REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

BELLE CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 5930

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

APR 04 2002

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DECISION

This is an appeal for the declaration of nullity of Assessment Notices Nos. RE-95-IT-153-97, RE-95-CGT-154-97, RE-95-DST-155-97, issued by the respondent against herein petitioner on November 27, 1997 for deficiency income, capital gains and documentary stamp taxes amounting to P15,519,931.40, P14,881,797.52 and P99,000.00, respectively, for the taxable year ended December 31, 1995.

The facts are as hereunder stated:

Petitioner is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines (par. 1.1, Summary of Admitted Facts). It is engaged in the business of developing subdivision and land improvements, which are intended for sale to the general public (p. 343, BIR Records).

During the taxable year ended 31 December 1995, petitioner sold on various dates and to various buyers petitioner's shares of stock in The Country Club at Tagaytay Highlands, Inc. ("TCCATH"), a stock non-profit corporation. Petitioner paid the capital

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gains and documentary stamp tax due on each sale of TCCATH shares of stock. Likewise, during the same taxable year, petitioner sold condominium units at Pinecrest Village and commenced the sale of condominium units at The Villas, both projects being part of The Tagaytay Highlands Community condominium project of which petitioner is the developer (pars. 1.3 & 1.4, Summary of Admitted Facts)

For the same taxable year, petitioner filed its corporate income tax return (together with attachments thereto) which included the income from the sale of Pinecrest Village and The Villas units (par. 1.5, Summary of Admitted Facts).

On 13 August 1996, Respondent served Letter of Authority No. 143678 on petitioner authorizing the examination of its books of accounts and other accounting records for all internal revenue taxes for the period from January 1, 1995 to December 31, 1995. In the course of the examination, documents requested by the respondent were submitted by the petitioner and formed part of the BIR records (pars. 1.6 & 1.7, Summary of Admitted Facts).

On 29 January 1999, petitioner received a demand letter and the corresponding assessment notices (the "Assessment"). The assessments (including increments) cover the following (par. 1.8, Summary of Admitted Facts):

Assessment No.	Particulars of Deficiency		Amount
RE-95-IT-153-97	Income Tax		P 15,519,931.40
RE-95-CGT-154-97	Capital Gains Tax		14,881,797.52
RE-95-DST-155-97	Documentary Stamp Tax		99,000.00
		Total:	P 30,500,728.92

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The deficiency income tax assessment resulted from the following findings of the BIR examiner as stated in Exhibit 1 (BIR records, pages 341-342|), thus:

> "However, it was discovered during the course of investigation that sales allegedly reported in 1994 showed as sales in 1995, (see page 408). The transactions showed that payments for the units sold only commenced and all other formalities have been completed and transpired in 1995, hence, the same are included as an adjustment to the taxable income for 1995. The transactions were unearthed from scrutinizing and collating the taxpayer's official receipts, subsidiary ledgers for receivables and schedule of sales for the period."

Based on the said findings, the BIR examiner computed the alleged deficiency income tax (Exhibit 2, BIR records, page 335) as follows:

Sales allegedly reported in 1994 but records show
Sales transpired in 1995

Fung Ka Fun	1-0119	P 5,500,000.00
MG Holdings	1-0136	3,200,000.00
Rene Ledesma	1-0137	3,900,000.00
Elizabeth Romualdez	1-0015	3,400,000.00
Cesar Purisima/SGV	1-0033	4,700,000.00
Ricardo Po	1-0056	3,400,000.00
Rachel Remullah Shah - South Seven Realty Corp.	1-0092	5,400,000.00
Total		P 29,500,000.00
Less: Sales in 1995 Per Belle Schedule		3,100,000.00
Adjustment for 1995 Sales		P26,400,000.00
Tax due thereon		P 9,240,000.00
Surcharge		2,310,000.00
Interest 04/15/96 to 12/30/97		3,944,931.40
Compromise Penalty		25,000.00
Total Amount Due		P15,519,931.40

The alleged deficiency capital gains and documentary stamp taxes in the amounts of P14,881,797.52 and P99,000.00, respectively, represent penalties for petitioner's alleged late payment/remittance of the capital gains and documentary stamp taxes due on the sale of its shares of stock in The Country Club at Tagaytay Highlands, Inc. ("TCCATH").

On 1 March 1999, petitioner, through counsel, protested the assessment by requesting for reconsideration thereof (the "Protest") (par. 1.9, Summary of Admitted Facts). In protesting the assessment, petitioner did not question its validity for failure to state the law and the facts on which it is made (par. 2.1, Stipulation of Facts). Instead, petitioner objected on the grounds relied upon by the BIR examiner in coming up with the assessment (pp. 524-530, BIR Records).

In a letter dated 28 April 1999 which was received by the respondent on the next day, petitioner considered the documents annexed to the protest and those submitted to the BIR, which formed part of the BIR records, as constituting all relevant supporting documents of the protest in compliance with Section 228 of the Tax Code (par. 1.10, Summary of Admitted Facts).

There being no action on the part of the respondent, the instant petition was filed on September 24, 1999.

Respondent filed his Answer on November 18, 1999, claiming by way of Special and Affirmative Defenses that:

> "5. In its protest, petitioner did not question the validity of the assessments for failure to state the law and the facts on which they are made. Since it did not raise such issue in the administrative level, it cannot raise the same for the first time on appeal (*Aguinaldo Industries Corp. vs. Commissioner of Internal Revenue, 112 SCRA 136*).
>
> 6. In its protest, petitioner cited and quoted from the report of investigation of the revenue examiners on which the assessments

are based, thereby implying that petitioner was aware of the law and the facts on which the assessments are made. Hence, the requirement under Section 228 of the Tax Code that the taxpayer shall be informed of the law and the facts on which the assessment is made, being procedural in nature, is deemed to have been complied with.

7. Even prior to the issuance of the assessments, in a letter dated May 14. 1997, petitioner had already commented on the findings of the revenue examiners on which the assessments are based, thereby implying that it was aware of the law and the facts on which the assessments are made.

8. Investigation disclosed that for income tax purposes, petitioner reported sales in 1994 which actually transpired in 1995. Hence, said sales should be included as adjustments to taxable income in 1995.

9. Investigation also disclosed that the capital gains tax due on the capital gains realized by petitioner from the disposal of shares in The Country Club at Tagaytay Highlands, Inc. and the corresponding documentary stamp taxes thereon were not paid on time, hence, subject to surcharge and interest.

10. The assessments were issued in accordance with law and regulations.

11. All presumptions are in favor of the correctness of tax assessments."

The issues we are tasked to resolve have been stipulated by the parties to be as follows:

1. Whether or not petitioner can raise before this Honorable Court the issue on the validity of the assessment for failure to state the law and the facts on which it is made;

2. Whether or not the requirement under Section 228 of the Tax Code that the taxpayer shall be informed of the law and the facts on which the assessment is made, is deemed to have been complied with by petitioner's actual knowledge of the basis of the assessment;

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3. Whether the assessments dated November 27, 1997 are null and void for having been issued without stating the facts and the law on which the assessments are based as required by Section 228 of the Tax Reform Act of 1997;

4. Whether the deficiency income tax assessment of P15,519,931.40 is valid;

5. Whether the capital gains tax and documentary stamp tax on the sale of TCCATH shares were timely paid.

With reference to the first issue, respondent argues that in protesting the assessment, petitioner did not question its validity for failure to state the law and the facts on which it was made, which fact was admitted by the latter in their Joint Stipulation of Facts. Citing the case of *Aguinaldo Industries Corporation vs. Commissioner of Internal Revenue*, supra, respondent pointed out that since the said issue was not raised in the administrative level, the same cannot be raised for the first time on appeal before this Court.

Petitioner, on its part, asserts that it can still raise the aforesaid issue because it is neither prohibited by the Tax Reform Act of 1997 nor by Revenue Regulations No. 12-99 which implements the provisions of the Tax Reform Act of 1997.

We agree with the respondent.

"It is a rule that issues not properly brought and ventilated below may not be raised for the first time on appeal" (*Casolita, Sr. vs. Court of Appeals*, 275 SCRA 257). Moreover, "(i)t is well-settled that points of law, theories and arguments not brought to the attention of the trial court need not be, and ordinarily will not be considered by a reviewing court, as they cannot be raised for the first time on appeal. Allowing a party to change horses in midstream, as it were, is to run roughshod over the basic principles of

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fair play, justice and due process" (*San Juan Structural and Steel Fabricators, Inc. vs. Court of Appeals*, 296 SCRA 631).

Assuming arguendo that petitioner may raise said issue for the first time in this Court, we believe that petitioner was fully informed of the law and the facts on which the assessment is made thus answering the second issue in the affirmative.

It bears emphasis that the purpose of the aforesaid requirement is to give the taxpayer the opportunity to refute the findings of the examiner and give a more accurate and detailed explanation regarding the proposed assessment(s). As correctly pointed out by respondent, as early as May 14, 1997, which is prior to the issuance of the subject assessments, petitioner already submitted its comments regarding two issues raised by the revenue examiners: first, the alleged understatement of 1995 sales of Pinecrest Village units by P7.4 million, and second, the reckoning date for the payment of capital gains tax on sales of shares and the documentary stamp tax thereon (pp. 439-442, BIR Records). It is to be noted that these issues constitute the very bases of the assessments which were subsequently issued. Likewise, in its protest letter dated March 1, 1999, petitioner was able to explain in detail and submit documents to support its claim that the assessments were erroneous. Verily, at the time the assessments were issued, petitioner knew very well the law and the facts on which they were based. The purpose of the law having been served, Section 228 of the Tax Code may be deemed to have been complied with.

Since we rule that by petitioner's actual knowledge of the bases of the assessments, the requirement under Section 228 of the Tax Code that 'the taxpayer be informed of the law and the facts on which the assessment is made' is deemed to have been complied, it follows then that the assessments dated November 27, 1997 are not null and void, even if the same failed to state the law and the facts on which they were based.

We proceed to the fourth issue.

Petitioner alleged that the questioned 1995 sales in the amount of P26,400,000.00 consisted of the sales returns in 1995 in the amount of P7,400,000.00 and sales amounting to P19,000,000.00 which were already reported in 1994.

Records show that the amount of P7,400,000.00 actually pertains to petitioner's reported sales in 1994 which were subsequently returned in 1995. As can be seen in Exhibits K and Z, Cecilio K. Pedro and Manuel V. Paterno each originally bought from petitioner in 1994 a Pinecrest unit with a contract price of P5,400,000.00 and P5,500,000.00, respectively. Since the initial payments made in 1994 by the said buyers exceeded 25% of the contract prices of the Pinecrest units (Exhibits L to P & AA to FF), petitioner considered the transactions as deferred payment sales and reported the entire contract prices of P5,400,000.00 and P5,500,000.00 as sales in 1994 even though the same were not yet fully paid.(Exhibits TT-1, TT-2, TT-7 & A-2-1). This is allowed under Sections 175 and 177 of Revenue Regulations No. 2 regarding sale of real property involving deferred payments. However, per letter agreements with petitioner dated October 19, 1995 and December 15, 1995 (Exhibits Y and SS), the two Pinecrest units originally purchased by Cecilio K. Pedro and Manuel V. Paterno were changed to other units. On the other hand, the change in the unit bought by Mr. Cecilio K. Pedro from a Pinecrest unit with a contract price of P5,400,000.00 to another Pinecrest unit with a lower contract price of P3,500,000.00 resulted to a decrease of P1,900,000.00 in

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petitioner's 1995 sales of Pinecrest units since petitioner had fully reported in 1994 the original contract price of P5,400,000.00. The change in the unit purchased by Mr. Manuel V. Paterno from a Pinecrest unit with a contract price of P5,500,000.00 to a The Villas unit with a higher contract price of P8,500,000.00 resulted to a decrease of P5,500,000.00 in petitioner's 1995 sales of Pinecrest units since petitioner had fully reported in 1994 the original contract price of P5,500,00.00. Thus, the total reduction in petitioner's 1995 sales of Pinecrest units amounted to P7,400,000.00 (P1,900,000.00 plus P5,500,000.00). It should be noted though that the new contract price of Mr. Manuel V. Paterno's The Villas unit of P8,500,000.00 was fully included by petitioner in its 1995 sales of The Villas units since Mr. Manuel V. Paterno's total payments prior to the change in unit totalled to P4,950,000.00 (Exhibits AA to FF & GG to RR) which is more than 25% of P8,500,000.00.

Although the amount of P7,400,000.00 was previously reported as sales in 1994, the same can be properly treated as sales returns in 1995 since the change in units occurred in 1995. Sales returns are allowed as deductions from gross income for income tax purposes. This can be deduced from Section 100(3) of the 1995 Tax Code which allows the value of goods sold and subsequently returned to be deducted from the gross sales or receipts for the quarter in which a refund is made or a credit memorandum or refund is issued.

As to the rest of the sales amounting to P19,000,000.00, which forms part of the subject deficiency income tax assessment, petitioner failed to sufficiently prove by

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documentary evidence its allegation that it reported the said amount in 1994 so that it was no longer proper to include it in 1995.

Petitioner claimed that the sales of P19,000,000.00 were made to the following:

	Amount
Fung Kan Fun	P 5,500,000.00
Cesar Purisima/SGV	4,700,000.00
Ricardo Po	3,400,000.00
Rachel Remullah Shah- South Seven Realty Corporation	5,400,000.00
Total:	P19,000,000.00

According to petitioner, these sales transactions were recorded as sales in 1994 because of verbal agreements with the petitioner that the units assigned to them were considered sold. Petitioner alleged that they have close business relationships with these buyers such that their verbal agreements of sale could be cast in stone even without confirmation in writing. Thus, the execution of contracts in 1995 was merely confirmatory of the verbal agreements in 1994.

To prove that it reported the sales amount of P19,000,000.00 in 1994, petitioner submitted its 1994 income tax return (Exhibit A) and its 1994 Analysis of Sales – Pinecrest Village (Exhibit TT), both showing the amount of P563,200,000.00 (Exhibits A-2-1 & TT-7) as gross sales. The BIR examiner, however, stated in his report (Exhibit 1) that the payment for the said units started only in 1995 and all other formalities were completed in 1995. Thus, the amount of P19,000,000.00 should be reported as sales in 1995.

A mere schedule reconciling the total gross sales of P563,200,000.00 reflected in the 1994 ITR is not sufficient proof that Petitioner reported in the said year the sales

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amounting to P19,000,000.00. The figures indicated in the 1994 Analysis of Sales – Pinecrest Village should have been corroborated by other documents such as official receipts evidencing payments for the said units with the corresponding names of the buyers. It seems illogical to report such a huge amount of income and pay the corresponding tax due thereon without any documents evidencing actual sale or payment for the said units. It is important to note that the 1994 Notes to Financial Statements of Petitioner (Exhibit A-13) under the item "Revenue Recognition" provides that "For income tax purposes, full revenue recognition is applied when at least 25% of the selling price has been collected during the year, otherwise, the installment method is applied." Clearly, in order for petitioner to fully recognize the full contract price of P19,000,000.00 as sales in 1994, it should have received at least 25% of the selling price or the amount of P4,750,000.00. Documents evidencing actual receipt of the amount of P4,750,000.00 in 1994 should have been presented. Petitioner failed to do so. Thus, this Court believes that petitioner actually earned the amount of P19,000,000.00 only in 1995 and petitioner should be assessed for deficiency income tax in the amount of P11,151,655.18 on the undeclared 1995 sales of P19,000,000.00, computed as follows:

Deficiency Income Tax	
Undeclared 1995 sales	P 19,000,000.00
Tax due thereon (35%)	P 6,650,000.00
Surcharge at 25%	1,662,500.00
Interest at 20% from 04/15/96 to 12/30/97 (.341552503)	2,839,155.18
Total Amount Due	P 11,151,655.18

Finally, we rule on the fifth issue.

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Section 7 of Revenue Regulations No. 2-82 provides for the time of payment of capital gains tax on sale of shares of stock not traded through any local stock exchange, thus:

> **SECTION 7**. *Payment of Tax and Manner of Filing Returns.* — The tax imposed by Section 5 of these Regulations shall be collected as follows:
>
> (a) *Payment of tax.*—
>
> xxx xxx xxx
>
> (2) *Tax on gains on sale of shares of stock not traded through any local stock exchange.* — The tax on net capital gains shall be paid by the seller on a per transaction basis upon filing the required return <u>within 30 days following each sale or other disposition of shares of stock.</u>
>
> (b) *Manner of Filing Returns.* —
>
> xxx xxx xxx
>
> (2) On sale of shares of stock not traded through any local stock exchange. — Taxpayers subject to the net capital gains tax shall, within 30 days following each sale or other disposition of shares of stock, file in duplicate a capital gains tax return on BIR form No. ______ showing, among others, the name of seller and buyer; amount realized (selling price or fair market value of other property received) and contract price; cost or adjusted basis; date of acquisition; sale or disposition. <u>The return shall be accompanied with a copy of the instrument of sale</u>. "(Underlining supplied).

The foregoing revenue regulation also provides that the capital gains tax return is to be accompanied by a copy of the instrument of sale. It then follows, as correctly pointed out by petitioner, that the capital gains tax accrues only upon the consummation of the sale, i.e., at the time of the execution of the contract of sale and should be paid within 30 days from the said date. In the case at bar, the BIR records (pp. 401 & 404) show that only the one share sold to Eduardo Lucero and one share sold to Evergisto Macatulad

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have corresponding Deeds of Assignment which were executed on July 29, 1996. The capital gains tax on the said shares in the total amount of P120,000.00 was timely paid on July 31, 1996 (BIR records, pages 402 & 405). However, as to the sale of the remaining 527 TCCATH shares, no Deeds of Assignment were presented by petitioner. The Court, therefore, could not ascertain with certainty whether there was timely payment of the capital gains tax due thereon. Consequently, petitioner should be assessed for deficiency capital gains tax of P14,812,324.90 on the sale of 527 TCCATH shares.

Deficiency Capital Gains Tax			
On the sale of 529 TCCATH shares (Exhibit 3)			
Surcharge at 25%			P 8,593,750.00
Interest at 20%			6,263,047.52
			P 14,856,797.52
Less: Surcharge on 2 shares sold to			
Eduardo Lucero	(P60,000.00 x 25%)	P 15,000.00	
Evergisto Macatulad	(P60,000.00 x 25%)	15,000.00	30,000.00
Interest on 2 shares sold to			
Eduardo Lucero	(P75,000.00 x .09648413)	P 7,236.31	
Evergisto Macatulad	(P75,000.00 x .09648413)	7,236.31	14,472.62
Amount Due			P 14,812,324.90

Finally, as to the deficiency documentary stamp tax, Sections 3 and 4 of Revenue Regulations No. 9-94 provides that the documentary stamp tax shall be paid at the time the act is done or transaction had, i.e., at the same time the document was executed, thus:

> **SECTION 4**. *Time and Manner of Payment of Documentary Stamp Tax.* — x x x
>
> If, however, the amount of the documentary stamp tax due on the taxable document is ten pesos (P10.00) or more, the documentary stamp tax shall be paid by the taxpayer at the time the act is done or transaction had, x x x .
>
> **SECTION 3**. *Definition of Terms.* — For purposes of these Regulations, the following terms shall mean:

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x x x x x x x x x

(i) " At the same time such act is done or transaction had" — means on the same date the document was executed, i.e., made, signed, issued, accepted or transferred."

As stated earlier, the two shares sold to Eduardo Lucero and Evergisto Macatulad have corresponding Deeds of Assignment which were executed on July 29, 1996. Based on RR 9-94, the documentary stamp tax due of P1,500.00 should be paid on the same day, July 29, 1996. However, per BIR certifications (BIR records, pages 403 & 406), the documentary stamp tax of P1,500.00 was paid only on July 31, 1996, which is beyond two days after July 29, 1996. Thus, there was late payment of documentary stamp tax on the two shares. Since petitioner failed to submit the Deeds of Assignment as to the remaining 527 shares, Petitioner should be made liable to pay the full documentary stamp tax assessment of P99,000.00.

In sum, petitioner should be held liable for deficiency income tax, capital gains tax and documentary stamp tax in the total amount of P26,062,980.08 computed as follows:

Deficiency Tax		Amount
Income Tax		P 11,151,655.18
Capital Gains Tax		14,812,324.90
Documentary Stamp Tax		99,000.00
	Total:	P 26,062,980.08

In view, however, of the absence of an agreement freely entered into by and between petitioner and respondent, this Court cancels the compromise penalty imposed by respondent **(Industrial Inspection (Int'l.) Incorporated vs. Liwayway Vinzons Chato in her capacity as The Commissioner of the Bureau of Internal Revenue,**

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CTA Case No. 5152, May 19, 1997 citing Collector of Internal Revenue vs. UST, GR-L-11274 & L-11280, November 28, 1958 and M.R. Arick vs. Comm., CTA Case No. 1679, May 30, 1969).

In conclusion, petitioner failed to satisfactorily refute the findings of the revenue examiners, hence the presumption of correctness of the assessments subsists. Assessments are prima facie presumed correct and made in good faith. The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties an assessment will not be disturbed. All presumptions are in favor of the assessments (**Bonifacia Sy Po vs. CTA and Commissioner, G.R. No. 81446, August 18, 1988**). Failure to present proof of error in the assessment will justify judicial affirmance of said assessment (**Delta Motor Co. vs. Commissioner, CTA Case No. 3782, May 21, 1986**).

WHEREFORE, in view of all the foregoing, the instant Petition for Review is hereby **DENIED** for lack of merit. Accordingly, petitioner is **ORDERED** to **PAY** to the respondent the amount of P26,062,980.08 representing deficiency income, capital gains and documentary stamp taxes for taxable year ended December 31, 1995, inclusive of surcharge and deficiency interest. In addition, petitioner is also **ORDERED** to **PAY** 20% delinquency interest computed from March 1, 1999 until full payment thereof pursuant to Section 249 (a)(c)(3) of the 1995 Tax Code.

SO ORDERED.

AMANCIO Q. SAGA
Associate Judge

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WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

JUANITO C. CASTAÑEDA, JR.
Associate Judge

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge

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