REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

LITA ENTERPRISES, INC.,
Petitioner,

- versus - C.T.A. CASE NO. 3511

COMMISSIONER OF INTERNAL REVENUE,
Respondent.
x - - - - - - - - - - - - x

2/6/87

D E C I S I O N

This is an appeal from a decision of the Commissioner of Internal Revenue, thru his Regional Director Reynaldo A. Suarez, Region No. 4-B of the Bureau of Internal Revenue, dated November 19, 1980, assessing against and demanding from petitioner Lita Enterprises, Inc., the sum of ₱23,463.41 as fixed and common carriers tax for 1974 (Exh. 3, p. 12, BIR rec.) computed as follows:

Gross taxable sales/receipts per return/per audit		₱523,526.83
_____% Tax due thereon		10,470.54
Less: Tax already paid		None
Deficiency tax due	₱50.50	10,470.54
25% surcharge due thereon	12.50	2,617.63
Interest from 1-21-75 to 3-15-80	53.56	9,439.18
Compromise penalty		820.00
Total amount due & collectible		₱ 23,463.41

On November 19, 1980, Revenue Service Chief Eufracio D. Santos of the National Assessment Office, Bureau of Internal Revenue, wrote a letter to petitioner confirming the letter of assessment of aforesaid Regional Director Suarez, and demanding the payment of the said amount of ₱23,463.41 as fixed and percentage tax (common carriers tax) and interest thereon within fifteen days from receipt thereof. (Exh. 4, p. 14, BIR rec.)

On December 9, 1980, Manuel A. Concordia, President of petitioner, wrote a letter to Revenue Service Chief Eufracio D. Santos acknowledging receipt on November 24, 1980 (Exh. 5, p. 12, BIR rec.) of the latter's letter dated November 19, 1980 and stating that he is "not aware of any non-payment of such taxes (fixed and percentage taxes) for the year (1974) and that in view of the fact that this is the first time that we (he) received the demand for such payment to (or no demand previous thereto having been received by petitioner); we (he) submit(s) that any action to collect the alleged tax due for 1974 had already prescribed."

On July 5, 1982, Deputy Commissioner of Internal Revenue Tomas C. Toledo wrote a letter to petitioner (Exh. 6, p. 16, BIR rec.), in reply to President Manuel Concordia's letter dated December 9, 1980 aforesaid, stating therein that he "x x x could not find any basis, legal or factual, to modify or revise the assessment and, therefore, your (petitioner's) aforesaid protest should be as it is, hereby denied and that this is our final decision on the matter."

On August 16, 1982, petitioner, through its said President, Manuel A. Concordia, wrote a letter to respondent Commissioner of Internal Revenue, rectifying its letter of December 9, 1980 which acknowledged receipt on November 24, 1980 of Revenue Service Chief Santos' letter and saying that it had received the same instead on December 4, 1980 and that prior thereto it did not receive any assessment or demand for payment of the alleged taxes due; and acknowledging the receipt on August 2, 1982 of the decision of Deputy Commissioner of Internal Revenue Tomas C. Toledo dated July 5, 1982; that no mention was ever made regarding as to what records were the bases for the assessment; and that respondent had not yet passed upon the question of prescription of the assessment or collection of the taxes. (Annex D, pp. 8-9, CTA rec.)

Without waiting for the reply of its letter to the Commissioner of Internal Revenue dated August 16, 1982 above, petitioner appealed from respondent's decision dated July 5, 1982, received by petitioner on August 2, 1982, by filing a petition for review with this Court on September 1, 1982, well within the 30-day period of appeal.

The only issues presented for determination by Us are the following:

1. Whether or not petitioner filed in 1974 quarterly returns of its gross receipts as common carrier and paid the common carriers tax thereon as well as the annual fixed tax of fifty pesos (₱50.00) required by law;

2. Whether or not the right of respondent to assess and collect the fixed and percentage tax for 1974 has already prescribed;

3. Whether or not prior to the filing of the instant petition for review, petitioner was deprived or denied due process of law in the assessment of the fixed and percentage tax claimed to be due from petitioner.

Considering that these issues are interrelated with one another, we will consider them at the same time.

Petitioner in this case is confronted with the difficult task of proving that it, through its agents or employees, had actually filed its privilege and percentage tax returns for the year 1974 because of the circumstance of the apparent destruction of its records.

There was uncontradicted testimony of petitioner's President, Manuel Concordia, that he allegedly knew of the fact of filing of the fixed and percentage tax returns and payment of the taxes due thereon in 1974 by his employees. However, he reasoned out that he does not have the fixed and percentage tax returns anymore because the law (purportedly petitioner's President referring to Section 334(A), later as Section 337 of the National Internal Revenue Code, as amended by PD 69, etc.) requires these records and documents be kept only within a five year period (p. 17, tsn, Oct. 18, 1983).

When there is testimony that the returns were in fact filed, it was bounden upon him who so testify to show by other records in his possession or that of his agents that there was in reality the fact of the filing of the returns referred to and also the fact of payment of the fixed and percentage taxes thereon. Taxpayer is thereafter subject to the general rule that "when a party fails to produce documentary evidence pursuant to a notice to produce and no satisfactory explanation for such failure is given, an inference may properly be recognized against the party failing to produce it." (Capento Securities Corp., 47 BTA 691; Pelhan G. Wodehouse, 8TC 637, 641, citing Jones on Evidence, Pars. 19.20 & case cited therein.)

It was therefore incumbent at this instance upon President Manuel Concordia, to show, by way of corroborative evidence, and present a duplicate original copy of the fix and percentage tax returns which were allegedly actually filed and the receipts which will definitely evidenced the fact of payment of the fix and percentage taxes due thereon for the year 1974. Petitioner cannot seek refuge under Section 33 of the National Internal Revenue Code and simply assert that it did not keep or preserved its books of accounts and subsidiary records which probably includes the tax returns referred to and the receipts of payment of the taxes due beyond five year period. The fact is that, under said law, the keeping or preservation of the books of accounts and subsidiary records within five years, except in case of fraud, mistake or irregularity, is conveniently provided for the purpose of reasonable inspection and examination within the said period of five years, or once every year within the span of five years, counted from the last entry of the business transaction in its books of account. However, the said law does not apparently, to the extent where taxpayer will be rendered non-culpable, excuse it from its responsibility of presenting real or documentary evidence to sustain the defenses against the assessment issued against it. Petitioner, thru its President Manuel Concordia, had testified in open court that since its employees were the ones who filed the fix and percentage tax returns in question for 1974 and had paid the taxes therein, it was then necessary for him to present his employees to testify on the fact of filing the returns and paid the taxes thereon. But not one of these employees were ever presented in court to testify in collaboration to the testimony of President Concordia. No fix and percentage tax returns, which were allegedly filed for 1974, were ever presented in evidence.

With the solitary testimony of President Concordia, without accompanying corroborative creditable testimonial or documentary evidence, we are not convinced that fixed and percentage tax returns were filed for petitioner for 1974 and that the taxes due thereon paid for said year.

The assessment of respondent against petitioner having been based upon a financial statement attached to the income tax return of petitioner filed for 1974, we take it that the information concerning taxable gross receipts as common carrier for percentage tax purposes entered therein is correct, and is the gross receipts of petitioner as common carrier and can therefore be taken as evidence against it. The said assessment having been issued and based upon actual facts, its presumption of correctness is very strong, and can stand the test of our judicial scrutiny. (Benipayo vs. Coll., G.R. L-13656, Jan. 31, 1962.) The negative testimony of Examiner Julita Batoon that no percentage tax returns for 1974 were filed and no fixed and percentage tax were paid stands. This negative testimony needs no further proof. It was brought about by her efforts in good faith of finding out from petitioner these facts when she invited petitioner's President Concordia to go to her office for investigation but to no avail. These apparent failure by President Concordia to heed her invitation had caused her to report a finding for fixed and percentage tax liability for 1974 to respondent, based on the financial statement of petitioner itself attached to its 1974 income tax return, who affirmed her finding; hence, respondent's assessment in the amount of ₱23,463.41 as fixed and percentage taxes for 1974. The good faith of tax assessors and the validity of their actions are presumed, and the burden to show their invalidity belongs to taxpayer. (Interprovincial Autobus Co., Inc. vs. Coll., G.R. L-6741, Jan. 31, 1956, 52 OG No. 2, p. 791.) The assessment by respondent against petitioner was not controverted by substantive, convincing and trustworthy evidence.

When President Concordia requested for a reconsideration of the assessment, and a period of time was given to him during the investigation by Examiner Julita Batoon, to present his case before she made her report, and that considering the presumption that public officers have acted lawfully in the performance of their duties (R.H. Stearns Co. vs. US, 291 US 34; 78 L. Ed. 647), there is, we think, sufficient conferment upon petitioner of the due process of law. It never occurred,to our mind, at any stage of the administrative proceedings in respondent's office, that petitioner received a treatment less than substantial due process for the only evidence that should have been presented, if there were actually any, to overcome the presumption of correctness of assessment, which evidence definitely must be substantial, trustworthy and conclusive evidence, are the facts that fixed and percentage tax returns were filed and that payment of said taxes due thereon were made. It cannot, therefore, be seriously charged that respondent did not afford petitioner substantial due process of law.

There being no percentage tax returns filed for 1974 and, similarly, no payment of the fixed and percentage taxes having been made for that year, respondent has within 10 years from the discovery of the non-filing of the return and/or non-payment of the taxes or from the date of Examiner Batoon's report (Exh. 1 & 1-B) on December 12, 1979 (p. 8, BIR records) to the date the assessment (p. 12, BIR records) was issued, thru Director Reynaldo Suarez on February 4, 1980, which is only less than one (1) year. The assessment is issued well within the period of 10 years under Section 332(a) of the National Internal Revenue Code. The right of respondent Commissioner of Internal Revenue to assess and demand the payment of the fix and percentage taxes for 1974 against petitioner has not therefore prescribed.

Finally, there being no conclusive, reliable and convincing evidence presented, which are corroborative to, or other than, the uncorroborated testimony given by petitioner's President Concordia, the said testimony becomes unsubstantial, not convincing, and, hence, the testimonial evidence presented should be, as it is hereby, disregarded. (Burka vs. Comm. of Internal Rev., 179 F 2d 483.) We are of the opinion and so hold that the assessment issued against petitioner, being unrebutted, is presumptively correct and valid (Fed. Tax Practice, par. 8-6, p. 201; Coll. vs. Bonol Land Transp. Co., G.R. L-13099, April 29, 1960) with the exception of the imposition of ₱820.00 compromise penalty which is illegal because a compromise penalty is not imposable in the absence of an agreement freely entered into between herein petitioner and respondent. (Coll. vs. UST, G.R. L-11274 & L-11280, Nov. 28, 1958; M.R. Arick vs. Comm., CTA 1679, May 30, 1969.)

WHEREFORE, the decision of the Commissioner of Internal Revenue appealed from is hereby modified.

Petitioner is hereby ordered to pay respondent Commissioner of Internal Revenue the sum of ₱22,643.41 as fix and percentage taxes for 1974.

With costs against petitioner.

SO ORDERED.

Quezon City, Metro Manila, April 6, 1987.

CONSTANTE C. ROAQUIN
Associate Judge

WE CONCUR:

AMANTE FILLER
Presiding Judge

ALEX Z. REYES
Associate Judge