REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

MANUEL MARAÑON, JR.,
Petitioner,

C.T.A. EB NO. 399
(C.T.A. Case No. 6711)

Present:

-versus-

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

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
AUG 10 2009 [illegible] 1:00 p.m.

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D E C I S I O N

BAUTISTA, J.:

The Case

Before Us is a Petition for Review[1] filed by Mr. Manuel Marañon, Jr. pursuant to paragraph 2, Section 18 of Republic Act No. 1125, as amended by Republic Act

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[1] *Rollo*, C.T.A. EB No. 399 (C.T.A. Case No. 6711), pp. 9 – 68, with Annexes.

No. 9282 and Rule 8, Section 4(b) of the Revised Rules of the Court of Tax Appeals, praying for the reversal of:

1. the Decision[2] dated December 4, 2007 rendered by the Second Division of the Court ("Court in Division") in CTA Case No. 6711, which ordered petitioner to pay respondent the amounts of Seventeen Million Eighty Six Thousand Six Hundred Eighty Nine and 25/100 Pesos (₱17,086,689.25), representing deficiency capital gains tax ("CGT"); and Eighteen Thousand Two Hundred Seven and 38/100 Pesos (₱18,207.38), representing deficiency documentary stamp tax ("DST"), for taxable year 1999, plus twenty percent (20%) delinquency interest per annum computed from August 31, 2001 until full payment; and
2. the Resolution of the Court in Division promulgated on May 23, 2008, which denied petitioner's "Urgent Motion for Reconsideration" and "Supplement to the Motion For Reconsideration with Motion for New Trial" for lack of merit.

The Facts

Petitioner is of legal age, married, a Filipino citizen and a resident of No. 12-A, Andaya St., BF Homes, Parañaque City.[3]

Respondent is the duly appointed Commissioner of Internal Revenue with office address at the 4th Floor, BIR Building, Agham Road, Diliman, Quezon City.[4]

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[2] Penned by Associate Justice Olga Palanca-Enriquez, with Associate Justices Juanito C. Castañeda, Jr. and Erlinda P. Uy, concurring.
[3] *Records*, C.T.A. Case No. 6711, p. 111, Stipulation of Facts and Issues.
[4] *Id.*

On November 29, 2002, petitioner received from respondent a Formal Letter of Demand[5] dated July 20, 2001, assessing petitioner for alleged deficiency CGT and its increments and deficiency DST and its increments for the year 1999, on the alleged "Over-The-Counter" ("OTC") sales transactions of Best World Resources Corporation, Inc. ("BW shares") in the amounts of ₱17,086,689.25 and ₱18,207.38, respectively.[6]

However, prior to the receipt of the said Formal Letter of Demand, petitioner filed a civil case for damages against Mr. Ramon Mapa and the Commissioner of Internal Revenue on July 4, 2002,[7] where petitioner alleged that Mr. Ramon Mapa fraudulently and illegally used petitioner's name to effect the transaction on the subject BW shares.

In a letter to the Commissioner of Internal Revenue dated November 30, 2002, petitioner protested the subject assessments and requested for reconsideration and reinvestigation.[8] In his protest, petitioner stated that the Letter of Authority dated June 23, 2000 was issued by respondent only to investigate the tax liability of Wise Securities Phils., Inc., ("WSPI") and that petitioner never authorized the sales transactions of the subject BW shares. [9] Petitioner did not receive any notice or Letter of Authority from respondent with respect to the examination of his books of accounts or accounting records for 1999.[10]

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[5] *Records*, pp. 141 – 146.
[6] *Id.*, at p. 111.
[7] *Rollo*, pp. 62 – 66.
[8] *Records*, p. 112.
[9] *Id.*, at p. 147.
[10] *Id.*, at p. 112.

On January 24, 2003, petitioner's lawyer sent his first follow-up of his request for reconsideration and reinvestigation.[11]

On June 27, 2003, petitioner filed his Petition for Review with the Court in Division.[12]

In his Answer,[13] respondent alleged that the investigation which led to the subject assessments was an off-shoot of the alleged stock manipulation and insider trading scandal perpetrated by Mr. Dante Tan and his associates involving Best World Resources Corporation, Inc. that hit the Philippine Stock Exchange in 1999. Respondent admitted that the Letter of Authority dated June 23, 2000 was issued to WSPI, covering the BW Tax Inquiry and Investigation of all internal revenue taxes of such entity. During the investigation, the working group headed by Mr. Leopoldo Gomez, was able to secure duly certified true copies of both Out and In receipts of the contra-broker, as well as the Ledger or Statement of Account evidencing transfer transactions made. It was only during the collation of these documents that the Revenue Officers discovered the transfer/OTC transactions of 1,300,000 BW shares owned by petitioner.

