Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SECOND DIVISION

CAPITOL STEEL CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 9240

Members:
CASTAÑEDA, JR., *Chairperson,*
CASANOVA, *and*
MANAHAN, *JJ.*

Promulgated:
OCT 2 6 2017
11:30 a.m.

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DECISION

CASANOVA, J.:

This is a Petition for Review[1] filed on January 14, 2016 by petitioner Capitol Steel Corporation against respondent Commissioner of Internal Revenue seeking the reversal of the Revised Final Decision on Disputed Assessment (FDDA) imposing upon petitioner capital gains tax in the amount of ₱18,407,314.17 and documentary stamp tax (DST) in the amount of ₱4,639,238.01 in relation to the expropriation of its properties located in the Municipality of Tagoloan, Misamis Oriental for the calendar year (CY) 2008.

Petitioner is a corporation organized and existing under the laws of the Philippines, with principal office address at No. 300 Quirino Highway, Baesa, Quezon City.[2]

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) who has the power to decide disputed

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[1] Docket, pp. 10-37.
[2] Par. 1, Stipulated Facts, Joint Stipulation of Facts and Issues (JSFI), Docket, p. 139.

assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto or other matters arising under the National Internal Revenue Code (NIRC) or other laws or portions thereof administered by the BIR. He holds office at 5th Floor, BIR Building, Diliman, Quezon City.

On June 10, 2009, petitioner received the Letter of Authority (LOA) No. 2008-00033456[3] dated June 9, 2009 issued by Zenaida G. Garcia, Officer-in-Charge, Assistant Commissioner of Internal Revenue (OIC-ACIR) of the Large Taxpayers Service authorizing Zenaida Paz, Ma. Salud Maddela, Rogelio Gonzales and Esterlina Aloy of the Large Taxpayers Audit and Investigation Division I to examine petitioner's books of accounts and other accounting records for all internal revenue taxes for the period from January 1, 2008 to December 31, 2008.

On January 31, 2011, petitioner received a Preliminary Assessment Notice[4] (PAN) dated January 4, 2011 signed by OIC-ACIR Zenaida G. Garcia informing petitioner of its alleged tax deficiencies for income tax, value-added tax (VAT), expanded withholding tax (EWT), compensation withholding tax, fringe benefit tax, capital gains tax and DST.

On April 25, 2011, petitioner received a Formal Letter of Demand[5] (FLD) dated April 11, 2011 for deficiency income tax, VAT, EWT, compensation withholding tax, fringe benefit tax, capital gains tax and DST.

On May 24, 2011, petitioner filed a protest to the FLD through a letter[6] dated May 23, 2011.

On June 3, 2015, petitioner received the FDDA[7] issued by the OIC-Assistant Commissioner of Large Taxpayers Service, Nestor S. Valeroso, assessing it for deficiency income tax, VAT, compensation withholding tax, fringe benefit tax, capital gains tax and DST. Petitioner filed for reconsideration[8] addressed to OIC-Assistant Commissioner of Large Taxpayers Service, Nestor S. Valeroso, on July

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[3] Exhibit "P-1".
[4] Exhibit "P-2".
[5] Exhibit "P-3".
[6] Exhibit "P-4".
[7] Exhibit "P-5".
[8] Exhibit "P-6".

2, 2015 on FDDA. On October 30, 2015, petitioner submitted a supplemental explanation/reconsideration through a letter[9] dated October 29, 2015.

On December 15, 2015, petitioner received an undated Revised FDDA[10] issued by OIC-Assistant Commissioner of Large Taxpayers Service, Nestor S. Valeroso, assessing it for capital gains tax in the amount of ₱18,407,314.17 and DST in the amount of ₱4,639,238.01.

The BIR assessed petitioner of capital gains tax on the ₱116,563,500.00 paid by Phividec Industrial Authority pursuant to Section 4 of Republic Act (R.A.) No. 8974 for the expropriation of the latter's property located in the Municipality of Tagoloan, Misamis Oriental. Said amount, initially deposited in bank escrow accounts, was later withdrawn by petitioner in 2008.[11]

Petitioner filed the present Petition for Review on January 14, 2016. Respondent filed his Answer[12] on April 5, 2016, interposing the following Special and Affirmative Defenses:

> **"SPECIAL AND AFFIRMATIVE DEFENSES**
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> 4. Respondent hereby reiterates and re-pleads the preceding paragraphs of this answer as part of her Special and Affirmative Defenses.
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> **THE ASSESSMENT HAS ATTAINED FINALITY, BY OPERATION OF LAW**
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> 5. It is most respectfully submitted that the assessment has attained finality, by operation of law. It cannot be overemphasized that a taxpayer's right to contest assessments, particularly the right to appeal to the Court of Tax Appeals, may be waived or lost as in this case.
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> 6. Pursuant to Section 3.1.4 of Revenue Regulations No. 18-2013, in relation to Section 228 of the

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[9] Exhibit "P-7".
[10] Exhibit "P-8".
[11] Supplemental Joint Stipulation of Facts, Docket, pp. 177-178.
[12] Docket, pp. 96-102.

1997 National Internal Revenue Code, as amended, 'if the protest is denied, in whole or in part, **by the Commissioner's duly authorized representative**, the taxpayer may *either*: (i) appeal to the Court of Tax Appeals (CTA) within thirty (30) days from date of receipt of the said decision; or (ii) **elevate his protest through request for reconsideration to the Commissioner** within thirty (30) days from date of receipt of the said decision' (emphasis supplied).

7. In the instant case, petitioner's protest dated July 2, 2015 through a request for reconsideration was addressed, *not* to respondent Commissioner, but to the Assistant Commissioner of the Large Taxpayers Service.

8. Clearly, from receipt of the Final Decision on Disputed Assessment on June 3, 2015, petitioner had the option to either appeal before the Honorable Court, or elevate his protest to respondent Commissioner. Petitioner's subsequent recourse to elevate its protest/request for reconsideration to the Assistant Commissioner is not sanctioned by pertinent rules and regulations by the BIR. Thus, the assessment has attained finality, by operation of law.

