REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

FSM CINEMAS, INC., Petitioner,	**CTA CASE NO. 8551**
	Members:
- versus -	**CASTAÑEDA, JR.,** *Chairperson,* **CASANOVA,** *and* **COTANGCO-MANALASTAS,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: MAR 02 2016 2:50 PM

x- -x

RESOLUTION

CASANOVA, *J.*:

For resolution are:

1. petitioner's **Motion for Partial Reconsideration**, filed on October 19, 2015, without the respondent's comment as per Records Verification dated December 7, 2015; and

2. respondent's **Motion for Reconsideration**, filed through registered mail on October 15, 2015 and received by this Court on October 22, 2015, with petitioner's Opposition (To Respondent's Motion for Reconsideration dated October 14, 2015), filed on November 4, 2015.

Both petitioner and respondent seek reconsideration of the Court's Decision dated October 2, 2015, which partially granted the

Petition for Review. The dispositive portion of the assailed Decision reads:

"**WHEREFORE**, premises considered, the Petition for Review is **PARTIALLY GRANTED**. The assessments issued by respondent against petitioner for taxable year 2008 covering deficiency income tax, Value-Added Tax, Expanded Withholding Tax and deficiency Withholding Tax on Compensation are hereby **AFFIRMED** but with **MODIFICATIONS**. Accordingly, petitioner FSM Cinemas, Inc., is ordered to pay the amount of ₱6,620,713.81, inclusive of the 25% surcharge imposed under Section 248(3) of the 1997 NIRC, as amended, computed as follows:

Tax Type	Basic Tax due	25% Surcharge	Total
Deficiency Income Tax	₱ 4,622,212.41	₱ 1,155,553.10	₱ 5,777,765.51
Deficiency VAT	56,913.32	14,228.33	71,141.65
Deficiency EWT	592,630.87	148,157.72	740,788.59
Deficiency WTC	24,814.45	6,203.61	31,018.06
Total	**₱ 5,296,571.05**	**₱ 1,324,142.76**	**₱ 6,620,713.81**

In addition, petitioner is hereby **ORDERED to PAY**:

a) Deficiency interest at the rate of 20% per annum on the basic deficiency Income Tax, VAT, EWT and WTC computed from the dates indicated below until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended:

Tax Type	Basic Tax	Deficiency interest computed from
Deficiency Income Tax	₱ 4,622,212.41	15-Apr-09
Deficiency VAT	56,913.32	25-Jan-09
Deficiency EWT	592,630.87	11-Jan-09
Deficiency WTC	24,814.45	11-Jan-09

b) Delinquency interest at the rate of 20% per annum on the total amount of ₱6,620,713.81 and on the 20% deficiency interest which have accrued as aforestated in (a) computed from September 28, 2012 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED."[1]

In assailing the aforesaid Decision, petitioner anchors its arguments on the following grounds:

(a) Respondent did not impute surcharge in its assessment, this Honorable Court may not *motu proprio* impose the 25% surcharge under Section 248 of the Tax Code;

(b) Petitioner is not liable to withhold 1% on the CUSA and airconditioning charges because it neither falls under Sec. 2.57.2(E) nor Section 2.57.2(M), (Q) or (R) of Revenue Regulations 2-98, as amended;

(c) Petitioner is not liable to withhold 1% on purchases, materials, R&M (materials), office supplies, miscellaneous, snackbar supplies, xerox, mimeograph, printed forms and others because they do not fall under any of the expenses subject to withholding tax at the rate of 1% under Section 2.57.2(E), (M), (Q) or (R) of Revenue Regulations 2-98 as amended;

(d) Once the corresponding withholding taxes have been paid, the income payments will be allowed as deductions from gross income pursuant to the Final Decision on Disputed Assessment; and

(e) There was an error in the computation of the modified assessment which is a reversible error on the part of the Honorable Court.

On the other hand, respondent assails the abovementioned Decision on the sole ground that petitioner failed to present relevant evidence that would warrant the cancellation of the assessment.

---

[1] Docket, pp. 544-545.

The 25% surcharge is based on Section 248(A)(3) of the National Internal Revenue Code (NIRC) of 1997.

Petitioner contends that the Court cannot impose the 25% surcharge because the assessment did not impose the said surcharge. Petitioner argues that since there was no finding that it failed to file its income tax return on time, respondent did not assess the former of the 25% surcharge, pursuant to Section 12(a)(1) of Revenue Regulations (RR) No. 05-07.

To emphasize, the imposition of the 25% surcharge is pursuant to Section 248(A)(3) of the NIRC of 1997, as amended, which provides:

> "SEC. 248. *Civil Penalties.* – (A) There shall be imposed, in addition to the tax required to be paid, a penalty equivalent to twenty-five percent (25%) of the amount due, in the following cases:
>
> xxx xxx xxx
>
> (3) Failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment; or
>
> xxx xxx xxx"

Clearly, the imposition of 25% surcharge is based on the failure to pay the deficiency tax within the time of its payment as stated in the notice of assessment, and not on petitioner's failure to file income tax return on time.

In the case of *Philippine Refining Company (now known as "Unilever Philippines [PRC], Inc.") vs. Court of Appeals, et al.* [2], the Supreme Court pronounced that the collection of penalty and interest in case of delinquency is mandatory, to wit:

[2] G.R. No. 118794, May 8, 1996.

> "xxx Tax laws imposing penalties for delinquencies, so we have long held, are intended to hasten tax payments by punishing evasions or neglect of duty in respect thereof. If penalties could be condoned for flimsy reasons, the law imposing penalties for delinquencies would be rendered nugatory, and the maintenance of the Government and its multifarious activities will be adversely affected.
>
> We have likewise explained that it is mandatory to collect penalty and interest at the stated rate in case of delinquency. **The intention of the law is to discourage delay in the payment of taxes due the Government and, in this sense, the penalty and interest are not penal but compensatory for the concomitant use of the funds by the taxpayer beyond the date when he is supposed to have paid them to the Government.** xxx" *(Emphasis supplied)*

Petitioner is liable to withhold 1% on the CUSA, airconditioning charges and purchases under Section 2.57.2(M) of RR No. 2-98, as amended.

Petitioner alleges that respondent failed to inform the former that it is a top 10,000 taxpayer. According to petitioner, being a top 10,000 corporation was neither alleged nor proven during the trial. This being so, the income payments made on the Common Usage Service Area (CUSA) and airconditioning charges as well as the purchases on goods, are allegedly not subject to withholding tax under Section 2.57.2(E), (M), (Q) and (R) of RR No. 2-98.

Petitioner also insists that it was able to establish the deductibility of the expenses representing CUSA and airconditioning charges. Petitioner further asserts that it should be informed in writing of the law and the facts on which the assessment was made; otherwise, the same was void.

The Court finds petitioner's arguments without merit.

Petitioner failed to establish that the payments of CUSA and airconditioning charges to Filinvest Land Incorporated (FLI) were reimbursements of actual expenses that were paid in advance by FLI.

We wish to emphasize that in the absence of any other documentary evidence which will prove that the said expenses were actually reimbursements of actual expenses without any mark-up or profit element paid by petitioner to FLI, the Court is constrained to sustain the findings of the respondent, *i.e.,* subjecting the same to 1% deficiency EWT.

Moreover, it is correct to subject the CUSA, airconditioning charges and purchases to 1% EWT based on Section 2.57.2(M) of RR No. 2-98. Records show that petitioner's BIR Form No. 1601-E (Monthly Remittance Return of Creditable Income Taxes Withheld (Expanded)) and the Monthly Alphalist of Payees (MAP)[3] submitted to the BIR include remittances of EWT with Alphanumeric Tax Codes (ATC) of WC158 and WC160, which represent income payments of a Top 10,000 Corporation for its purchases of goods and services, respectively.

When petitioner remitted the EWT under the Alphanumeric Tax Codes (ATC) of WC158 and WC160, petitioner deemed itself as a Top 10,000 Corporation. Accordingly, the income payments of petitioner on its purchases of goods and services as well as the CUSA and airconditioning charges, are subject to withholding tax in accordance with Section 2.57.2(M) of RR No. 2-98, as amended by RR No. 17-2003.

Thus, the Court reiterates that petitioner is liable to withhold 1% on purchases, materials, R&M (materials), office supplies, miscellaneous, snackbar supplies, xerox, mimeograph, printed forms and others. Without any evidence to prove that petitioner withheld and remitted the corresponding tax on income payments, the same cannot be claimed as expenses deductible from gross income.

It is a well-settled rule that 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*

---

[3] BIR Records, pp. 164 to 269.

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.[4]

There was no error in the computation of the modified assessment.

Petitioner alleges a mathematical error in the computation of the modified deficiency tax liability, as follows:

Item	FDDA	CTA	Should be
Taxable Income per investigation	₱ 14,591,843.44	₱ 13,242,641.16	₱ 13,222,641.16
Income Tax due	7,214,852.90	4,634,924.41	4,627,924.41
Basic Income Tax Due		**₱ 4,622,212.41**	

Petitioner arrived at the reduced Taxable Income per investigation by subtracting the total disallowed penalties of ₱19,244,663.16 against the loss of ₱6,022,022.00. The result should be ₱13,222,641.16 instead of ₱13,242,641.16 as stated in the assailed Decision.

According to petitioner, as a result of said variance, the income tax due should have amounted to ₱4,627,924.41 (₱13,222,641.16 x 35%). And then, deducting the prior years' excess tax credits of ₱12,712.00, the basic deficiency income tax should amount to ₱4,615,212.41 instead of ₱4,622,212.41.

The Court disagrees with petitioner.

It is clear from the Annual Income Tax Return for Calendar Year 2008 that the net loss reported amounted to ₱6,**002**,022.00[5],

---

[4] *Commissioner of Internal Revenue vs. Hantex Trading, Co. Inc.*, G.R. No. 136975, March 31, 2005, citing the cases of *United States v. Rindskopf*, 105 U.S. 418 (1881) and *United States v. Rexach*, 482 F.2d 10 (1973)

[5] Line 23B, Exhibit "P-25" and Line 119, Exhibit "P-25-b", Docket, Vol. I, p. 313-315.

and not ₱6,**022**,022.00 as petitioner insisted. Subtracting the total disallowed expenses and penalties of ₱19,244,663.16 will result to ₱13,242,641.16. Therefore, there is no need to revise the computation of basic deficiency income tax because the same is not erroneous.

Respondent's Motion for Reconsideration lacks merit.

In respondent's *Motion for Reconsideration*[6], respondent insists that despite petitioner's assurances to submit documents within the time allowed by law to justify its grounds for the protest, the latter failed to do so. Thus, respondent claims that the disallowances were properly made, and were not susceptible to any question.

Respondent posits that the evidence presented by petitioner were insufficient to warrant the cancellation of the assessment. According to respondent, petitioner was not able to overturn the presumption of the correctness of the assessment issued by the respondent. Thus, petitioner is liable to pay the assessed deficiency income tax, value-added tax, expanded, withholding tax and withholding tax on compensation for taxable year 2008.

Petitioner opposes the respondent's Motion for Reconsideration on the following grounds:

> 1. Respondent failed to point out the specific part of the Decision she did not agree with, and as such, the motion for reconsideration pertains to the entire Decision including those assessment which have been affirmed by the Court;
>
> 2. The assailed Decision determined not only the factual basis of the assessment but also the legal basis of the same; and
>
> 3. Respondent's assessment for deficiency income tax due to failure to withhold was without legal basis. Petitioner is not liable to withhold 1% on the CUSA and airconditioning charges, purchases, R & M materials,

[6] Docket, Vol. II, pp.565-569.

office supplies, miscellaneous, snackbar supplies, xerox, mimeograph, printed forms and others.

It bears stressing that "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.**"[7]

The mere fact that petitioner was not able to present the promised pieces of evidence in the administrative level does not preclude the Court from cancelling the assessment if it finds that it was without legal or factual basis or both. The presumption of correctness is only *prima facie*, and therefore, may be controverted. Moreover, in the case of *Collector of Internal Revenue vs. Benipayo*[8], the Supreme Court pronounced that "**the presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption**".

In the instant case, the Court cancelled the assessment of some items on deficiency income tax, such as undeclared income, disallowed Net Operating Loss Carry-Over (NOLCO) for taxable year 2008, and disallowed Minimum Corporate Income Tax (MCIT) and excess MCIT carry-over, either for lack of factual or legal basis.

It is stated in the assailed Decision that the imputation of alleged undeclared income is based on a mere presumption since there were unaccounted expenses and there were unaccounted income which correspond to it. That being the case, the undeclared income would be effectively offset by recording the equivalent payments as expenses. Consequently, no taxable income will result from the said transactions.

Also, the NOLCO that was incurred in taxable year 2008, if not offset as deduction from petitioner's gross income, should be carried a

---

[7] *Commissioner of Internal Revenue vs Hantex Trading Co. Inc.*, G.R. No. 136975, March 31, 2005.

[8] G.R. No. L-13656, January 31, 1962

over as such for the next three consecutive taxable years of 2009, 2010 and 2011. Records show that petitioner did not offset the NOLCO as deduction from petitioner's gross income for taxable year 2008. Thus, the assessment on the disallowed NOLCO was cancelled.

As regards the disallowed MCIT and the excess MCIT carry-over, the Court found it improper for the respondent to disallow the same, because any tax benefit derived by petitioner from the carry-over of the said amounts redounds to the succeeding year. Since the tax benefit will be in the succeeding year, at most, petitioner may only be assessed in the said succeeding year.

Thus, there is no cogent reason to disturb the findings and ruling in the assailed Decision.

WHEREFORE, premises considered, petitioner's **Motion for Partial Reconsideration** and respondent's **Motion for Reconsideration** are **DENIED** for lack of merit.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice