REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

BPI CAPITAL CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8787

Members:

BAUTISTA, *Chairperson*
FABON- VICTORINO, *and*
RINGPIS-LIBAN, *JJ.*

Promulgated:

JUL 12 2016
11:00 a.m.

x- -x

DECISION

RINGPIS-LIBAN, *J*.:

The Case

This Petition for Review[1] filed by BPI Capital Corporation seeks the cancellation and setting aside of the Final Decision on Disputed Assessment issued by the Commissioner of Internal Revenue, assessing it for alleged deficiency income tax in the amount of ₱266,467.59 for taxable year 2008.[2]

The Facts

Petitioner BPI Capital Corporation is a corporation organized and existing under and by virtue of the laws of the Philippines, with principal place of business at 8th Floor BPI Building, Ayala Avenue corner Paseo de Roxas, Makati City.[3]

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1 Under Section 228 of the NIRC in relation to Section 3(a)(1), Rule of the Revised Rules of the Court of Appeals.
2 Par. I, Pre-Trial Order, docket, p. 315
3 The Parties, Petition for Review, docket, p. 16

On the other hand, respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) vested under the appropriate laws with the authority to carry out the functions, duties and responsibilities of said office, including, *inter alia*, the power to decide disputed assessments and cancel and abate tax liabilities, pursuant to the provisions of the National Internal Revenue Code (NIRC) of 1997 and other tax laws, rules and regulations. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On April 15, 2009, petitioner filed its Annual Income Tax Return[4] (ITR) for taxable year 2008.

Petitioner received on July 3, 2009 a Letter of Authority (LOA) No. 00033766[5] dated June 29, 2009, authorizing Revenue Officers Daniela Gabaon, Maribel Serafica, Reynoso Bravo, Walter Batoon, and Julieta Tubilla to examine petitioner's books of accounts and other accounting records for all internal revenue taxes covering taxable year 2008.[6]

Several Waivers of the Statute of Limitations under the National Internal Revenue Code dated June 30, 2011[7], December 15, 2011[8], March 23, 2012[9], September 28, 2012[10], and February 5, 2013[11] were executed by petitioner and accepted by respondent. There was also an undated Waiver of the Statute of Limitations which was notarized on October 20, 2011 and accepted by respondent on October 25, 2011.[12]

Subsequently, an informal conference was held.[13]

On October 18, 2013, petitioner received a Preliminary Assessment Notice[14] (PAN) issued by the Regular Large Taxpayers Audit Division II, assessing it for deficiency income tax in the amount of ₱6,231,422.20, deficiency percentage tax in the amount of ₱247,624.33, deficiency expanded withholding tax (EWT) in the amount of ₱952,380.36, and deficiency documentary stamp tax (DST) in the amount of ₱144,846.15.[15]

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4 Exhibit "P-7", docket, pp. 391 to 393.
5 Exhibit "R-2", BIR records, p. 1.
6 Par. 1.2, Stipulated Facts, Joint Stipulation of Facts and Issues (JSFI), docket, pp. 291 to 292.
7 Exhibit "R-16", BIR records, p. 385.
8 Exhibit "R-18", BIR records, p. 387.
9 Exhibit "R-19", BIR records, p. 388.
10 Exhibit "R-20", BIR records, p. 389.
11 Exhibit "R-21", BIR records, p. 391.
12 Exhibit "R-17", BIR records, p. 386.
13 Par. 1.4, Stipulated Facts, JSFI, docket, p. 292; Exhibit "P-2", docket, p. 346; Exhibit "R-23", BIR records, p. 420.
14 Exhibit "P-3", docket, pp. 356 to 357; Exhibit "R-27", BIR records, pp. 549 to 550.
15 Par. 1.5, Stipulated Facts, JSFI, docket, p. 292.