9. Moreover, as held in *Fishwealth Canning Corporation vs. CIR, G.R. No. 179343, January 21, 2010,* **the filing of a request for reconsideration does not toll the 30-day period to appeal to the Honorable Court.** The pertinent portions of the *Fishwealth Case* are reproduced, as follows:

> Section 228 of the 1997 Tax Code provides that an assessment x x x 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 the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable. (underscoring supplied)
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> **In the case at bar, petitioner's administrative protest was denied by Final Decision on Disputed Assessment dated August 2, 2005 issued by respondent and which petitioner received on August 4, 2005. Under the above-quoted Section 228 of the 1997 Tax Code, petitioner had 30 days to appeal respondent's denial of its protest to the CTA. (underscored in the original)**
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> Since petitioner received the denial of its administrative protest on August 4, 2005, it had until September 3, 2005 to file a petition for review before the CTA Division. It filed one, however, on October 20, 2005, hence, it was filed out of time. **For a motion for reconsideration of the denial of the administrative protest does not toll the 30-day period to appeal to the CTA.**' (Emphases supplied)

Therefore, even assuming that petitioner's filing of a request for reconsideration was in order, still the petition for review was filed out of time considering that the 30-day period to appeal before the Honorable Court should have been reckoned from the receipt of the FDDA on June 3, 2015.

10. Applying the above-cited case, petitioner had until **July 3, 2015** within which to appeal before the Honorable CTA, notwithstanding the filing of the request

for reconsideration. Thus, the instant petition filed only on January 14, 2016 was filed out of time.

11. From the foregoing, respondent respectfully submits that the Honorable Court has no jurisdiction over the instant petition. It is apparent from the admissions in the petition that the assessment subject of this case has long become final, executory, and demandable. Being such, the assessments are not subject to judicial scrutiny and beyond the jurisdiction of the Honorable Court. Indubitably, **when a court has no jurisdiction over the subject matter, the only power it has is to dismiss the action.**

PETITIONER IS LIABLE FOR THE ASSESSED CAPITAL GAINS TAX AND DOCUMENTARY STAMP TAX.

12. Without conceding to the Honorable Court's jurisdiction to rule on the assessment, respondent submits that 'when assessments are assailed, the burden of proof is upon the complaining party. It is incumbent upon the complaining party to show that the assessment was erroneous, in order to relieve himself from it.'

13. As found by the BIR Examiner, the assessed Capital Gains Tax was derived from petitioner's involuntary sale of its land through expropriation by Phividec Industrial Authority for the actual consideration of Php 116,563,500.00. In 2008, petitioner withdrew the said consideration as reflected in its notes to FS note no. 10 *page 320-321.*

14. In addition, the assessment notices received by petitioner satisfactorily informed it of the legal bases of the assessment under Revenue Memorandum Order (RMO) No. 41-91, which states that *'When the State or any of its instrumentalities in the exercise of its power of eminent domain, acquires through expropriation proceedings, private real property for public use upon payment of 'just compensation' to the owner. Both capital gains tax and documentary stamp tax shall be computed*

based on said 'just compensation' as actual consideration'. (Refer to BIR Rulings No. 476-13 and 388-11, and Excerpt of RR No. 07-03 on pages 1218-1228).

15. Considering that petitioner is liable for the assessed CGT and DST, and there being no evidence or proof of payment of capital gains tax presented or submitted by petitioner pursuant to Section 27 (D) (5) of the Tax Code - *Capital Gains Realized from sales, Exchange or Disposition of Lands and/or Buildings of Domestic Corporation,* it is most respectfully submitted that the assessment is in order.

16. To recapitulate, failure to present proof of error in the assessment will justify judicial affirmation of said assessment *(Delta Motors Co. vs. Commissioner, CTA Case No. 3782, 21 May 1986; Commissioner of Internal Revenue vs. Court of Appeals, et al., G.R. Nos. 104151 and 105563, 10 March 1995).*"

The case was set[13] for Pre-Trial Conference on May 12, 2016. Petitioner's Pre-Trial Brief[14] was filed on May 6, 2016; while Respondent's Pre-Trial Brief[15] was filed on May 10, 2016. The parties filed their Joint Stipulation of Facts and Issues[16] on June 23, 2016, which was approved by the Court in its Pre-Trial Order[17] dated June 28, 2016.

Petitioner presented witnesses, Ms. Dorothy Vallesteros and Ms. Vanessa Bautista during the hearing on August 1, 2016.[18] Thereafter, petitioner filed its Formal Offer of Evidence[19] on September 14, 2016, offering Exhibits "P-1", "P-2", "P-3", "P-4", "P-5", "P-6", "P-7", "P-8", "P-9" and "P-10", as its documentary evidence. Respondent filed his Comment (Re: Petitioner's Formal Offer of Evidence)[20] on September 22, 2016.

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[13] Notice of Pre-Trial Conference, Docket, pp. 103-104.
[14] Docket, pp. 105-108.
[15] Docket, pp. 115-121.
[16] Docket, pp. 139-143.
[17] Docket, pp. 146-149.
[18] Minutes of the hearing on August 1, 2016, Docket, p. 151.
[19] Docket, pp. 156-160.
[20] Docket, pp. 163-165.

In the Resolution[21] dated October 5, 2016, the Court admitted Exhibits "P-1", "P-2", "P-3", "P-4", "P-5", "P-6", "P-7", "P-8", "P-9" and "P-10". For his part, counsel for respondent manifested that he will no longer present evidence during the hearing on October 5, 2016 but instead the parties will be submitting a Supplemental Stipulation of Facts.[22] Hence, Supplemental Stipulation of Facts[23] was filed on October 11, 2016, which was approved by the Court in its Resolution[24] dated October 14, 2016.

Memorandum for the Petitioner[25] was filed on November 17, 2016, while respondent's Memorandum[26] was filed on November 21, 2016. Hence, the case was submitted for decision.[27]

The parties submitted the following issues[28] for the Court's resolution:

1. Whether or not the Honorable Court has jurisdiction in this case; and

2. Whether or not Capitol Steel is liable to pay the assessed capital gains tax and documentary stamp tax subject of this case.

The Court has jurisdiction to entertain the present Petition for Review since the assessment has not yet attained finality.

Respondent contends that the assessment has attained finality by operation of law.

Section 228 of the NIRC of 1997, as amended, governs the periods in filing an administrative protest, as follows:

[21] Docket, pp. 175-176.
[22] Minutes of the hearing on October 5, 2016, Docket, p. 172.
[23] Docket, pp. 177-178.
[24] Docket, p. 180.
[25] Docket, pp. 181-209.
[26] Docket, pp. 210-222.
[27] Resolution dated November 24, 2016, Docket, p. 223.
[28] JSFI, Docket, pp. 139-140.

> "SEC. 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 xxx
>
> xxx xxx xxx
>
> 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."

In this regard, Revenue Regulations (RR) No. 12-99[29] provides:

> "xxx xxx xxx
>
> SECTION 3. Due Process Requirement in the Issuance of a Deficiency Tax Assessment. —
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> xxx xxx xxx

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[29] Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extra-Judicial Settlement of a Taxpayer's Criminal Violation of the Code Through Payment of a Suggested Compromise Penalty. Issued on September 6, 1999.

3.1.4 Formal Letter of Demand and Assessment Notice. — The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void (see illustration in ANNEX B hereof). The same shall be sent to the taxpayer only by registered mail or by personal delivery. If sent by personal delivery, the taxpayer or his duly authorized representative shall acknowledge receipt thereof in the duplicate copy of the letter of demand, showing the following: (a) His name; (b) signature; (c) designation and authority to act for and in behalf of the taxpayer, if acknowledged received by a person other than the taxpayer himself; and (d) date of receipt thereof.

3.1.5 Disputed Assessment. — The taxpayer or his duly authorized representative may protest administratively against the aforesaid formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof. If there are several issues involved in the formal letter of demand and assessment notice but the taxpayer only disputes or protests against the validity of some of the issues raised, the taxpayer shall be required to pay the deficiency tax or taxes attributable to the undisputed issues, in which case, a collection letter shall be issued to the taxpayer calling for payment of the said deficiency tax, inclusive of the applicable surcharge and/or interest. No action shall be taken on the taxpayer's disputed issues until the taxpayer has paid the deficiency tax or taxes attributable to the said undisputed issues. The prescriptive period for assessment or collection of the tax or taxes attributable to the disputed issues shall be suspended.

The taxpayer shall state the facts, the applicable law, rules and regulations, or jurisprudence on which his protest is based, otherwise, his protest shall be considered void and without force and effect. If there are several issues involved in the disputed assessment and the taxpayer fails to state the facts, the applicable law, rules and regulations, or jurisprudence in support of his protest against some of the several issues on which the assessment is based, the same shall be considered undisputed issue or issues, in which case, the taxpayer shall be required to pay the corresponding deficiency tax or taxes attributable thereto.

The taxpayer shall submit the required documents in support of his protest within sixty (60) days from date of filing of his letter of protest, otherwise, the assessment shall become final, executory and demandable. The phrase 'submit the required documents' includes submission or presentation of the pertinent documents for scrutiny and evaluation by the Revenue Officer conducting the audit. The said Revenue Officer shall state this fact in his report of investigation.

If the taxpayer fails to file a valid protest against the formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof, the assessment shall become final, executory and demandable.

If the protest is denied, in whole or in part, by the Commissioner, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from date of receipt of the said decision, otherwise, the assessment shall become final, executory and demandable.

In general, if the protest is denied, in whole or in part, by the Commissioner or his duly authorized representative, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from date of receipt of the said decision, otherwise, the assessment shall become final, executory and demandable: Provided, however, that if the taxpayer

elevates his protest to the Commissioner within thirty (30) days from date of receipt of the final <u>decision</u> of the Commissioner's duly authorized representative, the latter's decision shall not be considered final, executory and demandable, in which case, the protest shall be decided by the Commissioner.

If the Commissioner or his duly authorized representative fails to act on the taxpayer's protest within one hundred eighty (180) days from date of submission, by the taxpayer, of the required documents in support of his protest, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from the lapse of the said 180-day period, otherwise, the assessment shall become final, executory and demandable."

In the case of *Philippine Amusement and Gaming Corporation vs. Bureau of Internal Revenue, at al.*[30], the Supreme Court held that:

"Section 3.1.5 of Revenue Regulations No. 12-99, implementing Section 228 above, provides:

3.1.5. Disputed Assessment. - The taxpayer or his duly authorized representative may protest administratively against the aforesaid formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof.xxx.

xxx xxx xxx

If the taxpayer fails to file a valid protest against the formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof, the assessment shall become final, executory and demandable.

If the protest is denied, in whole or in part, by the Commissioner, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from the date of receipt of

[30] G.R. No. 208731, January 27, 2016.

the said decision, otherwise, the assessment shall become final, executory and demandable.

In general, if the protest is denied, in whole or in part, by the Commissioner or his duly authorized representative, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from date of receipt of the said decision, otherwise, the assessment shall become final executory and demandable: Provided, however, that if the taxpayer elevates his protest to the Commissioner within thirty (30) days from date of receipt of the final decision of the Commissioner's duly authorized representative, the latter's decision shall not be considered final, executory and demandable, in which case, the protest shall be decided by the Commissioner.

If the Commissioner or his duly authorized representative fails to act on the taxpayer's protest within one hundred eighty (180) days from date of submission, by the taxpayer, of the required documents in support of his protest, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from the lapse of the said 180-day period, otherwise the assessment shall become final, executory and demandable.

Following the *verba legis* doctrine, the law must be applied exactly as worded since it is clear, plain, and unequivocal. A textual reading of Section 3.1.5 of RR No. 12-99 gives a protesting taxpayer only three options:

1. If the protest is wholly or partially denied by the CIR or his authorized representative, then the taxpayer may appeal to the CTA within 30 days from receipt of the whole or partial denial of the protest.

2. If the protest is wholly or partially denied by the CIR's authorized representative, then the taxpayer may appeal to the CIR within 30 days from receipt of the whole or partial denial of the protest.

3. If the CIR or his authorized representative failed to act upon the protest within 180 days from submission of the required supporting documents,

> then the taxpayer may appeal to the CTA within 30 days from the lapse of the 180-day period."

Moreover, Section 3.1.4 of RR No. 18-2013[31] provides that "if the protest is denied, in whole or in part, by the Commissioner's duly authorized representative, the taxpayer may either: (i) appeal to the Court of Tax Appeals (CTA) within thirty (30) days from date of receipt of the said decision; or (ii) elevate his protest through request for reconsideration to the Commissioner within thirty (30) days from date of receipt of the said decision".

It must be stressed that if the protest is denied, in whole or in part, by the **Commissioner's duly authorized representative**, the taxpayer may either: (a) appeal to the Court of Tax Appeals (CTA) within thirty (30) days from date of receipt of the said **decision**; or (b) elevate his protest through request for reconsideration to the Commissioner within thirty (30) days from date of receipt of the **decision** of the Commissioner's duly authorized representative.

In this case, petitioner received the FDDA **signed by the OIC-Assistant Commissioner** assessing it for deficiency income tax, VAT, compensation withholding tax, fringe benefit tax, capital gains tax and DST on June 3, 2015. Hence, the FDDA was considered to be issued by the Commissioner's duly authorized representative. However, petitioner sought reconsideration of the FDDA issued by the OIC-Assistant Commissioner which led to the latter's issuance of the Revised FDDA. Therefore, it is the Revised FDDA signed by the OIC-Assistant Commissioner which is considered to be the **decision** of the Commissioner's duly authorized representative which may either be: appealed to the CTA or protested through request for reconsideration to the Commissioner, both within thirty (30) days from date of receipt of the Revised FDDA.

Thereafter, petitioner received the Revised FDDA assessing it for capital gains tax in the amount of ₱18,407,314.17 and DST in the amount of ₱4,639,238.01 on **December 15, 2015**. Counting thirty (30) days from December 15, 2015, petitioner had until January 14, 2016 within which to file Petition for Review to the CTA or (b) request for reconsideration to the Commissioner. Petitioner chose to file a Petition for Review to the Court on January 14, 2016.

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[31] Amending Certain Sections of Revenue Regulations No. 12-99 Relative to the Due Process Requirement in the Issuance of a Deficiency Tax Assessment, November 28, 2013.

Given that the present Petition for Review was filed on January 14, 2016, the filing thereof is well within the thirty (30)-day reglementary period provided in Section 228 of the NIRC of 1997, as amended, in relation to Section 3.1.5 of RR No. 12-99.

Accordingly, the tax assessment cannot be considered as final, executory and demandable; and the petitioner was correct in filing the present Petition for Review with the Court, which in turn, has jurisdiction to entertain the same.

The Court shall now determine the propriety of the deficiency tax assessments against petitioner.

Capitol Steel is <u>not</u> liable to pay the assessed capital gains tax and documentary stamp tax

The imposition of capital gains tax is found in Section 24(D) of the NIRC of 1997, as amended, quoted as follows:

> "**SEC. 24. Income Tax Rates.**
>
> (**D**) ***Capital Gains from Sale of Real Property.*** –
>
> (**1**) ***In General.*** - The provisions of Section 39(B) notwithstanding, a final tax of six percent (6%) based on the gross selling price or current fair market value as determined in accordance with Section 6(E) of this Code, whichever is higher, is hereby imposed upon capital gains presumed to have been realized from the **sale, exchange, or other disposition of real property** located in the Philippines, classified as capital assets, including pacto de retro sales and other forms of conditional sales, by individuals, including estates and trusts: *Provided*, That the tax liability, if any, **on gains from sales or other dispositions of real property to the government or any of its political subdivisions or agencies or to government-owned or -controlled corporations shall be determined either under**

> **Section 24 (A) or under this Subsection, at the option of the taxpayer.**" (*Emphasis supplied*)

Capital gains tax is a tax on the gain from the sale of the taxpayer's property forming part of capital assets.[32] It implies that in order to be liable for payment of capital gains tax, one has to profit or gain from the sale, exchange or disposition of the real property. In other words, in the **absence of income** from or the **absence of sale**, disposition or conveyance of real property, the imposition of capital gains tax does not arise.[33]

The power of eminent domain is an inherent competence of the state. It is essential to a sovereign. Thus, the Constitution does not explicitly define this power but subjects it to a limitation: that it be exercised only for public use and with payment of just compensation. Whether the use is public or whether the compensation is constitutionally just will be determined finally by the courts.[34]

In the case of *Republic of the Philippines vs. Salem Investment Corporation, et al.*[35], the Supreme Court emphasized that expropriation is deemed complete only upon **full payment of just compensation** to petitioner and ownership over the expropriated land property shall pass from the owner, as follows:

> "The expropriation of lands consists of two stages. As explained in *Municipality of Biñan v. Garcia*:
>
>> The first is concerned with the determination of the authority of the plaintiff to exercise the power of eminent domain and the propriety of its exercise in the context of the facts involved in the suit. It ends with an order, if not of dismissal of the action, 'of condemnation declaring that the plaintiff has a lawful right to take the property sought to be condemned, for the public use or purpose described in the complaint, upon the payment of just compensation

[32] *Commissioner of Internal Revenue vs. B.F. Goodrich Phils., Inc. (now Sime Darby International Tire Co., Inc.), et al.*, G.R. No. 104171, February 24, 1999.
[33] *Spouses Mabutas vs. Hon. Lilian B. Hefti, OIC-Commissioner of Internal Revenue*, CTA Case No. 7659, June 3, 2009.
[34] *National Power Corporation vs. Posada, et al.*, G.R. No. 191945, March 11, 2015.
[35] G.R. No. 137569, June 23, 2000.

to be determined as of the date of the filing of the complaint'. . . .

The second phase of the eminent domain action is concerned with the determination by the court of 'the just compensation for the property sought to be taken.' This is done by the court with the assistance of not more than three (3) commissioners. . . .'

It is only upon the completion of these two stages that expropriation is said to have been completed. Moreover, it is only upon payment of just compensation that title over the property passes to the government. Therefore, until the action for expropriation has been completed and terminated, ownership over the property being expropriated remains with the registered owner. xxx" (*Emphasis supplied*)

This ruling was reiterated in the case of *Reyes, et al. vs. National Housing Authority*[36], where the Supreme Court held, as follows:

"First, under the expropriation judgment the payment of just compensation is not subject to any condition. Second, it is a recognized rule that although the right to enter upon and appropriate the land to public use is completed prior to payment, title to the property expropriated shall pass from the owner to the expropriator only upon full payment of the just compensation. In the case of *Association of Small Landowners in the Phils., Inc., et al. vs. Secretary of Agrarian Reform*, it was held that:

'**Title to property which is the subject of condemnation proceedings does not vest the condemnor until the judgment fixing just compensation is entered and paid**, but the condemnor's title relates back to the date on which the petition under the Eminent Domain Act, or the commissioners report under the Local Improvement Act, is filed.

xxx **Although the right to appropriate and use land taken for a canal is complete at**

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[36] G.R. No. 147511, January 20, 2003.

> **the time of entry, title to the property taken remains in the owner until payment is actually made.**
>
> In Kennedy v. Indianapolis, the US Supreme Court cited several cases holding that title to property does not pass to the condemnor until just compensation had actually been made. In fact, the decisions appear to be uniformly to this effect. As early as 1838, in Rubottom v. McLure, it was held that actual payment to the owner of the condemned property was a condition precedent to the investment of the title to the property in the State albeit not to the appropriation of it to public use. In Rexford v. Knight, the Court of Appeals of New York said that the construction upon the statutes was that the fee did not vest in the State until the payment of the compensation although the authority to enter upon and appropriate the land was complete prior to the payment. Kennedy further said that both on principle and authority the rule is xxx that **the right to enter on and use the property is complete, as soon as the property is actually appropriated under the authority of law for a public use, but that the title does not pass from the owner without his consent, until just compensation has been made to him.**" (*Emphasis supplied*)

Thus, there can be no transfer of title until after the payment of just compensation to petitioner. The taking of the property and payment of just compensation are the stages of expropriation proceedings. But it is only upon payment of just compensation that the title over the property passes to the government.

In the instant case, the BIR assessed petitioner capital gains tax on the ₱116,563,500.00 paid by Phividec Industrial Authority pursuant to Section 4 of Republic (Act) R.A. No. 8974 for the expropriation of petitioner's property located in the Municipality of Tagoloan, Misamis

Oriental. Said amount, initially deposited in bank escrow accounts, was later withdrawn by petitioner in 2008.

The question is whether the amount of ₱116,563,500.00 constitutes capital gains and may therefore serve as the basis for the imposition of capital gains tax.

In the case of *Gutierrez, et al. vs. The Honorable Court of Tax Appeals, et al.*[37], the Supreme Court held that:

> "There is no question that the property expropriated being located in the Philippines, compensation or income derived therefrom ordinarily has to be considered as income from sources within the Philippines and subject to the taxing jurisdiction of the Philippines. However, it is to be remembered that said property was acquired by the Government through condemnation proceedings and appellants' stand is, therefore, that same cannot be considered as sale as said acquisition was by force, there being practically no meeting of the minds between the parties. Consequently, the taxpayers contend, this kind of transfer of ownership must perforce be distinguished from sale, for the purpose of Section 29-(*a*) of the Tax Code. But the authorities in the United States on the matter sustain the view expressed by the Collector of Internal Revenue, for it is held that:
>
> > '*The transfer of property through condemnation proceedings* is a sale or exchange within the meaning of section 117 (*a*) of the 1936 Revenue Act and *profit from the transaction constitutes capital gain*' (1942. Com. Int. Revenue *vs.* Kieselbach (CCA 3) 127 F. (24) 359). '***The taking of property by condemnation and the, payment of just compensation therefore is a 'sale' or 'exchange'*** within the meaning of section 117 (*a*) of the Revenue Act of 1936, *and profits from that transaction is capital gain* (David S. Brown *vs.* Comm., 1942, 42 BTA 139).'

[37] G.R. Nos. L-9738 and L-9771, May 31, 1957.

The proposition that income from expropriation proceedings is income from sales or exchange and therefore taxable has been likewise upheld in the case of Lapham *vs.* U.S. (1949, 40 AFTR 1370) and in Kneipp *vs.* U.S. (1949, 85 F Suppl. 902). **It appears then that the acquisition by the Government of private properties through the exercise of the power of eminent domain, *said properties being JUSTLY compensated*, is embraced within the meaning of the term 'sale' 'disposition of property', and the proceeds from said transaction clearly fall within the definition of gross income laid down by Section 29 of the Tax Code of the Philippines**." (*Emphasis supplied*)

Likewise, in the case of *Gonzales vs. The Honorable Court of Tax Appeals, et al.*[38], the Supreme Court held that:

"xxx. In a previous case, we held that 'the acquisition by the Government of private properties through the exercise of the power of eminent domain, said properties being **justly compensated**, is embraced within the meaning of the term 'sale' or 'disposition of property' and the definition of gross income laid down by Section 29 of the Tax Code of the Philippines. We also adhered to the view that the transfer of property through condemnation proceedings is a sale or exchange and that profit from the transaction constitutes capital gain.

And, in a more recent case of Republic of the Philippines, represented by the *Department of Public Works and Highways (DPWH) vs. Spouses Salvador*[39], the Supreme Court rules as follows:

"This is clearly an error. It is settled that **the transfer of property through expropriation proceedings is a sale or exchange within the meaning of Sections 24(D) and 56(A)(3) of the National Internal Revenue Code**, and profit from the transaction constitutes capital gain. Since capital gains is a

[38] G.R. No. L-14532 and G.R. No. L-14533, May 26, 1965.
[39] G.R. No. 205428, June 7, 2017.

tax on passive income, it is the seller, or respondents in this case, who are liable to shoulder the tax.

In fact, the Bureau of Internal Revenue (BIR), in BIR Ruling No. 476-2013 dated December 18, 2013, has constituted the DPWH as a withholding agent tasked to withhold the 6% final withholding tax in the expropriation of real property for infrastructure projects. Thus, as far as the government is concerned, **the capital gains tax in expropriation proceedings remains a liability of the seller**, as it is a tax on the seller's gain from the case of real property."

From the foregoing, it is clear that the transfer of property through expropriation proceedings and the payment of just compensation are necessary elements of "sale" or "exchange" for purposes of Sections 24(D) and 56(A) (3) of the NIRC of 1997, as amended. Hence, both elements must be present in order to be considered "sale" and be subjected to the imposition of capital gains tax.

The Court shall now determine what is "just compensation".

In the case of *National Power Corporation vs. YCLA Sugar Development Corporation*[40], the Supreme Court defined "just compensation", as follows:

> "In expropriation proceedings, just compensation is defined as the **full** and fair equivalent of the property taken from its owner by the expropriator. The measure is not the taker's gain, but the owner's loss. The word 'just' is used to intensify the meaning of the word 'compensation' and to convey thereby the idea that the equivalent to be rendered for the property to be taken shall be real, substantial, full and ample. The constitutional limitation of 'just compensation' is considered to be the sum equivalent to the **market value of the property**, broadly defined as the price fixed by the seller in open market in the usual and ordinary course of legal action and competition; or the fair value of the property; as between

[40] G.R. No. 193936, December 11, 2013.

> one who receives and one who desires to sell it, fixed at the time of the actual taking by the government." (*Emphasis supplied*)

In *Capitol Steel Corporation vs. Phividec Industrial Authority*[41], the Supreme Court held that the amount of ₱116,563,500.00 paid by Phividec Industrial Authority to petitioner was merely payment of provisional value as a prerequisite to the issuance of a writ of possession pursuant to Section 4 of Republic (Act) R.A. No. 8974. This amount deposited represents one hundred percent (100%) of the value of the properties based on the **schedule of zonal valuation** for real properties under Department Order (D.O.) No. 40-97, as follows:

> "By letter of November 21, 2003, PHIVIDEC informed Capitol Steel that it would file anew an expropriation case and that it had deposited the amount of ₱116,563,500 in the name of Capitol Steel, ₱51,818,641 of which was deposited at the Landbank of the Philippines (Landbank) and ₱64,744,859 at the Development Bank of the Philippines (DBP). PHIVIDEC further informed Capitol Steel that the total amount deposited represents the zonal value of the properties, and may be withdrawn at any time.
>
> Subsequently, PHIVIDEC, represented by the Government Corporate Counsel, re-filed on November 24, 2003 an expropriation case, docketed as Civil Case No. 2003-346, and raffled to Branch 20 of RTC of Misamis Oriental.
>
> And on December 8, 2003, PHIVIDEC filed an Urgent Motion for the Issuance of a Writ of Possession to which it attached a Certificate of Availability of Funds, and Certifications from the Landbank and the DBP that it deposited the total amount of ₱116,563,500 required under Republic Act No. 8974 (R.A. 8974), 'AN ACT TO FACILITATE THE ACQUISITION OF RIGHT-OF-WAY, SITE OR LOCATION FOR NATIONAL GOVERNMENT INFRASTRUCTURE PROJECTS AND FOR OTHER PURPOSES'.
>
> The total amount deposited represents one hundred percent (100%) of the value of the properties based on the

[41] G.R. No. 169453, December 6, 2006.

schedule of zonal valuation for real properties under Department Order No. 40-97 (D.O. 40-97) fixing the zonal valuation of the properties at Sugbongcogon and Casinglot at ₱300 and ₱500 per square meter, respectively.

xxx xxx xxx

Under R.A. 8974, the requirements for authorizing immediate entry in expropriation proceedings involving real property are: (1) the filing of a complaint for expropriation sufficient in form and substance; (2) due notice to the defendant; (3) payment of an amount equivalent to 100% of the value of the property based on the current relevant zonal valuation of the BIR including payment of the value of the improvements and/or structures if any, or if no such valuation is available and in cases of utmost urgency, the payment of the proffered value of the property to be seized; and (4) presentation to the court of a certificate of availability of funds from the proper officials.

Upon compliance with the requirements, a petitioner in an expropriation case, in this case respondent, is entitled to a writ of possession as a matter of right and it becomes the ministerial duty of the trial court to forthwith issue the writ of possession. No hearing is required and the court neither exercises its discretion or judgment in determining the amount of the provisional value of the properties to be expropriated as the legislature has fixed the amount under Section 4 of R.A. 8974.

xxx xxx xxx

In fine, all the requirements set forth under Section 4 of R.A. 8974 have been satisfactorily complied with, there is no legal impediment to the issuance of a writ of possession in favor of respondent. xxx" (Emphasis supplied)

Furthermore, in the same case of *Capitol Steel Corporation vs. Phividec Industrial Authority*,[42] the Supreme Court laid the distinctions

[42] See footnote no. 41.

between the payment of the provisional value and the payment of just compensation, as follows:

> "To clarify, the payment of the provisional value as a prerequisite to the issuance of a writ of possession differs from the payment of just compensation for the expropriated property. While the provisional value is based on the current relevant zonal valuation, just compensation is based on the prevailing fair market value of the property. As the appellate court explained:
>
> > The first refers to the preliminary or provisional determination of the value of the property. It serves a double-purpose of pre-payment if the property is fully expropriated, and of an indemnity for damages if the proceedings are dismissed. It is not a final determination of just compensation and may not necessarily be equivalent to the prevailing fair market value of the property. Of course, it may be a factor to be considered in the determination of just compensation.
> >
> > Just compensation, on the other hand, is the final determination of the fair market value of the property. It has been described as 'the just and complete equivalent of the loss which the owner of the thing expropriated has to suffer by reason of the expropriation.' Market values, has also been described in a variety of ways as the 'price fixed by the buyer and seller in the open market in the usual and ordinary course of legal trade and competition; the price and value of the article established as shown by sale, public or private, in the ordinary way of business; the fair value of the property between one who desires to purchase and one who desires to sell; the current price; the general or ordinary price for which property may be sold in that locality'." (Emphasis and underscoring supplied)

To reiterate, the provisional value is based on the current relevant zonal valuation, just compensation, on the other hand, is based on the prevailing fair market value of the property. "Zonal valuation is just one of the indices of the fair market value of the real estate. By itself, this index cannot be the sole basis of 'just compensation' in expropriation cases."[43]

It is worthy to note that the Regional Trial Court (RTC) of Misamis Oriental, Branch 20 certified that the final valuation of the just compensation for the property involved in this case has not yet been decided by the Court.[44] Therefore, the payment of just compensation has not been made to petitioner.

Without payment of just compensation, title remains with petitioner. The expropriation process, therefore, is not yet complete and terminated. Thus, there is no sale and capital gains upon which the capital gains tax may be imposed.

Similarly, the BIR's assessment of DST was based on the provisional amount of ₱116,563,500.00 paid by Phividec Industrial Authority pursuant to Section 4 of Republic (Act) R.A. No. 8974 to secure immediate possession of petitioner's property. This amount merely represents one hundred percent (100%) of the value of the properties based on the schedule of zonal valuation for real properties under D.O No. 40-97. To reiterate, the amount paid is not equivalent "just compensation".

Section 196 of the NIRC of 1997, as amended provides that the tax shall be based on actual consideration, as follows:

> "**SEC. 196.** ***Stamp tax on Deeds of Sale and Conveyances of Real Property.*** **-** On all conveyances, deeds, instruments, or writings, other than grants, patents or original certificates of adjudication issued by the Government, whereby any land, tenement, or other realty sold shall be granted, assigned, transferred or otherwise conveyed to the purchaser, or purchasers, or to any other person or persons designated by such purchaser or purchasers, there shall be collected a documentary stamp tax, at the rates herein below prescribed, based on the **consideration contracted to be paid for such realty or on its fair market value** determined in accordance with Section 6(E) of this Code, whichever is

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[43] *Republic of the Philippines, represented by the Department of Public Works and Highways (DPWH) vs. Asia Pacific Integrated Steel Corporation*, G.R. No. 192100, March 12, 2014.
[44] Exhibit "P-9".

higher: *Provided*, That when one of the contracting parties is the Government the tax herein imposed shall be based on the **actual consideration**.

(a) When the consideration, or value received or contracted to be paid for such realty after making proper allowance of any encumbrance, does not exceed One thousand pesos (P1,000) fifteen pesos (P15.00).

(b) For each additional One thousand Pesos (P1,000), or fractional part thereof in excess of One thousand pesos (P1,000) of such consideration or value, Fifteen pesos (P15.00).

When it appears that the amount of the documentary stamp tax payable hereunder has been reduced by an incorrect statement of the consideration in any conveyance, deed, instrument or writing subject to such tax the Commissioner, provincial or city Treasurer, or other revenue officer shall, from the assessment rolls or other reliable source of information, assess the property of its true market value and collect the proper tax thereon." (*Emphasis supplied*)

Moreover, RR No. 17-2003[45] provides that "the payment of DST shall accrue upon the execution of Deed of Absolute Sale, but the basis for the imposition thereof shall be the **gross selling price** or **fair market value of the property**, whichever is higher".

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.[46] DST is by nature, an excise tax since it is levied on the exercise by persons

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[45] Amending Further Pertinent Provisions of Revenue Regulations No. 2-98, as Amended, Providing for Additional Transactions Subject to Creditable Withholding Tax; Re-Establishing the Policy that the Capital Gains Tax on the Sale, Exchange or Other Disposition of Real Property Classified as Capital Assets Shall be Collected as a Final Withholding Tax, Thereby Further Amending Revenue Regulations Nos. 8-98 and 13-99, as Amended by Revenue Regulations No. 14-2000; and for Other Purposes, March 31, 2003.

[46] Philippine Home Assurance, et al. vs. Court of Appeals, et al., G.R. No. 119446, January 21, 1999.

of privileges conferred by law.[47] It is a tax on documents, instruments, loan agreements, and papers evidencing the acceptance, assignment, sale or transfer of an obligation, right or property incident thereto.

It must be noted that in a contract of sale, one of the contracting parties obligates himself to transfer the ownership of the property. In this case, it is only upon payment of just compensation that title over the property passes to the government.

Pending valuation of the just compensation before the RTC, ownership over the property cannot yet be transferred to the government. Thus, expropriation process cannot be deemed completed. Consequently, there is still no sale transaction which may be subject to the imposition of DST.

WHEREFORE, premises considered, the Petition for Review is **GRANTED**. Accordingly, respondent's Revised Final Decision on Disputed Assessment imposing upon petitioner capital gains tax in the amount of ₱18,407,314.17 and documentary stamp tax (DST) in the amount of ₱4,639,238.01, is **CANCELLED**.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

Catherine T. Manahan
(With Dissenting Opinion)
CATHERINE T. MANAHAN
Associate Justice

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47 Fort Bonifacio Development Corporation vs. Commissioner of Internal Revenue, G.R. Nos. 164155 & 175543, February 25, 2013.

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson, Second Division

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

CAPITOL STEEL CORPORATION,
Petitioner,

-*versus*-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 9240

Members:

CASTAÑEDA, JR., *Chairperson*
CASANOVA, *and*
MANAHAN, *JJ.*

Promulgated:

OCT 26 2017 11:30 a.m.

x- x

DISSENTING OPINION

MANAHAN, *J.:*

With due respect, I disagree with the finding and assumption of jurisdiction over the instant petition for review.

The majority reasoned as follows:

> It must be stressed that if the protest is denied, in whole or in part, by the **Commissioner's duly authorized representative**, the taxpayer may either: (a) appeal to the Court of Tax Appeals (CTA) within thirty (30) days from the date of receipt of the said **decision**; or (b) elevate his protest through request for reconsideration to the Commissioner within thirty (30) days from date of receipt of the **decision** of the Commissioner's duly authorized representative.
>
> In this case, petitioner received the FDDA **signed by the OIC-Assistant Commissioner** assessing it for deficiency income tax, VAT, compensation withholding tax, fringe benefit tax, capital gains tax and DST on June 3, 2015. Hence, the FDDA was considered to be issued by the Commissioner's duly authorized representative. However, petitioner sought reconsideration of the FDDA issued by the OIC-Assistant Commissioner which led to the latter's issuance of the Revised FDDA. Therefore, it is the Revised FDDA signed by the OIC-Assistant

> Commissioner which is considered to be the **decision** of the Commissioner's duly authorized representative which may either be: appealed to the CTA or protested through request for reconsideration to the Commissioner, both within thirty (30) days from date of receipt of the Revised FDDA. (*Emphasis in the original*)

Based on the foregoing, the majority counted thirty (30) days from receipt of the Revised FDDA on December 15, 2015, and concluded that petitioner had until January 14, 2016 within which to appeal to the CTA or request reconsideration with the CIR. Petitioner chose to file its Petition for Review with the CTA on January 14, 2016.

However, I believe that it is the original FDDA received on June 3, 2015 which should be considered as the decision of the CIR's duly authorized representative.

The pertinent portion of Section 3.1.5 of Revenue Regulations No. (RR) 12-99 provides:

> 3.1.5 Disputed Assessment. – The taxpayer or his duly authorized representative may protest administratively against the aforesaid formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof. xxx
>
> xxx
>
> <u>If the protest is denied, in whole or in part, by the Commissioner, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from date of receipt of the said decision</u>, otherwise, the assessment shall become final, executory and demandable.
>
> <u>In general, if the protest is denied, in whole or in part, by the Commissioner or his duly authorized representative, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from date of receipt of the said decision</u>, otherwise, the assessment shall become final, executory and demandable: Provided, however, <u>that if the taxpayer elevates his protest to the Commissioner within thirty (30) days from date of receipt of the final decision of the Commissioner's duly authorized representative, the latter's decision shall not become final, executory and demandable, in which case the protest shall be decided by the Commissioner</u>.

> If the Commissioner or his duly authorized representative fails to act on the taxpayer's protest within one hundred eighty (180) days from date of submission, by the taxpayer, of the required documents in support of his protest, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from the lapse of the said 180-day period, otherwise, the assessment shall become final, executory and demandable. (*Underscoring ours*)

The foregoing rules were summarized in *Philippine Amusement and Gaming Corp. v. Bureau of Internal Revenue*[1] (PAGCOR case) into three options available to the protesting taxpayer:

1. If the protest is wholly or partially denied by the CIR **or** his authorized representative, then the taxpayer may appeal to the CTA within 30 days from receipt of the whole or partial denial of the protest.

2. If the protest is wholly or partially denied by the CIR's authorized representative, then the taxpayer may appeal to the CIR within 30 days from receipt of the whole or partial denial of the protest.

3. If the CIR or his authorized representative failed to act upon the protest within 180 days from submission of the required supporting documents, then the taxpayer may appeal to the CTA within 30 days from the lapse of the 180-day period.

The PAGCOR case further clarified the three options, as follows:

> A whole or partial denial by the CIR's representative may be appealed to the CIR or the CTA. A whole or partial denial by the CIR may be appealed to the CTA. The CIR or the CIR's authorized representative's failure to act may be appealed to the CTA. There is no mention of an appeal to the CIR from the failure to act by the CIR's authorized representative.

It can be gleaned from the rules and the PAGCOR case that it is the whole or partial denial of the protest, or inaction thereon, which triggers the options available to the taxpayer. *cm*

[1] G.R. No. 208731, January 27, 2016.

In the instant case, it is option 2 that is applicable.

The protest was denied by the OIC-Assistant Commissioner (the CIR's duly authorized representative) through the FDDA, received on June 3, 2015. Thus, applying the provisions of RR 12-99 as clarified by the PAGCOR case, petitioner had the option to appeal to the CTA or to the CIR within 30 days from receipt of the FDDA. However, petitioner did neither. Instead, it filed its request for reconsideration with the same office which issued the FDDA, or before the same OIC-Assistant Commissioner. This request for reconsideration before the same OIC-Assistant Commissioner cannot be considered as an elevation of the protest to the Commissioner. Since such remedy is not contained in the rules, the 30-day period to file the appeal before the CTA continued to run.

This being the case, petitioner's appeal to the CTA filed on January 14, 2016 was filed out of time.

For the foregoing, I vote to deny the petition for review.

CATHERINE T. MANAHAN
Associate Justice