REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,	**CTA *EB* NO. 2610** (CTA Case No. 9779)
	Present:
-versus-	**DEL ROSARIO**, *P.J.*, **RINGPIS-LIBAN**, **MANAHAN**, **BACORRO-VILLENA**, **MODESTO-SAN PEDRO**, **REYES-FAJARDO**, **CUI-DAVID**, **FERRER-FLORES**, *and* **ANGELES**, *JJ.*
ATENEO DE DAVAO UNIVERSITY, *Respondent.*	Promulgated: DEC 20 2023 4:30 pm

x- x

DECISION

CUI-DAVID, J.:

Before this Court is a *Petition for Review*[1] filed by petitioner Commissioner of Internal Revenue (CIR) assailing the Decision dated September 23, 2021[2] (assailed Decision) and the Resolution dated April 12, 2022[3] (assailed Resolution) promulgated by the Court's First Division (Court in Division) in CTA Case No. 9779, cancelling and setting aside the deficiency expanded withholding tax (EWT) assessment against respondent Ateneo De Davao University for taxable period June 1, 2005 to May 31, 2006 (taxable year 2006).

[1] *En Banc* (*EB*) Docket, pp. 1-25.
[2] *EB* Docket, pp. 28-52; Division Docket – Vol. II, pp. 1070-1094.
[3] *EB* Docket, pp. 55-59; Division Docket – Vol. II, pp. 1137-1141.

The dispositive portions of the assailed Decision and assailed Resolution are as follows:

Assailed Decision dated September 23, 2021:

> **WHEREFORE**, in light of the foregoing considerations, the instant Petition for Review is **GRANTED**. Accordingly, the assailed FLD and Assessment Notices, all dated July 29, 2009, holding petitioner liable for deficiency EWT, for taxable period June 1, 2005 to May 31, 2006, in the total amount of ₱14,918,950.00, inclusive of surcharges, interests, and compromise penalty, are **CANCELLED** and **SET ASIDE**.
>
> Respondent is hereby **ENJOINED** from proceeding with the collection of the assailed deficiency taxes against petitioner arising from the FLD/Assessment Notices dated July 29, 2009 for taxable period June 1, 2005 to May 31, 2006 in the total amount of ₱14,918,950.00.
>
> **SO ORDERED.**

Assailed Resolution dated April 12, 2022:

> **WHEREFORE**, premises considered, respondent's *Motion for Reconsideration (Re: Decision promulgated 23 September 2021)* filed on October 25, 2021 is **DENIED** for lack of merit.
>
> **SO ORDERED**.

THE FACTS

The facts, [4] as found by the Court in Division, are as follows:

> [Respondent] received a copy of [petitioner]'s Letter of Authority (LOA) No. 00052388 dated January 29, 2007 in May of 2007, authorizing Revenue Officer (RO) Ismael L. Marimon and Group Supervisor (GS) Dennis Michael Deluao of Revenue District Office (RDO) No. 113, to conduct the examination of [respondent]'s books of accounts and other accounting records for the period June 1, 2005 to May 31, 2006.
>
> On March 6, 2008, [respondent] received [petitioner]'s Fifteen Day Notice for Conference (Notice for Conference) dated January 31, 2008, informing [respondent] that a report has been submitted to RDO No. 113 which recommended that [respondent] be assessed for alleged deficiency income tax, value-added tax (VAT), and "final income withholding tax" for

[4] *Supra*, note 2.

taxable year 2006, in the aggregate amount of ₱20,317,276.49, inclusive of surcharge, interest, and compromise penalty[.] ...

Subsequently, on September 11, 2008, [respondent] received the letter dated June 24, 2008 from BIR RDO No. 113, referring the case to the Legal Division, BIR, Revenue Region (RR) No. 19 for the resolution of the issues raised in the Notice of Conference.

On January 21, 2009, [respondent] received the letter dated January 9, 2009 from the Regional Director, BIR RR No. 19 upholding the proposed assessment against [respondent] for taxable year 2006.

On February 24, 2009, [respondent] filed a letter appealing the ruling of the Regional Director in connection with the findings embodied in the Notice of Conference.

On May 20, 2009, [respondent] received [petitioner]'s Preliminary Assessment Notice (PAN) dated May 17, 2009 containing the following findings for taxable year 2006 in the aggregate amount of ₱20,317,376.49, inclusive of interest[.] ...

On June 4, 2009, [respondent] filed its Reply to the PAN dated June 3, 2009.

Thereafter, [respondent] received the Formal Letter of Demand (FLD) with the corresponding Assessment Notices, all dated July 29, 2009, reiterating [petitioner]'s assessment against [respondent] for deficiency income tax, VAT and EWT, in the total amount of ₱20,317,276.49, for fiscal year ending May 31, 2006.

On September 4, 2009, [respondent] filed a Protest Letter dated September 1, 2009 against the said FLD and Assessment Notices, disputing [petitioner]'s deficiency income tax, VAT and EWT assessment for taxable year 2006.

Subsequently, [respondent] received the BIR's Preliminary Collection Letter (PCL) dated June 11, 2014 on June 13, 2014, requesting [respondent] to settle the alleged deficiency taxes for taxable year 2006 in the aggregate amount of ₱20,317,276.49.

On June 18, 2014, [respondent] filed a letter dated June 17, 2014 to the BIR, arguing that collection proceedings cannot be lawfully made since the subject tax assessments are still under protest.

On July 17, 2014, [respondent] received the Final Notice Before Seizure (FNBS) dated July 14, 2014 from BIR RDO No. 113, requesting for the settlement of the subject assessments with a notice signifying the intent of [petitioner] to serve and

execute Warrants of Distraint and/or Levy and Garnishment to enforce the collection of the assessed deficiency taxes.

On July 18, 2014, [respondent] filed a letter reply with the BIR on the said FNBS, reiterating its stance that collection proceedings cannot be lawfully made since the subject tax assessments are still under protest.

On July 26, 2014, [respondent] received the letter dated July 24, 2014 from BIR RDO No. 113, informing petitioner that the letter dated March 25, 2014 signed by Atty. Glen A. Geraldino, OIC-Regional Director of RR No. 19, has already been sent to [respondent] in response to its protest. Furthermore, the BIR RDO No. 113 advised [respondent] that the docket of the case has been endorsed to the Collection Section for the issuance of Warrants of Distraint and/or Levy against [respondent]'s properties.

The WDL was then served to [respondent] on July 28, 2014.

On July 30, 2014, [respondent] filed with the BIR its letter on even date, pointing out that it is crucial that the said letter dated March 25, 2014 be officially served upon [respondent] to allow it to exhaust its administrative and judicial remedies under Section 228 of the 1997 NIRC, as amended and under Republic Act (RA) No. 9282.

On August 14, 2014, [respondent] filed an Administrative Appeal/Request for Reconsideration addressed to respondent appealing the denial of its protest by the Regional Director.

On October 28, 2014, [respondent] received the letter dated October 9, 2014 from Assistant Commissioner-Assessment Service, Erlinda A. Simple, informing [respondent] that its Administrative Appeal/Request for Reconsideration has been endorsed to the Appellate Division for evaluation.

On February 5, 2018, [respondent] received [petitioner]'s Decision dated January 24, 2018, which affirmed the denial of [respondent]'s Protest with an order to pay the assessed deficiency income tax, VAT, and withholding tax for taxable year 2006, quoted as follows:

> "**WHEREFORE**, predicated on all of the foregoing, the Decision denying Ateneo's protest against the Formal Letter of Demand and Assessment Notice with Assessment Number 2006-000000 dated July 29, 2009 demanding payment of the total amount of ₱20,317,276.49 representing deficiency income tax, withholding

> tax, and value-added tax for fiscal year ending May 31, 2006 is hereby affirmed in all respects.
>
> Consequently, Ateneo de Davao University is hereby ordered to pay the aforestated amount, plus increments that have accrued thereon until the actual date of payment, to the Collection Service, BIR National Office, Diliman, Quezon City, within thirty (30) days from the receipt hereof, otherwise, collection thereof will be effected through the summary remedies provided by law.
>
> This constitutes the Final Decision of this Office on the matter."

On February 12, 2018, [respondent] received the Follow-Up Collection Letter dated February 8, 2018 from BIR RR No. 19, requesting [respondent] to settle its alleged deficiency taxes for taxable year 2006 in the aggregate amount of ₱20,317,276.49.

[Respondent] filed the instant Petition for Review on March 2, 2018.

[Petitioner] posted his Answer to the Petition for Review on June 16, 2018.

[Petitioner] then transmitted the BIR Records of this case on June 29, 2018.

On July 2, 2018, [respondent] filed its Reply (To Respondent's Answer dated June 13, 2018).

The Pre-Trial Conference was initially set on August 2, 2018. However, upon the respective motions by both [petitioner] and [respondent], the Court reset the Pre-Trial Conference to September 13, 2018.

[Petitioner]'s Pre-Trial Brief was submitted on September 3, 2018, while [Respondent]'s Pre-Trial Brief was filed on September 7, 2018.

... ...

The parties submitted their Joint Stipulation of Facts and Issues (JSFI) on February 8, 2019. In the Resolution dated February 20, 2019, the Court noted the parties' submission of the JSFI, and ordered them to proceed and appear before the Philippine Mediation Center-Court of Tax Appeals (PMC-CTA) on March 13, 2019 for a possible amicable settlement of the case.

The Court then issued the Order dated March 25, 2019, cancelling the hearings set until further orders.

On April 29, 2019, the parties requested for an extension of another thirty (30) days to reach an amicable settlement, which the Court granted in the Resolution dated May 8, 2019.

Thereafter, the parties filed a Joint Motion to Suspend Court Proceedings and Extension of Period of Mediation on June 7, 2019. However, such joint motion was denied by the Court in the Resolution dated July 12, 2019.

Consequently, the Court issued the Pre-Trial Order on July 16, 2019, deeming the termination of the Pre-Trial Conference.

On July 29, 2019, [petitioner] filed his Motion With Leave of Court to Amend Pre-Trial Order dated 16 July 2019, praying for the correction of the description of [petitioner]'s Exhibit "R-9".

The Court then received the Mediator's Report on August 16, 2019 signed by retired Judge Manuela F. Lorenzo, as Appellate Mediator, declaring the subject mediation as unsuccessful.

Subsequently, on August 20, 2019, [respondent] filed a Motion to Limit Issues, requesting that the Court limit the issue in the resolution of this case with regard to the validity of EWT assessment for taxable year 2006. Attached to the said Motion is a Certificate of Availment (Compromise Settlement) dated December 18, 2018 signed by Mr. Alfredo V. Misajon, ACIR-Collection Service and Head, TWG on Compromise, of the BIR, certifying, *inter alia*, that [respondent]'s application/s for compromise settlement of deficiency income tax and VAT has/have been approved by the National Evaluation Board (NEB).

On September 20, 2019, [respondent] filed a Motion to Render Partial Judgment Based on Compromise Agreement and to Limit Issues. [Petitioner], on the other hand, filed his Comment/Manifestation thereto on October 11, 2019.

In the meantime, [respondent] presented its documentary and testimonial evidence. [Respondent] proffered the testimonies of the following individuals, namely: (1) Mr. Jimmy E. Delgado, [respondent]'s former Vice-President for Finance & Treasurer; and (2) Ms. Eugenia P. Tesoro, its Accounting Manager.

[Respondent] filed its Formal Offer of Evidence on November 4, 2019. [Petitioner] filed his Comment (on [Respondent]'s Formal Offer of Evidence) on November 19, 2019.

The Court, in its Resolution dated January 14, 2020, admitted [respondent]'s Exhibits, except for Exhibit "P-5", for failure to submit the original for comparison.

In the Resolution dated January 21, 2020, the Court granted both [respondent]'s Motion to Render Partial Judgment Based on Compromise Agreement and to Limit the Issues and Motion to Limit Issues; and upheld the validity of [petitioner]'s approval of [respondent]'s Application for Compromise of its deficiency VAT and income tax assessments, and ordered that an Amended Pre-Trial Order be issued.

Consequently, the Amended Pre-Trial Order dated January 23, 2020 was issued by the Court.

[Petitioner] likewise set forth his documentary and testimonial evidence. He offered the testimonies of (1) Ms. Marilou E. Cubero, Revenue Officer IV of the Assessment Division of RR No. 19, Davao City; and (2) Mr. Dennis Michael B. Deluao, Chief Revenue Officer III, Large Taxpayers Division-Davao City.

Thereafter, [petitioner] filed his Formal Offer of Evidence on February 21, 2020. [Respondent] submitted its Comment (Re: [Petitioner]'s Formal Offer of Evidence dated February 21, 2020) on June 25, 2020.

In the Resolution dated July 7, 2020, the Court admitted only Exhibit "R-1", and denied all the remaining exhibits. Specifically, Exhibits "R-2", "R-3", "R-4", "R-5", "R-7", and "R-8", were denied as the offered exhibits do not correspond to the duly marked exhibits, while Exhibits "R-6" and "R-8-A", were denied for failure to present the duly marked exhibits.

On July 17, 2020, [petitioner] filed a Motion for Reconsideration (of the Resolution dated 07 July 2020). [Petitioner] then posted his Memorandum on August 18, 2020.

[Respondent] filed its Memorandum on August 28, 2020. It also filed a Comment Re: [Petitioner]'s Motion for Reconsideration (of the Resolution dated 07 July 2020) on September 18, 2020.

> In the Resolution dated October 1, 2020, the Court resolved to grant [petitioner]'s Motion for Reconsideration (of the Resolution dated 07 July 2020), and admitted all of his exhibits.
>
> In the same Resolution dated October 1, 2020, the case was submitted for decision.

On September 23, 2021, the Court in Division promulgated the assailed Decision.[5]

On October 25, 2021, petitioner filed a *Motion for Reconsideration (Re: Decision promulgated 23 September 2021)*,[6] to which respondent posted its *Comment (Re: [Petitioner]'s Motion for Reconsideration dated October 20, 2021)*[7] on January 4, 2022.

