REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

CLEMENTE FONTANAR,
Petitioner,

- versus -

C.T.A. CASE NO. 6004

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
NOV 04 2003

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DECISION

This is a judicial appeal from the decision of the Commissioner of Internal Revenue denying petitioner's protest on the deficiency income tax and percentage tax assessments covering the taxable years 1993, 1994 and 1995 in the total amount of P2,018,245.42.

Petitioner is a businessman primarily engaged in the operation of passenger jeepneys in Cebu City and its outlying and neighboring cities and municipalities.

By virtue of a denunciation letter,[1] a 10-Day Preliminary Letter was sent to petitioner informing him that there was found due from him the amount of P238,716.01, inclusive of interest and surcharge, representing deficiency income and percentage taxes for taxable years 1993 to 1995.[2]

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[1] BIR Records, pages 2-3.
[2] Exhibit D.

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On March 30, 1998, petitioner requested for a review of the findings in the said 10-Day Preliminary Letter which he found to be excessive.[3]

On July 23, 1998, petitioner received a letter signed by Crescente A. Militante, Chief, Special Investigation Division, informing him that after a recomputation, there was found due from him deficiency income and percentages taxes in the amounts of P1,644,563.08 and P194,776.99, respectively, inclusive of interests and surcharges, for the taxable years 1993, 1994 and 1995.[4] Petitioner went to the Special Investigation Division (SID) of the Bureau of Internal Revenue and complained about the findings and inquired therefrom the basis of the said findings. He was then told that the matter would be endorsed to the Assessment Division for reinvestigation and/or re-assessment.

On October 16, 1998, petitioner received a Pre-Assessment Notice wherein he was assessed the amounts of P1,808,017.74 and P210,227.68 as deficiency income and percentage taxes, respectively, for the years 1993 to 1995.[5]

On October 30, 1998, respondent received a letter from the petitioner claiming that the assessment is not acceptable and without any basis.[6]

In a letter dated November 17, 1998 and received by the petitioner on December 2, 1998, respondent answered petitioner's letter and requested that petitioner furnish the respondent some necessary information.[7]

On December 15, 1998, petitioner received the subject notices of assessment, all dated November 20, 1998, detailed as follows:

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[3] Exhibit E.
[4] Exhibit F.
[5] Exhibit G.
[6] Exhibit H.
[7] Exhibit H-2.

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Assessment/Demand No.	Date Issued	Kind of Tax	Year		Amount	Exh.
80-IT-13-93-98-11-120	11/20/98	Deficiency Income Tax	1993	P	546,351.40	H-4
80-PT-13-93-98-11-121	-do-	Deficiency Percentage Tax	1993		64,731.97	H-6
80-PT-13-94-98-11-122	-do-	Deficiency Percentage Tax	1994		62,726.22	H-7
80-IT-13-94-98-11-123	-do-	Deficiency Income Tax	1994		541,238.73	H-8
80-IT-13-95-98-11-124	-do-	Deficiency Income Tax	1995		720,427.61	H-9
80-PT-13-95-98-11-125	-do-	Deficiency Percentage Tax	1995		82,769.49	H-10
			Total	P	2,018,245.42	

On December 28, 1998, petitioner reiterated his request to the BIR to furnish him the basis of the computation of his alleged underdeclared income.[8] Through a letter dated January 15, 1999 and received by petitioner on January 27, 1999, respondent granted petitioner's request and informed the latter as to how the assessments were arrived at.[9]

On February 26, 1999, petitioner filed an administrative protest on the assessments issued against him.[10]

On January 3, 2000, petitioner received the decision of the respondent denying his protest.[11]

Hence, the instant petition filed on January 31, 2000.

By way of an Answer, respondent raised the following Special and Affirmative Defenses, to wit:

1) He reiterates and repleads the preceding paragraphs of this Answer as part of his Special and Affirmative Defenses;

2) The assessment in question was issued in accordance with law;

3) Investigation disclosed that petitioner filed fraudulent income and percentage tax returns for 1993, 1994 and 1995 through substantial

[8] Exhibit I.
[9] Exhibit J.
[10] Exhibit K.
[11] Exhibit N.

