REPUBLIC OF THE PHILIPPINES
*Court of Tax Appeals*
QUEZON CITY

# ***EN BANC***

IRENE C. SALUD,
*Petitioner,*

-versus-

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

**C.T.A. EB NO. 412**
**(C.T.A. CASE NO. 6954)**

Present:

ACOSTA, Presiding Justice,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, JJ.

**Promulgated:**

APR 30 2009 [illegible] 1:10 p.m.

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# DECISION

**PALANCA-ENRIQUEZ, J.:**

## THE CASE

This is a Petition for Review filed by Irene C. Salud (hereafter "petitioner") under *Section 11 of RA 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals)*, in relation to *Rule 43 of the 1997 Rules of Civil Procedure, as amended*, praying for the reversal of the Decision dated April 29, 2008 and Resolution dated July 14, 2008 rendered by the First Division of this Court in C.T.A. Case No. 6954, the respective dispositive portions of which read, as follows:

> "**WHEREFORE**, for lack of merit, this instant Petition for Review is hereby **DISMISSED**. Accordingly, petitioner is ordered to pay her deficiency capital gains and documentary stamp taxes in the amount of P7,249,991.00 and P53,250.74, respectively computed as follows:

Deficiency Capital Gains Tax

| | |
|---|---|
| Sales | P128,250,000.00 |
| Less: Cost | 82,250,000.00 |
| Net Taxable Gains | 46,000,000.00 |
| Capital Gains Tax Due (Sec. 24C) | P4,595,000.00 |
| Less: Capital Gains Tax Paid | 0.00 |
| Basic Deficiency Capital Gains Tax Due (Sec. 24C) | P4,595,000.00 |
| Add: 25% surcharge (non-filing/non-payment) (Sec. 248 A) | 1,148,750.00 |
| 20% interest from 9-10-99 up to 4-15-00 (Sec.249) (11.95%) | 549,102.50 |
| 20% interest from 4-16-00 to 4-30-01 (20.83%) | 957,138.50 |
| **Total Deficiency Capital Gains Tax Due** | **P7,249,991.00** |

Deficiency Documentary Stamp Tax

| | |
|---|---|
| Total Volume of BW Shares transferred Via EQ Trade of PCDI with Change in Beneficial Ownership | 4,500,000.00 |
| Par Value | 1.00 |
| Taxable Base | P4,500,000.00 |
| DST Rate Applicable (Sec. 176) | P1.50/P200.00 |
| DST Due | P33,750.00 |
| DST Paid | 0.00 |
| Basic Deficiency Documentary Stamp Tax | P33,750.00 |
| Add: 25% surcharge (non-filing/non-payment ) (Sec. 248A) | 8,437.50 |
| 20% interest from 9-10-99 up to 4-15-00 (Sec.249) (11.95%) | 4,033.12 |
| 20% interest from 4-16-00 to 4-30-01 (20.83%) (Sec. 249) | 7,030.12 |
| **Total Deficiency Documentary Stamp Tax Due** | **P53,250.74** |

In addition, petitioner is hereby **ORDERED TO PAY** delinquency interest of twenty percent (20%) per annum on the total amount of P7,303,241.74 from April 9, 2004 until fully paid, pursuant to Sections 248 and 249 of the NIRC of 1997, as amended.

**SO ORDERED**"

"**WHEREFORE**, petitioner's Motion for Reconsideration is hereby **DENIED** for lack of merit.

**SO ORDERED**."

**THE PARTIES**

Petitioner Irene C. Salud is a Filipino, of legal age and the petitioner in C.T.A. Case No. 6954. She may be served with processes through her counsel, with address at 23rd Floor, Multinational Bancorporation Center, 6805 Ayala Avenue, Makati City.

Respondent, on the other hand, is the Commissioner of the Bureau of Internal Revenue who issued the decision finding petitioner liable for deficiency Capital Gains and Documentary Stamp Taxes, with principal address at BIR National Office Building, Agham Road, Diliman, Quezon City, where processes of this Honorable Court may be served.

**THE FACTS**

The facts, as culled from the records, are as follows:

Petitioner alleges that on August 11, 2009, she obtained a personal loan from Dante Tan and executed a promissory note in his favor in the amount of P17,036,430.19. To secure said loan, petitioner also executed a pledge agreement over her 4,500,000 shares in Best World Resources Corp., Inc. (BW shares) in favor of Dante Tan.

Thereafter, petitioner authorized PCCI Securities Brokers Corporation to transfer her BW shares to Dante Tan.

On March 16, 2001, petitioner received a Notice of Assessment from the Bureau of Internal Revenue (BIR) advising petitioner of her deficiency assessment for Capital Gains Tax and Documentary Stamp Tax (DST) relative to her "Over-the-Counter" sales transaction of BW shares.

On April 2, 2001, petitioner filed her position paper questioning the findings on the deficiency assessment.

On March 9, 2004, petitioner received respondent's decision, finding her liable for deficiency Capital Gains and Documentary Stamp Taxes in the amounts of P8,398,741.00 and P61,688.24, respectively.

On April 21, 2004, petitioner filed a Petition for Review before this Court, docketed as C.T.A. Case No. 6954, appealing respondent's decision dated March 2, 2004.

In his Answer, respondent alleged the following special and affirmative defenses:

> "5. Petitioner seeks to set aside thru this instant Petition the deficiency capital gains tax and documentary stamp tax assessments issued against her for the taxable year 1999 relative to the sale or transfer of her BW shares on the following grounds to wit: (1) the Commissioner violated petitioner's right to due process; (2) petitioner can not be held liable for documentary stamp taxes as no document of sale was executed by her; and (3) respondent failed to present clear and convincing proof of fraud as required by the Tax Code;
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> 6. On the first issue, petitioner was fully apprised of the law and facts upon which the questioned assessments were based contrary to her allegations in the Petition. She was informed of the facts and the law as evidenced by the annexes which were attached to the Assessment Notice. These include the Computation of the Deficiency Capital Gains and Documentary Stamp Tax covering her over-the-counter transaction, the Schedule of Over the Counter Transaction and Details of Discrepancies of the assessments. To our mind, the above-mentioned documents or attachments completely informed petitioner of the factual and legal bases of the assessments;
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> 7. On the second issue, petitioner posited the view that she can not be held liable for the Documentary Stamp Tax as no document of sale was ever executed. We disagree. As mentioned in the memorandum, which was prepared by the

task force that conducted the investigation, the trading is not done in the trading floor but directly settled between two counter-parties. The Philippine Central Depository, aside from being a depository, is a place where settlement of securities takes place. It utilizes scripless trading; In the scripless trading, settlement is carried out via Book Entry System or BES. BES is a system used to record the ownership of shares. When a trade is done at the Philippine Stock Exchange, securities are moved via electronic debit and credit of participant's securities account to effect settlement. There is no need for physical movement of stock certificate (scrip) between buyer or seller. Well settled is the rule that a documentary stamp tax is an excise tax, the purpose of which is to raise revenue;

8. There is no question that the BW shares were actually transferred in view of the fact that this was clearly established by the examiners during the investigation. Proper documentation was done for the over-the-counter transactions by securing duly certified true copies of Out Receipt attached with Letter of Instruction, In Receipt of the contra broker and Ledger of Statement of Account. Out of Receipt No. 967 was used to transfer the 4,500,000 BW shares from PCCI Securities Brokers account of petitioner Irene Salud to Quality Investments Securities for the account of Mr. Lucio Co with In Receipt No. 46383. This transfer was further verified through the Customer Ledger or Statement of Accounts of petitioner, Out Receipt No. 967, In Receipt No. 46838 and Customer Ledgers/Statement of Account of petitioner and Mr. Lucio Co. On 11 August 1999, petitioner authorized PCCI Securities Brokers Corporation to transfer her 4,500,000 BW shares to Quality Investment Securities for the account of Dante Tan. However, upon verification from the receiving broker, it was disclosed that the shares were not transferred or credited to the account of Mr. Dante Tan but rather to the account of Mr. Lucio Co. Change of beneficial ownership was the result of such transfer hence, the resultant tax consequence of said

transfer is expressly provided under Section 24(c) of the 1997 Tax Code;

9. In Philippine Home Assurance Corporation et al. vs. Court of Appeals, G.R. No. 119446, 21 January 1999, the Honorable Supreme Court explicitly ruled that "while it is true that a documentary stamp tax is levied on the document and not on the property involved, the documentary stamp tax is not intended to be a tax on the document alone. The law taxes the document because of the transaction so that the tax becomes due and payable at the time the transaction is had or accomplished, which in this case, is at the time of the issuance of the document;

10. Lastly, petitioner also questioned the propriety of the imposition of the 50% surcharge as fraud penalty on the ground that the Commissioner failed to present clear and convincing proof of fraud. The circumstances attendant to this case indicate that petitioner's willful neglect to file the corresponding returns within the time prescribed by law was due to fraud with intent to evade the payment of the corresponding tax due. Petitioner's failure to report her substantial gain derived from the transfer of shares is a palpable attempt to evade her tax liabilities. Her failure to file returns can not be imputed as an honest mistake. Accordingly, the imposition of 50% surcharge as fraud penalty is consistent with the provision of the law and, therefore, justified;

11. Finally, it is well settled rule in taxation that assessments are prima facie presumed correct and made in good faith. The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed."

After trial on the merits, on April 29, 2008, the First Division of this Court rendered the assailed decision dismissing the Petition for Review for lack of merit, but reduced the deficiency Capital Gains and Documentary Stamp Taxes to P7,249,991.00 and P53,250.74, respectively.

On May 26, 2008, petitioner filed a Motion for Reconsideration, which was denied by the First Division in a Resolution dated July 14, 2008.

On August 15, 2008, petitioner filed the instant Petition for Review, raising the following:

**ISSUES**

I

THE FIRST DIVISION OF THIS HONORABLE COURT GRAVELY ERRED IN RULING THAT PETITIONER'S ACT OF PLEDGING HER SHARES OF STOCK AS SECURITY AND SUBSEQUENTLY AUTHORIZING THE TRANSFER OF HER SHARES OF STOCK TO DANTE TAN FALLS UNDER THE PHRASE "DISPOSITION OF SHARES" SUBJECT TO CAPITAL GAINS TAX.

II

THE FIRST DIVISION OF THIS HONORABLE COURT COMMITTED GRAVE REVERSIBLE ERROR WHEN DESPITE CLEAR EVIDENCE TO THE CONTRARY, THE COURT RULED THAT RECORDS SUPPORT THE FINDING THAT A CONSUMMATED TAXABLE TRANSACTION BETWEEN PETITIONER AND DANTE TAN AND/OR LUCIO CO OCCURRED WHICH WOULD JUSTIFY THE ASSESSMENT AGAINST PETITIONER OF DEFICIENCY CAPITAL GAINS AND DOCUMENTARY STAMP TAXES, INCLUDING SURCHARGES AND INTERESTS.

III

THE FIRST DIVISION OF THIS HONORABLE COURT SERIOUSLY ERRED WHEN IT RULED THAT PETITIONER WAS NOT DENIED DUE PROCESS.

On September 2, 2008, We require respondent Commissioner of Internal Revenue to file his comment, not a motion to dismiss, within ten (10) days from notice.

On September 16, 2008, respondent filed a "Motion for Extension of Time to File Comment", which was granted by this Court in a Resolution dated September 19, 2008.

On October 3, 2008, respondent filed his "Opposition (Re: Petition for Review). Thus, the petition is now deemed submitted for decision.

The issues raised by petitioner may be simplified as follows: (1) whether the assessment for deficiency Capital Gains Tax and Documentary Stamp Tax has factual and legal bases; and (2) whether petitioner was denied due process.

## THE COURT *EN BANC'S* RULING

The petition has no merit.

**First Issue:**

***Whether the assessment for Capital Gains Tax and DST has Factual and Legal Bases***

***Capital Gains Tax***

Petitioner contends that she pledged her 4,500,000 BW shares to Dante Tan as security for the loan she obtained from the latter; that the said act of pledge and subsequent transfer of her BW shares to Dante Tan is not the "disposition of shares", as contemplated under *Section 24 (C) of the NIRC*; that no net realizable gain or loss may and/or will be realized on the pledge transaction; that she did not consent to the alleged sale of her BW shares to a certain Lucio Co and she only discovered that her BW shares were illegally transferred to the account of Lucio Co from Dante

Tan through Quality Investments Securities. Hence, no Capital Gains Tax nor DST can be imposed upon her.

Petitioner's contention is devoid of merit.

*Section 24 (C) of the NIRC of 1997, as amended*, provides:

> "SEC. 24. Income Tax Rates. -
>
> xxx xxx
>
> (C) Capital Gains from Sale of Shares of Stock not Traded in the Stock Exchange.— The provision of Section 39 (B) notwithstanding, a final tax rates prescribed below is hereby imposed upon the net capital gains realized during the taxable year from the sale, barter, exchange or other disposition of shares of stock in a domestic corporation, except shares sold, or disposed of through the stock exchange.
>
> Not over P100,000..................................5%
> Or any amount in excess of P100,000......10%
>
> xxx xxx."

As provided for in the aforequoted provision, Capital Gains Tax shall be imposed upon the net capital gains realized during the taxable year from the sale, barter, exchange or other disposition of shares of stock in a domestic corporation, except shares sold, or disposed of through the Stock Exchange. In capital gains tax, the tax is imposed on the gain or profit from the sale of capital assets. In this case, the tax is imposed on the gain from the sale of shares of stock not traded in the Stock Exchange.

A reading of the aforecited provision shows that the law does not define nor qualify the phrase "other disposition". It is clear, plain and therefore must be applied without attempted or strained interpretation. It shall be construed in its plain and simple meaning. "Disposition" means an act of disposing; transferring to the care or possession of another; the parting with, alienation of, or giving up property *(Black's Law Dictionary, 6th Edition)*.

In the case at bar, record shows that petitioner executed a pledge agreement in favor of Dante Tan over her 4,500,000 BW shares, as security for the loan she obtained from the latter. She instructed her broker, PCCI Securities Brokers Corporation, to transfer her shares to Quality Investments Securities for the account of Dante Tan. However, upon verification from the receiving broker, it was discovered that the shares were transferred to the account of Lucio Co.

It is clear from the records that petitioner had disposed her BW shares when she ordered her broker, PCCI Securities Broker Corporation, to transfer her 4,500,000 BW shares to Dante Tan. Notwithstanding the fact that the subject shares were actually transferred to the account of Lucio Co, such disposition is subject to Capital Gains Tax, pursuant to the aforequoted *Section 24 (C) of the NIRC of 1997, as amended.*

As aptly ruled by the First Division:

> "The records show that petitioner transferred her shares of stock to Dante T. Tan as a security for a loan. Thereafter, she wrote to PCCI Securities Brokers Corporation (PCCI Securities) authorizing the latter to transfer the 4,500,000 BW shares from her account to Quality Securities for the account of Dante T. Tan. Her act of pledging her shares of stock as security, and subsequently authorizing the transfer of her shares of stock to Dante T. Tan after receiving the loaned amount of P17,036,430.19 clearly falls under the phrase "disposition of shares" and petitioner became liable to pay the capital gains tax.
>
> As correctly pointed out by respondent, the fact that the transferee was actually Lucio L. Co and not Dante T. Tan, does not belie the fact that petitioner transferred her shares without paying the capital gains tax to which the said transaction is liable. Records support this finding.
>
> Petitioner, in a letter dated August 11, 1999, instructed her broker PCCI Securities to transfer 4,500,000 shares to Quality Securities for the account of Dante T. Tan. On the same date, PCCI Securities Account Ledger of Customers

12656 shows that 4,500,000 BW shares were transferred. PCCI Securities Account No. 12656 is the account number of petitioner as shown by Reference Card of petitioner with PCCI Securities. On the same date, Quality Securities Stock Debit Memo No. 00967 was executed indicating that 4,500,000 BW shares were transferred from PCCI Securities Account No. 12656 and delivered to Quality Securities. On August 12, 1999, the Account Ledger of Lucio L. Co with Quality Securities shows that 4,500,000 BW shares were transferred to the account of Lucio L. Co. Accordingly, Quality Securities issued In Receipt No. 46838 dated August 12, 1999 showing that 4,500,000 BW shares were received from PCCI Securities for the account of Lucio L. Co. The Letter of Instruction may show that the BW shares should be transferred to the Account of Dante T. Tan with Quality Securities; however, upon verification from the receiving broker, it was discovered that the shares were actually transferred to the account of Lucio L. Co. In spite of this circumstance, petitioner is still liable for deficiency capital gains tax."

***Documentary Stamp Tax***

As regards the assessment for deficiency DST, We sustain the findings of the First Division.

*Section 173 of the NIRC of 1997, as amended*, provides:

"SEC. 173. Stamp Taxes Upon Documents, Loan Agreements, Instruments, and Papers.— Upon documents, instruments, loan agreements and papers, and upon acceptances, assignments, sales, and transfers of the obligation, right, or property incident thereto, there shall be levied, collected and paid for, and in respect of the transaction so had or accomplished, the corresponding documentary stamp taxes prescribed in the following Sections of this Title, by the person making, signing, issuing, accepting, or transferring the same wherever the document is made, signed, issued, accepted, or transferred when the obligation or right arises from Philippine sources or the property is situated in the Philippines, and at the same time such act is done or transaction had: Provided, that whenever one party to the taxable document enjoys exemption from the tax herein imposed, the other party thereto who is not exempt shall be the one directly liable for the tax."

Corollary thereto, *Section 176* of the same Code, provides:

"SEC. 176. Stamp Tax on Sales, Agreements to Sell, Memoranda of Sales, Deliveries or Transfer of Due-bills, Certificates of Obligation, or Shares or Certificates of Stock— On all sales, or agreements to sell, or memoranda of sales, or deliveries, or transfer of due-bills, certificates of obligation, or shares or certificates of stock in any association, company, or corporation, or transfer of such securities by assignment in blank, or by delivery, or by any paper or agreement, or memorandum or other evidences of transfer or sale whether entitling the holder in any manner to the benefit of such due-bills, certificates of obligation or stock, or to secure the future payment of money, or for the future transfer of any due-bill, certificate of obligation or stock, there shall be collected a documentary stamp tax of One peso and fifty centavos (P1.50) on each Two hundred pesos (P200), or fractional part thereof, of the par value of such due-bill, certificate of obligation or stock: Provided, that only one tax shall be collected on each sale or transfer of stock or securities from one person to another, regardless of whether or not a certificate of stock or obligation is issued, indorsed, or delivered in pursuance of such sale or transfer: and Provided, further, that in case of stock without par value the amount of the documentary stamp tax herein prescribed

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shall be equivalent to twenty five percent (25%) of the documentary stamp tax paid upon the original issue of said stock."

It is clear from the aforecited provisions that the subject of a DST is not limited to the document, instrument and paper embodying the enumerated transactions. A DST is an excise tax on the exercise of a right or privilege to transfer obligations, rights or properties incident thereto *(Michel J. Lhuillier Pawnshop, Inc. vs. Commissioner of Internal Revenue, 489 SCRA 147)*.

Thus, when petitioner exercised the privilege of transferring her 4,500,000 BW shares to Dante Tan by way of a pledge, said transaction under the law, is subject to DST. Notwithstanding the fact that the said shares were actually transferred to the account of Lucio Co, petitioner is still liable for DST.

Furthermore, *Section 195 of the NIRC of 1997, as amended*, explicitly provides that on every mortgage or pledge of lands, estate, or property, real or personal, heritable or movable, whatsoever, where the same shall be made as a security for the payment of a definite and certain sum of money lent at the time or previously due and owing or forborne to be paid, being payable, and on any conveyance of land, estate, or property whatsoever, in trust or to be sold, or otherwise converted into money which shall be and intended only as security, either by express stipulation or otherwise, there shall be collected a DST.

In other words, pledge, which is an exercise of a privilege to transfer obligations, rights or properties incident thereto, is subject to DST *(First Planter Pawnshop, Inc. vs. Commissioner of Internal Revenue, 560 SCRA 606).*

**Second Issue:**

***Whether petitioner was denied due course***

Petitioner's claim that she was denied due process cannot also be sustained.

*Section 228 of the NIRC of 1997, as amended*, provides:

> "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: Provided, however, that a preassessment notice shall not be required in the following cases:
>
> xxx xxx

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.

xxx xxx."

The above provision requires that the taxpayer must be informed in writing of the law and the facts on which the assessment is made. Thus, such cannot be presumed. Otherwise, the express provision of *Section 228* would be rendered nugatory *(Commissioner of Internal Revenue vs. Enron Subic Power Corporation, G. R. No. 166387, January 19, 2009)*,

A careful perusal of the records shows that respondent has substantially explained how he arrived at such an assessment in the Assessment Notice No. BW-99-CGT-0002-01, together with the Formal Letter of Demand dated April 2, 2001 *(BIR Records, pp.72-80)*. Respondent did not merely enumerate the deficiency taxes, but stated in writing the legal and factual bases of the assessment. In fact, the Assessment Notice and the Formal Letter of Demand were accompanied with complete details, such as the computations, schedules and applicable laws, which are the factual and legal bases covering the aforementioned discrepancies established during the investigation (*BIR Records, pp. 72-76*).

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Considering that respondent has duly complied with the requirements prescribed under *Section 228 of the NIRC of 1997, as amended,* that the taxpayer be informed in writing of the law and the facts on which the assessment was made, it is clear that petitioner was not denied due process.

It has been held that the essence of due process is found in the reasonable opportunity to be heard and submit any evidence one may have in support of one's defense. What the law proscribes is the lack of opportunity to be heard. As long as a party is given the opportunity to defend his interests in due course, he would have no reason to complain, for it is this opportunity to be heard that makes up the essence of due process *(Estares vs. Court of Appeals, 459 SCRA 604)*. Petitioner, therefore, cannot complain that she was denied due process. She was duly notified when she received the copies of the Preliminary Assessment Notice, Assessment Notice and assailed decision of the respondent. She was given the full opportunity to be heard and to express her objections during the Preliminary Conference *(BIR Records, p.52)*. Thereafter, she filed her

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protest to the assailed assessment. Clearly, petitioner was accorded due process.

Finding no reversible error, the Court *En Banc* has no alternative, but to sustain the findings and conclusion of the First Division of this Court.

**WHEREFORE**, premises considered, the present Petition for Review is hereby **DENIED DUE COURSE**, and accordingly **DISMISSED** for lack of merit. The assailed Decision dated April 29, 2008 and Resolution dated July 14, 2008 are hereby **AFFIRMED**.

**SO ORDERED.**

**OLGA PALANCA-ENRIQUEZ**
Associate Justice

**WE CONCUR:**

**ERNESTO D. ACOSTA**
Presiding Justice

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

**LOVELL R. BAUTISTA**
Associate Justice

**ERLINDA P. UY**
Associate Justice

**CAESAR A. CASANOVA**
Associate Justice

# CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

**ERNESTO D. ACOSTA**
Presiding Justice