REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

FIRST DIVISION

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

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8480

Members:

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

Promulgated:

JUN 20 2016, 10:00 a.m.

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AMENDED DECISION

DEL ROSARIO, P.J.:

This resolves petitioner's **"MOTION FOR RECONSIDERATION"** filed on November 13, 2015, and **"ADDITIONAL AUTHORITIES & ARGUMENTS (IN SUPPORT OF MOTION FOR RECONSIDERATION WITH MOTION FOR LEAVE TO FILE AND TO ADMIT)"** [1] filed on January 15, 2016, with respondent's **"MANIFESTATION & COMMENT"** posted on March 8, 2016 stating that she is adopting the factual findings and legal conclusions of all the members of this Court in its Decision dated October 29, 2015 as part of her comment/opposition to petitioner's aforesaid "Motion for Reconsideration" and "Additional Authorities & Arguments".

In its Motion, petitioner prays that the Court reconsider the assailed Decision promulgated on October 29, 2015 and render another Decision holding that the alleged deficiency Value-Added Tax

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[1] Admitted into the records of the case in the Resolution dated April 1, 2016.

(VAT) and Documentary Stamp Tax (DST) assessments against petitioner for taxable year 2008 including surcharges and interest penalties be cancelled and withdrawn, and the matter be deemed closed and terminated.

The dispositive portion of the assailed Decision reads:

> "**WHEREFORE**, premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the assessments for deficiency VAT and DST for January to December 2008 are hereby **UPHELD**. Petitioner Tulay sa Pag-Unlad, Inc. is hereby **ORDERED TO PAY** respondent the amount of ₱77,630,341.30, inclusive of the fifty percent (50%) surcharge provided under Section 248(B) of the NIRC of 1997, as amended, computed, as follows:

Tax Type	Basic Tax Due	50% Surcharge	Total
Value-Added Tax	₱ 48,103,630.20	₱ 24,051,815.10	₱ 72,155,445.30
Documentary Stamp Tax	5,474,896.00	0.00	5,474,896.00
Total	**₱ 53,578,526.20**	**₱ 24,051,815.10**	**₱ 77,630,341.30**

> In addition, petitioner is hereby ordered to pay delinquency interest at the rate of twenty percent (20%) per annum on the total amount due of ₱77,630,341.30, computed from April 28, 2012, until full payment thereof pursuant to Section 249(C)(3) of the NIRC of 1997, as amended.
>
> **SO ORDERED.**"

In support thereof, petitioner contends that its microfinance loans are not subject to DST pursuant to Section 179 of the National Internal Revenue Code (NIRC) of 1997, as amended.

Petitioner also posits that the imposition of VAT on petitioner will destroy microfinance for the underprivileged. Petitioner asserts that the term "other non-bank financial intermediaries" mentioned in Section 4.109-1(B)(I)(W) of Revenue Regulation (RR) No. 16-2005, as amended by RR No. 4-2007, under the title "VAT Exempt Transaction" is a broad term as the said RR did not define "other non-bank financial intermediaries" and merely added the words "such as money changers and pawnshops" as examples. The said RR's use of the words "such as" meant that the mention of money changers and pawnshops was not intended to be exclusive.

Petitioner further contends that it is not engaged in any commercial lending activity and performs only a social lending activity as it imposes nominal interest rates with no form of collateral.

Petitioner also argues that the passage of RA No. 10693[2] solidifies petitioner's position that a microfinance Non-Government Organization (NGO) is *sui generis*. Petitioner claims that as a microfinance NGO, which lends money to the poor without collateral, it is a class of its own, separate and distinct from the definition of "lending investor" pursuant to Section 4.108-3 (g) of RR No. 16-2005 which defines the term to include "all persons other than banks, non-bank financial intermediaries, finance companies and other financial intermediaries not performing quasi-bank functions who make a practice of lending money to themselves or others with interest."

With regard to the imposition of the fifty percent (50%) surcharge, petitioner cites *Commissioner of Internal Revenue vs. Air India and the Court of Tax Appeals,*[3] and claims that negligence whether slight or gross, is not equivalent to fraud which amounts to intentional wrong doing with the sole object of avoiding the tax. Petitioner further argues that fraudulent payment of taxes can never be presumed.

The Court finds that aside from its objection against the imposition of the fifty percent (50%) surcharge, the contentions presented in the Motion are mere reiteration or amplification of the arguments raised by petitioner in its Petition for Review[4] filed on April 27, 2012 and in its Memorandum[5] filed on May 15, 2015, all of which were duly considered in the assailed Decision.

Petitioner's microfinance loans are subject to Documentary Stamp Tax

Petitioner's argument that microfinance loans are not subject to DST is untenable.

Petitioner presented the testimony of Ms. Eleanor S. So, petitioner's Corporate Operating Officer (COO) in evidence to allegedly support its exemption from DST by testifying on the Pamphlet,[6] and Annual Reports[7] on February 26, 2013.[8] The Court

[2] Republic Act No. 10693- An Act Strengthening Nongovernment Organizations (NGOs) Engaged In Microfinance Operations For The Poor
[3] G.R. No. 72443, January 29, 1988.
[4] *CTA Docket*, pp. 6-23.
[5] *CTA Docket*, pp. 519-543.
[6] Exhibit "J".
[7] Exhibits "K", "L", "M" and "N".

reiterates its position in the assailed Decision that there is nothing on record to show that the loan agreements extended by petitioner to its borrowers were not utilized for business or resale, barter or hire of a house, lot, motor vehicle, appliance or furniture and that they were employed for the borrower's personal use or for their family in order that the loan agreements subject of this case be classified as exempt from DST pursuant to Section 180 of the NIRC of 1997, as amended.[9] The testimony of Ms. Co, albeit not refuted by respondent, failed to confirm that the various loan agreements executed by petitioner and its borrowers are within the exception under the aforecited provision of law.

As it is settled in our jurisdiction that all presumptions are in favor of the correctness of tax assessments and the burden of proof is on the taxpayer to show the contrary;[10] petitioner's failure to discharge this burden is fatal to its cause.

Republic Act No. 10693 is not applicable

Petitioner's argument that it is exempt from VAT and DST because it falls under the definition of microfinance NGOs under RA No. 10693 is unmeritorious.

Undeniably, microfinance NGOs under Section 20 of RA No. 10693 enjoy a preferential tax of two percent (2%) based on its gross receipts:

> SEC. 20. *Taxation of Microfinance NGOs.* – A duly registered and accredited Microfinance NGO shall pay a two percent (2%) tax based on its gross receipts from microfinance operations in lieu of all national taxes: *Provided,* That preferential tax treatment shall be accorded only to NGOs whose primary purpose is microfinance and only on their microfinance operations catering to the poor and low-income individuals in alignment with the main goal of this Act to alleviate poverty. The non-microfinance activities of Microfinance NGOs shall be subject to all applicable regular taxes.

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[8] Minutes of the Hearing dated February 26, 2013, vol. 1, *CTA Docket,* p. 283; TSN, February 26, 2013, p. 10.

[9] Section 180. *Stamp Tax on All Bonds, Loan Agreements, Promissory Notes, Bills of Exchange, Drafts, Instruments and Securities Issued by the Government or Any of its Instrumentalities, Deposit Substitute Debt Instruments, Certificates of Deposits Bearing Interest and Others Not Payable on Sight or Demand.* – xxx Provided, however, That loan agreements or promissory notes the aggregate of which does not exceed Two hundred fifty thousand pesos (P250,000) executed by an individual for his purchase on installment for his personal use or that of his family and not for business, resale, barter or hire of a house, lot, motor vehicle, appliance or furniture shall be exempt from the payment of the documentary stamp tax provided under this Section.

[10] *Collector of Internal Revenue vs. Bohol Land Transportation Co.*, G.R. Nos. L-13099 and L-13462, April 29, 1960.

xxx xxx xxx

While the Court agrees that accredited Microfinance NGOs are currently granted a preferential tax rate of two percent (2%) in lieu of all national taxes, the law -- RA No. 10693 -- upon which it is based, was passed only on November 3, 2015 while the disputed assessment covers taxable year 2008. Since there is no indication in the law that the beneficial tax provision under Section 20 may be given retroactive effect, the same may not be applied to petitioner.

Imposition of fifty percent (50%) surcharge is unfounded

The Court, however, after careful deliberation, reconsiders its earlier Decision insofar as it upheld the imposition of the fifty percent (50%) surcharge against petitioner.

Section 248 (B) of the NIRC of 1997, as amended provides:

"Section 248. *Civil Penalties.* –

xxx xxx xxx

(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."

In *Commissioner of Internal Revenue vs. Japan Air Lines, Inc.* (*JAL case*),[11] the Supreme Court emphasized the importance of proving fraud to justify the imposition of the fifty percent (50%) surcharge since willful neglect to file the tax return is not presumed, *viz*:

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

Noteworthy is that while the imposition of the 50% surcharge was indicated on the FAN[12] which was imposed accordingly pursuant to Section 248 (B) of the NIRC of 1997, as amended, respondent, however, failed to submit any proof before this Court to justify the imposition of surcharge as required in the *JAL case*. Consequently, petitioner is only liable for twenty-five percent (25%) surcharge pursuant to Section 248 (A) of the NIRC of 1997,[13] as amended.

WHEREFORE, in light of the foregoing, petitioner's **"MOTION FOR RECONSIDERATION"** is **PARTIALLY GRANTED**. The fifty

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[11] G.R. No. 60714, October 4, 1991.
[12] Exhibit "R"; BIR Records, p. 423.
[13] "Section 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:
>
> (1) Failure to file any return and pay the tax due thereon as required under the provisions of this Code or rules and regulations on the date prescribed; or xxx"

percent (50%) surcharge imposed in the Decision promulgated on October 29, 2015 is **REDUCED** to twenty-five percent (25%). The dispositive portion of the assailed Decision is hereby accordingly **MODIFIED** to read as follows:

"**WHEREFORE**, premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the assessments for deficiency VAT and DST for January to December 2008 are hereby **UPHELD**. Petitioner Tulay sa Pag-Unlad, Inc. is hereby **ORDERED TO PAY** respondent the amount of ₱65,604,433.75 computed, as follows:

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

In addition, petitioner is hereby ordered to pay delinquency interest at the rate of twenty percent (20%) per annum on the total amount due of ₱65,604,433.75 computed from April 28, 2012, until full payment thereof pursuant to Section 249(C)(3) of the NIRC of 1997, as amended."

SO ORDERED."

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

WE CONCUR:

ERLINDA P. UY
Associate Justice

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

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice