REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PEOPLE OF THE PHILIPPINES Petitioner,	CTA EB CRIM No. 059 (CTA Crim. Case NO. O-637)
	Present:
-versus-	DEL ROSARIO, *P.J.*, CASTAÑEDA, JR. UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA, and MODESTO-SAN PEDRO, *JJ.*
PROSPERO A. PICHAY, JR., Respondent.	Promulgated: DEC 06 2019 3:28 p.m.

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DECISION

FABON-VICTORINO, J.:

In this Petition for Review, petitioner People of the Philippines categorically states that it is only seeking reconsideration of the civil aspect of the twin Resolutions dated May 3, 2018 and August 17, 2018 issued by the Court in Division in CTA Crim Case No. O-637 entitled *"People of the Philippines versus Prospero A. Pichay, Jr."*.

The dispositive portions of the assailed Resolutions read as follows:

Assailed Resolution of May 3, 2018:

> **WHEREFORE**, premises considered, accused's Demurrer to Evidence is **GRANTED**. Accordingly, the instant case is **DISMISSED**. Further, the Formal Letter of Demand and Assessment Notice Number EAS-IT-2009-1046 for taxable year 2009 are **CANCELLED**.
>
> **SO ORDERED**.

Assailed Resolution of August 17, 2018:

> **WHEREFORE**, premises considered, plaintiff's **Motion for Reconsideration (of the Decision dated May 3, 2018)** is **DENIED** for lack of merit.
>
> **SO ORDERED.**

The Facts and the Proceedings

Respondent Prospero A. Pichay, Jr. was charged before the Court in Division for alleged willful failure to file his Income Tax Return (ITR) for taxable year (TY) 2009 and non-payment of the corresponding tax thereon in the amount of ₱18,667,975.34, exclusive of charges and penalties, in violation of Sections 255, in relation to Sections 24(A)(1)(a), 51(A)(1)(a) and 74(A) of the National Internal Revenue Code (NIRC) of 1997, as amended.

Respondent was arraigned on September 20, 2017 during which he pleaded not guilty of the crime charged.[1]

Trial ensued during which petitioner presented three (3) witnesses, namely, Grace G. Marohomsalic, Rosalita B. Devera, and Agahkan M. Guro. Thereafter, petitioner rested its case.[2]

On December 4, 2017, respondent filed his Motion with Leave of Court to File and Admit attached Demurrer to

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[1] Minutes of the Hearing on September 20, 2017, CTA Crim Case No. O-637 docket, pp. 106-115.
[2] *Ibid.*, pp. 235-238.

Evidence[3] to which petitioner filed its Comment/Opposition on December 14, 2017.[4]

In the Resolution[5] dated March 21, 2018, the Court in Division admitted all the evidence formally offered by petitioner and at the same time granted respondent's Motion with Leave of Court to File and Admit attached Demurrer to Evidence.

On March 28, 2018, petitioner filed its Comment/Opposition (To the Demurrer to Evidence of the Accused).[6]

On May 3, 2018,[7] the Court in Division granted respondent's Demurrer to Evidence by dismissing the criminal case and nullifying the Formal Letter of Demand and Assessment Notice Number EAS-IT-2009-1046 for TY 2009 issued against him by petitioner.

On May 24, 2018, petitioner moved for the reconsideration[8] of the assailed Resolution of May 3, 2018 to which respondent interposed objection on July 6, 2018.[9]

In the similarly assailed Resolution of August 17, 2018,[10] the Court in Division denied petitioner's Motion for Reconsideration for lack of merit.

Hence, the instant Petition for Review filed with the Court *En Banc* on September 18, 2018.[11] Petitioner prays that the twin Resolutions of May 3, 2018 and August 17, 2018 rendered by the Court in Division be reversed and a new one be issued directing respondent to pay: 1) deficiency Income Tax in the amount of ₱18,667,975.34 for TY 2009; and 2) penalties, surcharges, deficiency interest and

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[3] CTA Crim Case No. O-637 Docket, pp. 245-268.
[4] *Ibid.*, pp. 281-285.
[5] *Ibid.*, pp. 288-290.
[6] *Ibid.*, pp. 291-297.
[7] *Ibid.*, pp. 310-331.
[8] *Ibid.*, pp. 334-349.
[9] *Ibid.*, pp. 356-363.
[10] *Ibid.*, pp. 382-386.
[11] CTA EB Crim No. O-059 Docket, pp. 1-30.

delinquency interest until fully paid pursuant to Sections 248 and 249 of the NIRC of 1997, as amended.

On November 22, 2018,[12] the Court *En Banc* gave the Petition for Review due course after respondent filed his Comment thereto on October 24, 2018.[13]

THE ISSUES

Petitioner assigns the following errors allegedly committed by the Court in Division, to wit:

I.

The Honorable CTA First Division erred when it ruled that Petitioner-Plaintiff's evidence is insufficient to prove that Respondent-Accused is required to make or file an ITR.

a. The Honorable CTA First Division erred when it ruled that Petitioner-Plaintiff failed to present any document proving that income was paid to the Respondent-Accused and that the BIR's computation was based on mere presumptions and not on actual facts;

b. The Honorable CTA First Division erred when it ruled that Respondent-Accused, as per the BIR registration System Individual Details, is registered as a "Local Employee" as his taxpayer-type, hence he is not required to file an ITR.

II.

The Honorable CTA First Division erred when it dismissed the present civil action on the ground that the Letter of Authority, the Formal Letter of Demand, Details of Discrepancies and Assessment

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[12] CTA EB Crim No. 059, pp. 75-76.
[13] *Ibid.*, pp. 66-73.

Notices were not served to the taxpayer or his authorized representative.

Petitioner's arguments

Petitioner contends that contrary to the finding of the Court in Division, it was able to prove that income was paid to respondent through its presentation of the latter's SALNs for TY 2008 and 2009. The said SALNs sourced from the Local Water Utilities Administration (LWUA) where respondent served as Chairman until December 31, 2009, show a significant increase in respondent's net-worth from 2008 to 2009, which petitioner considers as direct evidence of respondent's unreported taxable income for TY 2009.

According to petitioner, the substantial increase in respondent's net worth in the amount of ₱59,502,797.94 was manifestly disproportionate to his annual salary of ₱584,911.64 as Chairman of LWUA rendering such increase in assets as undisclosed taxable income which respondent was legally obliged to declare in his ITR but failed. Apart from the foregoing, petitioner also factored in respondent's other assets, investments and business interests he indicated in the same SALNs as other sources of respondent's unreported receipts.

Citing American jurisprudence,[14] petitioner claims that unreported income may be established by several methods of proof and the government is free to use all legal methods available to determine whether a taxpayer has correctly reported his income. Using another American case,[15] petitioner argues that the Net-Worth Method of proof is frequently used when it is difficult or impossible to establish the taxpayer's taxable income by direct evidence as in the present case.

The use of the Net-Worth Method in the investigation of tax evasion cases is also allowed under Sections 6(B) and 43

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[14] *Holland v. United States*, 348 U.S. 121,132 (1954); *United States v. Baum*, 435 F.2d 1197, 1201 (7th Cir), cert. denied, 402 U.S. 907 (1971); *United States v. Doyle*, 234 F.2d 788, 793 (7th Cir.), cert. denied, 352 U.S. 893 (1956) as cited in the Criminal Tax Manual of the Tax Division of the U.S. Department of Justice.

[15] *United States v. Dwoskin*, 644 F.2d 418, 423 *5th Cir. 1981) as cited in the Criminal Tax Manual of the Tax Division of the U.S. Department of Justice.

of the NIRC of 1997, as amended, says petitioner. Section V(A)(a) of Revenue Memorandum Circular (RMC) No. 10-75 also provides that the use of the Net-Worth Method does not require identification of the sources of the alleged unreported income. Thus, its non-presentation of documents or direct proof showing that income was actually received by respondent is of no moment. Besides, income tax is imposed on any gain or profit, regardless of its source.

Petitioner also points out that since respondent's SALNs were executed under oath, his declarations therein were admission against his own interest, thus, entitled to full-weight and credence. Although respondent did not identify the subject SALNs in open court, his declarations thereon pertaining to his net worth, could be relied upon by the BIR for purposes of assessment.

