Excessive Docket Fees in Disputed Tax Assessments and Their Adverse Impact on the Right to Appeal

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I. INTRODUCTION

The right to appeal is a remedy granted by statute; hence, one who appeals must abide by the rules laid down by statute.[1] Consequently, payment of appellate court docket fees and other lawful fees within the established reglementary period is compulsory and jurisdictional.[2] Cognizant that appeal is an integral part of the judicial system, courts should ensure that a party

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1. Ayala Land, Inc. v. Carpo, 345 SCRA 579, 584 (2000).
2. *Id.*

should not be denied the right to appeal, most especially if the appeal is considered meritorious.[3]

Though a person's right to appeal has been established to be neither a natural right nor part of due process,[4] courts cannot deprive a person of the right to appeal when the same has been recognized by the Constitution or by statute.[5] The violation of such right would be tantamount to a direct transgression of the requirement of due process as mandated by the Constitution.[6]

Prior to 2005, docket fees for appealing a decision of the Bureau of Internal Revenue (BIR) on a disputed assessment to the Court of Tax Appeals (CTA) were based on a sliding scale, depending on the amount of the disputed assessment.[7] The maximum docket fee was ₱50,000.00 when the amount of the disputed tax assessment exceeded ₱50 million.[8]

Sometime in 2004, the Supreme Court, upon the recommendation of the CTA, approved a very significant increase in docket fees.[9] Although docket fees are still based on the amount of the disputed assessment, for assessments beyond ₱50 million, the docket fees for the excess shall be equivalent to one-half (1/2) of one per cent (1%).[10] Unlike the old docket fee structure, there is no cap or maximum docket fee for appealing a disputed assessment.

A taxpayer at the receiving end of a bloated tax assessment — which the BIR seems to issue with alarming regularity — may incur exorbitant docket fees to appeal the disputed assessment in court. Under the Revised Rules of the CTA, "[t]he Clerk of Court shall not receive a petition for review for filing unless the petitioner submits proof of payment of docket fees."[11] The

3. *See* Goulds Pumps (Phils.), Inc. v. Court of Appeals, 224 SCRA 127, 132 (1993).

4. Bello v. Fernando, 4 SCRA 135, 138 (1962) (citing Aguilar and Casapao v. Navarro, 55 Phil. 898 (1931) & Santiago and Flores v. Valenzuela and Pardo, 78 Phil. 397 (1947)).

5. Light Rail Transit Authority v. Salvaña, 726 SCRA 141, 151 (2014).

6. *Id.* at 151-52.

7. *See* 2000 LEGAL ETHICS, rule 141 (superseded 2004).

8. *Id.*

9. Senen Y. Glinoga, *Unconscionable CTA filing fees*, PHIL. STAR, Aug. 10, 2004, *available at* http://www.philstar.com/business/260735/unconscionable-cta-filing-fees (last accessed Oct. 31, 2016).

10. LEGAL ETHICS, rule 141, § 4 (b).

11. 2005 REVISED RULES OF THE COURT OF TAX APPEALS, rule 6, § 3 (a).

imposition of excessive docket fees may effectively deter, or worse, curtail the right to judicially appeal disputed assessments.

This Article aims to demonstrate how the current CTA docket fee structure, taken together with other factors, could effectively lead to the deprivation of the right of taxpayers to appeal administrative decisions on disputed assessments.

II. REMEDY OF APPEALING DECISIONS ON DISPUTED ASSESSMENTS: A STATUTORY RIGHT

The right of a taxpayer to appeal an adverse decision on a disputed tax assessment is granted by statute, as provided in the National Internal Revenue Code of 1997 (1997 NIRC).[12] The 1997 NIRC, otherwise known as the "Tax Code," provides that decisions of the Commissioner of Internal Revenue (Commissioner) on disputed assessments may be appealed to the CTA —

> Section 4. *Power of the Commissioner to Interpret Tax Laws and to Decide Tax Cases.*
>
> ...
>
> The power to decide disputed assessments, refunds of internal revenue taxes, fees[,] or other charges, penalties imposed in relation thereto, or other matters arising under this Code or other laws or portions thereof administered by the [BIR] is vested in the Commissioner, subject to the exclusive appellate jurisdiction of the [CTA].[13]

The remedy to judicially appeal disputed assessments is reiterated in Section 228 of the 1997 NIRC —

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

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12. An Act Amending the National Internal Revenue Code, as Amended, and for Other Purposes [Tax Reform Act of 1997], Republic Act No. 8424 (1997) [hereinafter NAT'L INTERNAL REVENUE CODE].

13. *Id.* tit. 1, § 4.

> Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within [30] days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations.
>
> Within [60] days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.
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> If the protest is denied in whole or in part, or is not acted upon within [180] days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the [CTA] within [30] days from receipt of the said decision, or from the lapse of the [180]-day period; otherwise, the decision shall become final, executory[,] and demandable.[14]

Finally, the right to appeal disputed assessments is embodied in the statute creating the CTA. Section 7 of Republic Act No. 1125,[15] as amended by Republic Act No. 9282,[16] outlines the jurisdiction of the CTA —

> Section 7. *Jurisdiction.* – The CTA shall exercise:
>
> (A) Exclusive appellate jurisdiction to review by appeal, as herein provided:
>
> (1) Decisions of the Commissioner [ ] in cases involving disputed assessments, refunds of internal revenue taxes, fees[,] or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue or other laws administered by the Bureau of Internal Revenue;
>
> (2) Inaction by the Commissioner [ ] in cases involving disputed assessments, refunds of internal revenue taxes, fees[,] or other charges, penalties in relations thereto, or other matters arising under the [NIRC] or other laws administered by the [BIR], where the [NIRC] provides a specific period of action, in which case the inaction shall be deemed a denial[.][17]

Based on the foregoing, the remedy of appealing administrative decisions on disputed assessments is a right granted by statute. There will be a violation

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14. *Id.* § 228.
15. An Act Creating the Court of Tax Appeals, Republic Act No. 1125, § 7 (1954).
16. An Act Expanding the Jurisdiction of the Court of Tax Appeals (CTA), Elevating its Rank to the Level of a Collegiate Court with Special Jurisdiction and Enlarging its Membership, Amending for the Purpose Certain Sections of Republic Act No. 1125, as Amended, Otherwise Known as the Law Creating the Court of Tax Appeals, and for Other Purposes, Republic Act No. 9282, § 7 (2004).
17. *Id.*

of the constitutional requirement of due process of law if a taxpayer is deprived of his right to appeal a disputed assessment.

