REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

MERCANTILE PROPERTIES AND HOLDINGS COMPANY INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB NO. 432
(C.T.A. CASE NO. 7410)

Present:

ACOSTA, Presiding Justice
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, JJ.

Promulgated:

MAY 2 9 2009 3:10 p.m.

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DECISION

PALANCA-ENRIQUEZ, J.:

THE CASE

This is a Petition for Review filed by Mercantile Properties and Holdings Company, Inc. (hereafter "petitioner") under *Section 11 of RA 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals)*, in relation to *Rule 43* of the *1997 Rules of Civil Procedure, as amended,* which seeks to set aside the Resolutions dated August 7, 2008 and October 9, 2008 rendered by the First Division of this Court in C.T.A.

Case No. 7410, the respective dispositive portions of which, read as follows:

> "**WHEREFORE**, premises considered, respondent's "Motion for Reconsideration" is hereby **GRANTED** and the assailed Resolution of May 26, 2008 is hereby **REVERSED** and **SET ASIDE**. Accordingly, petitioner's "Motion to Dismiss" filed on April 11, 2008 is denied and respondent's "Comment and Motion to Dismiss" filed on May 2, 2008 is **GRANTED**. This instant Petition for Review is effectively **DISMISSED** for lack of jurisdiction.
>
> **SO ORDERED**."

> "**WHEREFORE,** petitioner's Motion for Reconsideration is hereby **DENIED** for lack of merit.
>
> **SO ORDERED**."

THE FACTS

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

Petitioner is a corporation duly organized and existing under the laws of the Republic of the Philippines, with principal office address at 20th Floor, Banco de Oro Plaza, 8737 Paseo de Roxas, Makati City.

Respondent, on the other hand, is the duly appointed and incumbent Commissioner of Internal Revenue vested by law to decide disputed assessments and to enforce the provisions of the National

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Internal Revenue Code, and other tax laws, with office address at BIR National Office Building, Diliman, Quezon City, where he may be served with summons and other court processes.

On April 6, 2005, petitioner received Formal Assessment Notice (FAN), together with the Details of Discrepancies, representing deficiency value-added tax (VAT) in the amount of P97,896,534.98 for taxable year 2001.

On May 5, 2005, petitioner filed a formal protest to the FAN.

On January 30, 2006, in view of the inaction of the respondent, petitioner filed a Petition for Review with this Court, docketed as C.T.A. Case No. 7410.

On April 10, 2006, respondent filed his Answer alleging the following special and affirmative defenses:

> "4. The assessments in question were made and issued in accordance with law, rules and regulations.
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> 5. The Honorable Court of Tax Appeals has no jurisdiction to take cognizance of the instant case.
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> The petition for review was filed out of time. Under Section 228 of the 1997 Tax Code, as implemented by Revenue Regulations No. 12-99, a taxpayer has thirty (30) days from receipt of an assessment to file a protest. Thereafter, the BIR has one hundred eighty (180) days within which to rule on the protest. The taxpayer has 30 days to

appeal to the Court of Tax Appeals (CTA), reckoned from the receipt of the decision or the lapse of the 180 day period.

In the case at bar, petitioner filed the instant petition anchoring on the 180 days inaction of the respondent on the petitioner's protest. Petitioner, however, filed the same beyond the 30-day period from the lapse of the 180-day period.

The records show that on May 5, 2005, petitioner filed with the respondent a letter protesting the subject deficiency value-added tax. Respondent has 180-day period from May 5, 2005 or until November 1, 2005 within which to resolve the protest of the petitioner. Accordingly, petitioner has only thirty (30) days from November 1, 2005 or until December 1, 2005 within which to appeal before the Honorable Court. However, a cursory look of the petition for review would reveal that the same was filed only on January 30, 2006, hence, the said petition was filed sixty (60) days late of the period granted under Section 228 of the 1997 Tax Code.

Thus, the filing of the instant petition has already prescribed. Consequently, the subject deficiency VAT assessment has already become final, executory and demandable, the Honorable Court of Tax Appeals, therefore, has no jurisdiction to take cognizance of the instant case.

6. Verification of petitioner's Financial Statements disclosed that Real estate held for sale called "Imperial Sky Garden" situated at Binondo, Manila which is valued at P339,436,732.00 per books was disposed at an amount of P360,000,000.00 thru an extra-judicial foreclosure sale involving an affiliate who made use of the property to secure its obligation. The aforesaid foreclosure sale transaction is in effect a transfer to a creditor in payment of debt which is deemed sale transaction subject to 10% VAT pursuant to Section 106 (B)(2)(b) of the 1997 Tax Code, interpreted in relation to Articles 2087 and 2126 of the Civil Code of the Philippines. While it appears that the foreclosure sale is

involuntary in nature and not in the ordinary course of business, the reality is that petitioner has already consented to the sale from the moment the Contract of Real Estate Mortgage was executed considering that foreclosure is a consequence in case of default.

7. As represented by the petitioner, furniture and equipment with a book value of P14,500.00 was disposed with a gain of P43,500.00. Such transaction is subject to 10% VAT pursuant to Section 106 of the 1997 Tax Code.

8. Petitioner failed to substantiate with sufficient evidence claimed input taxes in the total amount of P12,763,947.25 in violation of Sections 110 and 113 of the 1997 Tax Code, hence, it was disallowed.

9. Exemptions from taxation are construed in *strictissimi juris* against the taxpayer and liberally in favor of the taxing authority primarily because taxes are the lifeblood of the government and their prompt and certain availability is an imperious need. Consequently, to be exempted from payment of taxes, the taxpayer is tasked to justify the exemption "by words too plain to be mistaken and too categorical to be misinterpreted (Province of Tarlac vs. Alcantara, G.R. No. 65230, December 23, 1992).

10. All presumptions are in favor of the correctness of the tax assessment (Interprovincial Autobus vs. Collector of Internal Revenue, 98 Phil 290)."

Petitioner presented Anelia I. Yoro, as its first witness. However, at the scheduled hearing on September 18, 2007, counsel for petitioner manifested that it intends to avail of the tax amnesty and moved that the hearing of the case be held in abeyance pending the approval of the amnesty.

The First Division ordered the resetting of the hearing and directed petitioner to inform the court of the status of its availment of the tax amnesty. After three resettings, the First Division ordered petitioner to either withdraw the case or proceed with the presentation of petitioner's evidence, otherwise it will be considered to have waived its right to present further evidence.

On April 11, 2008, petitioner filed a "Motion to Dismiss (Petition for Review)" in view of its availment of the tax amnesty program.

On May 2, 2008, respondent filed his "Comment (Petitioner's Motion To Dismiss) and Motion to Dismiss (Petitioner's Petition for Review on the ground of LACK OF JURISDICTION)".

On May 26, 2008, the First Division issued a Resolution, the dispositive portion of which reads, as follows:

> "**WHEREFORE**, respondent's Motion to Dismiss on the ground of lack of jurisdiction is hereby **DENIED**; petitioner's Motion to Dismiss on the ground that its availment of the Tax Amnesty Program under Republic Act No. 9480, as implemented by Department Order No. 29-07, has rendered the case moot and academic is hereby **GRANTED**; and the case is now considered **WITHDRAWN, CLOSED AND TERMINATED**, subject to the provision of Republic Act No. 9480, otherwise known as the Tax Amnesty Law.
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> **SO ORDERED.**"

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On June 12, 2008, respondent filed a "Motion for Reconsideration".

On June 20, 2008, petitioner, in turn, filed its "Comment (to Respondent's Motion for Reconsideration)".

In a Resolution dated August 7, 2008, the First Division reversed and set aside its Resolution dated May 26, 2008 and granted respondent's "Motion for Reconsideration" and dismissed the petition for lack of jurisdiction.

On August 26, 2008, petitioner filed its "Motion for Reconsideration" of the Resolution dated August 7, 2008, which was denied by the First Division in a Resolution dated October 9, 2008.

Hence, the instant Petition for Review raising the following:

ISSUES

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THE HONORABLE COURT ERRED WHEN IT FOUND THAT THE HONORABLE COURT HAD NO JURISDICTION OVER THE PETITION FOR BEING FILED OUT OF TIME.

II

THE HONORABLE COURT ERRED WHEN IT DID NOT FIND THE LIABILITY OF THE PETITIONER AS EXTINGUISHED ON THE BASIS OF ITS AVAILMENT OF THE TAX AMNESTY.

On November 18, 2008, without necessarily giving due course to the petition, We required the respondent CIR to file its comment, not a motion to dismiss, within ten (10) days from notice.

Despite notice, respondent failed to file his comment.

On February 12, 2009, both parties were ordered to file their simultaneous memoranda, within thirty (30) days from notice, afterwhich the case shall be deemed submitted for decision.

On March 19, 2009, petitioner filed its "Memorandum". Considering the Report of the Records Division dated March 31, 2009 that respondent failed to file his memorandum, the petition was submitted for Decision on April 3, 2009.

Hence, this decision.

THE COURT *EN BANC'S* RULING

The petition has no merit.

Petitioner contends that the assessment for deficiency VAT is void for lack of factual and legal basis as the extrajudicial foreclosure sale of Imperial Sky Garden (ISG) is not subject to VAT; that the interpretation of tax laws operates against the imposition of VAT on extrajudicial foreclosure sale; that the foreclosure sale of ISG is not a sale in payment to creditors under *Section 106 (b) of the NIRC of 1997, as amended*; that

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its availment of tax amnesty under *RA 9480* and submission of all the required documents, extinguished its alleged VAT liability; that only cases subject of final and executory judgments by the courts are not allowed by law to avail of the tax amnesty and considering that there is no existing judgment of any court which has declared the assessment in this case final and executory, this case is not covered by the said exclusion for availment of amnesty.

Record shows that both parties moved for the dismissal of the Petition for Review filed with the First Division anchored on different grounds. However, complexity arose from the consequence of the dismissal based on the grounds relied upon by the parties.

In a Resolution dated May 26, 2008, the First Division granted petitioner's "Motion to Dismiss" and considered the case as withdrawn, closed and terminated, on the ground of its availment of tax amnesty under *RA 9480*. However, on August 7, 2008, the First Division reconsidered and set aside said Resolution dated May 26, 2008 dismissing the Petition for Review on the ground of lack of jurisdiction as the Petition for Review was filed out of time, and further ruled that it has no jurisdiction to consider the case withdrawn, closed and terminated in view of petitioner's availment of *RA 9480*.

Timeliness of the Petition for Review with the First Division

In order to resolve the issues raised herein by petitioner, We deal first on the timeliness of the filing of the Petition for Review before the First Division.

Petitioner protested the assessment against it for deficiency VAT, pursuant to *Section 228 of the NIRC of 1997, as amended*, which provides:

> "SEC. 228. *Protesting of Assessment*.- x x x.
>
> x x x x x x
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> 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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> Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (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 one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within (30) days from receipt of the said decision, or from the lapse of the one hundred eighty**

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(180)-day period; otherwise the decision shall become final, executory and demandable." (Emphasis supplied)

Pursuant to the above-quoted provision, in case the Commissioner fails to act on the disputed assessment within 180 days from the submission of documents, a taxpayer can either: (1) appeal to the Court of Tax Appeals, within thirty (30) days after the expiration of the 180-day period; or (2) await the final decision of the Commissioner on the disputed assessment and appeal such final decision to the Court of Tax Appeals, within thirty (30) days after receipt of a copy of such decision *(Rizal Commercial Banking Corp. vs. Commissioner of Internal Revenue, 522 SCRA 144)*. The failure of a taxpayer to appeal from an assessment on time will render the assessment final, executory and demandable, and incontestable. Consequently, the taxpayer is precluded from disputing the correctness of the assessment.

A careful perusal of the records shows that petitioner filed its formal protest to the FAN on May 5, 2005. As found by the First Division, it appears that the documents in support of its protest were also filed on the same day. Petitioner failed to refute such findings and did not present contrary evidence in order to prove the proper reckoning date of the 180-day period, even in the present petition. As aptly ruled by the First Division in its Resolution dated August 7, 2008:

"Petitioner could have easily alleged and presented proof as to when all supporting documents relevant to its protest filed on May 5, 2005 were in fact submitted to the Bureau of Internal Revenue for this Court to determine the reckoning date of the 180-day period Section 228 of the Tax Code of 1997. However, nowhere in the records have it done so, not even in its Comment on the instant motion. It must be stressed that petitioner has the burden of proving the timeliness of filing this appeal before this Court. It cannot just make allegations without any valid proof to support the same.

Thus, reading from the afore-quoted allegations of petitioner in its Petition for Review filed on January 30, 2006, it stands to reason that the filing of petitioner's protest and the submission of all relevant supporting documents were done simultaneously or on the same day, i.e., on May 5, 2005. "

Therefore, the 180-day period under *Section 228 of the NIRC of 1997, as amended*, commenced to run on May 6, 2005 and expired on November 1, 2005. Petitioner had thirty (30) days from November 1, 2005 or until December 1, 2005, within which to appeal to this Court. Hence, the Petition for Review, docketed as C.T.A. Case No. 7410, filed only on January 30, 2006, was clearly filed out of time. Accordingly, for failure of petitioner to appeal on time, the assessment had become final, executory and demandable, consequently divesting the CTA of authority to entertain the petition filed in C.T.A. Case No. 7410.

The CTA has jurisdiction to entertain appeals on disputed assessments from inaction of the Commissioner. However, in order to vest the CTA with jurisdiction to entertain the appeal, it must be filed within thirty (30) days after the expiration of the one hundred eighty (180) day period fixed by law for the Commissioner to act on the disputed assessments. This 30-day period within which to file an appeal is jurisdictional and failure to comply therewith would bar the appeal and deprive the CTA of its jurisdiction to entertain and determine the correctness of the assessments. Such period is not merely directory, but mandatory and it is beyond the power of the courts to extend the same *(Chan Kian v. Court of Tax Appeals, 105 Phil. 904, 906).*

In the case of *Ker & Company, Ltd. v. Court of Tax Appeals, 4 SCRA 160, 163*, the Supreme Court ruled that while the right to appeal a decision of the Commissioner to the CTA is merely a statutory remedy, nevertheless the requirement that it must be brought within thirty (30) days is jurisdictional. If a statutory remedy provides as a condition precedent that the action to enforce it must be commenced within a prescribed time, such requirement is jurisdictional and failure to comply therewith may be raised in a motion to dismiss.

Well-settled is the rule that the right to appeal is not a natural right or a part of due process, it is merely a statutory privilege, and may be exercised only in the manner and in accordance with the provisions of law. The party who seeks to avail of the same must comply with the requirements of the rules. Failing to do so, leads to the loss of the right to appeal *(Producers Bank of the Phil. vs. Court of Appeals, 381 SCRA 185).*

Petitioner's Availment of the Tax Amnesty

As to the second issue, the First Division correctly ruled that it has no jurisdiction to consider the case as withdrawn, closed and terminated in view of petitioner's availment of the tax amnesty under *RA 9480* since it has no authority to entertain the Petition for Review for being filed out of time.

Records show that petitioner availed of the tax amnesty on February 20, 2008. To reiterate, for failure of petitioner to file the appeal with the CTA on or before December 1, 2005, the assessment had become final, executory, and demandable on December 2, 2005. Considering that the questioned assessment had become final and demandable and non-appealable long before petitioner availed of the tax amnesty, clearly this Court has no authority to entertain the Petition for

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Review filed in C.T.A. Case No. 7410. Accordingly, the Court cannot rule on whether petitioner's liability on the assessed tax deficiencies based on its availment of the tax amnesty had already been extinguished because the assessment in question had long become final, executory and non-appealable, prior to the availment of the tax amnesty.

Finding no reversible error, We affirm the Resolutions dated August 7, 2008 and October 9, 2008 rendered by the First Division in C.T.A. Case No. 7410.

WHEREFORE, premises considered, the present Petition for Review is hereby **DENIED DUE COURSE,** and accordingly **DISMISSED,** for lack of merit.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
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

CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice