REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

BANK OF COMMERCE,
Petitioner,

C.T.A. EB NO. 259
(C.T.A. Case No. 6975)

-versus-

Present:

Acosta, P.J.
Castañeda, Jr.
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, JJ.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
JUN 27 2007

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DECISION

BAUTISTA, J.:

The Case

Before the Court *En Banc* is a Petition for Review with a prayer to set aside:

1. The Decision dated August 31, 2006 of the Second Division of this Court ("Court in Division") denying due course the Petition for Review filed by petitioner contesting the Formal Letter of Demand and Assessment Notice No. DST-99-00-000049 dated September 11, 2002 issued by the respondent demanding payment of the amount of ₱41,467,887.51[1] as deficiency documentary stamp taxes ("DST") on the Special Savings Deposit ("SSD") accounts of Traders Royal Bank ("TRB") for taxable year 1999; and

2. The Resolution dated January 8, 2007 denying petitioner's Motion for Reconsideration.

Antecedent Facts

The Court in Division summarized the facts of this case as follows:

"In their 'Joint Stipulation of Facts and Simplification of Issues', the parties agreed on the following facts:

'1. Petitioner is a banking corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office address at 12th Floor, Bankers' Centre Building, 6764 Ayala Avenue, Makati City;

2. Respondent is the Commissioner of the Bureau of Internal Revenue duly appointed to perform the duties of his office, including among others, the power to decide, cancel and abate tax liabilities pursuant to Section 224(B) of the Tax Code, as amended by Republic Act ("RA") 8424, otherwise known as the 'Tax Reform Act' ('TRA') of 1997;

3. On November 9, 2001, Petitioner Bank of Commerce (BOC) and Traders Royal Bank (TRB) executed a Purchase and Sale Agreement whereby it stipulated the TRB's desire to sell and the BOC's desire to purchase identified recorded assets of TRB in consideration of BOC assuming identified recorded liabilities;

4. Under the Purchase and Sale Agreement, BOC and TRB shall continue to exist as separate corporations with distinct corporate personalities;

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[1] Reduced to ₱41,442,887.51 as per Decision of Commissioner Guillermo L. Parayno dated March 22, 2004, pages 33 to 38, CTA Records.

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5. On September 27, 2002, Petitioner Bank of Commerce received copies of the Formal Letter of Demand and Assessment Notice No. DST-99-00-000049 dated September 11, 2002, addressed to "TRADERS ROYAL BANK (now Bank of Commerce)", issued by Respondent demanding payment of the amount of P41,467,887.51, as deficiency documentary stamp taxes (DST) on Special Savings Deposit (SSD) of TRB for taxable year 1999;

6. On October 11, 2002, Traders Royal Bank filed its protest letter contesting the Formal Letter of Demand and Assessment Notice No. DST-99-00-000049 dated September 11, 2002, pursuant to Sec. 228 of the Tax Code;

7. On March 31, 2004, Petitioner Bank of Commerce received the Decision dated March 22, 2004 denying the protest filed by Traders Royal Bank on October 11, 2002. The last two paragraphs of the Decision stated that:

> "WHEREFORE, in view of all the foregoing, Assessment Notice No. DST-99-00-000049 demanding payment of the amount of P41,467,887.51 as deficiency stamp tax for the taxable year 1999 is hereby **MODIFIED AND/OR REDUCED** to P41,442,887.51. Consequently, Traders Royal Bank (now Bank of Commerce) is hereby ordered to pay the above-stated amount, plus interest that have accrued thereon until the actual date of payment, to the Large Taxpayers Service, B.I.R. National Office Building, Diliman, Quezon City, within thirty (30) days from receipt hereof, otherwise, collection thereof shall be effected through the summary remedies provided by law.
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> This constitutes the **Final Decision** of this Office on the matter."

8. Pursuant to *Section 228* of the *Tax Code* in conjunction with *Section 4* of the same Code, as well as *Section 7 of R.A. 1125, as amended*, otherwise known as an *'Act Creating the Court of Tax Appeals'*, this Honorable Court has the exclusive appellate jurisdiction to take cognizance of the instant Petition for Review.'

In his Answer, the Commissioner of Internal Revenue (hereafter referred to as 'respondent'), by way of Special and Affirmative defenses alleged: that Article II of the Purchase and Sale Agreement is very clear that the liabilities of TRB before the effectivity of the said Agreement shall be assumed by petitioner; that petitioner in its protest against the assessment, did not raise the issue that it is not liable for the assessment because there was no merger between it and TRB, hence, it cannot now raise said issue for the first time on appeal; that petitioner's Special Savings Deposit is considered a certificate of deposit contemplated and taxable under *Section 180* of the *Tax Code*; that a 'certificate of deposit' is a written acknowledgement by a bank of the receipt of money on deposit which the bank promises to pay to the depositor, bearer or to some other person or order; and that all presumptions are in favor of the correctness of tax assessments.

Petitioner presented Mr. Bayani R. Navarro, Head of the Administrative Services Group, as witness, and documentary evidence marked as *Exhibits 'A' to 'E'*, together with their submarkings, which were all admitted by the Court.

On the other hand, respondent presented Mr. Ernesto P. Gamad, Revenue Officer III, National Investigation Division of BIR, as witness, and formally offered in evidence *Exhibits '1' and '2'*.

Thereafter, both parties having filed their respective memoranda within the period given by the Court, the case was deemed submitted for decision on April 18, 2006."

The Ruling of the Court in Division

On August 31, 2006, the Court in Division rendered its Decision dismissing the Petition for Review for lack of merit.

The Court in Division held that for all intents and purposes, petitioner's SSD is deemed to be of the same nature and substance as a certificate of deposit bearing interest. Thus, said SSD passbooks are in themselves certificates of deposit, subject to DST under Section 180 of the National Internal Revenue Code ("NIRC") of 1997.

The Court in Division also applied the rule that issues not raised in the administrative level cannot be raised for the first time on appeal. It found that petitioner never raised the issue of merger between petitioner and TRB, which should have been its main concern in its letter of protest to protect its interest. Petitioner did not even offer as evidence the alleged letter of protest. Such letter never questioned the proper party that should be held liable for such deficiency tax. Petitioner also actively participated in the proceedings before the BIR without questioning the legitimacy of the proper party of interest.

The dispositive portion of the aforementioned Decision reads as follows:

"**WHEREFORE**, premises considered, the instant petition is hereby **DENIED DUE COURSE**, and accordingly, **DISMISSED** for lack of merit.

SO ORDERED."

On September 25, 2006, petitioner filed a Motion for Reconsideration which the Court in Division denied for lack of merit in its Resolution promulgated on January 8, 2007.

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The Issues

Unperturbed, petitioner has come to the Court *En Banc* via the present petition, placing reliance on the following assignment of errors:

> "THE HOLDING OF THE HONORABLE SECOND DIVISION THAT PETITIONER IS DEEMED TO HAVE ADMITTED THAT IT IS THE PROPER PARTY ASSESSED BY THE RESPONDENT BECAUSE IT DID NOT RAISE THE ISSUE OF MERGER IN THE LETTER OF PROTEST FILED WITH THE RESPONDENT IS WITHOUT BASIS AND VIOLATES THE ELEMENTARY RULES OF DUE PROCESS.
>
> THE HONORABLE SECOND DIVISION ERRED IN HOLDING THAT TRB'S SSD ACCOUNTS FOR TAXABLE YEAR 1999 ARE SUBJECT TO DOCUMENTARY STAMP TAX UNDER THEN SECTION 180 OF THE TAX CODE."

Petitioner's Arguments

Petitioner stressed that as stipulated upon by the parties and embodied in the Joint Stipulation of Facts and Issues duly approved by the Court in Division, it was TRB, and not petitioner, that filed the letter of protest contesting the Formal Letter of Demand and Assessment Notice issued by the BIR. Hence, there is no basis to hold that petitioner is deemed to have admitted that it is the proper party assessed by the respondent for failure to raise the issue of merger between petitioner and TRB in the letter of protest filed with the BIR.

Petitioner also avers that the issue of "whether an issue which was not raised in the administrative level before the BIR can be raised for the first time on appeal," is not among the issues stipulated upon by the parties for resolution of the Court. Hence, both petitioner and respondent did not present any evidence in connection with the said issue. The holding of the Court in Division that issues not raised in the administrative level cannot be raised for the first time on appeal, was made without hearing the side of both parties, in gross violation of the elementary rules of due process.

Petitioner likewise argues that respondent is deemed to have waived its defense that petitioner never raised the issue of merger in the letter of protest filed with the BIR. Records will show that respondent did not raise the said defense as an issue in its Pre-Trial Brief and during Pre-Trial. Moreover, respondent did not object to petitioner's presentation and offer of evidence showing that there was no merger that transpired between petitioner and TRB.

Petitioner further asserts that it is grossly unfair to hold petitioner liable for the DST deficiency assessment of TRB for taxable year 1999, considering that there was really no merger between TRB and petitioner and the latter did not assume the aforementioned assessment as a liability under the Purchase and Sale Agreement with TRB.

Lastly, petitioner insists that its SSD is not a certificate of deposit within the ambit of Section 180 of the 1997 NIRC.

Respondent's Counter-arguments

Respondent, in its Comment, posits that petitioner can be held liable for the subject deficiency tax assessment. Petitioner, while denying its liability for TRB's obligation to pay DST on TRB's SSD accounts, on its own, took the cudgels of ventilating TRB's defenses on the merits. Even in the administrative stage, petitioner filed the protest for TRB. In said protest letter, nothing was raised about petitioner and TRB's distinct and separate personalities. If indeed there is a separate and distinct personality between TRB and petitioner, the petition for review in CTA Case No. 6975 should have just raised the impropriety of having petitioner pay for TRB's liabilities.

Respondent also asseverates that the defense of petitioner is a ruse designed to evade the payment of liabilities of TRB. This ruse is illuminated when petitioner's annexes to its Petition for Review in CTA Case No. 6975 is examined thoroughly. In annex A-1 of petitioner is a Supplement to the November 9, 2001 Purchase and Sale Agreement between petitioner and TRB. The said supplement details the establishment of a ₱50,000,000 escrow fund by TRB to answer for other liabilities of TRB which may arise after the "Purchase and Sale Agreement." There is also a provision in said agreement that the escrow fund, if unclaimed after fifteen (15) years, will redound to petitioner's account without need of BSP approval. This ruse is further exposed considering that petitioner, in its formal offer of evidence, presented only the main agreement between petitioner and TRB. This, despite the fact that the main agreement and the supplement were executed on the same day.

To respondent's mind, while petitioner sings good faith in its purchase of TRB's assets, it is likewise shielding itself from claims against TRB which might arise after the agreement. It knows that it can be held liable for TRB's liabilities because the effect of the transaction it entered into with TRB is a merger. Even if merger can be ruled out, petitioner's act of defending the assessment against TRB coupled with the circumstances cited above, strengthens the theory that petitioner is estopped from questioning the assailed Decision on the ground that petitioner and TRB have distinct corporate personalities.

Lastly, respondent alleges that petitioner's conduct, motivated by its desire for profit from the escrow fund or by simply undertaking the cudgels for TRB, has already cost the government considerable loss of time and resources in its collection efforts. Certainly, petitioner is asking this Court to commit an injustice.

The Ruling of the Court En Banc

The petition is devoid of merit.

SSD is subject to DST

We shall first discuss the taxability of the SSD involved in this case.

The applicable provision is Section 180 of the 1997 NIRC, which reads:

> "*Section 180. Stamp Tax on All Bonds, Loan Agreements, Promissory Notes, Bills of Exchange, Drafts, Instruments and Securities Issued by the Government or Any of its Instrumentalities, Deposit Substitute Debt Instruments,* ***Certificates of Deposits Bearing Interest*** *and Others Not Payable on Sight or Demand.* — On all bonds, loan agreements, including those signed abroad, wherein the object of the contract is located or used in the Philippines, bills of exchange (between points within the Philippines), drafts, instruments and securities issued by the Government or any of its instrumentalities, deposit substitute debt instruments, **certificates of deposits drawing interest**, orders for the payment of any sum of money otherwise than at sight or on demand, on all promissory notes, whether negotiable or non-negotiable, except bank notes issued for circulation, and on each renewal of any such note, there shall be collected a documentary stamp tax of Thirty centavos (P0.30) on each Two hundred pesos (P200), or fractional part thereof, of the face value of any such agreement, bill of exchange, draft, certificate of deposit, or note. xxx" *(Emphasis supplied)*

Recently, the Supreme Court ruled[2] that under then Section 180 of the 1977 NIRC, as amended by Republic Act No. 7660, savings deposit accounts with the following features are subject to DST as a certificate of deposit bearing interest:

1. It is an interest earning deposit account issued by a bank;

2. It provides for a higher interest rate when the deposit is not withdrawn within the required fixed period; otherwise, it earns interest pertaining to a regular savings deposit; and

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[2] International Exchange Bank v. Commissioner of Internal Revenue, G.R. No. 171266, April 4, 2007.

3. It is evidenced by a passbook.

The High Tribunal ratiocinated as follows:

"As correctly found by the CTA En Banc, **a passbook representing an interest earning deposit account issued by a bank qualifies as a certificate of deposit drawing interest.**

A document to be deemed a certificate of deposit requires no specific form as long as there is some written memorandum that the bank accepted a deposit of a sum of money from a depositor. What is important and controlling is the nature or meaning conveyed by the passbook and not the particular label or nomenclature attached to it, inasmuch as substance, not form, is paramount.

Contrary to petitioner's claim, not all certificates of deposit are negotiable. A certificate of deposit may or may not be negotiable as gathered from the use of the conjunction **or**, instead of **and**, in its definition. A certificate of deposit may be payable to the depositor, to the order of the depositor, **or** to some other person or his order.

In any event, the negotiable character of any and all documents under Section 180 is immaterial for purposes of imposing DST.

Orders for the payment of sum of money payable at sight or on demand are of course explicitly exempted from the payment of DST. Thus, a regular savings account with a passbook which is withdrawable at any time is not subject to DST, unlike a time deposit which is payable on a fixed maturity date.

As for petitioner's argument that its FSD is similar to a regular savings deposit because it is evidenced by a passbook, and that based on the legislative deliberations on the bill which was to become R.A. 9243 which amended Section 180 of the NIRC (which is to a large extent the same as Section 180 of the Tax Code, as amended by R.A. 7660), Congress admitted that deposits evidenced by passbooks which have features akin to time deposits are not subject to DST, the same does not lie.

The FSD, like a time deposit, provides for a higher interest rate when the deposit is not withdrawn within the required fixed period; otherwise, it earns interest pertaining to a regular savings deposit. Having a fixed term and the reduction of interest rates in case of pre-termination are essential features of a time deposit. Thus explains the CTA En Banc:

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The findings and conclusion reached by the CTA which, by the very nature of its function, is dedicated exclusively to the consideration of tax problems and has necessarily developed an expertise on the subject, and unless there has been an abuse or improvident exercise of authority, and none has been shown in the present case, deserves respect.

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It bears emphasis that DST is levied on the exercise by persons of certain privileges conferred by law for the creation, revision, or termination of specific legal relationships through the execution of specific instruments. It is an excise upon the privilege, opportunity or facility offered at exchanges for the transaction of the business.

