from the customs territory is treated as an importer and is subject to the corresponding customs duties and import taxes on his purchase of products from within these Freeport Zones.'

5.9 Furthermore, [respondent] cannot contend that it is not liable for VAT on its sales of services for being classified as a non-VAT entity. Needless to state, even assuming that [respondent] is registered as non-VAT entity, its gross annual receipts far exceed the threshold provided under Section 109 of the Tax Code.

5.10 Hence, considering that verification showed that [respondent's] gross receipts exceeded the ₱1,919,500 threshold, it cannot escape the fact that it is mandatorily subject to VAT.

6. x x x

6.1 The imposition of interest and surcharge on the deficiency assessment is pursuant to Sections 248 and 249 of the Tax Code.

6.2 It can be gleaned that for failure of [respondent] to pay the VAT due within the period prescribed by law for paying the same, it is thus liable to pay interest and surcharge in accordance with the above provisions of the Tax Code.

6.3 Contrary to [respondent's] allegation, there is no need to prove fraud/intentional violation before civil penalties are imposed as the law was enacted to ensure prompt payment of taxes."

The pre-trial conference was initially set on April 27, 2017. However, upon the filing of [respondent's] *Urgent Motion to Defer Pre-Trial Conference* on April 21, 2017, and [petitioner's] *Motion to Reset Pre-Trial Conference* on April 24, 2017, the Pre-Trial Conference was reset to, and held on, May 25, 2017.

[Petitioner's] *Pre-Trial Brief* was filed on May 18, 2017, while [respondent's] *Pre-Trial Brief* was filed on May 19, 2017.

The *BIR Records* for the instant case was filed on May 18, 2017.

The parties filed their *Joint Stipulation of Facts and Issues* on June 19, 2017, which was approved and adopted in the Pre-Trial Order dated June 27, 2017. The Court also deemed the Pre-Trial terminated.

During trial, [respondent] presented its documentary and testimonial evidence. [Respondent] offered the testimonies of the following individuals: Ms. Daisy A. Lacap, [respondent's] Accounting Manager; and Ms. Arlyn S. Villanueva, the Court-commissioned Independent Certified Public Accountant (ICPA).

On October 12, 2017, [respondent] filed its *Formal Offer of Evidence*. [Petitioner] filed [his] *Opposition Re: [respondent's] Formal Offer of Evidence* on October 23, 2017.

In the Resolution dated February 15, 2018, the Court admitted [respondent's] Exhibits, except for [those not found] in the records of the case.

Thus, [respondent] filed, *via* registered mail, its *Motion for Partial Reconsideration (Re: Resolution dated February 15, 2018)* on March 8, 2018. [Petitioner], however, failed to file [his] comment thereon.

In the Resolution dated May 21, 2018, the Court partially granted the above-stated Motion for Partial Reconsideration and admitted certain Exhibits, except for [those not found] in the records of the case.

Undeterred, [respondent] filed a *Submission with Motion for Reconsideration* on June 13, 2018, praying, among others, for the admission of Exhibits [not found in the records of the case] as part of [respondent's] evidence. [Petitioner], however, failed to file [his] comment thereon.

In the Resolution dated August 7, 2018, the Court granted [respondent's] Motion for Reconsideration and admitted the above-stated denied Exhibits.

On the other hand, [petitioner] presented documentary as well as testimonial evidence. With respect to testimonial evidence, [petitioner] offered the testimony of Mr. Jose Gil L. Reyes, Revenue Officer IV of the BIR.

Thereafter, [petitioner] filed [his] *Formal Offer of Evidence* on October 19, 2018. [Respondent] filed its *Comment (To [Petitioner's] Formal Offer of Evidence)* on November 14, 2018. The Court admitted all Exhibits offered by [petitioner] in its Resolution dated January 22, 2019.

> In view of the filing of [petitioner's] *Memorandum* on March 26, 2019, and [respondent's] *Memorandum* on April 10, 2019, the case was deemed submitted for decision on April 22, 2019.

In dismissing the Petition for Review, the Court in Division ruled that the subject tax assessment lacks the definite amount of tax liabilities for which respondent is accountable because the FLD states that the interest "*will have to be adjusted if paid beyond October 31, 2016.*" [9] As such, the amount of respondent's VAT liability "*remains indefinite, since the said tax assessment is still subject to modification or adjustment, depending on the date of payment.*"[10]

Aggrieved, petitioner moved for reconsideration[11] posted *via* registered mail on July 8, 2020 and received by the Court on July 14, 2020. Still, the same was denied in the assailed Resolution dated October 30, 2020, which petitioner received on November 5, 2020.

Unsatisfied, petitioner elevated the case to the Court *En Banc via* this Petition for Review filed through registered mail on December 7, 2020, which is within the reglementary period provided under Section 3(b),[12] Rule 8 of the Revised Rules of the Court of Tax Appeals (RRCTA).[13]

On January 6, 2021, the Court *En Banc* ordered respondent to file its comment to the Petition.[14] Respondent filed its Comment on January 25, 2021.[15]

In a Resolution dated February 4, 2021,[16] the Court *En Banc* referred the case to the Philippine Mediation Center-Court of Tax Appeals (PMC-CTA) for mediation.

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[9] *EB* Docket, p. 51; Division Docket – Vol. II, p. 494.
[10] *Id.*
[11] Division Docket – Vol. II, pp. 497-511.
[12] SEC. 3. Who may appeal; period to file petition. — ... ...
(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and ... before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review. (*Emphasis added*)
[13] The Petition for Review was received by the Court *En Banc* on December 11, 2020.
[14] *EB* Docket, pp. 56-57.
[15] *Id.*, pp. 58-81.
[16] *Id.*, pp. 83-84.

On July 22, 2021, the Court *En Banc* received the PMC-CTA's request for an extension of thirty (30) days, or until August 29, 2021, to give the parties additional time to reach an amicable settlement, which the Court *En Banc* granted in its Resolution dated October 11, 2021.

On May 31, 2022, petitioner and respondent filed a *Joint Motion to Suspend Court Proceedings and for Extension of Period of Mediation* manifesting that respondent's counsel is still in the process of securing petitioner's formal approval of the Compromise Agreement. Consequently, the parties are unable to execute the Compromise Agreement within the period allowed by the Court. Thus, the parties requested the Court *En Banc* to suspend the proceedings and to extend the period of mediation to allow the parties an opportunity to obtain petitioner's formal approval and to finalize and submit the signed Compromise Agreement.

On July 4, 2022, the Court *En Banc* issued a Resolution,[17] denying the parties' *Joint Motion to Suspend Court Proceedings and for Extension of Period of Mediation* since the same was filed on May 30, 2022, way beyond the expiration of the period of mediation on August 29, 2021. The Court *En Banc* added that the process of securing petitioner's formal approval of the Compromise Agreement is not a hindrance to the resolution of petitioner's Petition for Review posted on December 7, 2020. Hence, this case was submitted for decision.

Meanwhile, on July 19, 2022, the Court received the Mediator's Report from the PMC-CTA stating that mediation was unsuccessful.

THE ISSUES

Petitioner raises the following grounds for consideration of the Court *En Banc*:

I. THE HONORABLE COURT IN DIVISION ERRED IN GRANTING A RELIEF THAT WAS NOT PRAYED BY RESPONDENT.

II. THE HONORABLE COURT IN DIVISION ERRED IN RULING THAT THE ASSESSMENT DID NOT INDICATE A DEFINITE TAX DUE NOR A DEMAND FOR THE PAYMENT OF TAX.

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[17] *Id.*, pp. 94-96.

III. THE ASSESSMENT FOR DEFICIENCY VALUE-ADDED TAX ISSUED AGAINST RESPONDENT HAS BASES BOTH IN FACT AND IN LAW.

IV. THE IMPOSITION OF SURCHARGE, INTEREST AND COMPROMISE PENALTY AGAINST RESPONDENT HAS BASES BOTH IN FACT AND IN LAW.

Petitioner's arguments:

Petitioner argues that the issue relating to the validity of the FLD was never raised by respondent; that he was neither heard nor given an opportunity to be heard on the issue; and, that he was denied procedural and substantive due process when the Court in Division ruled on said issue. Petitioner states that achieving an orderly disposition of the cases under the RRCTA is not synonymous with violating litigants' basic right to fair play and due process or disregarding rules of procedure and rules on pre-trial.

Petitioner insists that the FLD/FAN has fixed and set the deficiency VAT liability being demanded from respondent. The statement on the FLD that "please note that the interest and the total amount due will have to be adjusted if paid *beyond* October 31, 2016" set a definite amount on respondent's basic tax liabilities. Petitioner asserts that the basic deficiency VAT remains the same and only the interest adjusts if the tax liability is paid after the due date on October 31, 2016, as stated on the FLD/FAN. Petitioner emphasizes that the tax deficiency is already definite while the interest is running; hence, the total amount due will be adjusted. This does not mean, however, that the taxpayer is incognizant of the amount of its tax deficiency. Petitioner points out that respondent was able to indicate the amount of its deficiency tax liability in its protest filed with the BIR and in its Petition for Review.

Petitioner adds that respondent is mistaken in its allegation that a Freeport Enterprise may generate services outside the Clark Special Economic Zone (CSEZ) and still be subject to the 5% preferential tax rate if the income sourced in the Customs Territory does not exceed 30% of its total income from all sources. Petitioner maintains that the assessment for deficiency VAT against respondent is anchored on Department of Finance (DOF) Department Office (DO) No. 3-08

that was issued to implement Republic Act (RA) No. 9400.[18] Section 5 of DO 3-08 is explicit that for purposes of implementing the special 5% tax on Gross Income Earned (GIE), in lieu of national and local taxes, granted to Ecozone Enterprises and Freeport Enterprises in Subic Special Economic Zone (SSEZ), Subic Freeport Zone (SFZ), the Clark Freeport Zone (CFZ), as well as the Poro Point Freeport Zone (PPFZ), and Morong Special Economic Zone (MSEZ), the GIE shall refer to gross sales or gross revenue derived from business activities *within* the subject Ecozone or Freeport Zone. Since respondent's subject sales transactions for CY 2014 were outside CSEZ or derived in the Customs Territory, petitioner opines that respondent is liable for deficiency VAT.

Petitioner also claims that the Philippine VAT system adheres to the *Cross Border Doctrine* that those destined for use or consumption within the Philippines shall be imposed with the 12% VAT, citing the case of *CIR v. Toshiba Information Equipment.*[19]

Petitioner further adds that the imposition of interest and surcharge is proper pursuant to Sections 248 and 249 of the Tax Code for respondent's failure to pay the VAT due within the period prescribed by the law for payment.

Respondent's counter-arguments:

Respondent submits that petitioner's Petition for Review should be denied for lack of merit. According to respondent, the grounds relied upon by petitioner are the same arguments raised in his Motion for Reconsideration dated July 8, 2020,[20] which the Court in Division already discussed and passed upon in the assailed Resolution.

Nevertheless, respondent maintains that petitioner was not denied due process when the Court in Division ruled on the validity of the FLD. Respondent reiterates that the FLD is void because it lacks an imperative demand for payment and a definite amount of tax liability. Assuming for the sake of argument that the FLD is valid, the deficiency VAT should be cancelled because as a duly registered CSEZ, respondent's sales transactions within the Customs Territory are covered by a

[18] An Act amending Republic Act No. 7227, as amended, otherwise known as the Bases Conversion and Development Act of 1992, and for other purposes, March 20, 2007.
[19] G.R. No. 150154. August 9, 2005.
[20] Division Docket – Vol. II, pp. 497-511.

preferential rate of 5% tax on its gross income, in lieu of all national and local taxes pursuant to RA No. 7227, as amended,[21] and are therefore not subject to 12% VAT.

THE COURT *EN BANC'S* RULING

The Petition is impressed with merit.

The instant Petition for Review was filed on time.

Before delving into the merits of the case, the Court *En Banc* shall first determine whether the present Petition for Review was timely filed.

Section 3(b), Rule 8 of the RRCTA states:

> SEC. 3. *Who may appeal; period to file petition.* — ...
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> ... ...
>
> (b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review **within fifteen days from receipt of a copy of the questioned decision or resolution**. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review. (*Emphasis supplied*)

Records show that petitioner received the assailed Resolution dated October 30, 2020, on November 5, 2020. Thus, petitioner had fifteen (15) days therefrom, or until November 20, 2022, to file a Petition for Review before the Court *En Banc.*

[21] An Act accelerating the conversion of military reservations into other productive uses, creating the Bases Conversion and Development Authority for this purpose, providing funds therefor and for other purposes, March 13, 1992.

On November 18, 2020, petitioner filed a Motion for Extension of Time to File Petition for Review[22] praying for an additional fifteen (15) days from November 20, 2022, or until December 5, 2020, to file a Petition for Review, which the Court *En Banc* granted in a Minute Resolution dated November 20, 2020.[23]

Considering that December 5, 2020 fell on a Saturday, petitioner had until the next working day, or on December 7, 2020, to file a Petition for Review. The present Petition was timely filed on December 7, 2020.

We shall now proceed to determine the merits of the Petition for Review.

The Court in Division did not err in granting a relief that was not prayed for; hence, it may rule on related issues even if not raised by the parties.

Section 1, Rule 14[24] of the RRCTA empowers the CTA to resolve related issues that are deemed necessary to achieve an orderly disposition of the case although not raised by any of the parties during the trial or in their respective pleadings.

The foregoing provision was further explained by the Supreme Court in *Commissioner of Internal Revenue v. Lancaster Philippines, Inc.*,[25] to wit:

> **On whether the CTA can resolve an issue which was not raised by the parties, we rule in the affirmative**.
>
> Under Section 1, Rule 14 of A.M. No. 05-11-07-CTA, or the Revised Rules of the Court of Tax Appeals, the CTA is not bound by the issues specifically raised by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case. The text of the provision reads:

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[22] *EB* Docket, pp. 1-4; Division Docket – Vol. II, pp. 554-557.
[23] *EB* Docket, p. 5.
[24] SEC. 1. *Rendition of judgment.* — ...
In deciding the case, the Court may not limit itself to the issues stipulated by the parties but **may also rule upon related issues necessary to achieve an orderly disposition of the case.** (*Emphasis supplied*)
[25] G.R. No. 183408, July 12, 2017; See also *Republic v. First Gas Power Corp.*, G.R. No. 214933, February 15, 2022.

> SECTION 1. *Rendition of judgment.* – xxx
>
> In deciding the case, the Court may not limit itself to the issues stipulated by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case.
>
> The above section is clearly worded. On the basis thereof, the CTA Division was, therefore, well within its authority to consider in its decision the question on the scope of authority of the revenue officers who were named in the LOA even though the parties had not raised the same in their pleadings or memoranda. The CTA *En Banc* was likewise correct in sustaining the CTA Division's view concerning such matter. (*Emphasis supplied*)

In the case of *Commissioner of Internal Revenue v. Yumex Philippines Corporation*,[26] the Supreme Court sustained the authority of this Court to raise and resolve an issue that was not raised in a petition for review, *viz.*:

> As the CTA *En Banc* held, the CTA Division was justified in ruling on the issue that respondent was denied due process even though it was not expressly raised by respondent in its petition for review. Sec. 1, Rule 14 of the RRCTA provides that "[i]n deciding the case, the Court may not limit itself to the issues stipulated by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case." Herein, **the issue of the validity of the assessment against respondent also necessarily requires the determination of the matter of the proper issuance of said assessment in accordance with the requirements of due process**. (*Emphasis supplied*)

The issue of whether respondent is liable to pay the deficiency VAT for its sales transactions within the Customs Territory is closely intertwined with the issue of the validity of the assessment, *i.e.*, the FLD/FAN. Thus, to be able to fully resolve the said issue of respondent's VAT liability, it is necessary to ascertain first the validity of the assessment.

Hence, although respondent never raised the validity of the subject FLD in its original Petition for Review nor during the trial, it is a relevant and material issue that the Court in Division may consider in its decision to achieve an orderly disposition of the case.

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[26] G.R. No. 222476, May 5, 2021.

Moreover, the Court *En Banc* does not agree with petitioner's contention that he was denied procedural and substantive due process[27] as he was neither heard nor given the opportunity to be heard on the subject validity of the FLD.

It bears to note that due process is satisfied once the party is accorded the opportunity to be heard and to present his or her evidence.[28]

> Accordingly, Milwaukee's right to due process was not transgressed. The Court has consistently reminded litigants that **due process is simply an opportunity to be heard. The requirement of due process is satisfactorily met as long as the parties are given the opportunity to present their side**. In the case at bar, Milwaukee was precisely given the right and the opportunity to present its side. It was able to present its evidence-in-chief and had its opportunity to present rebuttal evidence. (*Emphasis supplied*)

Records reveal that petitioner was given ample opportunity to present his evidence. Judgment in the case was also rendered only after a full-blown trial. Hence, the assertion of petitioner that his constitutional right to due process was violated,[29] has no leg to stand on.

Given the foregoing, the Court *En Banc* finds no error in the Court in Division's ruling on the validity of the FLD although not raised by the parties during the trial or in their pleadings.

The Court in Division erred in ruling that the assessment did not indicate a definite amount of tax due and a demand for payment.

The FLD and FAN contain a definite liability and due date.

Section 228 of the Tax Code and Section 3.1.3 of Revenue Regulations (RR) No. 12-99, as amended by RR No. 18-2013,[30] requires, among others, that the assessment must provide for a

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[27] Petition for Review, *EB* Docket, par. 2, p. 10.
[28] *Milwaukee Industries Corporation v. Court of Tax Appeals*, G.R. No. 173815, November 24, 2010.
[29] Petition for Review, *EB* Docket, last paragraph, p. 12.
[30] Amending Certain Sections of Revenue Regulations No. 12-99 Relative to the Due Process Requirement in the Issuance of a Deficiency Tax Assessment, November 28, 2013.

definite amount of tax due and a demand for payment. Failure to comply with the requirement will automatically render the issuance invalid.

The Court in Division, relying on the case of *Commissioner of Internal Revenue v. Fitness by Design, Inc. (Fitness by Design),*[31] ruled that the subject VAT assessment is void since herein respondent's tax liability remains indefinite. The pertinent ruling of the Court in Division is quoted as follows:

> In Fitness By Design, the Supreme Court concluded that the disputed Final Assessment Notice was not a valid assessment because it did "not purport to be a *demand for payment* of tax due, which a final assessment notice should supposedly be."
>
> To demand means to "require (a person) to do" and is also defined as "the assertion of a legal right", "an imperative xxx by one person to another under a claim of right, requiring the latter to do or yield something or to abstain from some act." A demand is "a claim, a legal obligation xxx a thing or amount claimed to be due" In this case, an examination of the tenor of the FLD dated September 19, 2016 would reveal that there is no demand or requirement for the taxpayer to pay the taxes due. The phrase "you are *requested* to pay your deficiency value-added" negates the imperative nature of the requirement to pay as it gives the taxpayer the option not to pay if it is not amenable to the assessment: ...
>
> Secondly, the FLD lacks the definite amount of tax liability for which petitioner is accountable. Specifically, the FLD states that the interest will still "*the interest and total amount due will have to be adjusted if paid beyond October 31, 2016.*" Similar to the facts in *Fitness By Design*, although the disputed notice provides for a computation of petitioner's VAT liability, the amount thereof remains indefinite, since the said tax assessment is still subject to modification or adjustment, depending on the date of payment by petitioner. Accordingly, the FLD is deficient according to the standards set in *Fitness by Design*. Such being the case, the subject VAT assessment is void, and thus, bears no valid fruit.

Petitioner, in assailing the Decision of the Court in Division, argues that:

> According to Merriam-Webster Dictionary of Law, "demand" is defined as:

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

> "a formal request or call for something (as payment for a debt) esp. based on a right or made with force. ..."
>
> Based on the foregoing, "demand" is essentially a request. Thus, when petitioner indicated in the FLD that respondent is requested to pay the deficiency tax liabilities, he is in effect demanding the payment of said tax liabilities.

The Court *En Banc* disagrees with the above observations of the Court in Division.

A comparison between the assessment notices (FANs) in the case of *Fitness by Design* and the present case shows the following substantial differences:

Fitness By Design (G.R. No. 215957)	**Clark Water (CTA EB Case No. 2379 [CTA Case No. 9519])**
Please note, however, that the interest and the total amount due will have to be adjusted if paid **prior or beyond April 15, 2004**.	Please note that the interest and total amount due will have to be adjusted if paid **beyond October 31, 2016**.
The Supreme Court found that: "[T]here are **no due dates in the Final Assessment Notice**. This negates petitioner's demand for payment. ... The last paragraph of the Final Assessment Notice states that the due dates for payment were supposedly reflected in the attached assessment: In view thereof, you are requested to **pay** your aforesaid deficiency internal revenue tax liabilities through the duly authorized agent bank in which you are enrolled **within the time shown in the enclosed assessment notice.**	The penultimate paragraph of the FLD states: In view thereof, you are requested to **pay** your deficiency value-added tax through the duly authorized agent bank in which you are enrolled **within the time shown in the enclosed assessment notice.**[32] A review of the enclosed Assessment Notice No. 21AR1504041909 shows the following: "DUE DATE: October 31, 2016"[33]

[32] Exhibit "P-8", *Formal Letter of Demand*, Division Docket – Vol. II, p. 313.
[33] Exhibit "P-8", *Audit Results/Assessment Notice*, Division Docket – Vol. II, p. 315.

However, based on the findings of the Court of Tax Appeals First Division, **the enclosed assessment pertained to remained <u>unaccomplished</u>**."	

First, in *Fitness by Design*, the Supreme Court noted that the FAN therein was found to lack a definite amount of tax liability since the same is subject to modification and is *entirely dependent* on the taxpayer's payment date, *viz.*:

> The complete details covering the aforementioned discrepancies established during the investigation of this case are shown in the accompanying Annex 1 of this Notice. The 50% surcharge and 20% interest have been imposed pursuant to Sections 248 and 249(B) of the [National Internal Revenue Code], as amended. **Please note, however, that the interest and the total amount due will have to be adjusted <u>if paid prior or beyond April 15, 2004</u>.** (*Emphasis on the original*)

Second, the FAN in the *Fitness by Design* case did not set a specific due date, negating the demand for payment. Thus, the Supreme Court held:

> ... [T]here are **no due dates in the Final Assessment Notice**. **This negates petitioner's demand for payment.** Petitioner's contention that April 15, 2004 should be regarded as the actual due date cannot be accepted. The last paragraph of the Final Assessment Notice states that the due dates for payment were supposedly reflected in the attached assessment:
>
> > In view thereof, you are requested to pay your aforesaid deficiency internal revenue tax liabilities through the duly authorized agent bank in which you are enrolled *within the time shown in the enclosed assessment notice.*
>
> However, based on the findings of the Court of Tax Appeals First Division, **the enclosed assessment pertained to remain unaccomplished**. (*Emphasis supplied*)

Hence, the Supreme Court, in *Fitness by Design*, cancelled the assessment notice considering that it did not contain a due date and a definite amount of tax liability. These irregularities in the FAN do not exist in the instant case.

Records reveal that the audit results/assessment notices (or FANs) attached to the FLD[34] contain a specific due date, *i.e., October 31, 2016.*[35] Also, the FLD and FAN specify a fixed and definite amount of respondent's deficiency VAT liability, as follows:

Basic (deficiency VAT) due	₱2,758,122.46
25% Surcharge	689,530.62
20% Interest p.a.	918,995.41
Compromise penalty	40,000.00
TOTAL AMOUNT DUE & COLLECTIBLE	**₱4,406,648.49**

With the due date of *October 31, 2016* stated explicitly in the FAN, together with the above computation of VAT liability up to the said due date, there is a definite amount of tax liability in this case.

The statement in the FLD that "*the interest and total amount due will have to be adjusted if paid* ***beyond*** *October 31, 2016,*" does not make respondent's deficiency VAT liability indefinite to render the subject FLD/FAN void. The statement merely reminded respondent that the interest would have to be adjusted if the assessed VAT liability is paid after *October 31, 2016.*

It bears to emphasize that only the 20% deficiency/delinquency interest per annum needs to be adjusted if paid **beyond** *October 31, 2016*, under Section 249 of the 1997 NIRC, as amended, to wit:

> **SEC. 249. *Interest.* –**
>
> (A) ***In General.*** - There shall be assessed and collected on any unpaid amount of tax, interest at the rate of **twenty percent (20%)**[36] **per annum**, or such higher rate as may be prescribed by rules and regulations, **from the date prescribed for payment until the amount is fully paid.**
>
> (B) *Deficiency Interest.* - ...
>
> (C) *Delinquency Interest.* - ... (*Emphasis supplied*)

[34] Exhibit "P-8", *Formal Letter of Demand*, Division Docket – Vol. 1, pp. 312-316.
[35] Exhibit "P-8", *Audit Results/Assessment Notice*, Division Docket – Vol. I, p. 315.
[36] The rate has been changed to "double the legal interest rate for loans or forbearance of any money in the absence of an express stipulation as set by the Bangko Sentral ng Pilipinas" under Republic Act No. 10963, Tax Reform for Acceleration and Inclusion (TRAIN), effective January 1, 2018.

Undeniably, the interest due on the VAT assessment is subject to change, considering that the BIR could not foresee when respondent would pay the deficiency taxes. Consequently, the total amount due will have to be adjusted.

Thus, the subject assessment is valid because it contains a **definite due date** and a **definite tax liability**.

Given the validity of the FAN/FLD, We now proceed to rule on the substantive merits of petitioner's appeal.

The assessment for deficiency VAT has bases both in fact and in law.

Respondent is liable to pay VAT from its sales of services within the Customs Territory.

In the FDDA, [37] petitioner assessed respondent for deficiency VAT covering CY 2014 in the amount of ₱4,366,648.49 on its sales in the Customs Territory or outside the Ecozone or Freeport Zone amounting to ₱22,984,353.84. Petitioner computed the deficiency VAT assessment as follows:

Deficiency Value-Added Tax		
VAT Sales per Return		₱ -
Add: Sales within the Customs Territory		₱ 22,984,353.84
Vatable Sales per Audit		₱ 22,984,353.84
Multiply by VAT Rate		12%
Output Tax Due		₱ 2,758,122.46
Less: Allowable Input tax		-
Deficiency VAT		₱ 2,758,122.46
Add: 25% Surcharge	₱689,530.62	
20% Interest p.a.	918,995.41	
Compromise Penalty	-	1,608,526.03
Total Value-Added Tax Deficiency		**₱4,366,648.49**

In response to respondent's Protest [38] to the FLD, petitioner argues that Section 5 of the DOF DO No. 03-08[39] provides that for purposes of implementing the special 5% tax on GIE, in lieu of national and local taxes granted to Ecozone

[37] Exhibit "P-10", Division Docket –Vol. I, pp. 322-325.
[38] Exhibit "P-9", Docket (CTA Case No. 9519) – Vol. I, pp. 317-321.
[39] Rules and Regulations to implement Republic Act No. 9400, "an act amending Republic Act No. 7227, otherwise known as the Bases Conversion and Development Act of 1992, and for other purposes", February 13, 2008.

