REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

FIRST DIVISION

TULAY SA PAG-UNLAD INC. (TSPI),
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8480

Members:

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

Promulgated:
SEP 20 2016 ; 1:05 p.m.

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RESOLUTION

DEL ROSARIO, P.J.:

For resolution are the following:

1. Petitioner's "**Manifestation and Motion**" filed on August 18, 2016; and

2. Respondent's "**Motion For Partial Reconsideration**" filed on July 8, 2016, without petitioner's comment thereon despite due notice as per Records Verification dated August 3, 2016.

In petitioner's Manifestation and Motion, it prays that it be given a new period of ten (10) days from notice within which to file its comment on respondent's Motion for Partial Reconsideration in the interest of justice. Petitioner manifested that it received the Order dated July 11, 2016 on July 15, 2016 directing it to comment on respondent's Motion within ten (10) days from notice. Petitioner's counsel explains that his failure to file comment was due to disconnect as petitioner received the Order dated July 11, 2016 three (3) days ahead of its receipt of respondent's Motion for Partial Reconsideration and that he was pre-occupied with the preparation and filing of its petition for review albeit not disclosing the forum where the said petition would be filed.

Since petitioner received the July 11, 2016 Order of the Court on July 15, 2016, it had until July 25, 2016 to file its comment on respondent's Motion for Partial Reconsideration; and yet it was only on August 18, 2016 or thirty-four (34) days from notice did it file the subject Manifestation and Motion asking the Court for a new period within which to file its comment on respondent's Motion. In view of the foregoing, the Court finds no basis to grant petitioner's Manifestation and Motion.

As to respondent's Motion, he prays that the Court partially reconsider and set aside the assailed Amended Decision promulgated on June 20, 2016 insofar as it reduced the fifty percent (50%) surcharge imposed in its Decision dated October 29, 2015 to twenty-five percent (25%).

The dispositive portion of the assailed Amended Decision reads:

> "**WHEREFORE**, in light of the foregoing, petitioner's **"MOTION FOR RECONSIDERATION"** is **PARTIALLY GRANTED**. The fifty percent (50%) surcharge imposed in the Decision promulgated on October 29, 2015 is **REDUCED** to twenty-five percent (25%). The dispositive portion of the assailed Decision is hereby accordingly **MODIFIED** to read as follows:
>
> > '**WHEREFORE**, premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the assessments for deficiency VAT and DST for January to December 2008 are hereby **UPHELD**. Petitioner Tulay sa Pag-Unlad, Inc. is hereby **ORDERED TO PAY** respondent the amount of ₱65,604,433.75 computed, as follows:

Tax Type	Basic Tax Due	25% Surcharge	Total
Value-Added Tax	₱ 48,103,630.20	₱ 12,025,907.55	₱ 60,129,537.75
Documentary Stamp Tax	5,474,896.00	0.00	5,474,896.00
Total	**₱ 53,578,526.20**	₱ 12,025,907.55	**₱ 65,604,433.75**

> > In addition, petitioner is hereby ordered to pay delinquency interest at the rate of twenty percent (20%) per annum on the total amount due of ₱65,604,433.75 computed

from April 28, 2012, until full payment thereof pursuant to Section 249(C)(3) of the NIRC of 1997, as amended.'

SO ORDERED.'

SO ORDERED."

Respondent contends that the Court erred in concluding that he failed to submit proof to justify the imposition of fifty percent (50%) surcharge. He stresses that petitioner's witness, Executive Director Eduardo A. Mendoza, admitted in open court that petitioner did not file its Value-Added Tax (VAT) and Documentary Stamp Tax (DST) Returns for taxable year 2008 with the Bureau of Internal Revenue (BIR). Respondent also argues that the Preliminary Assessment Notice, Formal Assessment Notice and Final Decision on the Disputed Assessment which were duly identified in Court by his witness, Revenue Officer Raul M. Aquino, indicate that the fifty percent (50%) surcharge has been imposed by the Commissioner of Internal Revenue pursuant to Section 248 (B) of the Tax Code since petitioner evidently failed to file returns for 2008 with the BIR. Further, respondent elaborates that the Formal Assessment Notice for deficiency VAT and DST issued by the BIR to petitioner for taxable year 2008, with imposition of fifty percent (50%) surcharge are *prima facie* presumed to be correct and made in good faith and petitioner has the duty of proving otherwise.

Respondent also contends that *Commissioner of Internal Revenue vs. Japan Air Lines, Inc. (*JAL case*)*[1] is inapplicable and irrelevant as it involves the filing of a fraudulent tax return and not the failure to file a return.

Respondent's contentions are bereft of merit.

In the *JAL case*, the Supreme Court stressed that willful neglect to file the required tax return cannot be presumed. Otherwise stated, mere allegations that the failure to file a return was done deliberately cannot be relied upon in the absence of any evidence to support them, much less could it justify the imposition of fifty percent (50%) surcharge, *viz*:

"Nowhere in the records of the case can be found that JAL deliberately failed to file its income tax returns for the years covered by the assessment. There was not even an attempt by petitioner to prove the same or justify the

[1] G.R. No. 60714, October 4, 1991.

> **imposition of the 50% surcharge.** All that petitioner did was to cite the provision of law upon which the surcharge was based without explaining why it was applicable to respondent's case. Such cannot be countenanced for mere allegations are definitely not acceptable. The **willful neglect** to file the required tax return or the fraudulent intent to evade the payment of taxes, considering that the same is accompanied by legal consequences, **cannot be presumed** (*CIR vs. Air India, supra*). The fraud contemplated by law is actual and constructive. It must be intentional fraud, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some legal right. Negligence, whether slight or gross, is not equivalent to the fraud with intent to evade the tax contemplated by the law. It must amount to intentional wrongdoing with the sole object of evading the tax (*Aznar v. Court of Tax Appeals, G.R. No. L-20569*, August 23, 1974, 58 SCRA 519). This was not proven to be so in the case of JAL as it believed in good faith that it need not file the tax return for it had no taxable income then. **The element of fraud is lacking**. At most, only negligence may be imputed to JAL for not ascertaining the dispensability of filing the tax returns. As such, JAL may be subjected only to the 25% surcharge prescribed by the aforequoted law." (*Boldfacing supplied*)

In the assailed Amended Decision, the Court ratiocinated the non-imposition of the fifty percent (50%) surcharge as follows:

> "In *Commissioner of Internal Revenue vs. Japan Air Lines, Inc.* (JAL case),[2] the Supreme Court emphasized the importance of **proving fraud** to justify the imposition of the fifty percent (50%) surcharge **since willful neglect to file the tax return is not presumed**, *viz*:
>
> xxx xxx xxx
>
> Noteworthy is that while the imposition of the 50% surcharge was indicated on the FAN which was imposed accordingly pursuant to Section 248 (B) of the NIRC of 1997, as amended, respondent, however, **failed to submit any proof before this Court to justify the imposition of surcharge as required in the *JAL case*.** Consequently, petitioner is only liable for twenty-five percent (25%) surcharge pursuant to Section 248 (A) of the NIRC of 1997, as amended." (*Citations omitted and Boldfacing supplied*)

While the FAN against petitioner states that "*The fifty percent (50%) surcharge has been imposed pursuant to the provision of Section 248 (B) of the National Internal Revenue Code as amended by R.A. 8424 in case of willful neglect to file the return within the period prescribed Code or by rules and regulations,*" the same is not sufficient to sustain the imposition of such rate. Respondent never

[2] G.R. No. 60714, October 4, 1991.

attempted to prove that petitioner's failure to file a return was **deliberate**. Albeit petitioner's witness, Executive Director Eduardo A. Mendoza, testified that petitioner did not file its VAT and DST Returns for taxable year 2008 with the BIR, the same merely proved the fact of non-filing of the returns. Absent any showing of willful neglect or deliberate non-filing of returns, only negligence can be imputed against petitioner. As such, petitioner may only be subjected to a twenty-five percent (25%) surcharge prescribed under Section 248 (A) of the NIRC of 1997, as amended.

All told, the Court finds no reason to reconsider and reverse the assailed Amended Decision.

WHEREFORE, premises considered, petitioner's **Manifestation and Motion** filed on August 18, 2016 and respondent's **Motion For Partial Reconsideration** filed on July 8, 2016 are hereby **DENIED** for lack of merit.

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

WE CONCUR:

ERLINDA P. UY
Associate Justice

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