On April 12, 2022, the Court in Division issued the assailed Resolution denying petitioner's motion for reconsideration.[8]

PROCEEDINGS BEFORE THE COURT *EN BANC*

On May 18, 2022, petitioner filed his *Petition for Review* with the Court *En Banc*.[9]

On July 1, 2022, the Court *En Banc* ordered petitioner to submit a new Verification in accordance with A.M. No. 19-10-20-SC, within five days from notice. In addition, petitioner's counsel, Atty. Sylvia R. Alma Jose (Atty. Alma Jose), was given five days from notice to submit the date and number of her current membership dues per Official Receipt or Lifetime Member Number in the Integrated Bar of the Philippines (IBP).[10]

On July 12, 2022, petitioner filed a *Compliance*,[11] which the Court noted; however, Atty. Alma Jose still submitted her old IBP Number for the year 2021 and was given a non-extendible period of five (5) days to comply with the foregoing directive.[12]

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[5] *Supra*, note 2.
[6] Division Docket – Vol. II, pp. 1095-1106.
[7] *Id.*, pp. 1121-1130.
[8] *Supra*, note 3.
[9] *Supra*, note 1.
[10] Resolution, *EB* Docket, pp. 61-62.
[11] *EB* Docket, pp. 64-68.
[12] Resolution dated August 11, 2022, *EB* Docket, pp. 70-72.

On August 22, 2022, petitioner posted a *Compliance*,[13] which the Court noted and admitted. The Court *En Banc* also required respondent to file a comment, not a motion to dismiss, within ten (10) days from receipt thereof.[14]

On October 7, 2022, respondent filed its *Comment (RE: Petition for Review dated May 16, 2022)*,[15] which the Court *En Banc* noted on November 4, 2022.[16] The Court *En Banc* referred the case to mediation.[17]

On December 16, 2022, the Court *En Banc* received the "No Agreement to Mediate" Report from the Philippine Mediation Center Unit[18] and noted the same.[19]

On January 18, 2023, the case was submitted for decision.[20]

THE ISSUES

Petitioner assigns the following errors[21] for the Court's resolution:

> I.
> WITH ALL DUE RESPECT, THE HONORABLE COURT *A QUO* ERRED IN RULING THAT THE ASSESSMENT ISSUED AGAINST RESPONDENT IS NULL AND VOID.
>
> II.
> WITH ALL DUE RESPECT, THE HONORABLE COURT *A QUO* ERRED IN RULING THAT THE PERIOD TO ASSESS DEFICIENCY TAXES AGAINST RESPONDENT HAS PRESCRIBED.

Petitioner's arguments

Petitioner submits that the Formal Letter of Demand (FLD) complies with the requirements under Section 228 of the National Internal Revenue Code (NIRC) of 1997, as implemented by Revenue Regulations (RR) No. 12-99, specifically Section 3.1.4 thereof, as they state the facts, law, rules, and regulations

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[13] *EB* Docket, pp. 73-77.
[14] Resolution dated September 23, 2022, *EB* Docket, pp. 80-81.
[15] *EB* Docket, pp. 82-89.
[16] Resolution, *EB* Docket, pp. 91-92.
[17] *Id.*
[18] *EB* Docket, p. 93.
[19] Resolution dated January 18, 2023, *EB* Docket, pp. 95-96.
[20] *Id.*
[21] Ground of the Petition, *Petition for Review* (Petition), *EB* Docket, p. 9.

on which it was based. As such, respondent was able to formulate an intelligent protest based on the FLD and was able to appeal to the CIR and explain its position.[22]

Petitioner further argues that the period to assess the EWT has not yet prescribed pursuant to Section 222 (a) of the NIRC of 1997. Since there was a substantial under-declaration of sales in respondent's value-added tax (VAT) and income tax returns, the ordinary period of prescription to assess respondent is extended to ten (10) years.[23] In the absence of proof of any irregularities in the tax examiners' performance of their duties, the assessment will not be disturbed.[24]

Respondent's arguments

Respondent contends that the petition failed to raise new matters that will warrant the reconsideration sought. [25] Respondent posits that the filing of a protest to the FLD does not cure the violation of its right to due process.[26]

Respondent avers that prescription is reckoned on a per tax type basis; and so, petitioner cannot apply the extraordinary prescriptive period on its right to assess respondent of the deficiency EWT on the alleged substantial under-declaration of respondent's income in its income tax and VAT returns. [27] Besides, no allegation of fraud was shown to justify the application of the 10-year prescriptive period[28] and was only raised for the first time in petitioner's motion for reconsideration with the Court in Division.[29]

THE COURT *EN BANC*'S RULING

The instant *Petition for Review* is not impressed with merit.

[22] Petition, *id.*, pp. 10-12.
[23] *Id.*, pp. 13-16.
[24] *Id.*, pp. 16-17.
[25] Par. 6, *Comment (RE: Petition for Review dated May 16, 2022)* (Comment), *EB* Docket, p. 83.
[26] Pars. 13-14, Comment, *id.*, pp. 85-86.
[27] Par. 17, Comment, *id.*, p. 86.
[28] Par. 18, Comment, *id.*, pp. 86-87.
[29] Par. 20, Comment, *id.*, p. 88.

The Court En Banc has jurisdiction over the instant case.

Under Section 3(b), Rule 8[30] of the Revised Rules of the Court of Tax Appeals (RRCTA), a petition for review must be filed with the Court *En Banc* within fifteen (15) days from receipt of the copy of the questioned resolution of the Court in Division.

On April 12, 2022, the Court in Division issued the assailed Resolution denying petitioner's motion for reconsideration, a copy of which was received by petitioner on April 21, 2022.[31]

Counting fifteen (15) days from April 21, 2022, petitioner had until May 6, 2022, to file a petition for review with the Court *En Banc.*

On May 5, 2022, petitioner filed a *Motion for Extension of Time to File Petition for Review,*[32] praying for a 15-day extension from May 6, 2022, or until May 21, 2022, to file a petition for review, which was granted by the Court *En Banc.*[33]

On May 18, 2022, petitioner timely filed this *Petition for Review.*

Having settled that the instant *Petition for Review* was timely filed, this Court likewise rules that it has validly acquired jurisdiction to take cognizance of this case under Section 2(a)(1), Rule 4[34] of the RRCTA.

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[30] 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 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.

[31] Division Docket – Vol. II, p. 1135.

[32] *EB* Docket, pp. 1-5.

[33] Minute Resolution dated May 10, 2022, *id.*, p. 6.

[34] SEC. 2. *Cases within the jurisdiction of the Court en banc.* – The Court *en banc* shall exercise exclusive appellate jurisdiction to review by appeal the following:
(a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Divisions in the exercise of its exclusive appellate jurisdiction over:
(1) Cases arising from administrative agencies – Bureau of Internal Revenue, Bureau of Customs, Department of Finance, Department of Trade and Industry, Department of Agriculture; ...

The Court in Division did not err in ruling that the EWT deficiency assessment is void for failure to state the facts and the law on which it was made.

Petitioner claims that the assessment is valid as it stated the facts and law on which it was based; hence, respondent was able to make an intelligent protest thereto.

Respondent counters that its filing of protest to the assessment does not denigrate the fact that there was a violation of due process.

We find for respondent.

Under Section 228 of the NIRC of 1997, taxpayers shall be informed in writing of the law and the facts on which the assessment is made for the assessment to be *valid*:

> 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: ...
>
> ... ...
>
> **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*.** ... [*Emphasis supplied*]

The requirement that the taxpayer be informed of the factual and legal bases of the assessment is *mandatory.*[35] It cannot be presumed.[36] As a requirement of due process, this rule allows the taxpayer to protest effectively.

