Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

FIRST DIVISION
****

EDUARDO LIM, JR.,
Petitioner,

C.T.A. CASE NO. 6943

- versus -

Members:

ACOSTA, *Chairperson*
BAUTISTA, *and*
CASANOVA, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
OCT 15 2008 ; 10:30 am

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DECISION

CASANOVA, *J.*

Before Us is a Petition for Review filed by Mr. Eduardo Lim, Jr. seeking that judgment be rendered reversing and setting aside the Decision of the Commissioner of Internal Revenue dated March 10, 2004 finding petitioner liable for deficiency Capital Gains Tax and Documentary Stamp Tax in the amounts of P125,491,899.23 and P362,443.61, respectively, for sales of his shares of stock of Best World Resources Corporation, Inc.

THE FACTS

Petitioner is Mr. Eduardo Lim, Jr., single, a resident of 176 Swallow Drive, Green Meadows Subdivision, Quezon City.[1]

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

On June 28, 2001, petitioner received a copy of the Formal Letter of Demand and Assessment Notice from the Bureau of Internal Revenue (BIR) advising him to pay deficiency assessment relative to his alleged "Over-the-Counter" sales/transaction of his Best World Resources shares of stocks (BW shares)[2] with the following details:[3]

Assessment No. BW-99-CGT-0022-01[4]

A. DEFICIENCY CAPITAL GAINS TAX

Sales	P 745,495,000.00
Less: Cost	61,895,527.26
Net Taxable Gains	P 683,599,472.74
Capital Gains Tax Due (Sec. 24C)	P 68,354,947.27
Less: Capital Gains Tax Paid	0.00
Basic Deficiency Capital Gains Tax Due (Sec. 24C)	P 68,354,947.27
Add: 50% surcharge (non-filing/non-payment) (Sec 248B)	34,177,473.64
20% interest in various transactions up to 4-15-00 (Sec. 249)	8,146,961.25
20% interest from 4-16-00 to 5-15-01 (21.67%)	14,812,517.07
Total Deficiency Capital Gains Tax Due	**P 125,491,899.23**

Assessment No. BW-99-DST-0023-01[5]

B. DEFICIENCY DOCUMENTARY STAMP TAX

Total Volume of BW shares Transferred Via EQ Trade of PCDI with Change in Beneficial Ownership	26,305,000.00
Par value	1.00
Taxable Base	P 26,305,000.00
DST Rate Applicable (Sec. 176)	P 1.50/P200.00
DST Due	P 197,287.50

[1] Transcript of Stenographic Notes (TSN), November 25, 2004, pp. 4-5.
[2] Joint Stipulation of Facts and Issues (JSFI), Rollo, p. 90.
[3] Bureau of Internal Revenue (BIR) Records, pp. 178-186.
[4] Ibid.
[5] Ibid.

DST Paid	0.00
Basic Deficiency Documentary Stamp Tax	P 197,287.50
Add: 50% surcharge (non-filing/non-payment) (Sec 248B)	98,643.75
20% interest n various transactions up to 3-15-01 (Sec. 249)	59,942.69
20% interest from 3-16-01 to 5-15-01 (3.33%) (Sec. 249)	6,569.67
Total Deficiency Capital Gains Tax Due	**P 362,443.61**

The Formal Letter of Demand contained annexes which show that petitioner's brokers, Asiasec Equities, Inc., Belson Securties, Inc. and Mark Securities Corporation, sold 325,000, 980,000, and 25,000,000 shares, respectively, allegedly on petitioner's instructions. These transactions were used as basis in computing for the assessed deficiency Capital Gains Tax (CGT) and Documentary Stamp Tax (DST), shown in the following computations:[6]

Date	Broker	Sales OR#	Vol.	CGT Due	CGT Paid	Basic CGT	50% Surch.	Interest	Total Pen.	Total Def. CGT
28-99	Asiasec Eq.	10712	325,000	1,468,875.00	-	1,468,875.00	734,437.50	136,278.96	870,716.46	2,339,591.4
08-11-99	Belson	1240	25,000,000	65,217,132.27	-	65,217,132.27	32,608,566.14	7,752,997.95	40,361,564.09	105,578,696.3
06/07/99	Mark Sec. Corp.	1905	980,000	1,668,940.00	-	1,668,940.00	834,470.00	257,684.34	1,092,154.34	2,761,094.3
				68,354,947.27	-	68,354,947.27	34,177,473.64	8,146,961.25	42,324,434.89	