Respondent also disagrees with petitioner's claim that he did not authorize WSPI and/or Mr. Ramon Mapa to buy shares for ₱6,175,000.00 and to sell the same for ₱98,000,000.00 and that he did not receive payment for the said sale or transfer. The records, particularly, the Ledger of Statement of Account (Security Movement Report) of petitioner, Stock Debit Memos of WSPI, the form used by the broker to

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[11] *Records*, p. 112.
[12] *Id.*, at pp. 1 – 37.
[13] *Id.*, at pp. 45 – 52.

debit (deduct) shares of stock transferred and Stock In Receipts of IGC Securities, Inc., show that the shares transferred were received and credited to the account of Mr. Ramon Mapa to the extent of 1,300,000 BW shares. Authenticated copies of the aforesaid documents were secured from the brokers, and were ascertained that the transfer transactions of petitioner and Mr. Ramon Mapa were consummated. In addition, petitioner filed a civil case for damages against said broker and Mr. Ramon Mapa on July 4, 2002 after the assessments in this case has been made.

Respondent likewise disputes petitioner's claim that he did not receive notices prior to the Formal Letter of Demand, hence, his right to due process was violated. The Notice to Taxpayer, Preliminary Assessment Notice and Amended Preliminary Notice were actually served to the residential house of petitioner on December 2,2000; February 27, 2001 and April 17, 2001, respectively. The Assessment Notice with attached Formal Letter of Demand was also served to the same residential address indicated in the previous notices on August 8, 2001.

During trial, petitioner testified as well as Mrs. Amercia G. Ami, the Revenue Officer from the National Investigation Division of the BIR. Petitioner also offered documentary exhibits marked as *Exhibits "A"* to *"L-2"*, which were all admitted by the Court in Division.

Respondent, on the other hand, also presented Mrs. Amercia G. Ami, as witness, and filed his Formal Offer of Evidence which was admitted by the Court in Division, upon respondent's "Motion For Reconsideration", except for *Exhibit "20"* which was denied admission for failure of respondent to compare the photocopy with the original.

Thereafter, both parties were ordered to file their simultaneous memoranda, within thirty (30) days from notice. The case was deemed submitted for decision on December 13, 2006 upon compliance with the said order by both parties.[14]

The Ruling of the Court in Division

On December 4, 2007, the Court in Division rendered a decision in favor of respondent, with a *fallo* reading:

> **WHEREFORE**, premises considered, the instant Petition For Review is hereby **DISMISSED**. Accordingly, petitioner is **ORDERED TO PAY** to respondent the amounts of **SEVENTEEN MILLION EIGHTY SIX THOUSAND SIX HUNDRED EIGHTY NINE AND 25/100 PESOS (P17,086,689.25)**, representing deficiency capital gains tax; and **EIGHTEEN THOUSAND TWO HUNDRED SEVEN AND 38/100 PESOS (P18,207.38)**, representing deficiency documentary stamp tax, for the taxable year 1999.
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> In addition, petitioner is **ORDERED TO PAY** to respondent 20% delinquency interest per annum computed from August 31, 2001 until full payment, pursuant to *Section 249 (C)(3) of the NIRC of 1997, as amended.*
>
> **SO ORDERED.**

The Court in Division affirmed the assessment of respondent against petitioner for deficiency CGT and DST incurred from his OTC sales transactions of his 1,300,000 BW shares for the year 1999.

According to the Court in Division, OTC transactions refer to the sale, transfer or other disposition of shares of stock listed with the Philippine Stock Exchange ("PSE") that are not effected on the trading floor, but only through the equity trading facility of the Philippine Central Depository, Inc. ("PCDI").

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[14] *Records*, p. 378.

Applying the presumption of regularity in the performance of official duty, the Court in Division ruled that petitioner failed to present evidence disputing his receipt of the notices issued by respondent against him for deficiency CGT and DST liabilities. It also found that there was no violation of petitioner's right to due process since despite several opportunities given to petitioner to appear at the administrative level, petitioner ignored said notices.

The Court in Division also found sufficient evidence to prove that petitioner's 1,300,000 BW shares were transferred to the account of Mr. Ramon Mapa for the price of ₱6,175,000.00 and subsequently sold for ₱98,000,000. Hence, it ruled that petitioner failed to refute the subject assessments issued to him by respondent.

Aggrieved, petitioner filed an "Urgent Motion for Reconsideration" and a "Supplement to the Motion For Reconsideration with Motion for New Trial" attaching therewith the Judicial Affidavit[15] of Mr. Ramon Mapa as newly discovered evidence. Both Motions were however denied by the Court in Division for lack of merit in its Resolution promulgated on May 23, 2008; hence this recourse.

The Issues

Petitioner cites as grounds in his Petition for Review the following errors:

I. WITH DUE RESPECT TO THIS HONORABLE COURT'S 2ND DIVISION (COURT), IT GRAVELY ERRED IN NOT FINDING THAT IT IS RAMON MAPA AND/OR WISE SECURITIES PHILIPPINES, INC. THAT SHOULD BE HELD LIABLE FOR DEFICIENCY CAPITAL GAINS TAX, DEFICIENCY DOCUMENTARY STAMP TAX, AND DELINQUENCY INTEREST.

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[15] *Records*, pp. 434 – 436.

II. WITH DUE RESPECT TO THE COURT, PETITIONER WAS NOT DULY NOTIFIED OF HIS ALLEGED TAX DEFICIENCY.

III. WITH DUE RESPECT TO THE COURT, IT ERRED IN ITS FINDING THAT THE TESTIMONY OF RAMON MAPA IS NOT A NEWLY DISCOVERED EVIDENCE WHICH WARRANTS A NEW TRIAL.

Petitioner's Arguments

Petitioner contends that the Court in Division relied solely on the pieces of evidence presented by respondent in finding him liable for the subject deficiency tax liabilities. He maintains that such evidence shows only the involvement of Mr. Ramon Mapa in the alleged OTC transaction of the 1,300,000 BW shares, the same Mr. Mapa who happens to be the President, Director and Stockholder of WSPI, the brokerage firm which facilitated the said OTC transactions by illegally and fraudulently using petitioner's name and account with it. He reiterates that he never knew and was never aware that he was maintaining an account with WSPI.

Petitioner also insists that he was not duly notified by respondent of his alleged deficiency tax liabilities as stated in the parties' Stipulation of Facts and Issues. Hence, petitioner was not afforded due process.

Lastly, petitioner asserts that the testimony of Mr. Ramon Mapa qualifies as newly discovered evidence, hence his Motion for New Trial should have been granted by the Court in Division.

Respondent's Counter-arguments

Respondent, in his Comment, avers that petitioner authorized Mr. Ramon Mapa and/or WISPI to buy for him 1,300,000 BW shares and to sell the same based on the Ledger or Statement of Account (Security Movement Report), the Stock Debit Memos and the Stock In Receipts of IGC Securities Inc.

Respondent also asseverates that petitioner was duly notified in writing of his deficiency tax liabilities considering that the Notice to Taxpayer, Preliminary Assessment Notice and Amended Preliminary Notice, and Assessment Notices with Formal Letter of Demand and its Annexes were actually served to the residential house of petitioner.

Lastly, respondent argues that the testimony of Mr. Ramon Mapa does not qualify as newly discovered evidence which warrants a new trial as the same could have been produced during trial with the exercise of reasonable diligence.

The Ruling of the Court En Banc

The Petition for Review has no merit.

We shall first resolve the issue of alleged violation of due process.

Petitioner was duly notified in writing of his deficiency tax liabilities

Petitioner's allegation that he was denied due process is without merit.

Section 228 of the National Internal Revenue Code (NIRC) of 1997, as amended, prescribes the stringent rules on formal assessments, scilicet:

> SEC. 228. Protesting of Assessment. — When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: Provided, however, That a preassessment notice shall not be required in the following cases:
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> xxx xxx xxx

> The taxpayer shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.
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> Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.
>
> Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.
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> If the protest is denied in whole or in part, or is not acted upon within One Hundred Eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the One Hundred Eighty (180)-day period; otherwise, the decision shall become final, executory and demandable.

The above-quoted section of the 1997 NIRC does not fix the form or content of the assessment notice. The simple meaning of procedural due process is that a party to a case must be given sufficient opportunity to be heard. Its very essence is to allow all parties opportunity to present evidence. In administrative cases, the requirement of due process is the right to a hearing, including the right of the party interested or affected to present her or his own case and to submit evidence to support her or his allegation.[16]

In the case at bar, the Court in Division made the following findings:

> [A] Notice to Taxpayer was issued by respondent to inform petitioner of his deficiency tax liabilities. Said notice also requested petitioner to appear for an informal conference. For petitioner's failure to appear during the scheduled date of conference, a Preliminary Assessment Notice (PAN) and an Amended PAN were separately issued and

[16] Robusta Agro Marine Products, Inc. and Mario Santos, Jr. v. Baltazar Gorombalem, et al., G.R. No. 80500, July 5, 1989, 175 SCRA 93,98.

personally delivered to the residential address of petitioner. As no protest was filed nor any payment made, a Formal Letter of Demand and Assessment Notices were again issued and personally delivered to the same residential address of petitioner.

Petitioner's contention that he did not receive any of the notices issued by respondent against him for deficiency tax liabilities cannot be sustained. Records show that the Notice to Taxpayer, Preliminary Assessment Notice, and Amended Preliminary Assessment Notice, were all served to the residential address of petitioner at #12-A Andaya St., BF Homes Parañaque City on different dates and were all received by one Leneth B. Palomares on December 2, 2000, February 27, 2001 and April 17, 2001, respectively. Likewise, the Assessment Notice with attached Formal Letter of Demand was delivered and served to the same residential address indicated in the previous notices and was received by Girly Gaerlan on August 8, 2001, as shown in petitioner's accomplished Customer Account Form (*Exhibit '19'*) and in the complaint for Damages filed on July 4, 2002 by petitioner in Civil Case No. 02-0287, entitled *'Manuel and Cecilia Maranon v. Ramon and Aurora Mapa, Wise Securities Phils., Inc. & Commissioner of Internal Revenue'*, against Ramon and Aurora Mapa and the Commissioner of Internal Revenue with the Regional Trial Court of Parañaque City (*BIR records, pp. 120-124*). Furthermore, petitioner admitted having received the Warrant of Distraint and/or Levy. The Court therefore finds no reason why he failed to receive the Notice to Taxpayer, Preliminary Assessment Notice, Amended Preliminary Assessment Notice, and Formal Letter of Demand and Assessment Notice, Final Notice Before Seizure, which were all delivered to the same residential address of petitioner. It must be stressed that the presumption of regularity in the performance of official duty applies in favor of the BIR officers or employees who delivered the Notice to Taxpayer, Preliminary Assessment Notice, Formal Letter of Demand and Assessment Notice, and Final Notice Before Seizure and Warrant of Distraint and/or Levy to petitioner's residential address, unless otherwise controverted by evidence.[17]

The issuance of a valid formal assessment *i.e. Formal Letter of Demand with Assessment Notices or the FAN,* is a substantive prerequisite to tax collection,[18] for it contains not only a computation of tax liabilities but also a demand for payment within a prescribed period, thereby signaling the time when penalties and interests

[17] *Rollo,* pp. 38 – 40, assailed Decision, pp. 17 -19.
[18] Commissioner of Internal Revenue v. Reyes, G.R. No. 159694, January 27, 2006, 480 SCRA 382.

begin to accrue against the taxpayer and enabling the latter to determine his remedies therefor. Due process requires that it must be served on and received by the taxpayer.[19]

Here, copies of the Notice to Taxpayer, the Preliminary Assessment Notice, Amended Preliminary Assessment Notice, the Formal Letter of Demand and Assessment Notice, and the Final Notice Before Seizure were all delivered to the residential address of petitioner. Said residential address is stated in the parties' Stipulation of Facts and Issues[20]. Petitioner was given the opportunity to attend the preliminary conference, hear the Bureau of Internal Revenue's findings and express objections thereto. It is quite odd that petitioner received the Formal Letter of Demand but denies receiving the Notice to Taxpayer, the Preliminary Assessment Notice, Amended Preliminary Assessment Notice when all the said notices were delivered to the same residential address.

Assuming *arguendo* that petitioner only received the Formal Letter of Demand and not the Preliminary Assessment Notices, the same is sufficient compliance with due process requirements, as the Supreme Court ruled, *viz.*:

> "[T]he stringent requirement that an assessment notice be satisfactorily proven to have been issued and released or, if receipt thereof is denied, that said assessment notice have been served on the taxpayer, applies only to formal assessments prescribed under Section 228 of the National Internal Revenue Code, but not to post-reporting notices or pre-assessment notices.
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> xxx xxx xxx

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[19] Roxas Securities, Inc. v. Commissioner of Internal Revenue, G.R. No. 157064, August 7, 2006, 498 SCRA 126. See also Commissioner of Internal Revenue v. Pascor Realty & Devt. Corp., 368 Phil. 714 (1999).
[20] *Records*, p. 111.

> A post-reporting notice and pre-assessment notice do not bear the gravity of a formal assessment notice. The post-reporting notice and pre-assessment notice merely hint at the initial findings of the BIR against a taxpayer and invites the latter to an 'informal' conference or clarificatory meeting. Neither notice contains a declaration of the tax liability of the taxpayer or a demand for payment thereof. Hence, the lack of such notices inflicts no prejudice on the taxpayer for as long as the latter is properly served a formal assessment notice."[21]

In this case, a Formal Letter of Demand with Assessment Notices was received by petitioner as acknowledged in his Petition for Review and Stipulation of Facts and Issues; and, on the basis thereof, he filed a protest with the BIR, and eventually a Petition for Review with the Court in Division.

We thus find that petitioner was afforded due process.

The subject assessment for deficiency CGT and DST is proper

We shall now tackle the propriety of assessing petitioner for deficiency CGT and DST in connection with the sale/transfer of the subject BW shares of stocks through OTC transactions.

Basic is the rule that tax assessments by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax

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[21] Commissioner of Internal Revenue v. Dominador Menguito, G.R. No. 167560, September 17, 2008, 565 SCRA 481- 482.

assessments.[22] Thus, after a review of the records of this case, We quote with approval the ruling of the Court in Division:

> Petitioner's contention that he did not authorize Wise Securities Phils., Inc. and/or Ramon Mapa to buy shares for P6,175,000.00 and to sell the same for P98,000,000.00 and that he did not receive payment for the said sale or transfer is likewise devoid of merit. Records, particularly, the Ledger of Statement of Account, Security Movement Report of petitioner (*Exhibit '9'*), Stock Debit Memo of Wise Securities (*Exhibits '3', '5', and '9'*), the form used by the broker to debit shares of stock transferred and Stock In Receipts of ICC Securities, Inc. (*Exhibits '4', '6', and '8'*) show that the shares transferred were received and credited to the account of Ramon Mapa to the extent of 1,300,000 BW shares. Authenticated copies of said documents were secured from the brokers and it was ascertained that the transfer transactions of petitioner and Ramon Mapa had been consummated. Records further show that on July 4, 2002 after the assessment in this case was issued, petitioner filed a complaint for damages against the broker and Ramon Mapa in Civil Case No. 02-0287 entitled *'Manuel and Cecilia Maranon v. Ramon and Aurora Mapa, Wise Securities Phils. Inc. vs. Commissioner of Internal Revenue'*, with the Regional Trial Court of Parañaque.
>
> We now proceed to the issue of whether or not petitioner is liable for any deficiency capital gains tax and deficiency documentary stamp for the taxable year 1999.
>
> Pursuant to the NIRC of 1997, as amended, 'over-the-counter' transactions are subject to the following taxes:
>
> **1. Capital Gains Tax**
>
> Final capital gains tax of 5% to 10% was assessed on the net capital gains realized on sale/transfer of shares of stock listed but not traded in the stock exchange (Over-the-Counter Transactions), prescribed under *Section 24 (C) of the 1997 Tax Code*, to wit:
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> **'SEC. 24. Income Tax Rates. –**
>
> xxx xxx xxx
>
> **(c) Capital Gains from Sale of Shares of Stock not Traded in the Stock Exchange.** – The provisions of Section 39(B)

[22] Commissioner of Internal Revenue v. Bank of the Philippine Islands, G.R. No. 134062, April 17, 2007, 521 SCRA 386, citations omitted.

notwithstanding, a final tax at the rates prescribed below is hereby imposed upon the net capital gains realized during the taxable year from the sale, barter, exchange or other disposition of shares of stock in a domestic corporation, except shares sold, or disposed of through the stock exchange.

Not over P100,000 5%
On any amount in excess of P100,000 10%'.

xxx xxx xxx.'

The highest closing price on the day when the shares are sold or transferred shall be used in determining the gross selling price, and the first-in, first-out (FIFO) method shall be used in computing the cost of shares since they cannot be properly identified, pursuant to *Revenue Regulations 2-82* dated March 29, 1982, to wit:

'**SEC. 6(a) Determination of selling price** – The selling price of the shares of stock shall be the fair market value of the shares of stock transferred or exchanged and not the fair market value of the property received in exchange.

xxx xxx

(b) (2) Determination of cost – If the stock cannot be properly identified, then the cost to be assigned shall be computed on the basis of the first-in, first-out (FIFO) method.'

2. Documentary Stamp Tax

As to the documentary stamp tax on sale, transfer of shares or certificates of stock, the amount of P1.50 on each Two Hundred pesos (P200.00) of the par value of shares or certificate of stock shall be collected, as provided under *Section 176 of the NIRC of 1997, as amended*, to wit:

'**SEC. 176. Stamp Tax on Sales, Agreements to Sell, Memoranda of Sales, Deliveries or Transfer of Due-bills, Certificates of Obligation, or Shares of Certificates of Stock.** – On all sales, or agreements to sell, or memoranda of sale, or deliveries, or transfer of due-bills, certificates of obligation, or shares of certificates of stock in any association, company, or corporation, or transfer of such securities by assignment in blank, or by delivery, or by any paper or agreement, or memorandum or other evidences of transfer or sale whether entitling the holder in any manner to the benefit of such due-bills, certificates of obligation or stock, or to secure the future payment of money, or for the future transfer of any due-bill, certificate of obligation or stock, there shall be collected a documentary stamp tax of One peso and fifty centavos (P1.50) on each Two hundred pesos (P200) or fractional part thereof, of the par value of such due-bill, certificate of obligation or stock; Provided, That only one tax shall be collected on each sale or transfer of stock or securities from one person to another, regardless of whether or not a certificate of stock or obligation is issued, indorsed, or delivered in pursuance of such sale or transfer: and Provided, further, That in the case of stock without par value the amount of documentary stamp tax herein prescribed shall be equivalent to twenty-five percent (25%) of the documentary stamp tax paid upon the original issue of said stock.'

The 50% surcharge was imposed for petitioner's willful neglect to file capital gains tax and documentary stamp tax returns and pay the corresponding taxes thereon, pursuant to *Section 248 (B) of the NIRC of 1997, as amended*, to wit:

'SEC. 248. Civil Penalties. –

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(B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud: Provided, That a substantial underdeclaration of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, shall constitute prima facie evidence of a false or fraudulent return: Provided, further, That failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding (30%) of actual deductions, shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions, as mentioned herein.'

The 20% interest per annum was imposed, pursuant to *Section 249 (B) of the NIRC of 1997, as amended*, to wit:

> 'SEC. 249. **Interest.—**
>
> **(B) Deficiency Interest. —** Any deficiency in the tax due, as the term is defined in this Code, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof.
>
> xxx xxx.'

The testimony of Mr.Ramon Mapa does not qualify as newly discovered evidence

Lastly, We shall discuss whether the testimony of Mr. Ramon Mapa can qualify as newly discovered evidence.

Section 5 of Rule 15 of the Revised Rules of the Court of Tax Appeals reads:

> SECTION 5. Grounds of Motion for New Trial. — A motion for new trial may be based on one or more of the following causes materially affecting the substantial rights of the movant:
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> (a) Fraud, accident, mistake or excusable negligence which ordinary prudence could not have guarded against and by reason of which such aggrieved party has probably been impaired in his rights; or
>
> (b) Newly discovered evidence, which he could not, with reasonable diligence, have discovered and produced at the trial and, which, if presented, would probably alter the result.
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> A motion for new trial shall include all grounds then available and those not included shall be deemed waived. *(Rules of Court, Rule 37, sec. 1a)*

In order to have a new trial on the basis of newly discovered evidence, it must be proved that: (a) the evidence was discovered after the trial; (b) such evidence could not have been discovered and produced at the trial with reasonable diligence; (c) it is material, not merely cumulative, corroborative or impeaching; and (d) it is of such weight that, if admitted, will probably change the judgment.

Relative to the foregoing, the Supreme Court explained that:

> These guidelines have since been followed by our courts in determining the propriety of motions for new trial based on newly discovered evidence.
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> It should be emphasized that **the applicant for new trial has the burden of showing that the new evidence** he seeks to present has complied with the requisites to justify the holding of a new trial.
>
> The threshold question in resolving a motion for new trial based on newly discovered evidence is whether the proferred evidence is in fact a 'newly discovered evidence which could not have been discovered by due diligence.' The question of whether evidence is newly discovered has two aspects: a temporal one, i.e., when was the evidence discovered, and a predictive one, i.e., when should or could it have been discovered. It is to the latter that the requirement of due diligence has relevance. We have held that in order that a particular piece of evidence may be properly regarded as newly discovered to justify new trial, what is essential is not so much the time when the evidence offered first sprang into existence nor the time when it first came to the knowledge of the party now submitting it; **what is essential is that the offering party had exercised reasonable diligence in seeking to locate such evidence before or during trial but had nonetheless failed to secure it**.
>
> The Rules do not give an exact definition of due diligence, and whether the movant has exercised due diligence depends upon the particular circumstances of each case. Nonetheless, it has been observed that the phrase is often equated with "reasonable promptness to avoid prejudice to the defendant." In other words, **the concept of due diligence has both a time component and a good faith component. The movant for a new trial must not only act in a timely fashion in gathering evidence in support of the motion; he must act reasonably and in good faith as well. Due diligence contemplates that the defendant acts reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him**. [23] *(Boldfacing supplied, citations omitted)*

[23] Custodio v. Sandiganbayan, G.R. Nos. 96027-28, March 8, 2005, 453 SCRA 33-35.

Applying the foregoing tests, We find that petitioner's purported evidence does not qualify as newly discovered evidence that would justify the holding of a second trial. We agree with the ruling of the Court in Division that the testimony of Mr. Ramon Mapa does not qualify as newly discovered evidence. As aptly pointed out by the Court in Division, the testimony of Mr. Ramon Mapa already existed long before the trial of this case. Such testimony was a pre-existing evidence within the power of petitioner to produce during trial. A review of the records shows that Mr. Ramon Mapa was subpoenaed as a hostile witness for the petitioner but did not appear. Had petitioner exercised reasonable diligence, he could have produced Mr. Ramon Mapa during the trial.

Perhaps realizing that under the Rules the said testimony cannot be correctly admitted as newly discovered evidence, petitioner invokes a liberal application of the Rules as provided in Rule 1, Section 2 of the Revised Rules of the Court of Tax Appeals. In this regard, the Supreme Court has stated that:

> This is a dangerous proposition and one which we refuse to countenance. We cannot agree more with the Court of Appeals when it stated thus,
>
> > 'To accept the contrary view of the petitioner would give rise to a dangerous precedent in that there would be no end to a hearing before respondent court because, every time a party is aggrieved by its decision, he can have it set aside by asking to be allowed to present additional evidence without having to comply with the requirements of a motion for new trial based on newly discovered evidence. Rule 13, Section 5 of the Rules of the Court of Tax Appeals should not be ignored at will and at random to the prejudice of the orderly presentation of issues and their resolution. To do so would affect, to a considerable extent, the principle of stability of judicial decisions.'

> We are left with no recourse but to conclude that this is a simple case of negligence on the part of the petitioner. For this act of negligence, the petitioner cannot be allowed to seek refuge in a liberal application of the Rules. For it should not be forgotten that the first and fundamental concern of the rules of procedure is to secure a just determination of every action. In the case at bench, a liberal application of the rules of procedure to suit the petitioner's purpose would clearly pave the way for injustice as it would be rewarding an act of negligence with undeserved tolerance.[24]

It bears stressing that the grant or denial of a new trial is, generally speaking, addressed to the sound discretion of the court which cannot be interfered with unless a clear abuse thereof is shown.[25] Petitioner has not shown any such abuse in the case at bar.

In fine, We find that petitioner failed to build a strong case that will warrant the setting aside of the assessments issued against him.

WHEREFORE, the Petition for Review is hereby **DISMISSED.** Accordingly, the assailed Decision promulgated on December 4, 2007 and the Resolution dated May 23, 2008 are hereby **AFFIRMED**.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

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[24] Commissioner of Internal Revenue v. A. Soriano Corporation, Court of Tax Appeals and Court of Appeals, G.R. No. 113703, January 31, 1997, 267 SCRA 319.

[25] Tumang v. Court of Appeals, G.R. No. 82072, April 17, 1989, 172 SCRA 328, 335, citation omitted.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

(with Dissenting Opinion)
CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of this Court.

ERNESTO D. ACOSTA
Presiding Justice