REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

PEOPLE OF THE PHILIPPINES,
Plaintiff,

-versus-

FERDINAND P. MAHUSAY,
Accused.

CTA Crim. Case No. O-424
For: Violation of Section 254 of the National Internal Revenue Code of 1997 (NIRC), as amended.
(Attempt to Evade or Defeat Tax)

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PEOPLE OF THE PHILIPPINES,
Plaintiff,

-versus-

FERDINAND P. MAHUSAY,
Accused.

CTA Crim. Case No. O-426
For: Violation of Section 255 of the National Internal Revenue Code of 1997 (NIRC), as amended.
(Failure to File Income Tax Return)

Members:

DEL ROSARIO, P.J., *Chairperson,*
UY, and
MINDARO-GRULLA, *JJ.*

Promulgated:
04 APR 2018 ; 10:21 Am.

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DECISION

MINDARO-GRULLA, J.:

Accused Ferdinand P. Mahusay is charged before this Court with violation of Sections 254 and 255 of the NIRC of 1997, as amended, under two (2) separate Informations which, respectively, read as follows:

Crim. Case No. O-424

"The undersigned Prosecution Attorney of the Department of Justice, hereby accuses **FERDINAND P. MAHUSAY** of the offense of attempt to evade or defeat tax for taxable year 2009 in violation of Section 254 of the National Internal Revenue Code (NIRC) of 1997, as amended, committed as follows:

That on or about April 16, 2010, in Pasay City and within the jurisdiction of this Honorable Court, the above-named accused, a Filipino Citizen residing in the Philippines and a registered taxpayer earning income as a member of the Board of Trustees of the Regular and Corporate Offices of Metropolitan Works and Sewerage System (MWSS) and as such, required by law, rules and regulations to file his annual income tax return and pay the appropriate tax, willfully, unlawfully and feloniously attempt to evade or defeat tax, by not declaring his income earned from Metropolitan Works and Sewerage System (MWSS) for taxable year 2009 amounting to Four Million Five Hundred Fifty Seven Thousand One Hundred Sixty Pesos and Thirteen Centavos (P4,557,160.13), which resulted to a basic deficiency income tax of One Million Four Hundred Seven Thousand One Hundred Sixty Pesos and Thirteen Centavos (P1,407,160.13) (*more or less-deleted/amended on July 1, 2015*) for taxable year 2009, exclusive of penalties, surcharge and interest, to the damage and prejudice of the Government of the Republic of the Philippines."

CONTRARY TO LAW. [1]

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[1] Docket, CTA Crim. Case No. O-424, Volume I, pp. 8-9.

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Crim. Case No. O-426

"The undersigned Prosecution Attorney of the Department of Justice, hereby accuses **FERDINAND P. MAHUSAY** of the offense of failure to file an income tax return for the taxable year 2009 in violation of Section 255 of the National Internal Revenue Code (NIRC) of 1997, as amended, committed as follows:

> That on or about April 16, 2010 in Pasay City and within the jurisdiction of this Honorable Court, the above-named accused, as a Filipino Citizen residing in the Philippines and a registered taxpayer earning income as member of the Board of Trustees of the Regular and Corporate Offices of Metropolitan Waterworks and Sewerage System (MWSS) and as such required by law, rules and regulations to file his income tax return and pay the corresponding tax for taxable year 2009 did, then and there, willfully, unlawfully, and feloniously fail to file his annual income tax return and pay the corresponding tax for taxable year 2009 for income earned from Metropolitan Waterworks and Sewerage Systems (MWSS), in violation of the provisions of the National Internal Revenue Code of 1997, as amended, to the damage and prejudice of the Government of the Republic of the Philippines in the amount of One Million Four Hundred Seven Thousand One Hundred Sixty Pesos and Thirteen Centavos (P1,407,160.13), *(more or less - deleted/amended on July 1, 2015)*, as basic income tax deficiency, exclusive of penalties, interests and surcharges.
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> CONTRARY TO LAW."[2]

[2] Docket, CTA Crim. Case No. O-426, pp. 6-7.

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On January 14, 2015, upon arraignment[3], the above-, named accused, duly assisted by his counsel *de parte*, entered his plea of not guilty to the crimes charged against him.

Meanwhile, the prosecution filed a Motion for Consolidation on January 23, 2015.

On February 4, 2015, a Preliminary Conference[4] was held. On the same date, the Court's First Division issued a Resolution[5] granting the Motion for Consolidation of CTA Crim. Case Nos. O-424 and O-426, subject to the conformity of the Court's Third Division. Similarly, in a Resolution[6] dated March 11, 2015, the Court's Third Division granted the consolidation of the cases, bearing the lower docket number.

Thereafter, in the Preliminary Conference held on July 1, 2015, this Court noted that the Informations filed for both cases have the statement "more or less" after the amount stated therein which could affect the Court's jurisdiction. Thus, re-arraignment of the accused was set. Upon re-arraignment[7], accused entered his plea of not guilty to the crimes charged against him.

