REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

JERRY OCIER,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 6831

Members:

CASTAÑEDA, JR., *Chairperson*
UY, *and*
PALANCA-ENRIQUEZ, *JJ.*

Promulgated:

FEB 0 2 2009
4:00 p.m.

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DECISION

UY, J.:

This is a Petition for Review filed by petitioner, Jerry Ocier, on December 5, 2003 seeking the reversal and setting aside of the Decision[1] of the Commissioner of Internal Revenue (respondent) dated March 10, 2003, the dispositive portion of which states:

> "**IN VIEW THEREOF**, this Office hereby resolves to **DENY** the protest of Mr. Jerry Ocier. The Final Assessment Notice No. BW-99-CGT-0040-01 for P17,862,848.21 and BW-99-DST-0041-01 for P71,703.76 both dated September 10, 2001 issued by this Bureau for deficiency capital gains tax and documentary stamp tax respectively, are hereby AFFIRMED in all respects. Consequently, Mr. Ocier is hereby ordered to pay the above-stated amount plus interest that may have accrued thereon after thirty (30) days from receipt hereof, otherwise the

[1] Annex "A" of Petition for Review; Docket, pp. 15-22.

collection thereon will be effected through the summary remedies provided by law.

This constitutes the **final decision** of this Office on the matter.[2]"

THE FACTS

Petitioner is of legal age, Filipino, with address at No. 6 Wilson Street, Greenhills, San Juan, Metro Manila, where he may be served summons and other court processes.

Respondent is the duly appointed officer of the Bureau of Internal Revenue (BIR) with the power to decide disputed assessments, cancel and abate tax liabilities, pursuant to the provisions of the National Internal Revenue Code (NIRC) of 1997, as amended, and other tax laws, rules and regulations.

On January 31, 2001, petitioner received a "Notice to Taxpayer" from the BIR which states that petitioner has incurred deficiencies in Capital Gains Tax (CGT) and Documentary Stamp Tax (DST) for the year 1999.[3]

On April 19, 2001, petitioner sent a Letter-Reply to the BIR stating therein that the transfer of a total of 4.9 million shares of BW Resources from his account to the account of Mr. Dante Tan, which is the basis of the alleged deficiency tax, was erroneously presumed by the BIR as a sale when it was actually a loan.[4]

On September 26, 2001, petitioner received Assessment Notice No. BW-99-DST/CGT-0041-01 dated September 10, 2001 from respondent

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[2] Ibid, at p. 22.
[3] Par. 2, Summary of Admitted Facts, Joint Stipulation; Docket, pp. 100-101.
[4] Exhibit "E"; Docket, pp. 159-160.

assessing petitioner for deficiency DST and GST, inclusive of increments in the amounts of P17,862,848.21 and P71,703.76, respectively. These deficiency assessments arose from the alleged gains that petitioner supposedly realized from the sale of shares of BW Resources through over-the-counter transaction.[5]

On October 12, 2001, petitioner duly filed with the BIR a Letter protesting the said assessment.[6] In the Decision dated March 10, 2003, addressed to the law office of *Fortun, Narvasa & Salazar*, respondent denied petitioner's protest pertaining to the deficiency CGT and DST assessments issued to him in the amounts of P17,862,848.21 and P71,703.76, respectively, relative to his BW Resources stock transaction in 1999.[7]

On June 16, 2003, petitioner received a Preliminary Collection Letter from the BIR, seeking to enforce the collection of the above-mentioned deficiency assessments. In reply thereto, petitioner filed a letter on July 30, 2003.[8] Subsequently on November 6, 2003, petitioner received a Letter dated October 15, 2003 from Teresita M. Angeles, Chief of the BIR Collection Enforcement Division, wherein the Decision dated March 10, 2003 was attached.[9]

Alleging that he learned of the Decision dated March 10, 2003 only on November 6, 2003, petitioner filed the instant Petition for Review on December 5, 2003.

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[5] Par. 4, Summary of Admitted Facts, Joint Stipulation; Docket, p. 101.
[6] Exhibit "G"; Docket, pp. 162-164.
[7] Exhibits "A" and "A-1"; Docket, pp. 148-155.
[8] Par. 5, Summary of Admitted Facts, Joint Stipulation; Docket, p. 101.
[9] Par. 2.2, Petition for Review; Docket, pp. 2-3; Exhibit "B", Docket, p. 156.