While tax avoidance schemes and arrangements are not prohibited, tax laws cannot be circumvented in order to evade payment of just taxes. **To claim that time deposits evidenced by passbooks should not be subject to DST is a clear evasion of the rule on equality and uniformity in taxation that requires the imposition of DST on documents evidencing transactions of the same kind, in this particular case, on all certificates of deposits drawing interest**.

The further amendment of Section 180 of the NIRC and its renumbering as Section 179 by R.A. 9243, which was approved on February 17, 2007, *viz:*

xxx xxx xxx

does not mean that as proffered, prior to its further amendment on said date, Section 180 of the Tax Code and the NIRC time deposits for which passbooks were issued were exempted from payment of DST.

If at all, the further amendment was intended to eliminate precisely the scheme used by banks of issuing passbooks to "cloak" its time deposits as regular savings deposits...." *(Citations omitted) (Emphasis supplied)*

We note that Section 180 of the 1977 NIRC is essentially the same as Section 180 of the 1997 NIRC[3] insofar as certificates of deposits bearing interest are concerned.

In the case at bar, the Court in Division found that the subject SSD accounts which are covered by passbooks, involve deposits which may be withdrawn anytime, but the depositor gets to earn a higher rate of interest if the money is kept in the bank within the specified number of days. Applying the afore-cited ruling of the Supreme Court, such accounts are deemed to be certificates of deposit bearing interest. Therefore, the Court in Division correctly ruled that the same are subject to DST in accordance with Section 180 of the NIRC of 1997, as amended.

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[3]Unlike Section 180 of the 1977 NIRC, Section 180 of the 1997 NIRC (prior to the amendments introduced by R.A. 9243), includes bonds and deposit substitute debt instruments.

Petitioner is the party liable for DST

We shall now proceed to the pivotal issue of who should be held liable for the DST on the subject SSD accounts. Is it petitioner or TRB?

The Court in Division, in holding petitioner liable for DST on the subject SSD accounts, ruled as follows:

> "Petitioner contends that it cannot be held liable for the alleged deficiency tax because there was no merger that transpired between BOC and TRB. On the other hand, respondent counter argues that petitioner never raised the issue on merger before them.
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> We agree with respondent. A careful scrutiny of the evidence on record shows that petitioner never raised the issue of merger between BOC and TRB, which should have been its main concern in its letter of protest to protect its interest. Petitioner did not even offer as evidence the alleged letter of protest. The decision of herein respondent discussed only the issues raised in the letter of protest. **And the letter of protest itself never questioned the proper party that should be held liable for such deficiency tax. It is but a natural inclination to establish first that one is not the proper party to be liable for taxes, rather than proving that a certain transaction is not taxable if such transaction was not related to the party at all. Petitioner, during the proceedings before the BIR, is deemed to have admitted that it is the proper party addressed by respondent and its only contest is that SSDs are not taxable. Petitioner actively participated in the proceedings before the administrative body without questioning the legitimacy of the proper party of interest.**
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> The Bureau of Internal Revenue that assessed it of such liability is the proper forum to determine whether it is the proper party to be taxed. Thus, this question was resolved in the case of *Aguinaldo Industries Corporation (Fishing Nets Division) vs. Commissioner of Internal Revenue and the Court of Tax Appeals (112 SCRA 140)*, where the Supreme Court held:
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>> "To allow a litigant to assume a different posture when he comes before the court and challenge the position he had accepted at the administrative level, would be to sanction a procedure whereby the Court — which is supposed to review administrative determinations — would not review, but determine and decide for the first time, a question not raised at the administrative forum. . . This cannot be permitted, for the same reason that underlies the requirement of prior exhaustion of administrative remedies to give administrative authorities the prior opportunity to decide controversies within its competence, and in much the same way that, on the judicial level, issues not raised in the lower court cannot be raised for the first time on appeal *(Pampanga Sugar Dev. Co., Inc. v. CIR, 114 SCRA 725; Garcia v. CA, 102 SCRA 597; Matialonzo v. Servidad, 107 SCRA 726)*."

> Basic is the rule that all issues not raised in the administrative level cannot be raised for the first time on appeal."[4] *(Emphasis supplied)*

We concur with the foregoing disquisition of the Court in Division.

A review of the records of this case reveals certain inconsistencies on the part of petitioner which weaken its position. In the Petition for Review filed with the Court in Division in C.T.A. Case No. 6975 and in its Pre-trial Brief, petitioner stated that it was the one that filed the protest letter with the BIR on October 11, 2002. However, in the Joint Stipulation of Facts and Issues, petitioner indicated that TRB filed the protest letter. A perusal of the protest letter itself[5] contesting the Formal Letter of Demand and Assessment Notice issued by the BIR, shows that the same was actually filed by SGV & Co. with the BIR Large Taxpayers Service on October 11, 2002. The first paragraph of the said protest letter states:

> "This is with reference to the Formal Letter of Demand and Assessment Notice dated September 11, 2002, **received by our client, Traders Royal Bank (now Bank of Commerce)('TRB [now BOC]', for brevity),** on September 27, 2002, assessing it deficiency documentary stamp tax for taxable year 1999 in the following amounts, inclusive of interest and penalties:
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> xxx xxx xxx
>
> **On behalf of TRB [now BOC], we respectfully request** that the above-mentioned deficiency documentary stamp tax assessment be cancelled and the case be considered closed and terminated, for reasons cited hereunder." *(Emphasis supplied)*

The foregoing wordings contradict petitioner's contention that it has a separate personality from TRB. At the very least, the protest letter should have contained a clarification that petitioner and TRB continue to exist as separate corporations with distinct corporate personalities as provided in Article III, Section 1 of the Purchase and

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[4] Pages 13 to 15, Decision dated August 31, 2006, C.T.A. Case No. 6975.
[5] Pages 1271 to 1274, BIR Records.

Sale Agreement. After all, the protest letter was filed on October 11, 2002 which was already subsequent to November 9, 2001, the date of execution of the Purchase and Sale Agreement between petitioner and TRB.

However, only the following arguments were advanced in the said letter: (a) that SSD is basically a regular savings account that requires a bigger amount of opening balance and earns a higher rate of interest; (b) like the regular savings account, SSD is evidenced by a passbook and the depositor can withdraw his deposit anytime; and (c) that SSD being savings deposit accounts are not subject to documentary stamp taxes.

We also find no merit in petitioner's claim that it is grossly unfair to hold petitioner liable for the DST deficiency assessment of TRB for taxable year 1999 considering that in the Supplement (To the Purchase and Sale Agreement dated November 09, 2001),[6] TRB agreed to constitute an Escrow Fund in the amount of Fifty Million Pesos (₱50,000,000.00) to answer for all contingent claims against TRB which are excluded from the Agreement and are determined to be valid by final judgment by the proper courts within the effectivity of the Escrow Fund. The Supplement also provides that the Escrow Fund shall be effective for a period of fifteen (15) years to commence from the date of final approval of the Monetary Board of the BSP of the Agreement and any remaining balance of the Escrow Fund at the end of the 15-year period shall be immediately remitted to petitioner without need of any further approval from BSP.

In fine, We find no reversible error committed by the Court in Division that would warrant a reversal of the assailed Decision promulgated on August 31, 2006 and the Resolution dated January 8, 2007.

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[6] Dated November 9, 2001 and attached as Annex "A-1" to the Petition for Review, C.T.A. Case No. 6975, pages 26 to 29, CTA Records.

WHEREFORE, the instant petition is hereby **DISMISSED.** Accordingly, the assailed Decision and Resolution are hereby **AFFIRMED**.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
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 this Court.

ERNESTO D. ACOSTA
Presiding Justice