Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SECOND DIVISION
****

FARCON MARKETING CORP.,
Petitioner,

-versus-

BUREAU OF INTERNAL REVENUE,
Respondent.

CTA CASE No. 8367

Members:

CASTAÑEDA, JR., *Chairperson,*
CASANOVA, and
COTANGCO-MANALASTAS, JJ.

Promulgated:

FEB 03 2015

x--x
4:30 p.m.

DECISION

CASTAÑEDA, JR., J.:

This Petition for Review filed by Farcon Marketing Corporation seeks to reverse and set aside the decision of the Commissioner of Internal Revenue, finding it liable for deficiency income tax in the amount of Five Hundred Sixteen Thousand Five Hundred Two Pesos and 26/100 (P516,502.26), inclusive of interest, for calendar year (CY) 2007.

The Facts

Petitioner Farcon Marketing Corporation is a domestic corporation organized, registered and existing under Philippine laws.[1] On the other hand, respondent Bureau of Internal Revenue (BIR), as represented by the Commissioner of Internal Revenue (CIR), is the government agency mandated by law to decide disputed assessments and to enforce the provisions of the National Internal Revenue Code (NIRC) of 1997 and other tax laws.

[1] Par. 1, Stipulation of Facts, Joint Stipulation of Facts and Issues (JSFI), docket, p. 74.

On June 13, 2008, a Tax Verification Notice[2] (TVN) was issued by the BIR, authorizing Revenue Officer Francisco M. Diokno to verify petitioner's supporting documents and/or pertinent records relative to all its revenue taxes. The TVN was revalidated on January 9, 2009. Meanwhile, by virtue of the said TVN, Revenue Officer Francisco M. Diokno sent several requests for presentation of records on June 16, 2008, on July 1, 2008, and on July 24, 2008 to petitioner.[3]

On June 1, 2010, petitioner received from Revenue Officer Jeffrey R. Ordonez a letter[4] dated May 30, 2010, requesting petitioner to submit its books of accounts and other accounting records necessary for the BIR's examination.

On June 4, 2010, the BIR received a letter[5] dated June 3, 2010 from petitioner, stating that it is not possible for petitioner to present its books of accounts and other accounting records because these documents were destroyed and damaged by typhoons *Ondoy* and *Pepeng*.

Thereafter, petitioner received an undated Notice of Informal Conference with attached Computation of Deficiency Tax in the amount of P511,441.08, inclusive of interest and compromise charges.[6]

On March 28, 2011, petitioner received from Regional Director Nestor S. Valeroso of Revenue Region No. 7-Quezon City a Preliminary Assessment Notice (PAN) dated March 11, 2011, with Details of Discrepancies assessing petitioner of the amount of P506,168.71.[7]

On April 15, 2011, petitioner sent to Regional Director Nestor S. Valeroso a letter to ask for a period of thirty (30) days from said date to reconstruct its accounting records and to dispute or protest its alleged tax liability.[8]

However, on April 28, 2011, petitioner received an Assessment Notice (FAN) under Demand No. 45-B023-07 with a Formal Letter of Demand (FLD) issued on April 14, 2011,[9] demanding payment of P516,502.26, inclusive of interest, and supported by Details of Discrepancies. Thus, petitioner sent to respondent its protest letter dated May 30, 2011, which was received by the latter on May 31,

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[2] Exhibit "6", BIR Records, p. 4.
[3] Exhibits "7", "8", and "9", BIR Records, pp. 1-3.
[4] Par. 3, Stipulation of Facts, JSFI, docket, p. 74; Exhibit "C", docket, p. 84.
[5] Exhibits "D", "D-1", and "D-2", docket, pp. 85-87.
[6] Par. 4, Stipulation of Facts, JSFI, docket, p. 74; Exhibits "E" and "E-1", docket, pp. 88-89.
[7] Par. 5, Stipulation of Facts, JSFI, docket, p. 75; Exhibits "F" and "F-1", docket, pp. 90-91.
[8] Par. 6, Stipulation of Facts, JSFI, docket, p. 75; Exhibits "G", "G-1", and "G-2", docket, pp. 92-94.
[9] Par. 7, Stipulation of Facts, JSFI, docket, p. 75; Exhibits "H", "H-1", and "H-2", docket, pp. 95-97.

2011.[10] Subsequently, on June 22, 2011, petitioner received a letter[11] from respondent granting its request for reinvestigation.

On July 6, 2011, petitioner received a letter from Assistant Revenue District Officer Jose G. Luna, with the information that the investigation is to be continued by Revenue Officer Kelly C. Chong.[12]

On October 5, 2011, petitioner received respondent's final decision through OIC-Regional Director Jonas DP. Amora reiterating the assessed tax deficiency of P516,502.26.[13] Consequently, petitioner filed the instant Petition for Review on November 4, 2011.

Respondent CIR filed her Answer[14] on December 26, 2011, raising the following Special and Affirmative Defenses:

> "5. All presumptions are in favor of the correctness of the assessment. 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;
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> 6. The Preliminary Assessment Notice (PAN) and Formal Letter of Demand and Assessment Notice No. 45-B023-07 (FAN) dated 17 March 2011 and 14 April 2011 respectively were issued in compliance with the provisions of Section 228 of the National Internal Revenue Code (NIRC) and in accordance to existing Revenue Rules and Regulations in relation to the right of the taxpayer and in the instant case, the petitioner to be informed of the factual and legal bases upon which the assessments were made;
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> 7. xxx Petitioner was fully appraised of the facts and the law on which the Final Assessment was issued. The Preliminary Assessment Notice (PAN) and Formal Letter of Demand and Assessment Notice No. 45-B023-07 (FAN) which have been sent to and received by the Petitioner provide in detail the manner of computation, the facts and provisions of the law, rules and regulations on which the assessments were based. xxx
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> xxx xxx xxx

[10] Exhibits "J", "J-1", and "J-2", docket, pp. 99-107.
[11] Par. 8, Stipulation of Facts, JSFI, docket, p. 75; Exhibit "I", docket, p. 98.
[12] Par. 9, Stipulation of Facts, JSFI, docket, p. 75; Exhibit "K", docket, p. 108.
[13] Par. 10, Stipulation of Facts, JSFI, docket, p. 75; Exhibit "B", docket, p. 83.
[14] Docket, pp. 44-50.

9. The same case also pointed out the elements to be considered as a formal assessment:

a. It should be addressed to the taxpayers;
b. There should be demand made on the taxpayers to pay the tax liability and should have a period for payment set therein;
c. The letter should be mailed or sent to the taxpayers by the Commissioner.

All these elements are present in the Preliminary Assessment Notice (PAN) and Formal Letter of Demand and Assessment Notice No. 45-B023-07 (FAN) dated 17 March 2011 and 14 April 2011 respectively. Furthermore, the receipt of the former and the latter were admitted by the Petitioner.

10. Assuming *arguendo* that these notices are not assessment per se as alleged by the Petitioner, the right of the Respondent to assess the income tax deficiency against the Petitioner had not yet prescribed. The running of the prescriptive period on the making of an assessment and collection of taxes is likewise suspended when the taxpayer requests for a reinvestigation which is granted by the Commissioner. In the case at bar, the Petitioner requested for the reinvestigation of the Assessment Notice No 45-B023-07 for taxable year 2007 as evidence by their letter dated 30 May 2011. The same was granted by the Commissioner through the Regional Director of Revenue Region No. 7 of Quezon City. Clearly, prescription is never an issue.

11. Furthermore, Revenue Memorandum Order No. 31-2009 provides for the Requirements for the Filing of Claims of Casualty Loss:

a. Sworn Declaration of Loss to be filed within forty-five (45) days after the date of the event, stating the following:

• Nature of the event that gave rise to such loss(es), and the time of its occurrence;
• Description and location of the damaged property(ies);
• Items needed to compute the loss(es), such as: a.) cost or other basis of the property(ies); b.) depreciation allowed, if any;

c.) value of the property(ies) before and after the event; d.) cost of repair.

• Amount of insurance or other compensation received or receivable.

a.1. The Sworn Declaration of loss must be supported by the following documents:

• The Financial Statement for the year immediately preceding the event; and,

• Copies of the Insurance Policy(ies), if any, for the concerned property(ies).

b. Proof of the elements of the loss(es) claimed, such as, but not limited to, the following:

• Photographs of the property(ies) before the typhoon and after the typhoon, showing the extent of the damage sustained;

• Documentary evidence for determining the cost or valuation of the damaged property(ies), such as, but not limited to: cancelled checks, vouchers, receipts, and other evidence of costs;

• Insurance policy, in the event that there is an insurance coverage for the property(ies);

• Police report, in cases of robbery/theft during the typhoon and/or as a consequence of looting.

<u>All documents and other evidence submitted to prove such loss(es) shall be subject to verification by the concerned Bureau office, and should be kept by the taxpayer as part of his tax records, and be made available to the duly authorized Revenue Officer(s), upon audit of his Income Tax Return and the declaration of loss.</u>

The Barangay Certification and Affidavit of Loss mentioned and attached in the Petition, although made and/or issued within the 45 days after the date of the event, did not prove or show that they were filed or received by the Bureau within 45 days as mandated by RMO No. 31-2009. Therefore, non-compliance with the rule will not excuse the Petitioner from the requirements of keeping the books of accounts as provided by the Tax Code;

12. Absence of the required documents **within the time fixed by laws or rules and regulations** will not prevent the Respondent

from making the assessment and therefore the Petitioner should be assessed based on Best Evidenced Obtainable Rule as provided by Section 6B of the Tax Code which says:

> 'B) Failure to Submit Required Returns, Statements, Reports and other Documents. – When a report required by law as a basis for the assessment of any national internal revenue tax shall not be forthcoming within the time fixed by laws or rules and regulations or when there is reason to believe that any such report is false, incomplete or erroneous, the Commissioner shall assess the proper tax on the best evidence obtainable. xxx

13. And lastly, the disallowance of expenses is just and right and proper as it is within the bounds of law. Section 34A (1) (b) of the Tax Code required the substantiation of all the expenses. It says:

> 'b) Substantiation Requirements. - No deduction from gross income shall be allowed under Subsection (A) hereof unless the taxpayer shall substantiate with sufficient evidence, such as official receipts or other adequate records; (i) the amount of the expense being deducted, and (ii) the direct connection or relation of the expense being deducted to the development, management, operation and/or conduct of the trade, business or profession of the taxpayer.' "

On December 28, 2011, the Court issued a Notice of Pre-Trial Conference.[15] Petitioner filed its Pre-Trial Brief on February 6, 2012; while respondent filed a Pre-Trial Brief on February 15, 2012.[16] On March 19, 2012, the parties submitted their Joint Stipulation of Facts and Issues[17] that was approved by the Court in its Resolution[18] dated March 21, 2012.

During trial, petitioner presented as witness, Atty. Virgilio S. Farcon[19] – petitioner's President/Director.

In addition, petitioner formally offered[20] its evidence, where Exhibits "A", "B", "C", "D", "D-1", "D-2", "E", "E-1", "F", "F-1", "G", "G-1", "G-2", "H", "H-1", "H-2", "I", "J", *Jc*

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[15] Docket, p. 51.
[16] Docket, pp. 56-60 and 61-66.
[17] Docket, pp. 74-77.
[18] Docket, p. 79.
[19] Exhibit "L", docket, pp. 114-115; Minutes of the Hearing dated April 11, 2012, docket, p. 109.
[20] Petitioner's Formal Offer of Evidence, docket, pp. 110-113.

"J-1", "J-2", "K", "L", and "L-1" were admitted by the Court via Resolution[21] dated May 30, 2012.

On the other hand, respondent presented the following witnesses: Francisco M. Diokno[22] - Revenue Officer of the BIR; Fidel B. Martinez[23] - Revenue Officer III of the BIR; and Kelly C. Chong[24] - Revenue Officer of the BIR.

Respondent also filed a Formal Offer of Evidence.[25] In the Court's Resolution[26] dated June 21, 2013, the Court admitted as evidence Exhibits "2" to "10-A", "12", and "15". However, Exhibits "1", "11", "13", "14", "16", "13-A" to "13-B", "17", "17-A", "18", and "18-A" were denied admission.

Respondent filed a Motion for Reconsideration (Resolution of 21 June 2013)[27] on June 27, 2013, which was denied by the Court in its Resolution[28] dated August 22, 2013. On September 11, 2013, respondent filed a Motion to Admit Compliant Replacement Judicial Affidavits (Exhibits "17", "17-A", "18" and "18-A")[29], which was again denied by the Court in its Resolution[30] dated November 11, 2013. Thus, on November 29, 2013, respondent filed a Motion for Reconsideration (Resolution of 11 November 2013)[31], which the Court finally granted in the Resolution[32] dated February 14, 2014.

The case was submitted for decision on May 30, 2014,[33] after petitioner filed its Memorandum[34] on January 7, 2014 and respondent filed a Memorandum[35] on May 27, 2014.

The Issues

The parties submitted the following issues[36] for resolution of the Court:

[21] Docket, pp. 175-176.
[22] Minutes of the Hearing dated November 19, 2012, docket, p. 203.
[23] Minutes of the Hearing dated February 18, 2013, docket, p. 242; Exhibit "17", docket, pp. 352-358.
[24] Minutes of the Hearing dated April 1, 2013, docket, p. 243; Exhibit "18", docket, pp. 372-378.
[25] Docket, pp. 248-253.
[26] Docket, pp. 332-333.
[27] Docket, pp. 334-337.
[28] Docket, pp. 343-345.
[29] Docket, pp. 346-349.
[30] Docket, pp. 391-393.
[31] Docket, pp. 394-399.
[32] Docket, pp. 413-414.
[33] Docket, p. 462.
[34] Docket, pp. 455-461
[35] Docket, pp. 444-451.
[36] Stipulation of Issues, JSFI, docket, p. 75.

1. Whether or not the government has demandable right to assess and collect deficiency Income Tax.

2. Whether or not the Final Assessment Notice/Demand Letter No. 45-B023-07 dated 14 April 2011 is valid and demandable.

3. Whether or not the Assessment had already prescribed.

The Court's Ruling

The core issue is whether or not the assessment made by respondent is valid.

The Court shall address first the timeliness of the assessment. Pertinent to this matter is Section 203 of the NIRC of 1997, as amended, which states:

> SEC. 203. *Period of Limitation Upon Assessment and Collection*. – Except as provided in Section 222, internal revenue taxes shall be assessed **within three (3) years after the last day prescribed by law for the filing of the return**, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: ***Provided*, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed**. For 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.(Emphasis supplied)

In relation to Section 203 of the NIRC of 1997, as amended, is Section 77(B) of the same Code, which provides:

> SEC. 77. *Place and Time of Filing and Payment of Quarterly Corporate Income Tax*. –
>
> xxx xxx xxx
>
> (B) *Time of Filing the Income Tax Return*. – The corporate quarterly declaration shall be filed within sixty (60) days following the close of each of the first three (3) quarters of the taxable year. The final adjustment return shall be filed on or before the fifteenth (15^{th}) day of April, or on or before the fifteenth (15^{th}) day of the fourth (4^{th}) month following the close of the fiscal year, as the case may be. *ge*

Records show that petitioner filed its Annual Income Tax Return on April 15, 2008,[37] which is also the last day prescribed by law for filing of the return pursuant to Sections 77 and 203 of the NIRC of 1997, as amended. Counting the three-year prescriptive period therefrom, the BIR had until April 15, 2011 to assess petitioner. In this regard, records confirm that the BIR issued the assessment on April 14, 2011.[38] Clearly, the assessment was issued within the prescriptive period.

To continue, petitioner assails the validity of the assessment by arguing that it is bereft of factual and legal bases.[39] Respondent counter-argues that the subject FAN satisfied the elements to be considered as a valid assessment.

In the case of *Commissioner of Internal Revenue v. Enron Subic Power Corporation*,[40] the Supreme Court discussed the concept of a notice of assessment in this wise:

> A notice of assessment is:
>
> > [A] declaration of deficiency taxes issued to a [t]axpayer who fails to respond to a Pre-Assessment Notice (PAN) within the prescribed period of time, or whose reply to the PAN was found to be without merit. The Notice of Assessment shall inform the [t]axpayer of this fact, and that the report of investigation submitted by the Revenue Officer conducting the audit shall be given due course.
> >
> > The formal letter of demand calling for payment of the taxpayer's deficiency tax or taxes **shall state the fact, the law, rules and regulations or jurisprudence on which the assessment is based, otherwise the formal letter of demand and the notice of assessment shall be void.** (Emphasis supplied)
>
> Section 228 of the NIRC provides that the taxpayer shall be informed in writing of the law and the facts on which the assessment is made. Otherwise, the assessment is void. To implement the provisions of Section 228 of the NIRC, RR No. 12-99 was enacted. Section 3.1.4 of the revenue regulation reads:

[37] BIR Records, pp. 5-10.
[38] Exhibits "H", "H-1", and "H-2", docket, pp. 95-97.
[39] Discussion, Petition for Review, docket, p. 8.
[40] G.R. No. 166387, January 19, 2009.

> 3.1.4. *Formal Letter of Demand and Assessment Notice.* – The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. **The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void.** The same shall be sent to the taxpayer only by registered mail or by personal delivery. x x x (Emphasis supplied)

It is clear from the foregoing that a taxpayer must be informed in writing of the legal and factual bases of the tax assessment made against him. The use of the word 'shall' in these legal provisions indicates the mandatory nature of the requirements laid down therein. xxx"

Based on the above-quoted pronouncement of the Supreme Court, Section 228 of the NIRC of 1997, as amended, in relation to Section 3.1.4 of Revenue Regulations No. 12-99, mandates that a taxpayer must be informed in writing of the legal and factual bases of the tax assessment made against him.

Petitioner assails the validity of the FAN, explaining that its failure to submit the required documents is not willful but due to reasonable and justifiable causes,[41] particularly, that its records were destroyed by neck-deep waters and ankle-deep muds caused by typhoons.[42] At any rate, petitioner asserts that on May 31, 2011, it submitted some reconstructed documents, *i.e.*, worksheet and schedule of purchases and expenses.

On the other hand, respondent explained in the subject FAN[43] that upon verification by the BIR, petitioner failed to meet the substantiation requirements under Section 34(A)(1)(b) of the NIRC of 1997, as amended; which led to the disallowance of some items as expense, *viz.*, purchases, gas and oil, and postage, telephone and telegraph, and were assessed the corresponding income tax.[44] On this score, the BIR resorted to the Best Evidence Obtainable Rule,[45] considering the alleged failure of petitioner to furnish the BIR the required supporting documents and for failure of petitioner to comply with the provisions of Revenue Memorandum Order (RMO) No. 31-2009.[46]

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[41] Discussion/Arguments, Petitioner's Memorandum, docket, p. 459.
[42] Discussion, Petition for Review, docket, p. 9.
[43] Exhibits "H", "H-1", and "H-2", docket, pp. 95-97; Exhibit "4", BIR Records, pp. 155-157.
[44] Exhibit "H-2", docket, p. 97.
[45] Par. 12, Special and Affirmative Defenses, Answer, docket, p. 48.
[46] Par. 11, Special and Affirmative Defenses, Answer, docket, pp. 47-48.

It must be pointed out that RMO No. 31-2009 was issued by the BIR to lay the substantiation requirements before a taxpayer can claim casualty losses for tax deductions. Therefore, RMO No. 31-2009 finds no application in this case because petitioner is not applying for deductibility of its casualty losses.

The Court shall now look into whether the deficiency assessment made by the BIR has valid factual basis in relation to the Best Evidence Obtainable Rule, in light of the foregoing circumstances.

Section 6(B) of the NIRC of 1997, as amended, and Section 2.3 of Revenue Memorandum Circular (RMC) No. 23-2000, provides:

> "SEC. 6. *Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.* –
>
> xxx xxx xxx
>
> (B) *Failure to Submit Required Returns, Statements, Reports and other Documents.* – When a report required by law as a basis for the assessment of any national internal revenue tax shall not be forthcoming within the time fixed by law or rules and regulations or when there is reason to believe that any such report is false, incomplete or erroneous, the Commissioner shall assess the proper tax on the best evidence obtainable.
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> xxx xxx xxx"
>
> "SECTION 2. *Prescribed Revenue Procedures.* –
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> xxx xxx xxx
>
> 2.3 *Assessment Based on Best Evidence Obtainable.* – An assessment based on best evidence obtainable is justified when any of the grounds provided by law is clearly established, viz:
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> 1. The report or records requested from the taxpayer are not forthcoming i.e. the records are lost; refusal of the taxpayer to submit such records;
> 2. The reports submitted are false, incomplete or erroneous.

xxx xxx xxx"

Applying the afore-cited provisions to the instant case, petitioner admits that its accounting books and records were lost or destroyed by reason of typhoons *Ondoy* and *Pepeng*.[47] While records[48] show that petitioner attached to its protest letter its reconstructed worksheet and schedule of purchases and expenses, the same would not limit the power of the BIR Commissioner to make an assessment based on the best evidence obtainable pursuant to Section 6(B) of the NIRC of 1997, as amended, and Section 2.3(1) of RMC No. 23-2000.

However, while the law allows wide latitude to respondent in resorting to the Best Evidence Obtainable Rule, such power is not without limitation. In the case of *Commissioner of Internal Revenue v. Hantex Trading Co., Inc.*,[49] the Supreme Court explained that an assessment must be based on sufficient evidence, to wit:

> We agree with the contention of the petitioner that the best evidence obtainable may consist of hearsay evidence, such as the testimony of third parties or accounts or other records of other taxpayers similarly circumstanced as the taxpayer subject of the investigation, hence, inadmissible in a regular proceeding in the regular courts. Moreover, the general rule is that administrative agencies such as the BIR are not bound by the technical rules of evidence. It can accept documents which cannot be admitted in a judicial proceeding where the Rules of Court are strictly observed. It can choose to give weight or disregard such evidence, depending on its trustworthiness.
>
> However, the best evidence obtainable under Section 16 of the 1977 NIRC, as amended, does not include mere photocopies of records/documents. The petitioner, in making a preliminary and final tax deficiency assessment against a taxpayer, cannot anchor the said assessment on mere machine copies of records/documents. Mere photocopies of the Consumption Entries have no probative weight if offered as proof of the contents thereof. The reason for this is that such copies are mere scraps of paper and are of no probative value as basis for any deficiency income or business taxes against a taxpayer. Indeed, in *United States v. Davey*, the U.S. Court of Appeals (2nd Circuit) ruled that where the accuracy of a taxpayer's return is being checked, the government is entitled to use the original records rather

[47] Exhibits "D", "D-1", and "D-2", docket, pp. 85-87.
[48] Exhibits "J", "J-1", and "J-2", docket, pp. 99-107.
[49] G.R. No. 136975, March 31, 2005.

than be forced to accept purported copies which present the risk of error or tampering.

In *Collector of Internal Revenue v. Benipayo*, the Court ruled that the assessment must be based on actual facts. The rule assumes more importance in this case since the xerox copies of the Consumption Entries furnished by the informer of the EIIB were furnished by yet another informer. While the EIIB tried to secure certified copies of the said entries from the Bureau of Customs, it was unable to do so because the said entries were allegedly eaten by termites. The Court can only surmise why the EIIB or the BIR, for that matter, failed to secure certified copies of the said entries from the Tariff and Customs Commission or from the National Statistics Office which also had copies thereof. It bears stressing that under Section 1306 of the Tariff and Customs Code, the Consumption Entries shall be the required number of copies as prescribed by regulations. The Consumption Entry is accomplished in sextuplicate copies and quadruplicate copies in other places. In Manila, the six copies are distributed to the Bureau of Customs, the Tariff and Customs Commission, the Declarant (Importer), the Terminal Operator, and the Bureau of Internal Revenue. Inexplicably, the Commissioner and the BIR personnel ignored the copy of the Consumption Entries filed with the BIR and relied on the photocopies supplied by the informer of the EIIB who secured the same from another informer. The BIR, in preparing and issuing its preliminary and final assessments against the respondent, even ignored the records on the investigation made by the District Revenue officers on the respondent's importations for 1987.

The original copies of the Consumption Entries were of prime importance to the BIR. This is so because such entries are under oath and are presumed to be true and correct under penalty of falsification or perjury. Admissions in the said entries of the importers' documents are admissions against interest and presumptively correct.

In fine, then, the petitioner acted arbitrarily and capriciously in relying on and giving weight to the machine copies of the Consumption Entries in fixing the tax deficiency assessments against the respondent.

The rule is that in the absence of the accounting records of a taxpayer, his tax liability may be determined by estimation. The petitioner is not required to compute such tax liabilities with mathematical exactness. Approximation in the calculation of the taxes due is justified. To hold otherwise would be tantamount to holding that skillful concealment is an invincible barrier to proof. However, the rule does not apply where the estimation is arrived at arbitrarily and capriciously.

We agree with the contention of the petitioner that, as a general rule, 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 the CTA 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.

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. In such a situation, the U.S. Court of Appeals ruled that the determination of the Commissioner contained in a deficiency notice disappears. *Hence, the determination by the CTA must rest on all the evidence introduced and its ultimate determination must find support in credible evidence.*

xxx xxx xxx

xxx As the Court held in *Collector of Internal Revenue v. Benipayo*, in order to stand judicial scrutiny, the assessment must be based on facts. The presumption of the correctness of an assessment, being a mere presumption, cannot be made to rest on another presumption.

In the *Hantex* case, the BIR Commissioner based the deficiency assessment on unauthenticated machine copies of the consumption entries of respondent therein. Hence, the High Court declared that the assessment is "barren of factual basis, arbitrary and illegal." Here, a perusal of the records shows that respondent failed to present before the Court any evidence which it supposedly procured by resorting to the Best Evidence Obtainable Rule, as basis for the deficiency assessment against petitioner.

Applying the rule laid down by the Supreme Court in the *Hantex* case, respondent could have determined petitioner's tax liability through estimation considering the absence of the latter's accounting records, which were destroyed by typhoons *Ondoy* and *Pepeng*. However, such estimation should be based on sufficient evidence. Thus, as aptly held by the Supreme Court in the *Hantex* case citing the *Benipayo* case, the presumption of correctness of an assessment, being a mere presumption, cannot be made to rest on another presumption. Since respondent failed to present any evidence which it used as basis or foundation for the subject deficiency assessment, the Court finds that respondent's assessment is void for lack of factual basis.

WHEREFORE, premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, the deficiency income tax assessment in the amount of P516,502.26, inclusive of interest, for calendar year 2007 is hereby **CANCELLED** and **WITHDRAWN**.

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

CAESAR A. CASANOVA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

<u>ATTESTATION</u>

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.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 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.

ROMAN G. DEL ROSARIO
Presiding Justice