On February 5, .2004, respondent filed his *Answer* alleging the following Special and Affirmative Defenses:

"6. Petitioner seeks to set aside thru the instant Petition for Review the deficiency capital gains tax and documentary stamp tax assessments issued against him for the taxable year 1999 relative to the sale or transfer of BW shares owned by him on the following grounds to wit: (1) that he did not sell/dispose his BW shares but was only borrowed from him by Mr. Dante Tan hence, he did not realize any gain therefrom; and (2) that, even if, a transfer was actually made, petitioner can not be held liable to pay the capital gains tax and documentary stamp tax assessment relative to the said transfer because under the withholding tax system, it is the withholding agent who should be held liable.

7. On the first issue, petitioner argued that he did not dispose of or sell his BW shares, the same having been borrowed only by Mr. Dante Tan from him as evidenced by an alleged trust declaration in the form of a letter showing the alleged agreement between him and Mr. Dante Tan. *We do not agree*. Contrary to common sense and sound business practice, petitioner would like us to believe that he parted with his substantial holdings of BW shares for no reason at all. No person in his right mind would part with his substantial shares of BW shares without any reason. Be that as it may, the letter cannot be considered a stock loan agreement or a trust declaration since the terms of the agreement were not specified. If we are to consider said agreement as one of a loan, the terms thereof, the time as to when such shares are to be returned should have been clearly indicated therein. However, no such term was indicated in the said agreement. This alone negates the position of petitioner. For this reason and for want of evidence, we seriously doubt the legitimacy or the efficacy of said letter purporting to be a stock loan. Obviously, the controversy here is not whether BW shares subject of this petition were actually transferred, in view of the fact that this was clearly established and not controverted. It is only how said BW shares were transferred or the mode of disposition that is the issue in this case.

8. Furthermore, petitioner can not argue that the transaction is or in the nature of a trust declaration and, therefore, not, a taxable transaction. In this regard, it is worthy to discuss in brief, the concept of *Securities Borrowing Lending* (SBL in brevity). SBL, which is the subject of BIR Ruling No. 168-98, is a product intended to be introduced, at the time, in

the market by the Philippine Stock Exchange. In principle it has the following proposed features:

- **There is an agreement prepared in accordance with the Guidelines of the BIR;**

- **While there is physical transfer of securities to the Borrower, the Lender retains most rights of ownership, such as dividend payments and the right to sell the loaned securities at any time;**

- **The Borrower puts up collateral, which is not necessarily cash but may not also be government securities or letters of credit, which collateral may be increased during the term of the securities lending to ensure full collateralization;**

- **Collateral is returned by the Lender to the Borrower at the end of the term whereupon, the Borrower returns the borrowed securities which need not be the same securities but may be merely identical; and**

- **The Lender has the right to terminate the agreement and to require return of the securities upon giving proper notice.**

In the said ruling, it is expressly stated that **'to qualify as a lending of securities, the transaction must strictly comply with all the forgoing requirements.'** So, if the transaction is outside the scope of the above-stated qualification, although described as a SBL, the same shall be considered as a regular exchange transaction subject to the corresponding taxes under the Tax Code.

9. On to the second issue, petitioner posited the view that even assuming for the sake of argument, that the transfer of the stock certificates should be considered as a taxable transaction, the remedy of collection should lie not against petitioner but against the withholding agent instead. Again, this position is without merit. Although, this issue was not raised by petitioner in his protest, still, we intend to answer the same, in this wise. Let it be stressed that the liability of a withholding agent/payor (in this case, petitioner's broker) is entirely different from the liability of the payee being the recipient of the income (the proceeds from the sale/transfer of the BW shares) being

subject of tax. Be it noted that under the Tax Code as well as the prevailing Revenue Regulations implementing the 'withholding tax system', the liability of a withholding agent is entirely different from that of the payee. The payor or the withholding agent's liability arose from its failure to withhold the tax, a function that is incumbent upon it as such. So when said withholding agent fails to perform his duty by not withholding the proper or correct tax, the agent is penalize for such failure. Such penalty may include the amount of the tax to be withheld and a fine, as the case may be, but in no way would the payee (like petitioner herein) be exempted or exonerated from the payment of the tax, because he is still the person primarily liable for the payment of the same, he being the recipient of the income subject of tax. If we are to follow petitioner's position that he is already exonerated from the payment of the tax, even if the tax sought to be collected has not been paid due to non-withholding of the same by his agent, it will have the effect of granting or giving exemption to petitioner despite lack of positive law granting or providing the same. Evidently, this will run counter to the well-settled principle in law that tax exemption is never presumed.

