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FIRST DIVISION

[G.R. No. 120935. May 21, 2009]

LUCAS G. ADAMSON, THERESE JUNE D. ADAMSON, and SARA S. DE LOS REYES, in their capacities as President, Treasurer and Secretary of Adamson Management Corporation, *petitioners, vs.* **COURT OF APPEALS and LIWAYWAY VINZONS-CHATO, in her capacity as Commissioner of the Bureau of Internal Revenue,** *respondents.*

[G.R. No. 124557. May 21, 2009]

COMMISSIONER OF INTERNAL REVENUE, *petitioner, vs.* **COURT OF APPEALS, COURT OF TAX APPEALS, ADAMSON MANAGEMENT CORPORATION, LUCAS G. ADAMSON, THERESE JUNE D. ADAMSON, and SARA S. DE LOS REYES,** *respondents.*

SYLLABUS

1. TAXATION; REMEDIES; ASSESSMENT; DEFINED.— x x x [A]n assessment is a written notice and demand made by the BIR on the taxpayer for the settlement of a due tax liability that is there definitely set and fixed. A written communication containing a computation by a revenue officer of the tax liability of a taxpayer and giving him an opportunity to contest or disprove the BIR examiner's findings is not an assessment since it is yet indefinite.

2. ID.; ID.; ID.; RECOMMENDATION LETTER OF THE COMMISSIONER OF INTERNAL REVENUE CANNOT BE CONSIDERED A FORMAL ASSESSMENT OF PRIVATE RESPONDENTS' TAX LIABILITY; EXPLAINED.— We rule that the recommendation letter of the Commissioner cannot be considered a formal assessment. Even a cursory perusal of the said letter would reveal three key points: 1. It was not addressed to the taxpayers. 2. There was no demand made on the taxpayers to pay the tax liability, nor a period for payment set therein. 3. The letter was never mailed or sent to the taxpayers by the

Commissioner. In fine, the said recommendation letter served merely as the *prima facie* basis for filing criminal informations that the taxpayers had violated Section 45 (a) and (d), and 110, in relation to Section 100, as penalized under Section 255, and for violation of Section 253, in relation to Section 252 9(b) and (d) of the Tax Code.

3. ID.; ID.; ID.; IN CASES OF FRAUDULENT TAX RETURNS, AN ASSESSMENT OF A DEFICIENCY IS NOT NECESSARY TO A CRIMINAL PROSECUTION.— x x x When fraudulent tax returns are involved as in the cases at bar, **a proceeding in court after the collection of such tax may be begun without assessment**. Here, the private respondents had already filed the capital gains tax return and the VAT returns, and paid the taxes they have declared due therefrom. Upon investigation of the examiners of the BIR, there was a preliminary finding of gross discrepancy in the computation of the capital gains taxes due from the sale of two lots of AAI shares, first to APAC and then to APAC Philippines, Limited. The examiners also found that the VAT had not been paid for VAT-liable sale of services for the third and fourth quarters of 1990. Arguably, the gross disparity in the taxes due and the amounts actually declared by the private respondents constitutes badges of fraud. Thus, the applicability of ***Ungab v. Cusi*** is evident to the cases at bar. In this seminal case, this Court ruled that there was no need for precise computation and formal assessment in order for criminal complaints to be filed against him. It quoted Merten's Law of Federal Income Taxation, Vol. 10, Sec. 55A.05, p. 21, thus: An assessment of a deficiency is not necessary to a criminal prosecution for willful attempt to defeat and evade the income tax. A crime is complete when the violator has knowingly and willfully filed a fraudulent return, with intent to evade and defeat the tax. The perpetration of the crime is grounded upon knowledge on the part of the taxpayer that he has made an inaccurate return, and the government's failure to discover the error and promptly to assess has no connections with the commission of the crime.

4. REMEDIAL LAW; JURISDICTION; EXCLUSIVE APPELLATE JURISDICTION; THE COURT OF APPEALS HAS JURISDICTION TO TAKE COGNIZANCE OF BOTH THE CRIMINAL AND CIVIL CASES AT BAR FOR FAILURE OF

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THE COMMISSIONER OF INTERNAL REVENUE TO ISSUE AN ASSESSMENT.— Under Republic Act No. 1125 (An Act Creating the Court of Tax Appeals) as amended, the rulings of the Commissioner are appealable to the CTA, x x x Republic Act No. 8424, titled "An Act Amending the National Internal Revenue Code, As Amended, And For Other Purposes," later expanded the jurisdiction of the Commissioner and, correspondingly, that of the CTA, x x x The latest statute dealing with the jurisdiction of the CTA is Republic Act No. 9282. x x x These laws have expanded the jurisdiction of the CTA. However, they did not change the jurisdiction of the CTA to entertain an appeal only from a final decision or assessment of the Commissioner, or in cases where the Commissioner has not acted within the period prescribed by the NIRC. In the cases at bar, the Commissioner has not issued an assessment of the tax liability of private respondents.

APPEARANCES OF COUNSEL

Abello Concepcion Regala & Cruz for Lucas G. Adamson, *et al.*

Redentor G. Liboro for petitioners.

The Solicitor General for Commissioner of Internal Revenue.

D E C I S I O N

PUNO, *C.J.*:

Before the Court are the consolidated cases of **G.R. No. 120935** and **G.R. No. 124557**.