In a Letter of Reply filed on October 31, 2013, petitioner disputed the PAN and requested a reinvestigation.[16]

Respondent issued a Formal Assessment Notice[17] (FAN) with Details of Discrepancy[18] and Assessment Notices[19] on November 11, 2013, reiterating the PAN and demanding payment of deficiency income tax in the amount of ₱6,270,166.80, deficiency percentage tax in the amount of ₱250,012.58, deficiency expanded withholding tax in the amount of ₱958,152.36, and deficiency documentary stamp tax in the amount of ₱145,904.62; which petitioner received on November 20, 2013.[20]

Consequently, petitioner protested the said FAN on December 18, 2013.[21]

Nevertheless, petitioner paid the deficiency assessment for EWT, percentage tax, and DST on January 29, 2014.[22]

Respondent issued a Final Decision on Disputed Assessment (FDDA) with Details of Discrepancy and Assessment Notice[23] on February 20, 2014 and received by petitioner on February 24, 2014, upholding the deficiency income tax assessment, but in the reduced amount of ₱266,467.59.[24]

Thus, petitioner filed this Petition for Review on March 26, 2014.[25]

Respondent raised the following special and affirmative defenses in the Answer[26] filed through registered mail on July 10, 2014 and received by the Court on July 17, 2014:

> On the basis of the foregoing allegations and in further support of the Specific Denials herein set forth, respondent respectfully alleges as her defense that:

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[16] Par. 1.6, Stipulated Facts, JSFI, docket, p. 292.
[17] Exhibit "P-5", docket, pp. 369 to 370.
[18] Exhibit "P-5-A", docket, pp. 371 to 376.
[19] Exhibits "P-5-B" to "P-5-E", docket, pp. 377 to 380.
[20] Par. 1.7, Stipulated Facts, JSFI, docket, pp. 292 to 293; Exhibits "R-29", BIR records, pp. 573 to 584.
[21] Par. 1.10, Stipulated Facts, JSFI, docket, p. 293; Exhibits "P-6" and "P-6-a", docket, pp. 381 to 384.
[22] Par. 1.12, Stipulated Facts, JSFI, docket, p. 294; Exhibits "P-8", "P-8-A" to "P-8-L", docket, pp. 394 to 406; Exhibits "R-30" to "R-35", BIR records, pp. 610 to 615.
[23] Exhibit "P-9", docket, pp. 407 to 412; Exhibit "R-37", BIR records, pp. 650 to 656.
[24] Par. 1.11, Stipulated Facts, JSFI, docket, pp. 293 to 294.
[25] Docket, pp. 14 to 26.
[26] Docket, pp. 138 to 146.

The assessment on deficiency income tax was issued in accordance with law, rules and jurisprudence.

4. It is strongly maintained that petitioner is liable for the deficiency income tax in the amount of P266,467.59 inclusive of interest for the calendar year 2008 based on the Final Decision on Disputed Assessment (FDDA). Contrary to petitioner's asseverations, the assessment issued against it has legal and factual bases. In fact per details of discrepancy, respondent established the following:

DETAILS OF DISCREPANCIES

INCOME TAX:

1. **Unrecorded/Under declaration of gross receipts per reconciliation of BIR Form 2307 against TRS (P370,395.53)** – Reconciliation of Certificate of Creditable Tax Withheld at Source against list of payors extracted from the BIR Data Warehouse of Withholding Tax Division disclosed a discrepancy of P370,395.53. This pertains to unrecorded gross receipts, hence; included in the assessment pursuant to Section 32(A) of the NIRC.

Schedule 1:

Customer's Name	Per BIR Form 2307	Per TRS	Difference
Manila Water Company	P 840,000.00	P 1,040,000.00	P 200,000.00
Aboitiz Equity Ventures Inc.	2,500.000.00	2,500,000.00	-
The Roman Catholic Archbishop	1,075,268.83	1,182,795.68	107,526.85
Asian Hospital Inc. (Asian Hospital did not issue BIR Form 2307 to BPI Capital Corp., hence, it did not claim tax credit per ITR. The amount of P1,080,150.32 paid by Asian Hospital as arranger's fee was recorded in the books as Commission-Others)	1,080,150.32	1,102,194.00	22,043.68
Globe Telecom, Inc.		7,863.00	7,863.00
Innove Communications Inc		32,962.00	32,962.00
Total	**P5,495,419.15**	**P5,865,814.68**	**P370,395.53**

2. **Unexplained source of cash from unrecorded of salaries and wages per ITR vs Alphalist of Employees (P11,801.24)** – Reconciliation of salaries and wages per Alphalist of Employees against salaries and wages recorded per FS/TB disclosed a discrepancy of P11,801.24. The discrepancy was accounted for as unexplained source of cash from unrecorded salaries and wages, hence; included in the assessment pursuant to Section 32(A) of the NIRC.

Schedule 2:

Particulars			Per TB/FS	Remarks
Salaries & wages-Officers-Sysgen-taxable		P	59,940,107.39	
Salaries & wages-Officers-Sysgen-non taxable			1,258,125.00	
Salaries & wages-manual-taxable			8,732,174.76	
Salaries & wages-manual-non taxable			601,648.72	
Salaries & wages-rank & file-sysgen taxable			4,270,663.38	
Salaries & wages-rank & file-sysgen non taxable			310,368.48	
Salaries & wages-rank & file-manual-taxable			671,568.72	
Salaries & wages-rank & file-manual-non taxable			100,582.53	
Salaries & wages-PB			3,475,804.04	
Salaries & wages-OT			2,870.33	
Staff Benefits-Incentives non taxable			25,390.00	
Staff Benefits-Others			564,802.83	
Staff Benefits-Assistance			12,000.00	
Total per FS		P	79,966,106.18	
Per Alphalist			86,468,177.68	
Difference		P	(6,502,071.50)	
Accounted for as follows:				
Add other compensation per TB/books:				
SSS, Medical & ECC Premium P	985,627.90			
Medical, dental & hospital	1,886,263.09			
Other employee benefits:				
Taxes & Licenses-FBT	319,511.54			
Staff benefits-Training local	44,603.00			
SB-Scho. Training foreign	51,698.38			
SB-Recreatl/cult activities	33,226.28			
Pension Expense				
Contribution to Ret. Fund	10,183,242.48		13,504,172.67	
Total		P	7,002,101.17	
Add/less adjustments:				
Salaries & wages-PB P	(3,475,804.04)			PB accrual actual payment made on succeeding year.
SB-Recreatl/cult activities	(33,226.28)			Outing/x'mas parties, etc.
Staff benefits-Training local	(44,603.00)			Local training of Personnel inclusive of Transp serv, etc).
SB-Scho. Training foreign	(51,698.38)			Cost of seminars/training of personnel inclusive of transp serv, etc.)
Staff Benefits-Others-Group Life Ins	(338,571.36)			Cost of group life insurance.
Medical, dental & hosp-GHIP/hmo bank's share	(1,159,971.35			Employee's med, dental & hospital charges
Bank's Contribution to Ret. Fund	(10,183,242.48)			Bank's contribution to ret fund of employees not yet paid.
SSS, Medical & ECC Premium	(985,627.90)			Bank's share.

Taxes & Licenses-FBT	(319,511.54)		Accrual of FBT.
ESOP accrual	(2,123,588.60)		Accrual of employee's stock option.
PB 2007 payout	7,619,815.00		Performance bonus paid on March 2008.
Retirement proceeds	4,082,127.52	(7,013,902.41)	Retirement proceeds received during 2008.
Discrepancy (Unaccounted cash)		**(11,801.24)**	

3. **Minimum Corporate Income Tax (MCIT) P1,535,431.00** – The minimum corporate income tax was not deducted as tax credit against the computed deficiency income tax considering that the said amount shall be carried over and credited against the normal income tax for the three (3) immediately succeeding taxable years pursuant to Section 27(E) (1) (2) of the Tax Code.

5. The Details of Discrepancies shows how respondent came up with the assessment. After evaluating all the documents submitted by petitioner and after reconciliation of Certificate of Creditable Tax Withheld at Source against list of payors extracted from the BIR Data Warehouse of the Withholding Tax Division disclosed a discrepancy of P370,395.53 which pertains to unrecorded gross receipts. Moreover, reconciliation of salaries and wages per Alphalist of Employees against salaries and wages recorded per FS/TB disclosed a discrepancy of P11,801.24. The discrepancy was accounted for as unexplained source of cash from unrecorded salaries and wages.

6. The fact that petitioner was furnished the computation and explanation of how the assessment for deficiency income tax was arrived at, the requirement under Section 228 of 1997 NIRC, as amended was complied with. Petitioner was notified of the specific provision of laws on which the assessment was based. This is evident in the Details of Discrepancies wherein Sections 32(A), 27(E) (1) (2) of the 1997 NIRC, as amended were written as basis.

7. Further, the fact that petitioner filed protest means that it was informed of the findings of the Revenue Officer. The protest although erroneous and self-serving was accomplished with meticulous detail trying in vain to overthrow the findings of deficiency. Hence, there is no denying that petitioner was informed of the factual and legal bases of the deficiency assessment

8. Hence, the contention that the assessment does not state the facts and law upon which the assessment is based is without merit. Mere allegations of vagueness and confusion in the mind of petitioner will not invalidate an assessment.

9. In view of the foregoing, petitioner is liable to pay the assessed deficiency income tax. The examiner's assessment should be given full weight and credit, in the absence of proof submitted by petitioner to the contrary. This is in line with the Hight Court's ruling in several cases wherein the Court said that **tax assessments by tax examiners are prima facie 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**. The case of *Commissioner of Internal Revenue vs. Construction Resources of Asia, Inc.*, where the Court cited 51 Am. Jur. pp. 620-621, states the principle in detail x x x.

xxx xxx xxx

11. The burden of proof is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the Commissioner of Internal Revenue is wrong but the taxpayer is right. Otherwise the presumption of correctness of tax assessment stands.

12. Unfortunately, petitioner failed to overcome the presumption of correctness of respondent's assessment.

13. Petitioner has not pointed out any provision or item in the assessment notice which bears a trace of falsity. Its averments were based on conjectures, surmises and speculations. These cannot supply the basis for the charge of impropriety in the assessments made.

The Regular Corporate Income Tax of 35% shall be applied to petitioner's adjusted gross income for taxable year 2008.

14. Petitioner argues that the Minimum Corporate Income Tax (MCIT) of 2% should have been applied and not the Regular Corporate Income Tax (RCIT) of 35% after adjustment of the gross income when respondent disallowed certain expenses. Petitioner further argues that the application of two (2) tax regimes, i.e. MCIT of 2% and RCIT of 35% for the same taxable year will result in absurdity.

15. When petitioner filed its 2008 Income Tax Return (ITR) the MCIT of 2% was applied because petitioner incurred a net loss. The audit/investigation conducted by respondent resulted to an adjusted taxable gross income. Considering that petitioner can no longer claim allowable deductions because it already claimed as deduction its Net Loss of P46,988,092.00 which became the Net-Operating Loss Carry-Over item in the amount of P46,988,092.00 as shown in its 2009 ITR. Hence, the adjusted gross income was subjected to RCIT of 35%.

16. Accordingly, petitioner cannot amend its 2008 ITR after the issuance of the Letter of Authority to include the findings of respondent as deductions. Pursuant to Section 6 of the 1997 NIRC, as amended, an amendment to ITR is allowed only within three (3) years from the date of such filing provided that no notice for audit or investigation has been served to the taxpayer.

17. Considering that a Letter of Authority was served and duly received by petitioner on 3 July 2009, any amendment to its 2008 ITR is not possible anymore. Therefore, the audit findings of respondent was considered as adjusted taxable gross income which is imposable with RCIT of 35%.