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underdeclaration of income. It must be noted that all presumptions are in favor of the issuing authority who issued the assessments in question. The Commissioner's determination based on the circumstances of the case that fraud is present stands if no evidence is presented by the taxpayer to show that the return filed by him was not fraudulent *(Tan Guan v. Commissioner, CTA Case No. 853, June 27, 1964)*. Thus, it is incumbent upon the petitioner to prove absence of fraud;

4) It is a settled rule that when there is fraudulent filing of tax returns, the ten-year period applies in lieu of the three-year prescriptive limit. The prescriptive period in this case is counted from the discovery of the fraud, not from the filing of the fraudulent return. Section 222(a) of the Tax Reform Act of 1997 (Section 223 of the Tax Code) on this particular point provides, as follows:

> "**Section 222. -** ***Exceptions as to Period of Limitation of Assessment and Collection of Taxes.*** –
>
> **(a)** In the case of a false or **fraudulent return** with intent to evade tax or failure to file return, the tax may be assessed, or 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 civil or criminal action for the collection thereof (Emphasis Ours);

5) Furthermore, under Section 229 of the Tax Code (now Section 228 of the Tax Reform Act), the period of thirty (30) days within which to question the validity of the assessment has already lapsed, rendering the assessments final and unappealable. In this case, petitioner received the Assessment Notices on December 15, 1998 and filed its protest only on March 4, 1999, clearly beyond the reglementary period provided for by law, thus:

Sec. 229. Protesting of Assessment.-

x x x

6) All presumptions are in favor of the correctness of tax assessments *(CIR vs. Construction Resources of Asia, Inc., 145 SCRA 671)* and the burden of proof to prove otherwise is upon petitioner;

7) Moreover, an appeal to the Court of Tax Appeals from a decision of the Commissioner of Internal Revenue shall not suspend the

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payment or collection of the tax liability of the petitioner herein since there was no motion presented before this Court that such collection will jeopardize the interest of the petitioner herein. *(Pirovino v. Commissioner, L-19865, July 31, 1965 Section 11, R.A. 1125)*; and

8) In fine, failure to comply with the thirty-day statutory period would bar appeal and deprive this Court of its jurisdiction to entertain and determine the correctness of the assessment *(Commissioner v. Western Pacific Corp., L-18804, May 27, 1965)*. It must be understood that assuming that petitioner timely filed its protest on March 4, 1998, he has only sixty (60) days from the date he filed his protest, or until May 4, 1998, as provided in Section 228(e) of the Tax Reform Act of 1997, to submit the supporting documents which to date has not been complied with.

The issues to be resolved by this court are as follows:

(1) Whether or not the assessments for income and percentage taxes are already barred by prescription;

(2) Whether or not the income tax returns filed by petitioner for taxable years 1993, 1994 and 1995 were false or fraudulent; and

(3) Whether or not petitioner is liable for the amounts of P1,808,017.74 as deficiency income tax and P210,227.68 as deficiency percentage tax for the years 1993, 1994 and 1995.

Petitioner posits that the income tax assessments for the years 1993 and 1994 had already prescribed since they were issued beyond the period allowed by law to assess. Under Section 203 of the Tax Code, taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return. Thus, where a return was filed, the period to assess is within three (3) years after the date the return was due or was filed, whichever is later. Thus, petitioner asserts that the prescriptive period should be as follows:

Taxable Year	Date Filed	Period of Prescription
1993	April 6, 1994	April 15, 1997
1994	April 17, 1995	April 17, 1998

Respondent issued the final assessment notices on November 20, 1998 which petitioner received on December 15, 1998. Therefore, said final income tax assessment had already prescribed.

Petitioner likewise claims that the percentage tax assessments for all quarters of 1993, 1994 and first to third quarters of 1995 had already prescribed. Applying Section 203 of the then Tax Code, the prescriptive period should be:

Taxable Year	Date Filed	Period of Prescription
1993 – 1st quarter	April 14, 1993	April 20, 1996
2nd quarter	July 19, 1993	July 20, 1996
3rd quarter	October 20, 1993	October 20, 1996
4th quarter	January 20, 1994	January 20, 1997
1994 – 1st quarter	April 20, 1994	April 20,1997
2nd quarter	September 8, 1994	September 8, 1997
3rd quarter	October 18, 1994	October 20, 1997
4th quarter	January 30, 1995	January 30, 1998
1995 -1st quarter	April 7, 1995	April 20, 1998
2nd quarter	July 17, 1995	July 20, 1998
3rd quarter	October 18, 1995	October 20, 1998

Inasmuch as the percentage tax assessment notices were only issued on November 20, 1998, which petitioner received on December 15, 1998, petitioner maintains that the same are not valid.

On the other hand, respondent avers that the three-year prescriptive period to assess does not apply in this case but rather the ten-year prescriptive period pursuant to Section 223 of the Tax Code [now Section 222] because petitioner was found to have filed fraudulent returns with the intent to evade payment of correct taxes.

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According to respondent, petitioner underdeclared his income by reporting only 92 units of public utility jeepneys (PUJs) contrary to the Confirmation Letter issued by the Land Transportation Franchising and Regulatory Board (LTFRB) showing that he is the registered owner of 270 units of PUJs which was the basis in computing the deficiency income and percentage taxes. Accordingly, the power of the respondent to issue the said assessments was not barred by prescription as he has ten (10) years within which to issue the assessments.

Petitioner counters that there was no underdeclaration of income in order to avoid the payment of correct taxes. Petitioner had declared as his income for the subject years based on his actual earnings and not on the minimum quarterly gross receipts for a jeepney in Manila and other cities pegged at P2,400.00 per unit for he was unaware that there was such quarterly gross receipts for a jeepney in Manila and other cities pegged at P2,400.00 per unit.

We agree with the petitioner that he did not file any fraudulent income tax return made for the years 1993, 1994 and 1995.

To support his position, respondent presented a Confirmation Letter from the Land Transportation Franchising and Regulatory Board with annexes[12], to prove that petitioner indeed is the registered owner of the 270 units of PUJs which was the basis in computing the deficiency income and percentage taxes. However, evidence will show that petitioner did not underdeclare his income tax returns. Based on the certifications issued and identified by Mr. Margarito Kong, Records Officer I of the LTFRB, Regional Office No. 7, Mandaue City, petitioner had operated only 115 PUJ units in 1993 and not 265 PUJ units as respondent claimed, 116 PUJ units in 1994 and

[12] Exhibit 2.

not 274 and 123 PUJ units in 1995 and not 270[13]. Moreover, petitioner presented evidence to prove:

1. That the BIR personnel who examined the tax accountability of the petitioner did not secure the needed information and necessary documents from the most competent person, namely, Margarito Kong, who is the Record Officer I of the LTFRB, Region 7.

2. That the said BIR personnel did not secure the proper certification from Margarito Kong relative to the actual number of PUJs operated by the petitioner for the years 1993, 1994 and 1995, hence, they were not able to properly compute the tax accountability of the petitioner.

3. That the BIR personnel conducted the examination of the petitioner's tax accountability in such an incomplete and haphazard manner that there were a lot of double postings and that some PUJ units which were operated by other persons were even listed and/or counted as the units of the petitioner.

   For instance:

   a. 22 PUJ units listed/posted in exhibit "TT-1" were also listed/posted in exhibit "TT-2" such that instead of 22 units, there were already 44 units counted/listed for purposes of determining the taxable income of the petitioner.

   b. Exhibit "VV" shows that under case no. 93-2075 15 PUJ units have been registered and operated by petitioner. Yet, the same number of units under the same case no. have been posted/listed in exhibit "WW" such that instead of only 15 units being counted as part of the total number of PUJ units as basis for the determination of the taxable income of the petitioner, the number is doubled.

   c. This is also true in exhibit "XX" which is also posted in exhibit "YY"; and in exhibit "ZZ" which is also posted in exhibit "AAA"; and in exhibit "BBB" which is also posted in exhibit "CCC" and also posted in exhibit "CCC-2" and also posted in exhibit "DDD"; and in exhibit "EEE" which is also posted in exhibit "FFF"; and in exhibit "HHH" which is also posted in exhibit "GGG-2" and exhibit "III"; and in exhibit "JJJ" which

[13] Exhibits PP, QQ and RR, respectively.

is also posted in exhibit “KKK-1”; and in exhibit “KKK”; and in exhibit “MMM-1” which is also posted in exhibit “LLL”; and in exhibit “NNN” which is also posted in exhibit “OOO-1”; and in exhibit “OOO” which is also listed in exhibit “PPP-2”; and in exhibit “PPP” which is also posted in exhibit “PPP-2”; and in exhibit “QQQ” which is also posted in exhibit “PPP”; and in exhibit “RRR” which is also posted in exhibit “SSS”; and in exhibit “SSS-1” which is also posted in exhibit “SSS-2”; and in exhibit “TTT” which is also posted in exhibit “UUU”; and in exhibit “UUU-1” which is also posted in exhibit “VVV” and “WWW”; and in exhibit “WWW” which is also posted in exhibit “WWW-2”; and in exhibit “WWW-2” which is also posted in exhibit “XXX”; and in exhibit “BBBB” which is also posted in exhibit “CCCC”; and in exhibit “EEEE” which is also posted in exhibit “FFFF”; and in exhibit “GGGG” which is also posted in exhibit “HHHH”; and in exhibit “IIII” which is also posted in exhibit “JJJJ”; and in exhibit “KKKK” which is also posted in exhibit “LLLL”; and in exhibit “MMMM” which is also posted in exhibit “NNNN”; and in exhibit “OOOO” which is also posted in exhibit “PPPP”; and in exhibit “QQQQ” which is also posted in exhibit “RRRR”; and in exhibit “SSSS” which is also posted in exhibit “TTTT”; and in exhibit “UUUU” which is also posted in exhibit “VVVV”; and in exhibit “WWWW” which is also posted in exhibit “XXXX”; and in exhibit “YYYY” which is also posted in exhibit “ZZZZ”.

d. That in fact, some of these exhibits, namely, “TT-1”, “TT-2”, “CCCC”, “CCCCC”, “DDDD”, “BBBB”, “AAAA”, “YYY” and “DDDDD” show that cases granting to the petitioner the authority to operate PUJs in 1996 were even posted and considered as part of the total number of PUJ units used to determine the taxable income of the petitioner which should not have been the case because the taxable income in question is for the years 1993, 1994 and 1995.

e. Further, even PUJ units registered in the names of Marilyn Fontanar and Paulina Fontanar were also considered in determining the total number of PUJ units used in computing the taxable income of the petitioner.

Considering that petitioner was able to substantiate his averments that he had only 115 units of PUJs operating in 1993 and computing his gross sales/receipts by multiplying per unit with P2,400.00 would result to P1,104,000.00. Yet petitioner reported as gross sales/receipts for the year 1993 the amount of P1,920,000.00.[14] This is higher by P816,000.00 of his supposed gross sales/receipts. Hence, there was no underdeclaration made for the year 1993.

For the year 1994, petitioner's 116 units of PUJs would earn P1,113,600.00 (pegged at P2,400.00 per unit). However, petitioner declared as total gross sales/receipts for the year the sum of P1,896,000.00[15] or P782,400.00 more than his supposed gross sales/receipts. Apparently, no underdeclaration was made either for the year 1994.

In 1995, petitioner declared a total gross sales/receipts of P1,632,000.00.[16] If he operated only 123 units of PUJs for said year, his total gross sales/receipts would only be P1,180,800.00 (at P2,400.00 per unit). So what he declared in his income tax return was P451,200.00 more than his supposed gross sales/receipts. Therefore, there was no underdeclaration made in his income tax return for the year 1995. It bears stressing that respondent proffered no evidence to refute the above allegations of petitioner.

Finding therefore that petitioner did not file any fraudulent return for the period involved in this case as to apply the provision of Section 223 of the Tax Code [now Section 222], the prescriptive period to assess petitioner is three years and not ten years in accordance with Section 203 of the then Tax Code which provides:

> SEC. 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

[14] BIR Records, page 146.
[15] BIR Records, page 151.
[16] BIR Records, page 156.

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> collection of such taxes shall be begun after expiration of such period: *Provided*, That in a case where a return is filed beyond the period prescribed by law, the three-year period shall be 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 as filed on such last day.

Applying the above law, the deficiency income tax assessment issued by the respondent for the years 1993 and 1994 as well as the deficiency percentage tax assessment for the years 1993, 1994 and 1995 save for the last quarter of 1995 had already prescribed.

As regards the deficiency income tax assessment for the year 1995 and the deficiency percentage tax assessment for the last quarter of 1995, petitioner asseverates that the same are excessive.

We are in accord with the petitioner's view.

It is the position of the respondent that petitioner is the registered owner of 270 units of PUJs which number of units was used as basis in computing the deficiency income and percentage taxes. However, as already earlier discussed, petitioner was able to rebut such allegation of the respondent and prove that the BIR examiners did not secure the proper certification relative to the actual number of PUJs operated by the petitioner for the years 1993, 1994 and 1995. "*Assessments should not be based on presumptions no matter how logical the presumption might be. In order to stand the test of judicial scrutiny the assessment must be based on actual facts. The presumption of correctness of an assessment being a mere presumption, it cannot be made to rest on another presumption xxx*"[17]. Moreover, the same examiners

[17] Collector of Internal Revenue vs. Benipayo, 4 SCRA 182; Commissioner of Internal Revenue vs. Island Garment Manufacturing Corporation and the Court of Tax Appeals, 153 SCRA 665

conducted the examination in such an incomplete and haphazard manner that there were a lot of double postings resulting to excessive tax liabilities.

Be that as it may, respondent argues that petitioner could no longer question the subject assessments because they had become final and unappealable for failure of the petitioner to file his protest within the thirty (30)-day period allowed by law, to wit:

> SEC. 228. **Protesting of 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 preassessment notice shall not be required in the following cases:
>
> xxx xxx xxx
>
> The taxpayers shall be informed in writing of the law and the facts on which the assessment is made: otherwise, the assessment shall be void.
>
> Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.
>
> **Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant documents shall have been submitted; otherwise, the assessment shall become final.**
>
> 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. (Emphasis supplied.)

According to the respondent, when petitioner received the assessment notices on December 15, 1998, he had only thirty days therefrom to file an administrative protest or until January 14, 1999. However, petitioner filed the protest only on February 26,

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1999. Clearly, said protest was filed beyond the prescriptive period thereby making the assessment final and unappealable.

Petitioner disagrees. He claims that although he is not familiar with the technicalities and nuances of our laws, he had always been protesting.

We concur with the petitioner.

When petitioner received the assessment notices on December 15, 1998, he immediately wrote respondent on December 28, 1998, which he sent to the latter through mail on the following day, reiterating his request to furnish him the basis in computing the alleged underdeclared income wherein he already intimated his intention to file a protest, only that he needed the necessary details of respondent's findings in order that he could properly protest the said assessments. It must be pointed out that the notices of assessment sent to petitioner did not contain any information as to the law and the facts on how the assessments were made. How then can petitioner contest in detail the findings of the respondent? This fact is admittedly true because respondent answered petitioner's request in a letter dated January 15, 1999, received by petitioner on January 27, 1999,[18] therein explaining how the examiners came up with the deficiency income and percentage taxes. So, we hold this letter of January 15, 1999 to be part of the assessment notice and the thirty (30)-day period to protest an assessment to be validly counted therefrom. Since petitioner received the same on January 27, 1999, the protest filed by petitioner on February 26, 1999 was still within the period allowed by law. Consequently, the assessments issued against petitioner did not become final and unappealable. Thus, petitioner could rightfully question respondent's right to assess him.

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[18] Exhibit J.

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On the basis of all the foregoing, this court rules that petitioner is not liable for the amount of P1,808,017.74 as deficiency income tax and P210,227.68 as deficiency percentage tax for the years 1993, 1994 and 1995.

WHEREFORE, Assessment Notice Nos. 80-IT-13-93-98-11-120, 80-IT-13-94-98-11-123 and 80-IT-13-95-98-11-124 for deficiency income taxes covering the years 1993, 1994 and 1995 in the aggregate amount of P1,808,017.74 and Assessment Notice Nos. 80-PT-13-93-98-11-121, 80-PT-13-94-98-11-122 and 80-PT-13-95-98-11-125 for deficiency percentage tax covering the years 1993, 1994 and 1995 are hereby **CANCELLED** and **SET ASIDE**.

SO ORDERED.

JUANITO C. CASTAÑEDA, JR.
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

LOVELL R. BAUTISTA
Associate Judge

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 Judge

DECISION
C.T.A. CASE NO. 6004