Pre-Trial proceeded. In the Pre-Trial Order[8] dated September 9, 2015, the admissions and issues read as follows:

> "A. The parties admitted during the Pre-Trial Conference held on July 29, 2015 and in their Joint Stipulation of Facts and Issues filed on August 12, 2015, the following:
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> 1. This Honorable Court has jurisdiction over these cases; and

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[3] Certificate of Arraignment and Minutes of the Hearing dated January 14, 2015, Docket, CTA Criminal Case No. O-424, Volume I, pp. 336-342.
[4] Ibid., Minutes of Hearing dated February 4, 2015, Docket, Volume I, pp. 349-423.
[5] Ibid., p.424.
[6] Ibid., pp.428-429.
[7] Certificate of Arraignment and Minutes of the Hearing dated January 14, 2015, Docket, CTA Criminal Case No. O-424, Volume I, pp. 487-494.
[8] Docket, Volume I, pp. 614-622.

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2. The identity of the accused Ferdinand P. Mahusay.

3. Stipulations on the existence of the parties' respective documentary evidence were held during the Preliminary Conference scheduled on February 4 and May 20, 2015.

B. Issues:

1. In CTA Crim. Case No. O-424-Whether the accused is guilty beyond reasonable doubt for violation of Section 254 of the NIRC of 1997, as amended; and

2. In CTA Crim. Case No. O-426- whether accused is guilty beyond reasonable doubt for violation of Section 255 of the NIRC of 1997, as amended."

During trial, the prosecution presented the testimonies of the following witnesses:

1. DANIEL R. LLAVOR

Based on the Judicial Affidavit[9], Daniel R. Llavor is currently designated as a Revenue Officer (RO) II of the Bureau of Internal Revenue (BIR), currently assigned at Revenue District Office (RDO) No. 34-Paco. Prior to being assigned at RDO 34, he served also as a RO at the National Investigation Division (NID) of the BIR from 2009 until 2013. According to him, pursuant to NID Memorandum dated October 5, 2010, his group was directed to conduct the intial investigation on the possible tax liabilities of the accused. His group is composed of the following persons: himself, Franklin Mendoza and Renato S. Corpuz as their Group Supervisor (GS). He also stated that in conducting said preliminary investigation, they adopted the following procedure:

[9] Docket, CTA Crim. Case O-424, Volume I, pp. 553-569.

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a. *Profiling of taxpayer*

- The group accessed the centralized database of the BIR which is the Integrated Tax System, and found that the accused is a registered taxpayer at RDO No. 51-Pasay City with Tax Identification Number (TIN) 118-395-316-000 and registered address at PICC Bldg., CCP Complex Roxas Blvd, Pasay City.

b. *Third-party verification*

- The group requested from MWSS and Commission On Audit (COA) a copy of the Report on Salaries, Allowance and other Personnel Benefits Received by principal officers and members of the governing board of GOCCs, specifically, MWSS for both the Regulatory Offices, and Corporate Offices for the period from January 1, 2008 through December 31, 2009[10].

He likewise stated that the group was able to secure Certifications[11] from the Information System Operation Service (ISOS), through Assistant Commisisoner Victoria V. Santos, and RDO No. 51, that no record of returns were filed by the accused for the years 2006, 2007, 2008 and 2009.

c. *Consolidation and Evaluation of all data, information, and documents gathered pertaining to the records of the accused*

- He testified that based on the all the information gathered, the group was able to conclude the following: (i) Ferdinand P.

[10] Exhibits "P-4" to "P-7".
[11] Exhibits "P-8" to "P-10".

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Mahusay did not file any return for the years 2006 to 2009; and (ii) Ferdinand Mahusay earned substantial income from MWSS for the years 2008 and 2009 as per lists from the COA.

d. *Findings and recommendations*

- The group recommended the issuance of a Letter of Authority[12] from the Commissioner of Internal Revenue (CIR) for the purpose of conferring upon them authority to examine the books of accounts of the accused and to prevent the accused from amending the tax return, where it committed violation of tax laws.

Accordingly, the group made a Memorandum to the CIR recommending that the results of the preliminary investigation be immediately forwarded to the Run Against Tax Evaders (RATE) - Legal Writing and Appearance Group (LWAG) for evaluation and preparation of the corresponding pleadings required for the filing of the criminal case. Eventually, after referral of the case by CIR to the Department of Justice (DOJ) Secretary, the DOJ Secretary authorized the filing of the criminal case[13].

He further testified that after the filing of the criminal case, the group continued with the assessment procedure against the accused and accessed the records where MWSS is registered. The group was able to secure from RDO No. 39, through Ms. Clavelina S. Nacar, computer print-outs of withholding tax returns and the alphalist of withholding tax on compensation income filed by MWSS for taxable years 2006-2009. Based on these, the initial findings of the group corroborated that accused was not among the individuals being subjected to withholding tax on compensation. Thus,

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[12] Exhibit "P-3".
[13] Joint Complaint Affidavit, Exhibit "P-2".

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he was not among the MWSS employees subject to substituted filing of income tax.

2. RENATO S. CORPUZ

Renato S. Corpuz testified that he is currently occupying the position of Revenue Officer IV of the BIR. He is the Group Supervisor (GS) of the team who conducted the investigation regarding the tax liabilities of the accused. He claims that tax investigation against the accused stemmed from an inquiry made by the Senate regarding the compensation given to Directors and Board of Trustees and Directors of government-owned and controlled corporations.

3. CLAVELINA S. NACAR

In her Judicial Affidavit, Clavelina S. Nacar stated that she is presently assigned as the OIC- Assistant Regional Director of Revenue Region (RR) No. 9- San Pablo City, and that prior to being assigned as the OIC-ARD of RR No. 9, she served as Revenue District Officer of Revenue District Office (RDO) No. 39-South Quezon City of the BIR. She testified that when she received a letter dated February 22, 2011 requesting for the withholding tax returns filed by MWSS for 2006 to 2009, she instructed the Document Processing Section to verify if MWSS filed withholding tax returns.

She also testified on how to verify filed withholding tax returns. She also confirmed in her testimony that MWSS filed its withholding tax returns on compensation and expanded withholding tax returns which she transmitted to Atty. Sixto C. Dy including the alpha list of individuals subject to withholding tax by MWSS.

4. MA. ROSARIO ADASA

Ma. Rosario Adasa is currently the State Auditor V-Office of the Assistant Commissioner (OAC), Corporate Government Sector (CGS), Commission on Audit (COA). Based on the *subpoena duces tecum* and *ad testificandum*, she is required to bring (a) the published copy of the ROSA in the custody of COA for the year for 2008-2009; and (b) other documents relative to the ROSA submitted by MWSS. In her testimony, she confirmed that accused Ferdinand P. Mahusay is included in the list of Officers per ROSA submitted to COA, both in the Regulatory and Corporate Office of MWSS.

5. <u>JOCELYN M. TOLEDO</u>

Jocelyn M. Toledo is presently the Acting Manager of the Finance Department of the MWSS. In her Judicial Affidavit, she stated that accused, as member of the Board of Trustees, was not an employee of MWSS.

On March 28, 2016, the prosecution filed their Formal Offer of Evidence. On April 15, 2016, accused filed his comment thereto. Acting on the Formal Offer of Evidence, this Court, in a Resolution[14] dated June 8, 2016, admitted Exhibits **"P-1", "P-2", "P-3", "P-5", "P-7", P"-8", "P-9", "P-11", "P-11-A", "P-11-B", "P-12", "P-12-A", "P-12-B", "P-13", "P-13-A", "P-13-B", "P-14", "P-15", "P-15-A", "P-16", "P-17", "P-17-a", "P-17-b", "P-19", "P-20", "P-22", "P-23", "P-24", "P-24-1", "P-24-2", "P-25" and "P-25-1"**, subject to this Court's final evaluation and appreciation of their purposes, materiality, relevancy, and probative value to the issues involved in this case.

However, the Court denied the admission of Exhibits **"P-4", "P-6", "P-10" and "P-21"**, for failure to present their originals for their comparison.

Meanwhile, the accused filed his Motion for Leave to File Demurrer to Evidence (With Notice of Change of Address) and his supplemental Motion for Leave to File Demurrer to Evidence[15] on June 20, 2016 and June 30, 2016, respectively. The prosecution filed their comment to the Motion for Leave to File Demurrer to Evidence on July 7, 2016 but, failed to file their comment with respect to the supplemental Motion for Leave to File Demurrer to Evidence, as per Records Verification dated July 27, 2016.

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[14] Docket, CTA Crim. Case No. O-424, pp. 843-844.
[15] Ibid., pp. 845-854.

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In a Resolution dated September 6, 2016, this Court granted accused's Motion for Leave to File Demurrer to Evidence. Thereafter, accused filed his Demurrer to Evidence on September 19, 2016. On September 30, 2016, the prosecution filed a Motion for Extension to File Comment (On Accused's Demurrer to Evidence). Accordingly, on October 4, 2017, the Court granted the motion. The prosecution's Comment/Opposition (To Accused's Demurrer to Evidence) was filed on October 17, 2016.

Finding no merit in accused's Demurrer to Evidence, the Court issued a Resolution dated November 24, 2016 denying the Demurrer to Evidence. Thus, trial proceeded.

On February 8, 2017, the defense presented the accused himself as its one and only witness.

On February 20, 2017, accused filed his Formal Offer of Evidence. However, prosecution failed to file a comment despite notice. Thus, acting on the Formal Offer of Evidence, the Court admitted Exhibits **"A-3", "A-4", "A-8", "A-9", "A-10", "A-11", "A-12", "A-13", "A-14", "A-14-A"**, subject to this Court's final evaluation and appreciation of their purposes, materiality, relevancy, and probative value to the issues involved in this case. However, this Court denied the following exhibits:

1. Exhibits **"A-1" and "A-2"**, for failure to identify; and
2. Exhibits **"A-5", "A-6", and "A-7"**, for failure to present the originals for comparison.

Consequently, with the admission of the aforementioned documentary exhibits, accused was deemed to have formally rested his case. On November 3, 2017, the Court directed both parties to file their respective memoranda. However, as per Records Verification dated December 27, 2017, both parties failed to file their respective memoranda despite notice.

On January 11, 2018, this Court issued its Resolution stating among others, that these cases are now considered submitted for decision. Counsel for the accused was directed to inform this Court within ten (10) days from notice, of the

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new address of accused since the Resolution dated November 3, 2017 was returned unserved.

We resolve.

At the outset, it is noteworthy to mention the case of *Commissioner of Internal Revenue vs. Pascor Realty and Development Corporation*[16], the Supreme Court held that an assessment is not necessary before filing a criminal complaint, to wit:

> "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*, 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. (Emphasis supplied)

Moreover, in the case of *Adamson, et al., vs. Court of Appeals*[17], et al., the Supreme Court held that a crime is complete when the violator has knowingly and willfully filed a fraudulent return, with intent to evade and defeat the tax, The Supreme Court ruled in this wise:

> "Thus, the applicability of *Ungab v. Cusi* is evident to the cases at bar. In this seminal case,

[16] G.R. No. 128315, June 29, 1999.
[17] G.R. Nos. 120935 & 124557, May 21, 2009.

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. SSA.OS, 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." (Emphasis supplied)

In the case at bar, accused is charged before this Court for violations of Sections 254[18] and 255[19] of the NIRC, as amended, for taxable years 2008 and 2009.

Under Section 254 of the NIRC of 1997, as amended, in order to sustain a conviction for attempt to evade or defeat tax the following elements must be established:

1. An **attempt in any manner to evade or defeat any tax** imposed under the NIRC or the payment thereof; and

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[18] SEC. 254. 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 punished by a fine of not less than Thirty thousand (P30,000) but not more than One hundred thousand pesos (P100,000) and suffer imprisonment of not less than two (2) years but not more than four (4) years: Provided, That the conviction or acquittal obtained under this Section shall not be a bar to the filing of a civil suit for the collection of taxes. (Emphasis supplied)

[19] 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 information, who willfully fails to pay such tax, make such return**, keep such record, or supply such 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 Ten thousand pesos (P10,000) and suffer imprisonment of not less than one (1) year but not more than ten (10) years. x x x" (Emphasis supplied)

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2. Such **attempt to evade or defeat tax or the payment thereof is willful.**

Accordingly, the Supreme Court, in the case of *Commissioner of Internal Revenue vs. The Estate of Benigno P. Toda, Jr.*,[20] held that tax evasion connotes the integration of three factors:

1. The end to be achieved, i.e., the payment of less than that known by the taxpayer to be legally due, or the non-payment of tax when it is shown that a tax is due;

2. An accompanying state of mind which is described as being "evil " in "bad faith " "willful " or "deliberate and not accidental"; and

3. A course of action or failure of action which is unlawful.

On these bases, the Court shall proceed to determine whether the prosecution was able to discharge the burden of establishing by proof beyond reasonable doubt each and every element of the crimes charged. After all, the prosecution has the burden of proving beyond reasonable doubt each element of the crime as its case will rise or fall on the strength of its own evidence, never on the weakness or even absence of that of the defense.[21] Failing to prove the required quantum of evidence, the presumption of innocence must prevail and accused should be acquitted.[22]

As to the first element, as alleged, that there was non-declaration and non-payment of income tax legally due from the accused, accused having failed to file an ITR for taxable years 2008 and 2009. ***<u>The failure of action, which is unlawful, is the willful non-filing of the ITR for taxable year 2008 and 2009, considering that it is a crime under Section 255 of the NIRC of 1997, as amended</u>***. (Emphasis supplied)

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[20] G.R. No. 147188, September 14, 2004.
[21] Alferez vs. People of the Philippines, et. al., G.R. No. 182301, January 31, 2011.
[22] The People of the Philippines vs. Santos, G.R. No. 175593, October 17, 2007.

Anent the second element, the prosecution also failed to prove that there was *"willfulness"* or deliberate intent on the part of accused to evade or defeat the payment of income taxes. The prosecution failed to prove by direct or circumstantial evidence that accused, by some overt or affirmative act, indeed had an accompanying state of mind which is described as being evil, in bad faith, willful or deliberate and not merely accidental. Even so, failing to file a return, standing alone, is not an attempt to evade or defeat tax.

If accused deliberately intended to evade the payment of income tax, he could have withheld presenting the Creditable Tax Withheld at Source or BIR Form No. 2307 issued by MWSS (Exhibit "A-4") and BIR Form No. 2316 issued by the Office of the President ("A-5") to support his allegations.

On this note, the Court rules that the prosecution was not able to prove the guilt of the accused beyond reasonable doubt for the crime of attempt to evade or defeat the payment of income tax under Section 254 of the NIRC of 1997, as amended.

Likewise, in order to sustain a conviction for failure to make or file a return under Section 255 of the NIRC of 1997, as amended, the following elements must be established:

1. The accused was **required under the NIRC of 1997 to pay any tax**, make a return keep any 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;

2. The **accused failed to pay the required tax**, make a return or keep the required record, or supply the correct and accurate information; and

3. The **accused willfully failed to pay such tax**, make such return, keep such record, or supply such correct and accurate information, or withhold or remit taxes withheld, or refund excess taxes

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withheld on compensation, at the time or times required by law or rules and regulations.

A careful scrutiny of the afore-mentioned elements would reveal that the second and third elements are dependent on the first element. Therefore, when the first element is established, it is only then that the remaining elements must be determined to exist.

The showing of the failure to pay the pertinent tax and the willfulness of such failure is dependent on whether the accused is required to pay the said tax in the first place. In sum, there can be no willful failure to pay a tax if there is no requirement to pay the same at all.

As to the first element, it is necessary to determine who are those required to file an income tax return. Sections 51(A) of the NIRC of 1997, as amended, mandates:

"SEC. 51. Individual Return. -

(A) Requirements.-

(1) Except as provided in paragraph (2) of this Subsection, the following individuals are required to file an income tax return:

(a) Every Filipino citizen residing in the Philippines;

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Based on the foregoing, accused is clearly required to file an ITR, which brings us to determine the second element of the offense charged. In this regard, the crux of the issue is whether or not accused is an employee of MWSS who is covered by the system of substituted filing.

The prosecution contends that herein accused is not a regular employee of MWSS based on the fact that he does not receive any basic salary from MWSS. The contention is bereft of merit and lacks legal basis.

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Accused presented BIR Form 2316 issued by the Office of the President (OP) for taxable year 2008, and Creditable Tax Withheld at Source or BIR Form No. 2307 issued by MWSS, in order to support his allegation that he is indeed a government employee, and that he has paid his taxes.

To quote the prosecution's distinction on these Certificates:

> "**15.1 BIR Form No. 2307** is a Certificate to be accomplished and ***issued to recipients of income*** subject to expanded withholding tax paid by a Payor/Withholding Agent including government money payments made by a government office ***showing a monthly breakdown of the total income payments made and total taxes withheld and remitted during the quarter/period***.
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> xxx xxx xxx
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> **15.2 BIR Form No. 2316** is a Certificate to be accomplished and ***issued to each employee receiving salaries, wages, and other forms or remuneration*** by each employer ***indicating therein the total amount paid and the taxes withheld*** therefrom during the calendar year."

In view of the foregoing, accused believed that since he received these Certificates, he was considered an employee of the OP for the year 2008, more so when he was later appointed as a Member of the Board of MWSS for taxable year 2009, even if his employment was co-terminous with the President.

This was further bolstered by the testimony of Ms. Jocelyn Toledo, when clarificatory questions were asked by this Court, the pertinent portions of which read as follows:

"PRESIDING JUSTICE DEL ROSARIO:

> Just guide the Court, what particular provision of law or of any existing policy of government that you are relying upon in saying that to be

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an employee, you must first receive a fixed salary so that I would understand also where you are coming from? On what basis are you making that conclusion?

MS. TOLEDO:

Your Honors, I'm sorry but, I do not have basis for that conclusion. That is my (interrupted)

PRESIDING JUSTICE DEL ROSARIO:

Your own impression?

MS. TOLEDO:

Yes, your Honors, my impression that for somebody to be considered an employee, there should be an appointment and she should be hired for a position with salary, stated salary of how much she will receive.

PRESIDING JUSTICE DEL ROSARIO:

So actually, a member of the Board is technically hired by the President, is it not? There is hiring, a member of the Board cannot perform any function had he not been appointed no less than by the appointing authority who happens to be the President?

MS. TOLEDO:

Yes, your honors.

PRESIDING JUSTICE DEL ROSARIO:

And if the law of MWSS says that that particular appointee would receive compensation in such amounts as maybe determined by the Board, that to you does not constitute a justification to consider the appointee as an employee? Because there is basis for compensation. The basis for the compensation is provided by the

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law, you can make determination of your compensation. So, if you would notice, there is appointment, and there is basis for compensation. If there is no basis, the Commission on Audit is not going to allow any payment, is it not?

MS. TOLEDO

Yes, your Honors.

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PRESIDING JUSTICE DEL ROSARIO:

So, can you say that members of the Board are public officials?

MS. TOLEDO:

Yes, your Honors.

PRESIDING JUSTICE DEL ROSARIO:

Now, are you saying that a public official now appointed by the President is not actually an employee of the government? Or you now entertain some doubts on that?

MS. TOLEDO:

Yes, your Honors. (interrupted)

PRESIDING JUSTICE DEL ROSARIO:

Because he is a public official appointed by the President and the Ombudsman can only investigate public officials, is he not considered technically an employee of the government?

MS. TOLEDO:

Yes, I have doubts, your Honors.

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PRESIDING JUSTICE DEL ROSARIO:

How about the appointment of the Board of Trustees? Do you furnish a copy of the appointment papers to the Civil Service Commission?

