REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

GERRY SEVILLA, HERMAN SON, RUBEN TIU, BEN TIU and JERRY TIU,
Petitioners,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB No. 95
(C.T.A. Case No. 6211)

Present:
Acosta, *P.J.*,
Castañeda, Jr.,
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, *JJ*:.

Promulgated:

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DECISION

CASTAÑEDA, JR., *J.*:

This is an appeal under Section 18 of Republic Act No. 1125 (An Act Creating the Court of Tax Appeals) as amended by Republic Act No. 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals) from the October 4, 2004 Decision of the then Court of Tax Appeals

152

(the Court in Division) affirming the assessments issued against petitioners for deficiency capital gains taxes for the taxable year 1993, as well as from the Resolution of the Court in Division dated May 10, 2005 which denied petitioners' Motion for Reconsideration.

The dispositive portion of the assailed Decision reads:

> "**IN VIEW OF ALL THE FOREGOING,** the assessments issued against petitioners for deficiency capital gains taxes for the taxable year 1993 are hereby AFFIRMED. Petitioners are liable for deficiency capital gains tax in the total amount of P33,796,546.03 (inclusive of surcharge and interest). Accordingly, petitioners are ORDERED TO PAY the respondent the deficiency capital gains taxes computed as follows:

TAXPAYER	NO. OF SHARES SOLD	OVERSTATEMENT OF ACQUISITION COST	DEFICIENCY CAPITAL GAINS TAX 50% BASIC	SURCHARGE	INTEREST	TOTAL
JERRY TIU	12,000	P12,894,400.00	P2,578,880.00	P1,289,440.00	P4,249,146.39	P8,117,466.39
RUBEN TIU	12,000	12,894,400.00	2,578,880.00	1,289,440.00	4,249,146.39	8,117,466.39
BEN TIU	12,000	12,894,400.00	2,578,880.00	1,289,440.00	4,249,146.39	8,117,466.39
GERRY SEVILLA	7,000	7,500,900.00	1,500,180.00	750,090.00	2,471,803.43	4,722,073.43
HERMAN SON	7,000	7,500,900.00	1,500,180.00	750,090.00	2,471,803.43	4,722,073.43
TOTAL	50,000	P53,685,000.00	P10,737,000.00	P5,368,500.00	P17,691,046.03	P33,796,546.03

> In addition, petitioners are ORDERED TO PAY 20% delinquency interest computed from May 3, 2000 until fully paid pursuant to Section 249 of the NIRC of 1997.
>
> **SO ORDERED**."

Petitioners' Motion for Reconsideration of the above Decision was denied in the assailed Resolution promulgated on May 10, 2005, the dispositive portion thereof reads as follows:

> "**WHEREFORE**, premises considered and there being no new issues raised by the petitioners which we have not considered in the Decision of October 4, 2004, the instant Motion for Reconsideration is hereby **DENIED** for lack of merit.
>
> **SO ORDERED**."

The facts of the case as found by the Court in Division are as follows:

> "Sometime in 1993, petitioners sold a total of 50,000 shares of East Esteban Realty Corporation owned by them to Seaboard Eastern Insurance Corporation, Jose Halili & Company, et al.
>
> After the payment of capital gains taxes due, Director Osmundo Umali of the BIR Revenue Region No. 6 (Manila) issued certifications all dated December 15, 1993 to each of the petitioners. The said certification was issued for registration purposes *(Exhibits F, G, H, I, J)*.
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> In his letters dated January 28, 1999, respondent ordered petitioners to shed light on the tax evasion case filed against [them] as per Confidential Information No. 53-98 filed dated 7 December 1998 relative to the underdeclaration of capital gains and the consequential non-payment of the capital gains tax due on [the] sale of 50,000 shares of stocks to Seaboard Eastern Insurance Corporation and Jose Halili & Co., et al. for P62,410,000.00.
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> In a letter dated March 3, 1999 *(Annex K, Petition for Review)*, which was received by the Tax Fraud Division on March 4, 1999, petitioners objected to allegations that they evaded taxes on account of the sale of the East Esteban Realty Corporation shares in 1993. And in a letter dated May 5, 1999 *(Annex L, Petition for Review)*, the Tax Fraud Division informed petitioners of their "point by point rebuttal of [the] reply dated 3 March 1999".
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> Subsequently, in his letters (*Exhibits 24, 25, 26, 27)* all dated July 6, 1999 which were received by petitioners on August 5, 1999, the Chief of the Tax Fraud Division requested petitioners to appear in an informal conference at the Bureau of Internal Revenue.
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> On August 10, 1999, the Tax Fraud Division received a letter dated August 9, 1999, wherein petitioners rebutted the May 5, 1999 reply of said Division.
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> In a letter addressed to petitioners dated December 10, 1999, then BIR Commissioner Beethoven L. Rualo informed them that "[f]or insufficiency of evidence, this Office has decided not to pursue any further your 1993 internal revenue tax cases subject matter of our preliminary notices, all dated July 6, 1999." *(Par. 17 of Stipulation of Facts and Issues; Exhibit K)*
>
> On May 2, 2000, petitioners each received assessment notices *(Exhibits L, L-1, M, M-1, N, N-1, O, O-1, P, P-1)* together with the corresponding demand letters, all of which were signed by Commissioner Dakila B. Fonacier. The assessment notices alleged deficiencies in capital gains taxes, inclusive of increments in the following amounts:

157

Taxpayer	Assessments	Deficiency Capital Gains Tax	Surcharge	Interest	Total
1. Gerry Sevilla	TFD-93-CGT-015-00	P1,510,180.00	P755,090.00	P2,831,587.50	P5,096,857.50
2. Herman Son	TFD-93-CGT-016-00	1,510,180.00	755,090.00	2,831,587.50	5,096,857.50
3. Ruben Tiu	TFD-93-CGT-017-00	2,588,880.00	1,294,440.00	4,854,150.00	8,737,470.00
4. Ben Tiu	TFD-93-CGT-018-00	2,588,880.00	1,294,440.00	4,854,150.00	8,737,470.00
5. Jerry Tiu	TFD-93-CGT-019-00	2,588,880.00	1,294,440.00	4,854,150.00	8,737,470.00
	Total	P10,787,000.00	P5,393,500.00	P20,225,625.00	P36,406,125.00

The demand letters state that deficiency capital gains taxes were due for the petitioners' capital gains tax liabilities covering the taxable year 1993.