Summary of Taxable Gross Gain & corresponding Def. CGT

TOTAL DEF. CGT	**P 110,679,382.1**
Add: Interest (4/16/2000- 5/15/2001) (21.67%)	**14,812,517.0**
TOTAL DEF. CGT DUE	**P 125,491,899.2**

Date	Broker	Out Receipts	Vol./ Basis	Par Val.	Basis	DST Rate	DST Due	50% Surch.	Interest	Total Amount Due
09-28-99	Asiasec Eq.	10712	325,000	1.00	325,000.00	0.0075	2,437.50	1,218.75	697.36	4,353.61
08-11-99	Belson	1240	25,000,000	1.00	25,000,000.00	0.0075	7,350.00	3,675.00	2,470.33	13,495.33
06/07/99	Mark Sec. Corp.	1905	980,000	1.00	980,000.00	0.0075	187,500.00	93,750.00	56,775.00	338,025.00
					26,305,000.00		197,287.50	98,643.75	59,942.69	355,873.94

TOTAL DEF. DST	**P 355,873.94**
Add: Interest (3/16/2000- 5/15/2001) (3.33%)	**6,569.67**
TOTAL DEF. DST DUE	**P 362,443.61**

[6] Ibid.

Petitioner, in a letter to the Commissioner of Internal Revenue dated July 30, 2001, protested the above mentioned assessments on the ground that he never sold his BW shares of stocks. Specifically on the 25M BW shares, petitioner alleged that these were pledged to Mr. Dante Tan. Petitioner attached the following documentary evidence to his letter as proof: (a) pledge agreement; (b) promissory note; and (c) authority to transfer.[7]

Petitioner's documents allegedly show that on August 10, 1999, petitioner executed a promissory note[8] in favor of Mr. Dante Tan to secure a personal loan in the amount of P81,660,914.20. On the same day, as added security, petitioner executed a pledge agreement[9] in favor of Mr. Dante Tan over his 25,000,000 (25M) BW shares.

Pursuant to the pledge agreement, petitioner supposedly instructed his broker, Belson Securities, Inc. to transfer its 25M BW shares to Quality Services, Inc., for the account of Mr. Dante Tan.[10] However, upon petitioner's receipt of respondent's Formal Letter of Demand, it came to his attention that there was a transfer of his share to a certain Mr. Lucio Co.[11] Hence, on August 17, 2001, petitioner filed a Complaint with the Regional Trial Court, National Capital Region, Quezon City, against Dante Tan, Quality Investments & Securities Corporation and Lucio Co for the annulment of sale on the 25M BW shares of

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[7] Exhibit "D", Rollo, pp. 21-29.
[8] Exhibit "A", Rollo, p. 17.
[9] Exhibit "B", Rollo, pp. 18-19.
[10] Exhibit "C", Rollo, p. 115.
[11] TSN, November 25, 2004, p. 18.

stocks.[12] In said complaint, petitioner stated that as far as he was concerned, he transferred his shares only to Mr. Dante Tan and that he did not authorize its transfer to any other party.

On March 15, 2004, petitioner received a copy of the decision of herein respondent, denying his administrative protest, on the ground that there was a transfer of shares pursuant to Section 24 (C) of the 1997 National Internal Revenue Code (NIRC), as amended. Respondent in arriving at such conclusion relied on the following documents:[13]

a. Out Receipt No. 1240 indicating the transfer of the BW shares from the Belson Securities account of petitioner to Quality Investment and Security Corporation (QIS) account to Lucio Co;

b. In Receipt No. 46834 indicating the transfer of the BW shares to the account of Lucio Co; and

c. The Customer Ledgers or Statement of Accounts of petitioner and Lucio Co.

In view of the denial of his administrative protest, petitioner filed the Petition for Review before Us on April 14, 2004.

Shortly thereafter, to further establish his right over the 25M BW shares, petitioner filed a Complaint-Affidavit on May 6, 2004 before the Department of Justice for Estafa against Dante Tan, Benjamin Y. Cu, Teresita P. Cu, Rosa Y. Cu and Lucio Co.[14]

[12] Exhibit I, Rollo, pp. 34-39.
[13] Petition for Review, Par. 5, Rollo, p. 3.
[14] Exhibit J, Rollo, pp. 130-137.

On June 1, 2004, respondent in his Answer interposed the following Special and Affirmative Defenses, to wit:

> "5. Petitioner seeks to set aside thru this instant [p]etition 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 his BW shares on the following grounds to wit: (1) that the decision (denying petitioner's written protest) is bereft of factual basis as petitioner never authorized the transfer of his BW shares to Mr. Lucio Co; (2) the Commissioner violated petitioner's right to due process; (3) petitioner can not be held liable for documentary stamp taxes as no document of sale was executed by him; (4) petitioner failed to present clear and convincing proof of fraud as required by the Tax Code; and (5) the written protest was timely filed;
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> 6. On the first issue, it is beyond dispute that the BW shares subject of controversy were actually transferred. Proper documentation was done to establish this fact using pertinent documents, such as, Out Receipts with attached Letter of Instruction executed by petitioner as well as the In Receipts of the contra broker and the Ledger or Statement of Account. The Out Receipt with the corresponding number 1240 was used to transfer the 25,000,000 BW shares from Belson Securities Inc., in the account of petitioner, Eduardo Lim, Jr[sic], to Quality Investment Securities for the account of Mr. Lucio Co with the corresponding In Receipt number 46834. This transfer was further verified through the Customer Ledger or Statement of Accounts of petitioner. Per records, petitioner authorized Belson Securities Inc., to transfer his 25,000,000 BW shares to Quality Securities for the account of Dante Tan. However, upon verification from the receiving broker, it was disclosed that the shares were not transferred or credited to the account of Mr. Dante Tan but rather to the account of Mr. Lucio Co. There being change of beneficial ownership as a result of the transfer, the resultant tax consequence is expressly provided under Section 24 (4) of the Tax Code;
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> 7. On the second issue, petitioner was fully apprised of the law and facts upon which the questioned assessments were based contrary to his allegations in the [p]etition. He was informed of the facts and the law as evidenced by the annexes which were attached to the Assessment Notice. This includes the Computation of the Deficiency Capital Gains and Documentary Stamp Tax

covering his Over the Counter Transaction as well as the Details of Discrepancies of the assessments. To our mind, the above-mentioned documents or attachments completely informed petitioner of the factual and legal bases of the assessment;

8. On the third issue, petitioner posited the view that he can not be held liable for the Documentary Stamp Tax as no document of sale was ever executed. [We disagree]. As mentioned in the memorandum which was prepared by the task force that conducted the investigation, the trading is not done in the trading floor but directly settled between two counter-parties. The Philippine Central Depository, aside from being a depository, is a place where settlement of securities takes place. It utilizes [scripless] trading. In the [scripless] trading, settlement is carried out via [Book Entry System or BES]. BES is a system used to record the ownership of shares. When a trade is done at the Philippine Stock Exchange, securities are moved via electronic debit and credit of participant's securities account to effect settlement. There is no need for physical movement of stock certificate (scrip) between buyer or seller. Well settled is the rule that a documentary stamp tax is an excise tax, the purpose of which is to raise revenue. In *Philippine Home Assurance Corporation et al. vs. Court of Appeals,* G.R. No. 119446, 21 January 1999, the Honorable Supreme Court explicitly ruled that '*while it is true that a documentary stamp tax is levied on the document and not on the property involved, the documentary stamp tax is not intended to be a tax on the document alone. The law taxes the document because of the transaction so that the tax becomes due and payable at the time the transaction is had or accomplished, which in this case, is at the time of the issuance of the document.*" '

9. Petitioner also questioned the propriety of the imposition of the 50% surcharge as fraud penalty on the ground that the Commissioner failed to present clear and convincing proof of fraud. The circumstances attendant to this case indicate that petitioner's willful neglect to file the corresponding returns within the time prescribed by law was due to fraud with intent to evade the payment of the corresponding tax due. Petitioner's failure to report his substantial gain derived from the transfer of shares is a palpable attempt to evade his tax liabilities. His failure to file returns can not be imputed as an honest mistake. Accordingly, the imposition of 50% surcharge as fraud penalty is consistent with the provision of the law and therefore justified;

> 10. Lastly, petitioner argued that his written protest dated July 30, 2001 was timely filed. To evidence his allegation, petitioner in the instant [petition] attached a copy of his written protest alleged to have been sent to the BIR thru registered mail on the same date appearing in the letter. Despite this allegation, herein respondent Commissioner is not convinced that petitioner filed his written protest within the period required under the law. Petitioner received the Assessment Notices on 28 June 2001. Petitioner has thirty days from 28 June 2001, or until 28 July 2001, within which to dispute the assessment. However, July 28, 2001 being a Saturday (legal holiday), the written protest may be filed on the next business or working day, which [sic] 30 July 2001. However, the BIR records reveal that the written protest filed by petitioner was received by the Commissioner only on 08 August 2001, or nine (9) days after the lapse of the period within which to protest or dispute the assessments under the law. Obviously, the subject assessments had become final, executory and demandable as a result of petitioner's failure to submit the written protest within the period required by law;
>
> 11. Finally, it is a 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."

To support his claim, petitioner presented testimonies of witnesses and documentary exhibits to prove his arguments of non-sale transfers.

For his part, respondent presented her lone witness, Ms. Josephine Madera, whose testimony was stricken out of records, *via* a Resolution[15] dated December 18, 2007, for witness' continued failure to be present for cross-examination. In the same resolution, respondent was likewise deemed to have terminated her presentation of evidence without having to formally offer any documentary exhibit. On January 7, 2008, petitioner filed its Memorandum,

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[15] Rollo, p. 301.

while respondent did not file any. On March 6, 2008, the instant case was submitted for decision.

THE ISSUES

The parties jointly stipulated the following issues for Our decision:[16]

"1. Whether or not petitioner authorized the transfer of the BW shares to Lucio Co for which he is now being held liable for capital gains and documentary stamp taxes[;]

2. Assuming that the petitioner authorized the transfer of the BW shares to Lucio Co, whether or not petitioner should be held liable for documentary stamp taxes given that no document of sale was ever executed by him[;]

3. Assuming that petitioner authorized the transfer of the BW shares to Lucio Co, whether or not respondent was able to present clear and convincing proof of fraud to merit the imposition upon him of a 50% surcharge on the deficiency capital gains and documentary stamp taxes[;]

4. Whether or not petitioner's right to due process was violated for failure of the respondent to furnish him copies or inform him of the existence of the out receipts and statement of accounts upon which the latter's decision was based[;]

5. Whether or not the assessment for deficiency capital gains tax and documentary stamp tax imposed against petitioner in connection with the sale/transfer of his shares of stocks in BW Resources Corporation through over-the-counter transaction, is proper."

THE COURT'S RULING

The foregoing issues raised can be summed up to the following:

I. Whether petitioner sold the alleged BW shares which would hold him liable to capital gains tax and documentary stamp tax.

[16] Supra, note 5; Rollo, p. 91.

II. Whether petitioner committed fraud in his failure to file his return which would subject him to 50% penalty surcharge on the deficiency capital gains tax and documentary stamp tax.

III. Whether petitioner was denied due process.

I. Whether petitioner sold his BW shares.

With respect to the 25M BW shares, petitioner in his defense, claims that there was no sale that transpired between himself and Mr. Lucio Co because the transaction that he entered into was a pledge agreement with Mr. Dante Tan.

Respondent on the other hand, failed to present any evidence in her behalf.

Under Article 1458 of the Civil Code, a contract of sale is defined in this manner:

> "**Art. 1458**. By the contract of sale, one of the contracting parties obligates himself to **transfer the ownership** of and to deliver a determinate thing, and the other to pay therefore a price certain in money or its equivalent. (Emphasis supplied)
>
> xxx xxx xxx"

A sale is a contract transferring dominion and other real rights in the thing sold. The transfer of ownership here speaks of the intent to divest oneself of ownership, the rights of ownership and possession pertaining to the thing sold ceases and are transferred to the buyer.[17]

On the other hand, a pledge agreement does not speak of divestment of ownership or rights but of security for a loan. It is defined as "an accessory, real

[17] *Titong vs. CA, et. al,* G.R. No. 111141, March 6, 1998.

and unilateral contract by virtue of which the debtor or a third person delivers to the creditor or to a third person movable property as security for the performance of the principal obligation, upon the fulfillment of which the thing pledged, with all its accessions and accessories, shall be returned to the debtor or to a third person."[18] Article 2085 in relation to Article 2093 of the Civil Code gives the following requisites for a contract of pledge:

a. that they be constituted to secure the fulfillment of a principal obligation;

b. that the pledgor be the absolute owner of the thing pledged;

c. that the persons constituting the pledge have the free disposal of their property, and in the absence thereof, that they be legally authorized for the purpose;

d. that the thing pledged be placed in the possession of the creditor or of a third person by common agreement.

It should be remembered that on August 10, 1999, petitioner executed a promissory note with Mr. Dante Tan.[19] As security thereof, he executed the pledge agreement over said BW shares in favor of Mr. Dante Tan,[20] and in order to facilitate the thing pledged in the possession of Mr. Dante Tan, petitioner executed the authority to transfer.[21] Such pledge agreement is valid and existing and was never refuted by the respondent.

As eloquently held by the Supreme Court:[22]

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[18] Civil Law Reviewer, by Desiderio P. Jurado, 19th ed., p. 1018.
[19] Exhibit A.
[20] Exhibit B.
[21] Exhibits C & C-1.
[22] *Caltex (Philippines), Inc., vs. Court of Appeals, et. al,* G.R. No. 97753, August 10, 1992.

> "[t]he character of the transaction between the parties is to be determined by their intention, regardless of what language was used or what the form of the transfer was. If it was intended to secure the payment of money, it must be construed as a pledge; but if there was some other intention, it is not a pledge. However, even though a transfer, if regarded by itself, appears to have been absolute, its object and character might still be qualified and explained by contemporaneous writing declaring it to have been a deposit of the property as collateral security. **It has been said that a transfer of property by the debtor to a creditor, even if sufficient on its face to make an absolute conveyance, should be treated as a pledge if the debt continues in existence and is not discharged by the transfer**, and that accordingly the use of the terms ordinarily importing conveyance of absolute ownership will not be given that effect in such a transaction if they are also commonly used in pledges and mortgages and therefore do not unqualifiedly indicate a transfer of absolute ownership, in the absence of clear and unambiguous language or other circumstances excluding an intent to pledge." (Emphasis supplied)

Article 2112 of the 1987 New Civil Code provides the procedure for discharge of a pledge agreement in the following manner:

> "**Article 2112**. The creditor to whom the credit has not been satisfied in due time, may proceed before a Notary Public to the sale of the thing pledged. This sale shall be made at a public auction, and with notification to the debtor and the owner of the thing pledged in a proper case, stating the amount for which the public sale is to be held. If at the first auction the thing is not sold, a second one with the same formalities shall be held; and if at the second auction there is no sale either, the creditor may appropriate the thing pledged. In this case he shall be obliged to give an acquittance for his entire claim."

No such procedure was performed by Mr. Dante Tan to discharge the pledge agreement. Likewise, there are no stipulations in the pledge agreement that may even be construed as importing conveyance or absolute ownership that may give doubt as to the intention of the parties.

Article 1371 of the Civil Code, states that if there is a doubt as to the intention of petitioner, this can be judged from their contemporaneous and subsequent acts, to wit:

> "**Art. 1371**. In order to judge the intention of the contracting parties, their contemporaneous and subsequent acts shall be principally considered."

Here, upon knowing that his 25M shares of stocks were allegedly sold without his consent or authority, petitioner filed a criminal case against Mr. Dante Tan and Mr. Lucio Co, among others, for estafa[23] and a complaint for annulment of sale[24].

These circumstances taken together bring Us to the conclusion that no sale was intended by petitioner.

It is wise to note that respondent failed to adduce and offer evidence in her behalf. Hence, We cannot find any reason to counter petitioner's claim.

Therefore, finding the real intention of the parties to maintain a pledge agreement and further finding that the same agreement still subsists, respondent's allegation that petitioner is liable for CGT and DST on the sale of 25M BW shares lacks any factual basis.