MS. TOLEDO:

We do furnish, your Honors.

PRESIDING JUSTICE DEL ROSARIO:

And the Civil Service Commission of course is only concern about government employees, is it not?

MS. TOLEDO:

Yes, your Honors.

PRESIDING JUSTICE DEL ROSARIO:

So, kindly clarify, with respect to other low ranking officials of the MWSS, is it not a practice that it is the MWSS that withholds taxes?

MS. TOLEDO:

Yes, your Honors.

PRESIDING JUSTICE DEL ROSARIO:

It is the MWSS also that guides the concerned employee of the withholding tax certificates?

MS. TOLEDO:

Yes, we do provide them, your Honors.

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PRESIDING JUSTICE DEL ROSARIO:

And do you inform them that they do not have to file ITRs in so far as the lower employees are concerned?

MS. TOLEDO

I'm not sure about that, your Honors, but I think, because the Personnel are the one who withheld taxes on allowances being received. I'm not sure whether they were informed that they should file.

PRESIDING JUSTICE DEL ROSARIO:

Yes, But how about the members of the Board? Is there any communication, let's say informing any member of the Board of the withholding tax certificates that you have executed on their behalf?

MS. TOLEDO:

At present, your Honors, we are asking our Board to submit an Affidavit that they are receiving less than Php720,000.00 a year for us to withhold taxes, whether it's 10% or 15%.

PRESIDING JUSTICE DEL ROSARIO:

Why the cut-off of Php720,000.00?

MS. TOLEDO:

Because if they exceed Php720,000.00, they should be taxed at 15%, your Honors.

PRESIDING JUSTICE DEL ROSARIO:

So, it is in connection with the computation of the withholding tax?

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MS. TOLEDO:

Yes, your Honors.

PRESIDING JUSTICE DEL ROSARIO:

Now, is there any official notice given to any of the members of the Board that they are not considered as employees and that they should file separately their Income Tax Returns?

MS. TOLEDO:

Now we are doing that because (interrupted)

PRESIDING JUSTICE DEL ROSARIO:

It is only now that you are doing that?

MS. TOLEDO:

Yes, your Honors.

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JUSTICE GRULLA:

Madame Witness, just follow-up questions on what has been asked to you by our Presiding Justice. You were asked if Mr. Mahusay is an employee of MWSS and you kept on answering that he is not an employee because he does not receive salary, a regular salary from MWSS. Did I get it right?

MS. TOLEDO:

Yes, your Honors.

JUSTICE GRULLA:

All right. But you will agree with me that when we try to define what an employee is, you can define an employee who is employed with or

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> employed by, like Mr. Mahusay, is working with MWSS, although he does not receive salary. So do I understand it correctly that when you answered that he is not an employee, you meant that he is, although that he is an employee, he does not receive a regular salary because he is a member of the Board of Trustees?
>
> MS. TOLEDO:
>
> And because he does not report to the office five (5) times a week, he only comes (interrupted)
>
> JUSTICE GRULLA:
>
> Yes, he is not that regular employee, but he is still employed with MWSS so based on that definition, can you now say that Mr. Mahusay is an employee of the MWSS? Can we categorize him as an employee? So where would he be? Why would he be working with MWSS if he is not employed, precisely he was appointed by the President.
>
> MS. TOLEDO:
>
> Yes, Mr. Mahusay is an employee of MWSS, your Honors."

The circumstances lead to the assertion that by withholding either 10 or 15% from the allowances, per diems, or bonuses received by herein accused, he is deemed an employee of MWSS.

Anent the third element, it requires that failure to make or file the return was willful. The term "willful" in tax crime statutes means a voluntary, intentional violation of a known

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legal duty and bad faith or bad purpose need not be shown[23].

> In *People v. Judy Anne Santos y Lumagui*[24], the accused was charged with violation of Section 255 by allegedly under-declaring her income. On the issue of willfulness, the CTA ruled as follows:
>
>> Citing *Black's Law Dictionary,* the term "willful" is defined as voluntary and intentional. And in *Merten's Law of Federal Income Taxation,* "willful" in tax crimes statutes is defined as voluntary, intentional violation of a known legal duty.
>>
>> Applying the foregoing in the case at bench, the element of willful failure to supply correct and accurate information must be fully established as a positive act or state of mind; it cannot be presumed nor attributed to mere inadvertent or negligent acts. *(Citations omitted, underscoring supplied)*

The crime of failure to pay tax under Section 255 is defined by the element of "willfulness" of not paying the tax, which in turn, requires the showing of "knowledge" and "voluntariness". Simply stated, the offender is aware or knows the existence of and obligation to pay a tax liability but voluntarily and intentionally failed to pay it.

Applying the same to the instant case, the willful failure to file an ITR was not fully established by the prosecution as a positive act or state of mind of the accused.