G.R. No. 120935 involves a petition for review on *certiorari* filed by petitioners LUCAS G. ADAMSON, THERESE JUNE D. ADAMSON, and SARA S. DE LOS REYES (private respondents), in their respective capacities as president, treasurer and secretary of Adamson Management Corporation (AMC) against then Commissioner of Internal Revenue Liwayway Vinzons-Chato (COMMISSIONER), under Rule 45 of the Revised Rules of Court. They seek to review and reverse the Decision promulgated on March 21, 1995 and Resolution issued on July 6, 1995 of the Court

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of Appeals in CA-G.R. SP No. 35488 (*Liwayway Vinzons-Chato, et al. v. Hon. Judge Erna Falloran-Aliposa, et al.*).

G.R. No. 124557 is a petition for review on *certiorari* filed by the Commissioner, assailing the Decision dated March 29, 1996 of the Court of Appeals in CA-G.R. SP No. 35520, titled *Commissioner of Internal Revenue v. Court of Tax Appeals, Adamson Management Corporation, Lucas G. Adamson, Therese June D. Adamson and Sara S. de los Reyes.* In the said Decision, the Court of Appeals upheld the Resolution promulgated on September 19, 1994 by the Court of Tax Appeals (CTA) in C.T.A. Case No. 5075 (*Adamson Management Corporation, Lucas G. Adamson, Therese Adamson and Sara de los Reyes v. Commissioner of Internal Revenue*).

The facts, as culled from the findings of the appellate court, follow:

On June 20, 1990, Lucas Adamson and AMC sold 131,897 common shares of stock in Adamson and Adamson, Inc. (AAI) to APAC Holding Limited (APAC). The shares were valued at ₱7,789,995.00.[1] On June 22, 1990, ₱159,363.21 was paid as capital gains tax for the transaction.

On October 12, 1990, AMC sold to APAC Philippines, Inc. another 229,870 common shares of stock in AAI for ₱17,718,360.00. AMC paid the capital gains tax of ₱352,242.96.

On October 15, 1993, the Commissioner issued a "Notice of Taxpayer" to AMC, Lucas G. Adamson, Therese June D. Adamson and Sara S. de los Reyes, informing them of deficiencies on their payment of capital gains tax and Value Added Tax (VAT). The notice contained a schedule for preliminary conference.

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[1] *Lucas G. Adamson and AMC v. CA and APAC Holding Limited,* G.R. No. 106879, May 27, 1994, 232 SCRA 602.

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The events preceding **G.R. No. 120935** are the following:

On October 22, 1993, the Commissioner filed with the Department of Justice (DOJ) her Affidavit of Complaint[2] against AMC, Lucas G. Adamson, Therese June D. Adamson and Sara S. de los Reyes for violation of Sections 45 (a) and (d)[3], and 110[4], in

[2] I.S. No. 93-581.

[3] *The NIRC of the Philippines, Annotated*, 16th and Revised Edition, Nolledo, J. and Nolledo, M. (1993), p. 414.

Section 45. *Corporation Returns. —*

(A) Requirements. — Every corporation, subject to the tax herein imposed, except foreign corporations not engaged in trade or business in the Philippines shall render, in duplicate, a true and accurate quarterly income tax return and final or adjustment return in accordance with the provisions of Chapter IX of this Title. The return shall be filed by the president, vice-president or other principal officer, and shall be sworn to by such officer and by the treasurer or assistant treasurer.

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(D) Return on Capital Gains Realized from Sale of Shares of Stock. — Every corporation deriving capital gains from the sale or exchange of shares of stock not traded thru a local stock exchange as prescribed under Sections 24 (e) 2 A, 25 (a) (6) (C) (i), 25(b)(5)(C) (i), shall file a return within thirty (30) days after each transactions and a final consolidated return of all transactions during the taxable year on or before the fifteenth (15th) day of the fourth (4th) month following the close of the taxable year.

[4] **SECTION 110.** *Return and Payment of Value-Added Tax. —*

(A) Where to File the Return and Pay the Tax. — Every person subject to value-added tax shall file a quarterly return of his gross sales or receipts and pay the tax due thereon to a bank duly accredited by the Commissioner located in the revenue district where such person is registered or required to be registered. However, in cases where there are no duly accredited agent banks within the city or municipality, the return shall be filed and any amount due shall be paid to any duly accredited bank within the district, or to the Revenue District Officer, Collection Agent or duly authorized Treasurer of the city or municipality where such taxpayer has his principal place of business. Only one consolidated

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relation to Section 100[5], as penalized under Section

return shall be filed by the taxpayer for all the branches and lines of business subject to value-added tax. If no tax is payable because the amount of input tax and any amount authorized to be offset against the output tax is equal to or is in excess of the output tax due on the return, the taxpayer shall file the return with the Revenue District Officer, Collection Agent or authorized municipal treasurer where the taxpayer's principal place of business is located.

(B) Time for filing of return and payment of tax. — The return shall be filed and the tax paid within 20 days following the end of each quarter specifically prescribed for a VAT-registered person under regulations to be promulgated by the Secretary of Finance: Provided, however, That any person whose registration is cancelled in accordance with paragraph (e) of Section 107 shall file a return within 20 days from the cancellation of such registration.

(C) Initial returns. — The Commissioner may prescribe an initial taxable period for any VAT-registered person for his first return, which in no case shall exceed 5 months.

[5] *Supra* note 3 at pp. 588-590.

Section 100. *Value-Added Tax on Sale of Goods.* —

(A) Rate and Base of Tax. — There shall be levied, assessed and collected on every sale, barter or exchange of goods, a value-added tax equivalent to 10% of the gross selling price or gross value in money of the goods or properties sold, bartered or exchanged, such tax to be paid by the seller or transferor: Provided, That the following sales by VAT-registered persons shall be subject to zero percent (0%):

(1) Export sales; and

(2) Sales to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects such sales to zero rate.

