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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
MANILA

MILAGROS H. VITERBO and
ANTONIO VITERBO, SR.,
Petitioners,

- versus -

C.T.A.
CASE NO. 363

December 26, 1958

THE COLLECTOR OF INTERNAL
REVENUE,
Respondent.

x - - - - - - - - - - - - x

D E C I S I O N

Petitioner Milagros H. Viterbo is the operator of "Victoria Theater" in Roxas City. For the period from November 1, 1954 to August 31, 1955, she filed amusement tax returns regularly and paid the amusement tax on the basis of such returns. The records show that the following charges were collected for admission to the Victoria Theater:

Balcony - - - - - - - -	P.60
Orchestra - - - - - - -	.30
Children (Orchestra)-	.20

The records also show that during said period, 257,904 admission tickets of all denominations were sold, 183,529 of which were allegedly of the 20-centavo denomination.

Suspecting that the Victoria Theater was issuing 20-centavo tickets in lieu of the 30-centavo tickets to avoid payment of the tax, admission charges of 20 centavos or less not being taxable pursuant to Section 260 of the National Internal Revenue Code, certain agents of the Bureau of Internal Revenue placed the theater under observation from October 17 to October 30, 1955, a period of 14 days. During this 14-day period of observation, a total of 14,912 tickets of all denominations were sold consisting of 4,828 20-centavo tickets, 9,683 30-centavo tickets and 401 60-centavo tickets. The 20-centavo tickets sold were only 32% of the total number of tickets sold during the two-week period. On this basis, respondent concluded that during the period from November 1, 1954 to August 31, 1955, the Victoria Theater should have sold 20-centavo tickets equivalent to 32% of 257,904, or 82,529, instead of 183,529 as shown in the taxpayer's returns, so that the excess of 101,000 represents 20-centavo tickets sold in lieu of the 30-centavo tickets. Accordingly, an assessment for the sum of ₱3,365.35 as deficiency amusement tax and surcharge was made against petitioner Milagres M. Viterbo, computed as follows:

Total number of tickets sold of all denominations from Nov. 1, 1954 to August 31, 1955 -------------		257,904
Total number of 20-centavo tickets sold during the period as per report -------------------------	183,529	
Deduct: Ratio of 20-centavo admissions sold estimated at 32% of the total number of tickets sold of all denominations, or 32% of 257,904 -------------------------	82,529	
Excess of 20-centavo tickets reported as sold over estimated 20-centavo admissions -----------	101,000	
Convert the excess 20-centavo tickets into 30-centavo admissions, or 101,000 divided by 1.5 ---------------------------	67,307	
Tax due on 30-centavo admissions at ₱.04 per ticket, or ₱.04 x 67,307 ----------------------	₱2,692.28	
25% surcharge ---------------------	673.07	
Total tax and surcharge ----------	₱3,365.35	

In addition to the sum of ₱3,365.35, petitioner was also asked to pay the sum of ₱300 as alleged "compromise penalty" for violation of Section 260 of the Revenue Code, penalized under Section 352 of the same Code.

Upon failure of petitioner Milagros H. Viterbo to secure a reconsideration of the assessment, the present appeal was instituted. Her husband, Antonio Viterbo, Sr., has been included as co-petitioner.

The issues presented for our consideration are: (1) the legality of the assessment of ₱3,365.35 as deficiency amusement tax and surcharge; and (2) the legality of the alleged "compromise penalty" in the sum of ₱300.

As shown in the above computation of the deficiency amusement tax and surcharge, respondent found that the Victoria Theater issued 101,000 20-centavo tickets in lieu of 67,307 30-centavo tickets to avoid payment of the amusement tax. This finding is based solely upon the result of the observation made during the period from October 17 to October 30, 1955 when the sales of 20-centavo tickets consituted merely 32% of the total number of tickets sold. The number of unissued 30-centavo tickets was arrived at by dividing 101,000, the alleged excess 20-centavo tickets issued, by one and one-half, without considering the 60-centavo tickets sold. In other words, for every adult admitted to the theater (orchestra), one and one-half 20-centavo tickets were issued.

The assessment is sought to be justified by virtue of Field Circular No. V-82 of the Bureau of Internal Revenue, dated May 20, 1955, which reads as follows:

"It has come to the knowledge of this Office that some fieldmen have failed to take notice that in the daily box receipts and monthly amusement tax returns filed by movie house operators, the number of 20-centavo admission tickets sold allegedly to children as half-price is suspiciously more numerous compared with the other kinds of admission tickets. To cite a case in point is the investigation of a movie house operator where it appears that during one (1) year the number of tickets sold were as follows:

17,774	tickets	at	₱0.60
110,112	"	"	.40
372,355	"	"	.20

"It is evident from the above figures that the number of 20-centavo tickets is exceedingly great compared with the number of 40-centavo and 60-centavo tickets. This is due to the issuance of two 20-centavo tickets in lieu of one 40-centavo ticket, or three 20-centavo tickets in lieu of one 60-centavo ticket, to evade the corresponding amusement tax.

"To stop this case of evasion of amusement taxes, all movie houses suspected of evading amusement taxes should be watched continuously from the opening to the closing hours for a period of not less than ten (10) days, with the end in view of determining the percentage of adults and children actually going to the movie house. Once determined, a ratio of the different kinds of admission tickets sold while under observation should be made. Apply the said ratio to the different kinds of admission tickets supposedly sold, as filed by the operator or owner of the movie house. Any excess of the 20-centavo tickets should be converted into the 40-centavo class, and then assess the deficiency amusement taxes due thereon.