Implementing the above provision, Section 3.1.4 of RR No. 12-99[37] provides for the following manner as to how the statement of facts, the law, rules, and regulations, or jurisprudence on which the assessment is based must be shown:

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[35] *Commissioner of Internal Revenue v. Spouses Magaan*, G.R. No. 232663, May 3, 2021, citing *Commissioner of Internal Revenue v. Metro Star Superama, Inc.*, G.R. No. 185371, December 8, 2010.
[36] *Id.*, citing *Commissioner of Internal Revenue v. Enron Subic Power Corporation*, G.R. No. 166387, January 19, 2009.
[37] 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, September 6, 1999.

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

Pertinent portions of Annex "B" referred to in Section 3.1.4 read:

ANNEX B

FORMAL LETTER OF DEMAND

ABC Corporation
123 Makati Avenue
Makati City
TIN: 000-000-000-000

Gentlemen:

Please be informed that after investigation there has been found due from you deficiency income tax for calendar year 1997, as shown hereunder:

Assessment No. _____

... ...

The complete details covering the aforementioned discrepancies established during the investigation of this case are shown in the accompanying SCHEDULE 1 of this letter of demand. [*Emphasis supplied*]

... ...

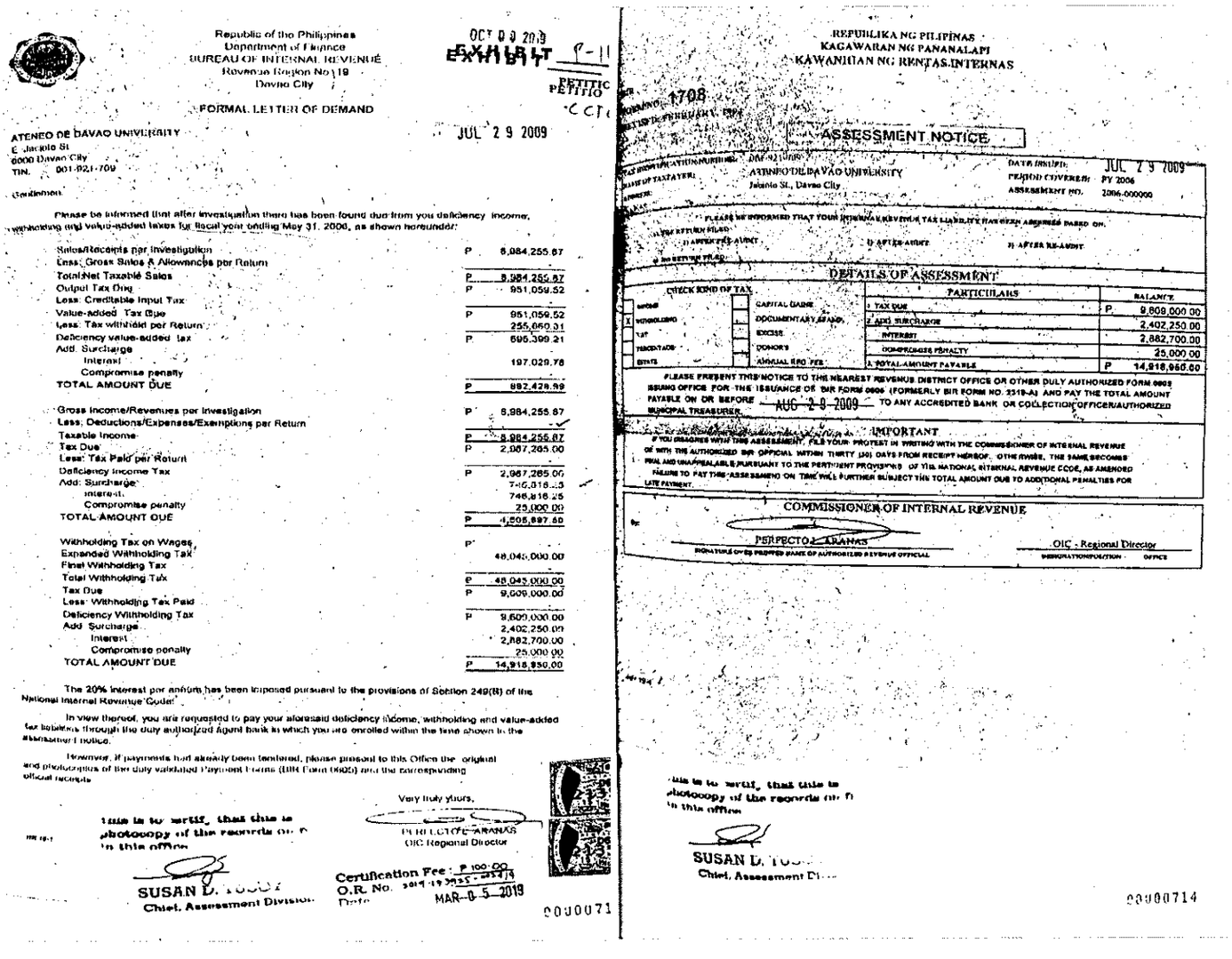
In view thereof, you are requested to pay your aforesaid deficiency income tax liability through the duly authorized agent bank in which you are enrolled within the time shown in the enclosed assessment notice.

Very truly yours,

Given the foregoing, the FLD and Assessment Notice (FLD/FAN) must be accompanied by complete details, *i.e.*, facts, law, rules and regulations, or jurisprudence on which the assessment is based. Otherwise, it is void.

In this case, the FLD issued by petitioner and served to respondent consists of *only one page,* without complete details covering the discrepancies established during the investigation. In other words, there is nothing in the FLD that would show the factual and legal bases on which the assessments were made. Moreover, the Assessment Notice on Withholding Tax attached to the one-page FLD suffers from the same infirmities as it did not state the basis of the assessment.

Based on the FLD/FAN on Withholding Tax presented below, petitioner merely *reiterated* the assessed amounts of withholding tax due, surcharge, interest, and compromise penalty in the Preliminary Assessment Notice (PAN), without any details or particulars of *how* they were arrived at, and *why* respondent's arguments in its 8-page Reply to the PAN were not addressed and was completely disregarded by petitioner, to wit:



Republic of the Philippines
Department of Finance
BUREAU OF INTERNAL REVENUE
Revenue Region No. 19
Davao City

OCT 09 2019
EXHIBIT F-11
PETITIC

FORMAL LETTER OF DEMAND

JUL 29 2009

ATENEO DE DAVAO UNIVERSITY
E. Jacinto St.
8000 Davao City
TIN. 001-921-709

Gentlemen:

Please be informed that after investigation there has been found due from you deficiency income, withholding and value-added taxes for fiscal year ending May 31, 2006, as shown hereunder:

Sales/Receipts per Investigation	P	8,984,255.67
Less: Gross Sales & Allowances per Return		
Total/Net Taxable Sales	P	8,984,255.67
Output Tax Due	P	951,059.52
Less: Creditable Input Tax		
Value-added Tax Due	P	951,059.52
Less: Tax withheld per Return		255,660.31
Deficiency value-added tax	P	695,399.21
Add: Surcharge		
Interest		197,029.78
Compromise penalty		
TOTAL AMOUNT DUE	P	892,428.99

Gross Income/Revenues per Investigation	P	8,984,255.67
Less: Deductions/Expenses/Exemptions per Return		
Taxable Income	P	8,984,255.67
Tax Due	P	2,967,265.00
Less: Tax Paid per Return		
Deficiency Income Tax	P	2,967,265.00
Add: Surcharge		746,818.15
Interest		746,818.15
Compromise penalty		25,000.00
TOTAL AMOUNT DUE	P	4,505,897.60

Withholding Tax on Wages	P	48,045,000.00
Expanded Withholding Tax		
Final Withholding Tax		
Total Withholding Tax	P	48,045,000.00
Tax Due	P	9,609,000.00
Less: Withholding Tax Paid		
Deficiency Withholding Tax	P	9,609,000.00
Add: Surcharge		2,402,250.00
Interest		2,882,700.00
Compromise penalty		25,000.00
TOTAL AMOUNT DUE	P	14,918,950.00

The 20% interest per annum has been imposed pursuant to the provisions of Section 249(B) of the National Internal Revenue Code.

In view thereof, you are requested to pay your aforesaid deficiency income, withholding and value-added tax liabilities through the duly authorized Agent Bank in which you are enrolled within the time shown in the attached notice.

However, if payments had already been tendered, please present to this Office the original and photocopies of the duly validated Payment Forms (BIR Form 0605) and the corresponding official receipts.

Very truly yours,

PERFECTO C. ARANAS
OIC Regional Director

This is to certify that this is a photocopy of the records on file in this office

SUSAN D. TUDOY
Chief, Assessment Division

Certification Fee: P 100.00
O.R. No. 2019-19 39325-0004/19
Date MAR-05-2019

00000071

REPUBLIKA NG PILIPINAS
KAGAWARAN NG PANANALAPI
KAWANIHAN NG RENTAS INTERNAS

1708

ASSESSMENT NOTICE

ATENEO DE DAVAO UNIVERSITY
Jacinto St., Davao City

DATE ISSUED: JUL 29 2009
PERIOD COVERED: FY 2006
ASSESSMENT NO. 2006-000000

PLEASE BE INFORMED THAT YOUR INTERNAL REVENUE TAX LIABILITY HAS BEEN ASSESSED BASED ON:

DETAILS OF ASSESSMENT

CHECK KIND OF TAX		PARTICULARS	BALANCE
	CAPITAL GAINS	1 TAX DUE	P 9,609,000.00
X WITHHOLDING	DOCUMENTARY STAMP	2 ADD: SURCHARGE	2,402,250.00
VAT	EXCISE	INTEREST	2,882,700.00
PERCENTAGE	DONOR'S	COMPROMISE PENALTY	25,000.00
ESTATE	ANNUAL REG FEE	3 TOTAL AMOUNT PAYABLE	P 14,918,950.00

PLEASE PRESENT THIS NOTICE TO THE NEAREST REVENUE DISTRICT OFFICE OR OTHER DULY AUTHORIZED FORM 0605 ISSUING OFFICE FOR THE ISSUANCE OF BIR FORM 0605 (FORMERLY BIR FORM NO. 2318-A) AND PAY THE TOTAL AMOUNT PAYABLE ON OR BEFORE AUG 29 2009 TO ANY ACCREDITED BANK OR COLLECTION OFFICER/AUTHORIZED MUNICIPAL TREASURER.

IMPORTANT

IF YOU DISAGREE WITH THIS ASSESSMENT, FILE YOUR PROTEST IN WRITING WITH THE COMMISSIONER OF INTERNAL REVENUE OR WITH THE AUTHORIZED BIR OFFICIAL WITHIN THIRTY (30) DAYS FROM RECEIPT HEREOF. OTHERWISE, THE SAME BECOMES FINAL AND UNAPPEALABLE PURSUANT TO THE PERTINENT PROVISIONS OF THE NATIONAL INTERNAL REVENUE CODE, AS AMENDED. FAILURE TO PAY THIS ASSESSMENT ON TIME WILL FURTHER SUBJECT THE TOTAL AMOUNT DUE TO ADDITIONAL PENALTIES FOR LATE PAYMENT.

COMMISSIONER OF INTERNAL REVENUE

By:

PERFECTO C. ARANAS
SIGNATURE OVER PRINTED NAME OF AUTHORIZED REVENUE OFFICIAL

OIC - Regional Director
DESIGNATION/POSITION - OFFICE

This is to certify that this is a photocopy of the records on file in this office

SUSAN D. TUDOY
Chief, Assessment Div...

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In *Commissioner of Internal Revenue v. Spouses Magaan* (*Magaan*), [38] the Supreme Court emphasized that it has invalidated tax assessments whose factual and legal bases were not stated, in violation of Section 228 of the Tax Code; and, that a FAN that only contained *a table of taxes* with no other details was insufficient, *viz.*:

> This Court has **invalidated tax assessments whose factual and legal bases were not stated in them**, in violation of Section 228:
>
> > *Commissioner of Internal Revenue v. United Salvage and Towage (Phils.), Inc.*, held that **a final assessment notice that only contained a table of taxes with no other details was insufficient**:
> >
> > > In the present case, a mere perusal of the [Final Assessment Notice] for the deficiency EWT for taxable year 1994 will show that other than a tabulation of the alleged deficiency taxes due, no further detail regarding the assessment was provided by petitioner. Only the resulting interest, surcharge and penalty were anchored with legal basis. Petitioner should have at least attached a detailed notice of discrepancy or stated an explanation why the amount of P48,461.76 is collectible against respondent and how the same was arrived at.
>
> Any deficiency to the mandated content of the assessment or its process will not be tolerated. In *Commissioner of Internal Revenue v. Enron*, an advice of tax deficiency from the Commissioner of Internal Revenue to an employee of Enron, including the preliminary five (5)-day letter, were not considered valid substitutes for the mandatory written notice of the legal and factual basis of the assessment. The required issuance of deficiency tax assessment notice to the taxpayer is different from the required contents of the notice. Thus:
>
> > **The law requires that the legal and factual bases of the assessment be stated in the formal letter of demand and assessment**

[38] G.R. No. 232663, May 3, 2021.

> **notice.** Thus, such cannot be presumed. Otherwise, the express provisions of Article 228 of the [National Internal Revenue Code] and [Revenue Regulations] No. 12-99 would be rendered nugatory. The alleged "factual bases" in the advice, preliminary letter and "audit working papers" did not suffice. **There was no going around the mandate of the law that the legal and factual bases of the assessment be stated in writing in the formal letter of demand accompanying the assessment notice**[.] [*Emphasis supplied*]

Similar to the case of *Magaan*, the FLD/FAN issued in the instant case did not state the factual and legal bases for the assessment and the FAN only contained *a table of taxes* with no other details.

Accordingly, petitioner's failure to strictly comply with the requirements of Section 228 of the NIRC of 1997, as amended, and its implementing rules is a denial of respondent's right to due process and renders void the subject FLD/FAN.

That respondent was able to file a protest to the FLD/FAN is of no moment. In *Commissioner of Internal Revenue v. Yumex Philippines Corporation*, [39] the Supreme Court clarified that while the taxpayer may have protested the assessment, such does not denigrate the fact of violation of due process, *viz.*:

> In *Pilipinas Shell Petroleum Corporation v. Commissioner of Internal Revenue*, the BIR ignored RR No. 12-99 and did not issue to the taxpayer, Pilipinas Shell Petroleum Corporation (PSPC), a notice for informal conference and a PAN as required; and as a result, deprived PSPC of due process in contesting the formal assessment levied against it. **The Court pronounced therein that "[w]hile PSPC indeed protested the formal assessment, such does not denigrate the fact that it was deprived of statutory and procedural due process to contest the assessment before it was issued.**" The Court once more reminded the BIR to be more circumspect in the exercise of its functions as the power of taxation is also sometimes called the power to destroy and,

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

> therefore, should be exercised with caution to minimize injury to the proprietary rights of the taxpayer.[40]

Thus, We sustain the Court in Division's ruling that the FLD/FAN holding respondent liable for deficiency EWT for taxable period June 1, 2005 to May 31, 2006, in the total amount of ₱14,918,950.00, inclusive of increments, are null and void for being issued in violation of respondent's right to due process.

The Court in Division did not err in ruling that the period to assess deficiency taxes against respondent has prescribed.

The Court in Division did not err in finding that the deficiency EWT had already prescribed pursuant to Section 203[41] of the NIRC of 1997, as amended.

Section 203 provides that the CIR's right to *assess* and *collect* an internal revenue tax is limited only to three (3) years, counted from the date of actual filing of the tax return or from the last date prescribed by law for the filing of such return, whichever comes later, except as provided in Section 222 of the NIRC of 1997, as amended. Section 222(a) thereof 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, ...*[*Emphasis supplied*]

Petitioner claims that the exception provided under Section 222(a) of the NIRC of 1997, as amended, should be considered in the determination of the period of limitation of petitioner's right to assess respondent.

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[40] See *Pilipinas Shell Petroleum Corp. v. Commissioner of Internal Revenue*, G.R. No. 172598, December 21, 2007, cited in *Commissioner of Internal Revenue v. Yumex Philippines Corp.*, G.R. No. 222476, May 5, 2021.

[41] 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.

Petitioner argues that the assessment against respondent was due to its failure to declare correct sales in its VAT returns; that the FLD revealed that respondent only paid ₱255,660.31 but the taxable income per audit should have been ₱951,059.51; that since the correct sales did not appear in respondent's *VAT returns* and the correct taxable income in its *Income Tax Return*, there can only be one inevitable conclusion – that there was a substantial under-declaration of sales in its VAT and Income Tax Returns.

Respondent counter argues that the only issue in this case is the validity of the deficiency EWT assessment; that prescription is reckoned on a per tax type basis, and so, petitioner cannot apply the extraordinary prescriptive period on its right to assess respondent of the deficiency EWT on the alleged substantial under-declaration of respondent's income in its income tax and VAT returns. It further argues that no allegation of fraud was shown to justify the application of the 10-year prescriptive period and that it was only raised for the first time in petitioner's motion for reconsideration with the Court in Division.

Petitioner's arguments do not persuade the Court *En Banc.*

Records reveal that while the FLD covers not only EWT or Withholding Tax assessment but also VAT and Income Tax assessments, the latter assessments had already been settled before the Court in Division. To recall, on January 21, 2020, the Court in Division granted respondent's *Motion to Render Partial Judgment Based on Compromise Agreement and to Limit the Issues*. The Court in Division likewise upheld the validity of petitioner's approval of respondent's Application for Compromise of its deficiency VAT and Income Tax assessments. Accordingly, the lone issue raised and resolved by the Court in Division was respondent's liability to pay the assessed deficiency EWT, plus surcharge, interest, and compromise penalty. Thus, discussing respondent's VAT and Income Tax assessments in this case would be pointless.

Moreover, as aptly found by the Court in Division, a scrutiny of the PAN and FLD/FAN reveals that there was no allegation of fraud nor any of the exceptions under Section 222 above to justify the application of the extraordinary ten (10)-year prescriptive period to assess deficiency taxes. Besides, only a 25% surcharge and not the 50% "fraud" surcharge was imposed on both the Deficiency Income Tax and Deficiency

Withholding Tax, and no surcharge was imposed on the Deficiency VAT.

Neither did petitioner submit any proof before the Court in Division that the returns filed by respondent were false or fraudulent with intent to evade correct payment of taxes.

We cannot conclude as true petitioner's allegation that there is substantial under-declaration of sales in respondent's VAT and Income Tax Returns without anything to support such an allegation. The mere understatement of a tax is not itself proof of fraud for the purpose of tax evasion. The fraud contemplated by law must be actual and not constructive. It must be intentional, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some legal right.[42]

Thus, finding no reason to apply the exception, the instant case falls under the general rule and should, therefore, be assessed within three (3) years from the date of actual filing of the tax returns or from the last day prescribed by law for the filing of such return, whichever comes later.

As determined by the Court in Division, the end of the three (3)-year prescriptive period under Section 203 of the NIRC of 1997, as amended, within which petitioner may assess respondent for deficiency EWT, are as follows:

Period	**Actual date of filing of the pertinent tax return**	**Reckoning date of the three-year prescriptive period**	**End of the three-year prescriptive period**
June 2005	July 8, 2005	July 10, 2005	July 10, 2008
July 2005	2005[43]	August 10, 2005	August 10, 2008
August 2005	September 9, 2005	September 10, 2005	September 10, 2008
September 2005	October 10, 2005	October 10, 2005	October 10, 2008
October 2005	November 10, 2005	November 10, 2005	November 10, 2008
November 2005	December 9, 2005	December 10, 2005	December 10, 2008
December 2005	January 10, 2006	January 15, 2006	January 15, 2009
January 2006	February 2006	February 10, 2006	February 10, 2009

[42] *Commissioner of Internal Revenue v. Javier*, G.R. No. 78953, July 31, 1991, cited in *Commissioner of Internal Revenue v. Spouses Magaan*, G.R. No. 232663, May 3, 2021.
[43] The specific date as to when the tax return was filed is unreadable. As the Court in Division found, "there being no indication that the tax return was filed out of time (as there is no penalties imposed or levied), the reckoning date is set on the last day prescribed by law for the filing of said tax return."

Considering that the subject FLD/FAN was issued only on *July 29, 2009*, beyond the 3-year period, the Court *En Banc* finds the subject assessment for deficiency EWT void.

Even if We assume that the FLD/FAN was issued within the three (3)-year ordinary prescriptive period *to assess* on July 29, 2009, the three (3)-year prescriptive period *to collect* lapsed on *July 29, 2012.*[44] Thus, when petitioner initiated the collection of taxes on June 13, 2014 by serving to respondent the Preliminary Collection Letter dated June 11, 2014, requesting respondent to settle the alleged deficiency taxes of ₱20,317,276.49, prescription had already set in, thereby preventing the CIR to collect from respondent.

The Supreme Court's ruling in *Commissioner of Internal Revenue v. Court of Tax Appeals Second Division and QL Development, Inc.*[45] is instructive, *viz.*:

> Here, given that the subject assessment was issued within the three-year ordinary prescriptive period to assess, **the CIR had another three years to initiate the collection of taxes by distraint or levy or court proceeding**. Accordingly, since the FAN/FLD was mailed on December 12, 2014, the CIR had another three years reckoned from said date, or until December 12, 2017, to enforce collection of the assessed deficiency taxes. Verily, prescription had already set in when the CIR initiated its collection efforts only in 2020. The Court also notes that regardless of which period to apply, *i.e.*, five years as determined by the CTA Division or three years, the CIR's collection efforts were, as they are, barred by prescription. [*Emphasis supplied*]

All told, the Court *En Banc* finds no compelling reason to deviate from the Court in Division's ruling that the subject deficiency EWT assessment, issued not only in violation of respondent's right to due process but also beyond the three (3)-year prescriptive period, is null and void. After all, the Supreme Court has not been remiss in reminding taxing authorities that, in ensuring collection of taxes, they must also be faithful to their duties in safeguarding the due process rights of taxpayers.[46]

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[44] In *Commissioner of Internal Revenue v. United Salvage and Towage (Phils.), Inc.*, the Supreme Court held: "... **[the CIR] has three (3) years from the date of actual filing of the tax return to assess a national internal revenue tax** or to commence court proceedings for the collection thereof without an assessment. However, **when it validly issues an assessment within the three (3)-year period, it has another three (3) years within which to collect the tax due by distraint, levy, or court proceeding.** The assessment of the tax is deemed made and **the three (3)-year period for collection of the assessed tax begins to run on the date the assessment notices had been released, mailed or sent to the taxpayer.**" [*Emphasis supplied*]

[45] G.R. No. 258947, March 29, 2022.

[46] See *National Power Corp. v. Province of Pampanga*, G.R. No. 230648 (Resolution), October 6, 2021; *Commissioner of Internal Revenue v. Avon Products Manufacturing, Inc.*, G.R. Nos. 201398-99 & 201418-19, October 3, 2018; *Commissioner of Internal Revenue v. Fitness by Design, Inc.*, G.R. No. 215957, November 9, 2016; *Roxas v. Court of Tax Appeals*, G.R. No. L-25043, April 26, 1968.

WHEREFORE, premises considered, the *Petition for Review* is **DENIED** for lack of merit. Accordingly, the Decision dated September 23, 2021, and the Resolution dated April 12, 2022 of this Court's First Division in CTA Case No. 9779 are **AFFIRMED**.

SO ORDERED.

LANEE S. CUI-DAVID
Associate Justice

We Concur:

ON LEAVE
ROMAN G. DEL ROSARIO
Presiding Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

With Separate 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

HENRY S. ANGELES
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.

CATHERINE T. MANAHAN
Acting Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
Quezon City

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 2610** (CTA Case No. 9779)
	Present:
- versus -	**DEL ROSARIO**, *P.J.*, **RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, MODESTO-SAN PEDRO, REYES-FAJARDO, CUI-DAVID, FERRER-FLORES**, *and* **ANGELES**, *JJ.*
ATENEO DE DAVAO UNIVERSITY, Respondent.	Promulgated: DEC 20 2023 4:30pm

x - x

SEPARATE CONCURRING OPINION

BACORRO-VILLENA, J.:

I concur with the dismissal of the present Petition for Review for lack of merit on the grounds that the Court in Division did not err in ruling that: (1) the Expanded Withholding Tax (**EWT**) deficiency assessment is void for failure to state the facts and the law on which it was made; and, (2) the period to assess deficiency taxes against respondent Ateneo de Davao University (**respondent**) has already prescribed.

The extraordinary ten (10)-year prescriptive period to assess deficiency taxes under Section 222(a)[1] of the National Internal Revenue Code (**NIRC**) of 1997, as amended, serves as an exception to the regular three (3)-year

[1] **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. (Emphasis supplied.)

prescriptive period under Section 203[2] of the NIRC of 1997, as amended. In ruling over the applicability of the former, the *ponencia* states that the mere understatement of a tax is not in itself proof of fraud for the purpose of tax evasion and cites *Commissioner of Internal Revenue v. Spouses Remegio P. Magaan and Leticia L. Magaan* (**Spouses Magaan**).[3]

In *Spouses Magaan*, the nature of and proof necessary for establishing fraud in the context of understated tax returns were clarified as follows: **fraud must be actual and intentional, and not constructive.**

On this matter, I forward supplementary disquisitions.

I, respectfully, forward the position that a 'presumption of fraud' can validly trigger the extraordinary ten (10)-year prescriptive period when a taxpayer fails to refute such a presumption, provided that the corresponding due process requirements were met.

With utmost due care not to overextend the scope, it is helpful to revisit the exception raised in Section 248(B) of the NIRC of 1997, as amended:

> ...
>
> SEC. 248. *Civil Penalties.* — ...
>
> (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 under-declaration** 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.**[4]
>
> ...

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[2] 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.

[3] G.R. No. 232663, 03 May 2021.

[4] Emphasis and underscoring supplied and italics in the original text.

From the foregoing, it is understood that a taxpayer's failure to report sales, receipts, or income in an amount exceeding thirty percent (30%) of that which was declared in its returns, or an excessive claim of deductions in an amount exceeding 30% of its actual deductions, is treated as a substantial under-declaration of sales, receipts or income, or overstatement of claimed deductions, as the case may be. Such fact, when duly established, constitutes *prima facie* evidence of a false or fraudulent return.

For the purpose of determining the applicability of the extraordinary 10-year prescriptive period under Section 222(a)[5] of the NIRC of 1997, as amended, I respectfully submit that a scrutiny of the facts material to the requisites set forth in the above-cited Section 248 of the NIRC of 1997, as amended, finds significance in the determination of the applicability of the 10-year period to each assessment involving false or fraudulent returns with intent to evade tax.

In its recent pronouncements in *McDonald's Philippines Realty Corporation v. Commissioner of Internal Revenue*[6] (**McDonald's**), the Supreme Court reiterated the application of the extraordinary 10-year assessment period under Section 222(a) of the NIRC of 1997, as amended, and outlined the relevant rules, *viz*:

> ...
> *Exception – Prima Facie Evidence of a False or Fraudulent Return (30% Threshold)*
>
> The CIR may be relieved from the above-mentioned burden of proof when there is *prima facie evidence of falsity or fraud*, as defined under Section 248(B) of the 1997 Tax Code.
>
> (1) The CIR ascertains that there is a *misstatement/misdeclaration* in the return, in particular,
>
> (a) an *understatement/underdeclaration* of sales, receipts, or income or
>
> (b) an *overstatement/overdeclaration* of expenses or other deductions, and
>
> (2) the misstatement is *substantial*, such that exceeds the corresponding amount declared in the return by 30%.

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5 Supra at note 1.
6 G.R. No. 247737, 08 August 2023; Emphasis and italics in the original text.

> ***30% threshold satisfied.*** There is *prima facie* evidence of falsity or fraud and the burden or proof shifts to the taxpayer. If the taxpayer fails to overcome the presumption, the *prima facie* evidence shall be sufficient to justify the application of the 10-year period.
>
> ***Taxpayer refutes presumption.*** If the taxpayer is successful in overturning the presumption (*e.g.*, demonstrating that the misstatement as ascertained by the CIR had been inadvertent or attributable to a mistake or was not deliberate or willful on the part of the taxpayer), the CIR cannot rely on the presumption in proving the taxpayer's intent to evade.
>
> ...

Pertinent thereto, the Supreme Court further laid down[7] the strict due process requirements for a proper application of the 10-year prescriptive period:

> ...
>
> *F. Summary: Conditions for a Valid Extension of Assessment Period in Case of a False Return*
>
> ...
>
> *ii. Due Process Requirements*
>
> (1) **First Due Process Requirement.** The *assessment notice* issued to the taxpayer must clearly state the following:
>
> (a) that extraordinary prescriptive period (not the basic three-year period) is being applied, and
>
> (b) the bases of allegations of falsity or fraud, *e.g.*, if the CIR seeks to rely on the *presumption of falsity or fraud* particularly, the formal notice to the taxpayer *must set out the computation by which it ascertained that the misdeclaration in the return surpassed the 30% threshold.*
>
> (2) **Second Due Process Requirement.** The tax authorities have not acted in a manner that is inconsistent with the invocation of the extraordinary prescriptive period or have otherwise misled the taxpayer that the basic period will be applied.
>
> ...

It is noteworthy that the case quoted above also provides a productive analysis of the general rule, *i.e.*, the requisites for the applicability of Section 222(a)[8] of the NIRC of 1997, as amended, in extending the prescriptive period to 10 years. However, it is readily apparent that the *ponencia* has already exhaustively explored the matter on this front.

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7 Supra; Emphasis and italics in the original text.

8 Supra at note 1.

With this, I relate the facts of the present case with the abovementioned exception as well as the due process requirements, discussing each of the components thereof *in seriatim*.

FIRST (1ST) REQUISITE:
PETITIONER FAILED TO SHOW THAT IT HAD ASCERTAINED THAT THERE IS A MISSTATEMENT OR MISDECLARATION IN THE RETURN.

At the outset, petitioner failed to establish any misstatements or misdeclarations in respondent's EWT returns. A reading of the subject Formal Letter of Demand (**FLD**) issued by the Bureau of Internal Revenue (**BIR**) shows that such fact was not addressed, nor did it make any references to respondent's EWT returns.

Instead, petitioner relied on a supposed misdeclaration within respondent's Value-Added Tax (**VAT**) and Income Tax (**IT**) returns, seeking a blanket application of the 10-year prescriptive period to all taxes covered in the assessment laid down in the FLD. While this position is clearly misplaced, the *ponencia* nevertheless addressed the issues surrounding VAT and IT, pointing out that these were previously resolved by the Court in Division and were no longer in issue before the Court *En Banc*.

SECOND (2ND) REQUISITE:
PETITIONER FURTHER FAILED TO SHOW THAT SUCH A MISSTATEMENT WOULD BE OF A SUBSTANTIAL AMOUNT.

Consequently, petitioner cannot possibly prove the existence of a substantial misstatement, having failed to establish any misstatement in the first place.

Notably, this requirement to show that the misstatement is substantial is intertwined with the due process requirements associated with the availment of this exception, as shall be discussed further below.

Assuming, for the sake of argument, that petitioner was able to sufficiently demonstrate a clear fact of misstatement without conclusively establishing that its amount is substantial, the present assessment would still fail to meet the requisites for applying the 10-year prescriptive period. While already a due process violation by itself, the tenor of the FLD and the corresponding Assessment Notice (**AN**) for EWT left this Court no

opportunity to verify whether any perceived misstatements would breach the 30% threshold. As aptly noted in the *ponencia*, the said documents, at most, laid down the list of taxes and penalties due.

FIRST (1ST) DUE PROCESS REQUIREMENT:
PETITIONER FAILED TO CLEARLY STATE THAT THE EXTRAORDINARY PERIOD IS BEING APPLIED AND THE BASES OF THE ALLEGATIONS OF FALSITY OR FRAUD.

Petitioner likewise failed to indicate a clear statement that the extraordinary 10-year prescriptive period is being applied, in place of the ordinary three (3)-year period. In the instant Petition for Review, petitioner erroneously argued for the application of the exception under Section 248(B)[9] of the NIRC of 1997, as amended, with reference to the case of *Commissioner of Internal Revenue v. Asalus Corporation.*[10] While the principles therein are sound and authoritative, petitioner appears to have missed the fact that the instant case, in comparison, is occasioned by a lapse in upholding the taxpayer's due process. After all, a plain reading of the provision of the NIRC of 1997, as amended, tells us that the presumption is *prima facie*, warranting an opportunity for the taxpayer to dispute the same.

Moreover, pursuant to the *McDonald's* ruling, the formal notice to the taxpayer must set out the computation by which it ascertained that the misdeclaration in the return surpassed the 30% threshold. Such a statement is crucial for respondent to be accorded the chance to intelligently refute the allegations raised in the assessment.

To my mind, in seeking to extend the prescriptive period to 10 years — either through the general rule (*i.e.*, facts outright constituting fraud) or the exception (*i.e.*, breaching the 30% threshold in the amount of misstatement or misdeclaration in the returns) — the failure to specify the bases of the allegations of falsity or fraud is fatal.

SECOND (2ND) DUE PROCESS REQUIREMENT:
PETITIONER ACTED IN A MANNER INCONSISTENT WITH THE INVOCATION OF THE EXTRAORDINARY PRESCRIPTIVE PERIOD.

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9 Supra at p. 2.
10 G.R. No. 221590, 22 February 2017.

Finally, upon revisiting the FLD again, it is noted that the surcharge imposed on the EWT assessment is twenty-five percent (25%). Meanwhile, for the other tax assessments petitioner relied upon in attempting to support its allegations of substantial misdeclarations or misstatements for purposes of establishing falsity or fraud, a similar 25% surcharge was imposed on the assessment for IT and no surcharge was imposed on that for VAT.

In cases of deficiency assessments involving false or fraudulent returns, a 50% surcharge[11] replaces the regular 25% surcharge.[12] However, in the subject FLD of the instant case, this 50% surcharge was not imposed on or to any of the taxes enumerated therein. This omission is inconsistent with the application of the 10-year prescriptive period. As highlighted in *McDonald's*, such an inconsistency can mislead the taxpayer as to which prescriptive period is applicable.

In sum, it is evident that there is no basis for applying the extraordinary 10-year prescriptive period to the EWT assessment. As such, the period to assess deficiency taxes against respondent has already prescribed.

While the procedures observed by the BIR over the course of the assessment in the present case prevent a fruitful invocation of the presumption under Section 248(B)[13] of the NIRC of 1997, as amended, I, nonetheless, respectfully note that the concurrence of the proper circumstances (*i.e.*, when the taxpayer fails to refute a properly-established presumption of substantial misdeclaration in its returns) should allow for the application of the 10-year prescriptive period under Section 222(a) of the NIRC of 1997, as amended.[14]

All told, I vote for the dismissal of the present Petition for Review for lack of merit.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

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11 Supra at p. 2, as implemented by Revenue Regulations (RR) No. 18-2013.
12 Section 248(A) of the NIRC of 1997, as amended.
13 Supra at p. 2.
14 Supra at note 1.