REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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ALLIED BANKING CORPORATION,
Petitioner,

C.T.A. CASE NO. 6981

Members:

- versus -

ACOSTA, *Chairman*
BAUTISTA, and
CASANOVA, *JJ.*

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
AUG 0 8 2005
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RESOLUTION

For this Court's resolution are:

1. Respondent's "Motion to Dismiss" filed on November 9, 2004 seeking for the dismissal of this instant case on the ground of prescription and finality of the Assessment Notice No. DST-2-01-000045 dated March 10, 2004; and

2. Petitioner's "Opposition" thereto filed on December 6, 2004.

After due hearing where both parties were afforded the right to be heard and after filing their respective memoranda on June 3, 2005 by petitioner and on July 12, 2005 by the Respondent, both parties submit the abovementioned motion for resolution.

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The facts of the case, as stipulated by the parties and borne by the records, are as follows:

Petitioner is a duly licensed commercial banking institution organized and existing under and by virtue of Philippine laws, with principal address at Allied Bank Center, 6754 Ayala Avenue, Makati City, Metro Manila. Respondent, on the other hand, is the duly appointed Commissioner of Internal Revenue with office address at BIR National Office Building, Diliman, Quezon City.

On February 5, 2004, petitioner received the Preliminary Assessment Notice dated January 14, 2004 issued by the respondent notifying the petitioner that after an investigation was conducted by their office, from the latter is found liable to pay the amount of P11,225,010.05, inclusive of interests (from January 11, 2002 to February 26, 2004) and compromise penalty (representing deficiency documentary stamp taxes on its Special Savings Account Deposits) for the taxable year 2001.

On February 18, 2004, petitioner filed its protest to the preliminary assessment arguing that its Special Savings Account Deposits were not subject to the documentary stamp tax imposed by respondent.

Subsequently, petitioner received the Formal Letter of Demand dated March 10, 2004 together with a copy of Assessment Notice No. DST-2-01-000045 assessing petitioner the total amount of P11,452,940.41, plus interest and compromise penalty, for deficiency documentary stamp taxes on its Special Savings Account Deposits for the taxable year 2001.

On the belief that the Formal Letter of Demand constituted the final decision on the matter of the assessment, petitioner filed its appeal to this Court on May 5, 2004.

On July 19, 2004, respondent filed his Answer and, as his Special and Affirmative defense, argued that the Court has no jurisdiction to take cognizance of the case as the petition was filed six (6) days after the expiration of the reglementary period provided under Section 228 of the 1997 National Internal Revenue Code. Subsequently or on November 9, 2004, respondent filed his Motion to Dismiss. He argued that the Formal Letter of Demand dated March 10, 2004, which was received by petitioner's Tax and Collection Department H.O on March 30, 2004, as evidenced by the stamp of receipt on respondent's original duplicate copy of the said demand letter (Exhibit "1-a"), had become final and executory for failure of petitioner to seasonably file its protest against said demand letter within thirty (30) days from its receipt thereof. The Petition for Review was filed on May 5, 2004.

On the other hand, petitioner, in its Opposition, argues that:

1. The filing of this Motion to Dismiss is procedurally infirm;

2. At best, considering that the Honorable Court has set the instant motion for hearing, the same should be treated as a preliminary hearing on respondent's affirmative defenses; and

3. The Formal Letter of Demand dated March 10, 2004 was received by petitioner ABC on 5 April 2004, hence, the instant Petition was filed within the reglementary period.

This Court RESOLVES to **GRANT** this instant motion to dismiss for the following reasons:

Firstly, it is petitioner's argument that this instant motion is not sanctioned by the 1997 Rules of Court nor by the rules of the Court, both of which uniformly provide for the filing of Motions to Dismiss within the time for filing the Answer. In

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fact, the 1997 Rules of Court is more specific in providing that the Motion to Dismiss must be filed before the filing of the Answer.

It is not disputed that Section 1, Rule 16 of the 1997 Rules of Court specifically states that a motion to dismiss must be filed "within the time for but before filing the answer to the complaint or pleading asserting a claim". However, under Section 1 of Rule 9 of the same rules also provides that:

> Section 1. Defenses and objections not pleaded. – Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. However, when it appears from the pleadings or the evidence on record that the **court has no jurisdiction over the subject matter, that there is another action pending between the same parties for the same cause, or that the action is barred by prior judgment or by the statute of limitations**, the court shall dismiss the same.

Evidently, in the four instances mentioned in the said section, the general rule that defenses and objections not pleaded either in a motion to dismiss or in an answer are deemed waived does not apply. In other words, in any of the cited instances, the filing of a motion to dismiss is allowed even if the same has been filed after the filing of an answer. In the case of *Quiaoit vs Consolacion, 73 SCRA 208*, the Honorable Supreme Court had the occasion to rule that the filing of a motion to dismiss is allowed even after the filing of an answer for special reasons, other than those enumerated in Section 1 of Rule 9 of the 1997 Rule of Court, when the evidence that would constitute a ground for dismissal was discovered during trial. The same rule was also emphasized in the case of *Laguatan vs Icao, 224 SCRA 69*, where the Honorable Supreme Court explained that the motion serves to supplement the averments of defendant's answer and to adjust the issues to the testimony of the plaintiff himself. The defense of prescription is a statutory right and, thus, the same may be raised for the first time on appeal.

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Secondly, based on the records of the case, the Formal Demand Letter dated March 10, 2004 was received by petitioner, as evidenced by the stamp of receipt on the original duplicate copy of the respondent, on March 30, 2004. Petitioner argues that the affixing of the date April 5, 2004 on its copy of the demand letter was based on its sincere belief that the said letter was actually received on that date. Petitioner further submits that such mistake as regards the correct date of receipt was justifiable and excusable and should not result in the deprivation of the petitioner's right to appeal.

This is clearly untenable.

It is basic that management personnel's are bound by the mistakes of their employees who are under their control or supervision. This is based on the principle of accountability not only for one's mistake but likewise for the mistake of those who are under his or her supervision and control.

In this case, the mistake made by the witness, Ms. Lucy Sieteriales, Senior Assistant Manager of the Controllership Group of petitioner, in not showing enough responsibility with regard to her job, is also the mistake of the petitioner. Based on her testimony (TSN, March 18, 2005), since the person in charge of receiving documents was not present on her desk, the receiving copy of the demand letter was presented to and received by her, as evidenced by her initial on the respondent's original duplicate copy of the demand letter, through the messenger. She further testified that she gave an instruction to the messenger to present the document to the person in charge of receiving documents the moment she arrived. And it was several days after that Ms. Lucy remembered about the document and had the messenger find it. Allegedly on the belief that the messenger correctly

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remembered the date of receipt, she then affixed the date as stated by the messenger.

She should have had the initiative to check on the correct date of receipt and not merely rely on the memory of the messenger. Petitioner's witness was aware that the document she received was important, for she even scolded the messenger for not having taken care of the same. Having been aware that the document was indeed essential, the clear laxity in the position taken by the witness by not inquiring further is intolerable. This negligence on the part of the witness proved to be fatal on the part of the petitioner. Such grossly inexcusable negligence cannot be entertained as mere justifiable.

Thus, the argument of herein petitioner that the correct date of its receipt of the document cannot be accepted. The date of receipt of the subject demand letter as clearly proved by respondent was on March 30, 2004.

Thirdly, Section 228 of the National Internal Revenue Code of 1997 provides that:

> Section 228. Protesting an Assessment. – When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings; Provided, however, That a preassessment notice shall not be required in the following cases:
>
> a. x x x
> b. x x x
> c. x x x
> d. x x x
> e. x x x
>
> The taxpayer shall be informed in writing of the law and the facts on which the assessment is made, otherwise, the assessment shall be void.
>
> Within a period to be prescribed by implementing rules and regulations the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.

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> **Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment** in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from the filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.
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> If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the **taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within 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.
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> (emphasis supplied)

It is clear from the above provision that a taxpayer shall first be informed of its tax liabilities through the issuance of a preliminary assessment notice, although, not in all cases of tax delinquencies or deficiencies, is the issuance of a preliminary assessment notice required. Section 228 of the 1997 NIRC specifically provides for the instances where a preliminary assessment notice is no longer required. A preliminary assessment notice is issued to inform the taxpayer that proper taxes should be assessed against it. Under Revenue Regulations 12-85, the taxpayer is given a period of fifteen (15) days from receipt of the preliminary assessment notice within which to file its reply and explain why no assessment notice should be issued against it. If the taxpayer fails to respond or that its explanation is not acceptable to the Commissioner of the Bureau of Internal Revenue, a formal assessment notice shall then be issued to the taxpayer.

It is this formal assessment notice, which is issued after the preliminary assessment notice, that the protest is required. The period of thirty (30) days within which to dispute or protest as allowed by Section 228 of the 1997 NIRC refers to the notice of formal assessment and not the preliminary assessment notice. After the filing of the protest, the taxpayer is then given another sixty (60) days within which

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to submit the relevant documents in support of its protest. This period is allowed to give chance to the taxpayer to show cause why the assessment has been wrongly issued against it. Likewise, this gives the Commissioner the chance to correct itself, in case if he finds the taxpayer's case meritorious.

Sad to say, the procedure was not thoroughly considered and observed by herein petitioner.

The Formal Demand Letter received by petitioner did not ripen into a disputed assessment for its failure to seasonably file its protest with the office of the respondent. When petitioner received the said demand letter, what it did was to actually file the appeal with this Court instead of exhausting the administrative remedies allowed by law. It is clear from the provision of Section 228 of the 1997 NIRC that the assessment notice must first be administratively protested before the same may be elevated to this Court, thus giving an opportunity for the respondent to consider or correct their mistakes.

The Formal Demand Letter dated March 10, 2004 cannot be considered as the final decision appealable to this Court. The final decision subject of appeal to this Court clearly concerns disputed assessments. An assessment not properly disputed can never be the subject of an appeal to this Court. It may be true that based on the letter of the demand letter, it was written that the same shall be considered as the final decision of the respondent, however, to have a closer look on the exact words of the letter shows that it was a "final decision based on the investigation. If you disagree, you may appeal the decision within thirty (30) days from receipt hereof x x x." Thus, the said demand letter was the decision arrived at

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after investigation, and thus giving petitioner a period of thirty (30) days within which to appeal.

In this case, the failure of the petitioner to dispute or protest the formal demand letter, there was then no disputed assessment to speak of as to confer jurisdiction upon this court to try and hear the case. It must be emphasized that this Court is a court of special jurisdiction, thus, this Court may only try cases which are clearly within its jurisdiction, as allowed by law (Commissioner of Internal Revenue vs Villa, 22 SCRA 3). Section 7(a)(1) of R.A. 9282 specifically provides that:

> Section 7. Jurisdiction. The CTA shall exercise:
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> "a. Exclusive appellate jurisdiction to review by appeal, as herein provided:
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> 1. Decisions of the Commissioner of Internal Revenue in cases involving **disputed assessments**, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue or other laws administered by the Bureau of Internal Revenue."
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> (Emphasis supplied)

Thus, only assessments properly disputed may the subject of an appeal to this Court. Failure on the part of the petitioner to seasonably protest the said assessment notice, the same became final and executory after the lapse of the thirty (30) day period allowed by law within which to protest the same, counting from the date of receipt thereof.

Fourthly, assuming for the sake of argument that the subject Formal Letter of Demand is indeed the final decision subject of review by this Court, it was nevertheless filed out of time, thus, likewise resulting in the finality and demandability of the assessment notice. As discussed above, the demand letter was received on March 30, 2004, thus petitioner had until April 29, 2004 to elevate the case to this Court. By filing the petition on May 5, 2004, petitioner indeed had filed the same out of time.

Wherefore, in view of the foregoing discussions, this instant Motion to Dismiss is hereby **GRANTED.** Accordingly, Petitioner's Petition for Review is **DISMISSED** for lack of jurisdiction, considering that the Formal Demand Letter dated March 10, 2004 and Assessment Notice No. DST-2-01-000045 assessing petitioner of deficiency documentary stamp taxes for the taxable year 2001 in the amount of P11,452,940.41 had become final and executory.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice