REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

GERRY SEVILLA, HERMAN SON, RUBEN TIU, BEN TIU AND JERRY TIU,
Petitioners,

- versus -

C.T.A. CASE NO. 6211

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
OCT 0 4 2004

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DECISION

This petition seeks to cancel and/or withdraw the assessments issued by respondent against the petitioners in the collective amount of Thirty-Six Million Four Hundred Six Thousand and One Hundred Twenty-Five Pesos (P36,406,125.00) for alleged deficiency capital gains tax (inclusive of surcharge & interest) on the sale of the 50,000 shares of stocks of Esteban Realty Corporation owned by petitioners to Seaboard Eastern Insurance Corporation, Jose Halili & Company, et al.

The following are the facts unraveled from the records of the case:

The petition is filed jointly by the petitioners pursuant to Sec. 6 Rule 3 of the Rules of Court on permissive joinder of parties, as the questions of

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law and facts are common to all petitioners therein and arose out of the same transaction, the sale of shares of stock.

All petitioners are Filipino citizens, of legal age, married, and may be served with summons and other court processes through counsel.

Sometime in 1993, petitioners sold a total of 50,000 shares of East Esteban Realty Corporation owned by them to Seaboard Eastern Insurance Corporation, Jose Halili & Company, et al.

After the payment of capital gains taxes due, Director Osmundo Umali of the BIR Revenue Region No. 6 (Manila) issued certifications all dated December 15, 1993 to each of the petitioners. The said certification was issued for registration purposes *(Exhibits F, G, H, I, J)*.

In his letters dated January 28, 1999, respondent ordered petitioners "to shed light on the tax evasion case filed against [them] as per Confidential Information No. 53-98 filed dated 7 December 1998 relative to the underdeclaration of capital gains and the consequential non-payment of the capital gains tax due on [the] sale of 50,000 shares of stocks to Seaboard Eastern Insurance Corporation and Jose Halili & Co., et al. for P62,410,000.00."

In a letter dated March 3, 1999 *(Annex K, Petition for Review)*, which was received by the Tax Fraud Division on March 4, 1999, petitioners objected to allegations that they evaded taxes on account of the sale of the

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East Esteban Realty Corporation shares in 1993. And in a letter dated May 5, 1999 *(Annex L, Petition for Review)*, the Tax Fraud Division informed petitioners of their "point by point rebuttal of [the] reply dated 3 March 1999".

Subsequently, in his letters *(Exhibits 24, 25, 26, 27)* all dated July 6, 1999 which were received by petitioners on August 5, 1999, the Chief of the Tax Fraud Division requested petitioners to appear in an informal conference at the Bureau of Internal Revenue.

On August 10, 1999, the Tax Fraud Division received a letter dated August 9, 1999, wherein petitioners rebutted the May 5, 1999 reply of said Division.

In a letter addressed to petitioners dated December 10, 1999, then BIR Commissioner Beethoven L. Rualo informed them that "[f]or insufficiency of evidence, this Office has decided not to pursue any further your 1993 internal revenue tax cases subject matter of our preliminary notices, all dated July 6, 1999." *(Par. 17 of Stipulation of Facts and Issues; Exhibit K)*

On May 2, 2000, petitioners each received assessment notices *(Exhibits L, L-1, M, M-1, N, N-1, O, O-1, P, P-1)* together with the corresponding demand letters, all of which were signed by Commissioner

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Dakila B. Fonacier. The assessment notices alleged deficiencies in capital gains taxes, inclusive of increments in the following amounts:

Taxpayer	Assessments	Deficiency Capital Gains Tax	Surcharge	Interest	Total
1. Gerry Sevilla	TFD-93-CGT-015-00	P 1,510, 180.00	P 755,090.00	P 2,831,587.50	P 5,096,857.50
2. Herman Son	TFD-93-CGT-016-00	1,510,180.00	755,090.00	2,831,587.50	5,096,857.50
3. Ruben Tiu	TFD-93-CGT-017-00	2,588,880.00	1,294,440.00	4,854,150.00	8,737,470.00
4. Ben Tiu	TFD-93-CGT-018-00	2,588,880.00	1,294,440.00	4,854,150.00	8,737,470.00
5. Jerry Tiu	TFD-93-CGT-019-00	2,588,880.00	1,294,440.00	4,854,150.00	8,737,470.00
	T o t a l	**P10,787,000.00**	**P5,393,500.00**	**P20,225,625.00**	**P36,406,125.00**

The demand letters state that deficiency capital gains taxes were due for the petitioners' "capital gains tax liabilities covering the taxable year 1993".

In a letter dated May 31, 2000 which was received by respondent on even date, petitioners protested the assessments *(Annex Y, Petition for Review)* on the grounds that the assessments are null and void for having been issued:

(1) In complete violation of statutory requirements
   a. No statement of the facts and the law on which the assessments are made.
   b. No basis for imposition of fraud penalty.

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(2) Without due process
  a. No informal conference and preliminary assessment notices.
  b. Taxpayers' 1993 transactions duly cleared and approved.

(3) Beyond the prescriptive period for making assessments
  a. The three-year period has lapsed.
  b. Ten-year prescriptive period not applicable.

Subsequently, in a letter dated July 31, 2000, petitioners requested the BIR to "consider the documents annexed to the protest and those documents submitted to the BIR examiners which form part of the BIR records as constituting all relevant supporting documents of the protest in compliance with Section 228 of the Tax Code". *(Annex Z, Petition for Review)*

On November 29, 2000 petitioners received a decision denying their protest *(Annex AA)*. Hence, the instant petition filed on December 26, 2000.

Respondent in his Answer filed on February 8, 2001, set up the following Special and Affirmative Defenses:

> 6. Petitioners maintain that the deficiency assessments issued by herein respondent are void, allegedly for failure to state the law and/or facts upon which they are based. This averment supports no basis. The assessments which are the subject of the instant petition evidently state the kind of deficiency tax involved, to reiterate, the capital gains tax arising from the sale of aforementioned shares of stocks; the computation of the tax; the amount of the tax due and the corresponding demand for payment of the tax due. Petitioners were duly notified of the underdeclaration of capital gains tax committed by them, and they were given sufficient time to explain their side, per letter dated 28 January 1999. Acting on such letter, petitioners on 03 March 1999 sent a reply explaining that correct declarations were made in the returns filed. Respondent on 05 May 1999, through the then Chief of the Tax Fraud Division, made a point by point rebuttal of petitioners' position

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explaining in detail the law and facts involved in the herein case. A copy of such rebuttal was even attached by petitioners as Annex "L" in this instant petition. In the said rebuttal, respondent maintained the view that petitioners did not file the correct capital gains tax returns because the cost of acquisition of the shares of stock was overstated.

7. Petitioners claim that the assessments are void for having imposed fraud penalties, thereby implying that they are liable for fraudulent acts. In short, it is their position that there was no basis finding the petitioners guilty of fraud. The averment is devoid of merit. Petitioners, in 1989, acquired the aforesaid shares of stocks from their original owner for a total consideration of ***Five Million Nine Hundred Twenty Five Thousand (Php: 5,925,000.00)***. However, in 1993, the same were eventually sold to Seaboard Eastern Insurance Co., Inc., Jose Halili Co. and Lili M. Co., et al to a total consideration of ***Sixty Two Million Four Hundred Ten Thousand Pesos (Php: 62,410,000.00)***, thereby realizing a gross profit of ***Fifty Six Million Four Hundred Eighty Five Thousand (Php: 56,485,000.00)*** from the said transactions. However, per records, at hand petitioners only paid the total amount of ***Five Hundred Ten Thousand Pesos (Php: 510,000.00)*** as capital gains tax on the said sale.

7.1. Per findings of the examiners who conducted the investigation, petitioners filed false and fraudulent capital gains tax returns for the year 1993, covering their stock transactions for the same period. They overstated in the said capital gains returns the acquisition costs of the shares of stocks sold to the tune of 990% and willfully evaded the capital gains tax that is due on the said transactions in the amount of Ten Million Seven Hundred Eighty Seven Thousand (Php: 10,787,000.00) excluding penalties and interests. The findings of fraud by herein respondent against petitioners and the imposition of the 50% fraud penalty is in accordance with the provision of Section 248 of the Tax Code which provides that:

> *In case of willful neglect to file return within the period prescribed by this code or regulation, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty (50%) of the tax or 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 under declaration of taxable sales, receipts, or income, or 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, receipt, or income in an amount exceeding thirty (30%) of the actual deductions, shall render the taxpayer liable for substantial*

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underdeclaration of sales, receipt, or income or for overstatement of deductions, as mentioned herein".

8. It is also the contention of petitioners that they were denied due process, because according to them no Pre-Assessment Notices were issued nor Informal Conference was conducted before the Assessment Notices were issued. We disagree. Records of the case will readily reveal that herein respondent religiously complied with the requisites of due process under the Tax Code. It bears stressing that before the questioned notices of assessment were issued, respondent sent sufficient notices to petitioners regarding the examiner's finding on the deficiency capital gains tax liabilities.

   8.1. However, petitioners did not only ignore said notices but worse they failed to appear and submit evidence to disprove the findings. Such being the case, petitioners can no longer claim that they were denied due process. Worthy to mention is the clear pronouncement by the Honorable Supreme Court is the case of ***"Stronghold Ins. Co. vs. Court of Appeals"*** that due process is not violated where a person is not heard because he has chosen, for whatever reason not to be heard. If he opts to be silent where he has a right to speak, he can not later be heard to complain that he was unduly silenced.(205 SCRA605). Furthermore, the right to due process, does not require a formal type or a trial type proceedings. More emphatic is the ruling of the High Court in the case of ***"Saldivar vs. Sandiganbayan"*** stating that due process as a constitutional precept does not always and in all situations require trial type proceedings. The essence of due process is to be found in the reasonable opportunity to be heard and to submit any evidence one may have in support of one's defense. *To be heard* does not only mean verbal arguments in court. One may be heard also through pleadings. Where opportunity to be heard, either through oral arguments or pleading is accorded, there is no denial of procedural due process (166 SCRA 316).

9. In parting, petitioners argue that respondent's authority or right to make assessments of the aforesaid tax liability has already prescribed. This is so because according to them the questioned assessments were issued beyond the three (3) year period allowed under the law. This position is misplaced. It bears stressing that the assessments subject of this petition are **fraud assessments** arising from petitioners' filing of a false and fraudulent capital gains tax returns for the period of 1993. The right of the government to assess the tax liabilities covered by the assessments in question falls within the exception on the limitation to assess enumerated under the Tax Code, to wit:

"(a) In the case of a false or fraudulent return with intent to evade tax or failure to file a return, the tax may be assessed, or a

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> **proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud, or omission: *Provided*, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof".**[1]

> 9.1. The aforecited provision of law is clear, to reiterate, the government's authority to assess tax liabilities in case of a false or fraudulent return with intent to evade payment of tax is ten (10) years from the discovery of such falsity or fraud as the case may be. Applying the above-stated law in the case at bar, the tax fraud committed by petitioners was discovered only on 09 December 1998 that is, after the examiners who conducted the investigation submitted their report finding petitioners liable for capital gains tax. And on the basis of such findings, herein respondent issued the questioned deficiency assessments all dated 31 March 2000 covering the said tax liabilities.

> 9.2. Verily, the right of the government to assess said tax liabilities against petitioners and the consequent issuance of the Formal Notices of Assessments is well within the ten (10) year period under Section 222 of the Tax Code. Therefore, the defense of prescription is totally misplaced.

On August 13, 2002, the parties mutually come into agreement to present the following issues for this court's consideration:

1. Whether or not the Assessments are null and void for lack of due process for failing to comply with statutory requirements, as determined under the following sub-issues:

   1.1 Whether or not the Assessments state the law and the facts upon which they are based.
   1.2 Whether or not the imposition of fraud penalties against petitioners is proper.

2. Whether or not the Assessments are null and void for lack of due process, as determined in the following sub-issues:

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[1] Section 222, 1997 Tax Reform Act of 1997

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2.1 Whether or not the issuance of the Assessments complied with the requirements in Revenue Regulations No. 12-99.

2.2 Whether or not the capital gains tax transactions of the petitioners in 1993 have all been duly approved and cleared with the BIR in accordance with established procedures.

3. Whether or not the Assessments are null and void for having been made beyond the prescriptive period, as determined in the following sub-issues:

3.1 Whether or not the authority or right of the respondent to make the Assessments has already prescribed.

3.2 Assuming arguendo that there is a finding of fraud, whether or not the Assessments are null and void for having been based upon a discovery of fraud or falsity made beyond the prescriptive period of three-year period from the due date for filing of the relevant returns.

The issues confronting this court could be simplified and summarized as follows:

1. Whether or not respondent observed due process in the making of the assessment against the petitioners;

2. Whether or not petitioners committed fraud in the filing of their individual capital gains tax returns for the transaction involved; and

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3. Whether or not the power of the respondent to issue the subject assessments has prescribed pursuant to Section 203 of the NIRC of 1993.

Petitioners assert that the assessments are null and void for lack of due process for failing to comply with the statutory requirements. Since the assessments were issued in the year 2000, the issuance thereof is subject to the rules of procedure found under the National Internal Revenue Code of 1997 (NIRC of 1997) and Revenue Regulations No. 12-99 implementing the NIRC of 1997, both in force at the time of issuance of assessments. Based on the said provisions of the law, an explanation of the facts, the law and regulations or jurisprudence on which any assessment is based is a necessary prerequisite for the validity of such an assessment. Petitioner concludes that since the assessments and demand letters failed to strictly follow the aforecited provisions of the NIRC of 1997 and Revenue Regulations No. 12-99, the same are void. Petitioners posit that there is no indication or explanation whatsoever in the assessments and demand letters of the factual and/or legal basis for the assessments because there is no statement of the facts from which purportedly arose the assessment for capital gains taxes, nor is there any indication of the specific law, rule or regulation imposing the said taxes.

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Petitioners further aver that the assessments and demand letters imposed fraud surcharges of 50% without stating or alleging fraud or acts of fraud and corollarily, without offering any explanation as to why such extraordinary surcharges were imposed instead of the regular 25%. The mere contents of the assessments and demand letters would not allow petitioners to verify the validity and correctness of taxes and charges being imposed therein.

On the other hand, the respondent maintains that the assessments in question were issued in accordance with the established requirements pursuant to the prevailing rules. The assessments sufficiently state the kind of tax involved, which is the capital gains tax relative to stock transactions; the year period covered, which is 1993; the computation of the tax as indicated in the details of the computation, the amount of the tax due; and the demand for payment of the tax due, as indicated in the formal assessment notice and demand letter.

The respondent supplements his view that he indeed extended fair play to the petitioners when in a memorandum dated July 19, 1999, which is an addendum to the first memorandum dated January 29, 1999, it was made clear that summons for clarificatory questioning and/or for the conduct of testimonial proceedings, were duly served to individual taxpayers and/or their representatives. On February 24, 1999, a certain Mr. Oscar Guzman, representing himself to be the authorized representative, appeared in the office of the Tax Fraud Division. Respondent also adds that the Notice to the Taxpayer dated July 6, 1999, signed by Atty. Edwin Marcos and served to the individual taxpayers via registered mail, would clearly negate or frustrate petitioner's position that they were not afforded sufficient notices.

We agree with the respondent.