18. Further, it is worthy to note that Section 6.5 of Revenue Regulations No. 14-2001 – Implementing Section 34(D)(3) of the National Internal Revenue Code of 1997, Relative to the Allowance of Net-Operating Loss Carry-Over (NOLCO) as a Deduction from Gross Income provides:

> 6.5 NOLCO in Relation to the Minimum Corporate Income Tax (MCIT). – In general, domestic and resident foreign corporations subject to the normal income tax rate are liable to the 2% MCIT, if applicable, computed based on gross income, whenever the amount of the MCIT is greater than the normal income tax rate due (computed with the

> benefit of NOLCO, if any) pursuant to Sections 27 or 28 of the Code. Thus, such corporation cannot enjoy the benefit of NOLCO for as long as it is subject to MCIT in any taxable year. Provided, however, that the running of the three year period for the expiry of the NOLCO is not interrupted by the fact that such corporation is subject to MCIT in any taxable year during such three year period.

19. Based on the above-cited regulation any corporation cannot enjoy the benefit of NOLCO for as long as it is subject to MCIT in any taxable year. In the present case, petitioner already benefitted from NOLCO when it applied its net loss for 2008 to its 2009 ITR. Hence, whatever is left to be taxed in its 2008 ITR, the MCIT of 2% shall not be applied instead the RCIT of 35% is the one applicable.

20. At any rate, it is worthy to stress that the power to tax, an inherent prerogative, has to be availed of to assure the performance of vital state functions. It is the source of the bulk of public funds. To paraphrase a recent decision, a tax being the lifeblood of the government, its prompt and certain availability is of the essence. The state will be deprived of the taxes validly due it and the public will suffer if taxpayers will not be held liable for the proper taxes assessed against them.

21. Well-settled is the principle that taxes are imposed for the support of the government in return for the general advantage and protection which the government affords to taxpayers and their property. Taxes are the lifeblood of the government. It is imperative that the power to impose them to be clothed with the implied authority to devise ways and means to accomplish their collection in the most effective manner. Without this implied power the end of government may falter or fall.

Petitioner filed its Pre-Trial Brief on September 1, 2014; while respondent submitted her Pre-Trial Brief on September 26, 2014.[27]

The parties then filed their Joint Stipulation of Facts and Issues[28] on October 15, 2014. Subsequently, the Court issued the Pre-Trial Order[29] on November 6, 2014 and terminated the pre-trial conference.

[27] Docket, pp. 237 to 244 and pp. 245 to 251.
[28] Docket, pp. 291 to 300.
[29] Docket, pp. 315 to 323.

To prove its claim, petitioner presented Ms. Joanne V. Sigua as its sole witness. Also, petitioner formally offered Exhibits "P-1", "P-1-A", "P-2", "P-3", "P-4" and "P-4-A", "P-5", "P-5-A" to "P-5-E", "P-6", "P-6-A" and "P-6-B", "P-7", "P-8", "P-8-A", "P-8-B", "P-8-C", "P-8-D", "P-8-E", "P-8-F", "P-8-G", "P-8-H", "P-8-I", "P-8-J", "P-8-K", "P-8-L", "P-9", and "P-10" to "P-10-B".[30] The Court admitted in evidence the said documentary exhibits except Exhibits "P-1", "P-1-A", "P-4", and "P-4-A".[31]

On the other hand, respondent presented Revenue Officer Erlita Maria C. Vergara as her sole witness, and formally offered Exhibits "R-1" to "R-38" and "R-15-A". All of these documentary exhibits were admitted in evidence.[32]

This case was declared submitted for decision on July 20, 2015,[33] after the filing of petitioner's Memorandum[34] on June 5, 2015 and respondent's Memorandum[35] on July 6, 2015.

The Issue

The parties submitted the following issue for the Court's resolution:

Whether petitioner is liable to pay Two Hundred Sixty-Six Thousand Four Hundred Sixty-Seven and 59/100 Pesos (₱266,467.59), representing the alleged deficiency income tax of petitioner for taxable year 2008.[36]

The Court's Ruling

Section 228 of the National Internal Revenue Code of 1997, as amended, provides:

> 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 x x x.
>
> xxx xxx xxx

[30] Formal offer of Evidence, docket, pp. 333 to 342.
[31] Resolution dated January 28, 2015, docket, pp. 418 to 419.
[32] Resolution dated April 28, 2015, docket, pp. 472 to 473.
[33] Resolution, docket, p. 522.
[34] Docket, pp. 478 to 489.
[35] Docket, pp. 507 to 518.
[36] Par. 2.1, Stipulated Issue, JSFI, docket, p. 294.

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 supporting 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.

Based on the afore-quoted provision, petitioner had thirty (30) days from receipt of the FDDA on February 24, 2014 or until March 26, 2014 within which to appeal such FDDA. Hence, the Petition for Review was timely filed on March 26, 2014.

Proceeding to the main issue, petitioner received the FAN[37] from respondent on November 20, 2013, demanding payment of the following deficiency taxes, inclusive of surcharges and interests, for taxable year 2008:

TYPE OF TAX	AMOUNT
Income Tax	₱ 6,270,166.80
Percentage Tax	250,012.58
Expanded Withholding Tax	958,152.36
Documentary Stamp Tax	145,904.62
TOTAL	**₱7,624,236.36**

[37] Supra, note 17.

Even though petitioner disputed the aforesaid tax assessments through a protest letter[38] filed on December 18, 2013, petitioner subsequently paid the outstanding deficiency percentage tax, EWT, and DST assessments on January 29, 2014.[39]

Consequently, respondent issued the FDDA[40] dated February 20, 2014, which was received by petitioner on February 24, 2014, upholding the deficiency income tax assessment for taxable year 2008, but in the reduced amount of ₱266,467.59, inclusive of interest, computed as follows:

Net loss		₱(46,988,092.00)
Add: Adjustments:		
Unrecorded gross receipts	₱ 370,395.53	
Unexplained source of cash	11,801.24	382,196.77
Adjusted taxable gross income		382,196.77
Tax due (35%)		133,768.87
MCIT paid per return	₱1,535,431.00	-
Basic deficiency tax		133,768.87
Add: Interest (4/16/2009 to 3/31/2014)		132,698.72
Still due and payable		**₱ 266,467.59**

The above assessment arose from respondent's imposition of thirty-five percent (35%) Regular Corporate Income Tax (RCIT) on petitioner's purported unrecorded gross receipts of ₱370,395.53 and unexplained source of cash of ₱11,801.24.

The Details of Discrepancy[41] states that the unrecorded gross receipts represent the discrepancy on the reconciliation of petitioner's Certificates of Creditable Tax Withheld at Source against the list of payors extracted from the BIR Data Warehouse of Withholding Tax Division. It also states that the unexplained source of cash pertains to the difference between the salaries and wages as reflected in petitioner's Alphalist of Employees and as recorded in petitioner's Trial Balance/Financial Statement/Income Tax Return (TB/FS/ITR).

[38] Supra, note 21.
[39] Supra, note 22.
[40] Supra, note 23.
[41] Docket, pp. 409 to 411.

Unexplained Source of Cash

Since the total amount of the salaries and wages reflected in petitioner's TB/FS/ITR was higher than that reported in the Alphalist, respondent concluded that the difference referred to undeclared income of the petitioner. Respondent based her conclusion on an assumption unsupported by evidence. This is unacceptable. In *Collector of Internal Revenue vs. Benipayo*,[42] the Supreme Court held:

> x x x 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. x x x
>
> **In order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption** x x x. (Emphasis supplied.)

Hence, the assessment pertaining to the alleged unexplained source of cash of ₱11,801.24 is cancelled.

Unrecorded Gross Receipts

Petitioner did not provide details of the transactions to controvert the assessment for unrecorded gross receipts. Accordingly, respondent's assessment pertaining to the same, in the amount of ₱370,395.53, is sustained.

However, the Court finds that petitioner's tax credits exceed the income tax due from petitioner for the taxable year 2008.

Petitioner claims that even after the adjustments brought about by the findings of the BIR-LTS are considered, the adjusted taxable income would still result in a negative position or a loss. In which case, the MCIT rate of two percent (2%) should have been applied, and not the RCIT rate of thirty-five percent pursuant to Section 27(E)(1) of the NIRC of 1997, as amended. Petitioner also claims that the application of two tax regimes, *i.e.*, MCIT of 2% and RCIT of 35% for the same taxable year will result in absurdity.

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[42] G.R. No. L-13656, January 31, 1962

On the other hand, respondent argues that petitioner can no longer claim allowable deductions because it already claimed its net loss of ₱46,988,092.00 as deduction in its ITR for the succeeding year 2009, which became the Net Operating Loss Carry-over (NOLCO) item. Hence, respondent insists that the audit/investigation conducted resulted in an adjusted taxable income upon which the 35% RCIT was imposed.

Respondent cites Section 6.5 of Revenue Regulations No. (RR) No. 14-2001, implementing Section 34(D)(3) of the NIRC of 1997, as amended, relative to the allowance of NOLCO as a deduction from gross income, to wit:

> "6.5 *NOLCO in Relation to the Minimum Corporate Income Tax (MCIT)* – In general, domestic and resident foreign corporations subject to the normal income tax rate are liable to the 2% MCIT, if applicable, computed based on gross income, whenever the amount of the MCIT is greater than the normal income tax due (computed with the benefit of NOLCO, if any), pursuant to Sections 27 or 28 of the Code. Thus, such corporation cannot enjoy the benefit of NOLCO for as long as it is subject to MCIT in any taxable year. Provided, however, that the running of the three-year period for the expiry of NOLCO is not interrupted by the fact that such corporation is subject to MCIT in any taxable year during such three-year period."

According to respondent, based on the above-cited regulation, a corporation cannot enjoy the benefit of NOLCO for as long as it is subject to MCIT in any taxable year. Respondent further states that petitioner benefited from NOLCO when it applied its net loss for 2008 to its 2009 ITR. Hence, respondent submits that whatever is left to be taxed in petitioner's 2008 ITR, the MCIT of 2% shall not be applied; instead the RCIT of 35% is the one applicable.

The Court finds respondent's contentions untenable.

Section 27(A) and (E)(1) of the NIRC of 1997, as amended, provides:

> "SEC. 27. *Rates of Income Tax on Domestic Corporations.* –
>
> (A) *In General.* – Except as otherwise provided in this Code, an income tax of thirty-five percent (35%) is hereby imposed upon the taxable income derived during each taxable year from all sources within and without the Philippines by every corporation, as defined in Section 22(B) of this Code and taxable under this Title as a corporation, organized in, or existing under the laws of

> the Philippines: *Provided,* That effective January 1, 2009, the rate of income tax shall be thirty percent (30%).
>
> xxx xxx xxx
>
> (E) *Minimum Corporate Income Tax on Domestic Corporations.* –
>
> (1) *Imposition of Tax.* – A minimum corporate income tax of two percent (2%) of the gross income as of the end of the taxable year, as defined herein, is hereby imposed on a corporation taxable under this Title, beginning on the fourth taxable year immediately following the year in which such corporation commenced its business operations, when the minimum income tax is greater than the tax computed under Subsection (A) of this Section for the taxable year.
>
> (2) *Carry Forward of Excess Minimum Tax.* – Any excess of the minimum corporate income tax over the normal income tax as computed under Subsection (A) of this Section shall be carried forward and credited against the normal income tax for the three (3) immediately succeeding taxable years."

Implementing the above provision is Section 2.27(E) of RR No. 09-98, as amended by RR No. 12-07, which states:

> Sec. 2.27(E) MINIMUM CORPORATE INCOME TAX (MCIT) ON DOMESTIC CORPORATIONS –
>
> (1) *Imposition of the Tax.* – A minimum corporate income tax (MCIT) of two percent (2%) of the gross income as of the end of the taxable year (whether calendar or fiscal year, depending on the accounting period employed) is hereby imposed upon any domestic corporation beginning on the fourth (4th) taxable year immediately following the taxable year in which such corporation commenced its business operations. The MCIT shall be imposed whenever such corporation has zero or negative taxable income or whenever the amount of minimum corporate income tax is greater than the normal income tax due from such corporation.
>
> xxx xxx xxx
>
> (2) *Carry forward of excess minimum corporate income tax* – Any excess of the minimum corporate income tax (MCIT) over the

> normal income tax as computed under Sec. 27(A) of the Code shall be carried forward on an annual basis and credited against the normal income tax for the three (3) immediately succeeding taxable years.
>
> xxx xxx xxx
>
> The taxpayer shall pay the MCIT whenever it is greater than the regular or normal corporate income tax which is imposed under Sec. 27 (A) and Sec. 28 (A) (1) of the Code. The final comparison between the normal income tax payable by the corporation and the MCIT shall be made at the end of the taxable year and the payable or excess payment in the Annual Income Tax Return shall be computed taking into consideration corporate income tax payment made at the time of filing of quarterly corporate income tax returns whether this be MCIT or normal income tax. x x x

It is clear from the foregoing provisions that the 2% MCIT on gross income shall be imposed whenever the taxpayer-corporation has zero or negative taxable income or whenever the amount of MCIT is greater than the normal or regular income tax due from such taxpayer-corporation. In other words, it is imposed in lieu of the normal or regular corporate income tax of 35%.

In its Annual ITR[43] for taxable year 2008, petitioner declared a net loss of ₱46,988,092.00.[44] Consequently, petitioner reported and paid an MCIT due of ₱1,535,431.00[45] on the gross income of ₱76,771,536.00[46].

After taking into account of the adjustment pertaining to the unrecorded gross receipts of ₱370,395.53, petitioner would still be in a net loss position in the amount of ₱46,617,696.47. Thus, the MCIT still applies.

Thus, petitioner's MCIT due increases to ₱1,542,838.63, which, when offset against its tax credits per its Annual ITR of ₱9,339,842.00[47] would still result in an overpayment in the amount of ₱7,797,003.37, as computed below:

[43] Exhibit "P-7", docket, p. 391.
[44] *Ibid.*, line 20B, docket, p. 391.
[45] *Ibid.*, line 26, docket, p. 391.
[46] *Ibid.*, line 18C, docket, p. 391.
[47] *Ibid.*, line 27G, docket, p. 391.

Total Gross Income per ITR	₱ 76,771,536.00
Less: Deductions	123,759,628.00
Net Loss per ITR	(46,988,092.00)
Add: Unrecorded gross receipts	370,395.53
Adjusted Net Loss	(46,617,696.47)
MCIT due [(₱76,771,536.00+₱370,395.53) x 2%]	1,542,838.63
Less: Tax Credits	
Creditable Tax Withheld for the First Three Quarters	8,278,226.00
Creditable Tax Withheld for the Fourth Quarter	1,061,616.00
Total Tax Credits	9,339,842.00
Tax Overpayment	**₱(7,797,003.37)**

Respondent's outright imposition of the 35% RCIT on the adjustments to taxable income is misplaced. The use of the ₱46,988,092.00 net loss as base amount in determining the adjusted income or loss is proper regardless if the same has already been claimed as deduction in the succeeding year or not. Respondent's argument that petitioner already benefitted from NOLCO when it applied its net loss for 2008 in its 2009 ITR is of no moment since the 2009 ITR is beyond the scope of the present assessment.

Accordingly, the adjustments to taxable income did not result in any taxable income upon which the 35% RCIT may be imposed. Moreover, petitioner even had an overpayment as its tax credits per its Annual ITR exceeded its MCIT due.

In sum, petitioner is not liable for any deficiency income tax for taxable year 2008.

WHEREFORE, premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, the assessment issued by respondent against petitioner for taxable year 2008 covering alleged deficiency income tax of ₱266,467.59, inclusive of interest, is **CANCELLED AND SET ASIDE**.

SO ORDERED.

Ma. Belen

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

LOVELL R. BAUTISTA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

ATTESTATION

I attest 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.

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

Pursuant to *Section 13 of Article VIII of the Constitution* and the Division Chairperson's Attestation, 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.

ROMAN G. DEL ROSARIO
Presiding Justice