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TAX LAW FOR BUSINESS

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One day too early: Premature issuance of FAN/FLD is a violation of due process

Who would have thought being early could be a bad thing?

In the recent Court of Tax Appeals en banc case of *Commissioner of Internal Revenue v. Pacific Bayview Properties* (CTA EB Case No. 1677), the Bureau of Internal Revenue (BIR) learned that being too zealous in issuing assessment notices could result in a violation of the taxpayer's right to due process.

In the said case, the taxpayer received from the BIR a Preliminary Assessment Notice dated January 10, 2011. Consequently, the taxpayer filed its Position Paper/Reply to the PAN on January 25, 2011, which is well within the 15-day period given to the taxpayer to respond to the PAN pursuant to Revenue Regulations RR 12-99. Subsequently, the BIR issued the Final Assessment Notice (FAN) and the Formal Letter of Demand (FLD), both dated January 24, 2011, which the taxpayer received on February 2, 2011.

In its appeal, the taxpayer argued that the BIR violated its right to due process when the FAN and the FLD were issued even before the lapse of the 15-day period given to the taxpayer to file its protest to the PAN. It further claimed that the issuance of the FAN without even hearing the side of the taxpayer is anathema to the cardinal principles of due process.

Upon deliberation, the court en banc found that the BIR indeed violated the due process requirement when it issued the Final Assessment Notice and Formal Letter of Demand before the expiration of the period to respond to the PAN.

The court en banc ruled that the taxpayer has 15 days from receipt of the PAN to file a protest thereto with the BIR. This is pursuant to Section 228 of the National Internal Revenue Code, as amended, in relation to Section 3.1.2 of RR 12-99. It held that “[i]f during the said period, the taxpayer failed to file a protest to the PAN, it is only then that the BIR can consider the taxpayer in default, and correspondingly cause the issuance of an FLD and assessment notice, which shall be subsequently served to the said taxpayer.”

Consequently, the court en banc is convinced that the BIR is duty bound to wait for the expiration of 15 days from the date of receipt of the PAN before issuing the FLD and FAN. Such a process or procedure is part and parcel of the due process requirement in the issuance of a deficiency tax assessment. Failure of the BIR to strictly comply with the requirements laid down by law and its own rules is a denial of the taxpayer’s right to due process.

Even the argument that “taxes are the lifeblood of the government” is not enough to overcome the fatal effect of a violation of the taxpayer’s right to due process.

The decision of the court en banc appears to be consistent with previous decisions promulgated by the CTA. The doctrine is crystal clear: Due process must be observed.

Interestingly, even though the court en banc decided in favor of the taxpayer, it did not pass upon one of the more stimulating arguments of the taxpayer: that the right of the taxpayer to answer the PAN carries with it the correlative duty on the part of the BIR to consider the response thereto.

Although the essence of the right to due process is the opportunity to be heard, such opportunity would be wasted if it would fall on deaf ears. The same idea applies to replies or protests to assessments submitted to the BIR but is not taken into consideration. The effort in crafting and explaining in detail the position of the taxpayer would be but an empty and meaningless exercise if the same is not even considered by the BIR.

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