The SALNs executed under oath by respondent may also be considered as public documents entered into public records by a public officer in the performance of official duty. Hence, they are *prima facie* evidence of the facts therein stated pursuant to Section 23, Rule 132 of the Rules of Court.

Petitioner also claims in its favor respondent's alleged failure to challenge the authenticity and contents of his 2008 and 2009 SALNs as well as to deny ownership of most of the properties listed in his 2009 SALN. Respondent merely alleged that a parcel of land valued at ₱6,000,000.00 should not have been included in his SALNs and the typographical errors in the valuation of the other properties, which defense respondent allegedly failed to substantiate.

The same SALNs also suggest that respondent, at the time of the incident, was a mixed-income earner, thus, disqualified from substituted filing and required to file his own ITR and pay the corresponding Income Tax thereon.

However, per the Certification from Bureau of Internal Revenue (BIR) Revenue District Office (RDO) No. 45, respondent did not file his ITR for TY 2009 for the unearthed substantial income he received as shown in the subject SALNs.

For its second argument, petitioner reiterates that there was proper service of the Letter of Authority (LOA), Preliminary Assessment Notice (PAN), Formal Letter of Demand (FLD), Details of Discrepancies and Assessment Notice to respondent as testified to by its witness, Grace G. Marohomsalic. In her testimony in open court, witness Marohomsalic allegedly declared that the LOA dated July 20, 2011 was received by a certain Jeaneth G. Sangalang on July 21, 2011, at 8:45 a.m., while the PAN with the attached Details of Discrepancies was served and received by Attorney Denya Garcia J. Uy-Anastacio on January 29, 2014. The FLD with the Details of Discrepancies and Assessment Notices were served to respondent's counsel Miranda, Anastacio and Loterte (MAL) Law Offices, and were received by a certain Mariaelen T. Oczmo, on May 30, 2014, at 3:15 p.m.

Per Revenue Regulations (RR) No. 18-2013, the PAN, FLD, FAN and FDDA may be served by the CIR or his duly authorized representative to the tax agent/practitioner, appointed by the taxpayer under circumstances prescribed in the pertinent regulations on accreditation of tax agents. In the present case, the service of assessment notices to respondent's counsel, MAL Law office, was service to respondent. And since MAL Law Office was respondent's counsel during the preliminary investigation in the Department of Justice (DOJ), it is logical to presume that the same counsel would represent him in court for the tax evasion case.

Finally, even without an assessment, the BIR could still collect unpaid taxes from the erring taxpayer considering that under Sections 205 and 222 of the NIRC of 1997, as amended, the filing of a criminal case for false or fraudulent return with intent to evade tax or failure to file a return is a mode for collecting taxes. Further, a criminal case endorsed by the CIR and filed with the DOJ is considered the CIR's final determination of the tax liability of the accused-taxpayer. Also, under Section 7(b)(1) of Republic Act (RA) No. 1125, as amended by RA No. 9282, the filing of the criminal action is deemed to include the civil aspect of the case.

Respondent's counter-arguments

Respondent rejects petitioner's contention that the alleged LOA was properly served and actually received by him. Petitioner's own witness Grace G. Marohomsalic admitted that she was not the one who served the subject LOA and she had no personal knowledge of the circumstances surrounding such service. Moreover, Jake Castillo, the person who allegedly served the LOA, was not presented in Court.

Respondent also points out that the alleged LOA could never be part of petitioner's evidence as it was an attachment to his Counter-Affidavit which was not presented in Court. And even assuming *arguendo* that the said LOA was offered in evidence by petitioner, being infirm for lack of proper service, the same was invalid. Therefore, all the subsequent assessment notices were also null and void.

Respondent does not deny that Atty. Denya Gracia J. Uy-Anastacio, represented him during the preliminary investigation before the DOJ. However, there was no evidence presented to establish that the same lawyer continued to represent him thereafter.

In addition, the modes of service provided under the cited RR No. 18-2013 applies only to service of PAN, FLD, FAN and FDDA but not to LOA. Significantly, there was yet no RR No. 18-2013 when his case was initiated on July 21, 2011. And even assuming that RR No. 18-2013 was already applicable at that time, still petitioner's assumption that Atty. Denya Gracia J. Uy-Anastacio was his tax agent/practitioner would not hold water in the absence of any proof that she was his duly appointed representative even after the DOJ's proceedings.

Finally, the filing of a criminal case for tax evasion cannot substitute the issuance and proper service of an assessment to collect tax.

THE RULING OF THE COURT *EN BANC*

Although petitioner claims that it is not questioning respondent's exculpation from criminal liability for failure to establish all the essential elements of willful failure to file ITR for TY 2009, it still insists that it was able to prove that respondent received huge income which he failed to declare in his ITR for TY 2009 and to pay the corresponding income tax therefor in violation of Section 255 of the NIRC, as amended.

But petitioner itself admitted that it did not present any direct evidence showing that respondent actually received enormous income that needed to be declared in his ITR for TY 2009. Per its own declaration, petitioner heavily relied on mere deduction from what it alleged to be a dramatic increase in respondent's assets from TY 2008 to 2009 as shown in the latter's SALNs for the pertinent years secured from the LWUA, where respondent served as Chairman until December 31, 2009. Verily, petitioner merely assumes that the increase in the net worth of respondent from 2008 to 2009 in the amount of Php58,496,797.94 indicated receipt of unreported income. In fine, petitioner merely assumed that income was paid to respondent which resulted in a significant increase in his assets. However, presumptions cannot by all measures or standards approximate direct evidence. Obviously, petitioner failed to consider that this is a criminal case, in which proof beyond reasonable doubt is required to sustain the indictment.

Petitioner even intimated that without the Net-Worth Method, it would be very difficult and even impossible for it to prove that respondent received undeclared income, especially considering that they were not able to secure respondent's ITR for TYs 2008 and 2009. Significantly, even the unverified SALNs marked as Exhibits P-4 and P-5 did not show any detail of the alleged income that was not reported by respondent to the BIR. Not even the likely source or nature of such unreported income could be extracted from the said documents. While petitioner was able to secure copies of respondent's SALNs, there was nothing therein that clearly showed his income, other emolument or allowances received from LWUA as Chairperson or from

LWUA Consult, Inc. as director and Express Savings Bank. Neither was there any indication of benefits received, monetary or otherwise, from his alleged business interests and investments.

In fine, it could not be determined with certainty, if respondent, at that time of alleged infraction, was a mixed-income earner, as suggested by petitioner, or purely a compensation income earner, as defined under Section 32(A)(1) of the NIRC, as amended. What is clear however, was that respondent was the Chairperson of LWUA who received salary from the said Government agency, thus, not required to file Income Tax Return for compensation income derived therefrom. In other words, at that time of the alleged infraction, respondent was qualified for substituted filing of ITR.

It was also clear that the BIR's computation of respondent's tax liability was without factual basis as it was merely based on presumption that he earned income in TY 2009 in the amount of ₱58,446,797.94. which in the first place was not proved. For lack of a valid assessment, civil liability could not be imposed upon respondent. It has been consistently held that while tax assessments are presumed correct, the assessment itself however, should not be based on mere presumptions no matter how reasonable or logical the presumption may be. The assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption.[16]

On the issue of proper service of the LOA, PAN, FLD, Details of Discrepancies and Assessment Notice to respondent, the Court *En Banc* agrees with the finding of the Court in Division that petitioner failed to establish that the subject LOA was duly served to respondent or his authorized representative within thirty (30) days from date of issuance. Witness Grace G. Marohomsalic confirmed that she was not the one who served the LOA or any assessment notices to respondent but Jake Castillo, who, on the other hand, was not presented in Court. Except for the self-serving and

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[16] *Collector of Internal Revenue v. Benipayo,* L-13656, January 31, 1962, 4 SCRA 182.

uncorroborated testimony of Grace G. Marohomsalic, no other evidence was presented to establish that respondent or his duly authorized representative received the LOA and other assessment notices from petitioner. Therefore, the burden of proving completeness of service was with petitioner who failed to do so.

To prove personal service, Section 13 of Rule 13 of the Rules of Court provides that proof of personal service shall consist of a written admission of the party served, or the official return of the server, or the affidavit of the party serving, containing a full statement of the date, place and manner of service.

As held in the case of *Republic of the Philippines v. Resins, Inc.*[17] when service of notice is an issue, the rule is that the person alleging that the notice was served must prove the fact of service. The burden of proving notice rests upon the party asserting its existence. Considering the foregoing principle and jurisprudence, it is clear that petitioner failed to present competent proof that the said LOA was indeed served and received by respondent himself. *A fortiori*, the subject LOA was null and void and that any assessment, if there was any, pursuant to the said LOA should be deemed unauthorized and without any legal consequence.

Further, even assuming the validity of the assessment, still, accused may not be held civilly liable. As afore-discussed, the prosecution miserably failed to show by clear, convincing and competent evidence that respondent derived any undeclared taxable income, much less the specific amount thereof that was not declared in his ITR for TY 2009. In other words, evidence is wanting of the fact upon which the civil liability may arise.[18]

As oft-repeated, the deficiency income tax was computed using the net worth method wherein the BIR compared the increase in respondent's net worth on December 31, 2008 vis-à-vis his net worth on December 31,

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[17] G.R. No. 175891, January 12, 2011.
[18] Section 2, Rule 120, Rules of Court.

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2009, as stated in his 2008 and 2009 SALNs and considered the difference as unreported income.

Again, it is well-settled that assessments must be based on actual facts and not on mere assumptions or presumptions. In *Commissioner of Internal Revenue v. Island Garment Manufacturing Corporation,*[19] the Supreme Court upheld the decision of the Court when it cancelled the assessment issued by the BIR against Island Garment Manufacturing Corporation on alleged "overstated" exportations for being merely based on assumption or on mathematical computations. The Supreme Court ruled:

> The basis of respondent corporation's deficiency income and advance sales taxes for 1962 and 1963 was held by petitioner to be the overdeclaration of its re-exportation of finished embroidered goods, computed as follows: x x x
>
> This discrepancy was arrived, at by the petitioner after an inspection of the boxes in which the finished goods were packed and concluding through "mathematical computations" that it was impossible for respondent corporation to re-export back in said boxes the total number of pieces it claims to have manufactured.
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> In disposing of petitioner's contention, respondent Court held:
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>> By alleging that he employed mathematical computations in ascertaining the quantity of finished products actually manufactured and exported by petitioner, respondent concedes at least that his assessments were based on mere inferences and presumptions. Likewise, by stating that it was physically impossible for such number of cartons with such volume capacity to contain such exportation, or for petitioner to have manufactured and exported such finished garments, respondent

[19] G.R. No. L-46644, September 11, 1987.

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> admits that his assessments were not based on actual facts but merely on approximations and calculations. And [in averring] that the raw material discrepancies in yards, [were] arrived at by mere inferences and presumptions, [and] subsequently became the basis of the assessments for advance sales tax and for income tax, respondent failed to indicate his nebulous position how the advance sales tax or the undeclared income from sales of embroidery textile materials in pesos and centavos were arrived at. Moreover, since fraud is imputed to petitioner, fraudulent intent was deduced from surmises and conjectures, unsupported by clear and [convincing] proof to this effect.

An assessment fixes and determines the liability of a taxpayer. As soon as it is served, an obligation arises on the part of the taxpayer concerned to pay the amount assessed and demanded. **Hence, assessment should not be based on mere presumptions no matter how reasonable or logical said presumptions may be. The assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption.**

WHEREFORE, the Petition for Review filed by petitioner People of the Philippines on September 18, 2018 against respondent Prospero A. Pichay, Jr., is hereby **DENIED** for lack of merit. Accordingly, the assailed Resolutions promulgated on May 3, 2018 and August 17, 2018, of the Court in Division in CTA Crim. Case No. O-637, are hereby **AFFIRMED *in toto***.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

ON LEAVE
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

CERTIFICATION

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.

ROMAN G. DEL ROSARIO
Presiding Justice