10. Petitioner was informed of the law and the facts on which the assessments are made in compliance with Section 228 of the Tax Code.

11. Finally, it is well settled rule in taxation that assessments are ***prima facie*** presumed correct and made in good faith. The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed."

On July 22, 2004, the parties filed their Joint Stipulation which was approved by the Court in a Resolution dated August 3, 2004.[10]

During trial, petitioner presented three (3) witnesses, to wit: Jerry Ocier, who is the Vice-President of Eastern Securities Development Corporation; Lemuel S. Bitong, Associate Director of the Philippine Depository and Trust Corporation; and Jennifer Laurenio, Accounting Assistant of Eastern Securities from July 16, 1991 to December 31, 2002. Thereafter he rested his

[10] Docket, pp. 100-105.

case and formally offered his documentary evidence consisting of *Exhibits "A" to "Q"*, inclusive of their submarkings, which were all admitted with the exception of *Exhibits "D", "F",* and *"H"* in the Resolution dated January 24, 2006.[11]

While respondent's counsel was able to present one (1) witness, Josephine D. Madera, Revenue Officer – National Investigation Division of the BIR, he however failed to make a formal offer of evidence despite several opportunities granted by the Court.

On February 6, 2008, this case was submitted for decision, taking into consideration petitioner's Memorandum filed on June 6, 2007, *sans* respondent's Formal Offer of Evidence and Memorandum.[12]

THE ISSUES

As jointly stipulated by the parties, the issues of this case are the following:

> "1. Whether or not petitioner's counsel of record with the Bureau of Internal Revenue (BIR) is the law firm of Tan Acut & Lopez Law Offices and not the law firm of Fortun Narvasa & Salazar?
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> 2. Whether or not the present petition for review was timely filed within the thirty (30) days reglementary period to appeal the assailed decision of respondent commissioner?
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> 3. Whether or not petitioner should be held liable to pay the deficiency capital gains tax and documentary stamp tax in connection with the alleged sale/transfer of his shares of stocks in the BW Resources Corporation through over-the-counter transaction?
>
> 4. Whether or not petitioner filed a criminal complaint for estafa against Dante Tan and is now pending before the Regional

[11] Ibid., at pp. 187-188.
[12] Id., at p. 315.

Trial Court of Pasig City, Branch 68 entitled 'People of the Philippines vs. Dante Tan', docketed as Criminal Case No. 12572? "

Petitioner's Arguments

Petitioner alleges that it was only on November 6, 2003 that he received from respondent a demand letter with the information that his protest and request for reconsideration have been denied. Although the Decision was dated March 10, 2003, petitioner was never aware thereof until he received a Letter dated October 15, 2003 from Teresita Angeles, Chief of the Collection Enforcement Division of the Bureau of Internal Revenue, on the above mentioned date.

Further, petitioner submits that the subject CGT and DST assessments are erroneous and arbitrary considering that the same was made without the benefit of any audit of the books or records of the petitioner; that he did not sell or dispose the shares of stock of BW Resources Corporation and he did not realize any gain as presumed by respondent; and that contrary to the presumption of respondent, said shares were in fact only borrowed by Mr. Dante Tan, as evidenced by the Letter-request dated September 2, 1999, and were not for disposition. Mr. Dante Tan has not accounted for the shares and petitioner has incurred a loss and was therefore constrained to file a criminal case against the former.

Even assuming for the sake of argument that the transfer of the stock certificates should be considered as a taxable transaction, it is petitioner's stand that the remedy of collection should not be against him. According to him, under Sections 24(C) and 57 of the NIRC of 1997, the transaction

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subject of this case is covered by the withholding tax system, and as it is a well-settled principle in taxation law that in case there should be a deficiency in the payment or in case there is no payment made by the withholding agent, the remedy of respondent is to collect the same from the withholding agent and not from the taxpayer himself. Additionally, petitioner emphasizes that one of the distinguishing characteristic of the withholding tax system is that although the payee or seller is still considered as the taxpayer, the liability or payment of the same is shifted to the payor or buyer.

Respondent's Counter-Arguments

Respondent argues that since the Decision dated March 10, 2003 was sent by registered mail to the Law Offices of *Fortun, Narvasa & Salazar*, who filed the protest against the assessment in behalf of petitioner, the assessment subject of this case has become final and executory for petitioner's failure to appeal the said decision to the Court within the reglementary period of thirty (30) days pursuant to Section 228 of the NIRC of 1997.

Additionally, respondent points out that it is contrary to common sense and sound business practice that petitioner parted with his substantial holdings of shares of stocks of BW Resources for no reason at all. The Letter dated September 2, 1999 cannot be considered as a stock loan agreement or a trust declaration since the terms of the agreement were not specified. Furthermore, respondent contends that in order for subject transaction may qualify as a lending of securities, the transaction must strictly comply with all the requirements as stated in the BIR Ruling No. 168-98 which embodies the concept of Securities Borrowing Lending – a product intended to be introduced, at that time, in the market by the Philippine Stock Exchange. Otherwise, the transaction will be considered as a regular exchange transaction subject to the corresponding taxes under the NIRC of 1997.

On the view of petitioner that the remedy of collection should not be made against him but instead against the withholding tax agent, respondent counters that the liability of the withholding tax agent/payor is entirely different from the liability of the payee being the recipient of the income being subject of tax. The failure of the withholding tax agent/payor to perform his duty may result to him being penalized for the amount of the tax and a fine, but in no way would the payee be exempted or relieved from the payment of the tax since he is still the person primarily liable for the payment of the tax.

THE COURT'S RULING

On the first issue, contrary to the claim of respondent, the Court finds that *Tan Acut & Lopez Law Offices* is the counsel of record of petitioner in the administrative proceedings with the Bureau of Internal Revenue (BIR) and not the *Law Office of Fortun Narvasa and Salazar*, as evidenced by the Special Power of Attorney (SPA) executed by petitioner on April 4, 2002 appointing Tan Acut & Lopez Law Offices as his counsel.[13] A perusal of the said SPA shows that it was in fact received by the BIR on April 9, 2002, a date before the promulgation of respondent's Decision on March 10, 2003.

[13] Exhibit "M"; Docket, p. 176.

Additionally, it appears from the records that the protest letter[14] was in fact signed by petitioner himself, and there was no indication that the *Law Office of Fortun Narvasa and Salazar* filed the same in behalf of petitioner as claimed by respondent. Records clearly show that most communications were written and signed by petitioner himself; that replies thereto from respondent or his authorized officers were likewise addressed to him; and that respondent is aware of petitioner's address at No. 6 Wilson Street, Greenhills, San Juan, Metro Manila, because respondent's Letter dated October 15, 2003 was sent at said address. The records also do not show that the *Law Office of Fortun Narvasa and Salazar* entered its appearance as counsel for petitioner with the BIR. There seems to be no reason why respondent failed to send the assailed Decision to the counsel of record *Tan Acut & Lopez Law Office* and to the petitioner himself at his address of record. Hence, it is clear that respondent erroneously sent the Decision to the *Law Office of Fortun Narvasa and Salazar*.

In this regard, the Court is inclined to believe petitioner's submission that it could not have received the Decision dated March 10, 2003 when it was first sent by the BIR because the same was mailed to the wrong address, and thus finds that he received it only on November 6, 2003 at his San Juan address when it was attached to the Letter dated October 15, 2003 of Teresita M. Angeles, the Chief of the Collection Enforcement Division of the BIR. Moreover, the Court notes that no controverting evidence was submitted by

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[14] Exhibit "G"; Docket, pp. 162-164.

respondent to refute petitioner's claim that the *Law Office of Fortun Narvasa and Salazar* is not his legal counsel in his dealings with the BIR.

With the foregoing findings, the second issue on the timeliness of the filing of the instant Petition for Review, or within the thirty (30) day reglementary period, is ruled in the affirmative reckoned from the time that petitioner actually received the Decision of respondent on November 6, 2003. Counting thirty (30) days therefrom, petitioner had until December 6, 2003 to elevate the case to this Court. As the Petition for Review was filed on December 5, 2003, the same is considered as timely filed.

As regards the third issue pertaining to petitioner's supposed tax liabilities for capital gains tax and documentary stamp tax, arising from the sale/transfer of his shares of stocks in BW Resources Corporation through over-the-counter transactions, the Court need no longer look into whether or not the subject BW shares were actually transferred, as this was clearly not controverted. What is at issue is whether or not respondent was able to establish, by sufficient evidence, the legal and factual bases for petitioner's supposed tax liabilities arising from said transfers.

The Court takes special note that during the presentation of respondent's evidence, his counsel failed to make a formal offer of evidence as mandated under our procedural rules.

It must be remembered that the rule on formal offer of evidence is not a trivial matter. Failure to make a formal offer within a considerable period of time shall be deemed a waiver to submit it. Consequently, as in this case, any evidence that has not been offered shall be excluded and rejected.[15]

Pertinent is Section 34, Rule 132 of the Revised Rules on Evidence, which reads:

> "SEC. 34. *Offer of evidence.* – The court shall consider no evidence which has not been formally offered. The purpose for which the evidence is offered must be specified."

Based on the records of the instant case, respondent presented one (1) witness to establish petitioner's supposed tax liability, and as early as January 24, 2007, respondent's counsel rested his case and was directed by the Court to file a Formal Offer of Evidence within thirty (30) days from said date.[16] For failure of respondent to file said Formal Offer of Evidence, this Court declared respondent to have waived his right to file the same in the Resolution dated March 29, 2007[17] and both parties were granted thirty (30) days to file their respective memorandum.

This Resolution was however cancelled and set aside in the Resolution dated July 16, 2007[18] upon a Motion for Reconsideration filed by respondent's counsel on April 18, 2007, with Opposition from petitioner's counsel filed on May 23, 2007, in view of the pending request of respondent's counsel for stipulation with petitioner's counsel that Exhibits "11" and "14" are faithful reproductions of the originals thereof. A commissioner's hearing was

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[15] *Heirs of Pedro Pasag vs. Spouses Lorenzo and Florentino Parocha*, G.R. No. 155483, April 27, 2007.
[16] Minutes of the hearing held on January 24, 2007; Docket, p. 238.
[17] Docket, p. 240.
[18] Ibid., at pp. 278-280.

set for that purpose before Atty. Jesus P. Inocando on July 30, 2007 at 1:30 p.m. Meanwhile, petitioner filed his Memorandum on June 6, 2007.

Thereafter, respondent's counsel failed to appear during the scheduled commissioner's hearing on July 30, 2007 and respondent was again declared to have waived his right to file his Formal Offer of Evidence in the Resolution dated August 7, 2007.[19] Again, the Court granted respondent's motion for reconsideration in the Resolution dated October 18, 2007[20] for the same purpose of allowing both parties' counsel to stipulate as regards Exhibits "11" and "14 during a commissioner's hearing scheduled on October 24, 2007. On said date, petitioner's counsel, Atty. Allene Anigan, failed to appear and respondent's counsel filed a Request for Admission on November 6, 2007.[21] Petitioner's counsel did not respond to said request.

Subsequently, in the Resolution dated February 6, 2008,[22] this case was considered submitted for decision without formal offer of evidence or memorandum having been filed by respondent.

It is well-settled that the courts cannot consider evidence which has not been formally offered. Parties are required to inform the courts of the purpose of introducing their respective exhibits to assist the latter in ruling on their admissibility in case an objection thereto is made. Without a formal offer of evidence, courts are constrained to take no notice of the evidence even if it has been marked and identified.[23]

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[19] Id., at p. 283.
[20] Id., at pp. 301-302.
[21] Id., at pp. 309-313.
[22] Id., at p. 315.
[23] *Far East Bank & Trust Co., vs. Commissioner of Internal Revenue*, G.R. No. 149589, September 15, 2006.

In the more recent case of ***Rafael Arsenio S. Dizon, in his capacity as the Judicial Administrator of the Estate of the deceased Jose P. Fernandez vs. Court of Tax Appeals and Commissioner of Internal Revenue, G.R. No. 140944, April 30, 2008,***[24] the Supreme Court had the occasion to explicate the significance of the formal offer of evidence, in this wise:

> "While the CTA is not governed strictly by technical rules of evidence, as rules of procedure are not ends in themselves and are primarily intended as tools in the administration of justice, the presentation of the BIR's evidence is not a mere procedural technicality which may be disregarded considering that it is the only means by which the CTA may ascertain and verify the truth of BIR's claims against the Estate. The BIR's failure to formally offer these pieces of evidence, despite CTA's directives, is fatal to its cause. Such failure is aggravated by the fact that not even a single reason was advanced by the BIR to justify such fatal omission. This, we take against the BIR."

Relevant thereto, in ***Interpacific Transit, Inc. vs. Aviles, G.R. No. 86062, June 6, 1990, 186 SCRA 385,***[25] the Supreme Court even clarified the distinction between *identification* of documentary evidence and its *formal offer* as an exhibit. The first is done in the course of the trial and is accompanied by the marking of the evidence as an exhibit. The second is done only when the party rests its case and *not before.* The mere fact that a particular document is identified and marked as an exhibit does not mean it will be or has been offered as part of the evidence of the party. The party may decide to formally offer it if it believes this will advance its cause, and then again it may decide not to do so at all.

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[24] Ponencia of Associate Justice Antonio Eduardo B. Nachura, Third Division.
[25] Ponencia of Associate Justice Cruz, First Division.

Applying the foregoing jurisprudence in the case at bench, the pieces of respondent's documentary evidence which may have been identified and marked as exhibits during pre-trial or trial, or attached to the records of this case, but which were not formally offered in evidence, cannot in any manner be looked into in the resolution of the issues raised in this case. Neither can such unrecognized proof be assigned any evidentiary weight and value.

It must be stressed that there is a significant distinction between identification of documentary evidence and its formal offer. The former is done in the course of the pre-trial, and trial is accompanied by the marking of the evidence as an exhibit; while the latter is done only when the party rests its case. The mere fact that a particular document is identified and marked as an exhibit does not mean that it has already been offered as part of the evidence. It must be emphasized that any evidence which a party desires to submit for the consideration of the court must formally be offered by the party, pursuant to Section 34, Rule 132 of the Revised Rules on Evidence; otherwise, it is excluded and rejected.

In the past however, it appears that in the case of ***Vda. De Oñate vs. Court of Appeals,***[26] the Highest Court relaxed the foregoing rule and allowed evidence, not formally offered, to be considered on condition that: (1) evidence must have been identified by testimony duly recorded; and (2) it must have been incorporated in the records of the case.

Thus, We look into the evidence presented by respondent, the oral testimony of Josephine D. Madera, Revenue Officer-National Investigation

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[26] G.R. No. 116149, November 23, 1995, 250 SCRA 283.

Division of the BIR, who testified by way of Judicial Affidavits dated October 5 and 25, 2006,[27] and specific documents which she identified therein that are attached to the docket of this case.

In her affidavits, she identified the following attached documents, to wit: Memorandum for the Commissioner dated November 21, 2000,[28] Memorandum for the Deputy Commissioner dated November 15, 2001,[29] various In and Out Receipts,[30] Security Movement Report,[31] and Letter of Instruction signed by a certain Jerry Go.[32]

A perusal of the identified "In and Out Receipts" shows that these were issued to a certain Jerry with the surnames of Ong , Ng, Go, with the exception of "Out" Receipt No. 0060154 issued by Eastern Securities Development Corporation showing delivery of BW Resources Corporation shares to Jerry Ocier on September 3, 1999. Nevertheless, the latter receipt is a mere photocopy and therefore without evidentiary value.