In a letter dated May 31, 2000 which was received by respondent on even date, petitioners protested the assessments *(Annex Y, Petition for Review)* on the grounds that the assessments are null and void for having been issued:

(1) In complete violation of statutory requirements

a. No statement of the facts and the law on which the assessments are made.
b. No basis for imposition of fraud penalty.

(2) Without due process

a. No informal conference and preliminary assessment notices.
b. Taxpayers' 1993 transactions duly cleared and approved.

(3) Beyond the prescriptive period for making assessments

a. The three-year period has lapsed.
b. Ten-year prescriptive period not applicable.

Subsequently, in a letter dated July 31, 2000, petitioners requested the BIR to "consider the documents annexed to the protest and those documents submitted to the BIR examiners which form part of the BIR records as constituting all relevant supporting documents of the protest in compliance with Section 228 of the Tax Code". (Annex Z, Petition for Review)

On November 29, 2000 petitioners received a decision denying their protest (Annex AA)."

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On December 26, 2000, Petitioners filed a Petition for Review with the Court in Division praying for the cancellation and/or withdrawal of the deficiency capital gains tax assessments.

As stated at the outset, the Court in Division rendered the assailed Decision affirming the deficiency capital gains tax assessments against the petitioners. Likewise, petitioners' Motion for Reconsideration was denied in the assailed Resolution for lack of merit. Hence, this appeal to the Court *en banc.*

In the present Petition for Review, petitioners made the following assignment of errors:

ASSIGNMENT OF ERRORS

A. THE HONORABLE FIRST DIVISION ERRED IN FINDING THAT FRAUD WAS "CLEARLY AND CONVINCINGLY" PROVEN IN THIS CASE;

B. THE HONORABLE FIRST DIVISION ERRED IN ADMITTING THE SUBJECT DEEDS OF ASSIGNMENT BY HOLDING THAT THE DEEDS OF ASSIGNMENT HAVE BECOME PUBLIC DOCUMENTS;

C. THE HONORABLE FIRST DIVISION ERRED IN HOLDING THAT THE DEEDS OF ASSIGNMENT ARE ADMISSIBLE TO PROVE THE CONTENTS THEREOF ON THE GROUND THAT PETITIONERS FAILED TO PROVE THAT THE SEC OFFICERS ACTED IRREGULARLY IN THE PERFORMANCE OF OFFICIAL DUTIES;

D. THE HONORABLE FIRST DIVISION ERRED IN HOLDING THAT PETITIONERS HAVE THE DUTY TO PRESENT PROOF TO REBUT THE DEEDS OF ASSIGNMENT; AND

E. THE HONORABLE FIRST DIVISION SHOULD HAVE STRICTLY ADHERED TO THE TECHNICAL RULES OF ADMISSIBILITY OF EVIDENCE PROVIDED IN THE RULES OF COURT, NOTWITHSTANDING SEC. 8 OF REPUBLIC ACT 1125.;

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F. THE HONORABLE FIRST DIVISION ERRED IN NOT HOLDING THAT THE ASSESSMENTS ARE VOID FOR HAVING BEEN ISSUED WITHOUT THE PROCEDURAL REQUIREMENTS PROVIDED BY REV. REG. 12-99.

PETITIONERS' ARGUMENTS

According to the petitioners, the Court in Division erred in finding that fraud was clearly and convincingly proven in this case. They assert that fraud must be proven by the party alleging it with clear and convincing evidence. Petitioners argue that the person who alleges fraud or negligence must prove it, because the general presumption is that men act with care and prudence.

> "Clearly, the duty to prove fraud by convincing and competent evidence rests upon the shoulder of respondent. In the absence of such proof, however, the burden of proof does not pass unto petitioners. Corollarily, petitioners need not rebut any unsupported allegation, as such allegation has never been proven at all. Thus, where in this case the Deeds of Assignment were inadmissible to prove fraud, petitioners need not present any rebuttal evidence to defend themselves against respondent's allegation of fraud, such allegation having no leg to stand on."

Petitioners argue that the respondent has not proven by convincing and competent evidence the fact of fraud. They contend that the Deeds of Assignment presented to the Court in Division being "mere photocopies of microfilmed deeds of assignment in the files of the Securities and Exchange Commission ("SEC"), do not pass the test of admissibility for being contrary to the Best Evidence Rule." Thus, "the Deeds of Assignment being inadmissible in the Courts of law, the

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same cannot be used to prove fraud. Absent such proof, the Honorable First Division's finding that Respondent has presented sufficient evidence to prove fraud is without legal basis, instead, the same is grounded on sheer assumptions and inadmissible documents".

Petitioners assert that the originals of the documents must be in the custody of the public officer issuing the certified true copies before these are admitted to prove the contents thereof. Rule 130 requires that the public record must be the original of the document in the custody of the competent public officer and the certified true copy is only evidence of the contents thereof. The certified true copies are not themselves the public documents. Hence, only when the originals of the subject Deeds of Assignment are clearly proven to be in the custody of the SEC can the Deeds be used to prove the contents thereof. This requirement, however, respondent utterly failed to show.

Furthermore, petitioners contend that the Court in Division erred when it upheld the validity and admissibility of the certified true copies of the Deeds of Assignment due to petitioners' supposed failure to prove that the SEC officials acted irregularly in the performance of official functions. Petitioners aver that "with respondent's failure to account for the original documents, it becomes patent that the Honorable First Division, relying completely on the presumption of regularity of performance of official functions, itself merely **presumed**

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that: 1) the originals of the Deeds of Assignment were filed with the SEC; 2) the microfilmed copies were derived from said originals presumed filed with the SEC; and 3) the Deeds of Assignment were true and faithful reproductions of the originals presumed by the Honorable First Division to have been filed with the SEC.