III. FACTORS INCREASING THE LIKELIHOOD OF JUDICIAL INTERVENTION ON DISPUTED ASSESSMENTS

A computation of tax liabilities with an accompanying demand for payment within a specified period is contained in a tax assessment.[18] An assessment, wherein the BIR informs the taxpayer that he or she has tax liabilities, is sent to the taxpayer. The assessment serves as a demand of payment of the taxes described therein within a specified period.[19]

Section 228 of the 1997 NIRC and its implementing rules and regulations provide the administrative mechanism for disputing and protesting an assessment. Section 228 states that "[w]hen the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings[.]"[20] Pursuant to the same provision of law, the taxpayer is given the opportunity to respond to the findings; otherwise, the Commissioner or his duly authorized representative shall issue an assessment based on his own findings.[21] In turn, the taxpayer may administratively protest the assessment by filing a request for reconsideration or for reinvestigation within 30 days from receipt of the assessment.[22] Within 60 days from the filing of the protest, the taxpayer shall submit all relevant supporting documents.[23] Thereafter, the BIR is given a statutory period of 180 days to act on the protest.[24]

In theory, the law seems to give taxpayers every opportunity at the administrative level to question an assessment. If he is subsequently able to cite applicable law, rules, and regulations while submitting the relevant documents to support his protest, he can have the assessment reduced or cancelled altogether.

However, in practice, most, if not all, of the findings set out in a formal assessment — many of which involve huge amounts — will likely be

18. Commissioner of Internal Revenue v. Pascor Realty and Development Corporation, 309 SCRA 402, 404 (1999).

19. *Id.* at 410.

20. NAT'L INTERNAL REVENUE CODE, § 228.

21. *See* NAT'L INTERNAL REVENUE CODE, § 228.

22. NAT'L INTERNAL REVENUE CODE, § 228.

23. *Id.*

24. *Id.*

maintained either by the investigating BIR office or by the BIR National Office. As a result, the taxpayer is left with no choice but to appeal the disputed assessment to the CTA. Several factors contribute to this probable outcome.

A. Broad Investigative and Assessment Powers of the BIR

The powers and duties of the BIR, which is headed by the Commissioner, are to "comprehend the assessment and collection of all national internal revenue taxes, fees, and charges, and the enforcement of all forfeitures, penalties, and fines connected therewith, including the execution of judgments in all cases decided in its favor by the [CTA] and the ordinary courts."[25]

In connection with the BIR's assessment and collection mandates, Sections 5 and 6 of the 1997 NIRC broadly set out the BIR's investigative and assessment powers and identify the allowable means to obtain the necessary information, documents, records, reports, and other data in support of an assessment.[26]

In accordance with Section 6 of the 1997 NIRC, the Commissioner has the power to make assessments and prescribe additional requirements for tax administration and enforcement.[27] Among the tools made available to the Commissioner in aid of his assessment powers is the so-called "Best Evidence Obtainable Rule,"[28] provided in paragraph (B) of Section 6 of the 1997 NIRC, which reads —

> Section 6. Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement
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> ...
>
> (B) *Failure to Submit Required Returns, Statements, Reports*[,] *and other Documents.*– When a report required by law as a basis for the assessment of any national internal revenue tax shall not be forthcoming within the time fixed by laws or rules and regulations[,] or when there is reason to believe that any such report is false, incomplete[,] or erroneous, the Commissioner shall assess the proper tax on the best evidence obtainable.

25. *Id.* tit. 1, § 2.

26. *See* NAT'L INTERNAL REVENUE CODE, tit. 1, §§ 5 & 6.

27. NAT'L INTERNAL REVENUE CODE, tit. 1, § 6.

28. *See generally* Commissioner of Internal Revenue v. Hantex Trading Co., Inc., 454 SCRA 301 (2005).

> In case a person fails to file a required return or other document at the time prescribed by law, or wilfully or otherwise files a false or fraudulent return or other document, the Commissioner shall make or amend the return from his own knowledge and from such information as he can obtain through testimony or otherwise, which shall be *prima facie* correct and sufficient for all legal purposes.[29]

This provision is applicable in cases wherein the Commissioner undertakes to perform his administrative duty of ascertaining the correctness of any return or determining the correct liability of any person for any internal revenue tax.[30] The Commissioner may avail himself of the best evidence or other information or testimony by exercising his power as provided[31] under paragraphs (A) to (D) of Section 5 of the 1997 NIRC:

> (A) To examine any book, paper, record, or other data which may be relevant or material to such inquiry;
>
> (B) To obtain [any information] on a regular basis from any person other than the person whose internal revenue tax liability is subject to audit or investigation, or from any office or officer of the national and local governments, government agencies and instrumentalities, including the Bangko Sentral ng Pilipinas and government-owned or -controlled corporations [...];
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> (C) To summon the person liable for tax or required to file a return, or any officer or employee of such person, or any person having possession, custody, or care of the books of accounts and other accounting records containing entries relating to the business of the person liable for tax, or any other person, to appear before the Commissioner or his duly authorized representative at a time and place specified in the summons and to produce such books, papers, records, or other data, and to give testimony;
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> (D) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry[.][32]

Commissioner of Internal Revenue v. Hantex Trading Co., Inc.[33] described the wide-ranging scope of the "Best Evidence Obtainable Rule" as follows —

29. NAT'L INTERNAL REVENUE CODE, § 6 (B).

30. *Hantex Trading Co., Inc.*, 454 SCRA at 324.