Even for the sake of argument that accused is indeed required to file a separate ITR, the above circumstances merely show that the accused's negligence is caused by merely relying on the assertion that the withholding taxes, as per BIR Form No. 2307, serve as his taxes to the

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[23] Ongsiako, Jr., et.al.,. vs. People of the Philippines, CTA EB Crim. Case No. 031, May 26, 2015, citing Mertens (Law of Federal Income Taxation) Chapter 47.05, p. 28, Vol. 13 cited in People of the Philippines vs. Estelita Delos Angeles, CTA Crim. Case No. 0-027, November 25, 2009.
[24] CTA Crim. Case No. O-012, January 16, 2013.

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government. Thus, the element of "willfulness" is lacking to find the accused guilty of the offense charged.

Further, it is axiomatic that in criminal cases, the prosecution proves that there is unpaid income tax.

A review of the pieces of evidence presented brings us back to the Commission on Audit Reports on Salaries, Allowances and Other Personnel Benefits (COA ROSA).

This Court cannot discount the importance of the subject Commission on Audit Reports on Salaries, Allowances and Other Personnel Benefits[25] since the figures appearing therein are the very basis of the alleged tax liabilities of the accused. Regrettably, these were denied admission by the Court for failing to present its originals or at least its certified true copies. Consequently, the Court is left with no option but to consider them as ***UNVERIFIED and UNAUTHENTICATED*** documents, and therefore, may not be given probative value.

The Annex "A" of the PAN dated October 13, 2011 showing the Details of Discrepancies[26] categorically state that the alleged income earned by respondent was derived from the COA ROSA, to wit:

> "Data obtained by the assigned examiners from the Commission on Audit (COA) disclosed that Mr. Mahusay, as member of the Board of Trustees, had received income payments from the Regulatory and Corporate Offices of MWSS for taxable years 2008 and 2009 xxx"

The figures contained therein, as well as in the Formal Letter of Demand were merely copied verbatim from the amounts stated in the unverified COA ROSA, and are based solely thereon.

If there is no other basis for the tax assessment apart from the mere photocopies of the COA ROSA, the subject PAN and Formal Letter of Demand should be treated as a

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[25] Docket, Exhibits "P-4" and "P-6".
[26] Docket, Exhibit "P-14", pp. 803-804.

"naked assessment" or one that is without any rational basis.

In the case of *Commissioner of Internal Revenue vs. Hantex Trading Co., Inc.,* [27]the Supreme Court ruled that an assessment based on mere photocopies of records/documents is one that is utterly without foundation, meaning it is arbitrary and capricious, to wit:

> " xxx the best evidence obtainable under Section 16 of the 1977 NIRC, as amended, does not include mere photocopies of records/documents. The petitioner, in making a preliminary and final tax deficiency assessment against a taxpayer, cannot anchor the said assessment on mere machine copies of records/documents. Mere photocopies of the Consumption Entries have no probative weight if offered as proof of the contents thereof. The reason for this is **that such copies are mere scraps of paper and are of no probative value as basis for any deficiency income or business taxes against a taxpayer.** Indeed, in *United States v. Davey,* the U.S. Court of Appeals (2nd Circuit) ruled that where the accuracy of a taxpayer's return is being checked, the government is entitled to use the original records rather than be forced to accept purported copies which present the risk of error or tampering.
>
> xxx xxx xxx
>
> We agree with the contention of the petitioner that, as a general rule, tax assessments by tax examiners are presumed correct and made in good faith. All presumptions are in favor of the correctness of a tax assessment. It is to be presumed, however, that such assessment was based on sufficient evidence. Upon the introduction of the assessment in evidence, a *prima 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*

[27] G.R. No. 136975, March 31,2005.

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.

However, the *prima facie* correctness of a tax assessment does not apply upon proof that an assessment is utterly without foundation, meaning it is arbitrary and capricious. **Where the BIR has come out with a 'naked assessment,' *i.e.,* without any foundation character, the determination of the tax due is without rational basis.** In such a situation, the U.S. Court of Appeals ruled that the determination of the Commissioner contained in a deficiency notice disappears. ***Hence, the determination by the CTA must rest on all the evidence introduced and its ultimate determination must find support in credible evidence."*** *(Emphases and underscoring supplied)*

Under the premises, the COA ROSA, being a mere unverified photocopy of the original document, has no probative value, and any assessment based thereon is considered a "naked assessment" or one that is without any foundation, or rational basis, and thus, cannot be upheld or sustained by this Court.

On the issue regarding due process, accused alleged that he had no knowledge of the assessment, the same being made known to him only when he was criminally charged, thus violating due process.

As previously discussed, the requirement to pay any tax under the NIRC of 1997 may arise from either of two (2) specific instances: first, upon being required by the same law to pay a particular tax, simultaneous with the filing of the pertinent tax return; or second, upon being informed of a tax assessment issued by the BIR, requiring the taxpayer to pay the assessed tax within a specific period as set forth in the said tax assessment.

The said first instance involves a self-assessment approach wherein the taxpayer is responsible for determining his or her tax liability, filing the appropriate tax return, paying the tax due, if any, and complying with other reporting requirements. In *Commissioner of Internal Revenue vs. Fitness By Design, Inc.*, the Supreme Court describes the said approach as follows:

> "The assessment process starts with the filing of tax return and payment of tax by the taxpayer. The initial assessment evidenced by the tax return is a self-assessment of the taxpayer. The tax is primarily computed and voluntarily paid by the taxpayer without need of any demand from government. If tax obligations are properly paid, the Bureau of Internal Revenue may dispense with its own assessment."

Upon the other hand, the above-stated second instance involves the issuance by the Commissioner of Internal Revenue, or his or her duly authorized representative, of a tax assessment, when the tax obligation is not properly paid. In this connection, it must be pointed out that Section 6(A) of the NIRC of 1997 provides as follows:

> "SEC. 6. Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement. -
>
> (A) Examination of Returns and Determination of Tax Due. – xxx The tax or any deficiency tax so assessed shall be paid upon notice and demand from the Commissioner or from his duly authorized representative." (Emphasis and underscoring supplied.) Accordingly, from the moment that the Commissioner or his or her duly authorized representative serves a notice on

> the concerned taxpayer and demands the payment of tax, or any deficiency tax, the legal obligation to pay the assessed tax arises. Such notice, however, must be in writing, informing the taxpayer of the law and the facts on which the assessment is made; otherwise, such assessment shall be void. As a corollary, the reason for requiring that taxpayers be informed in writing of the facts and law on which the assessment is made is the constitutional guarantee that no person shall be deprived of his property without due process of law.

In this case, the first element of the crime being charged against the accused supposedly arose from the above-stated second instance on being required to pay tax, i.e., upon being informed of tax assessments issued by the BIR. Due process requires that the receipt of the Assessment Notices be proven by the prosecution. Notably, accused denied having received the Preliminary Assessment Notice (PAN), Final Assessment Notice (FAN) and the Formal Letter of Demand (FLD).

In civil cases, service made through registered mail is proved by the registry receipt issued by the mailing office and an affidavit of the person mailing of facts showing compliance with Section 7 of Rule 13 (in relation to Section 13 of Rule 13 of the 1997 Rules of Civil Procedure).[28] Then there is more reason to require the prosecution, the instant case being a criminal case, to show the registry receipt issued by the mailing office and the affidavit of the person who mailed the matter.

After a thorough scrutiny of the evidence for the prosecution, We find that the prosecution failed to show that the notices were indeed received by the accused. There was no proof that the notices were actually received by him. While names of the person who received the notices are evident, this Court would like to remind the prosecution that for notice by mail, it must appear that the same was ***served on the addressee or a duly authorized agent of the***

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[28] Ting and Chan-Azcyar vs. Court of Appeals, et aL, G.R. No. 140665, November 13, 2000.

addressee. In fact, the registry return receipt itself provides that "[a] registered article must not be delivered to anyone but the addressee, or upon the addressee's written order, in which case the authorized agent must write the addressee's name on the proper space and then affix legibly his own signature below it."[29]

The rule is that receipts for registered letters and return receipts do not prove themselves; they must be properly authenticated in order to serve as proof of receipt of the letter. At most, registry receipts show that it was possible for a certain person to have received the notices. Possibilities, however, cannot replace proof beyond reasonable doubt.

The prosecution, however, was not able to successfully establish that the accused was served with the PAN, FAN and FLD.

In criminal cases, the burden is on the prosecution to prove, beyond reasonable doubt, the essential elements of the offense with which the accused is charged; and if the proof fails to establish any of the essential elements necessary to constitute a crime, the accused is entitled to an acquittal. Proof beyond reasonable doubt does not mean such a degree of proof as, excluding the possibility of error, produces absolute certainty.

Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind. At best, the evidence proffered by the prosecution only goes so far as to create a suspicion that accused probably perpetrated the crime charged. But suspicion alone is insufficient, the required quantum of evidence being proof beyond reasonable doubt. When the People's evidence fail to indubitably prove the accused's authorship of the crime of which they stand accused; then, it is the Court's duty, and the right of the accused, to proclaim their innocence. Acquittal, therefore, is in order.[30]

As to the civil aspect of these consolidated cases, the same is deemed simultaneously instituted and jointly

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[29] Marlin Del Rosario vs. Judge Eranio G. Cedillo, A.M. No. MTJ-04-1557, October 21, 2004.
[30] Darvin vs. Court of Appeals, et. al., G.R. No. 125044, July 13, 1998.

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determined with the instant criminal cases pursuant to Section 7(b)(1) of Republic Act (RA) No. 1125, as amended by RA No. 9282, which provides that "the filing of a criminal action being deemed to necessarily carry with it the filing of the civil action, and no right to reserve the filing of such civil action separately from the criminal action will be recognized."

WHEREFORE, premises considered, in **CTA Criminal Case Nos. O-424 and O-426**, accused **Ferdinand P. Mahusay** is hereby **ACQUITTED** for failure of the prosecution to prove his guilt beyond reasonable doubt. Accordingly, for insufficiency of evidence, no civil liability is herein imposed.

SO ORDERED.

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

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

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ROMAN G. DEL ROSARIO
Presiding Justice
Chairperson, 1st Division