

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF
INTERNAL REVENUE,

Petitioner,

CTA *EB* NO. 2335

(CTA Case No. 8986)

Present:

DEL ROSARIO, *P.J.*,
CASTAÑEDA, JR.,
UY,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA,
MODESTO-SAN PEDRO,
REYES-FAJARDO, *and*
CUI-DAVID, *JJ.*

-versus-

THE ORCHARD GOLF AND
COUNTRY CLUB, INC.,

Respondent.

Promulgated:

APR 25 2022

[Signature]
1:55 p.m.

x-----

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DECISION

MANAHAN, J.:

Before the Court *En Banc* is a *Petition for Review*¹ filed by the Commissioner of Internal Revenue (CIR) praying for the reversal of the Decision dated January 14, 2020, and the Resolution dated September 1, 2020, which cancelled and set aside the Formal Letter of Demand and Final Assessment Notice (FLD/FAN) issued against The Orchard Golf and Country Club, Inc. (Orchard Golf) for deficiency taxes in the aggregate amount of Php113,766,847.77 involving the taxable year 2010.

FACTS

The CTA 3rd Division narrated the factual antecedents, as follows:

¹ EB Docket, pp. 7-28. *cm*

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Petitioner [now, respondent] The Orchard Golf and Country Club, Inc. is a domestic, non-profit corporation, organized and validly existing in accordance with the laws of the Republic of the Philippines, for the purpose of promoting the social, educational, and athletic activities among its stockholders, the main objective and undertaking of which will be the construction and maintenance of a golf course, tennis courts, squash courts, swimming pools, and other indoor and outdoor related sports and recreational facilities, where no part of its income is distributable to its members/shareholders.

On the other hand, Respondent [now, petitioner] is the Commissioner of the Bureau of Internal Revenue (BIR), with principal office address at the 5th Floor BIR National Office Building, Agham Road, Diliman, Quezon City. Respondent, *motu proprio* or through his authorized representatives, has the power to assess deficiency taxes, and decide protests to disputed assessments, pursuant to Section 4, in relation to Section 228, both of the National Internal Revenue Code (NIRC), as amended.


On September 19, 2012, Petitioner received the Letter of Authority (LOA) No. LOA-54A-2012-00000102 dated September 13, 2012, authorizing Revenue Officer Herbert Ordiz and Group Supervisor Romanito Guiuan, to examine Petitioner's books of accounts and other accounting records for the period January 1, 2010 to December 31, 2010.

On March 26, 2014, Petitioner received a Preliminary Assessment Notice (PAN) issued on February 17, 2014, which states that Petitioner is liable for deficiency taxes for taxable year 2010 in the aggregate amount of P113,033,316.81.

Subsequently, on April 10, 2014, Petitioner filed the *Request for Reinvestigation* dated April 8, 2014, in respect of the said PAN.

On April 21, 2014, Petitioner received the Formal Letter of Demand (or Final Assessment Notice) (FLD/FAN) issued on March 28, 2014. In the FLD/FAN, Petitioner was found liable for deficiency taxes in the aggregate amount of P113,766,847.77 for transactions in 2010, detailed as follows:

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Thus, on May 21, 2014, Petitioner filed the Request for Reinvestigation dated May 21, 2014, in respect of the said FLD/FAN. 

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On July 21, 2014, the Petitioner submitted documents to support its Request for Reinvestigation.²

On February 16, 2015, Orchard Golf filed its Petition for Review with the Court of Tax Appeals (CTA) Division. After trial, the CTA 3rd Division rendered the assailed Decision, which granted Orchard Golf's Petition for Review, as follows:

WHEREFORE, in light of the foregoing considerations, the instant Petition for Review is **GRANTED**. Accordingly, the FLD/FAN dated March 28, 2014, assessing Petitioner for deficiency taxes in the aggregate amount of P113,766,847.77, for taxable year 2010, is **CANCELLED** and **SET ASIDE**.

SO ORDERED.³

The CIR's Motion for Reconsideration of the above Decision was denied in the Resolution⁴ dated September 1, 2020.

The Court in Division found that the CIR violated Orchard Golf's right to due process when the FLD/FAN was issued barely two (2) days from Orchard Golf's receipt of the PAN, and before the lapse of the 15-day period to respond to the PAN.

On October 9, 2020, the CIR filed the subject Petition for Review. Orchard Golf filed its Comment (Re: Petition for Review)⁵ by registered mail on December 16, 2020.

The case was referred to mediation,⁶ however, the parties decided not to have their case mediated.⁷

Thus, the case was submitted for decision on May 26, 2021.⁸

² EB Docket, Division Decision dated January 14, 2020, pp. 36-38.

³ EB Docket, Division Decision dated January 14, 2020, p. 60.

⁴ EB Docket, pp. 62-65.

⁵ EB Docket, pp. 74-98.

⁶ EB Docket, Resolution dated January 14, 2021, pp. 214-215.

⁷ EB Docket, No Agreement to Mediate, p. 216.

⁸ EB Docket, pp. 218-219. *on*

ISSUES

The CIR submits the following grounds for the petition:

- I. The Honorable Court in Division erred in ruling that the assessment issued against respondent is void.
- II. The Honorable Court in Division erred in ruling that respondent is not liable for deficiency taxes for taxable year 2010.

CIR's arguments

The CIR states that Orchard Golf's right to due process was not violated since it was given the opportunity to refute the PAN. Orchard Golf's protest letter was actually considered and its request for reinvestigation was granted. However, Orchard Golf failed to substantiate its claim that it is not liable for deficiency taxes for taxable year 2010.

The CIR also argues that Orchard Golf is liable for deficiency income tax. Relying on Revenue Memorandum Circular (RMC) No. 35-2012,⁹ the CIR states that clubs organized and operated exclusively for pleasure, recreation and other non-profit purposes shall now be subject to income tax and value-added tax (VAT), because the tax exemption previously granted to such clubs have not been carried over in the 1997 National Internal Revenue Code (NIRC), as amended. Thus, RMC No. 35-2012 only calls for the strict implementation of Section 27¹⁰ of the 1997 NIRC, as amended.

The CIR also asserts that Orchard Golf is liable for VAT because when a member pays the dues/fees, there is an actual sale of service. The service that the club offers to the members are the exclusive and preferential right to enjoy the facilities of the clubs, as well as other privileges enjoyed by its members.

⁹ Clarifying the Taxability of Clubs Organized and Operated Exclusively for Pleasure, Recreation, and Other Non-Profit Purposes, August 3, 2012.

¹⁰ SEC. 27. *Rates of Income Tax on Domestic Corporations.* –

(A) *In General.* – Except as otherwise provided in this Code, an income tax of thirty-five (35%) is hereby imposed upon the taxable income derived during each taxable year from all sources within and without the Philippines by every corporation, as defined in Section 22(B) of this Code and taxable under this Title as a corporation, organized in, or existing under the laws of the Philippines: *Provided,* That effective January 1, 2009, the rate of income tax shall be thirty percent (30%). xxx *am*

Orchard Golf's arguments

Orchard Golf counter-argues that its rights to both procedural due process and substantive due process were violated. It states that the 15-day period to respond to the PAN was not observed when barely two (2) days from its receipt of the PAN, the FLD/FAN was already issued.

Orchard Golf also states that its right to substantive due process was violated because the alleged reinvestigation was a sham since the revenue officer assigned for the reinvestigation did not perform an audit and does not even know the case assigned to him for reinvestigation.

Finally, citing *Association of Non-Profit Clubs, Inc. v. Bureau of Internal Revenue*¹¹ (ANPC case), Orchard Golf asserts that membership fees, assessment fees, and the like, for as long as the same are intended for the upkeep and maintenance of a club's facilities, are classified as capital, and as such, no income tax may be collected. Such fees are likewise not subject to VAT because there is no sale, barter or exchange of goods or properties, or sale of service.

RULING OF THE COURT

The instant Petition for Review was timely filed.

The CIR received the assailed Resolution dated September 1, 2020, on September 9, 2020.¹²

Pursuant to the Revised Rules of the Court of Tax Appeals (RRCTA), Rule 8, Section 3(b),¹³ the CIR has fifteen days from such receipt, or until September 24, 2020, within which to file his Petition for Review.

¹¹ G.R. No. 228539, June 26, 2019.

¹² Division Docket, Vol. 9, p. 4333.

¹³ Rule 8 Procedure in Civil Cases

Sec. 3. *Who may appeal; period to file petition.*

xxx xxx xxx

(b) A party adversely 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. *an*

On September 22, 2020, the CIR filed his *Motion for Extension of Time to File Petition for Review*,¹⁴ praying for an additional period of fifteen (15) days from September 24, 2020, or until October 9, 2020. The extension was granted in the Minute Resolution dated September 25, 2020.

Thus, the instant Petition for Review was timely filed on October 9, 2020.

There is no cogent reason to reverse nor modify the assailed Decision and Resolution.

Section 228 of the 1997 NIRC, as amended, provides the steps in the issuance and protesting of an assessment, *to wit*:

SEC. 228. *Protesting of Assessment.* – When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: xxx

xxx xxx xxx

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

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

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The abovequoted provision is implemented by Section 3 of Revenue Regulations (RR) No. 12-99,¹⁵ as amended by RR No. 18-2013,¹⁶ which provides:

¹⁴ EB Docket, pp. 1-5.

¹⁵ 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.

¹⁶ Amending Certain Sections of Revenue Regulations No. 12-99 Relative to the Due Process Requirement in the Issuance of a Deficiency Tax Assessment. *on*

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SECTION 3. *Due Process Requirement in the Issuance of a Deficiency Tax Assessment.* –

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


xxx xxx xxx

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

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

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

The issuance of the PAN, as well as giving the taxpayer fifteen (15) days from receipt of such PAN to respond thereto, are part of due process in the issuance of tax assessments. If the taxpayer fails to respond to the PAN within the said 15-day period, the taxpayer shall be considered in default. It is only then that the CIR, or his duly authorized representative, can validly issue the FLD/FAN. In other words, the CIR or his duly authorized representative is duty bound to wait for the expiration of the 15-day period, **reckoned from the date of receipt of the PAN**, before the FLD/FAN can be issued.¹⁷

¹⁷ *Commissioner of Internal Revenue v. Lanao Del Norte Electric Cooperative (LANECO)*, CTA EB No. 2236, June 9, 2021. 

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In the instant case, the PAN dated February 17, 2014¹⁸ was received by Orchard Golf on March 26, 2014.¹⁹ However, the subject FLD/FAN was issued on March 28, 2014,²⁰ or barely two (2) days from Orchard Golf's receipt of the PAN. Clearly, the FLD/FAN was issued before the lapse of the 15-day period granted to the taxpayer to respond to the PAN. Thus, the FLD/FAN was issued prematurely depriving Orchard Golf of the opportunity to be heard on the PAN, in violation of the due process requirement in the issuance of tax assessments. Consequently, the subject FLD/FAN is void and bears no valid fruit.

The fact that Orchard Golf was able to protest the FLD/FAN and that its request for reinvestigation was allegedly granted, does not cure the violation of its due process at the PAN level.


In a case involving similar circumstances, the Supreme Court held as follows:

Succinctly put, if it was determined that there exists sufficient basis to assess the taxpayer for deficiency taxes, the CIR or her duly authorized representative shall issue to the taxpayer a Preliminary Assessment Notice (PAN), to which the taxpayer is required to respond. Upon **receipt** of the PAN, the taxpayer is granted fifteen (15) days, within which to file a reply. If he fails to do so within the prescribed period, he shall be considered in default and only then shall the CIR or his duly authorized representative issue an FLD/FAN, calling for the payment of the assessed deficiency tax liability, surcharges and penalties.