31. *Id.* at 325.

32. NAT'L INTERNAL REVENUE CODE, § 5, ¶¶ (A)-(D).

33. *Hantex Trading Co., Inc.*, 454 SCRA 301.

> The 'best evidence' envisaged in Section 16 of the 1977 NIRC — now Section 6 of the 1997 NIRC — as amended, includes the corporate and accounting records of the taxpayer who is the subject of the assessment process, the accounting records of other taxpayers engaged in the same line of business, including their gross profit and net profit sales. Such evidence also includes data, record, paper, document[,] or any evidence gathered by internal revenue officers from other taxpayers who had personal transactions or from whom the subject taxpayer received any income; and record, data, document[,] and information secured from government offices or agencies, such as the [Securities and Exchange Commission], the Central Bank of the Philippines, the Bureau of Customs, and the Tariff and Customs Commission.
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> The law allows the BIR access to all relevant or material records and data in the person of the taxpayer. It places no limit or condition on the type or form of the medium by which the record subject to the order of the BIR is kept. The purpose of the law is to enable the BIR to get at the taxpayer's records in whatever form they may be kept. Such records include computer tapes of the said records prepared by the taxpayer in the course of business. In this era of developing information-storage technology, there is no valid reason to immunize companies with computer-based, record-keeping capabilities from BIR scrutiny. *The standard is not the form of the record but where it might shed light on the accuracy of the taxpayer's return.*
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> In *Campbell, Jr. v. Guetersloh*, the [Fifth Circuit of the] United States (U.S.) Court of Appeals [ ] declared that it is the duty of the Commissioner [ ] to investigate any circumstance which led him to believe that the taxpayer had taxable income larger than reported. Necessarily, this inquiry would have to be outside of the books because they supported the return as filed. He may take the sworn testimony of the taxpayer; he may take the testimony of third parties; he may examine and subpoena, if necessary, traders' and brokers' accounts and books and the taxpayer's book accounts. The Commissioner is not bound to follow any set of patterns. The existence of unreported income may be shown by any practicable proof that is available in the circumstances of the particular situation. Citing its ruling in *Kenney v. Commissioner*, the U.S. appellate court declared that where the records of the taxpayer are manifestly inaccurate and incomplete, the Commissioner may look to other sources of information to establish income made by the taxpayer during the years in question.
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> [The Court] agree[s] with the contention of the petitioner that the best evidence obtainable may consist of hearsay evidence, such as the testimony of third parties or accounts or other records of other taxpayers similarly circumstanced as the taxpayer subject of the investigation, hence, inadmissible in a regular proceeding in the regular courts. Moreover, the general rule is that administrative agencies such as the BIR are not bound by the technical rules of evidence. It can accept documents which cannot be admitted in a judicial proceeding where the Rules of Court are strictly

> observed. It can choose to give weight or disregard such evidence, depending on its trustworthiness.[34]

Thus, the 1997 NIRC equips the Commissioner with the necessary tools to ascertain the return correctness or determine the correct internal revenue tax obligations of a target taxpayer. The information and records accessible to the BIR which it relies upon are not limited to the corporate and accounting records of the taxpayer, but extend to information and other data from other taxpayers, third parties who may have had dealings with the target taxpayer, or even information held by government agencies. The BIR may even rely on factual evidence that would otherwise be inadmissible in a court of law.

B. Presumption of Correctness of Assessments

Complementing the BIR's broad investigatory and assessment powers is the principle that a deficiency assessment issued by the BIR generally carries a presumption of correctness. The Supreme Court in the case of *Sy Po v. Court of Tax Appeals*[35] elaborated on this principle —

> Tax assessments by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a [BIR] examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments.[36]

The U.S. case of *Portillo v. Commissioner of Internal Revenue*[37] described the presumption as a procedural device assigning the burden of proof to the taxpayer —

> This presumption is a procedural device that places the burden of producing evidence to rebut the presumption on the taxpayer. In essence, the taxpayer's burden of proof and the presumption of correctness are for the most part merely opposite sides of a single coin; they combine to

34. *Hantex Trading Co., Inc.*, 454 SCRA at 325-27 (citing United States v. Davey, 543 F.2d 996 (2d Cir. 1976); Campbell v. Guetersloh, 287 F.2d 878 (5th Cir. 1961) (U.S.); & Kenney v. Commissioner of Internal Revenue, 111 F.2d 374 (5th Cir. 1940) (U.S.)).

35. Sy Po v. Court of Tax Appeals, 164 SCRA 524 (1988).

36. *Id.* at 530.

37. Portillo v. Commissioner of Internal Revenue, 932 F.2d 1128 (5th Cir. 1991) (U.S.).

> require the taxpayer to prove by preponderance of the evidence that the Commissioner's determination was erroneous.[38]

In the case of *Collector of Internal Revenue v. Reyes*,[39] the Supreme Court explained what the presumption entailed on the taxpayer —

> Where the taxpayer is appealing to the tax court on the ground that the Collector's assessment is erroneous, it is incumbent upon him to prove [ ] what is the correct and just liability by a full and fair disclosure of all pertinent data in his possession. Otherwise, if the taxpayer confines himself to proving that the tax assessment is wrong, the tax court proceedings would settle nothing, and the way would be left open for subsequent assessments and appeals in interminable succession.[40]

Portillo further justified the presumption on the need to promptly recover a just debt owed to the sovereign and to encourage taxpayers to maintain adequate records.[41] The U.S. Federal Court of Appeals explained —

> The presumption of correctness generally prohibits a court from looking behind the Commissioner's determination even though it may be based on hearsay or other evidence inadmissible at trial. Justification for the presumption of correctness lies in the government's strong need to accomplish swift collection of revenues and in the need to encourage taxpayer recordkeeping.[42]

A similar premise for this rule was also described by the Supreme Court in *Hantex Trading Co., Inc.* —

> Upon the introduction of the assessment in evidence, a *prima facie* case of liability on the part of the taxpayer is made. If a taxpayer files a petition for review in the CTA and assails the assessment, the *prima facie* presumption is that the assessment made by the BIR is correct, and that in preparing the same, the BIR personnel regularly performed their duties. This rule for tax initiated suits is premised on several factors other than the normal evidentiary rule imposing proof obligation on the petitioner-taxpayer: the presumption of administrative regularity; the likelihood that the taxpayer

38. *Id.* at 1133.

39. Collector of Internal Revenue v. Reyes, G.R. Nos. L-11534 & L-11558, Nov. 25, 1958 (unreported).

40. *Sy Po*, 164 SCRA at 530 (citing *Reyes*, G.R. Nos. L-11534 & L-11558 (unreported)).

41. *See Portillo*, 932 F.2d 1128.

42. *Portillo*, 932 F.2d at 1133.

> will have access to the relevant information; and the desirability of bolstering the record-keeping requirements of the NIRC.[43]

In the case of *Churchill and Tait v. Rafferty*,[44] the Supreme Court explained that "because it is upon taxation that the Government chiefly relies to obtain the means to carry on its operations, [ ] it is of the utmost importance that the modes adopted to enforce the collection of the taxes levied should be summary and interfered with as little as possible."[45]

Thus, an assessment bearing the presumption of correctness serves administrative convenience by simplifying the assessment and collection enforcement processes bearing in mind the immense administrative burden of an extensive or full-blown tax audit. From a tax administration standpoint, presumptive assessments enhance the BIR's collection efforts, especially in cases where the taxpayer is uncooperative, where his records are incomplete, or where the taxpayer simply conceals financial information.

Considering the administrative convenience deriving from the presumption of correctness sanctioned by law, it is not surprising that the BIR places considerable reliance on this presumption because the burden of proving the contrary falls on the taxpayer.

C. Overzealous Tax Administration and "Naked Assessments"

The wide latitude given to the BIR in conducting tax investigations[46] and the BIR's over-reliance on the principle of presumed correctness of assessments have led to the BIR's tendency to issue overly aggressive assessments. These assessments are often based on either questionable findings of fact or interpretation of the law or regulation. Likewise, these would usually involve inordinately huge amounts. This tendency is also borne out of necessity to meet revenue targets.[47] As the lead revenue-generating agency of the government, the BIR is under intense pressure to meet collection goals set by the Department of Finance.

More often than not, the BIR merely informs the taxpayer of discrepancies noted in his returns and other accounting and financial documents, demands payment of tax deficiencies, and then merely leaves it

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43. *Hantex Trading Co., Inc.*, 454 SCRA at 329-30.

44. Churchill and Tait v. Rafferty, 32 Phil. 580 (1915).

45. *Id.* at 585.

46. *See* NAT'L INTERNAL REVENUE CODE, tit. 1, §§ 2 & 4.

47. *See, e.g.*, Prinz Magtulis, *BIR full-year target in peril*, PHIL. STAR, Apr. 14, 2016, *available at* http://www.philstar.com/business/2016/04/14/1572493/bir-full-year-target-peril (last accessed Oct. 31, 2016).

up to the taxpayer to reconcile the discrepancies and establish that the audit adjustments are incorrect.

Nowhere is the BIR's reliance on the presumption of correctness of assessments more apparent than in the issuance of so-called "Letter Notices," which often lead to tax assessments. The Letter Notices are generated through the Tax Reconciliation System (TRS), Reconciliation of Listing for Enforcement System (RELIEF), and the Third Party Matching-Bureau of Customs Data Program (TPM-BOC).[48] TRS, RELIEF, and TPM-BOC cross-refer third party information to income, sales, and purchases, either domestic or imported, reported by taxpayers in tax filings to determine discrepancies.[49] Taxpayers with discrepancies arising from such cross-reference are notified of such findings through the issuance of Letter Notices.[50]

In many cases, the BIR's over-reliance on third party information has led to abuses and inefficiencies in the conduct of tax audits and investigations which, in turn, have resulted in so-called "naked assessments."

In the case of *Collector of Internal Revenue v. Benipayo*,[51] the Supreme Court, quoting the CTA whose decision it affirmed, held that the presumption of correctness of an assessment presupposes that the assessment is based on actual facts —

> [A]ssessments should not be based on mere presumptions no matter how reasonable or logical said presumptions may be. [...] In order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption[.]"[52]

The Supreme Court reiterated this rule in *Hantex Trading Co., Inc.* —

> [T]he *prima facie* correctness of a tax assessment does not apply upon proof that an assessment is utterly without foundation, meaning it is arbitrary and capricious. Where the BIR has come out with a 'naked assessment,' [i.e.], without any foundation character, the determination of the tax due is without rational basis. In such a situation, the U.S. Court of Appeals ruled

48. The guidelines and procedures in handling Letter Notices generated through TRS, RELIEF, and TPM-BOC are set out in Revenue Memorandum Order No. 7-2010. *See* Bureau of Internal Revenue, Revenue Memorandum Order No. 7-2010 [BIR RMO 7-2010] (Jan. 21, 2010).

49. *Id.*

50. *Id.*

51. Collector of Internal Revenue v. Benipayo, 4 SCRA 182 (1962).

52. *Id.* at 185.

> that the determination of the Commissioner contained in a deficiency notice disappears. *Hence, the determination by the CTA must rest on all the evidence introduced and its ultimate determination must find support in credible evidence.*[53]

The need for tax collection does not serve to excuse the government from providing some factual foundation for its assessments. The U.S. Federal Court of Appeals has said that "[t]he tax collector's presumption of correctness has a herculean muscularity of Goliath-like reach, but [courts will] strike an Achilles' heel when [they] find no muscles, no tendons, [or] no ligaments of fact."[54]

In some decided cases, the CTA found some assessments of the BIR lacking "ligaments of fact" and held that the presumption of regularity and correctness in favor of tax assessments does not apply upon proof that the assessment is without foundation. In the CTA case of *Fort Bonifacio Development Corporation v. Commissioner of Internal Revenue*,[55] which involved a deficiency tax assessment based on the computerized matching conducted by the BIR of the taxpayer's sales and its customers' purchases,[56] the CTA invalidated the assessment on the ground that the same was based on mere presumptions and not on actual facts.[57] The CTA stated that —

> [P]ursuant to such authority, respondent [BIR] assessed petitioner [taxpayer] through a 'no-contact-audit approach' which is implemented by Revenue Memorandum Order (RMO) 46-2004. Under such RMO, respondent must [obtain sworn statements from third party information sources] to ascertain the veracity of the information [ ] derived from the 'no-contact-audit approach.'
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> ...
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> True, that assessments are *prima facie* presumed correct and made in good faith; that the taxpayer has the duty of proving otherwise; and, in the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed, in the present case[,] however, the

53. *Hantex Trading Co., Inc.*, 454 SCRA at 330.

54. *Portillo*, 932 F.2d at 1133 (citing Carson v. United States, 560 F.2d 693, 696 (5th Cir. 1977)).

55. Fort Bonifacio Development Corporation v. Commissioner of Internal Revenue, CTA Case No. 7531, Feb. 4, 2009, *available at* cta.judiciary.gov.ph/home/download/38440cb3539f156b9f3758c9ed7e65af (last accessed Oct. 31, 2016).

56. *Id.* at 165.

57. *Id.* at 178.

> assessment of respondent has failed to comply with the guidelines implementing the procedure it ad[o]pted.
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> Since respondent was not able to present to [u]s such certifications and statements necessary to support the audit, [w]e cannot verify the veracity of the assessment. With the failure to present other supporting documents, [w]e believe that, the assessment, though possibly meritorious, cannot hold water due to unconfirmed data gathered and is concluded to be mere presumptions.
>
> Therefore, [w]e agree with petitioner when it cited [ ] *Benipayo* which ruled that assessments should be based on facts and not mere presumptions. As such, the income tax deficiency assessment cannot be enforced against petitioner; otherwise, the Court stands to tax petitioner arbitrarily.[58]

In *Philippine Daily Inquirer, Inc. v. Commissioner of Internal Revenue*,[59] the taxpayer was issued a Letter Notice based on the computerized matching of the taxpayer's declared purchases in its value-added tax (VAT) returns with the information provided by third party sources.[60] As the information did not match, the taxpayer was assessed deficiency income tax and VAT on the finding that, since there is under-declared input tax, there is correspondingly an under-declaration of purchases, and consequently, the same should translate to undeclared income.[61] In invalidating the assessment, the CTA ruled that —

> [T]he whole income tax assessment and part of the VAT assessment rest on the finding that there is under[-]declared input tax in the amount of ₱715,371.17. Simply put, respondent's theory is that since there is an under[-]declaration of input tax and correspondingly, of purchases, the same should translate to taxable income for income tax purposes, and taxable gross receipts, for VAT purposes.
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> We disagree with respondent [BIR].
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> The three [ ] elements on the imposition of income tax are: (1) there must be gain or profit; (2) that the gain or profit is realized or received, actually or constructively; and (3) it is not exempted by law or treaty from income tax. Income tax is assessed on income received from any property, activity[,] or service. Such being the case, in the imposition or assessment of income tax, it must be clear that there was an income, and such income

58. *Id.* at 176-78.

59. Philippine Daily Inquirer, Inc. v. Commissioner of Internal Revenue, CTA Case No. 7853, Feb. 16, 2012, *available at* cta.judiciary.gov.ph/home/download/124a84e52e8573252f28a600a3c5c08f (last accessed Oct. 31, 2016).

60. *Id.* at 2.

61. *Id.* at 17-18.

> was received by the taxpayer, not when there is an under[-]declaration of purchases.
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> Furthermore, it must be emphasized that for income tax purposes, a taxpayer is free to deduct from its gross income a lesser amount, or not [ ] claim any deduction at all. What is prohibited by the income tax law is to claim a deduction beyond the amount authorized therein. Hence, even when there is under[-]declaration of input tax, which means that there is also a corresponding under[-]declaration of purchases or expenses, the same is not prohibited by law. Consequently, respondent's imposition or assessment of the subject income tax does not hold water, for it simply relies on the fact that there is under[-]declared input tax.[62]

The CTA *en banc* reached a similar conclusion in the case of *Commissioner of Internal Revenue v. Agrinurture, Inc.*[63] In this case, the BIR issued an assessment to the taxpayer for deficiency income tax and VAT.[64] The assessment was based on the taxpayer's alleged under-declaration of purchases based on the reconciliation of data from the Bureau of Customs as against the taxpayer's purchases per returns filed.[65] The BIR asserted that since the purchases of merchandise neither appeared in the taxpayer's returns nor reflected in inventory or capital expenditures, the undeclared merchandise was eventually sold resulting in income which was not reported.[66]

The CTA *en banc* affirmed the holding of the court sitting as a division that the presumption of correctness does not carryover to instances where the government makes a "naked assessment" lacking a foundation,[67] ruling that —

> [E]ven granting that there was an under-declaration of purchase on the part of respondent[-taxpayer], the same is of no consequence. We fully agree with the Court in Division that a finding of under-declaration of purchase does not by itself result in the imposition of income tax and VAT.
>
> The three [ ] elements for the imposition of income tax are: (1) there must be gain or profit, (2) that the gain or profit is realized or received, actually or constructively, and (3) it is not exempted by law or treaty from income

62. *Id.* at 21-22.

63. Commissioner of Internal Revenue v. Agrinurture, Inc., CTA Case No. 8345, Jan. 13, 2015 (unreported).

64. *Id.* at 2.

65. *Id.* at 3.

66. *Id.* at 6.

67. *Id.* at 11-12.

> tax. Income tax is assessed on income received from any property, activity[,] or service.
>
> Such being the case, in the imposition or assessment of income tax, it is not when there is an undeclared purchase, but only when there was an income, and such income was received or realized by the taxpayer.
>
> In this case, said elements are not present. The BIR merely imposed income tax on respondent simply because there was '[*u*]*nder-declaration on purchases*,' nothing more.
>
> ...
>
> In the same vein, no deficiency VAT assessment should arise from the said '*under-declared purchase*.'[68]

The cases cited above are just some of the many cases where the BIR exercised overzealous officialdom and exceeded its assessment and collection powers.

As illustrated in the abovementioned cases, the BIR's reliance on third party information is an effective audit tool in order to generate additional collections from assessments. However, third party information ought to be just a starting point. The BIR should take steps to validate its initial discrepancy findings so that the eventual assessment has factual basis. In this manner, both revenue authorities and taxpayers would be spared from the stress and wasted efforts in pursuing and disputing "naked assessments." As it is, the initial discrepancy findings become the end rather than a mere starting point for further scrutiny.

D. Lack of an Independent Administrative Review Process

When an assessment is based on questionable findings or, worse, where the government makes a "naked assessment" lacking a foundation, it is unlikely to be declared as such and invalidated outright at the administrative level. It usually involves judicial intervention before an assessment is invalidated on the ground of being a "naked assessment" or being a misappreciation of applicable facts and law. The reason for this is the absence of an independent administrative review process. In an ideal tax system, taxpayers have the right to prompt and independent administrative review of assessments made by the tax administration.

There are two levels of the tax appeal system in the Philippines: first, administrative review, where taxpayer objections to audit findings are reviewed by the BIR itself; and second, judicial review, where the disputed

68. *Id.* at 15-16.

assessment is appealed to the CTA if the taxpayer is not satisfied with the outcome of the administrative review process.[69]

Section 228 of the 1997 NIRC provides that "when the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings[.]"[70] The notification of findings is in the form of a Preliminary Assessment Notice (PAN).[71] The taxpayer is given the opportunity to dispute the findings by responding to the PAN within 15 days.[72]

Curiously, Revenue Regulations No. 12-99,[73] as amended by Revenue Regulations 18-2013, provides —

> If the taxpayer, within [15] days from receipt of the PAN, responds that he [or] it disagrees with the findings of deficiency tax or taxes, a [Formal Letter of Demand (FLD) and Final Assessment Notice (FAN)] shall be issued within [15] days from filing [or] submission of the taxpayer's response, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.[74]

Thus, it seems that the BIR's findings will be finalized anyway through the issuance of an FLD or FAN even if the taxpayer disputes the findings by responding to the PAN.

Upon the issuance of the FLD or FAN, the taxpayer may administratively protest the same by filing a written request for reconsideration or reinvestigation within 30 days from receipt of the FLD or FAN.[75] Within 60 days from the filing of the protest, the taxpayer shall submit all relevant supporting documents.[76] The BIR then is given a statutory period of 180 days to act on the protest.[77]

If the protest is denied, in whole or in part, by the Commissioner's duly authorized representative, the taxpayer may either proceed to the second

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69. *See* NAT'L INTERNAL REVENUE CODE, tit 1, § 4.

70. NAT'L INTERNAL REVENUE CODE, § 228.

71. Bureau of Internal Revenue, Revenue Regulations No. 18-2013 [BIR R.R. 18-2013] (Nov. 28, 2013).

72. *Id.*

73. Bureau of Internal Revenue, Revenue Regulation No. 12-99 [BIR R.R. 12-99] (Sep. 14, 1999) (as amended).

74. *Id.* § 3.1.1.

75. *Id.* § 3.1.4.

76. *Id.*

77. *Id.*

level of the tax appeals system by appealing to the CTA within 30 days from date of receipt of the said decision; or remain at the first level of the appeals process by elevating his protest through a request for reconsideration to the Commissioner within 30 days from date of receipt of the said decision.[78] The denial of the protest or the decision on the disputed assessment is referred to in the regulations as the Final Decision on Disputed Assessment.[79]

If the protest is not acted upon by the Commissioner or his duly authorized representative within 180 days counted from the date of filing of the protest in case of a request for reconsideration; or from the date of submission by the taxpayer of the required documents within 60 days from the date of filing of the protest in case of a request for reinvestigation, the taxpayer may either: (1) appeal to the CTA within 30 days after the expiration of the 180-day period; or, (2) await the final decision of the Commissioner or his duly authorized representative on the disputed assessment.[80]

If the protest or administrative appeal, as the case may be, is denied, in whole or in part, by the Commissioner, the taxpayer may appeal to the CTA within 30 days from date of receipt of the said decision.[81]

At the first stage of the review process, where the taxpayer's case is reviewed internally by the tax authority, the taxpayer must have confidence that the appeal is being reviewed impartially and objectively. On the surface, it may appear that the administrative review process is relatively straightforward. However, taxpayers generally view the administrative review process as not very credible. Among the issues raised by taxpayers on the first stage of the review process is that the BIR is incapable of a detached and objective review of the protest.

Persons assigned to review the protest are also BIR employees who may entertain the notion that ruling in favor of the taxpayer may not be good for their career prospects. Furthermore, revenue officers assigned to review protests are likely to have been at one time examiners themselves. Thus, the reviewers will most likely have retained the audit mind-set — where the taxpayer is viewed with suspicion — that they developed during their career and which may cloud their objectivity in the review process.

78. *Id.*

79. *See* BIR R.R. 12-99, § 3.1.5.

80. *Id.*

81. *Id.*

Additionally, having been examiners themselves, the reviewers are often familiar with the examiner who prepared the report of investigation and may be less willing to challenge a colleague. Finally, the final decision on a disputed assessment is approved and signed by the head of the investigating office. The head is usually the Regional Director in BIR Revenue Regions or the Division Chief or Service Chief in the BIR National Office, who themselves are assigned revenue collection quotas.

Therefore, most, if not all, of the findings set out in a formal assessment will likely be affirmed in the administrative review process. Consequently, the taxpayer is left with no choice but to appeal the disputed assessment to the CTA. Taxpayers, thus, turn to the judicial system to seek redress and protection for their rights to ensure that actions taken by the State are lawful.

IV. CTA DOCKET FEE STRUCTURE AND ITS ADVERSE IMPACT ON THE RIGHT TO APPEAL

Section 4 (b), Rule 141 of the Rules of Court[82] prescribes the filing fees for petitions filed with the CTA:

> Section 4. *Clerks of the Supreme Court, Court of Appeals, Sandiganbayan and [CTA].* –
>
> ...
>
> (b) For filing an action or proceeding with the [CTA]:
>
> 1. For filing an action or proceeding, including petition for intervention, and for all services in the same, if the sum claimed or the amount of disputed tax or customs assessment, inclusive of interest, penalties and surcharges, damages of whatever kind[,] and attorney's fees or value of the article of property in seizure cases, is:
>
> (a) Less than ₱50,000.00.....₱750.00
>
> (b) ₱50,000.00 or more but less than ₱200,000.00.....₱1,000.00
>
> (c) ₱200,000 or more but less than ₱400,000.00.....₱1,500.00
>
> (d) ₱400,000.00 or more but less than ₱600,000.00.....₱2,500.00
>
> (e) ₱600,000.00 or more but less than ₱800,000.00.....₱4,000.00
>
> (f) ₱800,000.00 or more but less than ₱1,000,000.00.....₱5,000.00

82. Supreme Court, Re: Guidelines in the Allocation of the Legal Fees Collected Under Rule 141 of the Rules of Court, as Amended, Between the Special Allowance for the Judiciary Fund and the Judiciary Development Fund, SC Administrative Circular No. 35-2004 [SC Admin. Circ. No. 35-2004] (Aug. 20, 2004).

(g) ₱1,000,000.00 or more but less than ₱7,500,000.00 – on the first ₱1,000,000.00, the fee shall be ₱5,000.00 and for each ₱1,000.00 in excess of ₱1,000,000.00 but less than ₱7,500,000.00.....₱7.00

(h) ₱7,500,000.00 or more – on the first ₱7,500,000.00, the fee shall be ₱50,500.00 and for each ₱1,000.00 in excess of ₱7,500,000.00.....₱10.00

Provided that for assessments beyond ₱50 million, the docket fees for the excess shall be equivalent to one-half (1/2) of one (1%) per centum.[83]

Thus, for assessments where the amount is more than ₱50 million, the fee is pegged as a percentage of the amount with no cap or maximum legal fee.

Consistent with Section 1, Rule 141 of the Rules of Court which provides that the prescribed fees shall be paid in full "upon filing of the pleading or other application which initiates an action or proceeding,"[84] a case is deemed filed only upon payment of the docket fee regardless of the actual date of its filing in court. In *Home Guaranty Corp. v. R-II Builders Inc.*,[85] the Supreme Court explained —

> Jurisdiction is defined as the authority to hear and determine a cause or the right to act in a case. In addition to being conferred by the Constitution and the law, the rule is settled that a court's jurisdiction over the subject matter is determined by the relevant allegations in the complaint, the law in effect when the action is filed, and the character of the relief sought irrespective of whether the plaintiff is entitled to all or some of the claims asserted. Consistent with Section 1, Rule 141 of the Revised Rules of Court which provides that the prescribed fees shall be paid in full 'upon the filing of the pleading or other application which initiates an action or proceeding,' the well-entrenched rule is to the effect that a court acquires jurisdiction over a case only upon the payment of the prescribed filing and docket fees.[86]

What makes the CTA docket fee structure unfair is that assessments, as stated above, are often based on questionable findings of fact or interpretation of the law or regulation. Moreover, these assessments would usually involve inordinately huge amounts inclusive of interest, surcharges, and penalties, or, worse, "naked assessments."

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83. SC Admin. Circ. No. 35-2004, § 1.

84. LEGAL ETHICS, rule 141, § 1.

85. Home Guaranty Corporation v. R-II Builders, Inc., 645 SCRA 219 (2011).

86. *Id.* at 230-31.

At the current state of things, taxpayers put little faith in the credibility of the administrative appeal process. Taxpayers are constrained to turn to the judicial system for redress. However, basing the docket fees on the amount of the assessment not only makes the fees arbitrary, the absence of a cap or maximum amount often leads to exorbitant filing fees. The right to appeal, therefore, may effectively be stymied where court docket fees are inordinately huge.

Some cases filed with the CTA illustrate how the docket fee structure could lead to excessive filing fees. The case of *Spouses Joseph Ejercito Estrada and Luisa P. Ejercito v. Bureau of Internal Revenue*[87] involved an assessment by the BIR in the amount of ₱2.905 billion.[88] The filing fees alone to appeal the disputed assessment amounted to approximately ₱14.5 million. The CTA eventually invalidated the assessment issued against the Spouses Estrada based on the court's finding that the determination made by the BIR amounted to a "naked assessment."[89]

In another case involving a famous world-class professional boxer,[90] the BIR assessed the taxpayer for deficiency income tax and VAT in the aggregate amount of ₱2.2 billion.[91] The filing fee for appealing the disputed assessment amounted to approximately ₱11.3 million. In yet another case, *Pilipinas Shell Petroleum Corporation v. Commissioner of Internal Revenue*,[92] the taxpayer appealed a Final Demand for Payment of Excise Tax, VAT on the said Excise Tax, and Penalty to the CTA.[93] The final demand sought the

87. Spouses Joseph Ejercito Estrada and Luisa P. Ejercito v. Bureau of Internal Revenue, CTA Case No. 7847, Nov. 23, 2015, *available at* http://cta.judiciary.gov.ph/cal_pdf/1291367103.pdf (last accessed Oct. 31, 2016).

88. *Id.* at 4.

89. *Id.* at 32-35.

90. Perfecto T. Raymundo, *SC remands tax raps vs Pacquiao to Court of Tax Appeal*, MANILA BULL., Apr. 21, 2016, *available at* http://www.mb.com.ph/sc-remands-tax-raps-vs-pacquiao-to-court-of-tax-appeal (last accessed Oct. 31, 2016). The case is still pending in the CTA. *Id.*

91. Tetch Torres-Tupas, *Court bides action on Pacquiao's P2.2-billion tax case*, PHIL. DAILY INQ., May 24, 2016, *available at* http://newsinfo.inquirer.net/787263/cta-suspends-resolution-of-motions-on-pacquiao-petition (last accessed Oct. 31, 2016).

92. Pilipinas Shell Petroleum Corporation v. Commissioner of Internal Revenue, CTA Case No. 8004, Nov. 7, 2012 (unreported). In this case, while the demand for payment was made by the Bureau of Customs, it did so as an agent of the BIR since the taxes involved, namely, excise tax and VAT, are internal revenue taxes. *Id.* at 2.

93. *Id.* at 5-6.

collection of deficiency taxes in the aggregate amount of ₱7.348 billion.[94] The filing fee for the appeal amounted to approximately ₱36.7 million. While assessments issued by the BIR do not usually involve billions in deficiency taxes, many assessments of the BIR involve tens of millions and hundreds of millions of pesos.[95]

Given the tendency of the BIR to issue aggressive assessments involving huge amounts, the amount of the assessment is not a fair basis for computing docket fees. The prospect of incurring exorbitant filing fees based on aggressive assessments may also encourage corruption, as it may be used as a means to harass taxpayers and force them to make improper payments if only to reduce the deficiency to sidestep a protracted and costly litigation.

V. RUBBING SALT INTO THE WOUND: ABSENCE OF LAW AWARDING COSTS OF SUIT AND EXPENSES OF LITIGATION IN FAVOR OF TAXPAYERS

To make matters worse for the taxpayer, costs of suit and expenses of litigation are generally not awarded to the taxpayer due to the absence of a law sanctioning the award. Being the agency primarily mandated to assess and collect all national internal revenue taxes, fees, and charges, the BIR cannot be held liable for costs of suit and litigation expenses. The pertinent provision of the Rules of Court reads —

> Section 1. *Costs ordinarily follow results of suit.* – Unless otherwise provided in these Rules, costs shall be allowed to the prevailing party as a matter of course, but the court shall have power, for special reasons, to adjudge that either party shall pay the costs of an action, or that the same be divided, as may be equitable. No costs shall be allowed against the Republic of the Philippines unless otherwise provided by law.[96]

Thus, in the absence of a law, the State may not be adjudged liable for costs of suit and expenses of litigation. The practical effect of this rule is that docket fees paid by the taxpayer to appeal disputed assessments are "sunk costs" and may generally not be recovered from the government even if the taxpayer prevails in litigation.

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94. *Id.* at 5.

95. As a tax practitioner, the Author has handled many assessment cases involving tens of millions and hundreds of millions of pesos. As of this writing, the Author is currently handling two administrative appeals pending with the Office of the Commissioner where the assessment amounts involved are ₱7.966 billion and ₱8.821 billion, respectively. If the Commissioner denies the administrative appeals, docket fees to appeal to the CTA would amount to ₱39.8 million and ₱44.1 million, respectively.

96. LEGAL ETHICS, rule 142, §1.

In the case of *Philex Mining Corporation v. Commissioner of Internal Revenue*,[97] the Supreme Court refused to award damages to the taxpayer in the form of interest on a claim for refund that the BIR denied, stating —

> As to the 20% interest per annum prayed by the petitioner, we reiterate our pronouncement in [*Commissioner of Internal Revenue v. Rio Tuba Nickel Mining Corporation*], where no interest was awarded although the claim for refund was granted. As aptly stated by the CTA [—]
>
> '[T]he rule is that no interest on refund of tax can be awarded unless authorized by law or the collection of the tax was attended by arbitrariness. An action is not arbitrary when exercised honestly and upon due consideration where there is room for two opinions, however much it may be believed that an erroneous conclusion was reached. Arbitrariness presupposes inexcusable or obstinate disregard of legal provisions. None of the exceptions are present in the case at bar. Respondent's decision denying petitioner's claim for refund was based on an honest interpretation of law. We, therefore see no reason why petitioner should be entitled to the payment of interest.'[98]

However, there is a provision in the 1997 NIRC which permits an action to be brought against revenue officers to recover damages by reason of any act done in the performance of official duty. Section 227 thereof provides —

> Section 227. *Satisfaction of Judgment Recovered Against any Internal Revenue Officer.* – When an action is brought against any Internal Revenue officer to recover damages by reason of any act done in the performance of official duty, and the Commissioner is notified of such action in time to make defense against the same, through the Solicitor General, any judgment, damages[,] or costs recovered in such action shall be satisfied by the Commissioner, upon approval of the Secretary of Finance, or if the same be paid by the person sued shall be repaid or reimbursed to him.
>
> No such judgment, damages[,] or costs shall be paid or reimbursed in behalf of a person who has acted negligently or in bad faith, or with willful oppression.[99]

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97. While this case involved a claim for refund rather than an assessment, the rule on the award of damages in favor of the taxpayer may similarly be applied to assessment cases. Philex Mining Corporation v. Commissioner of Internal Revenue, 306 SCRA 126 (1998).

98. *Id.* at 133-34.

99. NAT'L INTERNAL REVENUE CODE, § 227.

Nevertheless, as to whether Section 227 may be invoked to recover costs of suit and expenses of litigation remains to be seen, as there are no known precedents applying this provision.

VI. CONCLUSION

Unless the CTA docket fee structure is revisited and the manner of computing docket fees based on the assessment amount revised, the current schedule of filing fees may effectively curtail the right of taxpayers to appeal since seeking redress from the CTA may be too prohibitive and burdensome. A cap or maximum amount similar to the pre-2005 docket fee structure may additionally be considered.

Likewise, Congress perhaps may also consider legislation to enhance and promote taxpayer rights by institutionalizing a credible and independent administrative review process through the creation of an office or agency of government that is independent from and not beholden to the BIR. In this manner, the administrative review process may give some assurance to the taxpayer that his appeal will be reviewed impartially and objectively.