Presumptions as the above merely are, and unsupported as they are by substantial evidence, the same can never satisfy the amount of evidence which respondent needs to discharge his burden of proof of fraud, namely, clear and convincing evidence. Thus, these presumptions can never have any probative value."

Petitioners conclude that the Honorable First Division erred when it ruled that the existence of fraud has been established by respondent and that petitioners should have presented their proof of rebuttal of such fraud. According to the petitioners, "any competent and admissible evidence presented to the Court should rightly be considered and accepted as proof of any fact in the absence of rebuttal thereto. However, such evidence must in the first place be admissible, meaning, <u>it should be relevant to the issue and is not excluded by the law or these rules</u>. In other words, if such evidence were inadmissible, it cannot be deemed by the Court as proof of any fact, and moreover, no rebuttal evidence shall be necessary to disprove the fact sought to be proven by such inadmissible evidence."

Petitioners assert that the Honorable First Division of the Court should have strictly adhered to the technical rules of admissibility of evidence provided in the Rules of Court, notwithstanding Sec. 8 of Republic Act 1125. According to the petitioners, the reference of Section 8 to the liberal application of the technical rules of evidence pertains only to proceedings in the Court of Tax Appeals and does not in any way suggest a lenient application of the Rules of Court in admitting evidence presented in Court. A proceeding only refers to the form, the manner, or the process by which a Court action is heard, tried, decided and executed. It does not deal with the admissibility, competence and relevance of the evidence offered or presented to support a claim in Court.

Petitioners argue that a different interpretation of the said provision could allow injustice and undue deprivation of property as was explained by the Court of Appeals in the 1998 case of *Hantex Trading Co., Inc., v. CIR, CA-G.R. SP No. 47172, September 30, 1998.* In disallowing the admission of sixty-eight photocopies of consumption entry documents which give credence to petitioner's tax delinquency, the Appellate Court, quoting landmark decisions of the Supreme Court, wisely declared, thus –

> "The [CIR] invokes the provisions of Section 8 of RA 1125 which states that the CTA shall not be strictly bound by the technical rules of evidence, and, therefore, the letter-certifications of the Customs

160

> Collection Officers amount to an authentication of the contents of the sixty-eight (68) photocopies of the consumption entry documents."

Petitioners argue that the technical rules of evidence relating to the admissibility of evidence guards against the danger of spurious and false evidence that could seize a favorable judgment. The rigidity of the rules has its own purpose. It could not be gainsaid that the same reason for these rigid rules in ordinary courts is also extant in the cases heard before the CTA.

Lastly, petitioners allege that "the Honorable First Division failed to consider the undisputed fact that respondent issued the subject assessments without any preliminary assessment notices (PAN), an express requirement in Rev. Reg. 12-99 before assessments may be issued. The summons for clarificatory questioning and the conduct for testimonial proceedings, as well as the other "writings" referred to by the Court do not substitute for the PAN expressly required by law. Further, the Honorable First Division failed to consider that these same summons for clarificatory questioning and the conduct for testimonial proceedings are part of a previous proceeding which had been categorically abandoned and terminated on the merits by respondent himself in a letter dated 10 December 1999 (*Exhibit K*), notifying the petitioners that:

> "For insufficiency of evidence, this Office has decided not to pursue any further your 1993 internal revenue tax cases

subject matter of our preliminary notices, all dated July 6, 1999 (*par. 17, Joint Stipulation of Facts and Issues*)."

The function of the above letter was clearly to declare the proceedings as terminated and abandoned, thus cutting off all ties between the communications, writings and procedures performed before the letter's issuance, and the assessments issued after.

Moreover, with due respect to this Honorable First Division, the clear provisions of Sec. 3.1.4 of Rev. Reg. No. 12-99, issued by Respondent himself, requires that it should be the letter of demand calling for the payment of the taxpayer's deficiency taxes which should state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, and not any other "writing". Absent this requirement, the formal letter of demand and the assessment notice shall be void. The language of the law is clear, and thus needs no interpretation. Hence, in the instant case where the Demand Letters do not state the facts and law upon which the Assessments were based, such Demand Letters and the corresponding Assessments are void".

RESPONDENT'S ARGUMENTS

Respondent argues that the finding of fraud was "clearly and convincingly" proven in this case. In support thereof, he avers the following:

"It is not disputed that Petitioners owned 50,000 shares of stocks of East Esteban Realty Corporation. Sometime in 1999, the

162

same number of shares were subsequently sold to Seaboard Eastern Insurance Corporation, Jose Halili Co., et. al., for a consideration in the amount Php 62,410,000. However, per tax returns filed, petitioners only paid the amount of Php 472,225.00 as capital gains tax.

The amount of Php 62,410,000.00, which represents the taxable gains realized by petitioners from the sale or transfer, came from the findings of the examiner pursuant to the investigation conducted and from the data/amounts reflected in the Capital Gains Tax Returns vis-à-vis the Deeds of Assignment executed. Theses Deeds of Assignment were the sole and primary evidence of sale or transfer executed by the various original owners of the shares involved to petitioners. In the course of the investigation, it was found out that petitioners grossly overstated in the capital gains tax returns filed for the subsequent sale to [S]eaboard the acquisition costs of the shares of stocks. The overstatement, as the Deeds of Assignment of the first transfer shows, correspond to 990% of the real cost of acquisition.

The effect of overstated cost of acquisition is to lessen the tax base. The lower the tax base is, the lower the capital gains tax due. This is because in the computation of capital gains tax for sales of shares of stock, the taxable base would be net capital gain. And in the determination of the net capital gains as taxable base, the cost of acquisition is defined in the BIR ruling to include not only cost per se but also expenses of sale, such as, legal expenses, brokerage fees, capital losses and even ordinary losses.

