REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

BRIXTON INVESTMENT CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1099
(CTA CASE NO. 8379)

Present:

Del Rosario, *P.J.,*
Castañeda, Jr.
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas,
and
Ringpis-Liban, *JJ.*

Promulgated:

APR 06 2015
1:48 p.m.

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DECISION

RINGPIS-LIBAN, J.

Before the Court *En Banc* is a Petition for Review filed on December 12, 2013[1], assailing the Resolution dated November 11, 2013 of the Second Division of this Court in CTA Case No. 8379, denying herein petitioner's Motion for Reconsideration of the Decision dated August 12, 2013. The said

[1] Rollo, CTA EB Case No. 1099, pp. 1-16, with annexes.

Decision, as upheld by the Resolution, dismissed the petitioner's petition for review filed on November 15, 2011 for lack of jurisdiction. Petitioner alleges that the Second Division's Decision and Resolution are contrary to law.

THE PARTIES

Petitioner Brixton Investment Corporation (hereinafter, "Brixton," for brevity) is a corporation organized and existing under the laws of the Philippines, with principal office at the 3rd Floor, Pako Building, Pedro Gil corner Gen. Luna Streets, Paco, Manila.

The respondent is the duly-appointed Commissioner of Internal Revenue (CIR), vested with authority to, *inter alia*, decide disputed assessments of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under the National Internal Revenue Code (NIRC) and other laws administered by the BIR, and holding office at the BIR National Office Building, Diliman, Quezon City.

JURISDICTIONAL FACTS

The instant Petition for Review was filed on December 12, 2013, or just twelve (12) days after the petitioner received a copy of the Second Division's Resolution dated November 11, 2013.

The Petition was therefore timely filed.

FACTUAL ANTECEDENTS

On January 27, 2011, Brixton received from BIR Regional Director Alfredo V. Misajon a Formal Letter of Demand (FLD) for alleged deficiency income tax, value-added tax, and penalty for non-maintenance of books of accounts and other accounting records. With the FLD were Assessment Notices Nos. 34-07-IT-0964, 34-07-VT-0965, and 34-07-MC-0966.

On February 25, 2011, Brixton filed a protest against the FLD and its enclosed Assessment Notices.

On April 12, 2011, respondent wrote Brixton that its protest had been forwarded to Revenue District Office No. 34 for appropriate action.

On September 19, 2011, Revenue District Officer Petronilo C. Fernando of Revenue District Office No. 34 wrote Brixton that they were standing pat on their assessments although the same had been revised.

On November 16, 2011, Brixton filed its petition for review, which was heard by this Court's Second Division.

On August 12, 2013, the Second Division promulgated its Decision, dismissing Brixton's petition for lack of jurisdiction.

On December 12, 2013, Brixton filed the instant Petition.

On February 5, 2014, the Court *En Banc* by Resolution[2] of even date ordered the respondent to file her Comment on the Petition within ten days from receipt of the Resolution.

On March 6, 2014, respondent filed her Comment/Opposition[3], with the explanation that the Court's *En Banc* Resolution of February 5, 2014 was received on February 25, 2014. The Comment was thus timely filed.

By Resolution[4] promulgated on March 31, 2014, the Court resolved to give due course to the Petition, and gave the parties thirty (30) days from notice within which to file their respective memoranda.

The respondent submitted her Memorandum on May 14, 2014[5], stating that she received the Court's Resolution dated March 31, 2014 on April 14, 2014. Brixton submitted its Memorandum on May 27, 2014.[6]

On June 30, 2014, the Court deemed the case submitted for decision[7].

ISSUES

The primordial issue in this case is whether or not the Second Division erred in dismissing Brixton's petition in CTA Case No. 8379 for lack of jurisdiction. The resolution of this issue is determinative of whether the Court should proceed to determine the validity of the assessments.

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[2] Ibid. pp. 37-38.
[3] Ibid. pp. 39-45.
[4] Ibid. pp. 47-48.
[5] Ibid. pp. 49-61.
[6] Ibid. pp. 62-75.
[7] Ibid. pp. 77-78.

It is Brixton's thesis that its petition in CTA Case No. 8379 was not prematurely filed, because what it appealed to the CTA was a decision of the respondent on the disputed assessments, which decision is within the statutory jurisdiction of this Court to review.

APPLICABLE LAWS

The laws applicable to the case is Section 228 of the NIRC in relation to Section 7(1) of R.A. No. 1125, as amended. Section 228 of the NIRC states:

> **Section 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: provided, however, That a pre-assessment notice shall not be required in the following cases: xxx
>
> The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.
>
> Within a period to be prescribed by 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.
>
> 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.
>
> 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 thirty (30) days from receipt of the said decision, or from the lapse of one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable.

Under Sec. 7(1) of R.A. No. 1125, this Court has exclusive appellate jurisdiction over "decisions of the Commissioner of Internal Revenue in cases involving disputed assessments." This is reiterated as Sec. 7(a)(1) in R.A. No. 9282. Sec. 7(a)(2) extended the CTA's exclusive appellate jurisdiction to "inaction by the CIR in cases involving disputed assessments." R.A. No. 9503 of 2008 enlarged the organizational structure of the CTA but did so without altering its jurisdiction.

DISCUSSION

Was Brixton's petition for review in CTA Case No. 8379 prematurely filed, and thus beyond the jurisdiction of the Court of Tax Appeals?

Brixton invokes Section 228 of the NIRC, as amended. Section 228, prescribes the procedures and timeframes for protesting assessments administratively. The protest should be filed within 30 days after receipt of the assessment. Within 60 days from the filing of the protest, all relevant supporting documents shall have been submitted. The CIR or his duly authorized representative has 180 days to render a decision on the protest. If an adverse decision is rendered within those 180 days, the taxpayer may appeal the decision to the CTA within 30 days from receipt of the decision. If no decision is rendered within the 180-day period, the taxpayer has 30 days from the lapse thereof, within which to appeal the inaction to the CTA.

Thus, from the viewpoint of the CTA, the appeal must be filed with it within 30 days from the taxpayer's receipt of the decision, or within 30 days from the lapse of the 180-day period during which no decision was made by the CIR or his duly authorized representative.

Protest of assessment belies appeal of decision

Brixton posits that not just one but at least two decisions were rendered by the CIR's duly authorized representatives. In its Memorandum filed on May 27, 2014, Brixton asserts that the following documents contained the "decision" referred to in Section 228 of the NIRC and in the law defining the jurisdiction of this Court, *i.e.*, R.A. No. 1125, as amended by R.A. No. 9282 and R.A. No. 9503:

(1) The Formal Letter of Demand[8];

[8] Exhibit "A" for Brixton, Exhibit "11" for CIR.

(2) The three Assessment Notices[9] attached to the Formal Letter of Demand;
(3) The September 19, 2011 letter of the Revenue District Officer[10]; and
(4) The revised assessments attached to the September 19, 2011 letter of the Revenue District Officer.[11]

The Formal Letter of Demand dated January 24, 2011, signed by Regional Director Alfredo V. Misajon, ended with this notice:

> Pursuant to Revenue Regulation No. 12-99 dated September 6, 1999, if you disagree to the above assessment, please file with the Regional Director through the Assessment Division, BIR, Port Area, Manila, a written protest within thirty (30) days from receipt hereof. xxx Failure on your part to file a valid protest to the assessment, the same shall become final, executory and demandable pursuant to Section 228 of the Tax Code.

Each of the three Assessment Notices dated January 24, 2011, attached to the Formal Letter of Demand, and also signed by Regional Director Alfredo V. Misajon, carried this notice:

> If you disagree with this assessment (details on the attached letter of demand), file your protest in writing stating the facts, applicable law, rules & regulations or jurisprudence in support of your protest with the Commissioner of Internal Revenue, B.I.R., Diliman, Quezon City or the Regional Director within 30 days from receipt hereof. Pursuant to the provisions of Sec. 228 of the NIRC, as amended, all relevant supporting documents should be submitted within 60 days from receipt hereof, otherwise the assessment becomes final, executory and demandable.

Although signed by a Regional Director, who is recognized as a duly authorized representative of the CIR, neither of the above-cited FLD and Assessment Notices comprises a decision appealable to the CTA. Indeed, Brixton contradicted its insistence that these are decisions, by protesting them administratively as assessments[12], instead of filing an appeal against them (if they were decisions) with the CTA within 30 days from its receipt of these documents.

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[9] Exhibits "A-2", "A-3" "A-4" for Brixton; Exhibits "12", "13", "14".
[10] Exhibit "15".
[11] Petitioner's Memorandum filed on May 27, 2014, p. 4.
[12] Exhibit "B" Protest Letter dated September 15, 2011.

If this Court were to sustain Brixton's claim that the FLD and/or its Assessment Notices embodied decisions of the CIR or her duly authorized representative, then Brixton would have had only until February 26, 2011 to appeal them to the CTA, that date being the last day of the 30 days from its receipt on January 27, 2011 of those documents. Thus, when Brixton filed its petition for review on November 16, 2011, the assessments (or "decisions") would already have long become final, executory and demandable. Contending that the FLD and its attached Assessment Notices are "decisions" of the CIR or her duly authorized representative, therefore, is incompatible with Brixton's filing of its petition for review on November 16, 2011.

The FLD and its three Assessment Notices were certainly not final, and Brixton itself cited their portions that state that they may be protested to the CIR or the Regional Director[13] – rather than to this Court, which underscores their true character as assessments, not decisions of the CIR or her authorized representative. That Brixton did in fact protest them administratively necessarily admits that they are not the decisions appealable to this Court under Section 7 of RA No. 1125, as amended.

RDO's letter had not ripened into an appealable decision

Section 228 of the NIRC allows the CIR a period of 180 days from the taxpayer's filing of documents in support of its protest, within which to decide a disputed assessment. The records are silent as to when the petitioner filed these documents, but the CIR alleges that none were filed despite the grant of a 60-day "grace period" to Brixton.

Section 228 gives the taxpayer 60 days from the filing of its protest, within which to submit all supporting documents. Assuming that Brixton filed the documents in support of its protest on April 26, 2011, the 60th day from the filing of the protest on February 25, 2011, the CIR had 180 days from such submission, or until October 23, 2011, within which to render decision. If no decision was made upon the expiry of the 180-day period, Brixton had 30 days from the lapse of that period, or until November 22, 2011, within which to appeal to the CTA. Thus, the filing on November 16, 2011 of Brixton's petition for review would have been on time – *if there was a decision or inaction to appeal from.*

Brixton, however, requested for a grace period of 60 days for filing its supporting documents, and this request was granted and exhausted. This pushed the last day for the filing of the said documents from April 26, 2011 to

[13] Petition for Review, Rollo, p. 6.

June 25, 2011. Consequently, this moved the last day of the 180-day period for the CIR to render decision from October 23, 2011 to April 20, 2012. Thus, when Brixton filed its petition for review that was docketed as CTA Case No. 8379 on November 16, 2011, there was still ample time for the CIR to review and revise the stand conveyed by RDO Petronilo C. Fernando (RDO Fernando) in his September 19, 2011 letter to Brixton. The CIR still had *five months* within which to render a decision on the disputed assessment. This rendered the filing of Brixton's petition for review on November 16, 2011 premature, because no appealable decision had been rendered and the period of inaction had not yet lapsed.

The records indeed suggest that the September 19, 2011 letter of RDO Fernando was merely a prelude to a decision that was still in the process of being reached. In the records is an undated Memorandum prepared by Revenue Officer Rafael M. Lentejas II, received by the BIR's Assessment Division on October 18, 2011, reporting findings from the reinvestigation of Brixton's possible tax liabilities for 2007, with the recommendation that the docket be forwarded to the Assessment Division "for further review and evaluation." The Memorandum was signed by RDO Fernando, who recommended approval, but the space for Regional Director Simplicio A. Madulara to indicate approval or disapproval was left unsigned.[14] Clearly, with the process of review and evaluation not yet completed, no decision by the CIR could have been reached as of October 18, 2011.

No decision inferable from the language and tenor of the subject documents

Even setting aside the calendar of material events, Brixton argues that the September 12, 2011 letter of RDO Fernando qualify as a decision, as do the FLD and its attached Assessment Notices, allegedly based on their language and tenor citing the case of *Allied Banking Corporation vs Commissioner of Internal Revenue.*[15]

The body of the letter dated September 19, 2011 of Revenue District Officer Petronilo C. Fernando is quoted below in full and verbatim:

> *This has reference to your protest letter dated February 15, 2011 raising several issues against the computation of deficiency taxes per preliminary assessment notice. After considering your protest and its*

[14] Records of CTA Case No. 8379, p. 212.
[15] G.R. No. 175097, February 5, 2010.

supporting documents the following findings still stands and explained briefly together with its legal basis to wit;

1. Deficiency Income Tax

We regret to inform you that the disallowance of operating expenses is still in force as you still failed to present documentary evidence for such claim as provided under Section 232, 234 and 34 of the National Internal Revenue Code. The sixty (60) days grace period you asked for the presentation of supporting documents had lapsed, already giving us no choice but to disallow such claim. On the issue of prior years excess credits to be applied for the taxable year under audit we regret to inform you that this could not be possibly done due to the fact that the said amount was carried over to the subsequent year. (Please see attached computation)

2. Deficiency Value Added Tax

The Value Added Tax return filed on the month of May 2007 was considered on the revised computation of the Value Added Tax. Despite the consideration of said Value Added Tax payment you still failed to present evidence for a valid deductibility of input tax pursuant to the pertinent provision of section 4.100-8 of Revenue Regulation 16-05. (Please see attached computation)

3. Compromise Penalty

We acknowledge the submission from your end of the photocopies of the 1st pages of your books of accounts, however pursuant to section 235 of the national internal revenue code which reads; "All the books of accounts, including the subsidiary books and other accounting records of corporations, partnerships, or persons, shall be preserved by them for a period beginning from the last entry in each book until the last day prescribed by Section 203 within which the Commissioner is authorized to make an assessment. ***<u>The said books and records shall be subject to examination and inspection by internal revenue officers:</u>*** *Provided, that for income tax purposes, such examination and inspection shall be made only once in a taxable year, except in the following cases."*

We hope that we have answered all the questions on your mind with regards to the assessment made, attached herewith is the revised assessment "annex a" for your guidance.[16]

The Court finds absolutely nothing in the above letter of RDO Fernando that conveys a sense of finality.

[16] Records of CTA Case No. 8379, p. 35.

In the case of *Allied Banking*, which was invoked by Brixton, whilst the bank's protest against a Preliminary Assessment Notice was pending, the BIR sent the bank a Formal Letter of Demand with Assessment Notices. The FLD twice *expressly* declared itself to be the BIR's "final decision" and stated that the taxpayer "may *appeal the final decision* within thirty (30) days from receipt hereof." Within 30 days from receipt of the FLD, the bank filed a petition for review with the CTA. The BIR raised the defense that the bank should have administratively protested the FLD. The Supreme Court held that the BIR was in estoppel, thereby relieving the bank from the need to exhaust administrative remedies. The Supreme Court ruled that in view of the language of the FLD, the CIR "is now estopped from claiming that he did not intend the Formal Letter of Demand with Assessment Notices to be a final decision," because of the use of the terms "final decision" and "appeal."

In the instant case, however, none of the BIR documents that Brixton alleges to bespeak a decision of the CIR on the disputed assessments made use of the terms "decision," "final decision," or "appeal." The FLD and its assessment notices signed by Regional Director Misajon all used the word "assessment" rather than "decision", and "protest" rather than "appeal." The letter dated September 19, 2011 of RDO Fernando likewise did not use the words "decision" and "appeal."

There is thus no analogy in the factual circumstances between *Allied Banking* and the instant petition.

Brixton's invocation of the "language used or the tenor of the letter" clause in *Allied Banking* strikes us as hollow. The "language used or the tenor of the letter" mantra pertinent to Section 228 of the NIRC has been qualified by jurisprudence other than *Allied Banking*. In *Surigao Electric Co., Inc. vs Court of Tax Appeals*[17] in 1974, cited in *Oceanic*[18] in 2005, the Supreme Court qualified that this language must be "clear and unequivocal" so as to "indubitably" convey the CIR's "final determination on the disputed assessment." In *Oceanic*, the BIR's demand letter clearly indicated denial, on the ground of lack of supporting documents, of the taxpayer's request for reconsideration, and carried the warning that failure to pay the deficiency tax assessment would result in the "issuance of a warrant of distraint and levy to enforce its collection without further notice."

Thus, applying the foregoing jurisprudence, for any among the documents cited by Brixton – the Formal Letter of Demand with Assessment Notices, and the letter dated 19 September 2011 with its revised assessment – to qualify as a decision by the CIR on the disputed assessments, the language or

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[17] G.R. No. L-25289, June 28, 1974, 57 SCRA 524.
[18] *Supra*.

tenor must *clearly*, *unequivocally*, and *indubitably* convey the CIR's "*final determination* on the disputed assessment." It is here that Brixton's contentions fall short, for the Court finds nothing in these documents that unmistakably presents a final determination on the disputed assessments.

Petitioner gravely erred in construing Section 228 of the NIRC

Brixton construed Section 228 of the NIRC as follows:

> If the law directs an aggrieved taxpayer to immediately file his Petition for Review before this Honorable Court if his Protest remains unacted upon by a Regional Director or the respondent's office before the lapse of 180 days from the time he has submitted the required documents, then a "decision" or "final decision" of respondent is not absolutely necessary for this Honorable Court to exercise jurisdiction over a disputed assessment. This is the only logical and justifiable interpretation of Section 7 of R.A. 1125 as amended and Section 228 of the Tax Reform Act.[19]

Brixton's understanding of Section 228 of the NIRC is severely inaccurate, with potentially fatal consequences. Section 228 states that –

> 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 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.

Brixton's seriously flawed understanding of Section 228 helps explain why Brixton prematurely filed the petition in CTA Case No. 8379: it thought that the appeal should be filed *before* 180 days from the filing of all documents in support of its protest, rather than within 30 days from the decision made by the CIR or her authorized representative on the disputed assessment, or within 30 days *after* the lapse of the 180 day period of inaction.

Brixton further errs in construing that the subject of an appeal under Section 228 of the NIRC is a disputed assessment, rather than the decision or

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[19] Petition, p. 7. Underscoring added, for emphasis.

inaction thereon. Without such decision or inaction, a disputed assessment cannot be brought to this Court under Section 228 of the NIRC. The rule is that for the Court of Tax Appeals to acquire jurisdiction, an assessment must first be disputed by the taxpayer and ruled upon by the Commissioner of Internal Revenue to warrant a decision from which a petition for review may be taken to the Court of Tax Appeals.[20]

Validity of assessments now also beyond review

As to Brixton's challenge to the validity of the assessments, the petitioner should be reminded that it had protested the same administratively, and should have awaited the final decision thereon of the respondent, before going to this Court.

Brixton cannot expect its allegation that it was denied due process to prosper, when it was the very party that short-circuited due process by prematurely going to this Court while its administrative protest was still being heard. In a sense, on the issue of the validity of the assessments, Brixton committed forum shopping, which this Court cannot countenance.

In any event, the respondent has sufficiently established that the Assessment Notices complied with Section 228 of the NIRC. As to the "revised assessment" attached to RDO Fernando's September 19, 2011 letter, we agree with the respondent that the same was merely a "computation" rather than a formal assessment, and was thus presented to the taxpayer only for its "guidance." This is consistent with respondent's averment that the said letter is not a final decision on disputed assessment.

At any rate, Brixton's challenge to the assessments has been mooted by their having attained finality by operation of law, because of the petitioner's failure to properly appeal the CIR's decision or inaction on them. They, too, are now beyond the jurisdiction of this Court.

CONCLUSION

The Court finds that there was no decision on disputed assessment rendered by the CIR or her authorized representative against Brixton, at the time of the filing of the petition below, over which the Court could assume

[20] *Oceanic Wireless Network, Inc. vs Commissioner of Internal Revenue, Court of Tax Appeals, and Court of Appeals, supra.*

jurisdiction. Nor had the "inaction" of the CIR, if the aborted resolution of Brixton's protest can be termed as such, ripened into the 180-day inaction contemplated under Section 228 of the NIRC, which could have given the petitioner 30 days from the lapse thereof within which to file an appeal with this tribunal.

This mistake in the pursuit of taxpayer's remedies resulted in the expiration of the 180-day period for the CIR to render a decision on the disputed assessment, as well as of the 30-day window after the lapse of the period for decision or inaction, within which the taxpayer could appeal the inaction to the CTA. Consequently, by operation of Section 228 of the NIRC, the disputed assessments, as revised, became final, executory and demandable.

WHEREFORE, premises considered, the assailed Decision and Resolution of the Second Division of this Court in CTA Case No. 8379 are hereby **AFFIRMED**, and the instant Petition for Review is **DENIED** for lack of merit.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

(On Leave)
CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO – MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Section 13 of 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.

ROMAN G. DEL ROSARIO
Presiding Justice