In the Memorandum for the Commissioner dated November 21, 2000, and Memorandum for the Deputy Commissioner of the Legal and Inspection Group of the Bureau of Internal Revenue dated November 15, 2001, it was mentioned therein that the subject over-the-counter transfers involve Jerry Ocier, Jerry O. Ng and Jerry Go, who are allegedly one and the same as evidenced by the attached client's information form and an officer (Vice-President) of Eastern Securities. Notably however, this client information was

[27] Docket, pp. 209-214 and 231-234, respectively.
[28] Ibid., at pp. 215-216.
[29] Id., at pp. 217-230.
[30] Id., at pp. 221-225, 227.
[31] Id., at p. 226.
[32] Id., at p. 228.

never presented and the Court cannot make a proper determination of the veracity of such conclusion.

Moreover, in the first Memorandum, the tax base was discussed as follows:

> "In determining the tax base, Sec. 6(a)(2) of Revenue Regulations 2-82, dated March 29, 1982, was used, which provides-
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> > *In the case of shares not traded through the stock exchange, but listed in one or more stock exchanges, the* ***highest closing price*** *on the day when the shares are sold, transferred or exchanged, shall be the "fair market value". When no sale is made in any stock exchange, the highest closing price on the day nearest to the day of sale, transfer or exchange of the shares shall be the fair market value.*
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> In Sec. (b)(1) the same revenue regulations, the first-in, first-out (FIFO) method was used in computing the cost of the shares, which is the **highest closing price** at the time of transfer in, since proper identification can not be applied."

Gleaned from the foregoing, proper identification of the shares admittedly could not be applied, and therefore, the revenue examiners of respondent had to resort to the provisions of Section (6)(a)(2) of Revenue Regulations No. 2-82, in computing the costs of supposed transferred shares, which is the "highest closing price at the time of transfer".

Thus, to be able to apply the aforequoted accounting principles invoked by respondent, We must be able to determine, using the documentary evidence identified by respondent's witness, what was the highest closing price of BW shares at the time of the supposed transfers, as well as the supposed sales transactions that led to the imposition of the subject assessments.

A careful and thorough evaluation of the testimony of respondent's witness and the documents she identified readily yields a negative answer.

Although in the Memorandum dated November 15, 2001, it was stated therein that the requisites under Section 228 of Republic Act no. 8424 as implemented by Revenue Regulations No. 12-99, that assessment state the factual and legal bases were fully satisfied with, whereby annexes and details of discrepancies attached to the assessment received furnished all the necessary information in compliance with the said regulations, presenting the important points of the taxable over-the-counter transactions, the said annexes were never presented nor formally offered in evidence by respondent.

Thus, We cannot determine with reasonable certainty the legal and factual basis of respondent's assessment, as there was neither a clear showing of an actual sale of shares of stock, nor evidence to support its basis for computing the subject assessments.

Respondent's reliance on BIR Ruling No. 168-98 as basis for considering the transaction as one involving sale is erroneous. In that ruling, respondent did not resolve the proper taxation treatment of securities borrowing and lending transactions. In fact, no revenue regulations were cited, much less promulgated to prescribe the guidelines and conditions for the tax treatment of securities borrowing and lending transactions. It was only on June 23, 2006 that Revenue Regulations No. 10-06[33] was promulgated to

[33] Subject: "Prescribing the Guidelines and Conditions for the Tax Treatment of Securities Borrowing and Lending Transactions Involving Shares of Stocks or Securities Listed in the Philippine Stock Exchange".

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govern such transactions. As stated in Section 1 thereof, Revenue Regulations No. 10-06 was promulgated pursuant to Sections 244[34] and 245[35] of the NIRC of 1997. As a revenue regulation intended to govern those affected, it became effective on August 3, 2006, fifteen (15) days after its publication in the newspaper Manila Bulletin on July 19, 2006. Consequently, petitioner cannot be bound by the rules contained therein as the same cannot be given retroactive effect pursuant to Section 246[36] of the NIRC of 1997.

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[34] **Section 244.** *Authority of Secretary of Finance to Promulgate Rules and Regulations.* - The Secretary of Finance, upon recommendation of the Commissioner, shall promulgate all needful rules and regulations for the effective enforcement of the provisions of this Code.

[35] **Section 245.** *Specific Provisions to be Contained in Rules and Regulations.* - The rules and regulations of the Bureau of Internal Revenue shall, among other things, contain provisions specifying, prescribing or defining:

(a) The time and manner in which Revenue Regional Director shall canvass their respective Revenue Regions for the purpose of discovering persons and property liable to national internal revenue taxes, and the manner in which their lists and records of taxable persons and taxable objects shall be made and kept;

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(d) The conditions to be observed by revenue officers respecting the institutions and conduct of legal actions and proceedings;

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(g) The manner in which revenue shall be collected and paid, the instrument, document or object to which revenue stamps shall be affixed, the mode of cancellation of the same, the manner in which the proper books, records, invoices and other papers shall be kept and entries therein made by the person subject to the tax, as well as the manner in which licenses and stamps shall be gathered up and returned after serving their purposes;

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(i) The manner in which tax returns, information and reports shall be prepared and reported and the tax collected and paid, as well as the conditions under which evidence of payment shall be furnished the taxpayer, and the preparation and publication of tax statistics;

(j) The manner in which internal revenue taxes, such as income tax, including withholding tax, estate and donor's taxes, value-added tax, other percentage taxes, excise taxes and documentary stamp taxes shall be paid through the collection officers of the Bureau of Internal Revenue or through duly authorized agent banks which are hereby deputized to receive payments of such taxes and the returns, papers and statements that may be filed by the taxpayers in connection with the payment of the tax: *Provided, however,* That notwithstanding the other provisions of this Code prescribing the place of filing of returns and payment of taxes, the Commissioner may, by rules and regulations require that the tax returns, papers and statements and taxes of large taxpayers be filed and paid, respectively, through collection officers or through duly authorized agent banks: *Provided, further,* That the Commissioner can exercise this power within six (6) years from the approval of Republic Act No. 7646 or the completion of its comprehensive computerization program, whichever comes earlier: *Provided, finally,* That separate venues for the Luzon, Visayas and Mindanao areas may be designated for the filing of tax returns and payment of taxes by said large taxpayers.

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[36] **Section 246.** *Non- Retroactivity of Rulings.* - Any revocation, modification or reversal of any of the rules and regulations promulgated in accordance with the preceding Sections or any of the rulings or

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This Court is not unmindful of the principle that assessments are *prima facie* presumed correct and made in good faith; that it is the taxpayer that has the duty of proving otherwise; and in the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed.

Considering however that the subject assessments are being contested by petitioner, it becomes incumbent upon respondent to present sufficient evidence in support thereof, most especially that respondent's computation of subject tax deficiencies were not based on clear cut evidence, because respondent's examiners had to resort to certain accounting methods and principles to arrive at the same, to wit: the first-in first out method in computing the cost of the subject shares of stock, and the "highest closing price" at the time of transfer, to arrive at the "fair market value" of the same, because admittedly, proper identification could not be applied.

To reiterate, applying the principle enunciated in the case of ***Rafael Arsenio S. Dizon, in his capacity as the Judicial Administrator of the Estate of the deceased Jose P. Fernandez vs. Court of Tax Appeals and Commissioner of Internal Revenue***,[37] respondent's failure to submit sufficient evidence to establish the propriety and legality of the assailed Decision and Assessment Notices, as there was no evidence formally offered in his behalf, is fatal to his case.

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circulars promulgated by the Commissioner shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers, except in the following cases:
(a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;
(b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or
(c) Where the taxpayer acted in bad faith.

[37] Supra.

In view of the foregoing discussion, the resolution of other related issues, such as whether the transaction between petitioner and Dante Tan is considered a sale of shares of stocks or stock loan, and whether or not petitioner filed a criminal case against Dante Tan, becomes irrelevant. Hence, the Court declines to resolve the same.

WHEREFORE, premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, respondent's Decision dated March 10, 2003, is **REVERSED AND SET ASIDE**. The Final Assessment Notice Nos. BW-99-CGT-0040-01 and BW-99-DST-0041-01, both dated September 10, 2001, assessing petitioner for deficiency CGT and DST in the amounts of P17,862,848.21 and P71,703.76, respectively, inclusive of interest, surcharge and compromise penalty for taxable year 1999 is hereby ordered **CANCELLED**.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

JUANITO C. CASTANEDA, JR.
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ATTESTATION

I attest 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.

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

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, 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.

ERNESTO D. ACOSTA
Presiding Justice