Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

PHILAM PLANS INC., Petitioner,	**EB CASE NO. 222** (CTA Case No. 6992)
-versus-	Present: ACOSTA, PJ, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, and PALANCA-ENRIQUEZ, JJ.
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: JUL 0 3 2007 [signature]

x- -x

DECISION

CASANOVA, J.:

This is a Petition for Review filed under Section 3(b), Rule 8 of the Revised Rules of the Court of Tax Appeals by herein petitioner, *Philam Plans Inc.*, praying for the Court *En Banc* to annul, reverse and set aside the Resolutions of the Court's *First Division* promulgated on July 18, 2006 and October 23, 2006, respectively.

The main issue involved here is whether or not respondent, Commissioner of Internal Revenue, lost his jurisdiction to decide on petitioner's protest on the Final Assessment Notice ("FAN") and to issue Final Decision on Disputed Assessment ("FDDA") the moment petitioner filed a Petition for Review before the Court of Tax Appeals under the last paragraph of Section 228 of the 1997 Tax Code[1].

THE FACTS

The facts of the case, as culled from the records, are as follows:

On August 8, 2003, petitioner received from respondent Bureau of Internal Revenue ("BIR") a FAN for alleged deficiency taxes for the taxable year ending 1997. On September 3, 2003, petitioner promptly filed a protest thereto pursuant to Section 228 of the 1997 Tax Code and submitted on November 3, 2003, the supporting documents to its protest. As of May 1, 2004 (the last day of the 180-day period from November 3, 2003 within which respondent is required to decide upon the protest), there was still no action on the protest. Thus, on May 25, 2004 or within 30 days from the lapse of the 180-day period of the BIR to act on the protest[2] a Petition for Review was filed with this Court docketed as CTA Case No. 6992 which was raffled to the *First Division* for trial and disposition.[3]

Petitioner's Petition for Review[4] prayed that:

> "[A]fter due hearing, judgment be rendered: (a) declaring the [respondent's] FAN as null and void for having been issued beyond the prescriptive period and/or (b) directing the Commissioner to cancel or withdraw the FAN for being without legal and factual bases."

Subsequently or on June 15, 2004, petitioner received respondent's Final Decision on Disputed Assessment or FDDA[5] denying petitioner's protest with finality for lack of factual and legal bases. The pertinent portion of which reads:

> "xxx. This is our final decision. If you disagree, you may appeal this final decision with the Court of Tax Appeals within thirty

---

[1] *Republic Act No. 8424, National Internal Revenue Code of 1997, as amended.*
[2] *Year 2004 was a leap year.*
[3] *4th Paragraph of Resolution dated February 11, 2005, Division Rollo. p. 200.*
[4] *Division Rollo. pp 1-67.*
[5] *Division Rollo. pp 313-319.*

> (30) days from date of receipt thereof, otherwise our said deficiency income, value-added and withholding tax assessment shall become final, executory and demandable."

Thus, petitioner filed on July 15, 2004 a Petition for Review *Ex Abudante Ad Cautelam*[6] before the Court, docketed as CTA Case No. 7025 and raffled to the *Second Division* of the Court for trial and disposition. The Petition for Review *Ex Abudante Ad Cautelam* was dismissed in a Resolution[7] dated Febuary 11, 2005 because it covers that same matters as that of the Petition for Review (CTA Case No. 6992) already pending before the *First Division*. The Court also suggested that the proper action by the petitioner should have been to file a supplemental pleading alleging therein respondent's denial of its protest in accordance with Section 6, Rule 10 of the Rules of Court.

On August 4, 2004, respondent filed his Answer[8] to the abovementioned Petition for Review (CTA Case. No. 6992).

On November 22, 2005, petitioner, following the suggestion specified by the *First Division*, filed its "Supplement (To Petition for Review)"[9] incorporating therewith allegations concerning respondent's belated issuance of FDDA.

On March 10, 2006, respondent filed his Answer[10] to petitioner's "Supplement (To Petition for Review)".

On March 31, 2006, petitioner filed its Reply[11] [To Respondent's Answer to the Supplement to the Petition for Review].

On May 11, 2006, petitioner filed a **"Motion to Resolve Issue of Jurisdiction"**[12] alleging, *inter alia*, that the jurisdictional issue must be resolved

---

[6] *Should be "ex abudanti cautela" which means "out of abundant caution". (Black's Law Dictionary, 6th ed.)*
[7] *Division Rollo. pp 199-203.*
[8] *Division Rollo. pp 88-94.*
[9] *Division Rollo. pp 276-309.*
[10] *Division Rollo. pp 356-371.*
[11] *Division Rollo. pp 382-393.*
[12] *Division Rollo. pp 420-430.*

first before the trial of this case can proceed. It claimed that respondent had lost jurisdiction to decide on petitioner's protest after petitioner had perfected its appeal on the FAN, otherwise there would be a "simultaneous jurisdiction" between the BIR and the CTA. It also stated that "a distinction must be made under the new Rules of the CTA, *in that where the taxpayer opted to appeal the inaction of the BIR, the BIR loses jurisdiction upon perfection of the appeal of the taxpayer.*" It also prayed that respondent's FDDA dated June 14, 2004 be declared null and void for having been issued by the respondent without jurisdiction.

Respondent on his Comment[13], filed on June 9, 2006, countered that there is nothing in the law which states that the respondent loses jurisdiction to decide a protest once an appeal before the CTA is filed and that petitioner is *estopped* from questioning the jurisdiction of the respondent [Commissioner] after it has requested for reinvestigation and that it had been informed that a reinvestigation was conducted prior to petitioner's filing of CTA Case No. 6992.

On July 18, 2006, the *First Division* in a Resolution[14] resolving petitioner's **"Motion to Resolve Issue of Jurisdiction"**, ruled that the BIR can still issue an FDDA even if the taxpayer has already filed a Petition for Review before the CTA, to quote:

> "First and foremost, there is nothing in the law which specifically provides that once an appeal of the decision of the respondent is taken to this Court, the office of the respondent loses its jurisdiction to issue a final decision on the disputed assessment. In fact, even if a petition for review has already been filed with this Court, the respondent is still not precluded from issuing a final decision on the disputed assessment more so if [a] motion for a reinvestigation has been filed by the petitioner. However, this does not necessarily mean that the final decision on the disputed assessment issued by the respondent after an appeal for his inaction has already been filed will prevail over the findings of the

[13] *Division Rollo. pp 437-442.*
[14] *Division Rollo, pp. 445-447.*

Court. At the very most, the final decision may be offered or presented by respondent, subject still to this Court's final evaluation of the facts and laws applicable to the case.

Likewise, petitioner's argument on "simultaneous jurisdiction" cannot be accepted. There is no simultaneous jurisdiction to speak of in the first place. As discussed earlier, the respondent is not precluded from issuing a final decision on the disputed assessment most especially if a motion for reinvestigation has been filed by the petitioner. It must be emphasized that pursuant to Section 3 (a)(2) of Rule 4 of the Revised Rules of the Court of Tax Appeals, the inaction of the respondent on the protest of the petitioner shall be deemed a denial for purposes only of allowing the petitioner to elevate its appeal to this Court and does not necessarily constitute the final decision of the respondent. In other words, a final decision may still yet be issued by the respondent, subject to this Court's review.

WHEREFORE, in view of the foregoing, this instant motion is hereby **DENIED** for lack of merit.

SO ORDERED."

On August 23, 2006, petitioner filed its "Motion for Reconsideration"[15] of the abovementioned Resolution. It claimed that Rule 42 of the Rules of Court, which by express provisions of the new CTA law applies to petitions for review filed before the CTA, provides that the lower court (the BIR in the instant case) loses jurisdiction upon appeal. It further stated that the law clearly provides that the BIR is given 180 days to decide on a protest, otherwise, the same is deemed denied and that once an appeal is perfected, the lower court or the BIR loses jurisdiction over the case.

On October 23, 2006, the *First Division* in a Resolution[16], resolved to deny petitioner's Motion for Reconsideration because it found no cogent or valid reason to reverse or modify the assailed Resolution.

---

[15] *Division Rollo, pp.463-472.*
[16] *Division Rollo, pp 479-481.*

Hence, this Petition for Review before the Court *En Banc* filed on November 15, 2006.

THE ISSUE

Petitioner submits that the sole issue of the petition is as follows:

WHETHER THE RESPONDENT STILL HAS JURISDICTION TO ISSUE THE FINAL DECISION ON DISPUTED ASSESSMENT [FDDA] AFTER PETITIONER [PPI] ALREADY PERFECTED ITS APPEAL OF THE DENIAL OF ITS PROTEST BEFORE THE CTA.

THE COURT'S RULING

Considering that the Petition for Review filed by petitioner that questioned the assessment made by the respondent was filed on May 25, 2004 and the Revised Rules of the Court of Tax Appeals took effect only on December 15, 2005, applicable here is the correct interpretation of the last paragraph of Section 228 of the 1997 National Internal Revenue Code ("NIRC") or Republic Act No. 8424, as amended, which took effect on January 1, 1998, quoted hereunder for easy reference:

> "**SECTION 228. Protesting of Assessment. —**
>
> x x x
>
> If the protest is <u>denied in whole or in part</u>, **or** <u>is not acted upon</u> within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the <u>decision</u> **or** <u>inaction</u> *may appeal* to the Court of Tax Appeals within thirty (30) days from receipt of *the said decision*, **or** from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable." (Emphasis and underscoring *Ours*)

The last paragraph of Section 228 of the 1997 NIRC depicts <u>two options</u> that a taxpayer may do in order to protect its rights by virtue of the way the word "**or**" was used.

The word "**or**" is defined as a disjunctive particle that marks an alternative generally corresponding to "**either**," as "**either this or that**." [People v. Fernandes, 15 P.2d 172, 173 127 Cal.App.45. – Words and Phrases Volume 30 p. 63].

In the case of *Philippine Banking Corporation vs. Commissioner of Internal Revenue*[17], this Court has already ruled that under Section 228 of the 1997 NIRC, a taxpayer has two options: *first* , if the protest remained not acted upon by the Commissioner within one hundred eighty (180) days from submission of documents in support of the protest, he may appeal to this Court within thirty (30) days from the lapse thereof; **or** *second*, he may wait until the Commissioner decides on his protest before elevating his case before this Court.

It is likewise important to note that even before the implementation of the Revised Rules of the Court of Tax Appeals, that took effect on December 15, 2005, the tenet about the taxpayer's two options were already existing by virtue of the aforequoted last paragraph of Section 228 of the 1997 NIRC.

In the case at bar, petitioner, by filing its Petition for Review on May 25, 2004, evidently chose the *first* option.

The petitioner cannot argue that respondent cannot anymore issue his FDDA after petitioner has already filed its Petition for Review before this Court because it is clear under Section 228 of the 1997 NIRC that respondent still has the authority to do so. What if the belatedly issued FDDA was favorable to the petitioner? Would petitioner still file the present **"Motion to Resolve Issue of Jurisdiction"**?

In view of this, *We* are constrained to reiterate the Court's ruling in the case of *Lascona Land Co., Inc. vs. Commissioner of Internal Revenue*[18], upon which the ruling in the above-mentioned case of *Philippine Banking Corporation vs. Commissioner of Internal Revenue* was based, to quote:

---

[17] *CTA Case No. 6395, July 16, 2004.*
[18] *CTA Case No. 5777, July 4, 2000.*

> "Verily, in cases of inaction, Section 228 of the Tax Code merely gave the taxpayer an option: first, he may appeal to the Court of Tax Appeals within thirty (30) days from the lapse of the one hundred eighty (180) day period provided for under the said section, **or** second, he may wait until the Commissioner decides on his protest before he elevates his case. This Court believes that the taxpayer was given this option so that in case his protest is not acted upon within the 180-day period, he may be able to seek immediate relief and need not wait for a positive action on the part of the Commissioner, then the same could not result in the assessment becoming final, executory and demandable." (Emphasis and underscoring supplied)

Clearly, by virtue of the last paragraph of Section 228 of the 1997 NIRC, respondent still has the authority to issue the FDDA despite petitioner's filing of its Petition for Review before this Court. It should be emphasized that *this does not necessarily mean that the FDDA* issued by the respondent after an appeal for his inaction has already been filed *will prevail over the findings of this Court*, because if it is offered or presented by respondent, the FDDA is still subject to this Court's final evaluation of the facts and the laws applicable to the case.

The other points raised by petitioner have been previously considered and passed upon by the Court in the assailed Resolutions.

WHEREFORE, in the light of all the foregoing, the instant Petition for Review is hereby **DENIED DUE COURSE** and **DISMISSED** for lack of merit. The Resolutions dated July 18, 2006 and October 23, 2006 both promulgated by the *First Division* of this Court are hereby AFFIRMED.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
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.

ERNESTO D. ACOSTA
Presiding Justice