"Export Sales" means the sale and shipment or exportation of goods from the Philippines to a foreign country, irrespective of any shipping arrangement that may be agreed upon which may influence or determine the transfer of ownership of the goods so exported, or foreign currency denominated sales. "Foreign currency denominated sales," means sales to nonresidents of goods assembled or manufactured in the Philippines, for delivery to residents in the Philippines and paid for in convertible foreign currency remitted through the banking system in the Philippines.

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(B) Transactions Deemed Sale. — The following transactions shall be deemed sale:

(1) Transfer, use or consumption not in the course of business of goods originally intended for sale or for use in the course of business;

(2) Distribution or transfer to:

(a) Shareholders or investors as share in the profits of the registered person; or

(b) Creditors in payment of debt;

(3) Consignment of goods if actual sale is not made within sixty (60) days following the date such goods were consigned;

(4) Retirement from or cessation of business, with respect to inventories of taxable goods existing as of such retirement or cessation.

(C) Changes in or Cessation of Status of a VAT-registered Person. — The tax imposed in paragraph (a) of this Section shall also apply to goods disposed of or existing as of a certain date if under circumstances to be prescribed in Regulations to be promulgated by the Secretary of Finance, the status of a person as a VAT-registered person changes or is terminated.

(D) Determination of the Tax. —

(1) Tax billed as a separate item in the invoice. — If the tax is billed as a separate item in the invoice, the tax shall be based on the gross selling price, excluding the tax. "Gross selling price" means the total amount of money or its equivalent which the purchaser pays or is obligated to pay to the seller in consideration of the sale, barter or exchange of the goods, excluding the value-added tax. The excise tax, if any, on such goods or properties shall form part of the gross selling price.

(2) Tax not billed separately or is billed erroneously in the invoice. — In case the tax is not billed separately or is billed erroneously in the invoice, the tax shall be determined by multiplying the gross selling price, including the amount intended by the seller to cover the tax or the tax billed erroneously, by the factor 1/11 or such factor as may be prescribed by regulations in case of persons partially exempt under special laws.

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255,[6] and for violation of Section 253[7], in relation to Section 252 (b) and (d) of the National Internal Revenue Code (NIRC).[8]

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(3) Sales Returns, Allowances and Sales Discounts. — The value of goods sold and subsequently returned or for which allowances were granted by a VAT-registered person may be deducted from the gross sales or receipts for the quarter in which a refund is made or a credit memorandum or refund is issued. Sales discount granted and indicated in the invoice at the time of sale may be excluded from the gross sales within the same quarter.

(4) Authority of the Commissioner to Determine the Appropriate Tax Base.— The Commissioner shall, by regulations, determine the appropriate tax base in cases where a transaction is deemed a sale, barter or exchange of goods under paragraph (b) hereof, or where the gross selling price is unreasonably lower than the actual market value.

[6] *Id.* at 1022.

Section 255. Penal Liability of Corporations. — Any corporation, association or general co-partnership liable for any of the acts or omissions penalized under this Code, in addition to the penalties imposed herein upon the responsible corporate officers, partners or employees, shall, upon conviction, for each act or omission be fined for not less than ten thousand pesos but not more than one hundred thousand pesos.

[7] *Id.* at 1021.

Section 253. Attempt to evade or defeat tax. — Any person who willfully attempts in any manner to evade or defeat any tax imposed under this Code or the payment thereof shall, in addition to other penalties provided by law, upon conviction thereof, be fined not more than ten thousand pesos or imprisoned for not more than two years, or both.

[8] *Id.*, pp. 1020-1021.

Section 252. General provisions.

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(b) Any person who willfully aids or abets in the commission of a crime penalized herein or who causes the commission of any such offense by another, shall be liable in the same manner as the principal.

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AMC, Lucas G. Adamson, Therese June D. Adamson and Sara S. de los Reyes filed with the DOJ a motion to suspend proceedings on the ground of prejudicial question, pendency of a civil case with the Supreme Court, and pendency of their letter-request for re-investigation with the Commissioner. After the preliminary investigation, State Prosecutor Alfredo P. Agcaoili found probable cause. The Motion for Reconsideration against the findings of probable cause was denied by the prosecutor.

On April 29, 1994, Lucas G. Adamson, Therese June D. Adamson and Sara S. de los Reyes were charged before the Regional Trial Court (RTC) of Makati, Branch 150 in Criminal Case Nos. 94-1842 to 94-1846. They filed a Motion to Dismiss or Suspend the Proceedings. They invoked the grounds that there was yet no final assessment of their tax liability, and there were still pending relevant Supreme Court and CTA cases. Initially, the trial court denied the motion. A Motion for Reconsideration was however filed, this time assailing the trial court's lack of jurisdiction over the nature of the subject cases. On August 8, 1994, the trial court granted the Motion. It ruled that the complaints for tax evasion filed by the Commissioner should be regarded as a decision of the Commissioner regarding the tax liabilities of Lucas G. Adamson, Therese June D. Adamson and Sara S. de los Reyes, and appealable to the CTA. It further held that the said cases cannot proceed independently of the assessment case pending before the CTA, which has jurisdiction to determine the civil and criminal tax liability of the respondents therein.

On October 10, 1994, the Commissioner filed a Petition for Review with the Court of Appeals assailing the trial court's dismissal of the criminal cases. She averred that it was not a condition prerequisite that a formal assessment should first be given to the private respondents before she may file the

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(d) In the case of associations, partnerships, or corporations, the penalty shall be imposed on the partner, president, general manager, branch manager, treasurer, officer-in-charge, and employees responsible for the violation.

aforesaid criminal complaints against them. She argued that the criminal complaints for tax evasion may proceed independently from the assessment cases pending before the CTA.

On March 21, 1995, the Court of Appeals reversed the trial court's decision and reinstated the criminal complaints. The appellate court held that**, in a criminal prosecution for tax evasion, assessment of tax deficiency is not required because the offense of tax evasion is complete or consummated when the offender has knowingly and willfully filed a fraudulent return with intent to evade the tax.**[9] **It ruled that private respondents filed false and fraudulent returns with intent to evade taxes, and acting thereupon, petitioner filed an Affidavit of Complaint with the Department of Justice, without an accompanying assessment of the tax deficiency of private respondents, in order to commence criminal action against the latter for tax evasion.**[10]

Private respondents filed a Motion for Reconsideration, but the trial court denied the motion on July 6, 1995. Thus, they filed the petition in **G.R. No. 120935**, raising the following issues:

1. WHETHER OR NOT THE RESPONDENT HONORABLE COURT OF APPEALS ERRED IN APPLYING THE DOCTRINE IN *UNGAB V. CUSI* (Nos. L-41919-24, May 30, 1980, 97 SCRA 877) TO THE CASE AT BAR.
2. WHETHER OR NOT AN ASSESSMENT IS REQUIRED UNDER THE SECOND CATEGORY OF THE OFFENSE IN SECTION 253 OF THE NIRC.
3. WHETHER OR NOT THERE WAS A VALID ASSESSMENT MADE BY THE COMMISSIONER IN THE CASE AT BAR.
4. WHETHER OR NOT THE FILING OF A CRIMINAL COMPLAINT SERVES AS AN IMPLIED ASSESSMENT ON THE TAX LIABILITY OF THE TAXPAYER.

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[9] *Rollo*, p. 65.

[10] *Id.* at 64.

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5. WHETHER OR NOT THE FILING OF THE CRIMINAL INFORMATION FOR TAX EVASION IN THE TRIAL COURT IS PREMATURE BECAUSE THERE IS YET NO BASIS FOR THE CRIMINAL CHARGE OF WILLFULL INTENT TO EVADE THE PAYMENT OF A TAX.

6. WHETHER OR NOT THE DOCTRINES LAID DOWN IN THE CASES OF *YABES V. FLOJO* (No. L-46954, July 20, 1982, 115 SCRA 286) AND *CIR V. UNION SHIPPING CORP.* (G.R. No. 66160, May 21, 1990, 185 SCRA 547) ARE APPLICABLE TO THE CASE AT BAR.

7. WHETHER OR NOT THE COURT OF TAX APPEALS HAS JURISDICTION OVER THE DISPUTE ON WHAT CONSTITUTES THE PROPER TAXES DUE FROM THE TAXPAYER.

In parallel circumstances, the following events preceded **G.R. No. 124557**:

On December 1, 1993, AMC, Lucas G. Adamson, Therese June D. Adamson and Sara S. de los Reyes filed a letter request for re-investigation with the Commissioner of the "Examiner's Findings" earlier issued by the Bureau of Internal Revenue (BIR), which pointed out the tax deficiencies.

On March 15, 1994 before the Commissioner could act on their letter-request, AMC, Lucas G. Adamson, Therese June D. Adamson and Sara S. de los Reyes filed a Petition for Review with the CTA. They assailed the Commissioner's finding of tax evasion against them. The Commissioner moved to dismiss the petition, on the ground that it was premature, as she had not yet issued a formal assessment of the tax liability of therein petitioners. On September 19, 1994, the CTA denied the Motion to Dismiss. It considered the criminal complaint filed by the Commissioner with the DOJ as an implied formal assessment, and the filing of the criminal informations with the RTC as a denial of petitioners' protest regarding the tax deficiency.

The Commissioner repaired to the Court of Appeals on the ground that the CTA acted with grave abuse of discretion. She contended that, with regard to the protest provided under

Section 229 of the NIRC, there must first be a formal assessment issued by the Commissioner, and it must be in accord with Section 6 of Revenue Regulation No. 12-85. She maintained that she had not yet issued a formal assessment of tax liability, and the tax deficiency amounts mentioned in her criminal complaint with the DOJ were given only to show the difference between the tax returns filed and the audit findings of the revenue examiner.

The Court of Appeals sustained the CTA's denial of the Commissioner's Motion to Dismiss. Thus, the Commissioner filed the petition for review under **G.R. No. 124557**, raising the following issues:

1. WHETHER OR NOT THE INSTANT PETITION SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH THE MANDATORY REQUIREMENT OF A CERTIFICATION UNDER OATH AGAINST FORUM SHOPPING;
2. WHETHER OR NOT THE CRIMINAL CASE FOR TAX EVASION IN THE CASE AT BAR CAN PROCEED WITHOUT AN ASSESSMENT;
3. WHETHER OR NOT THE COMPLAINT FILED WITH THE DEPARTMENT OF JUSTICE CAN BE CONSTRUED AS AN IMPLIED ASSESSMENT; and
4. WHETHER OR NOT THE COURT OF TAX APPEALS HAS JURISDICTION TO ACT ON PRIVATE RESPONDENTS' PETITION FOR REVIEW FILED WITH THE SAID COURT.

The issues in **G.R. No. 124557 and G.R. No. 120935** can be compressed into three:

1. **WHETHER THE COMMISSIONER HAS ALREADY RENDERED AN ASSESSMENT (FORMAL OR OTHERWISE) OF THE TAX LIABILITY OF AMC, LUCAS G. ADAMSON, THERESE JUNE D. ADAMSON AND SARA S. DE LOS REYES;**
2. **WHETHER THERE IS BASIS FOR THE CRIMINAL CASES FOR TAX EVASION TO PROCEED AGAINST AMC, LUCAS G. ADAMSON, THERESE JUNE D. ADAMSON AND SARA S. DE LOS REYES; and**

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3. WHETHER THE COURT OF TAX APPEALS HAS JURISDICTION TO TAKE COGNIZANCE OF BOTH THE CIVIL AND THE CRIMINAL ASPECTS OF THE TAX LIABILITY OF AMC, LUCAS G. ADAMSON, THERESE JUNE D. ADAMSON AND SARA S. DE LOS REYES.

The case of ***CIR v. Pascor Realty, et al.***[11] is relevant. In this case, then BIR Commissioner Jose U. Ong authorized revenue officers to examine the books of accounts and other accounting records of Pascor Realty and Development Corporation (PRDC) for 1986, 1987 and 1988. This resulted in a recommendation for the issuance of an assessment in the amounts of ₱7,498,434.65 and ₱3,015,236.35 for the years 1986 and 1987, respectively.

On March 1, 1995, the Commissioner filed a criminal complaint before the DOJ against PRDC, its President Rogelio A. Dio, and its Treasurer Virginia S. Dio, alleging evasion of taxes in the total amount of ₱10,513,671.00. Private respondents filed an Urgent Request for Reconsideration/Reinvestigation disputing the tax assessment and tax liability.

The Commissioner denied the urgent request for reconsideration/reinvestigation because she had not yet issued a formal assessment.

Private respondents then elevated the Decision of the Commissioner to the CTA on a petition for review. The Commissioner filed a Motion to Dismiss the petition on the ground that the CTA has no jurisdiction over the subject matter of the petition, as there was yet no formal assessment issued against the petitioners. The CTA denied the said motion to dismiss and ordered the Commissioner to file an answer within thirty (30) days. The Commissioner did not file an answer nor did she move to reconsider the resolution. Instead, the Commissioner filed a petition for review of the CTA decision with the Court of Appeals. The Court of Appeals upheld the CTA order. However, this Court reversed the Court of Appeals decision and the CTA order, and ordered the dismissal of the petition. We held:

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[11] G.R. No. 128315, June 29, 1999, 309 SCRA 402.

An assessment contains not only a computation of tax liabilities, but also a demand for payment within a prescribed period. It also signals the time when penalties and interests begin to accrue against the taxpayer. To enable the taxpayer to determine his remedies thereon, due process requires that it must be served on and received by the taxpayer. Accordingly, an affidavit, which was executed by revenue officers stating the tax liabilities of a taxpayer and attached to a criminal complaint for tax evasion, cannot be deemed an assessment that can be questioned before the Court of Tax Appeals.

Neither the NIRC nor the revenue regulations governing the protest of assessments[12] provide a specific definition or form of an assessment. However, the NIRC defines the specific functions and effects of an assessment. To consider the affidavit attached to the Complaint as a proper assessment is to subvert the nature of an assessment and to set a bad precedent that will prejudice innocent taxpayers.

True, as pointed out by the private respondents, an assessment informs the taxpayer that he or she has tax liabilities. But not all documents coming from the BIR containing a computation of the tax liability can be deemed assessments.

To start with, an assessment must be sent to and received by a taxpayer, and must demand payment of the taxes described therein within a specific period. Thus, the NIRC imposes a 25 percent penalty, in addition to the tax due, in case the taxpayer fails to pay the deficiency tax within the time prescribed for its payment in the notice of assessment. Likewise, an interest of 20 percent per annum, or such higher rate as may be prescribed by rules and regulations, is to be collected from the date prescribed for its payment until the full payment.[13]

The issuance of an assessment is vital in determining the period of limitation regarding its proper issuance and the period within which

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[12] Revenue Regulation No. 12-85.

[13] NIRC (1997)

"**Sec. 205**. Remedies for the Collection of Delinquent Taxes. — The civil remedies for the collection of internal revenue, fees, or charges, and increment thereto resulting from delinquency shall be:

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to protest it. Section 203[14] of the NIRC provides that internal revenue taxes must be assessed within three years from the last day within which to file the return. Section 222,[15] on the other hand, specifies a period of ten years in case a fraudulent return with intent to evade was submitted or in case of failure to file a return. Also, Section

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(a) By distraint of goods, chattels, or effects, and other personal property of whatever character, including stocks and other securities, debts, credits, bank accounts, and interest in and rights to personal property, and by levy upon real property and interest in or rights to real property; and

(b) By civil or criminal action.

Either of these remedies or both simultaneously may be pursued in the discretion of the authorities charged with the collection of such taxes: *Provided, however*, That the remedies of distraint and levy shall not be availed of where the amount of tax involved is not more than One hundred pesos (₱100).

The judgment in the criminal case shall not only impose the penalty but shall also order payment of the taxes subject of the criminal case as finally decided by the Commissioner. The Bureau of Internal Revenue shall advance the amounts needed to defray costs of collection by means of civil or criminal action, including the preservation or transportation of personal property distrained and the advertisement and sale thereof, as well as of real property and improvements thereon."

[14] *Id.*

"**SEC. 203**. *Period of Limitation Upon Assessment and Collection*. — Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day."

[15] *Id.*

"**Sec. 222**. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.*—

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228[16] of the same law states that said assessment may be protested only within thirty days from receipt thereof. Necessarily, the taxpayer must be certain that a specific document constitutes an assessment. Otherwise, confusion would arise regarding the period within which to make an assessment or to protest the same, or whether interest and penalty may accrue thereon.

(a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: *Provided*, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

(b) If before the expiration of the time prescribed in the Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.

(c) Any internal revenue tax which has been assessed within the period of limitation as prescribed in paragraph (a) hereof may be collected by distraint or levy or by a proceeding in court within five (5) years following the assessment of the tax.

(d) Any internal revenue tax, which has been assessed within the period agreed upon as provided in paragraph (b) hereinabove, may be collected by distraint or levy or by a proceeding in court within the period agreed upon writing before the expiration of the five (5)-year period. The period so agreed upon may be extended by subsequent written agreements made before the expiration of the period previously agreed upon.

(e) *Provided, however*, That nothing in the immediately preceding Section and paragraph (a) hereof shall be construed to authorize the examination and investigation or inquiry into any tax return filed in accordance with the provisions of any tax amnesty law or decree."

[16] *Id*.

"**Section 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 reassessment notice shall not be required in the following cases:

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It should also be stressed that the said document is a notice duly sent to the taxpayer. Indeed, an assessment is deemed made only when the collector of internal revenue releases, mails or sends such notice to the taxpayer.[17]

In the present case, the revenue officers' Affidavit merely contained a computation of respondents' tax liability. It did not state a demand or a period for payment. Worse, it was addressed to the justice secretary, not to the taxpayers.

Respondents maintain that an assessment, in relation to taxation, is simply understood to mean:

> (a) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the face of the return; or
>
> (b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or
>
> (c) When a taxpayer who opted to claim a refund or tax credit of excess creditable withholding tax for a taxable period was determined to have carried over and automatically applied the same amount claimed against the estimated tax liabilities for the taxable quarter or quarters of the succeeding taxable year; or
>
> (d) When the excise tax due on excisable articles has not been paid; or
>
> (e) When an article locally purchased or imported by an exempt person, such as, but not limited to, vehicles, capital equipment, machineries and spare parts, has been sold, traded or transferred to non-exempt persons.
>
> 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."

[17] *Basilan Estates v. Commissioner of Internal Revenue*, No. L-22492, September 5, 1967, 21 SCRA 17.

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"A notice to the effect that the amount therein stated is due as tax and a demand for payment thereof."[18]

"Fixes the liability of the taxpayer and ascertains the facts and furnishes the data for the proper presentation of tax rolls."[19]

Even these definitions fail to advance private respondents' case. That the BIR examiners' Joint Affidavit attached to the Criminal Complaint contained some details of the tax liabilities of private respondents does not *ipso facto* make it an assessment. The purpose of the Joint Affidavit was merely to support and substantiate the Criminal Complaint for tax evasion. Clearly, it was not meant to be a notice of the tax due and a demand to the private respondents for payment thereof.

The fact that the Complaint itself was specifically directed and sent to the Department of Justice and not to private respondents shows that the intent of the commissioner was to file a criminal complaint for tax evasion, not to issue an assessment. Although the revenue officers recommended the issuance of an assessment, the commissioner opted instead to file a criminal case for tax evasion. What private respondents received was a notice from the DOJ that a criminal case for tax evasion had been filed against them, not a notice that the Bureau of Internal Revenue had made an assessment.

Private respondents maintain that the filing of a criminal complaint must be preceded by an assessment. This is incorrect, because Section 222 of the NIRC specifically states that in cases where a false or fraudulent return is submitted or in cases of failure to file a return such as this case, proceedings in court may be commenced *without an assessment*. Furthermore, Section 205 of the same Code clearly mandates that the civil and criminal aspects of the case may be pursued simultaneously. In *Ungab v. Cusi*,[20] petitioner therein sought the dismissal of the criminal Complaints for being premature, since his protest to the CTA had not yet been resolved. The Court held that such protests could not stop or suspend the criminal action which was independent of the resolution of the protest in the CTA. This was because the commissioner of internal revenue had, in such tax evasion cases, discretion on whether to issue an assessment or to file a criminal case against the taxpayer or to do both.

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[18] Citing *Philippine Law Dictionary*, 2nd ed., p. 49.

[19] Citing Black's *Law Dictionary*, 5th ed., p. 107.

[20] Nos. L-41919-24, May 30, 1980, 97 SCRA 877.

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Private respondents insist that Section 222 should be read in relation to Section 255 of the NIRC,[21] which penalizes failure to file a return. They add that a tax assessment should precede a criminal indictment. We disagree. To reiterate, said Section 222 states that an assessment is not necessary before a criminal charge can be filed. This is the general rule. Private respondents failed to show that they are entitled to an exception. Moreover, the criminal charge need only be supported by a *prima facie* showing of failure to file a required return. This fact need not be proven by an assessment.

The issuance of an assessment must be distinguished from the filing of a complaint. Before an assessment is issued, there is, by practice, a pre-assessment notice sent to the taxpayer. The taxpayer is then given a chance to submit position papers and documents to prove that the assessment is unwarranted. If the commissioner is unsatisfied, an assessment signed by him or her is then sent to the taxpayer informing the latter specifically and clearly that an assessment has been made against him or her. In contrast, the criminal charge need not go through all these. The criminal charge is filed directly with the DOJ. Thereafter, the taxpayer is notified that a criminal case had been filed against him, not that the commissioner has issued an assessment. It must be stressed that a criminal complaint is instituted not to demand payment, but to penalize the taxpayer for violation of the Tax Code.

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[21] "**SEC 255**. Failure to File Return, Supply Correct and Accurate Information, Pay Tax, Withhold and Remit Tax and Refund Excess Taxes Withheld on Compensation. — Any person required under this Code or by rules and regulations promulgated thereunder to pay any tax, make a return, keep any record, or supply correct and accurate any information, who willfully fails to pay such tax, make such return, keep such record, or supply correct and accurate information, or withhold or remit taxes withheld, or refund excess taxes withheld on compensation, at the time or times required by law or rules and regulations shall, in addition to other penalties provided by law, upon conviction thereof, be punished by a fine of not less than one (1) year but not more than ten (10) years.

Any person who attempts to make it appear for any reason that he or another has in fact filed a return or statement, or actually files a return or statement and subsequently withdraws the same return or statement after securing the official receiving seal or stamp of receipt of an internal revenue office wherein the same was actually filed shall, upon conviction therefor, be punished by a fine of not less than Ten thousand pesos (₱10,000) but not more than Twenty thousand pesos (₱20,000) and suffer imprisonment of not less than one (1) year but not more than three (3) years."

In the cases at bar, the Commissioner denied that she issued a formal assessment of the tax liability of AMC, Lucas G. Adamson, Therese June D. Adamson and Sara S. de los Reyes. She admits though that she wrote the recommendation letter[22] addressed to the Secretary of the DOJ recommending the filing of criminal complaints against AMC and the aforecited persons for fraudulent returns and tax evasion.

The first issue is whether the Commissioner's recommendation letter can be considered as a formal assessment of private respondents' tax liability.

In the context in which it is used in the NIRC, an assessment is a written notice and demand made by the BIR on the taxpayer for the settlement of a due tax liability that is there definitely set and fixed. A written communication containing a computation by a revenue officer of the tax liability of a taxpayer and giving him an opportunity to contest or disprove the BIR examiner's findings is not an assessment since it is yet indefinite.[23]

We rule that the recommendation letter of the Commissioner cannot be considered a formal assessment. Even a cursory perusal of the said letter would reveal three key points:

1. It was not addressed to the taxpayers.
2. There was no demand made on the taxpayers to pay the tax liability, nor a period for payment set therein.
3. The letter was never mailed or sent to the taxpayers by the Commissioner.

In fine, the said recommendation letter served merely as the *prima facie* basis for filing criminal informations that the taxpayers had violated Section 45 (a) and (d), and 110, in relation to Section 100, as penalized under Section 255, and for violation

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[22] Annex "F", *rollo* (G.R. No. 120935), pp. 252-258.

[23] *Tax Law and Jurisprudence, 2nd Edition*, Vitug, J. and Acosta, E., (2000), p. 282.

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of Section 253, in relation to Section 252 9(b) and (d) of the Tax Code.[24]

The next issue is whether the filing of the criminal complaints against the private respondents by the DOJ is premature for lack of a formal assessment.

Section 269 of the NIRC (now Section 222 of the Tax Reform Act of 1997) provides:

> Sec. 269. Exceptions as to period of limitation of assessment and collection of taxes.-(a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court after the collection of such tax may be begun without assessment, at any time within ten years after the discovery of the falsity, fraud or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for collection thereof…

The law is clear. When fraudulent tax returns are involved as in the cases at bar, **a proceeding in court after the collection of such tax may be begun without assessment.** Here, the private respondents had already filed the capital gains tax return and the VAT returns, and paid the taxes they have declared due therefrom. Upon investigation of the examiners of the BIR, there was a preliminary finding of gross discrepancy in the computation of the capital gains taxes due from the sale of two lots of AAI shares, first to APAC and then to APAC Philippines, Limited. The examiners also found that the VAT had not been paid for VAT-liable sale of services for the third and fourth quarters of 1990. Arguably, the gross disparity in the taxes due and the amounts actually declared by the private respondents constitutes badges of fraud.

Thus, the applicability of ***Ungab v. Cusi***[25] is evident to the cases at bar. In this seminal case, this Court ruled that there was no need for precise computation and formal assessment

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[24] *Supra*, 3-8.

[25] Nos. L-41919-24, May 30, 1980, 97 SCRA 877.

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in order for criminal complaints to be filed against him. It quoted Merten's Law of Federal Income Taxation, Vol. 10, Sec. 55A.05, p. 21, thus:

> An assessment of a deficiency is not necessary to a criminal prosecution for willful attempt to defeat and evade the income tax. A crime is complete when the violator has knowingly and willfully filed a fraudulent return, with intent to evade and defeat the tax. The perpetration of the crime is grounded upon knowledge on the part of the taxpayer that he has made an inaccurate return, and the government's failure to discover the error and promptly to assess has no connections with the commission of the crime.

This hoary principle still underlies Section 269 and related provisions of the present Tax Code.

We now go to the issue of whether the CTA has no jurisdiction to take cognizance of both the criminal and civil cases here at bar.

Under Republic Act No. 1125 (An Act Creating the Court of Tax Appeals) as amended, the rulings of the Commissioner are appealable to the CTA, thus:

> SEC. 7. *Jurisdiction.* — The Court of Tax Appeals shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided —
>
> > (1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under the National Internal Revenue Code or other laws or part of law administered by the Bureau of Internal Revenue;

Republic Act No. 8424, titled "An Act Amending the National Internal Revenue Code, As Amended, And For Other Purposes," later expanded the jurisdiction of the Commissioner and, correspondingly, that of the CTA, thus:

> SEC. 4. *Power of the Commissioner to Interpret Tax Laws and to Decide Tax Cases*. — The power to interpret the provisions of this Code and other tax laws shall be under the exclusive and original

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jurisdiction of the Commissioner, subject to review by the Secretary of Finance.

The power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under this Code or other laws or portions thereof administered by the Bureau of Internal Revenue is vested in the Commissioner, subject to the exclusive appellate jurisdiction of the Court of Tax Appeals.

The latest statute dealing with the jurisdiction of the CTA is Republic Act No. 9282.[26] It provides:

SEC. 7. Section 7 of the same Act is hereby amended to read as follows:

Sec. 7. *Jurisdiction.* — The CTA shall exercise:

(a) Exclusive appellate jurisdiction to review by appeal, as herein provided:

(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;

(2) Inaction by 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 Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code provides a specific period of action, in which case the inaction shall be deemed a denial;

(3) Decisions, orders or resolutions of the Regional Trial Courts in local tax cases originally decided or resolved by them in the exercise of their original or appellate jurisdiction;

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[26] An Act Expanding The Jurisdiction Of The Court Of Tax Appeals (CTA), Elevating Its Rank To The Level Of A Collegiate Court With Special Jurisdiction And Enlarging Its Membership, Amending For The Purpose Certain Sections Of Republic Act No. 1125, As Amended, Otherwise Known As The Law Creating The Court Of Tax Appeals, And For Other Purposes.

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(b) Jurisdiction over cases involving criminal offenses as herein provided:

(1) Exclusive original jurisdiction over all criminal offenses arising from violations of the National Internal Revenue Code or Tariff and Customs Code and other laws administered by the Bureau of Internal Revenue or the Bureau of Customs: *Provided, however*, That offenses or felonies mentioned in this paragraph where the principal amount of taxes and fees, exclusive of charges and penalties, claimed is less than One million pesos (₱1,000,000.00) or where there is no specified amount claimed shall be tried by the regular courts and the jurisdiction of the CTA shall be appellate. Any provision of law or the Rules of Court to the contrary notwithstanding, the criminal action and the corresponding civil action for the recovery of civil liability for taxes and penalties shall at all times be simultaneously instituted with, and jointly determined in the same proceeding by the CTA, the filing of the criminal action being deemed to necessarily carry with it the filing of the civil action, and no right to reserve the filling of such civil action separately from the criminal action will be recognized.

(2) Exclusive appellate jurisdiction in criminal offenses:

(a) Over appeals from the judgments, resolutions or orders of the Regional Trial Courts in tax cases originally decided by them, in their respected territorial jurisdiction.

(b) Over petitions for review of the judgments, resolutions or orders of the Regional Trial Courts in the exercise of their appellate jurisdiction over tax cases originally decided by the Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts in their respective jurisdiction.

(c) Jurisdiction over tax collection cases as herein provided:

(1) Exclusive original jurisdiction in tax collection cases involving final and executory assessments for taxes, fees, charges and penalties: Provided, however, That collection cases where the principal amount

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> of taxes and fees, exclusive of charges and penalties, claimed is less than One million pesos (₱1,000,000.00) shall be tried by the proper Municipal Trial Court, Metropolitan Trial Court and Regional Trial Court.
>
> (2) Exclusive appellate jurisdiction in tax collection cases:
>
> (a) Over appeals from the judgments, resolutions or orders of the Regional Trial Courts in tax collection cases originally decided by them, in their respective territorial jurisdiction.
>
> (b) Over petitions for review of the judgments, resolutions or orders of the Regional Trial Courts in the exercise of their appellate jurisdiction over tax collection cases originally decided by the Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts, in their respective jurisdiction.

These laws have expanded the jurisdiction of the CTA. However, they did not change the jurisdiction of the CTA to entertain an appeal only from a final decision or assessment of the Commissioner, or in cases where the Commissioner has not acted within the period prescribed by the NIRC. In the cases at bar, the Commissioner has not issued an assessment of the tax liability of private respondents.

Finally, we hold that contrary to private respondents' stance, the doctrines laid down in ***CIR v. Union Shipping Co.*** and ***Yabes v. Flojo*** are not applicable to the cases at bar. In these earlier cases, the Commissioner already rendered an assessment of the tax liabilities of the delinquent taxpayers, for which reason the Court ruled that the filing of the civil suit for collection of the taxes due was a final denial of the taxpayers' request for reconsideration of the tax assessment.

IN VIEW WHEREOF, premises considered, judgment is rendered:

1. In G.R. No. 120935, *AFFIRMING* the CA decision dated March 21, 1995, which set aside the Regional

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Trial Court's Order dated August 8, 1994, and *REINSTATING* Criminal Case Nos. 94-1842 to 94-1846 for further proceedings before the trial court; and

2. In G.R. No. 124557, *REVERSING* and *SETTING ASIDE* the Decision of the Court of Appeals dated March 29, 1996, and *ORDERING* the dismissal of C.T.A. Case No. 5075.

No costs.

SO ORDERED.

Carpio, Corona, Leonardo-de Castro, and *Bersamin, JJ.*, concur.

FIRST DIVISION

[G.R. No. 141001. May 21, 2009]

BANK OF AMERICA, NT & SA, *petitioner, vs.* **ASSOCIATED CITIZENS BANK, BA-FINANCE CORPORATION, MILLER OFFSET PRESS, INC., UY KIAT CHUNG, CHING UY SENG, UY CHUNG GUAN SENG, and COURT OF APPEALS,** *respondents.*

[G.R. No. 141018. May 21, 2009]

ASSOCIATED CITIZENS BANK (now UNITED OVERSEAS BANK PHILS.), *petitioner, vs.* **BA-FINANCE CORPORATION, MILLER OFFSET PRESS, INC., UY KIAT CHUNG, CHING UY SENG, UY CHUNG GUAN SENG, and BANK OF AMERICA, NT & SA,** *respondents.*