Guided by above-ruling, herein respondent called the attention of all petitioners to produce documentary evidence to prove and justify that the amounts stated or reflected in the returns which, according to them, represent the cost of acquisition, are true and that the allegation of expenses relative to the sale stated therein are real and not fabricated. However, despite this opportunity given to petitioners, they deliberately failed and/or refused to heed the request, to the dismay of herein respondent.

Despite such failure, petitioners were successful in making it appear in the capital gains tax return the alleged cost of acquisition, which is obviously bloated and grossly overstated and succeeded as well in paying a very much lower capital gains tax as a result of the underdeclaration of capital gains. In the hearing on 13 June 2002, respondent's witness, Atty. Arthur Ramos, made clear the scheme perpetuated by [the] petitioners in successfully filing false and fraudulent capital gains tax returns and consequential non-payment of correct taxes due on the stock transaction. Thus:

Q. (Atty. Pascual): Pursuant to the Memorandum was there a Preliminary investigation conducted?

163

A. (Atty. Ramos): Yes, we conducted a preliminary investigation?

Q. And what was the result of your preliminary investigation?

A. We were able to establish that the petitioner acquired by way of purchase these 50,000 shares of stocks from Dennis Go and others and these were subsequently sold to Seaboard Insurance Corporation at profit. We were able to establish that they deliberately overstated the cost in order to lessen the capital gains tax due. This is done by filing a fraudulent and false capital gains stocks returns, sir.

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Q. You mentioned a while ago that petitioner intentionally and feloniously did not pay the correct capital gains tax, [what] is your basis in saying so?

A. Because during the preliminary investigation we were able to establish that the petitioners bought the shares of stocks for Php 5,925,000.00 and then they sold these, the same stock for Php 62,410,000.00 thereby gaining the profit of Php 56,485,000.00. The tax should have been Php 11,297,000.00, however, in the capital gains tax returns that they filed, they deliberately overstated the cost ten (10) fold from Php 5.9 million ... We were able to establish petitioners overstated the cost of acquisition from Php 5.9 Million to Php 59 Million which is ten (10) fold. In so doing, the tax due that they paid is only Php 510,000.00 instead of Php 11,2[9]7,000.00, by deducting the amount paid with the actual tax due, they were able to save Php 10,787,000.00.

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To corroborate the above-testimony of Atty. Ramos, Ms. Noble Bambina Perez, was presented as second witness for the respondent. Ms. Perez was the group supervisor of Atty. Ramos who was tasked to conduct the investigation of petitioners' tax liabilities pursuant to the Memorandum issued by Atty. Antonio Montemayor. In her testimony, Ms. Perez testified clearly on how petitioners intentionally and deliberately overstated the cost of acquisition, by 1000% more of less, by comparing the Deeds of Assignment executed by the original owners of the shares of stocks in favor of petitioners and the Capital Gains Tax Returns filed by petitioners with the BIR relative to the sale of the same shares to Seaboard Eastern Insurance Corp., and Jose Halili et al, the buyer. And based on her testimony, the following undisputed facts were established from the transcript of stenographic notes (TSN) pages 21 to 32 of the hearing on 19 June 2003.

164

Name of Petitioner/ Stockholder (A)	Total Number of Shares of Stocks Owned and Transferred (B)	Cost of Acquisition (Per Return Filed) (C)	Cost of Acquisition (PerDeed of Assignment) (D)	Overstated Amount of Acquisition (C-D)
Ruben Tiu	10,000	11,907,516.00	1,422,000.00	10,485,516.00
Jerry Tiu	12,000	14,316,400.00	1,422,000.00	13,556,400.00
Ben Tiu	12,000	14,360,400.00	1,422,000.00	12,894,400.00
Herman Son	7000	8,333,400.00	1,422,000.00	6,908,400.00
Gerry Sevilla	7000		829,500.00	

> The facts established from the data/figures gathered by herein respondent all came from documents as well as the information taken from other entit[ies] which respondent made access into, specifically, the Deeds of Assignment filed with Securities and Exchange Commission. The said documents only prove one thing, that is, the overstatement of cost of acquisition was deliberately done by petitioners precisely to evade payment of correct tax due of the transaction, thereby denying or depriving the government revenue." [1]

Respondent asserts that the Deeds of Assignment are admissible in evidence considering that that while the subject Deeds of Assignment were originally private documents, they became public documents after the same were submitted and filed with the Securities and Exchange Commission and acknowledged by a competent notary public. Such being the case and pursuant to the rules, the due execution and authenticity of these documents are beyond reproach. In addition, this Court is not bound by the technical rules of admissibility of evidence under the Rules of Court citing Section 8 of Republic Act No. 1125, as amended.

By quoting a portion of the assailed Decision, respondent argues that during the trial he "presented the responsible custodian of these

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[1] *Comment* (To the Petition for Review En Banc dated 17 June 2005), pp. 8-13.

documents from the SEC to identify and testify as to the authenticity and genuineness of the said documents, Ms. Isma C. Gonzales. When Ms. Isma Gonzales was asked to why her signature appeared only at the last page and not on every page of the whole nineteen (19) documents, she intimated that it is their standard operating practice at the Public Reference Unit of the Records Division to sign and certify at the last page of the documents depending on the total number of pages. Each of these pages is verified by the records custodian as authentic reproductions of the official records on file. And at the last page of the said document below the certification, appears the signature of the Officer-in-Charge, showing that said document is really an authentic document as verified by the records custodian (TSN, November 12, 2002, pages 32-36)."

Finally, the respondent contends that the First Division of the Tax Court is correct in finding that due process was complied with when herein respondent issued the subject assessments. In support thereof, again quoting a portion of the assailed Decision, respondent avers that petitioners were not left in confusion with respect to the kind of tax that the petitioners were made liable to and the explanation therefore. "This is easily discernible from petitioner's protest letter *(BIR Records, page 180)* dated May 31, 2000. This court in the case of Subic Power

166

Corporation vs Commissioner of Internal Revenue *(CTA Case No. 6059, May 8, 2003)* held that:

> While we concede that the mere filing of a protest letter does not automatically mean that the requirement of Section 228 has not been violated, if the taxpayer is able to intelligently, as in this case, then it cannot contradict itself by asserting that it was not informed of the law and facts on which the assessment was made.

Besides, petitioners stipulated that on August 10, 1999, the Tax Fraud Division received a letter dated August 9, 1999, wherein petitioners rebutted the May 5, 1999 reply of the said Division *(Joint Stipulation of Facts)*."

THIS COURT'S RULING

Petitioners' assignment of errors can be reduced to four (4), namely: 1) alleged non-compliance with the procedural requirements provided by Rev. Reg. 12-99 dealing with the issuance of assessment notices; 2) that fraud was not "clearly and convincingly" proven; 3) the alleged inadmissibility of the certified true copies of the deeds of assignment to prove the contents thereof; and 4) alleged error of the Court in Division in holding that petitioners have the duty to present proof to rebut the Deeds of Assignment.

On the issue of non-compliance with the procedural requirements in the issuance of assessment notices pursuant to Revenue Regulations No. 12-99, petitioner argues that the assessments are void because the same were issued without any Preliminary Assessment Notices which is an express requirement under the aforementioned Revenue Regulations and pursuant to Sec. 3.1.4 thereof, it should be the letter of Demand calling for payment of the taxpayer's deficiency taxes which should state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, and not any other writing.

Petitioners' arguments are untenable.

Section 228 of the National Internal Revenue Code of 1997 (1997 NIRC) provides as follows:

> 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:
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> (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
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> (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
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> (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 taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.

168

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

From the language of the law, when the respondent or his duly authorized representative finds that proper taxes should be assessed, a written notice to the taxpayer informing him of the law and the facts upon which the assessment is based is necessary. In a recent case, the Supreme Court explained the rationale behind the second paragraph of Section 228 as follows:

> The law imposes a substantive, not merely a formal, requirement. To proceed heedlessly with tax collection without first establishing the validity of the assessment is evidently violative of the cardinal principle in administrative investigations: **that taxpayers should be able to present their case and adduce supporting evidence.**[2] *(Emphasis supplied)*

The essence of Section 228 is due process, that is, the taxpayer shall be accorded the opportunity to present his side and prove his

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[2] *Azucena T. Reyes v. Commissioner of Internal Revenue,* G.R. No. 163581 and *Commissioner of Internal Revenue v. Azucena T. Reyes,* G.R. No. 159694, January 27, 2006 (480 SCRA 382).

169

defenses. The records of this case reveal that the respondent complied with the requirement of due process as mandated by Section 228 of the 1997 NIRC. Respondent's notices dated July 6, 1999 *(Exhibits "24", "25", "26", "27" of the respondent)* addressed to each of the petitioners herein, captioned "Notice to Taxpayer" reads as follows:

"<u>NOTICE TO TAXPAYER</u>

July 6, 1999

Mr. Gerry Sevilla
c/o 130 Amorsolo Street
Legaspi Village, Makati City

Dear Mr. Sevilla:

Please be advised that the report of investigation of your capital gains tax liabilities for taxable year 1993 pursuant to Confidential Information No. 53-98 filed dated December 7, 1998 relative to the underdeclaration of capital gains and the consequential non-payment of the correct capital gains tax due on your sale of 50,000 shares of stocks to **SEABOARD-EASTERN INSURANCE CO., INC.** and **JOSE HALILI COMPANY, ET AL,** for P62,410,000.00 was submitted by Revenue Officer Arthur C. Ramos under the supervision of Group Supervisor Noble Bambina B. Perez.

Pursuant to the provisions of Section 228 (formerly Section 229, as amended by the Comprehensive Tax Reform Act of 1997) of the National Internal Revenue Code, as amended by E.O. 273, which requires this Office to notify you of the findings of your tax liabilities, and to enable you to present your side of the case, you are requested to appear in an informal conference at Room 211, 2nd Floor, BIR National Office Bldg., Diliman, Quezon City on <u>Aug. 16, 1999</u>. In this conference, you may be represented by your duly authorized representative or official and/or assited (sic) by your counsel who should be authorized in writing, if you cannot come personally. If you agree to the findings or if you choose to file your objections thereon, or take other courses of action, you may forego this conference and instead, you may accomplish the enclosed **<u>Response Form</u>** by checking the applicable items of your choice.

We shall appreciate your preferential attention to this case. Your failure to appear on the scheduled date of conference without prior notice to us, or if the enclosed **<u>Response Form</u>** is not accomplished by you, we shall presume that you have waived your right to a preliminary conference and that you have opted to file no objections at this level. Accordingly, the report on your case, on the basis of the findings per our investigation, shall be submitted to higher authorities for review and proper disposition.

Very truly yours,

BEETHOVEN L. RUALO
Commissioner of Internal Revenue

By:
EDWIN L. MARCOS
Chief, Tax Fraud Division"

The Response Form referred to in the Notice to Taxpayer gives the opportunity to the taxpayer to evaluate and refute the basis of the findings of the respondent and indicates the options available to the taxpayer in refuting the resulting proposed tax deficiency assessments thereon. A sample of the response form is hereunder reproduced:

"The Commissioner of Internal Revenue
Thru Counsels
BIR, Quezon City

Sir:

In response to the examination of my capital gains tax liabilities for taxable year 1993 pursuant to Confidential Information No. 53-98, please be informed that the Chief, Tax Fraud Division and Group Supervisor Noble Bambina B. Perez have duly notified me of the findings and have afforded me an opportunity to evaluate the basis of such findings and the resulting proposed tax deficiency assessments thereon, as follows:

Capital Gains Tax Deficiency Assessment, Inclusive of Increments **P3,634,432.00**

In view thereof: (Check applicable action)

A. ________ I fully subscribe to the findings and I agree to pay the deficiency taxes, including the increments thereon, in accordance with the above proposed assessments within the period that I shall be required to pay the same.

B. ________ I do not subscribed to the findings:

171

(a) ______ Will file a protest, as soon as the assessment notice shall have been received by me.

(b) ______ My position paper is enclosed, without prejudice to submission of additional documents on the matter, as warranted.

C. ________ I shall take the proper course of action as soon as the notice of assessment hereon shall have been received by me.

D. ________ I shall avail of other administrative and legal remedies provided for by existing laws.

MR. GERRY SEVILLA
Taxpayer"

Moreover, in their Joint Stipulations of Facts and Issues filed on August 13, 2001, the parties admitted the following facts:

"12. In his letters dated 28 January 1999, Respondent ordered Petitioners "to shed light on the tax evasion case filed against (them) as per Confidential Information no. 53-98 filed dated 7 December 1998 relative to the underdeclaration of capital gains and the consequential non-payment of the capital gains tax due on [the] sale of 50,000 shares of stocks to Seaboard Eastern Insurance Corporation and Jose Halili Co. et al. for 62,410,000.00".

13. In a letter dated 3 March 1999, which was received by the Tax Fraud Division on 4 March 1999, Petitioners objected to allegations that they evaded taxes on account of the sale of the East Esteban Realty Corporation shares in 1993. A copy of this letter is attached to the Petition as Annex "K" and made an integral part thereof.

14. In a letter dated 5 May 1999, the Tax Fraud Division informed Petitioners of their "point by point rebuttal of [the] reply dated 3 March 1999". A copy of this letter is attached in the Petition as Annex "L" and made an integral part thereof.

15. Subsequently, in his letters dated 6 July 1999 which were received on 5 August 1999, the Tax Fraud Division requested Petitioners to appear in an informal conference at the Bureau of Internal Revenue. Copies of these letters are attached in the Petition as Annexes "M" to "P" and made integral parts thereof.

16. In a letter dated 9 August 1999 which was received by the Tax Fraud Division on 10 August 1999, Petitioners rebutted the 5 May 1999 reply of said Division. A copy of this letter is attached in the Petition as Annex "R" and made an integral part thereof."

Respondent's letter dated 28 January 1999 signed by then Commissioner Rualo informed each of the petitioners herein that there is a tax evasion case against them "as per Confidential Information No. 53-98 filed on 7 December 1998 relative to the underdeclaration of capital gains and the consequential non-payment of the capital gains tax due on your sale of 50,000 shares of stocks to Seaboard Eastern Insurance Corporation and Jose Halili Co, et al. for P62,410,000.00". The letter further states that "[f]ailure to appear on the scheduled date shall mean a waiver of your right to present whatever controverting evidences you may have in your favor". Respondent's letter dated 5 May 1999 addressed to the counsel of the petitioners refuted petitioners' objections reiterating that petitioners did not file the correct capital gains tax returns because the cost of acquisition of shares of stock is overstated, the defense of prescription is untenable because according to Section 223 of the NIRC, a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, at anytime within ten (10) years after discovery of the falsity, fraud or omission, that on February 24, 1999, Mr. Oscar Guzman, representative of Jerry, Ben and Ruben all surnamed Tiu appeared before this Office and was afforded every opportunity to scrutinize and secure a copy of all the documents in respondent's possession, and that the respondent has initiated the issuance of assessment notices and the institution of appropriate criminal actions against the petitioners.

The Notice to Taxpayer dated July 6, 1999 specified that the respondent found an under-declaration of capital gains and the consequential non-payment of the correct capital gains tax due on the sale of 50,000 shares of stocks to Seaboard-Eastern Insurance Co., and Jose Halili Company, et al. for P62,410,000.00 as the basis of the assessment. The notice even indicated the courses of action available to the petitioners and facilitated petitioners' reply by attaching a Response Form that indicated the amount of the deficiency capital gains tax and further indicating the options available to the petitioner.

Clearly, the respondent complied with the requirement of giving a written notice to each of the petitioners informing them of the law and the facts on which the assessment is based. Although the written notices are not captioned as Preliminary Assessment Notice as stated in Revenue Regulations No. 12-99, nevertheless, the notices satisfy the requirement of Section 228 of the 1997 NIRC pertaining to a written notice to the taxpayer before the issuance of the assessments. Therefore, the assessments against the petitioners are valid and binding.

174

The admissibility of the certified true copies of the Deeds of Assignment and the finding of fraud shall be discussed jointly considering that the latter depends upon the resolution of the former.

Material to the resolution of the issue of fraud is the admissibility of the Certified True Copies of the Deeds of Assignment (Exhibits "15" to "23" of the respondent) issued by the Public Reference Unit of the Securities and Exchange Commission showing the original acquisition costs of the herein petitioners.

Petitioners argue that the respondent has not proven the fact of fraud by convincing and competent evidence. They assert that fraud must be proven by the party alleging it with clear and convincing evidence, and contend that the Deeds of Assignment presented to the Court in Division being "mere photocopies of microfilmed deeds of assignment in the files of the Securities and Exchange Commission ("SEC"), do not pass the test of admissibility for being contrary to the Best Evidence Rule."

The Certified True Copies of
The Deeds of Assignment
are Admissible in Evidence

We concur with the ruling of the Court in Division that the certified true copies of the Deeds of Assignment are admissible in evidence. As early as January 28, 1999, the respondent had "ordered" the petitioners to shed light on the tax evasion case filed against them. Petitioners, however, did not furnish the respondent with any document pertinent to the investigation. Thus, the respondent had no recourse but to use the *"best evidence obtainable"* pursuant to Sec. 6 (B) of the 1997 NIRC which provides as follows:

> (B) Failure to Submit Required Returns, Statements, Reports and Other Documents. — When a report required by law as a basis for the assessment of any national internal revenue tax shall not be forthcoming within the time fixed by laws or rules and regulations or when there is reason to believe that any such report is false, incomplete or erroneous, the Commissioner ***shall assess the proper tax on the best evidence obtainable***.
>
> In case a person fails to file a required return or other document at the time prescribed by law, or willfully or otherwise files a false or fraudulent return or other document, the Commissioner shall make or amend the return from his own knowledge and from such information as he can obtain through testimony or otherwise, which shall be prima facie correct and sufficient for all legal purposes. *(Italics and emphasis supplied)*

In explaining the meaning of the foregoing provision, the Supreme Court said:

> The "best evidence" envisaged in Section 16 of the 1977 NIRC, as amended, includes the corporate and accounting records of the taxpayer who is the subject of the assessment process, the accounting records of other taxpayers engaged in the same line of business, including their gross profit and net profit sales. ***Such evidence also includes*** data, record, paper, document or any evidence gathered by internal revenue officers from other taxpayers who had personal transactions or from whom the subject taxpayer received any income; and ***record, data, document and information secured from government offices or agencies, such as the SEC,*** the Central Bank of the Philippines, the Bureau of Customs, and the Tariff and Customs Commission.[3] *(Italics and emphasis supplied)*

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[3] *Commissioner of Internal Revenue v. Hantex Trading Co., Inc.,* G.R. No. 136975, March 31, 2005 (454 SCRA 301); see also *Bonifacia Sy Po v. Honorable Court of Tax Appeals and Honorable Commissioner of Internal Revenue,* No. L-81446, August 18, 1988 (164 SCRA 524).

174

And in the final disposition of the same case, the Supreme Court ruled as follows:

> On the disposition of the case, the Court has two options, namely, to deny the petition for lack of merit and affirm the decision of the CA, without prejudice to the petitioner's issuance of a new assessment against the respondent based on credible evidence; or, to remand the case to the CTA for further proceedings, ***to enable the petitioner to adduce in evidence certified true copies*** or duplicate original copies ***of the Consumption Entries*** for the respondent's 1987 importations, if there be any, and the correct tax deficiency assessment thereon, without prejudice to the right of the respondent to adduce controverting evidence, so that the matter may be resolved once and for all by the CTA. In the higher interest of justice to both the parties, the Court has chosen the latter option. After all, as the Tax Court of the United States emphasized in *Harbin v. Commissioner of Internal Revenue*, taxation is not only practical; it is vital. The obligation of good faith and fair dealing in carrying out its provision is reciprocal and, as the government should never be over-reaching or tyrannical, ***neither should a taxpayer be permitted to escape payment by the concealment of material facts***.[4] *(Citations omitted, italics and emphasis supplied)*

Applying the foregoing ruling in the present Petition for Review, the Certified True Copies of the Deeds of Assignment reproduced from the microfilmed records of the Securities and Exchange Commission are admissible in evidence. The distinction between the present Petition and the case of *CIR v. Hantex Trading Co., Inc.,*[5] is that Exhibits "14" to "23" of the respondent herein are Certified True Copies of the official file in the custody of the SEC duly issued by the proper officer having custody of such official file, duly identified, authenticated and offered in evidence during the trial of the case. Exhibits "14" to "23" are not just mere photocopies. Being certified true copies, the aforementioned

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[4] *Supra.*
[5] *Supra.*

177

Exhibits are admissible in evidence. In fact, it is noteworthy that in the same case of *CIR v. Hantex Trading Co., Inc.,*[6] the Supreme Court instructed the petitioner therein to ***adduce in evidence certified true copies*** of the Consumption Entries. The certified true copies of the Deeds of Assignment are thus admissible in evidence.

Fraud Was Clearly and Convincingly Proven

Finding that the Certified True Copies of the Deeds of Assignment are admissible, the Court in Division did not err in arriving at its conclusion that petitioners filed a fraudulent or false capital gains tax return because "when petitioners intentionally overstated the cost of acquisition of the said shares in their capital gains tax returns, they willfully evaded the payment of correct taxes".

"*Fraud* in its general sense, is deemed to comprise anything calculated to deceive, including all acts, omissions, and concealment involving a breach of legal or equitable duty, trust or confidence justly reposed, resulting in the damage to another, or by which an undue and unconscionable advantage is taken of another." [7]

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[6] *Supra.*
[7] *Commissioner of Internal Revenue v. Court of Appeals,* 327 SCRA 1, 33; 257 SCRA 200, 225 (1996) cited in *Commissioner of Internal Revenue v. The Estate of Benigno P. Toda, Jr., represented by Special Co-administrators Lorna Kapunan and Mario Luza Bautista,* G. R. No. 147188, September 14, 2004 (438 SCRA 290).

Based on the above-quoted definition, fraud is present when there is any "concealment involving a breach of legal or equitable duty, trust or confidence justly reposed, resulting in the damage to another, or by which an undue and unconscionable advantage is taken of another". The law provides that "a citizen of the Philippines residing therein is taxable for all income derived from sources within and without the Philippines"[8]. Petitioners are all Filipino citizens and as such they are considered as taxpayers having the legal duty or obligation to declare a true and accurate accounting of their total taxable income in the appropriate tax returns, in this case, the Capital Gains Tax Return On Stock Transactions *(BIR Form 1701E-2) (Exhibits "A", "B", "C", "D" and "E")*. The petitioners declared in their respective tax returns the acquisition costs of their shares of stock sold. Upon investigation, however, the respondent found out that petitioners overstated their respective acquisition costs. Such overstated acquisition costs of the stocks sold are the basis of the deficiency capital gains tax liabilities of each of the petitioners. The deliberate overstatement of the acquisition costs of the shares of stocks sold in their respective Capital Gains Tax Returns on Stock Transactions to evade the payment of correct taxes constitutes fraud. Thus, respondent's findings were sustained by the Court in Division when it ruled as follows:

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[8] Section 23, 1997 NIRC.