Enterprises and Freeport Enterprises in SSEZ, SFZ, CFZ, PPFZ and MSEZ, GIE shall refer to gross sales or gross revenue derived from **business activities *within* the subject Ecozone or Freeport**, net of sales discounts, sales returns, and allowances minus the cost of sales or direct costs. ...[40]

Petitioner further argues that the Philippine VAT system adheres to the *Cross Border Doctrine,* according to which no VAT shall be imposed to form part of the cost of goods destined for consumption outside of the territorial border of the taxing authority. Hence, the actual export of goods and services from the Philippines to a foreign country must be free of VAT, while those destined for use or consumption within the Philippines shall be imposed with twelve percent (12%) VAT.[41]

In addition, petitioner insists that with the issuance of RMC No. 50-2007, the BIR rulings cited by respondent[42] have been impliedly repealed as they are inconsistent with the provision of said RMC, *viz.*:

> Freeport Zone-registered enterprises may generate income from sources within the Customs Territory of up to thirty percent (30%) of its total income from all sources; provided, that should a Freeport Zone-registered enterprise's income from sources within the Customs Territory exceed thirty percent (30%) of its total income from all sources, then it shall be subject to the income tax laws of the Customs Territory; Provided further, **that in any case, customs duties and taxes must be paid with respect to transactions, receipts, income and sales of articles to the Customs Territory and in the Customs Territory.** (*Emphasis on the original*)

Petitioner explains that even if the income generated by respondent from the Customs Territory represents only 6% of its total revenues from all sources, the 6% shall still be subject to the regular internal revenue taxes of the Philippines, and the 94% shall be subject to the preferential tax rate of 5% in lieu of other national and local taxes.[43]

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[40] *Id.*, SEC. 5. *The Special Five Percent (5%) Tax on Gross Income Earned (GIE).* —
a. For purposes of implementing the special 5% tax on Gross Income Earned, in lieu of national and local taxes, granted to Ecozone Enterprises and Freeport Enterprises in SSEZ, SFZ, CFZ, PPFZ, and MSEZ, the following **shall apply**:
1. **Gross Income Earned (GIE) shall refer to gross sales or gross revenue derived from business activities within the subject Ecozone or Freeport**, net of sales discounts, sales returns and allowances minus cost of sales or direct costs but before any deduction for administrative, marketing, selling, and/or operating expenses or incidental losses during a given taxable year. Provided, that, in the case of financial enterprises within freeports, gross income shall include interest income, gains from sales, and other income, net of costs of funds." *(Emphases and Underscoring Supplied)*

[41] *CIR v. Toshiba Information Equipment (Phils.), Inc.*, G.R. No. 150154, August 9, 2005.

[42] *EB* Docket – Vol. I, pp. 17-18.

[43] FDDA, Exhibit "P-10", Division Docket – Vol. I, p. 325.

Respondent, on the other hand, counters[44] that as a registered CSEZ enterprise under Section 15 of RA No. 7227,[45] as amended by RA No. 9400,[46] it enjoys the preferential tax rate of 5% on gross income, in lieu of all national and local taxes, unless it breaches the 30% threshold on its sales within the Customs Territory as mentioned in Section 8 of the DOF DO No. 03-08, which states:

> SEC. 8. *Other Tax and Fiscal Obligations.*
>
> A. If the Ecozone or Freeport Enterprise wants to avail of the incentives under the 5% special tax regime, it may generate income from sources outside the Ecozone or Freeport Zone or within the Customs territory of up to thirty percent (30%) of its total income from all sources. Provided, however, that if the income of an Ecozone or Freeport Enterprise exceeds said thirty percent (30%) threshold, then all of its income, whether from the Zone or the Customs Territory shall be subject to the relevant internal revenue taxes under the National Internal Revenue Code of 1997, as amended.

Respondent asserts that the regular internal revenue taxes implemented in the Customs Territory shall apply to the income of a CSEZ Enterprise only if the enterprise breaches the 30% threshold.[47] Otherwise, the entire income of the enterprise shall be subject to the 5% preferential tax, which is in lieu of all national and local taxes, including VAT. Respondent points out that its total sales transactions within the Customs Territory constituted only 8.86% of its total revenues for CY 2014, referring to the Court-commissioned ICPA findings.[48]

We disagree with respondent's argument.

The crux of the controversy in the instant case lies in the determination of whether respondent's sale of services outside the Ecozone or Freeport Zone or within the Customs Territory, is subject to 12% VAT.

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[44] *EB* Docket – Vol. I, pp. 67-78.
[45] An Act accelerating the conversion of military reservations into other productive uses, creating the Bases Conversion and Development Authority for this purpose, providing funds therefor and for other purposes, March 13, 1992.
[46] An Act amending Republic Act No. 7227, as amended, otherwise known as the Bases Conversion and Development Act of 1992, and for other purposes, March 20, 2007.
[47] Memorandum, Division Docket – Vol. II, p. 459.
[48] Exhibit "P-16", Sworn Statement of Dr. Arlyn S. Villanueva, the Court-commissioned ICPA, September 26, 2017, Docket, pp. 262-263.

This controversy is not novel. It is not one of first impression. We have ruled in two (2) cases[49] involving the same parties and issues, but different taxable years, that respondent Clark Water Corporation's sale of services within the Customs Territory or outside the Clark Economic Zone or Freeport Zone area is not exempted from the payment of VAT. It is considered importation by the buyer; hence, subject to 12% VAT.

In *Commissioner of Internal Revenue v. Clark Water Corporation*,[50] covering respondent's deficiency VAT assessment for CY ***2011***, We held that:

> ***Respondent is not exempted from the payment of VAT from its sales of services within the customs territory***
>
> Respondent argues that as a registered CSEZ enterprise, it enjoys the preferential tax rate of 5% in lieu of national and local taxes under RA 7227, as amended by RA 9400, unless it breaches the 30% threshold on its sales within customs territory pursuant to Department Order No. (DO) 3-08. Hence, its sales of services within the customs territory are covered by the 5% special tax regime and are therefore exempt from VAT.
>
> Respondent cites Section 15 of RA 7227, as amended by RA 9400 and Section 8 of Department Order (DO) No. 3-08 issued by the Department of Finance, ...
>
> We do not agree with respondent's argument.
>
> A reading of the above provision shows two scenarios. First, if the Ecozone or Freeport Enterprise wants to avail of the incentives under the 5% special tax regime, it may generate income from sources outside the Ecozone or Freeport Zone or within the Customs territory of up to thirty (30%) of its total income from all sources; and the other is that if the income of an Ecozone or Freeport Enterprises exceeds said thirty percent (30%) threshold, then all of its income whether from the Zone or the Customs Territory shall be subject to the relevant internal revenue taxes under the NIRC of 1997, as amended.

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[49] *Commissioner of Internal Revenue v. Clark Water Corporation*, C.T.A. *EB* Case No. 1920 (C.T.A. Case No. 9286), March 12, 2020; and *Clark Water Corp. v. Commissioner of Internal Revenue*, C.T.A. *EB* Case No. 1608 (C.T.A. Case No. 8865), October 5, 2018.
[50] C.T.A. *EB* Case No. 1920 (C.T.A. Case No. 9286), March 12, 2020.

In the instant case, the parties stipulated and as found in the records, the sales of services outside the CSEZ (or within the Customs Territory) for Calendar Year 2011 amounted to ₱19,827,708.97 or only 7.12% of the total sales. The instant case falls under the first scenario.

However, it must be emphasized that although the provision allows the Ecozone or Freeport Enterprise to generate income from sources outside the Ecozone or Freeport Zone, it does not mean that its income from sources outside the Ecozone or Freeport Zone are outside the subject of the regular 12% VAT under the NIRC.

... ...

Section 8 of DO No. 3-08 must be read in harmony with Section 5 of the same, which pertains to basis of where the Special 5% Tax must be imposed on, ...

The foregoing provision categorically states that **the gross income, refers to gross sales or gross revenue derived from business activities <u>within</u> the subject Ecozone or Freeport**. ...

Considering that respondent incurred sales of services which were derived in the Customs Territory, these sales are not included in the computation of the special 5% tax on GIE, in lieu of national and local taxes, thus, **petitioner is correct in imposing VAT under the NIRC of 1997, as amended**.

Respondent's sales of services rendered in the customs territory are subject to VAT and are considered importation by the buyer

Petitioner argues that the sales of services rendered by respondent outside the Ecozone are technically considered as importations by the buyers from the Custom Territory and are subject to VAT under the Tax Code of 1997.

On the other hand, respondent counter-argues that the principle of technical importation does not apply to respondent's sales of services within the Customs Territory. The principle of technical importation applies only to the sale of goods and properties by the Freeport Zone-registered enterprises to a buyer from the Customs Territory based on 08/A8 of RMC No. 50-2007. ...

We agree with petitioner.

> One of the important principles of the Philippine VAT system is the Destination Principle. According to the Destination Principle, goods and services are taxed only in the country where these are consumed.
>
> ... ...
>
> In connection with the said principle, it is well-settled that export processing zones are to be managed as a separate customs territory from the rest of the Philippines, and thus, for tax purposes, are effectively considered as foreign territory. As a result, sales made by a supplier in the Customs Territory to a purchaser in the Ecozone shall be treated as an exportation from the Customs Territory. Conversely, sales made by a supplier from the Ecozone to a purchaser in the Customs Territory shall be considered as an importation into the Customs Territory.
>
> In the present case, respondent's place of business is located in Bicentennial Hills, Clark Freeport Zone (CFZ), Philippines. Its site is specifically located inside CFZ.
>
> The case of *Secretary of Finance Cesar B. Purisima vs. Representative Carmela F. Lazatin* is instructive as to the nature and tax situs of an enterprise inside the CFZ, ...
>
> Based on the foregoing, the legislature's intent in RA 7227, as amended by RA 9400 is that FEZ enterprises enjoys the tax incentives granted thereof specifically to transactions that take place within the jurisdiction or to persons/establishments within the jurisdiction. As such, **respondent's sales of services that were destined for consumption within the customs territory or outside its place of jurisdiction should be considered as importations by the buyer and exportation on the part of respondent that is subject to 12% VAT**.[51]

Whereas, in an earlier case entitled *Clark Water Corporation v. Commissioner of Internal Revenue*,[52] involving respondent's deficiency VAT assessment for CY ***2010,*** We declared that:

> CWC maintains its stand that since only 7.65% of its total sales for CY 2010 was derived on its sales of services to enterprises within the Customs Territory, which do not exceed the 30% threshold, such sale of service derived outside is not subject to regular income tax and VAT.

[51] *Id.* (*Emphasis supplied*)
[52] C.T.A. *EB* Case No. 1608 (C.T.A. Case No. 8865), October 5, 2018.

CWC cited Section 8 of DOF Department Order No. 003-08, which states:

... ...

CWC's contention lacks merit.

A reading of the above provision shows the following scenarios:

a.) If the Ecozone or Freeport Enterprise wants to avail of the incentives under the 5% special tax regime, it may generate income from sources outside the Ecozone or Freeport Zone or within the Customs territory of up to thirty percent (30%) of its total income from all sources; and

b.) If the income of an Ecozone or Freeport Enterprise exceeds said thirty percent (30%) threshold, then all of its income whether from the Zone or the Customs Territory shall be subject to the relevant internal revenue taxes under the National Internal Revenue Code of 1997, as amended.

The above provision should not be applied in isolation, but rather applied in harmony with the other provisions of the said DOF Department Order No. 03-08.

As stipulated by the parties and as found in the records, the sales of services within the Customs Territory for CY 2010 amounted to Php18,057,494.94 or only 7.65% of the total sales. The instant case falls under scenario (a). In order to avail of the incentives under the 5% special tax regime, pertinent is Section 5 of DOF Department Order No. 03-08, ...

Based on the foregoing provision, it is categorically stated that **the gross income**, which is the basis of the 5% special rate, **refers to gross sales or gross revenue derived from business activities within the subject Ecozone or Freeport**. ... Considering that the sale of services were derived in the Customs Territory, these sales were not included in the computation of the special 5% tax on Gross Income Earned, in lieu of national and local taxes, thus, the CIR is correct in imposing the relevant internal revenue taxes under the National Internal Revenue Code of 1997, as amended.

... ...

Anent the assessment of deficiency VAT, this Court agrees with the CTA Division that, **"If the services are performed or rendered outside the freeport zone or within the custom's territory, such sale of services are considered as *technical importations*, thus subject to 12% VAT."** CIR based its assessment pursuant to the provisions of Section 108 of the 1997 NIRC and Revenue Regulations No.

> 1-95 as clarified in Q & A No. 7 of Revenue Memorandum Circular No. 50-2007 which provides, that in any case, customs duties and taxes must be paid with respect to transactions, receipts, income and sales to customs territory. We reiterate the CTA Division's finding that CWC "failed to present and offer evidence to prove that it is not liable to pay the assessed deficiency VAT, the presumption of correctness of the subject tax assessment remains."[53]

Moreover, Section 15 of RA No. 7227, as amended by RA No. 9400, states:

> SEC. 15. *Clark Special Economic Zone (CSEZ) and Clark Freeport Zone (CFZ).* —
>
> ... ...
>
> **The CFZ shall be operated and managed as a separate customs territory ensuring free flow or movement of goods and capital equipment within, into and exported out of the CFZ, as well as provide incentives such as tax and duty-free importation of raw materials and capital equipment**. However, exportation or removal of goods from the territory of the CFZ to the other parts of the Philippine territory shall be subject to customs duties and taxes under the Tariff and Customs Code of the Philippines, as amended, the National Internal Revenue Code of 1997, as amended, and other relevant tax laws of the Philippines.
>
> ... ...
>
> **Duly registered business enterprises that will operate in the Special Economic Zones to be created shall be entitled to the same tax and duty incentives as provided for under Republic Act No. 7916**, as amended: Provided, That for the purpose of administering these incentives, the PEZA shall register, regulate, and supervise all registered enterprises within the Special Economic Zones. (*Emphasis supplied*)

Based on Section 15 above, CSEZ and CFZ-registered enterprises are entitled to the same tax and duty incentives as provided for PEZA-registered enterprises.[54]

Additionally, RMC No. 74-99 outlines the tax incentives of PEZA-registered enterprises as regards their sales **within and without the ecozone, as follows:**

---

[53] *Id.* (*Emphasis supplied*)
[54] Concurring Opinion of Justice Jean Marie A. Bacorro-Villena, *id.*

> SEC. 5. *Tax Treatment of Sales Made by a PEZA Registered Enterprise.* —
>
> 1) Sale of goods (*i.e.*, merchandise), by a PEZA-registered enterprise, to a buyer from the Customs Territory (*i.e.*, domestic sales). —
>
> ... ...
>
> 2) **Sale of Services by a PEZA Registered Enterprise to a Buyer from the Customs Territory. — This type of transaction is not embraced by the 5% special tax regime governing PEZA-registered enterprises pursuant to R.A. No. 7916, as implemented by the PEZA rules and regulations hence, such seller shall be subject to the 10% VAT [now 12%], pursuant to Section 108 or to the percentage tax, pursuant to Title V, whichever is applicable, and to the normal income tax on income derived therefrom, pursuant to Title II, NIRC.** Such income tax shall be computed in accordance with the method of general apportionment provided in the immediately preceding paragraph. (*Emphasis and underscoring supplied*)
>
> ... ...

The above issuance categorically and clearly provides that the sale of services by PEZA-registered enterprises to a buyer from Customs Territory, as in the instant case, is not covered by the 5% special tax regime, hence, subject to 12% VAT.[55]

The quoted provision of RMC No. 74-99 is consistent with the well-settled *Cross Border Doctrine* of our VAT system, which means that no VAT shall be imposed to form part of the cost of goods destined for consumption outside of the territorial border of the taxing authority. Conversely, those destined for use or consumption within the Philippines (Customs Territory) shall be imposed with a 12% VAT.[56]

To clarify, RMC No. 50-2007 was also issued dealing with the tax treatment of the sale or exchange of goods and services. Section 3 thereof reads:

> SEC. 3. *Clarificatory Questions and Answers.* —
>
> Q7: What is the tax treatment for the income of Freeport Zone-registered enterprises derived from sources in the Customs Territory?

[55] *Id.*
[56] *Id.*

> A7: Freeport Zone-registered enterprises may generate income from sources within the Customs Territory of up to thirty percent (30%) of its total income from all sources; provided, that should a Freeport Zone-registered enterprise's income from sources within the Customs Territory exceed thirty percent (30%) of its total income from all sources, then it shall be subject to the income tax laws of the Customs Territory; provided further, that **in any case, customs duties and taxes must be paid with respect to transactions, receipts, income and sales of articles to the Customs Territory and in the Customs Territory**. (*Emphasis supplied*)
>
> ... ...

The first part pertains to the **income tax treatment** of the sales within the Customs Territory. Should the income from within the Customs Territory exceed the 30% total income from all sources, then it shall be subject to the income tax laws of the Customs Territory. On the other hand, the second part addresses the **VAT treatment** which provides that, in any case (whether the income is sold within the Freeport Zone or within the Customs Territory), duties and taxes **must be paid with respect to transactions to the Customs Territory and in the Customs Territory**. This interpretation is congruent with the outline provided under RMC No. 74-99.[57]

Considering all the foregoing, We rule that respondent's sales of services to buyers within the Customs Territory or outside the Clark Freeport Zone or CFZ, even if less than or equal to 30% of its total income from all sources, are not included in the computation of the special 5% tax on GIE. Simply put, the said sales should be considered as importations by the buyer and exportation on the part of respondent that are subject to the 12% VAT under the NIRC of 1997, as amended.

We shall now determine respondent's VAT liability.

Petitioner assessed respondent of deficiency VAT for CY 2014 based on its sales within the Custom Territory or outside the CFZ, in the amount of **₱22,984,353.84,**[58] which represents 6% of respondent's total sales, computed as follows:

[57] *Id.*
[58] Exhibit "P-10," Docket (CTA Case No. 9519) – Vol. 1, pp. 322-325.

Amount subjected to 12% VAT per FLD	₱22,984,353.84
Total Sales during TY 2014 per Annual Income Tax Return[59]	₱382,840,411.00
Percentage of assessed amount over total sales	**6.00364%**

Respondent did not assail the amount and even admitted to a higher percentage of sales within the Customs Territory of 8.86%, based on the findings of the Court-commissioned ICPA, Dr. Arlyn S. Villanueva (Dr. Villanueva).[60]

Upon review and validation of the various documents supporting respondent's total sales for CY 2014, Dr. Villanueva classified respondent's sales within and outside the CFZ as follows:[61]

Sources	Per WBS	Per SOAs	Others	Total	Percentage
Within CFZ	₱341,684,955.76	₱ 5,912,837.94	₱1,075,514.92	₱348,673,308.62	91.14%
Outside CFZ	33,908,406.43	3,326.00	815.00	**33,912,547.43**	**8.86%**
Total	**₱375,593,362.19**	**₱5,916,163.94**	**₱1,067,329.92**	**₱382,585,856.05**	**100.00%**

According to the ICPA,[62] she sorted all the water, sewerage and non-water revenues for CY 2014 and then classified them into: (a) those generated from customers within the CFZ; and (b) those generated from customers outside the CFZ based on the customers' addresses, as they appeared on the water billing statements (WBS), statement of accounts (SOAs) and the official receipts (ORs).

Moreover, in determining which customers of the Corporation are located outside the CFZ, the ICPA referred to the provisions of RA No. 9400, which denominated the following areas as outside the CFZ: the Bayanihan Park, including the area of SM Clark. Such facts were verified by the letter of Clark Development Corporation dated August 1, 2017, confirming that "the 22.00 hectares commercial areas situated near the main gate (SM-Clark) and the Bayanihan Park with an area of 12.17 hectares," to be outside of the CFZ.

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[59] Exhibit "P-11", Division Docket – Vol. I, pp. 326-334.
[60] Memorandum for Petitioner, Division Docket – Vol. II, pars. 41 and 44, pp. 459 and 460, respectively.
[61] Exhibit "P-14", p. 7.
[62] *Id.*

On the other hand, all bulk sales made by respondent to the Balibago Waterworks Systems, Inc., Angeles City Water District, and the Mabalacat City Water District were also classified as revenues outside the CFZ.

Dr. Villanueva was presented as a witness, and she testified on direct examination by way of her Judicial Affidavit[63] as follows:

> Q7: Dr. Villanueva, what is the objective of your examination of Petitioner's supporting documents?
>
> A: As stated in page 1 of the ICPA Report, the objective of our audit was to verify the claim of Petitioner that for CY 2014, it generated total revenues of Php382,591,688.00, and that, out of such revenues, only Php22,984,353.84or 6.01% of the total revenue, were sales made outside the Clark Freeport Zone (CFZ).
>
> Q10: Dr. Villanueva, what were your conclusions after conducting the examination and verification procedures that you earlier mentioned?
>
> A: Based on our verification and review of Petitioner's WBS and SOAs for CY 2014, I have made the following conclusions relative to Petitioner's total revenues and sales outside the CFZ:
>
> 1. Petitioner's total revenues for CY 2014 amounted to Php382,585,856.05, computed as follows:

Total Revenues as per WBS (Annex A)	Php 375,593,362.19
Total Revenues as per SOAs (Annex B)	5,916,163.94
Total Revenues from Unmetered Sales (Annex C)	396,702.10
Total Revenues from Penalties (Annex D)	567,732.76
Total Revenues from Other Operating Income (Annex E)	111,895.06
TOTAL	**Php 382,585,856.05**

> 2. Sales within the CFZ of Petitioner amounted to Php348,673,308.62, which is equivalent to 91.14%; and
>
> 3. Sales outside the CFZ of Petitioner amounted to Php33,912,547.43, which is equivalent to 8.86%.
>
> Q11: Dr. Villanueva, you indicated that the objective of your audit is to verify that Petitioner generated total revenues of Php382,591,688.00. However, in your conclusion, it shows that Petitioner's total revenues amounted to only

[63] Judicial Affidavit of Dr. Arlyn S. Villanueva, Division Docket – Vol 1, pp. 260-265.

> Php382,585,856.05. What constitutes the discrepancy in the amount of Php5,831.95?
>
> A: The amount of Php5,831.95 pertains to a missing OR that Petitioner was not able to present to us. Nevertheless, even if treated as sale outside CFZ, such amount will not affect the ratio of sales outside the CFZ *vis a vis* Petitioner's total revenues for CY 2014.

Petitioner assessed respondent for deficiency VAT on its sales within the Customs Territory in the amount of **₱22,984,353.84**.[64] However, based on the ICPA findings, which were adopted and supported by respondent,[65] the total sales within the Customs Territory amounts to **₱33,912,547.43**, which is equivalent to 8.86% of respondent's sales.[66]

Based on these admissions, respondent is liable to pay basic deficiency VAT in the amount of ₱4,069,505.69 on its sales outside the CFZ for CY 2014, computed as follows:

Total Sales Outside CFZ per ICPA report[67]	₱33,912,547.43
Multiply by VAT Rate	x 12%
Basic deficiency VAT	**₱4,069,505.69**

Courts decide cases based on the evidence presented and the admissions of the parties. In the assessment of the facts, reason and logic are used.[68]

In this case, the fundamental evidence is respondent's own *admission* that the amount of its sales within the Customs Territory for CY 2014 is ₱33,912,547.43 and not the amount of ₱22,984,353.84 which petitioner used as the tax base in computing respondent's deficiency VAT for CY 2014.

WHEREFORE, premises considered, the instant Petition for Review is **GRANTED**. The Decision dated June 17, 2020 and the Resolution dated October 30, 2020, of the Court's Second Division in CTA Case No. 9519, are **REVERSED and SET ASIDE.**

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[64] FDDA, Exhibit "P-10", Division Docket –Vol. I, pp. 322-325.
[65] Memorandum for Petitioner, Division Docket – Vol. II, pars. 41 and 44, pp. 459 and 460, respectively.
[66] *Id.*
[67] Exhibit "P-14", p. 7.
[68] *Manzano vs. Perez, Sr., et al.*, G.R. No. 112485, August 9, 2001.

Accordingly, respondent is **ORDERED TO PAY** petitioner the aggregate amount of **₱8,995,448.28**, inclusive of the 25% surcharge, 20% deficiency interest, and 20% delinquency interest imposed under Sections 248(A)(3), 249(B) and (C) of the NIRC of 1997, as amended, respectively, computed until December 31, 2017 as follows:

Basic Deficiency VAT	₱4,069,505.69
Surcharge (25%)	1,017,376.42
Deficiency Interest (Jan. 26, 2015 to Oct. 31, 2016)	
[₱4,069,505.69 x 20% x 644/365 days]	1,436,033.79
Total Amount Due as of October 31, 2016	**₱6,522,915.90**
Deficiency Interest (Nov. 1, 2016 to Dec. 31, 2017)	
[₱4,069,505.69 x 20% x 426/365 days]	949,922.97
Delinquency Interest (Nov. 1, 2016 to Dec. 31, 2017)	
[₱6,522,915.90 x 20% x 426/365 days]	1,522,609.41
Total Amount Due as of December 31, 2017	**₱8,995,448.28**

In addition, respondent is **ORDERED TO PAY** petitioner delinquency interest at the rate of twelve percent (12%) per annum on the total unpaid amount due as of October 31, 2016, *i.e.*, ₱6,522,915.90, as determined above, or an amount of **₱2,144.52** per day,[69] from January 1, 2018 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended by RA No. 10963, also known as Tax Reform for Acceleration and Inclusion (TRAIN), as implemented by RR No. 21-2018.

SO ORDERED.

LANEE S. CUI-DAVID
Associate Justice

WE CONCUR:

(With due respect – see Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

[69] ₱6,522,915.90 x 12%/365 days.

ERLINDA P. UY
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

(With Concurring Opinion)
JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

MARIAN IVY F. REYES-FAJARDO
Associate Justice

CORAZON G. FERRER-FLORES
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB No. 2379** (CTA Case No. 9519)
- versus -	Present: **DEL ROSARIO**, *P.J.*, **UY**, **RINGPIS-LIBAN**, **MANAHAN**, **BACORRO-VILLENA**, **MODESTO-SAN PEDRO**, **REYES-FAJARDO**, **CUI-DAVID**, and **FERRER-FLORES**, *JJ.*
CLARK WATER CORPORATION, Respondent.	Promulgated: FEB 17 2023 11:47am

x- -x

DISSENTING OPINION

DEL ROSARIO, P.J.:

After much introspection and consideration, I am constrained to withhold my concurrence to the *ponencia* of Associate Justice Lanee S. Cui-David.

With due respect, I submit that this Court cannot ignore the application of a doctrine so clearly and plainly elucidated in *Commissioner of Internal Revenue vs. Fitness by Design Inc.* ("*Fitness by Design*").[1]

Fitness by Design was parenthetic in saying that a demand by government for the taxpayer to pay deficiency tax liabilities must specify the **definite amount sought to be collected**, failing which, the demand would be violative of the taxpayer's right to due process of law. Thus, in declaring as fatally infirm a demand letter **similarly worded** as that involved in the present case, the Supreme Court,

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

speaking through Honorable Associate Justice Marvic M. V. F. Leonen, opined:

> "The disputed Final Assessment Notice is not a valid assessment.
>
> First, it lacks the definite amount of tax liability for which respondent is accountable. It does not purport to be a demand for payment of tax due, which a final assessment notice should supposedly be. An assessment, in the context of the National Internal Revenue Code, is a 'written notice and demand made by the [Bureau of Internal Revenue] on the taxpayer for the settlement of a **due tax liability that is there definitely: set and fixed.' Although the disputed notice provides for the computations of respondent's tax liability, the amount remains indefinite. It only provides that the tax due is still subject to modification, depending on the date of payment.** Thus:
>
> > The complete details covering the aforementioned discrepancies established during the investigation of this case are shown in the accompanying Annex 1 of this Notice. The 50% surcharge and 20% interest have been imposed pursuant to Sections 248 and 249 (B) of the [National Internal Revenue Code], as amended. **Please note, *however, that the interest and the total amount due will have to be adjusted if prior or beyond April 15, 2004.*** (Emphasis Supplied)
> >
> > x x x
>
> The Court of Tax Appeals **did not err in cancelling the Final Assessment Notice** as well as the Audit Result/Assessment Notice issued by petitioner to respondent for the year 1995 covering the 'alleged deficiency income tax, value-added tax and documentary stamp tax amounting to P10,647,529.69, inclusive of surcharges and interest' **for lack of due process**. Thus, the Warrant of Distraint and/or Levy is void since an invalid assessment bears no valid effect." *(Boldfacing supplied)*

Juxtaposed in parallel, the Formal Letter of Demand (FLD) dated September 19, 2016[2] in the case at bar likewise reads:

> **"Please note that the interest and total amount due will have to be adjusted if paid beyond October 31, 2016."** *(Boldfacing supplied)*

There must be some wisdom behind the legal precept in *Fitness by Design*, more so as it was a unanimous decision promulgated by the Second Division of the Supreme Court.

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[2] Exhibit "P-8", Division Docket, Vol. I, pp. 312-313.

Thus, after assessing the rationale behind the doctrine in *Fitness by Design*, I noted that indeed -- the amount indicated in the afore-quoted FLD is definite only if payment is made on the EXACT due date stated therein. While payment can be made BEFORE or AFTER the date indicated, the exact MANNER of COMPUTING the "adjustment" to come up with a final and definite amount in case payment is made before or after the due date was undisclosed.

Any ambiguity in the amount demanded from a taxpayer is fatal as it precludes him or her from knowing the exact amount to pay whenever an adjustment is made.

Of course, there would have been a semblance of CERTAINTY if the FLD at the very least indicated how adjustment of the demanded amount would be made – particularly with respect to the purported interest that should have to be adjusted vis-à-vis the resulting total amount.

The manner by which interest was computed in *Fitness By Design* and in the present case is very similar as BOTH **do not indicate the date when interest commences to run**, *viz.*:

Final Assessment Notice in *Fitness by Design*		**FLD dated September 19, 2016**	
Value Added Tax		**Deficiency Value-Added Tax**	
Unreported Sales	xxx	VAT Sales per Return	xxx
Output Tax (10%)	xxx	Add: Sales within the customs territory	xxx
Add: Surcharge (50%)	xxx	VATable Sales per Audit	xxx
Interest (20% per annum) until 4-15-04	xxx	Multiply by VAT Rate	xxx
		Output Tax due	xxx
Deficiency VAT	xxx	Less: Allowable Input tax	xxx
		Deficiency VAT	xxx
		Add: 25% surcharge	xxx
		20% interest p.a.	xxx
		Compromise penalty	xxx
		Total Value-Added Tax deficiency	xxx

At once glaring is the fact that in the present case, while the FLD states that the interest was computed up to October 31, 2016, **it does not categorically provide for the specific reckoning point or date when interest commences to run**.

Since adjustment of the amount due becomes indispensable if payment is made by petitioner beyond or after October 31, 2016, the date as to when interest begins to run is crucial and of much significance to petitioner's right to be informed of the exact amount it is liable to pay.

Financial matters, more so computation of interest, involve technical and skill-based concepts that require proper guidance in their application in pragmatic terms. **Thus, it was faulty and flawed for respondent to presume that petitioner would know the exact amount of what is sought to be collected after "adjustment" if no clear and specific formula is communicated to it.**

In the words of *Fitness by Design*: "An assessment does not only include a computation of tax liabilities; ... Its main purpose is to determine the amount that a taxpayer is liable to pay."

Verily, the FLD sent to petitioner can hardly be considered as one with indication of DEFINITE amount of liability. *Fitness by Design* is unambiguous and precise.

ALL TOLD, I *VOTE* to deny the Petition for Review, and affirm the assailed Decision dated June 17, 2020 and Resolution dated October 30, 2020, both rendered by the Court in Division.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
Quezon City

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 2379** (CTA Case No. 9519)
- versus -	*Present*: **DEL ROSARIO**, *P.J.*, **UY**, **RINGPIS-LIBAN**, **MANAHAN**, **BACORRO-VILLENA**, **MODESTO-SAN PEDRO**, **REYES-FAJARDO**, *and* **CUI-DAVID**, **FERRER-FLORES**, *JJ.*
CLARK WATER CORPORATION, Respondent.	Promulgated: FEB 17 2023 11:42am

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CONCURRING OPINION

BACORRO-VILLENA, J.:

I concur with the *ponencia* of our esteemed colleague, Associate Justice Lanee S. Cui-David, granting the present Petition for Review filed by petitioner Commissioner of Internal Revenue (**petitioner/CIR**) against respondent Clark Water Corporation (**respondent/CWC**), thereby reversing and setting aside the Second Division's Decision dated 17 June 2020[1] (**Assailed Decision**) and Resolution dated 30 October 2020[2] (**Assailed Resolution**), and ordering respondent to pay the correct amount of deficiency Value-Added Tax (**VAT**) liability on its sales within the Customs Territory, inclusive of surcharge, deficiency and delinquency interests.

[1] Division Docket, Volume II, pp. 479-496.
[2] Id., pp. 549-553.

Previously, I concurred in the Assailed Decision[3] that found the subject Formal Letter of Demand[4] (**FLD**) and Final Assessment Notice[5] (**FAN**) deficient according to the standards set in *Commissioner of Internal Revenue v. Fitness by Design, Inc.*[6] (**Fitness by Design**) on the grounds that (1) it does not demand or require respondent to pay the taxes due; and, (2) it lacks a definite amount of tax liability for which respondent is accountable. As a result, petitioner's value-added tax (**VAT**) assessment against respondent was declared void.

After a second hard look, I have decided to forego my previous position in favor of the present *ponencia*.

The facts of the instant case are not in all fours with *Fitness By Design* as to warrant its application herein.

In *Fitness By Design*, the Supreme Court noted that the amount in the FAN remained indefinite as the same was subject to modification, depending on the date of the taxpayer's payment. The wordings in the FAN there is quoted, as follows:

> ...
> The complete details covering the aforementioned discrepancies established during the investigation of this case are shown in the accompanying Annex 1 of this Notice. The 50% surcharge and 20% interest have been imposed pursuant to Sections 248 and 249(B) of the [National Internal Revenue Code], as amended. **Please note, *however, that the interest and the total amount due will have to be adjusted if paid prior or beyond April 15, 2004*.**[7]
> ...

The Supreme Court also emphasized that the FAN there did not contain due dates, thus, it held:

> ...
> Second, there are no due dates in the Final Assessment Notice. This negates petitioner's demand for payment. Petitioner's contention that April 15, 2004 should be regarded as the actual due date cannot be accepted. The last paragraph of the Final Assessment Notice states that the due dates for payment were supposedly reflected in the attached assessment:

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3 Supra at note 1.
4 Exhibit "P-8", Division Docket, Volume I, pp. 312-313.
5 Id., p. 315.
6 G.R. No. 215957, 09 November 2016.
7 Emphasis in the original text, italics and underscoring supplied.

> In view thereof, you are *requested to pay* your aforesaid deficiency internal revenue tax liabilities through the duly authorized agent bank in which you are enrolled *within the time shown in the enclosed assessment notice.*
>
> However, based on the findings of the Court of Tax Appeals First Division, **the enclosed assessment pertained to [remain] unaccomplished**.[8]
>
> ...

Whereas, the pertinent portion of the FLD in the case at bar reads:

> ...
> **Please note that the interest and total amount will have to be adjusted if paid beyond October 31, 2016.**[9]
> ...

In the FLD in herein case, it is clear to mean that the *interest* will only be adjusted if the taxpayer pays *beyond* the deadline or due date provided (which is 31 October 2016[10]). Insofar as the total amount indicated in the FLD, it is undeniable that the amount of the liability and the deadline for payment of the same are definite. This fact remains to be despite a warning on the part of the Bureau of Internal Revenue (**BIR**) that additional interest shall continue to accrue beyond the due date. It would therefore be unfair to admonish the BIR for just reminding the taxpayer of the necessary consequences of a delayed settlement.

What is crucial in determining the validity of the assessment is the definiteness of the amount indicated in the FLD and the deadline for payment (shown in the assessment notices attached to the FLD). If the FLD substantially satisfies both requirements, then the FLD could not be found wanting nor the assessment voided. It is true that while the computation of interest may not yet appear definite, the same is only logical as BIR could not reasonably be expected to know or foresee when the taxpayer will actually settle the tax obligation. Therefore, to set aside the entire assessment on the basis of the indefiniteness *not* of the amount of tax liability but of the interest that may accrue (beyond the deadline of payment) is in discord with the wisdom of the Supreme Court in *Fitness By Design*.

Moreover, the *proviso* in *Fitness By Design* used the phrase "prior to or beyond April 15, 2004". The logical interpretation of this phrase entails requiring taxpayers, after receiving the assessment, to come forward to the

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8 Citations omitted, italics in the original text, emphasis and underscoring supplied.
9 Exhibit "P-8", supra at note 4; Emphasis and underscoring supplied.
10 As shown in FAN, supra at note 5.

BIR and inform the latter of its intended payment date (even if within the period prescribed) for the adjustment of interest, and correspondingly the total amount due. This makes the total amount in the FAN indefinite and subject to modification. In effect, the total amount of assessment in the FAN is merely suggestive as the final computation of liability is entirely dependent on the actual date of payment by the taxpayer. Hence, the Supreme Court held:

> ...
>
> A final assessment is a notice "to the effect that the amount therein stated is due as tax and a demand for payment thereof." This demand for payment signals the time "when penalties and interests begin to accrue against the taxpayer and enabling the latter to determine his remedies[.]" Thus, it must be "sent to and received by the taxpayer, and must demand payment of the taxes described therein within a specific period."
>
> The disputed Final Assessment Notice is not a valid assessment.
>
> First, it lacks the definite amount of tax liability for which respondent is accountable. It does not purport to be a demand for payment of tax due, which a final assessment notice should supposedly be. An assessment, in the context of the National Internal Revenue Code, is a "written notice and demand made by the [Bureau of Internal Revenue] on the taxpayer for the settlement of a due tax liability that is there definitely set and fixed." **Although the disputed notice provides for the computations of respondent's tax liability, the amount remains indefinite. It only provides that the tax due is still subject to modification, depending on the date of payment**. Thus:
>
> > The complete details covering the aforementioned discrepancies established during the investigation of this case are shown in the accompanying Annex 1 of this Notice. The 50% surcharge and 20% interest have been imposed pursuant to Sections 248 and 249 (B) of the [National Internal Revenue Code], as amended. Please note, *however, that the interest and the total amount due will have to be adjusted if prior or beyond April 15, 2004.*
>
> ...
>
> However, based on the findings of the Court of Tax Appeals First Division, the enclosed assessment pertained to remained unaccomplished.
>
> Contrary to petitioner's view, April 15, 2004 was the reckoning date of accrual of penalties and surcharges and not the due date for payment of tax liabilities. The total amount depended upon when respondent decides to pay. The notice, therefore, did not contain a definite and actual demand to pay."[11]
>
> ...

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11 Citations omitted, emphasis and underscoring supplied, and italics in the original text.

The above circumstance is not the scenario in the instant case.

The more significant difference between the two (2) cases is the deadline for payment indicated in the assessment notices. The deadline for payment is vital as it is the reckoning date from which delinquency interest will run (assuming the taxpayer pays beyond the prescribed period).

In *Fitness By Design*, the deadline for payment in the assessment notices remained unaccomplished. The absence of the said deadline was fatal to the BIR's claim because the FAN itself indicated that the taxpayer was requested to pay the deficiency taxes due "within the time shown in the enclosed assessment notice". It was for this reason that 15 April 2004 indicated in the FAN was not considered as deadline for payment.

On the other hand, in the instant case, the FAN[12] attached to herein petitioner's FLD[13] contains a specific due date, *i.e.*, 31 October 2016. This goes to show that petitioner has made a definite and actual demand for payment upon respondent.

Further, unlike in *Fitness by Design* where the notation on the FLD states that "the interest and the total amount due will have to be adjusted if paid **prior or beyond**" the specified date therein, the notation on herein petitioner's FLD[14] states that "the interest and total amount due will have to be adjusted if paid **beyond** October 31, 2016". Such notation merely means that the interest (as distinguished from the basic deficiency tax) will be adjusted if the taxpayer fails to pay on the due date specified in the assessment notices. The interest, and only the interest, may be adjusted if the taxpayer pays before or after the due date, *i.e.*, on 31 October 2016 as indicated in the FAN.[15]

I also wish to clarify that the phrase "you are requested to pay" does not necessarily negate the imperative nature of the requirement to pay as to give the taxpayer the option not to pay. In fact, such phrase is merely lifted from the pro-forma FLD attached as Annex B to Revenue Regulations (**RR**) No. 12-99[16], as amended by RR No. 18-13.[17]

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12 Supra at note 5.
13 Supra at note 4.
14 Supra at note 4.
15 Supra at note 5.
16 *Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extra-Judicial Settlement of a Taxpayer's Criminal Violation of the Code Through Payment of a Suggested Compromise Penalty.*
17 *Amending Certain Sections of Revenue Regulations No. 12-99 Relative to the Due Process Requirement in the Issuance of a Deficiency Tax Assessment.*

As to the substantive merits of petitioner's appeal, the subject assessment for deficiency VAT on respondent's sales of services within the Customs Territory has bases both in fact and in law.

Section 5(2)[18] of Revenue Memorandum Circular (**RMC**) No. 74-99[19] categorically and clearly provides that the sale of services by Philippine Economic Zone Authority (**PEZA**)-registered enterprises to a buyer from the Customs Territory, as in this case, is not covered by the 5% special tax regime; hence, subject to 12% VAT. This is consistent with the Cross Border Doctrine of the Philippine VAT system, according to which, no VAT shall be imposed to form part of the cost of goods destined for consumption outside of the territorial border of the taxing authority. Conversely, those destined for use or consumption within the Philippines (Customs Territory) shall be imposed with 12% VAT.

Section 15 of Republic Act (**RA**) No. 7227[20], as amended by RA 9400[21], states that Clark Special Economic Zone (**CSEZ**) and Clark Freeport Zone (**CFZ**)-registered enterprises are entitled to the same tax and duty incentives as provided for PEZA-registered enterprises. Accordingly, Section 5(2) of RMC No. 74-99 above also applies to respondent, as a duly registered CSEZ.

Indeed, the Court *En Banc* has earlier ruled in two (2) cases[22] involving the same parties and issues, but different taxable years, that respondent's 'sale of services within the Customs Territory or outside the Clark Economic Zone or Freeport Zone area' is not exempt from the payment of 12% VAT as it is considered 'importation by the buyer'.

Given the above disquisitions, I find the conclusion in the *ponencia* proper. Thus, I join the vote to **GRANT** the petition filed by the CIR, **REVERSE and SET ASIDE** the Assailed Decision[23] and Resolution[24],

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18 SECTION 5. *Tax Treatment Of Sales Made By A PEZA Registered Enterprise.* —

...

(2) ***Sale of Services by a PEZA Registered Enterprise to a Buyer from the Customs Territory.*** **— This type of transaction is not embraced by the 5% special tax regime governing PEZA-registered enterprises pursuant to R.A. No. 7916, as implemented by the PEZA rules and regulations hence, such seller shall be subject to the 10% VAT [now 12%], pursuant to Section 108 or to the percentage tax, pursuant to Title V, whichever is applicable, and to the normal income tax on income derived therefrom, pursuant to Title II, NIRC.** Such income tax shall be computed in accordance with the method of general apportionment provided in the immediately preceding paragraph. (Emphasis and underscoring supplied.)

19 Tax Treatment of Sales of Goods, Property and Services Made by a Supplier from the Customs Territory to a PEZA Registered Enterprise; and Sale Transactions Made by PEZA Registered Enterprises Within and Without the ECOZONE.

20 AN ACT ACCELERATING THE CONVERSION OF MILITARY RESERVATIONS INTO OTHER PRODUCTIVE USES, CREATING THE BASES CONVERSION AND DEVELOPMENT AUTHORITY FOR THE PURPOSE, PROVIDING FUNDS THEREFORE AND FOR OTHER PURPOSES.

21 AN ACT AMENDING REPUBLIC ACT NO. 7227, AS AMENDED, OTHERWISE KNOWN AS THE BASES CONVERSION AND DEVELOPMENT ACT OF 1992, AND FOR OTHER PURPOSES.

22 *Commissioner of Internal Revenue v. Clark Water Corporation*, CTA EB Case No. 1920 (CTA Case No. 9286), 12 March 2020; and *Clark Water Corporation v. Commissioner of Internal Revenue*, CTA EB Case No. 1608 (CTA Case No. 8865), 05 October 2018.

23 Supra at note 1.

24 Supra at note 2.

respectively, in CTA Case No. 9519, and **ORDER** respondent to pay petitioner the aggregate amount of ₱8,995,448.28, inclusive of 25% surcharge, 20% deficiency interest, and 20% delinquency interest, plus delinquency interest at the rate of 12% *per annum* on the total unpaid amount of ₱6,522,915.90, from 01 January 2018 until full payment.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice