

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL
REVENUE,

Petitioner,

C.T.A. EB NO. 481
(C.T.A. CASE NO. 7531)

Present:

-versus-

ACOSTA, Presiding Justice
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, JJ.

FORT BONIFACIO DEVELOPMENT
CORPORATION,

Respondent.

Promulgated:

JAN 05 2010

Go Apolinario
1:30 p.m.

X ----- X

DECISION

PALANCA-ENRIQUEZ, J.:

THE CASE

This is a Petition for Review filed by the Commissioner of Internal Revenue (hereafter "petitioner CIR") under *Section 3(b) Rule 8 of the 2005 Revised Rules of the Court of Tax Appeals, as amended*, in relation to *Rule 43 of the 1997 Rules of Civil Procedure, as amended*, which seeks to set aside the Decision dated February 4, 2009 and Resolution dated March 19, 2009 rendered by the First Division of this Court in

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C.T.A. Case No. 7531, the respective dispositive portions of which read,
as follows:

“WHEREFORE, in view of the foregoing,
the instant Petition for Review is hereby
GRANTED. The deficiency income tax
assessment covered by Assessment Notice No.
LTS-LN-116-R-02-04-S-01607-IT-05-00236,
dated December 28, 2005, in the amount of
P683,265, is hereby **CANCELLED**.

SO ORDERED.”

“WHEREFORE, respondent’s Motion for
Reconsideration is **DENIED for LACK OF
MERIT**. The Decision dated February 4, 2009 is
hereby **AFFIRMED**.

SO ORDERED.”

THE PARTIES

Petitioner is the duly appointed Commissioner of Internal Revenue
vested with the authority to act as such, including inter alia, the power to
decide disputed assessments, refund internal revenue taxes, fees or other
charges, penalties in relation thereto, or other matters arising under the
tax laws. He holds office at the BIR National Office Building, Diliman,
Quezon City.

Respondent Fort Bonifacio Development Corporation (hereafter
“respondent Fort Bonifacio”), on the other hand, is a domestic



corporation duly registered with the Securities and Exchange Commission, existing under and by virtue of the laws of the Republic of the Philippines, with principal office address at 2nd Floor, Bonifacio Technology Centre, 31st St., corner 2nd Ave., Bonifacio Global City, Taguig City, Metro Manila.

THE FACTS

The facts, as culled from the records, are as follows:

On February 3, 2006, respondent Fort Bonifacio received a Formal Letter of Demand and Assessment Notices for alleged deficiency Income Tax and Value Added Tax (VAT) arising from the discrepancy based on the computerized matching conducted by the BIR on respondent Fort Bonifacio's sales and customer's purchases for the 4th quarter of 2002. The alleged deficiency income taxes and VAT amounted to P683,265.02 and P236,779.59, respectively, or in the aggregate amount of P920,044.61, inclusive of interests and penalties.

On March 6, 2006, respondent Fort Bonifacio filed a protest alleging that the assessment notices and the corresponding formal letter of demand are null and void for failure to state clearly the law and facts on which the assessments were made, contrary to the due process requirements; as regards the deficiency income tax assessment, the same



is without basis; and as regards the deficiency VAT assessment, the same had already prescribed.

On May 5, 2006, respondent Fort Bonifacio submitted its documents to the BIR in support of its arguments.

On September 14, 2006, respondent Fort Bonifacio received a Final Decision on Disputed Assessment dated August 18, 2006, canceling the deficiency VAT assessment of P236,779.59, and sustaining the deficiency income tax assessment of P683,265.02.

With the partial denial of its protest, on October 16, 2006, respondent Fort Bonifacio filed a Petition for Review with this Court, docketed as C.T.A. Case No. 7531.

On December 27, 2006, petitioner filed his answer.

Thereafter, on March 16, 2007, the case was set for pre-trial, which was reset to the following dates for the continued failure of counsel for CIR to appear:

- 1) March 30, 2007;
- 2) April 20, 2007;
- 3) May 4, 2007 (with warning to CIR's counsel); and
- 4) June 1, 2007 (with warning to CIR's counsel).



On June 29, 2007, counsel for CIR again failed to appear for the pre-trial and upon motion of Fort Bonifacio, the CIR was declared in default and Fort Bonifacio was allowed to present its evidence *ex parte*.

On July 26, 2007, the CIR filed a "Motion for Reconsideration" praying that the Order of Default be lifted.

The *ex parte* presentation of evidence for Fort Bonifacio was set on August 14, 2007, which was reset to September 27, 2007 upon motion of Fort Bonifacio. On September 27, 2007, counsel for Fort Bonifacio again failed to appear; and the *ex parte* presentation of evidence for Fort Bonifacio was again reset to October 25, 2007, with warning to Fort Bonifacio. Again, on October 17, 2007, Fort Bonifacio moved for the resetting of the scheduled *ex parte* presentation of evidence on October 25, 2007, which was granted by the First Division. Hence, the *ex parte* presentation of evidence for Fort Bonifacio was again reset to November 20, 2007. On November 20, 2007, counsel for Fort Bonifacio manifested that it is considering a possible amicable settlement of the instant case, however, the manifestation was denied, and Fort Bonifacio was deemed to have waived the right to present its evidence. Thereafter, the Court considered CIR's pending "Motion for Reconsideration" submitted for resolution. In a Resolution dated December 4, 2007, the Petition for



Review was dismissed for failure to prosecute and the case was deemed closed and terminated.

On January 2, 2008, Fort Bonifacio filed a "Motion for Reconsideration" of the Resolution dated December 4, 2007 dismissing the case for failure to prosecute, to which an "Opposition Re: Motion for Reconsideration" was filed on January 22, 2008 by the CIR. In a Resolution dated February 5, 2008, Fort Bonifacio's "Motion for Reconsideration" was deemed submitted for resolution, without taking into consideration CIR's Opposition thereto, as CIR was declared in default in the Resolution dated July 11, 2007. On April 4, 2008, Fort Bonifacio's "Motion for Reconsideration" was granted, and the Resolution dated December 4, 2007 dismissing the case for failure to prosecute was lifted and set aside, and the *ex parte* presentation of evidence for Fort Bonifacio was set on May 6, 2008.

After the *ex parte* presentation of the evidence for Fort Bonifacio, on February 4, 2009, the First Division rendered a decision granting the petition, thereby canceling Assessment Notice No. LTS-LN-116-R-02-04-S-01607-IT-05-00236, in the amount of P683,265.02.

The CIR filed a "Motion for Reconsideration" of the Decision dated February 4, 2009 praying that the Decision be reversed and set



aside, or in the alternative to resolve his “Motion for Reconsideration” dated July 26, 2007, that he be allowed to present evidence in support of its assessments on February 23, 2009, which was denied by the First Division in a Resolution dated March 19, 2009.

Hence, this instant Petition for Review raising this sole:

ISSUE

WHETHER OR NOT THE HONORABLE COURT
ERRED IN CANCELLING ASSESSMENT NOTICE
NO. LTS-LN-116-R-02-04-S-01607-IT-05-00236
DATED 28 DECEMBER 2005.

On May 11, 2009, without necessarily giving due course to the petition, we required herein respondent Fort Bonifacio to file its comment, not a motion to dismiss, within ten (10) days from notice.

On June 2, 2009, respondent filed its “Comment/Opposition to Petition for Review”.

On June 5, 2009, both parties were ordered to file their simultaneous memoranda within thirty (30) days from notice; after which the case shall be deemed submitted for decision.

On April 21, 2009, both parties having filed their respective memorandum, the case was deemed submitted for decision on April 27, 2009.



THE COURT EN BANC'S RULING

The petition has no merit.

**Petitioner CIR's Motion for Reconsideration
on the Order of Default**

We deem it necessary to first resolve the issue raised by petitioner CIR as regards his "Motion for Reconsideration" dated July 26, 2007 praying for the lifting of the Order of Default.

Petitioner CIR, in his alternative prayer in the instant Petition for Review, prays for the resolution of his "Motion for Reconsideration" of the Order of Default, filed before the First Division on July 26, 2007.

Upon a careful review of the records, the Court finds no valid or compelling reason to disturb the findings of the First Division in its Resolution dated March 19, 2009 denying CIR's "Motion For Reconsideration" of the decision. As aptly ruled by the First Division, the CIR failed to file any other motion to lift the Order of Default, and instead slept on his right until a decision was rendered on February 4, 2009. The CIR moved for the resolution of said "Motion for Reconsideration" only after the Decision was already rendered by the First Division. This Court, likewise, cannot countenance CIR's belated attempt to move for the resolution of his "Motion for Reconsideration"



dated July 26, 2007 praying for the lifting of the Order of Default in order to accord him a relief, which he unjustifiably failed to pursue.

Furthermore, a perusal of CIR's Motion for Reconsideration of the decision shows that CIR raised as one of the grounds the failure of the First Division to resolve his Motion for Reconsideration of the Order of Default, which the First Division resolved in its Resolution dated March 19, 2009, pertinent portion of which reads, as follows:

“Although respondent appears to be seeking reconsideration of the Decision dated February 4, 2009, what he actually prays is the lifting of his default status the remedy of which has long prescribed. In the earlier resolution, dated December 4, 2007, respondent was already aware that his right to present evidence was in jeopardy as his Motin for reconsideration, dated July 26, 2007, was rendred moot. Then, another Resolution, dated April 4, 2008, again rendered moot respondent's Opposition, dated Jnauary 22, 2008. Thereafter, respondent failed to file any other motion to revive his status; he chose to remain quiet and slept on his right until after a Decision has been rendered.

It appears that respondent's instant motion is a last ditch effort in the hope of a favorable result that should be rejected. Respondent should have been vigilant and filed the timely motion to remedy his declaration of default, otherwise, such default status remains.”

It is, therefore, clear that there is no merit to CIR's contention that his Motion For Reconsideration of the Order of Default has not yet been resolved by the First Division.



On the merits of the instant Petition for Review

It must be emphasized that a judgment of default against a party who failed to appear during pre-trial does not imply a waiver of all of its rights, except the right to be heard and to present evidence to support its allegations. Otherwise, it would be meaningless to request presentation of evidence every time the other party is declared in default. If it were so, a decision would then automatically be rendered in favor of the non-defaulting party and exactly to the tenor of his prayer. The law also gives the defaulting parties some measure of protection because plaintiffs/petitioners, despite the default of defendants, are still required to substantiate their allegations in the complaint (*Social Security System v. Chavez*, 440 SCRA 269, 276 [2004]).

In the case at bench, where petitioner CIR was declared in default and consequently lost his right to present his case and adduce evidence to prove his defenses, the burden of proof is still on respondent Fort Bonifacio to establish its case by a preponderance of evidence. If it claims a right granted or created by law, it must prove its claim by competent evidence. Respondent Fort Bonifacio must rely on the strength of its own evidence and not on the weakness of that of its opponent.



Hence, it must be stressed that the decision of the First Division was based on the evidence adduced *ex parte* by respondent Fort Bonifacio.

In the instant Petition, petitioner CIR alleges that the First Division erred in finding that the assessment has failed to comply with the guidelines implementing the “no contact-audit approach”, which petitioner CIR adapted in coming up with the subject assessment; that he issued the subject assessment based on *Revenue Memorandum Order (RMO) No. 42-2003*, wherein he conducted computer matching that revealed under-declared sales on respondent Fort Bonifacio’s reported sales and purchases with customers for the 4th quarter of 2002; respondent Fort Bonifacio was given ample time to refute the assessment however, the documentary evidence it submitted were found by petitioner CIR to be insufficient; that there is a presumption of regularity and accuracy of findings made by revenue officials, which was upheld by the Supreme Court.

On the other hand, in its Comment, respondent Fort Bonifacio counter argues that the First Division is correct in ruling that petitioner failed to comply with the guidelines implementing the procedure it adapted under RMO No. 46-2004; that petitioner CIR likewise deviated from certain guidelines provided in RMO No. 42-03; that the aforesaid



failure of the examiners to comply with RMO Nos. 42-03 and 46-2004 constitutes irregularities in the performance by examiners of their duties, thereby taking out the subject income tax assessment from the ambit of the application of the presumption of validity and regularity of tax assessments.

Petitioner CIR's contentions are devoid of merit.

Upon a careful review of the evidence adduced *ex parte* by respondent Fort Bonifacio and as aptly ruled by the First Division, respondent Fort Bonifacio's regular corporate tax for the year 2002 is lower than the minimum corporate income tax; that it has paid its MCIT; and that it has excess tax credits amounting to P339,075,150.64 as of December 31, 2002 (*TSN, May 6, 2008*). In view of such findings, it is imperative for the Court to determine whether such findings are supported by the evidence adduced *ex parte* by respondent Fort Bonifacio.

Basic is the rule that tax assessments by tax examiners are presumed correct and made in good faith. All presumptions are in favor of the correctness of a tax assessment. It is to be presumed, however, that such assessment was based on sufficient evidence. Upon the introduction of the assessment in evidence, a *prima facie* case of liability on the part of



the taxpayer is made. If a taxpayer files a petition for review in this Court and assails the assessment, the *prima facie* presumption is that the assessment made by the BIR is correct, and that in preparing the same, the BIR personnel regularly performed their duties. This rule for tax initiated suits is premised on several factors other than the normal evidentiary rule imposing proof obligation on the petitioner-taxpayer: the presumption of administrative regularity; the likelihood that the taxpayer will have access to the relevant information; and the desirability of bolstering the record-keeping requirements of the NIRC (*CIR vs. Hantex Trading Co., Inc.*, 454 SCRA 301).

However, the *prima facie* correctness of a tax assessment does not apply upon proof that an assessment is utterly without foundation, meaning it is arbitrary and capricious. Where the BIR has come out with a "naked assessment," i.e., without any foundation character, the determination of the tax due is without rational basis. Hence, the determination by this Court must rest on all the evidence introduced and its ultimate determination must find support in credible evidence.

Considering that respondent Fort Bonifacio was allowed to present its evidence *ex parte* to prove that the income tax deficiency for taxable year 2002 has no factual basis, as it was liable only to MCIT and that it



has excess tax credits accruing for said taxable year, We deem it necessary to determine whether there was regularity in the performance of duties by petitioner CIR's agents in coming up with the subject assessment to uphold the presumption of the correctness of the same.

RMO No. 42-2003 implemented the "no contact audit approach" in order to intensify enforcement of the power of the Commissioner to authorize any examination of taxpayer and the assessment of the correct amount of tax. The "no contact-audit approach" includes the process of computerized matching of sales and purchases data contained in the Schedules of Sales and Domestic Purchases, and Schedule of Importation submitted by VAT taxpayers under the RELIEF System. This approach was designed in order to expedite the determination of the accuracy of the return filed by the taxpayers. Through this procedure, the BIR is authorized to conduct a computerized matching of data/information from third party sources/providers vis-à-vis return information filed by the taxpayers. However, since the procedure will not conduct an audit or investigation of the entire books of account of the taxpayer, the BIR must show its basis to support the assessment based on the found discrepancies.



Based on RMO Nos. 42-2003 and 46-2004, petitioner CIR issued an assessment against respondent Fort Bonifacio. Since the same was protested by respondent Fort Bonifacio, the BIR must prove compliance with the procedure on "Action on Protested Letter Notices", in accordance with the procedure implementing the "no contact-audit approach". Petitioner CIR himself promulgated said implementing guidelines of its adapted procedure, thus, he and his agents must be the first to comply with said guidelines. However, as aptly ruled by the First Division and from the evidence adduced *ex parte* by respondent Fort Bonifacio, the assessment issued by petitioner CIR failed to comply with the guidelines implementing the procedure it adapted. Failing to show proof of compliance and the proper computation, the assessment remains to be a mere presumption. As petitioner CIR was declared in default, he was not able to present proof that the proper procedure was observed in coming up with the said assessment.

Settled is the rule that 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 (*Commissioner of Internal Revenue vs. Alberto D. Benipayo*, 4 SCRA 182). Hence, assessment should not be based on mere



presumptions no matter how reasonable or logical said presumptions may be (*Commissioner of Internal Revenue vs. Island Garment Manufacturing Corporation and the Court of Tax Appeals, 153 SCRA 665*).

As aptly ruled by the First Division, the assessment against respondent Fort Bonifacio for income tax deficiency for the taxable year 2002 has no factual and legal basis, hence, the assessment cannot be presumed correct in any respect, thus:

“True, that assessments are prima facie presumed correct and made in good faith; that the taxpayer has the duty of proving otherwise; and, in the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed, in the present case, however, the assessment of respondent has failed to comply with the guidelines implementing the procedure it adapted.

Since respondent was not able to present to Us such certifications and statements necessary to support the audit, We cannot verify the veracity of the assessment. With the failure to present other supporting documents, We believe that, the assessment, though possibly meritorious, cannot hold water due to unconfirmed data gathered and is concluded to be mere presumptions.

Therefore, We agree with petitioner when it cited Collector of Internal Revenue vs. Benipayo which ruled that assessments should be based on facts and not mere presumptions. As such, the income tax deficiency assessment cannot be enforced against petitioner; otherwise, the Court stands to tax petitioner arbitrarily. In Roxas vs. Court of Appeals, the Supreme Court eloquently ruled that:



'The power of taxation is sometimes called also the power to destroy. Therefore it should be exercised with caution to minimize injury to the proprietary rights of a taxpayer. It must be exercised fairly, equally and uniformly, lest the tax collector kill the 'hen that lays the golden egg'. And, in order to maintain the general public's trust and confidence in the Government this power must be used justly and not treacherously.'

Having found respondent's assessment without basis, the other issues of this case are now rendered moot."

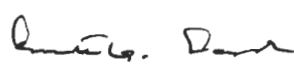
Finding that respondent Fort Bonifacio's evidence adduced *ex parte* has substantially established that the income tax deficiency assessment for taxable year 2002 has no basis, we affirm the assailed Decision dated February 4, 2009 and Resolution dated March 19, 2009 rendered by the First Division.

WHEREFORE, premises considered, the present Petition for Review is hereby **DENIED DUE COURSE**, and accordingly **DISMISSED**, for lack of merit.

SO ORDERED.


OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:


ERNESTO D. ACOSTA
Presiding Justice


JUANITO C. CASTAÑEDA, JR.
Associate Justice

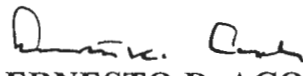

LOVELL R. BAUTISTA
Associate Justice


ERLINDA P. UY
Associate Justice


CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.


ERNESTO D. ACOSTA
Presiding Justice