"To insure full compliance with this Circular, it is hereby instructed that a list of movie houses with their addresses operating in your district be first submitted and thereafter individual reports as herein required be forwarded to this Office, until all shall have been investigated."

The validity of the said field circular is not in issue. But it is argued on behalf of petitioners that in order that the assessment in this case may be validly sustained, it is necessary that the facts obtaining during the period under review and those obtaining during the period of observation must be the same or substantially the same. No attempt has been made in this case to prove that the circumstances obtaining during the period from November 1, 1954 to August 31, 1955 were the same or substantially the same as those obtaining during the two-week period of observation from October 17 to October 30, 1955. We agree with petitioners that, in cases of this nature, for the assessment to be validly sustained, it is essential that the facts and conditions in the situation which is used as basis for comparison must first be established and that such facts and conditions must be shown to be the same or similar to those obtaining during the period under review.

> "To our mind, the appealed decision has no factual basis and must be reversed. An assessment fixes and determines the tax liability of a taxpayer. As soon as it is served, an obligation arises on the part of the taxpayer concerned to pay the amount assessed and demanded. Hence, assessments should not be based on mere presumptions no matter how reasonable or logical said presumptions may be. Assuming arguendo that the average ratio of adults and children patronizing the Lucena Theater from 1949 to 1951 was 3 to 1, the same does not give rise to the inference that the same conditions existed during the years in question (1952 and 1953). The fact that almost the same ratio existed during the month of July, 1955 does not provide a sufficient inference on the conditions in 1952 and 1953. There has been no finding nor showing by respondent that the circumstances and conditions have remained the same during the years in question.
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> "In order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correct-

> ness of assessment being a mere presumption cannot be made to rest on another presumption that the circumstances in 1952 and 1953 are presumed to be the same as those existing in 1949 to 1951 and July 1955. In the case under consideration, there are no substantial facts to support the assessment in question." (Benipayo v. Coll. of Int. Rev., C.T.A. No. 251, Jan. 23, 1958.)

A careful examination of the evidence reveals other factors which have impelled us to conclude that the assessment is untenable. First, the Victoria Theater has been keeping an itemized daily record of its sales of tickets, all of which sales are reflected in its monthly returns. No proof has been adduced that its records are inadequate or that they do not reflect all its transactions. The correctness of such records is sought to be destroyed indirectly by the result of an observation made subsequently. The result of such observation is given in broad terms without specifying the number of tickets of each denomination sold each day. Second, the alleged 20-centavo tickets issued in excess of the actual number of children admitted were considered merely as representing adult 30-centavo tickets without considering the 60-centavo tickets. There is no legal basis for the assumption that the operator of the theater sought to defraud the Government of the tax due on the 30-centavo tickets and not on the 60-centavo tickets. Third, in converting the alleged 101,000 20-centavo excess tickets into 30-centavo tickets, respondent assumed that for each 30-centavo ticket one and one-half 20-centavo tickets were issued and delivered to each adult customer. There is no showing that 10-centavo tickets were ever issued. It is not reasonable to presume that each adult who sought admission for ₱.30 was given one 20-centavo and another 10-centavo tickets. Fourth, during the period from August 16 to August 21, 1955, before the observation was made, the percentage of 20-centavo tickets to the total number of tickets sold is even much less compared to the sales of 20-centavo tickets during the period of observation, as shown below:

Date	₱.60 tickets	₱.30 tickets	₱.20 tickets
August 16, 1955	12	318	52
" 17 "	35	450	18
" 18 "	21	365	42
" 19 "	31	420	59
" 20 "	22	383	54
" 21 "	33	759	115

(Page 1, BIR records)

On August 16, 1955, the 20-centavo tickets sold were only 13.6% of the total number of tickets sold; on August 17, 3.5%; on August 18, 9.8%; on August 19, 11.5%; on August 20, 11.7%; and on August 21, 12.6%. This argues strongly against the correctness of the assessment.

It is true that Section 15 of the Revenue Code authorizes the Commissioner of Internal Revenue to "assess the proper tax on the best evidence obtainable." But such assessment can be made only (1) when a report required by law as a basis for the assessment of any internal revenue tax shall not be forthcoming within the time fixed by law or regulation, and (2) when there is reason to believe that any such report is false, incomplete, or erroneous. It has not been shown that petitioners failed to file the corresponding amusement tax returns. Neither has it been satisfactorily proven that the amusement tax returns filed by petitioners were false, incomplete, or erroneous.

We are, therefore, of the opinion that the assessment of ₱3,365.35 as deficiency amusement tax and surcharge against petitioner Milagros H. Viterbo cannot be validly sustained. This makes it unnecessary for us to pass upon the legality of the alleged compromise penalty. At any rate, we have consistently held that respondent has no power to impose penalties in the guise of compromise.

FOR THE FOREGOING CONSIDERATIONS, the decision appealed from is reversed, without pronouncement as to costs.

SO ORDERED.

Manila, December 26, 1958.

ROMAN M. UMALI
Associate Judge

WE CONCUR:

Not appealed.

MARIANO NABLE
Presiding Judge

AUGUSTO M. LUCIANO
Associate Judge