Clearly, due process demands that the taxpayer receives the PAN **and** that he is given the opportunity to respond thereto. Moreover, in *CIR v. Avon Products Manufacturing, Inc.*, the Court even went beyond "opportunity to be heard" as an aspect of due process. In said case, the Court, reiterating *Ang Tibay v. The Court of Industrial Relations*, held that "[n]ot only must the party be given an opportunity to present his case and to adduce evidence tending to establish the rights which he asserts **but the [CIR] must consider the evidence presented.**"

¹⁸ Division Docket, Vol. 6, Exhibit "P-2", pp. 3017-3020; BIR Records, Folder 1, pp. 169-172.

¹⁹ Division Docket, Vol. 3, Joint Stipulation of Facts and Issues (JSFI), pars. 1.2 and 1.3, p. 1429.

²⁰ Division Docket, Vol. 3, JSFI, par. 1.5, p. 1430. 

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In this case, records show that respondent received the PAN on February 5, 2009. However, without waiting for the lapse of the 15-day period, the CIR already issued the FLD/FAN. By disregarding the 15-day period provided by law, the CIR utterly deprived respondent of the opportunity to contest the PAN and present evidence in support thereto before an FLD/FAN was issued.

In *CIR v. Metro Star Superama, Inc.*, the Court emphasized that the PAN is part of due process. The persuasiveness of the right to due process reaches both substantial and procedural rights and the failure of the CIR to **strictly comply** with the requirements laid down by law and its own rules, as in this case, is a denial of the taxpayer's right to due process.


Finally, the Court need not belabor to discuss the matter on respondent's timely or belated filing of its protest to the FLD/FAN. To be sure, whether respondent was able to timely file a protest to the FLD/FAN "does not denigrate the fact that it was deprived of statutory and procedural due process to contest the assessment before it was issued." On the other hand, if respondent indeed failed to file a protest to the FAN/FLD within the prescribed period, is also of no moment; for settled is the rule that tax assessments issued in violation of the due process rights of a taxpayer are null and void and bears no fruit.²¹ (*Emphases in the original, citations omitted*)

Based on the foregoing, the Court finds no reason to reverse nor modify the assailed Decision and Resolution. The other issues raised by the CIR will no longer be discussed in view of the nullity of the subject tax assessments.

WHEREFORE, the Petition for Review is **DENIED** for lack of merit. The Decision and Resolution of the Court's 3rd Division, dated January 14, 2020 and September 1, 2020, respectively, are **AFFIRMED**.

The CIR, his representatives, agents, or any person acting on his behalf are **ENJOINED** from collecting or taking any further action on the subject deficiency taxes.

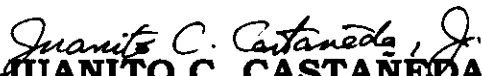
SO ORDERED.

²¹ *Commissioner of Internal Revenue v. Nippo Metal Tech Phils., Inc. (formerly Global Metal Tech Corporation)*, G.R. No. 227616, Resolution dated June 19, 2019. 



CATHERINE T. MANAHAN
Associate Justice

WE CONCUR:


ROMAN G. DEL ROSARIO
Presiding Justice

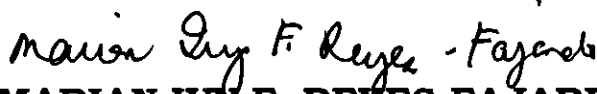

JUANITO C. CASTAÑEDA, JR.
Associate Justice



ERLINDA P. UY
Associate Justice


MA. BELEN M. RINGPIS-LIBAN
Associate Justice


JEAN MARIE A. BACORRO-VILLENA
Associate Justice

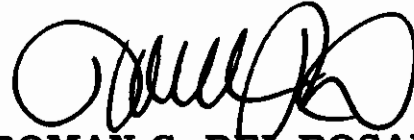

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice


MARIAN IVY F. REYES-FAJARDO
Associate Justice


LANEE S. CUI-DAVID
Associate Justice

CERTIFICATION

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



ROMAN G. DEL ROSARIO
Presiding Justice