Section 228 of the NIRC of 1997 provides:

> **SEC. 228.** ***Protesting an Assessment.*** – When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however*, That a pre-assessment notice shall not be required in the following cases:
>
> xxx xxx xxx
>
> The taxpayer shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.
>
> xxx xxx xxx
>
> If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable.

The respondent though may not have provided the specific provisions of the National Internal Revenue Code or other internal revenue laws as bases for the assessments but by indicating the kind of tax petitioners were liable was a substantial compliance with the requirements of Section 228 of the NIRC of 1997. In a fair play point of view the petitioners were after all, not left in confusion and grasping in the dark for explanations of the assessment. This is easily discernible from petitioner's protest letter *(BIR Records, page 180)* dated May 31, 2000. This court in the case of ***Subic Power Corporation v. Commissioner of Internal Revenue*** (CTA Case No. 6059, May 8, 2003) held that:

> While we concede that the mere filing of a protest letter does not automatically mean that the requirement of Section 228 has not been violated, if the taxpayer is able to intelligently argue its case and elucidate the reasons for the assessment, as in this case, then it cannot contradict itself by asserting that it was not informed of the law and facts on which the assessment was made.

Besides, petitioners stipulated that on August 10, 1999, the Tax Fraud Division received a letter dated August 9, 1999, wherein petitioners rebutted the May 5, 1999 reply of said Division *(Joint Stipulation of Facts, par. 16)*.

Further, it is our considered opinion that the phrase "in writing" under Section 228 does not exclusively mean written words. "Writings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation *(Black's Law Dictionary, Sixth Edition, page 1609)*. Indubitably, figures are also "writings" and if the numerical presentation is understandable enough, then there is no reason why we should automatically reject the same as adequate compliance with the law. It must be stressed that the underlying reason for the law is the basic constitutional requirement that "no person shall be deprived of his property without due process of law". Parenthetically, in whatever form and manner, as long as the taxpayer is informed of how the assessment was arrived at, then Section 228 has not been violated. And if petitioner had already been informed during the preliminary stage of the bases for the assessment, then it could not insist that it was not informed of the law and the facts on which the assessment was based ***(Subic Power Corporation vs. Commissioner of Internal Revenue**, supra)*. Indeed, the due process requirement in the instant petition has been satisfactorily met.

We will now resolve the remaining issues.

The argument of respondent that there was fraud committed by the petitioners in the filing of their capital gains tax returns for the transactions involved must be viewed in the light of the importance of whether the assessments were issued beyond the statutory prescriptive period of ten or three years as provided in the NIRC.

Fraud has been interpreted as actual and not constructive. It must be intentional fraud, consisting of deception willfully and deliberately done or resorted to. Courts never sustain findings of fraud upon circumstances

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which create only suspicion and the mere understatement of a tax is not itself proof of fraud *(Commissioner of Internal Revenue v. Melchor Javier, Jr., 199 SCRA 824).*

In the instant case, the Deeds of Assignment indicating the transfer of the subject shares of stocks from the previous owners to the petitioners is crucial in the determination of whether or not there was an overstatement in the acquisition cost of the shares of stocks involved declared by petitioners in their capital gains tax returns. Fraud is a question of fact and the circumstances constituting fraud must be alleged and proved in the court *(Commissioner of Internal Revenue vs. Ayala Securities Corporation, 70 SCRA 204).*

Petitioners argue that respondent has the burden of proof that indeed they filed false or fraudulent returns and, under both circumstances, with an intention to evade payment of the due tax. According to the petitioners, Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11 (inclusive of submarkings), presented by respondent to try to prove such overstatement are inadmissible because they are mere photocopies. Although said exhibits were conditionally marked subject to the presentation of the originals thereof, respondent failed to present their originals or any secondary evidence. Instead, respondent presented Exhibits 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 (inclusive of submarkings), during a subsequent hearing which do not rise to the level of secondary evidence, or best evidence.

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On the contrary, the respondent claims that despite the consideration of P62,410,000.00 for the sale or transfer of the shares of stocks by petitioners to Seaboard Eastern Insurance Corporation, Jose Halili & Company, et al., the former, per capital gains tax returns filed, only paid the amount of P472,225.00 as capital gains tax. The amount of P62,410,000.00 which represents the taxable gains realized by petitioners from the sale or transfer, came from the findings of the examiners pursuant to the investigation conducted and from the data/amounts reflected in the capital gains tax returns filed by petitioner vis-à-vis the Deeds of Assignment executed by the various original owners of the shares in favor of the petitioners. In the course of investigation, it was found out that petitioners grossly overstated in the capital gains tax returns filed the acquisition costs of the shares of stocks sold to the tune of 990%, to the prejudice of the government.

To prove the allegation of overstatement of the acquisition costs by the petitioners, respondent submitted certified true copies of microfilmed copies of the Deeds of Assignment furnished by the Securities and Exchange Commission (SEC) *(Exhibits 13-23)*. Petitioners vehemently objected to the presentation of the same on the ground that said documents are not constitutive of originals or of secondary evidence. Petitioners contend that the certification of Ms. Isma Gonzales *(Exhibit 13)*, that the photocopies were based on microfilmed copies on file with the SEC does not have the effect of making the photocopies as originals under Rule 130, Section 3 of the Rules of Court. Nowhere in the said certification, or even in the testimony of Ms. Gonzales was it proven that the originals of the photocopies are in her custody or her office at the SEC. Exhibit 13 merely states that the photocopies are machine copies of the microfilms that the SEC has on file. In short, what the SEC has on file are the microfilmed records. Petitioners further add that the testimony of Ms. Gonzales in court, clarified that her basis for saying initially that the documents were microfilmed from the originals was only the copy of the transmittal letter she found in the SEC records. Thus, at best, what has Ms. Gonzales certified to is that the photocopies were based on the microfilmed records of the SEC.

We are not convinced.

If indeed the contents of the Deeds of Assignment presented by the respondent are unreliable or objectionable, then petitioners could have easily presented their own copies of the Deeds. Yet, they did not. Instead, they objected on grounds of technicalities.

It must be stressed that this court is not bound by technical rules of evidence *(TMBC Investment Corporation vs. Commissioner of Internal Revenue, CTA Case No. 3994, April 15, 1991; Pacifico T. Torres vs. Commissioner of Internal*

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Revenue, CTA Case No. 4595, March 23, 1992). Thus, Section 8 of Republic Act No. 1125, as amended, categorically provides:

> SEC. 8. *Court of record; seal; proceedings.* - The Court of Tax Appeals shall be a court of record and shall have a seal which shall be judicially noticed. It shall prescribe the form of its writs and other processes. It shall have the power to promulgate rules and regulations for the conduct of the business of the Court, and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law, **but such proceedings shall not be governed strictly by the technical rules of evidence.**

Further, during the presentation of the subject Deeds of Assignment, respondent presented the responsible custodian of these documents from the SEC to identify and testify as to the authenticity and genuineness of the said documents, Ms. Isma C. Gonzales. When Ms. Isma Gonzales was asked as to why her signature appeared only at the last page and not on every page of the whole nineteen (19) documents, she intimated that it is their standard operating practice at the Public Reference Unit of the Records Division to sign and certify at the last page of the documents depending on the total number of pages. Each of these pages is verified by the records custodian as authentic reproductions of the official records on file. And at the last page of the said document below the certification, appears the signature of the Officer-In-Charge, showing that said document is really an authentic document as verified by the records custodian *(TSN, November 12, 2002, pages 32-36).* In addition, the witness testified:

JUDGE CASTANEDA:

Miss Witness, those certified true copies are copies of the original copies on filed (sic) with your office, with the Securities and Exchange Commission.

MISS GONZALES:

Your Honors, I have issued a certified copy based on the microfilm copied (sic) which is usually the basis in the issuance of authenticated copy at the Public Reference Unit of the Securities and Exchange Commission, Your Honors.

JUDGE CASTANEDA

And this microfilm are (sic) based on original document, Miss Gonzales?

MISS GONZALES:

Yes, Your Honors, it is based on the original copy that we have on file, but, whatever is on the original file we have it converted into microfilm copy which is stored in a microfilm roll and we retrieve documents based on that microfilm roll to saves (sic) spaces for the commission.
(Ibid, pages 38-39)

On cross, the witness was asked:

ATTY. VALDEZ:

But not what you have read. That is why I am asking you, do you know for sure that what was in fact microfilmed were the originals of these documents Exhibits "14" up to Exhibit "23", Miss Witness?

MS. GONZALES

I am not sure whether the document that was microfilmed is the original copy because this document was received from the Legal Department in 1989 stating the fact

that the original copy was received by certain Mr. Ricky Laportesa so what has been transmitted to us are the duly acknowledged receipt of the Deed of Assignment together with the attachment of the same but whatever has been submitted to us are considered official records of the commission, Sir.
(Id., pages 111-112)

The same witness likewise clarified:

JUDGE CASTANEDA

For point of clarification.

Is it the matter on record that the original copies of that documents which just filed (sic) in the SEC indicate in the certification by the receiving officer (sic)?

MS. GONZALES

Your Honors, the receiving officer actually receive the original.

JUDGE CASTANEDA

The original.

MS. GONZALES

Yes, Your Honors, the original copy, but after processing from the department concerned, the department who released the documents after it was duly acknowledged by the one who in-charged (sic) and then the acknowledgment receipt of that particular department which is duly signed by the head of the department is the one forwarded to the Micro Graphic unit as an official records (sic) of the original.

JUDGE CASTANEDA

So, it is possible that original copy after having been duly compared and was returned to the parties but was (sic) retained was reproduction.

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MS. GONZALES

Yes, Your Honors.
(Id., pages 114-116)

Well-settled is the rule that findings and conclusions of government officials warrant the presumption of regularity and correctness in the absence of proof to the contrary *(La Campana Food Products, Inc. vs. The Court of Appeals, 221 SCRA 770)*. Public officers are entitled to the presumption of regularity in the performance of their official duties. Absent any clear controverting proofs, the general inference is that an official act has been rightly and duly discharged. Thus, any person who may wish to impugn such legal presumption has the burden of proof and must show affirmatively that a convincing reason exists to support the challenge that the public officer has not so acted in the regular manner *(US vs. Escalante, 36 Phil 743)*. In the present case, respondent's witness, Ms. Isma Gonzales, testified as to the procedures of the SEC with respect to receipt, distribution, recording, processing and authentication of documents filed with said office *(TSN, November 12, 2002, pp. 9-11; 25-28; 38-39; 85-122)* and petitioners, save for the objection that the Deeds of Assignment in question are not the originals, failed to prove that officers of the SEC acted irregularly in the performance of their official functions.

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In fact, in a letter of Ms. Sonia M. Ballo (SEC Chief SE Specialist) dated October 12, 1989 to East Esteban Realty Corporation *(Exhibit 14)* she acknowledged receipt of the Deeds of Assignment of shares of stock executed by the original owners in favor of the petitioners and informed the corporation that said assignments have been duly noted and attached on the records of same corporation on file with the SEC. In that connection, Ms. Ballo transmitted to East Esteban Realty Corporation the duplicate original copies of the Deeds of Assignment advising the corporation to make the necessary recording of such transfer in its stock and transfer book. So, if the SEC was able to send duplicate original copies of the subject Deeds of Assignment, there can be no doubt that what were filed with same office were original copies. Besides, as we have stated earlier, petitioners could easily produce their own copies of the Deeds to disprove respondent's assertion of fraud if the SEC copies were really different from what they have executed.

Furthermore, the Deeds of Assignments although originally were private documents for having been executed by private individuals, became public documents after they have been submitted and filed with the proper government office/entity, the Securities and Exchange Commission. And these documents were likewise notarized by competent notary public such that the due execution and authenticity thereof are beyond reproach.

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In view thereof, we consider the certified true copies of the microfilmed copies of the Deeds of Assignment submitted by the respondent sufficient to prove the contents of the Deeds as to the parties involved, the consideration and the number of shares assigned.

Moreover, respondent presented his principal witnesses, Atty. Arthur C. Ramos and Ms. Noble Bambina Perez, to prove that that petitioners intentionally and deliberately overstated the cost of acquisition to the tune of 1000% more or less by comparing the Deeds of Assignment executed by the original owners of the shares of stocks in favor of the petitioners and the capital gains tax returns filed by petitioners with the BIR relative to the sale of the same shares to Seaboard Eastern Assurance Corp., Jose Halili & Company, et al., the buyers *(TSN, June 13, 2002; June 19, 2003).*

Upon examination of the Deeds of Assignment executed on September 29, 1989, we found that the total consideration paid by the petitioners for the assignment of the 50,000 shares of stocks was P5,929,000.00 computed as follows:

EXHIBIT	ASSIGNOR	ASSIGNEE	NO. OF SHARES	ASSIGN. VALUE
21	DENNIS GO	JERRY TIU	3,000	P 355,500.00
20	ELMA ALEJANDRIA GO		3,000	355,500.00
23	JESUSA ALEJANDRIA		3,000	355,500.00
22	MARY ANN GO		3,000	355,500.00
				1,422,000.00
18	DENNIS GO	RUBEN TIU	12,000	1,422,000.00
19	ELMA ALEJANDRIA GO	BEN TIU	12,000	1,422,000.00

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16	FILEMON GO	GERRY SEVILLA	5,000	592,500.00
15	JESUSA ALEJANDRIA		2,000	237,000.00
				829,500.00
17	MARY ANN GO	HERMAN SON	7,000	829,500.00
		TOTAL:	50,000	P 5,925,000.00

However, as per the declaration of the petitioners, the acquisition cost of the said shares amounted to P59,610,000.00 *(Exhibits A-E)*. And petitioners sold the same shares on December 13, 1993 for the amount of P62,410,000.00.

EXHIBIT	SELLER	BUYER	NO. OF SHARES	SELLING PRICE	ACQUISITION COST
E	JERRY TIU	SEABOARD EASTERN INSURANCE CORP.	12,000	P 14,978,400.00	P 14,316,400.00
	RUBEN TIU	HALILI CO.	2,000	2,496,400.00	2,408,884.00
C		JOSE HALILI CO.	10,000	12,482,000.00	11,907,516.00
			12,000	14,978,400.00	14,316,400.00
D	BEN TIU	SEABOARD EASTERN INSURANCE CORP.	12,000	14,978,400.00	14,316,400.00
p. 75, BIR Rec.	GERRY SEVILLA	SEABOARD	5,000	8,732,407.20	8,325,817.20
A		LILY M. GO. ET. AL.	2,000	4,992.80	4,582.80
			7,000	8,737,400.00	8,330,400.00
B	HERMAN SON	SEABOARD EASTERN INSURANCE CORP.	7,000	8,737,400.00	8,330,400.00
		TOTAL:	50,000	P 62,410,000.00	P 59,610,000.00

Petitioners reported then a realized total gain of P2,800,000.00 which they paid the capital gains tax thereon in the sum of P510,000.00, computed hereunder:

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EXHIBIT	SELLER	BUYER	SHARES	GAIN	CGT PAID
J	JERRY TIU	SEABOARD	12,000	P 662,000.00	P 122,400.00
p. 19, BIR Rec. H	RUBEN TIU	HALILI CO.	2,000	87,516.00	17,504.00
		JOSE HALILI CO	10,000	574,484.00	104,896.00
			12,000	662,000.00	122,400.00
I	BEN TIU	SEABOARD	12,000	662,000.00	122,400.00
p. 16, BIR Rec. F	GERRY SEVILLA	SEABOARD	6,996	406,590.00	71,359.00
		LILY M. CO. ET AL	4	410.00	41.00
			7,000	407,000.00	71,400.00
G	HERMAN SON	SEABOARD	7,000	407,000.00	71,400.00
		TOTAL:	50,000	P 2,800,000.00	P 510,000.00

For clarity, below is a summary of the cost of acquisition of the 50,000 shares of stocks when purchased by the petitioners from the original owners in 1989 and the cost of acquisition of the same shares when sold by the petitioners in 1993 to Seaboard Eastern Insurance Corporations, Jose Halili & Company, et al.:

TAXPAYER	NO. OF SHARES SOLD	ORIGINAL ACQUISITION COST	ACQUISITION COST PER RETURN	OVERSTATEMENT OF ACQUISITION COST
JERRY TIU	12,000	P 1,422,000.00	P 14,316,400.00	P 12,894,400.00
RUBEN TIU	12,000	1,422,000.00	14,316,400.00	12,894,400.00
BEN TIU	12,000	1,422,000.00	14,316,400.00	12,894,400.00
GERRY SEVILLA	7,000	829,500.00	8,330,400.00	7,500,900.00
HERMAN SON	7,000	829,500.00	8,330,400.00	7,500,900.00
TOTAL	50,000	P 5,925,000.00	P 59,610,000.00	P 53,685,000.00

Clearly from the foregoing, there was an overstatement of the acquisition cost in the sum of P53,685,000.00 for which the capital gains tax due thereon was not paid by the petitioners. Because of the deliberate

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overstatement of the cost of acquisition of the subject shares of stocks by the petitioners, the tax base was lessened which ultimately led to a lower capital gains tax due. In other words, when petitioners intentionally overstated the cost of acquisition of the said shares in their capital gains tax returns, they willfully evaded the payment of correct taxes thereby denying or depriving the government the right to collect the exact taxes due from petitioners' stock transactions. Furthermore, it is noteworthy that except for the objection that the Deeds of Assignment were not best evidence nor secondary evidence, petitioners failed to rebut the allegation of overstatement of the cost of acquisition in the capital gains tax return. Petitioners during the investigation and during the trial of the case did not present evidence to justify their declaration of the cost of acquisition in the capital gains tax returns filed with the Bureau of Internal Revenue:

> JUDGE CASTANEDA
>
> I have questions. You noted that there were Capital Gains Tax Returns submitted by the Petitioner to this case and the supporting documents in the Capital Gains Tax Returns. Are you aware if there were supporting documents.
>
> MS. PEREZ
>
> The Deeds of Sale, your Honors, which will show the Gross Selling Price.

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JUDGE CASTANEDA

Did they present any proof of the acquisition cost in the Capital Gains Tax Returns?

MS. PEREZ

In the Capital Gains Tax Returns, your honors, please, it states there Gross Selling Price less Cost of Acquisition that would be the Capital Gains Tax. So, they declared the Cost of Acquisition in the Capital Gains Tax Returns.

JUDGE CASTANEDA

Was there any supporting documents (sic) to show the Acquisition Cost in the Capital Gains Tax Returns?

MS. PEREZ

None, the petitioner declared the Cost of Acquisition at an overstated amounts (sic). There was no supporting documents (sic) to evidence.

JUDGE CASTANEDA

Subsequently, in the investigation of this case or anytime thereafter, if the Petitioner showed any proof of acquisition as cost?

MS. PEREZ

In fact, your Honors, we gave them enough time and notices to invite them for clarificatory questioning and summonned (sic) for testimony on proceeding for us to acquired (sic) them due process and for them to be able to raise or support the cost of acquisition but after considerable lapsed (sic) of time, they failed to present any support on the Cost of Acquisition that is overstated.
(TSN, June 19, 2003, page 63-65)

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Having established the blatant and willful filing of fraudulent or false returns by the petitioners, the imposition of fraud penalties against them is proper. Section 248 (B) of the 1997 Tax Code mandates:

> (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 the 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*, xxx. (Emphasis ours)

Petitioners also aver that the subject assessments have been dismissed and abandoned on the merits based on the findings of insufficiency of evidence pursuant to the letter of then Commissioner Bethooven L. Rualo *(Exhibit K)* reproduced in full below for easy reference:

December 10, 1999

Messrs. Ruben Tiu, Herman son, Ben Tiu,
Gerry Sevilla and Jerry Tiu
Dakota Mansion, 555 Gen. Malvar St.
Ermita, Manila

Sirs:

Please be informed that for insufficiency of evidence, this Office has decided not to pursue any further your 1993

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> internal revenue tax bases subject matter of our preliminary notices, all dated July 6, 1999.
>
> The records of this case have been sent to the files for future reference.
>
> Very truly yours,
>
> (signed)
> BETHOOVEN L. RUALO
> Commissioner of Internal Revenue

It is the position of the respondent that the existence of above letter should in no way diminish or deprive the government of its right or authority to collect taxes.

We concur. Erroneous application and enforcement of the law by public officers do not preclude subsequent correct application of the statute, and the government is never estopped by mistakes or error on the part of its agents *(Philippine Basketball Association vs. Court of Appeals, 337 SRA 358).*

We now delve on the issue of whether or not the right of the government to assess petitioners has prescribed.

The relevant provisions of the 1993 Tax Code are hereunder quoted:

> Section 203. *Period of limitation upon assessment and collection.* – Except as provided in the succeeding section, internal revenue taxes shall be assessed within three years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That in case where a return is filed beyond the period prescribed by law, the three-year period shall be

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> counted from the day the return was filed. For the purposes of this section, a return filed before the last day prescribed by law for the filing thereof shall be considered filed on such last day.
>
> Section 223. [now 222] ***Exceptions as to period of limitation of assessment and collection of taxes.*** – (a) <u>In the case of a false or fraudulent return with intent to evade tax</u> or of failure to file a return, <u>the tax may be assessed</u>, or a proceeding in court for the collection of such tax may be begun without assessment, <u>at any time within ten years after the discovery of the falsity, fraud</u> or omission: *Provided*, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof. *(Underscoring supplied)*

Based on the above provisions of law, the respondent has three years from the filing of their returns to assess petitioners of any internal revenue taxes. The exception is when there is a finding of falsity or fraud in the filing of said returns, in which case, the prescriptive period to assess is ten years from the discovery of such falsity or fraud.

Nevertheless, petitioners have different ideas. They asseverate that assuming there was fraud or falsity, the fraud or falsity should have been discovered within the three-year period from the due date of filing of the relevant returns. Otherwise, the time for making assessments shall be practically imprescriptible.

We disagree.

The law is clear that in the case of a false or fraudulent return with intent to evade tax, the tax may be assessed **at any time within ten years**

after the discovery of the falsity or fraud. The law speaks of "at any time within ten years after the discovery" and not within ten years to make an assessment on a finding of fraud discovered within three years from the filing of the appropriate returns. To adopt the view of the petitioners would in effect shorten the ten-year period allowed by law which in turn would render the above provision nugatory. Thus, the case of *Avelino vs. Collector of Internal Revenue, L-17715, July 31, 1963* relied upon by the respondent, is in point:

> "Where the petitioner has been guilty of fraud, the period within which he may be subject to liability begins from the moment the fraud is discovered and not when the income tax return was filed".

Thus, when there is fraudulent filing of tax returns, the ten (10)-year period applies in lieu of the three (3)-year prescriptive limit. The prescriptive period in this instance is counted from the discovery of the fraud, not from the filing of the fraudulent return. In another case, the Supreme Court ruled:

> **"In case of a false or fraudulent return, the Commissioner of Internal Revenue has ten years from the discovery of the falsity or fraud within which to make deficiency assessment".**

Fraud in the case at bar was clearly and convincingly proven by the records submitted by the parties as well as the testimony of respondent's witnesses which petitioners failed to rebut. Petitioners intentionally and

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deliberately overstated in their capital gains tax returns the cost of acquisition of the subject shares of stocks they sold to Seaboard Eastern Insurance Corporations, Jose Halili & Company, et al. on December 13, 1993. By such overstatement, petitioners willfully evaded the payment of correct taxes due on their stock transactions amounting to P10,737,000.00. Therefore, the period to assess petitioners of the deficiency capital gains taxes is ten years from the discovery of fraud which was on September 9, 1998 *(TSN, June 13, pages 44-46)* (should be January 29, 1999 - Exhibit 2) when the examiners submitted the report of investigation. The assessments in question were issued on March 31, 2000, hence, within ten years after the discovery of fraud.

IN VIEW OF ALL THE FOREGOING, the assessments issued against petitioners for deficiency capital gains taxes for the taxable year 1993 are hereby **AFFIRMED**. Petitioners are liable for deficiency capital gains tax in the total amount of P33,796,546.03 (inclusive of surcharge and interest). Accordingly, petitioners are **ORDERED TO PAY** the respondent the respective deficiency capital gains taxes computed as follows:

TAXPAYER	NO. OF SHARES SOLD	OVERSTATEMENT OF ACQUISITION COST	DEFICIENCY CAPITAL GAINS TAX BASIC	50% SURCHARGE	INTEREST	TOTAL
JERRY TIU	12,000	P 12,894,400.00	P 2,578,880.00	P 1,289,440.00	P 4,249,146.39	P 8,117,466.39

RUBEN TIU	12,000	12,894,400.00	2,578,880.00	1,289,440.00	4,249,146.39	8,117,466.39
BEN TIU	12,000	12,894,400.00	2,578,880.00	1,289,440.00	4,249,146.39	8,117,466.39
GERRY SEVILLA	7,000	7,500,900.00	1,500,180.00	750,090.00	2,471,803.43	4,722,073.43
HERMAN SON	7,000	7,500,900.00	1,500,180.00	750,090.00	2,471,803.43	4,722,073.43
TOTAL	50,000	P 53,685,000.00	P10,737,000.00	P 5,368,500.00	P17,691,046.03	P33,796,546.03

In addition, petitioners are **ORDERED TO PAY** 20% delinquency interest computed from May 3, 2000 until fully paid pursuant to Section 249 of the NIRC of 1997.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Justice

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