REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

LUCIA MANOTOC MACAM, Petitioner,	**CTA EB No. 680** **(CTA Case No. 6601)**
	Present:
- versus -	**ACOSTA,** *P.J.* **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, PALANCA-ENRIQUEZ, FABON-VICTORINO, MINDARO-GRULLA,** *and* **COTANGCO-MANALASTAS,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE AND RAMON WILFREDO B. PAGARIGAN, Respondents.	
	Promulgated: SEP 15 2011 GASApolinario 9:00 a.m.

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DECISION

UY, *J*.:

This is a Petition for Review filed by the petitioner, Lucia Manotoc Macam, against the respondents, the Commissioner of Internal Revenue and Ramon Wilfredo B. Pagarigan, praying for the reversal and/or setting aside of the Decision promulgated on December 15, 2009[1] and the Resolution dated August 11, 2010[2], respectively rendered by the First Division and Special First Division of this Court (hereinafter referred to as the "Court in Division") in CTA Case No.

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[1] Penned by Associate Justice Lovell R. Bautista, and concurred by Presiding Justice Ernesto D. Acosta and Associate Justice Caesar A. Casanova, Docket, pp. 26 to 39.

[2] Docket, pp. 41 to 44.

6601, entitled *"Lucia Manotoc Macam, Petitioner, vs. Commissioner of Internal Revenue and Ramon Wilfredo B. Pagarigan, Respondents"*, the dispositive portions of which respectively read:

> **DECISION promulgated on December 15, 2009**
>
> "**WHEREFORE,** premises considered, the instant *Petition for Review* is hereby **DENIED**. Accordingly, petitioner is hereby **ORDERED** to **PAY** deficiency income tax and deficiency documentary stamp tax in the respective amount of P3,378,829.13 and P39,525.00 or the total amount of P3,418,354.13.
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> In addition, petitioner is hereby **ORDERED** to **PAY** delinquency interest of 20% *per annum* on the deficiency income and documentary stamp taxes from September 15, 2000 until full payment.
>
> **SO ORDERED.**"
>
> **RESOLUTION dated August 11, 2010**
>
> "**WHEREFORE**, respondent's *Motion for Reconsideration* is hereby **DENIED**.
>
> **SO ORDERED.**"

THE FACTS

Petitioner Lucia Manotoc Macam is of legal age, Filipino, widow, and residing at 123 P. Zamora Street, Caloocan City.

On the other hand, respondent Commissioner of Internal Revenue (hereafter referred to as the Commissioner) is the Head of the Bureau of Internal Revenue (BIR) who is granted by law the power to assess and collect all national internal revenue taxes, fees, and charges and to enforce all forfeitures, penalties, and fines connected therewith. The Commissioner holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Co-respondent Ramon Wilfredo B. Pagarigan is the Chief of the BIR Collection and Enforcement Division.

On April 19, 1996, petitioner and her co-owner Basilia A. Manotoc (now deceased, hereinafter referred to as "Basilia") executed a *Deed of Absolute Sale* in favor of a certain Rajude Mansukhani over a parcel of land with an area of 114.07 square meters, situated in the District of Tondo, Manila. The land is covered by and more particularly described in Transfer Certificate of Title (TCT) No. 225279 of the Registry of Deeds of Manila. Capital gains tax in the amount of ₱ 51,600.00 and documentary stamp tax of ₱ 15,480.00 were paid on the said transaction between petitioner and Rajude Mansukhani.

Sometime in October 1997, the BIR received information from a certain Erlinda Cu, Timoteo Cunanan, and Gedelita Obiena (hereinafter referred to as the "informers"), reporting that petitioner and some other persons, including her co-owner, Basilia, committed tax evasion. In a *Joint Affidavit*, said informers reported to the BIR that petitioner and her companions sold two (2) parcels of land and "connived to defraud the government in terms of taxes due on the sale of the aforesaid property, and therefore guilty of Internal Revenue Tax Evasion" by not paying capital gains tax and documentary stamp tax due on the said sale. According to the informers, the two (2) parcels of land (located at Tondo, Manila), which were registered under the names of petitioner and Basilia, and covered by Transfer Certificate of Title (TCT) Nos. 225279 and 225280, were sold to Rajude Mansukhani and Jaime and Helen So, respectively. New TCTs were respectively issued to the said buyers by the Registry of Deeds of the City of Manila, numbered as 228435 and 228883.

Furthermore, sometime in September 1998, the same informers executed an *Additional Affidavit-Information* alleging another tax evasion committed by petitioner and Basilia on the sale of their property covered by TCT No. 225281 to RCS Marketing Corporation. A new TCT was likewise issued in favor of the latter, numbered as 237334.

Acting on the above information, Revenue Officers Alvin Batausa, Ricardo Santiage, and Section Chief Teodoro Huelva of the Tax Fraud Division of the BIR, through a letter dated October 16, 1998, invited petitioner to clarify some matters relative to the sale transaction. Petitioner's representative was then told that respondents were provided by the informers of a photocopy of a document in their possession denominated as "*Receipt of Earnest Money*". The said document showed that petitioner and her co-owner Basilia sold the lot subject of the *Deed of Absolute Sale* dated April 19, 1996, and two (2) other lots, not for ₱ 9,047.08 per square meter but for ₱ 70,000 per square meter.

Subsequently, petitioner received from respondents a *Formal Letter of Demand* dated August 18, 2000 and Assessment Notice Nos. TRD-95-IT-033-00, TRD-95-DST-034-00, TRD-96-IT-035-00, TRD-96-DST-036-00, all dated September 4, 2000, demanding payment of deficiency income tax and documentary stamp tax in the aggregate amounts of ₱ 13,252,521.26 and ₱ 300,474.83, respectively, inclusive of surcharges and interests.

On October 13, 2000, petitioner filed with respondents a protest with a waiver of the defense of prescription. On December 12, 2000, petitioner filed her *Position Paper* with respondents. Subsequently, petitioner received a *Final Notice Before Seizure* dated November 28, 2002.

Petitioner, through counsel, then filed a letter dated January 13, 2003 on January 14, 2003, questioning the said *Final Notice Before Seizure* and requesting respondent Pagarigan to act on petitioner's protest.

On February 10, 2003, petitioner filed a Petition for Review before the Court in Division docketed as CTA Case No. 6601, praying that the said deficiency tax assessments and the said *Final Notice Before Seizure* be declared null and void. The Commissioner filed her Answer thereto on April 4, 2003 raising certain special and affirmative defenses.

At the hearing held on March 4, 2004, respondents' oral motion for the dismissal of the case was granted, for failure of petitioner to prosecute her case and for ignoring the final warning of the Court during the hearing held on January 12, 2004 that the resetting of petitioner's presentation of evidence was for the last time on said date. Thus, the Petition for Review was dismissed by the Court in Division, through its Resolution dated March 16, 2004.

Upon petitioner's motion for the reconsideration of the said Resolution and in the interest of justice and fairness, and considering respondents' failure to oppose the motion, the Court in Division granted the same and accordingly set aside the said Resolution. Thus, trial ensued. After respondent rested her case, the parties were ordered to submit their respective memorandum within thirty (30) days from receipt of the Resolution dated August 29, 2008 of the Court in Division.

On October 6, 2008, respondents filed a Motion of Extension of Time to File Memorandum. The same was granted upon the Order dated October 7, 2008 by the Court in Division, and respondent was given until November 3, 2008 to file the said Memorandum. Petitioner filed her Memorandum on November 3,

2008. On the same date, respondent filed another Motion for Extension of Time To File Memorandum. Said Motion was likewise granted by the Court in Division and respondents were given until December 3, 2008, through its Order dated November 5, 2008. On December 17, 2008, petitioner filed a Manifestation (with Motion to Submit the Case for Decision).

On December 24, 2008, the case was submitted for decision, without respondents' Memorandum having been filed.

THE COURT IN DIVISION'S ASSAILED DECISION AND RESOLUTION

In the assailed Decision, the Court in Division declared as a mere scrap paper and of having no probative value the *Receipt of Earnest Money* relied upon by respondents for being a mere photocopy. Thus, the information contained therein, specifically the information as to the purchase price in the amount of ₱ 70,000.00 per square meter on the sale by petitioner and Basilia to Rajude Mansukhani, was disregarded and was not given effect by the Court in Division. However, since petitioner never denied the existence of the three (3) sale transactions entered into by her and Basilia as indicated in respondent's *Formal Letter of Demand* dated August 18, 2000, both at the administrative level and before the Court in Division, deficiency income tax liability in the total amount of ₱ 3,378,829.13, including surcharges and interests, for the taxable years 1995 and 1996, was ordered to be paid by petitioner. In addition, deficiency documentary stamp tax was also imposed by the Court in Division, for the same years, at the rate of 1.5%, amounting to a total of ₱ 39,525.00, including the corresponding surcharges. Said amounts were computed as follows:

INCOME TAX	1995	1996	Total
Zonal value of real property sold	₱ 3,475,912.50	₱ 3,148.087.50	₱ 6,624,000.00

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Less: Personal exemption	18,000.00	18,000.00	36,000.00
Net taxable income	₱ 3,457,912.50	₱ 3,130,087.50	₱ 6,588,000.00
Income tax due	₱ 993,973.75	₱ 895,626.25	₱ 1,889,600.00
Less: CGT paid	154,033.72	139,506.28	293,540.00
Deficiency income tax	₱ 839,940.03	₱ 756,119.97	₱ 1,596,060.00
Add: 25% surcharge	209,985.01	189,029.99	399,015.00
20% interest *pa* until 12.31.97	358,724.39	133,896.24	492,620.63
20% interest *pa* until 9.15.00	468,966.52	422,166.98	891,133.50
Total amount due	**₱ 1,877,615.94**	**₱ 1,501,213.19**	**₱ 3,378,829.13**
DOCUMENTARY STAMP TAX			
Zonal value of real property sold	₱ 3,475,912.50	₱ 3,148,087.50	₱ 6,624,000.00
DST due thereon	₱ 52,138.69	₱ 47,221.31	₱ 99,360.00
Less: DST paid	35,546.00	32,194.00	67,740.00
Deficiency DST	₱ 16,592.69	₱ 15,027.31	₱ 31,620.00
Add: 25% surcharge	4,148.17	3,756.83	7,905.00
Total amount due	**₱ 20,740.86**	**₱ 18,784.14**	**₱ 39,525.00**
TOTAL	**₱ 1,898,356.80**	**₱ 1,519,997.33**	**₱ 3,418,354.13**

On January 14, 2010, petitioner filed a Motion for Reconsideration of said Decision contending that the assailed Assessment Notice Nos. TRD-95-IT-033-00, TRD-95-DST-034-00, TRD-96-IT-035-00, TRD-96-DST-036-00, sprung from the sale transactions entered into by petitioner and her deceased sister, Basilia. Thus, according to petitioner, if indeed there are still unpaid taxes due on the said sale transactions, the same should be adjudged not only against petitioner, but also against the estate of her said deceased sister.

Furthermore, petitioner argued that the properties formerly covered and described under TCT No. 225281 (cancelled by TCT No. 237334), TCT No. 225280 (cancelled by TCT No. 228883), and TCT No. 225279 (cancelled by TCT No. 228435) are not regular assets but capital assets.

In her Comment (to petitioner's Motion for Reconsideration) filed on February 11, 2010, the Commissioner asserted that (1) the issue of co-ownership as a defense against liability was never raised by petitioner, and (2) petitioner is mistaken in claiming that respondent failed to adduce evidence that the subject properties are ordinary assets.

In the assailed Resolution dated August 11, 2010, the Court in Division sided with the Commissioner and ruled that the issue of co-ownership was indeed never raised by petitioner, and that the evidence clearly reveals that the subject properties were being leased prior to their sale, hence, considered as properties used in trade or business of the taxpayer, which makes them ordinary assets rather than capital assets. Parenthetically, it is herein noted that the Court in Division mistakenly stated, in the dispositive portion of the assailed Resolution, that it was **respondent's** Motion for Reconsideration that was being denied, but apparently, it was petitioner who filed such Motion.

From the foregoing Resolution, petitioner came to the Court *En Banc* by way of the instant Petition for Review on September 22, 2010. In the Resolution dated October 1, 2010,[3] the Court *En Banc* ordered respondents to file their Comment thereto, within ten (10) days from receipt thereof. However, said respondents never filed the required Comment.

In the Resolution dated December 17, 2010,[4] the Court *En Banc* ordered the parties to submit their respective Memorandum within a period of thirty (30) days from receipt of the said Resolution. Petitioner filed her Memorandum on February 2, 2011; while respondents again failed to do so.

On March 16, 2011, the Court *En Banc* deemed the instant case submitted for decision.[5]

Hence, this Decision.

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[3] Docket, pp. 46 to 47.
[4] Docket, pp. 50 to 51.
[5] Resolution dated February 23, 2011, Docket, pp. 107 to 108.

THE ISSUES

The issues raised by petitioner are as follows:

" (a) whether or not the property sold is capital asset or regular asset?

(b) whether or not petitioner is solely liable to pay the deficiency taxes assessed by respondents?

(c) whether or not petitioner is liable to pay delinquency interest of 20% per annum on the deficiency income and documentary stamp taxes from September 15, 2005 until full payment?"[6]

Petitioner's Arguments

Petitioner presents the following arguments, to wit: (1) that the properties sold and covered by Assessment Notice Nos. TRD-95-IT-033-00, TRD-95-DST-034-00, TRD-96-IT-035-00 and TRD-96-DST-036-00, are capital assets; (2) the estate of Basilia should not be included as co-petitioner in the petition; (3) petitioner should not be held to pay solely the aggregate amount assessed by respondents from the sale of the property, considering that the estate of her co-owner is equally liable to the said obligation; (4) separate action should not be filed by petitioner against the estate of her deceased sister in order to get the latter's share in the taxes due and arising from the sale of the property they co-owned; and (5) the imposition of the 20% per annum delinquency interest on the deficiency income and documentary stamp taxes in addition to the deficiency income tax and deficiency documentary stamp tax in the total amount of ₱ 3,418,354.13 from September 15, 2000 until full payment is unconscionable.

THE COURT EN BANC'S RULING

The subject properties are capital assets.

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[6] Docket, p. 56.

Section 33(a)(1) of the National Internal Revenue Code (NIRC), as amended,[7] provides:

> "SEC. 33. *Capital gains and losses.*
>
> (a) *Definitions.*— As used in this Title—
>
> (1) *Capital assets.*— **The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), <u>but does not include</u>** stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property used in the trade or business, of a character which is subject to the allowance for depreciation in subsection (f) of Section 29; or **real property used in the trade or business of the taxpayer**." *(Emphases and underscoring supplied)*

The statutory definition of capital assets is negative in nature. If the asset is not among the exceptions, it is a capital asset; conversely, assets falling within the exceptions are ordinary assets. And necessarily, any gain resulting from the sale or exchange of an asset is a capital gain or an ordinary gain depending on the kind of asset involved in the transaction.[8]

In this case, the only basis for treating the subject properties as ordinary assets is the finding of the BIR. In this connection, it must be remembered that the performance of duties of BIR personnel enjoys the presumption of regularity, pursuant to Section 3(m) of Rule 131 of the Rules of Court, to wit:

> "SEC. 3. *Disputable presumptions.*— The following presumptions are satisfactory if uncontradicted, **but may be contradicted and overcome by <u>other</u> evidence**:
>
> xxx xxx xxx
>
> (m) That **official duty has been regularly performed**;" *(Emphases and underscoring supplied)*

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[7] Now Section 39(A)(1) of the NIRC of 1997.
[8] *Calasanz, et al. vs. Commissioner of Internal Revenue, et al.*, G.R. No. L-26284, October 9, 1986.

Jurisprudence is to the effect that a presumption may operate against an adversary who has not introduced proof to rebut it.[9] Petitioner never presented any evidence to rebut the finding of the BIR that the subject properties are ordinary assets. Thus, We are constrained to rule that said properties are indeed ordinary assets.

The theory of co-ownership was not timely raised as a defense against liability and thus deemed waived.

It is clear that the Assessment Notice Nos. TRD-95-IT-033-00, TRD-95-DST-034-00, TRD-96-IT-035-00 and TRD-96-DST-036-00, and the *Formal Letter of Demand* dated August 18, 2000, as well as the subject *Final Notice Before Seizure* were all addressed to petitioner, and to her alone. Thus, petitioner could have already raised the issue of co-ownership at the administrative level, but she failed to do so. In all of petitioner's protest letters[10], there is no indication that she ever raised the defense or the matter of co-ownership.

In *Aguinaldo Industries Corporation (Fishing Nets Division) vs. Commissioner of Internal Revenue, et al.*[11], the Supreme Court held:

> "To allow a litigant to assume a different posture when he comes before the court and **challenge the position he had accepted at the administrative level**, would be to sanction a procedure whereby the court — which is supposed to *review* administrative determinations — would not review, but determine and decide for the first time, a question not raised at the administrative forum. **This cannot be permitted, for the same reason that underlies the requirement of prior exhaustion of administrative remedies to give administrative authorities the prior opportunity to decide controversies within its competence, and in much the same way that, on the judicial level, issues not raised in the lower court cannot be raised for the first time on appeal**." (*Emphasis supplied*)

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[9] *Spouses Surtida vs. Rural Bank of Malinao (Albay), Inc.*, G.R. No. 170563, December 20, 2006.
[10] Exhibits "J", "L", and "N". Division Docket, pp. 157, 159 to 162, and 163.
[11] G.R. No. L-29790, February 25, 1982.

Furthermore, upon failure of petitioner to timely plead and prove before the Court in Division the defense of co-ownership, petitioner is deemed to have waived the same.

Rule 9, Section 1 of the Rules of Court provides:

> "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 a prior judgment or by statute of limitations, the court shall dismiss the claim." (*Emphasis supplied*)

Petitioner did not argue straight away in her Petition for Review[12] in CTA Case No. 6601 the defense of co-ownership. Her Pre-Trial Brief[13] was equally bereft of such allegation or argument. Petitioner passed up the opportunity to prove the same allegation or argument during the trial before the Court in Division. She missed another opportunity to present the said issue before the Court in Division in her Memorandum[14]. Petitioner had to wait until the Court in Division already rendered the assailed Decision in CTA Case No. 6601, before asserting in her Motion for Reconsideration the defense of co-ownership.

Petitioner did not offer any explanation as to why she did not argue the said matter, only doing so in her Motion for Reconsideration of the adverse judgment by the Court in Division. Surely, said defense or objection was already available to petitioner during the pendency of CTA Case No. 6601.

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[12] Division Docket, pp. 1 to 6.
[13] Division Docket, pp. 60 to 61.
[14] Division Docket, pp. 301 to 322.

It is axiomatic in pleadings and practice that no new issue in a case can be raised in a pleading which by due diligence could have been raised in previous pleading.[15]

The imposition of the additional 20% delinquency interest* per annum *is in accordance with law.

Section 249 of the NIRC, as amended,[16] provides:

> "SEC. 249. *Interest.*— (a) *In general.*— There shall be assessed and collected on any unpaid amount of tax, interest at the rate of twenty percent (20%) per annum, or such higher rate as may be prescribed by regulations, from the date prescribed for payment until the amount is fully paid.
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> xxx xxx xxx
>
> (c) *Delinquency interest.*— In case of failure to pay:
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> (1) The amount of the tax due on any return required to be filed, or
>
> (2) The amount of the tax due for which no return is required, or
>
> (3) A deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner, **there shall be assessed and collected on the unpaid amount, interest at the rate prescribed in paragraph (a) hereof until the amount is fully paid**, which interest shall form part of the tax." *(Emphasis supplied)*

The above legal provision makes no distinctions nor does it establish exceptions. It directs the collection of interests at the stated rate. With the use of the word "shall", the provision is therefore mandatory[17] in case of delinquency.

Tax laws imposing penalties for delinquencies are clearly intended to hasten tax payments or to punish evasions or neglect of duty in respect thereof. If delays in tax payments are to be condoned for light reasons, the law imposing penalties for delinquencies would be rendered nugatory, and the maintenance of

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[15] *Toshiba Information Equipment (Phils.), Inc. vs. Commissioner of Internal Revenue*, G.R. No. 157594, March 9, 2010, citing *Director of Lands vs. Court of Appeals, et al.*, 363 Phil. 117, 128 (1999).
[16] Also Section 249 of the NIRC of 1997.
[17] *Gonzales vs. Chavez, et al.*, G.R. No. 97351, February 4, 1992.

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the government and its multifarious activities would be as precarious as tax payers are willing or unwilling to pay their obligations to the state in time. The imperatives of public welfare will not approve of this result.[18]

Thus, the imposition of the additional delinquency interest of 20% *per annum* on the deficiency income and documentary stamp taxes from September 15, 2000 until full payment cannot be considered unconscionable.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED**. The Decision promulgated on December 15, 2009 and Resolution dated August 11, 2010 by the Court in Division in CTA Case No. 6601, are hereby **AFFIRMED**.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

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[18] *Jamora, et al. vs. Meer*, G.R. No. 48129, November 11, 1942.

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, 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 *En Banc*.

ERNESTO D. ACOSTA
Presiding Justice