REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

BANK OF THE PHILIPPINE ISLANDS,
Petitioner,

- versus -

C.T.A. CASE NO. 4715

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
NOV 16 1995

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DECISION

This is a case involving an assessment of alleged deficiency percentage tax in the amount of P12,319,441.13 and alleged deficiency documentary stamp tax in the amount of P117,169,215.50 or a total of P129,488,656.63.

Petitioner is a commercial banking corporation organized and existing under Philippine laws.

In a letter to the petitioner, dated October 28, 1988, Respondent "ascertained that you incurred deficiency percentage and documentary stamp taxes in the amount of P129,488,656.63 as computed below, subject to adjustment of interest up to the actual date of payment.

1986 - Deficiency Percentage Tax

Deficiency percentage tax	P 7,270,892.88
Add: 25% surcharge	1,817,723.22
20% interest from 1-21-87 to 10-28-88	3,215,825.03

Compromise penalty	15,000.00
TOTAL AMOUNT DUE AND COLLECTIBLE	P12,319,441.13

1986 - Deficiency Documentary Stamp Tax

Deficiency Documentary Stamp Tax	P 93,723,372.40
Add: 25% surcharge	23,430,843.10
Compromise penalty	15,000.00
TOTAL AMOUNT DUE AND COLLECTIBLE	P117,169,215.50

(Exh. A and A-1; BIR Records, pp. 403-404)

"By letter, dated December 10, 1988, petitioner, through counsel, inquired from the respondent how these deficiency assessments were arrived at, since the assessments did not explain, however briefly, the basis for each assessment" (Par. 3, Petition for Review)

On June 27, 1991, petitioner received a letter from respondent, dated May 8, 1991, saying that "although in all aspects, your letter failed to qualify as a protest under Revenue Regulations No. 12-85 and therefore not deserving of any rejoinder by this office as no valid issue was raised against the validity of our assessment..." (Exh. C) still, we obliged to explain the basis of the assessments. Respondent ended the letter with a fair warning to the petitioner that "this constitutes the final decision of this office on the matter" (ibid., Emphasis supplied).

On July 8, 1991, petitioner through its counsel, "request(ed) for a reconsideration of your letter dated

May 8, 1991" (Annex D) and "explain very briefly why these assessments are clearly wrong and that the information given to you was contrary to the facts" (ibid.).

On January 21, 1992, petitioner received respondent's letter dated December 12, 1991, denying said motion for reconsideration.

Hence this appeal, filed on February 18, 1992.

The issues to be resolved are the following:

1) Whether or not the assessment has already become final and unappealable.

2) Whether or not the petitioner is liable for the respective amounts of P12,319,441.13 and P117,169,215.50 as deficiency percentage tax and documentary stamp tax for the year 1986.

As to the first issue, respondent in a concise disquisition on the matter said, thusly:

> In the case at bar, petitioner did not protest the assessment within 30 days from its receipt thereof. In its letter dated December 10, 1988, it merely requested respondent to explain the basis of the assessment and even advised respondent that <u>as soon as the assessment is explained and clarified, it shall inform the latter of its decision on whether to pay or protest the assessment.</u> Clearly, by petitioner's own declaration, said letter was not a protest against the assessment. Furthermore, said letter did not qualify as a protest under Revenue Regulations No. 12-85 since it did not request a reconsideration or

reinvestigation of the assessment and was not in the form and manner as prescribed by said regulations.

Although there is no showing when petitioner actually received the assessment, the date of its letter replying to the assessment, which is December 10, 1988, may be fairly presumed to be the date of its receipt of the assessment. Since within 30 days from December 10, 1988, petitioner did not protest the assessment, the same has become final and unappealable.

The records show that after the examination, petitioner's responsible officials were informed of the findings of the BIR examiner. Its accountant even prepared working papers disputing the findings. It received a Pre-Assessment Notice which is practically the same as the assessment itself. In fact, its representative reacted to the Pre-Assessment Notice by conferring with the BIR examiners on the matter. Since it was given the opportunity to examine the records of the case, it is presumed that it was aware of the basis of the proposed assessment. However, it did not present its arguments in writing protesting the proposed assessment as required under Revenue Regulations No. 12-85. Hence, it cannot claim that it could not protest the assessment because the same did not explain the basis thereof. The fact is, even before it received the assessment, it was already aware of the nature and basis thereof. Its request for an explanation of the basis of the assessment was, therefore, not justified.

Assuming <u>arguendo</u> that petitioner's letter of December 10, 1988 was a protest against the assessment, such protest is deemed to have been denied on June 27, 1991 when it received respondent's letter dated May 8, 1991 requesting it to pay the assessment and stating that it constitutes the final decision of the BIR on the matter. Instead of appealing respondent's final decision to this Honorable Court within 30 days from its receipt thereof as required under Section 229 of the Tax Code, petitioner requested a reconsideration thereof in a letter dated July 6, 1991.

(CTA Records, pp. 125-127)

We agree.

Section 270 of the 1986 Tax Code provides:

> Sec. 270. ***Protesting of assessment.*** - When the Commissioner of Internal Revenue or his duly authorized representative finds the proper taxes should be assessed, he shall first notify the taxpayer of his findings. Within a period to be prescribed by implementing regulations, the taxpayer shall be required to respond to the said notice. If the taxpayer fails to respond, the Commissioner shall issue an assessment based on his findings. Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation in such form and manner as may be prescribed by implementing regulations <u>within thirty (30) days from receipt of the said decision; otherwise, the decision shall become final and unappealable.</u> (Underscoring supplied)
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> If the protest is denied in whole or in part, the individual, association, or corporation adversely affected by the decision on the protest may appeal to the Court of Tax Appeals <u>within thirty (30) days from receipt of the said decision; otherwise, the decision shall become final, executory and demandable.</u> (Underscoring supplied)

Under the aforequoted provision, the law clearly defined two instances when an assessment becomes final, namely:

> 1) When it is not protested within thirty (30) days from receipt thereof from the Commissioner; and
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> 2) When the adverse decision on the protest is not appealed to the Court of Tax Appeals within thirty (30) days from receipt of the said decision

which must be complied with, otherwise, no other recourse is had to the taxpayer since it had already become final and unappealable. We do not attempt to make an interpretation on what is already clearly laid down by law. (see Protectors Services, Inc., vs. Commissioner of Internal Revenue, CTA Case No. 4514, July 21, 1993) On both instances, sadly, petitioner miserably failed.

Petitioner's letter, dated December 10, 1988, by its own counsel's admission was only an "inquiry" from the respondent "how these deficiency assessments were arrived at, since the assessments did not explain, however briefly, the basis for each assessment" (Par. 3, Petition for Review). It cannot be, by any means, considered a "protest" under Revenue Regulations No. 12-85 since it did not request for a reconsideration or reinvestigation and was not in the form and manner as prescribed therein. In fact, the tenor of that letter was one of challenging the validity *per se* of the assessment letters issued. Petitioner thus, said:

> 1. Your "deficiency assessments" are no assessments at all. The taxpayer is not informed, even in the vaguest terms, why it is being assessed a deficiency. The very purpose of a deficiency assessment is to inform the taxpayer why he has incurred a deficiency so that he can make an intelligent decision on whether to pay or to protest the assessment.
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> xxx xxx xxx xxx
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> 3. As to the alleged deficiency percentage tax, we are completely at a loss on how such assessment may be protested since your letter does not even tell the taxpayer what particular percentage tax is involved and how your examiner arrived at the deficiency. AS SOON AS THIS IS EXPLAINED AND CLARIFIED IN A PROPER LETTER ASSESSMENT, WE SHALL INFORM YOU OF THE TAXPAYER'S DECISION ON WHETHER TO PAY OR PROTEST THE ASSESSMENT. (Capitalization and Underscoring supplied; Exh. B).

By its own counsel's declaration, said letter indeed CANNOT be considered a protest. Surprisingly, however, after respondent's filing of her Answer questioning the petitioner's lack of protest during the hearing of this case, petitioner adopted a completely different stand and declared that said letter was after all a protest letter (Exh. "B", Formal Offer of Documentary Evidence). We can only surmise what made petitioner change its posture if only to probably "save" a dying case. But We refuse to be swayed by petitioner's sudden shift of stance. The fact remains, however, that there was no protest at all during the reglementary period provided by law. This

Court is always wary against such legal strategies and maneuvers employed by seasoned counsellors.

In the said letter, petitioner and/or its counsel exposed their apparent lack of honesty and candor when it said, "the taxpayer is not informed, even in the vaguest terms, why it is being assessed a deficiency. The very purpose of a deficiency assessment is to inform the taxpayer why he has incurred a deficiency... We therefore request that the examiner concerned be required to state, even in the briefest form why he believes the taxpayer has a deficiency in documentary and percentage taxes... also as to <u>what particular percentage tax</u> the assessment refers to ...x x x ... we are completely at a loss on how such assessment may be protested since your letter does not even tell the taxpayer what particular percentage is involved and how your examiner arrived at the deficiency." (ibid.) In fine, petitioner and/or its counsel pleaded innocence, as if they knew of such thing only for the very first time which is far from the truth.

Records of this case, however, reveal the dubiousness of their intentions. Said the respondent in his reply:

> In reply, please be informed that records of the case show that opportunities were afforded your client to study and controvert our examiners' findings immediately after the

audit/examination was conducted. Copies of the worksheets containing the details and computations of the proposed assessments were furnished the representatives of BPI, namely: Mr. Carlos Tan, Senior Vice President and Controller, Mr. Jerry Lazaro, Accountant, and Atty. Nicanor Cabaniero, in house counsel. Several conferences were also held wherein the merits of the investigation report were discussed and after which the bank controller was requested to submit a position paper. No written memorandum was however submitted and instead our examiners were informed that BPI will just contest the findings after receipt of the Pre-Assessment Notice.

After receipt of the assessment demand letter, had BPI opted to it could have sent its duly authorized representative to the Bureau and we could have allowed him/her to examine the records of the case. <u>There would have been no use for you to resort to this lame excuse of playing ignorant of the reasons why an assessment was issued, and a proper administrative protest could have been filed within the reglementary period provided by law</u>.

(Exh. C, CTA Records, pp. 8-9; Underscoring supplied)

Moreover, the examiners themselves in a Memorandum report revealed, thus:

It is informed that in the investigation of this case, the taxpayer was afforded all the opportunities to controvert the findings made in the examination. First, upon the completion of the verification of the books and records, copies of the worksheets containing details and computations of the proposed assessments were duly furnished to the representatives of the taxpayer, Mr. Jerry Lazaro, Accountant; Mr. Carlos Tan, Senior Vice President and Controller; and Atty. Nicanor Cabaniero, in house counsel of BPI; for their information and ready reference. Several discussions on the merits of the case were held and after the issues were properly joined we requested the bank controller to submit a memorandum containing their position on the case. Before we could wait for the submission of their position paper, we were transferred to this Division by virtue of the reorganization of the Bureau. However, before we left the Bank's Division we made one final attempt to secure a written reply from the taxpayer but unfortunately Atty. Nicanor Cabaniero informed us that they would instead contest the findings upon receipt of the Pre-Assessment Notice, hence the submission of the formal reports to Chief of Division.

Secondly, after the formal report had already been submitted, the Sector Audit Review Division sent the taxpayer a Pre-Assessment Notice on October 7, 1988 as required under existing law and regulations. The taxpayer was invited to go over the docket of the case and to present an objection within ten (10) days from receipt of the notice, if she is not agreeable thereto. Unfortunately, however, this was again ignored by the taxpayer. Hence, the issuance of the formal Notice of Assessment and Letter of Demand.

From the facts recited above, it would seem that the allegations of counsel in his protest are not properly substantiated. From the tenor of the protest it would appear that the taxpayer only learned of the proposed assessments for the first time upon receipt of the formal Letter of Demand and Notice of Assessment when as a matter of fact the taxpayer has had two (2) chances to refute the assessments as shown from the records of the case. As correctly observed by then Assistant Commissioner Parungo in his memorandum dated July 28, 1989 (copy attached) protest of this nature (pro-forma) is merely intended to delay the proceedings for the collection of the aforementioned deficiency taxes in order to protect the interest of the government from this dilatory tactic.

(Exh. 3, BIR Records, pp. 436-437; Underscoring supplied)

We believe them.

Even the testimonies of the supposedly responsible officers of the Petitioner are filled with inconsistencies and marred by incongruities. The testimony of Atty. Nicasio C. Cabanero, Senior Manager of herein petitioner Bank of the Philippine Islands, is very telling:

Q. Do you teach taxation?

A. I am teaching taxation since 1976 in San Beda and Arellano Foundation. I am still teaching up to now.

Q. Is that the College of Law of San Beda?

A. College of Law.

Q. Now, since you are in charge or you handle tax assessments issued against Bank of the Philippine Islands, are you aware, Mr. Cabanero, of an income tax assessment against BPI for the year 1986?

A. Yes.

Q. There is attached to the petition as Annex "A" which for purposes of identification, Your honors, we ask to be marked as Exhibit "A", two assessment notices, one is entitled - although the form is income tax assessment notice - there is typewritten on Exhibit "A" 1986 deficiency percentage tax, and on Exhibit "A-1", 1986 deficiency documentary stamp tax. Are these the assessments you were referring as having come to your knowledge?

A. Yes, sir.

JUDGE ACOSTA

Mark them.

(Deputy Clerk so marks.)

ATTY PADILLA

Q. When these assessments reached the bank, do you know what the bank did?

A. Well, it's routine in the bank, the moment we receive assessments, whether it is a formal, whether it is proposed assessment, preliminary assessment or final, then we will have to validate the findings from our records. So we have to coordinate principally with the Accounting Department and trace the authenticity of the figures. Of course, we verify first the authenticity of the assessment. After that, then, we validate the figures from our end. So that, as in usual assessment, that is what we did in the 1986 assessment.

Q. All right. Now, after validating the figures, what do you do?

A. Well, after we are convinced that, well, there is a basis for the figures, then we try now to prepare our arguments and we see whether there is really a basis for the BIR assessing the tax. And also, of course, the BIR examiners are going to the bank. So, we talk to them and we try to thresh out the issues, present evidences as to what they need. Let's say, they are just questioning certain things that are not documented, so we show them the documents and the worksheets.

Q. Now, specifically, in the case of these two assessments, 1986 deficiency percentage tax assessment and 1986 deficiency documentary stamp tax assessment, did these examiners confer with you following what you say is the SOP in the bank, or explained to you the nature of this assessment?

A. Well, regarding this 1986 deficiency --- they brought this assessment to the bank and well, explained to us the figures that are appearing here, and that's all.

Q. Now, after this assessment was received, I take it there was to be some formal action on the part of the bank. Do you know what action the bank took after receipt of this assessment?

A. Well, after receipt of that assessment, because assessment received by the bank will go to me first, the very first stage, because I am reporting this to the SVP Controller, to Mr. Tan. And so after I have validated the figures, then I will report to him that this is what is being assessed by the BIR and the basis of the records that I presented. Then, I explain to Mr. Tan, our Controller, our

<u>arguments and what we are going to do. After that, we have to consult the external tax counsel for the proper thing to do, whether or not to protest, or to pay, or what</u>.

Q. You mentioned that you have to refer this to the external tax counsel of the bank?

A. Yes.

Q. May we know who is the external tax consultant of the bank.

A. Our external tax counsel is Padilla Law Office.

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Q. Now, let's go to the substance where they say they even furnished you details and computations before the assessment was issued. What can you say as to that?

A. I don't think the BIR furnished us copies of the details of the computation. All they furnished us are copy of the assessment itself.

Q. So when they say you have a deficiency documentary tax assessment, would you be able to tell from the assessment for what documentary stamps are you being assessed a deficiency?

A. If the assessment is complete because as in --- we have so many assessment, tax assessment against the bank. And documentary stamp tax assessment, I cannot immediately tell from what they submit as to what they are trying to assess, as to what documents are these being assessed. So I'll be the one to go out of my way to look from our records and try to do some guess work on how they were able to arrive at this assessment.

JUDGE ACOSTA

Witness, do you mean to say the BIR did not follow the usual procedure of sending you a pre-assessment notice.