Going now to petitioner's alleged sale of his 980,000 BW shares transferred by Mark Securities, Inc to A.T. De Castro Securities, Inc., petitioner presented a Certification[25] from Mark Securities to attest that no sale transaction

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[23] Exhibit J.
[24] Exhibit I.
[25] Exhibit "E", Rollo, p. 30.

transpired, but a mere transfer. This is bolstered by petitioner's witness, Ms. Analiza Hernandez, whose testimony[26] is as follows:

> "Ms. Hernandez:
> A: In June 1999 Mr. Eduardo Lim instructed Mark Securities to transfer 980,000 shares BW resources to AP De Castro Securities. We issued a stock debit Memo to effect the transfer to AP De Castro Securities through PCD.
>
> Atty. Chua:
> Q: What is this PCD?
>
> Ms. Hernandez:
> A: PCD is the Philippine Central Depository a provider the depository and settlement system for securities in the system plan.
>
> Atty. Chua:
> Q. How is this settlement plan in the PCD?
>
> Ms. Hernandez:
> A: Settlement is recorded electronically, those recorded electronically rather than the physical movement of certificate.
>
> Atty. Chua:
> Q: You said a while ago that Mark Securities also issued a stock debit memo, what is this stock debit memo?
>
> Ms. Hernandez:
> A: A stock debit memo is a receipt or a memo issued by Mark Securities Corporation to effect the transfer of shares from one broker to another through PCD.
>
> Atty. Chua:
> Q: In this case, why did Mark Securities issued this stock debit memo?
>
> Ms. Hernandez:
> A: Mark Securities issue a stock debit memo for Sir Eduardo Lim to effect the transfer of the shares to AP De Castro Securities.

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[26] TSN, June 28, 2005, pp. 12-15.

Atty. Chua:
Q: You said that Mr. Lim transferred his share to AP De Castro Securities, how would you characterize this transfer or this transaction?

Ms. Hernandez:
A: **Pursuant to the instruction, we just merely facilitate that the transfer of shares to another broker AP De Castro Securities and it was reflected in the Stock Debit Memo 1905 and there was no sales transaction occur.**

Atty. Chua:
Q: You said that no sale transaction occur effective the transfer, do you have any proof that no sale took effect upon such instruction of Mr. Lim?

Ms. Hernandez:
A: **One of the Standard-Operating-Procedure of Mark Securities Corporation is to issue a selling confirmation when there is a sale transaction. For this particular case there was no sale transactions it was just a mere transfer instruction from Mr. Lim and as far as Mark Securities is concerned we just follow his instructions nothing else. And as I can remember we even issued a Certification stating that there was no sale transaction effective on June 1999.** (Emphasis supplied)

xxx xxx xxx"

As regards the alleged sale transfer of petitioner's 325,000 BW shares, petitioner presented Ms. Ma. Aurora Santo Domingo from Asiasec Equities, Inc. She likewise testified that no sale transaction transpired with respect to petitioner's 325,000 BW shares. Her testimony[27] is as follows:

"Atty. Chua:

[27] Ibid. pp. 23-28.

Q. In the performance of your duties and functions, would you know petitioner in this case Mr. Eduardo Lim, Jr.?

Ms. Santo Domingo:
A. Yes.

Atty. Chua:
Q. How do you know Mr. Eduardo Lim, Jr.?

Ms. Santo Domingo:
A. He is the client of Asiasec Equities.

Atty. Chua:
Q. As the client of Asiasec Equities what transactions if any did petitioner has with Asiasec Equities?

Ms. Santo Domingo:
A. He traded various shares of stocks to Asiasec Equities.

Atty. Chua:
Q. What if any were these shares of stocks traded by the petitioner with Asiasec Equities.

Ms. Santo Domingo:
A. Among shares of stocks traded by Mr. Lim were Asiatrust and BWRC.

Atty. Chua:
Q. You said that one of the stocks that have been traded by Mr. Lim was the BWRC shares of stocks, what if any were petitioner's transactions relative to such BWRC stocks?

Ms. Santo Domingo:
A. The Asiasec check records in September 1999 our clients Mr. Lim sent us a letter of instruction to transfer his shares, 325,000 shares of BW to PCCI Securities.

xxx xxx xxx

Atty. Chua:
Q. What if any, happened thereafter?

Ms. Santo Domingo:

A. Following our client's instruction we issued an out receipt to transfer his shares through the PCD.

Atty. Chua:
Q. When you say transfer, what do you mean by the word "transfer"?

Ms. Santo Domingo:
A. The Philippine Central Depositary acts as the custodian of securities represents securities company and its member broker maintains an account with them so in case of a transfer the shares are recorded by bookkeeping and then send as physical delivery. As in this case we prepared an out receipt and through the PCD the transfer was recorded by a bookkeeping entry transferring out the shares from Asiasec and transferring it into the account PCCI.

Atty. Chua:
Q. You said that Asiasec Equities issued an out receipt in this case, what if any, does this out receipt indicate?

Ms. Santo Domingo:
A. It merely effects the transfer of shares from one broker to another there is [sic] no sales transactions was [sic] took effect.

Atty. Chua:
Q. What proof is any do you have to say that there was no sale transaction effective in this transfer?

Ms. Santo Domingo:
A. **In a selling transaction the normal procedure for Asiasec is to issue a sales confirmation and there also a sales contract printed but in this case there was none only an out receipt was issued to the client Mr. Lim to transfer the share from Asiasec Equity**." (Emphasis supplied)

With respondent's failure to cross-examine Ms. Analiza Hernandez and Ms. Aurora Santo Domingo, present evidence in her behalf, and failure to controvert above evidence adduced by petitioner, the latter's arguments are deemed to have been admitted by the respondent.

However, We do not agree that no taxable transaction took place.

Section 24 (C) of the 1997 National Internal Revenue Code (NIRC), as amended, states that:

> "**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) 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. (Emphasis supplied)
>
> xxx xxx xxx"

It is clear from the foregoing that what is being subject to capital gains tax is not just the sale of shares of stocks but any barter, exchange or disposition of shares. Based from the testimonies of petitioner's witnesses there were transfers made based on petitioner's instructions. Although these witnesses likewise testified that the transfers were not sale, they failed to explain the underlying circumstances surrounding the transfers and at the same time controvert that there were other disposition of shares.

For failure of petitioner to satisfactorily refute the findings of the revenue examiners, the presumption of correctness of the assessments subsists. 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 assessments.[28] This Court finds that petitioner failed to build a strong case that will warrant the setting aside of the CGT assessment issued against him concerning the 980,000 and 325,000 BW shares.

With respect to the assessment of deficiency DST, We agree with respondent that petitioner is liable thereto, in relation to the transfers of 980,000 and 325,000 BW shares.

Petitioner alleged that it is not liable for DST considering that no document of sale was ever executed by him.[29] However, it has been held that a documentary stamp tax is a privilege tax because it is really imposed on the privilege to enter into a transaction rather than on the document. The law taxes the document because of the transaction. What is being taxed is the privilege of the petitioner to enter into such a transaction. [30] Hence, when petitioner exercised the privilege of transferring his 980,000 and 325,000 BW shares, he is already subject to DST.

II. Whether petitioner committed fraud in failing to file his return which justifies the imposition of 50% surcharged as penalty.

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[28] *Bonifacio Sy Po vs. Court of Tax Appeals*, 164 SCRA 524.
[29] Petition for Review, Rollo p. 9.
[30] *Traders Royal Bank vs. Commissioner of Internal Revenue*, CTA Case No. 6392, promulgated on April 28, 2004.

Fraud must be actual and not 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 wrong-doing with the sole object of avoiding the tax.[31]

In the instant case, nowhere in the records can We find that petitioner deliberately failed to file his income tax returns for the year covered by the assessment. As shown on respondent's Decision dated March 10, 2004, respondent based the existence of fraud merely on the belief that the surrounding circumstances were fraudulent[32] without further proof of the existence of an intentional wrongdoing with the sole object of evading the tax. Such being the case, We cannot submit to respondent's proposition for the element of fraud is lacking. Accordingly, the imposition of 50% surcharge is without basis.

Nonetheless, due to petitioner's failure to file the corresponding returns and pay the taxes due thereon, the 25% surcharge under Section 248 A(1) of the Tax Code applies.

III. Whether petitioner was denied due process.

In the instant case, it can not be said that petitioner was deprived of due process when he was able to protest the assessment by writing respondent as a

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[31] *CS Garments, Inc. vs. CIR*, CTA Case No. 6520, January 4, 2007.
[32] BIR Records, p. 247.

letter dated July 30, 2001[33]. In such letter petitioner was able to point out that he was not liable to capital gains tax and documentary stamp tax. Being able to contest and point out the facts and the law of his case, petitioner cannot allege that he was denied due process.

WHEREFORE, with the foregoing, the instant Petition for Review is hereby **PARTIALLY GRANTED**. The Decision dated March 10, 2004 of the Commissioner of Internal Revenue is hereby **MODIFIED**. Petitioner is **ORDERED TO PAY** Capital Gains Tax in the amount of P4,988,863.06 and Documentary Stamp Tax in the amount of P15,727.99 on the disposition of his 980,000 and 325,000 BW shares, computed as follows:

DEFICIENCY CAPITAL GAINS TAX

Sales	P 32,995,000.00
Less: Cost	1,566,850.00
Net Taxable Gains	P 31,428,150.00
Capital Gains Tax Due (Sec. 24C)	P 3,132,815.00
Less: Capital Gains Tax Paid	0.00
Basic Deficiency Capital Gains Tax Due (Sec. 24C)	P 3,132,815.00
Add: 25% surcharge (non-filing/non-payment) (Sec 248A)	783,203.75
20% interest in various transactions up to 4-15-00 (Sec. 249)	393,963.30
20% interest from 4-16-00 to 5-15-01 (21.67%)	678,881.01
Total Deficiency Capital Gains Tax Due	**P 4,988,863.06**[34]

[33] Supra, note 7.
[34] As deduced from respondent's Formal Letter of Demand and Assessment Notice (BIR Records, pp. 178-186), the amended computation for deficiency CGT is as follows:

Date	Broker	Sales OR#	Vol.	CGT Due	CGT Paid	Basic CGT	25% Surch.	20%Interest	Total Pen.	Total Def. CGT
09-28-99	Asiasec Eq.	10712	325,000	1,468,875.00	-	1,468,875.00	367,218.75	136,278.96	503,497.71	1,972,372.71
06/07/99	Mark Sec. Corp.	1905	980,000	1,668,940.00	-	1,663,940.00	415,985.00	257,684.34	673,669.34	2,337,609.34
				3,132,815.00	-	3,132,815.00	783,203.75	393,963.30	1,177,167.05	

Summary of Taxable Gross Gain & corresponding Def. CGT

TOTAL DEF. CGT	**P 4,309,982.05**
Add: Interest (4/16/2000- 5/15/2001) (21.67%)	**678,881.01**
TOTAL DEF. CGT DUE	**P 4,988,863.06**

DEFICIENCY DOCUMENTARY STAMP TAX

Total Volume of BW shares Transferred Via EQ Trade of PCDI with Change in Beneficial Ownership	1,305,000
Par value	1.00
Taxable Base	P 1,305,000.00
DST Rate Applicable (Sec. 176)	P 1.50/P200.00
DST Due	P 9,787.50
DST Paid	0.00
Basic Deficiency Documentary Stamp Tax (24C)	P 9,787.50
Add: 25% surcharge (non-filing/non-payment) (Sec 248A)	2,446.88
20% interest n various transactions up to 3-15-00 (Sec. 249)	3,167.69
20% interest from 3-16-00 to 5-15-01 (3.33%) (Sec. 249)	325.92
Total Deficiency Capital Gains Tax Due	**P 15,727.99**[35]

In addition, petitioner is likewise **ORDERED TO PAY** delinquency interest of twenty percent (20%) per annum on the total amount of P5,004,591.05 from April 14, 2004 until fully paid, pursuant to Sections 248 and 249 of the NIRC of 1997, as amended.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

[35] As deduced from respondent's Formal Letter of Demand and Assessment Notice (BIR Records, pp. 178-186), the amended computation for deficiency DST is as follows:

Date	Broker	Out Receipts	Vol./ Basis	Par Val.	Basis	DST Rate	DST Due	25% Surch.	Interest	Total Amount Due
09-28-99	Asiasec Eq.	10712	325,000	1.00	325,000.00	0.0075	2,437.50	609.38	697.36	3,744.24
06/07/99	Mark Sec. Corp.	1905	980,000	1.00	980,000.00	0.0075	7,350.00	1,837.50	2,470.33	11,657.83
					1,305,000.00		9,787.50	2,446.88	3,167.69	

TOTAL DEF. DST	**P 15,402.07**
Add: Interest (3/16/2000- 5/15/2001) (3.33%)	**325.92**
TOTAL DEF. DST DUE	**P 15,727.99**

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
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's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division