"For clarity, below is a summary of the cost of acquisition of the 50,000 shares of stocks when purchased by the petitioners from the original owners in 1989 and the cost of acquisition of the same shares when sold by the petitioners in 1993 to Seaboard Eastern Insurance Corporations, Jose Halili & Company, et al.:

	NO. OF SHARES SOLD	ORIGINAL ACQUISITION COST	ACQUISITION COST PER RETURN	OVERSTATEMENT OF ACQUISITION COST
JERRY TIU	12,000	P1,422,000.00	P14,316,400.00	P12,894,400.00
RUBEN TIU	12,000	1,422,000.00	14,316,400.00	12,894,400.00
BEN TIU	12,000	1,422,000.00	14,316,400.00	12,894,400.00
GERRY SEVILLA	7,000	829,500.00	8,330,400.00	7,500,900.00
HERMAN SON	7,000	829,500.00	8,330,400.00	7,500,900.00
TOTAL	50,000	P5,925,000.00	P59,610,000.00	P53,685,000.00

Clearly from the foregoing, there was an overstatement of the acquisition cost in the sum of P53,685,000.00 for which the capital gains tax due thereon was not paid by the petitioners. **Because of the deliberate overstatement of the cost of acquisition of the subject shares of stocks by the petitioners, the tax base was lessened which ultimately led to a lower capital gains tax due**. In other words, when petitioners intentionally overstated the cost of acquisition of the said shares in their capital gains tax returns, **they willfully evaded the payment of correct taxes** thereby denying or depriving the government the right to collect the exact taxes due from petitioners' stock transactions." *(Emphasis supplied)*

Taxpayer Has The Duty To Prove That The Assessments Are Not Correct

In the case of *CIR v. Hantex Trading Co., Inc.,*[9] the Supreme Court categorically stated that ***a taxpayer should not be permitted to escape payment by the concealment of material facts.*** Petitioners should have presented their own copies of the Deeds of Assignment to prove that the assessments are without any factual

[9] *Supra.*

(180)

basis. The rule is that the determination by the agents of the Commissioner of Internal Revenue may not be disturbed when there is no evidence that was presented to show that a tax return is not fraudulent[10], thus, the Supreme Court had ruled as follows:

> "The Commissioner's bases in concluding that Tan Guan's income tax return was false or fraudulent are the findings of his agents that the Philippine Surplus Co. claimed deductions of fictitious expenses for the purpose of avoiding the declaration of profits which eventually would be taxable as income of Tan Guan and Sia Lin, and that the names of the payees in the corresponding entries of the expenses involved in the books of accounts were erased.
>
> The Commissioner's finding on the facts constituting fraud, proved in, and found established by, the Court of Tax Appeals, was not rebutted by the taxpayer. Hence, We are not inclined to disturb the finding of falsity or fraudulence in Tan Guan's return.
>
> The returns being false or fraudulent, the Commissioner of Internal Revenue has not lost his right to issue the assessment on January 8, 1957.
>
> xxx xxx xxx.
>
> The Commissioner of Internal Revenue, sustained by the Tax Court, found for a fact that the expenses in the amount of P206,870.00 are fictititious. Tan Guan presented no evidence to disprove such finding. **In appeals to the Court of Tax Appeals, the determination of the Commissioner of Internal Revenue is presumed correct and it behooves the taxpayer to rebut such presumption**. Tan Guan failed to overcome his burden. Hence, the finding that the expenses are fictitious must be sustained. And being fictitious, the expenses cannot be claimed as deduction from gross income." *(Emphasis supplied)*

Assessments are prima facie presumed correct and made in good faith.[11] Upon the introduction of the assessment in evidence, a *prima*

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[10] *Tan Guan v. The Court of Tax Appeals and The Commissioner of the Bureau of Internal Revenue,* No. L-23676, April 27, 1967 (19 SCRA 903).

[11] *Commissioner of Internal Revenue v. Court of Appeals, Atlas Consolidated Mining and Development Corporation and Court of Tax Appeals,* G.R. No. 104151, March 10, 1995; *Atlas Consolidated and Development Corporation v. Court of Appeals, Commissioner of*

181

facie case of liability on the part of the taxpayer is made. If a taxpayer files a petition for review in the CTA and assails the assessment, the *prima facie* presumption is that the assessment made by the BIR is correct, and that in preparing the same, the BIR personnel regularly performed their duties. This rule for tax initiated suits is premised on several factors other than the normal evidentiary rule imposing proof obligation on the petitioner-taxpayer: the presumption of administrative regularity; the likelihood that the taxpayer will have access to the relevant information; and the desirability of bolstering the record-keeping requirements of the NIRC.[12] Verily, failure to present proof of error in the assessment will justify judicial affirmance of said assessment.[13]

As held by the Supreme Court, "the determination by the CTA must rest on all the evidence introduced and its ultimate determination must find support in credible evidence"[14]. In the present controversy, the petitioners did not present in evidence their respective copies of the Deeds of Assignment which could show the acquisition costs of the shares of stocks. The presentation of their respective Deeds of Assignment could have proven that what they declared as acquisition

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Internal Revenue and Court of Tax Appeals, G.R. No. 105563, March 10, 1995 (242 SCRA 289).

[12] *Commissioner of Internal Revenue v. Hantex Trading Co., Inc., supra.*

[13] *Commissioner of Internal Revenue v. Court of Appeals, Atlas Consolidated Mining and Development Corporation and Court of Tax Appeals, supra.*

[14] *Commissioner of Internal Revenue v. Hantex Trading Co., Inc., supra.*

182

costs in their capital gains tax returns were not overstated. Neither was there any evidence presented by the petitioners that they incurred deductible expenses related to the sale of their shares of stocks which would reduce their taxable gain from the sale.

Petitioners' respective Capital Gains Tax Return on Stock Transactions (Exhibits *"A", "B", "C", "D" and "E")* and the Certified True Copies of the Deeds of Assignment issued by the SEC (Exhibits "15" to "23") together with the testimonies of the respondent's witnesses constitute credible evidence in support of the finding that petitioners overstated their respective costs of acquisition of the shares of stocks for the purpose of reducing their capital gains tax liabilities, thus, evading the payment of the correct taxes.

WHEREFORE, premises considered, the Petition for Review is hereby **DENIED** for lack of merit. The assailed Decision dated October 4, 2004 and Resolution dated May 10, 2005 are hereby **AFFIRMED**.

SO ORDERED.

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

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

183

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
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 this Court.

ERNESTO D. ACOSTA
Presiding Justice

184