A. Well, sometimes, Your Honor, ---

JUDGE ACOSTA

No, in this case, not sometimes. We are talking only of this case.

A. Yes.

JUDGE ACOSTA

They did not or they did?

A. If ever they furnished, it is not complete. I cannot see it from whatever ---

JUDGE ACOSTA

So they furnished you a pre-assessment notice?

A. They have a pre-assessment notice but we cannot sense from what is stated there ---

JUDGE ACOSTA

Usually, in a pre-assessment notice, they set a preliminary findings with the examiner of the assessment which they intend to formalize. And usually, the wordings is that, "Please come to our office for conference regarding this." If you received that pre-assessment notice, then you could have been enlightened as to the nature of the assessment.

ATTY. PADILLA

The distinguished counsel for the respondent was kind enough to show a copy of the pre-assessment notice, Your Honors, and I would like to have it marked as Exhibit "D" and the attachment thereto again as Exhibit "D-1."

JUDGE ACOSTA

Mark it.

(Deputy Clerk so marks.)

(T.S.N. June 19, 1992; Hearing, pp. 6-10, 14-17))

From the foregoing testimony, it can be safely adduced that not only was the petitioner given the opportunity to discuss with the respondent when the latter issued the former a Pre-Assessment Notice (which petitioner ignored) but that the examiners themselves went to the petitioner and "we talk to them and we try to t(h)resh out the issues, present evidences as to what they need" (ibid.). Now, how can the petitioner and/or its counsel honestly tell this Court that they did not know anything about the assessments?

Not only that. To further buttress the fact that petitioner indeed knew beforehand the assessments contrary to the allegations of its counsel was the testimony of Mr. Jerry Lazaro, Assistant Manager of the Accounting Department of petitioner. He testified to the fact that he prepared worksheets which contain his analysis regarding the findings of the respondent's examiner, Mr. San Pedro and that the same worksheets were presented to Mr. Carlos Tan, Comptroller of herein petitioner, Bank of the Philippine Islands. Thus:

DIRECT EXAMINATION BY ATTY. PADILLA.

Q. Mr. Lazaro, there was a witness who testified for the defense for the Respondent Commissioner, Examiner, Manuel San Pedro. And among others he presented several documents which have been marked and offered in evidence as Exhibit "2", "2-a", "2-b", "2-c", "2-d", "2-e" "2-f", and "2-g". Will you please go over these exhibits and tell this Honorable Court whose handwriting these are?

A. Sir, these exhibits are in my own handwriting.

Q. So, these are in your own handwriting?

A. Yes.

Q. Will you please explain to this Honorable Court the nature why you prepared these Exhibit "2", "2-a" to "2-g"?

A. These exhibits present how the bank derived the bankers stocks rebate for the year 1986. For Exhibit 2 for comparison of the amount which is disallowed and the deficiency tax that we are going to pay. So, these facts are really meant to be further evaluated.

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CROSS EXAMINATION BY ATTY. BASTES.

Q. Mr. Witness, Mr. San Pedro testified that the documents marked as Exhibits "2" to "2-g" which you presented to him were also presented by you to Mr. Carlos Tan, Comptroller of Bank of the Philippine Islands, is that correct?

A. Sir, the default in paper was not yet refer to Mr. Tan because it was not verified.

Q. You never in any occasion discussed it with Mr. Carlos Tan, your computation appearing on Exhibits "2" to "2-g"?

A. Sir, verbally, we discussed it with Mr. Tan. Certain items but, we were waiting for his final computation because there are still items that are subject for arguments.

Q. Mr. Witness, Mr. San Pedro also testified that after he examined the books of accounts of BPI for tax purposes for 1986 he informed you about these findings, is that correct?

A. Verbally, yes.

ATTY. BASTES

That is all for the witness, Your Honors.

(T.S.N. August 23, 1994 Hearing, pp. 7-8 and pp. 19-20; Underscoring supplied)

From all the foregoing discussions, We can now conclude that the petitioner was indeed aware of the nature and basis of the assessments, and was given all the opportunity to contest the same but ignored it despite the notice conspicuously written on the assessments which states that "this ASSESSMENT becomes final and unappealable <u>if not protested within 30 days after receipt."</u> (Exh. "A", "A-1") Counsel resorted to dilatory tactics and dangerously played with time. Unfortunately, such strategy proved fatal to the cause of his client, (see **Protectors Services, Inc. vs. CIR**, CTA Case No. 4514, July 21, 1993).

Moreover, under Section 270 of the Tax Code the second instance wherein an assessment becomes final is:

2) When the adverse decision on the protest is not appealed to the Court of Tax Appeals within thirty (30) days from receipt of the said decision.

In the letter, dated May 8, 1991, (Exh. "C"), respondent in unmistakable terms told the petitioner that <u>"this constitutes the final decision of this office on the matter</u>." Hence, within thirty (30) days from receipt of said decision on June 27, 1991, petitioner should have already come to this Court.

Yet, it did not.

Instead, its counsel chose to "request a reconsideration of your letter dated May 8, 1991, received by us on June 27, 1991..." (Annex D, CTA Records, p. 11) in a letter to the Respondent, dated July 6, 1991, and received by him on July 8, 1991. From the date of receipt of the finality of the Respondent's decision on June 27, 1991 up to the time of receipt of the request for reconsideration by the respondent on July 8, 1991, a total of eleven (11) days have already elapsed.

On January 21, 1992 petitioner received the denial of the request for reconsideration in a letter, dated December 12, 1991 (Annex E, CTA Records, p. 16).

On February 18, 1992 or a period of twenty-eight (28) days from petitioner's receipt of the denial of respondent's decision, petitioner filed this Petition for Review.

Well-settled is the rule that a Motion for Reconsideration of a decision will only suspend the running of the prescriptive period. (Sec. 4, Rule 13, Rules of the Court of Tax Appeals and Sec. 3, Rule 41, Rules of Court) Hence, from June 27, 1991 which was the date of receipt of the final decision of the respondent up to July 8, 1991, the date of receipt of petitioner's request for reconsideration, eleven (11) days have already elapsed. From thereon, the running of the prescriptive period was interrupted and began to run again on January 21, 1992, the date of receipt by petitioner of respondent's denial of the request for reconsideration and continued until February 18, 1992 when petitioner filed its Petition for Review or for a period of twenty-eight (28) days or a total of THIRTY-NINE (39) days have already ELAPSED before petitioner brought the matter to this Court in clear violation of Section 270 of the Tax Code and Section 7 of Republic Act No. 1125. Hence, the assessments already became final and unappealable.

Time and again, it has been consistently held that once a decision becomes final, the Court can no longer amend, modify, much less set aside the same. (**Adez Realty Inc. vs. Hon. Court of Appeals, et al.**, 212 SCRA 623; **Petra Duenas vs. The Hon. Pelagio S. Mandi, et al.**, 151 SCRA 530; **Tarcisio Icao vs. Hon. Simplicio M. Apalisok**, 180 SCRA 680; **Hannah Corporation vs.**

Commissioner of Customs, CTA Case No. 4977, Resolution dated January 18, 1994).

> Payment of taxes being admittedly a burden, taxpayers should not be left without any recourse when they feel aggrieved due to the erroneous and burdensome assessments made by the Bureau of Internal Revenue agent or by the Commissioner. Said right is vested upon adversely affected taxpayers under Republic Act No. 1125. xxx However, the remedy of an aggrieved taxpayer is not without any limitation. 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. (**Dayrit vs. Cruz,** L-39910, Sept. 26, 1988, 165 SCRA 571)
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> Under Section 7 of Republic Act No. 1125, the assessment is appealable to the Court of Tax Appeals within thirty (30) days from receipt of the letter. The taxpayer's failure to appeal in due time, as in the case at bar, makes the assessment in question final, executory and demandable. (**Republic of the Philippines vs. The Court of Appeals and Nielson Company,** Inc., No. L-38540, April 30, 1987, 149 SCRA 351.)

Prescinding from the foregoing decision, We find it unnecessary to delve into the merits of the case at bar.

WHEREFORE, in all the foregoing, this case is hereby **DISMISSED** for lack of jurisdiction -- the subject assessments having become final and unappealable.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

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WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

MANUEL K. GRUBA
Associate Judge

C E R T I F I C A T I O N

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

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals