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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

JOSE V. HERRERA and
ESTER OCHANGCO-HERRERA,
Petitioners,

- versus -

C.T.A. CASE No. 2060

June 27/72

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

x- - - - - - - - - - - - - -x

D E C I S I O N

Petitioners have appealed from the decision of the Commissioner of Internal Revenue assessing against and demanding from them the sums of ₱345.00 representing fixed tax due as operator of a nightclub and as beer and liquor retailer for the 2nd semester of 1964, the years 1965 and 1966, and the 1st semester of 1967; and ₱39,773.24 as percentage tax from December, 1964 to December, 1965 inclusive of 50% and 25% surcharges.

Petitioners owned and operated El Dorado Supper Club & Restaurant (El Dorado for brevity), Roxas Boulevard, Parañaque, Rizal, from December 24, 1964 up to March, 1967 where food, refreshment, beverages and liquor were served to customers. The building housing the same was burned thereafter. Petitioners occupied the 1st and 2nd floors of the said building which could reportedly accommodate from 200 to 300 persons. Each floor had a space for dancing where customers danced to the music furnished by petitioners.

On February 3, 1966, Supervising Revenue Examiner Pedro R. Velasco was authorized by respondent's Regional Director to investigate petitioners for business tax purposes. Said examiner reported and recommended to respondent that an assessment of ₱26,090.31, excluding compromise penalties, be issued against petitioners covering the period from December, 1964 to December, 1965. Thereafter, an assessment dated February 10, 1967 was sent by respondent to petitioners based on the examiner's report and recommendation.

On July 13, 1966, Revenue Inspector Romeo Salalima and Revenue Examiner José Trampe conducted a surveillance of El Dorado where they ordered food and beer and later on asked for their receipt. The waiter allegedly gave them Chit No. 425 in the amount of ₱30.00. After finding that no separate receipt was issued for food and beer, they contacted the cashier and asked for the duplicate invoice. The cashier allegedly gave them another receipt, Invoice No. 1522, in the amount of ₱20.00 only, indicating a difference of ₱10.00. Invoice No. 425 shows a charge of ₱6.00, or ₱3.00 per person. When they asked the cashier why there was a discrepancy between the amount charged from the customer and the receipt kept by the cashier, the latter reportedly informed them that the difference represents the cover charge. They then confiscated the invoice pad containing Serial Nos. 1501 to 1550.

Mr. Salalima reported to respondent that the amount of cover charge per person depended upon the quality of the floor show; the usual cover charge was ₱5.00 per person; when the floor show featured Jayne Mansfield, the dinner and cover charges amounted to ₱30.00, ₱50.00 and ₱70.00 per person; and no other surveillance was conducted by his [illegible] the said allegations were [illegible] beyond the period covered by the disputed assessment.

Thereafter, Revenue Inspector Romeo Salalima, Examiners Rodolfo Serrano and Jose Trampe examined petitioners for business tax liability from July 1, 1964 to June 30, 1966. In their progress report dated October 7, 1966, it was averred that El Dorado started operations in December, 1964 with a total gross receipt of ₱6,748.40 during the said month and ₱163,323.95 in 1965, computed as follows:

1.	Food	₱ 82,177.25
2.	Beer	9,644.40
3.	Wine	58,080.45
4.	Soft drinks	13,132.35
5.	Others	289.50
		₱163,323.95

The said figures were allegedly taken from the entries to the tax and license accounts. Petitioners have reportedly paid percentage taxes of ₱3,968.70 computed as follows:

December	- - - - - - -	₱ 714.47
January	- - - - - -	1,829.40
February	- - - - - -	1,424.83
		₱3,968.70

Respondent's examiners claimed that petitioners have erronsoudy paid 3% tax on the value of the food, soft drinks, and others amounting to ₱95,599.10, and 7% tax on beer and wine amounting to ₱67,724.85; the total percentage tax due thereon amounted to ₱7,608.71; thereby showing unpaid percentage taxes on the basis of the payments made above; petitioners have reportedly not issued sales invoices or issued unregistered invoices; their findings were based on the denunciation of Emeterio Bagaslao (not attached to examiners' report) and the sworn statements of Casiano Abadies (Exh. 1-A, pp. 24-25 BIR rec.) and Jesus L. Peñaflorida (Exh. 1-B, pp. 18-19, BIR rec.), former employees of petitioners; and recommended that a thorough investigation be conducted.

Subsequently, Special Agent Conrado Quesada recommended on May 29, 1967, the issuance of an assessment against petitioners in the total amount of ₱45,567.20, consisting of ₱345.00 as fixed taxes from December, 1964 to 1967; ₱25,841.26 as percentage taxes from December, 1964 to December 21, 1965; and ₱19,380.94 as 50% and 25% surcharges, computed as follows:

FIXED TAXES		1964 (2nd Sem)	1965	1966 (2nd Sem)	1967 (1st Sem.)
C-4(12)(e)-nightclub	-	₱10.00	₱ 20.00	₱20.00	₱10.00
B-7-beer retailer	-	25.00	50.00	25.00	25.00
B-4-liquor retailer	-	50.00	100.00	50.00	50.00
Total amount due	-₱	85.00	₱170.00	₱95.00	₱85.00
Less: amount paid	-	10.00	20.00	40.00	20.00
Total deficiency tax	-	₱ 75.00	₱150.00	₱55.00	₱65.00

Total Fixed Taxes Due and Collectible ------------ ₱ 345.00

PERCENTAGE TAXES:	1964	1965
Gross receipts declared --	₱ 8,748.40	₱163,323.95
Add: Cover charges ----	2,340.00	109,320.00
Receipts subject to tax --	₱11,088.40	₱272,643.95
10% tax due thereon -----	₱ 1,108.84	₱ 27,264.40
Less: tax already paid ---	445.89	2,086.09
Deficiency percentage tax	₱ 662.95	₱ 25,178.31
Add: Surcharges:		
50% for fraud ---	331.47	12,589.15
25% for late payment-	165.74	6,294.58
Total percentage tax due	₱ 1,160.16	₱ 44,062.04

Total Percentage Tax Due and Collectible ----- ₱45,222.20

TOTAL FIXED & PERCENTAGES TAXES DUE AND COLLECTIBLE ------------------------------------ ₱45,567.20

Respondent issued an assessment based on the foregoing figures but petitioners' counsel disputed the same and alleged that: petitioners have been faithfully paying the fixed taxes; the basis of the tax is inaccurate since the restaurant was a supper club at night and an ordinary restaurant at daytime where no dancing is held; the reported gross receipts for 1964 and 1965 are accurate except that no cover charges were collected in said years; and petitioners started collecting cover charges in May, 1966 as a means to improve the quality of the patronage and improve the financial outlook of the venture.

Based on the report and recommendation of Special

Agent Conrado Quesada and Examiner Rodolfo Serraon, respondent Commissioner issued a revised and reduced assessment of ₱39,773.24 (Exh. 11, pp. 448-449 BIR rec.), computed as follows:

FIXED TAXES	1964 (2nd Sem.)	1965	1966 (2nd Sem.)	1967	
C-4(12)(c)-nightclub -	₱10.00	₱ 20.00	₱20.00	₱10.00	
B-7-beer retailer ----	25.00	50.00	25.00	25.00	
B-4-liquor retailer --	50.00	100.00	50.00	50.00	
Total amount due ----	₱85.00	₱170.00	₱95.00	₱85.00	
Less: amount paid ----	10.00	20.00	40.00	20.00	
Total deficiency tax due --------------	₱75.00	₱150.00	₱55.00	₱65.00	
Total Fixed Taxes Due & Collectible					₱ 345.00

PERCENTAGE TAXES	1964	1965	
Gross receipts declared -	₱ 8,748.40	₱163,323.95	
Add: Cover charges -----	2,340.00	109,320.00	
Receipts subject to tax -	₱11,088.40	₱272,643.95	
10% tax due thereon -----	₱ 1,108.84	₱ 27,264.40	
Less: Tax already paid --	563.58	5,279.24	
Deficiency % tax due ----	₱ 545.26	₱ 21,985.16	
Add: surcharges:			
50% for wilful neglect -------	272.64	10,992.58	
25% for late payment -------	136.31	5,496.29	
Total percentage tax due	₱ 954.21	₱ 38,474.03	₱39,428.24
Total Fixed and Percentages Taxes due and Collectible			₱39,773.24

Petitioners denied receipt of said assessment. However, respondent alleged that petitioners have received the revised assessment on July 9, 1969. On November 13, 1969, the warrant of distraint and levy was issued. (Exh. 14, p. 467 BIR rec.) On November 25, 1969, petitioners' counsel requested a reinvestigation but it was denied in respondent's letter dated December 19, 1969. On January 5, 1970, respondent distrained and levied upon petitioners' properties. On January 14, 1970, petitioners filed the instant petition for review.

The issues posed before the Court for resolution are the following:

(1) Whether or not this Court has jurisdiction over the appeal;

(2) Whether or not petitioners are liable for fixed taxes as a nightclub operator, retail liquor dealer, and retail dealer of fermented liquor;

(3) Whether or not petitioners are liable for deficiency percentage tax from December, 1964 to December, 1965;

(4) Whether or not petitioners collected the estimated amount of cover charges from December, 1964 to December, 1965; and

(5) Whether or not petitioners are subject to the 50% and 25% surcharges imposed by the Tax Code.

FIRST ISSUE:

Respondent contends that this Court has no jurisdiction to take cognizance of petitioners' appeal because the same was filed beyond the 30-day period prescribed by Republic Act No. 1125.

Petitioners, however, claim that the petition for review was seasonably filed. They deny having received the notice of the revised assessment. Petitioners maintain that the return card (Exh. 12) merely shows that a certain mail was received by an agent of the addressee; respondent has not presented proof of service required by Section 10, Rule 113, Rules of Court; and he has not submitted the registry receipt nor the required affidavit of the person who mailed the revised assessment showing that the mailing was done in accordance with the requirements of Section 5, Rule 13, Revised Rules of Court. Petitioners contend that, assuming the revised assessment was sent to petitioners, the service of the revised assessment is a nullity since the notice was not served to petitioners' counsel as required by law.

We find that the notice of the revised assessment was sent to petitioners on July 9, 1969. (Exh. 12, p. 450 BIR rec.) However, the said notice is not served in accordance with law. It is indispensable that where a party appears by an attorney in an action or proceeding, all notices thereafter required to be given must be sent to the attorney of record and not to his client; otherwise, the revised assessment is deemed an insufficient legal notice. (Palad v. Mariano Cui, et al., 28 Phil. 44; Perez v. Isip, 81 Phil. 218; Santiago v. Ca, L-12920, Feb. 28, 1959; Mata v. Lagarda, L-18941, Jan. 31, 1961) This rule is founded on consideration of fair play. A taxpayer engages an attorney because he does not feel competent to handle his problem. A direct notice to the lawyer would shorten the usable period needed by the attorney to protect the taxpayer's interests. (See J. M. Javier Logging Corp. v. Mardo, L-28183, Aug. 28, 1968.)

Respondent admits that the warrant of distraint and levy containing the final deficiency tax assessment was served upon petitioners on January 5, 1970. It was only on said date that petitioners were notified officially of the revised assessment. The petition for review having been filed on January 14, 1970, the same was seasonably filed in the Tax Court under the provisions of Section 11 of Republic Act No. 1125. Moreover, respondent did not question the jurisdiction of this Court either during the hearing of the case on the merits or assailed the same in his memorandum.

SECOND AND THIRD ISSUES:

The two issues being interrelated, we are going to discuss them jointly.

Petitioners contend that El Dorado was not a nightclub and, therefore, their gross receipts are not subject to 10% tax because dancing was not its main business since no hostesses were furnished to their customers when they dance, citing as authority the case of Sy Chiuco v. Collector (107 Phil. 428, 431).

On the other hand, respondent maintains that El Dorado is a nightclub and that the restaurant and bar which petitioners operate are within the premises of a nightclub, citing as authority the definition of a nightclub under Revenue Regulations No. V-57, May 30, 1957, which reads as follows:

"(n) Nightclub are resorts frequented by pleasure seekers at night where food and wines and drinks are served and music furnished and the patrons allowed to dance whether with their own partners or professional hostesses furnished by such resorts."

Respondent contends that a nightclub to be considered as such need not feature dancing as its main business; it is not indispensable that hostesses be employed; and it is enough that food, beverage, wine and liquor are served at night to customers who may dance to the music furnished by management. To bolster his stand, respondent submitted in evidence the certificate of the Assistant Municipal Treasurer, Parañaque, Rizal, dated May 17, 1967, showing that El Dorado had paid the municipal license as nightclub, bar and restaurant for 1964 to 1966. (Exh. 2-G, p. 66 BIR rec.). By petitioners' admission, El Dorado served food, refreshments, beverages and liquors. The testimony of Revenue Inspector Romeo R. Balalima and Catalino Abadies show that there was space for dancing in El Dorado where customers were allowed to dance with music furnished by the management. (Exh. G, p. 294 BIR rec.). Under the circumstances, we find that El Dorado comes within the purview of a nightclub. In the case of Sy Chiuco vs. Collector, supra, cited by petitioners, it was held therein that dancing must be its main business in order to attain the status of a nightclub. The said ruling is not in point because in the Sy Chiuco case, what was operated was a cabaret subject to amusement tax under Section 260 of the Tax Code, whereas the 10% tax on gross receipts involved herein is under Section 191 of the same Code. Verily, the claim of petitioners that hostesses are indispensable in the operation of a nightclub is untenable.

Concerning the fixed taxes as nightclub operator, beer and liquor retailer for the 2nd semester of 1964, 1965, 1966, and the 1st semester of 1967, petitioners do not dispute their liability because the same was conceded. (Exhs. D & 10, pp. 393-398, BIR rec.)

With respect to the percentage tax, it appears that petitioners is subject to 10% tax on their gross receipts of ₱8,748.00 for December, 1964 and ₱163,323.95 from January to December, 1965, under Section 191 of the Tax Code which provides as follows:

> "Sec. 191.- Percentage tax on road, building, irrigation, artesian well, waterworks, and other construction work contractors, proprietors or operators of dockyards, and others. xx xx xx
>
> "xx xx xx Where the establishment is maintained within the premises of a cabaret or night club, or is accessible to patrons thereof by means of a connecting door or passage, the keeper of the establishment shall pay a tax of ten per centum of the gross receipts. (As amended by Sec. 1, Republic Act No. 39; Sec. 4, Republic Act No. 588; Sec. 12, Republic Act No. 1612; Sec. 1, Republic Act No. 2072; Sec. 3, Republic Act No. 2376.)"

Petitioners, through counsel, signified their conformity to pay the 10% tax under the said section of the Tax Code based on their reported gross receipts. (Exhs. D & 10, ibid, p. 394.) Moreover, during the period covered by the assessment, petitioners have maintained a restaurant and bar where food, wine, and beverages were served to their customers within the premises of the nightclub.)

FOURTH ISSUE

Mr. Jesus Abrebueno, Administrative Assistant of petitioners in El Dorado, testified in a formal investigation of the Appellate Division, BIR, that cover charges were collected in 1966 and 1967 whenever special shows were held; no cover charges were collected from 1964 to 1965; the cover charges during the shows of Pilita Corrales were collected by her personnel; the statements of Jesus Peñaflorida and Casiano Abadies were pure hearsay; Peñaflorida's statement that El Dorado collected cover charges from December, 1964 to December, 1965 was incredible as he had worked therein from October 1, 1965 to February 5, 1966 only; raffle ticket No. 6227 mentioned in Abadies' statement was a falsified receipt; if the ticket were genuine, the cashier of El Dorado would not have left the same on his desk to be within the reach of anyone; and the waiters of El Dorado in 1964 and 1965 used falsified and spurious invoices for personal gain thereby forcing the management to discharge and replace 80% of them.

Respondent claimed, however, that petitioners collected from their customers cover charges of ₱2,340.00 and ₱109,320.00 in December, 1964 and from January to December, 1965, respectively. Respondent's examiners calculated and assumed that there were 40 customers on ordinary days who paid ₱3.00 each and 150 customers on every Friday and Saturday who paid ₱5.00 each for cover charges. In short, under the theory of respondent, petitioners collected as cover charges the amount of ₱120.00 a day on ordinary days and ₱750.00 a day on special days.

The breakdown of petitioners' alleged gross receipts on cover charges are itemized and computed as follows:

DECEMBER, 1964

7 ordinary days	x ₱120.00	---₱ 840.00	
2 special days	x ₱750.00	--- 1,500.00	₱ 2,340.00

Jan. to Dec. 1965

261 ordinary days	x ₱120.00	--₱31,320.00	
104 special days	x ₱750.00	- 78,000.00	109,320.00
Grand Total	....		₱111,660.00

The Court is at a loss to understand the legality, validity, and soundness of respondent's assessment on cover charges in the staggering amount of ₱111,660.00. In the first place, respondent's examiners and fieldmen merely estimated that the premises of petitioners' business could accommodate from 200 to 300 customers without giving any justifiable basis for the said estimate. Second, the surveillance and successive investigations made by respondent's examiners and fieldmen took place long after the period covered by the disputed assessment (December, 1964 to December, 1965) and, therefore, the assessed cover charges were based on conjectures and inferences devoid of factual considerations. Third, Messrs. Emeterio Bagaslao and Casiano Abadies, informer and witness, respectively, were not presented as witnesses during the trial of the case on the merits. Fourth, the alleged floor shows featuring Pilita Corrales failed to specify the dates they were held, the total amount of cover charges collected, and the persons who collected them. On the other hand, petitioners have proven during the formal administrative investigation that the said cover charges were collected by the brother and personnel of Pilita Corrales. Fifth, there is ample evidence of harrassment in the surveillance and investigation of petitioners' tax liability and utter lack of coordination among the BIR examiners and fieldmen as shown by the BIR records, namely: (1) Petitioners' fixed and percentage tax liability was first investigated by Supervising Revenue Examiner Pedro R. Velasco, Regional Office No. 6, pursuant to an authority dated February 3, 1966, and his report and recommendation was the basis of an assessment of the National Office, dated February 10, 1967, demanding from petitioners payment of ₱26,510.31 as deficiency fixed and percentage taxes, exclusive of compromise penalties, covering the period from December, 1964 to December, 1965 (BIR rec. p. 86); (2) While the said investigation was in progress, Revenue Inspector Romeo Salalima and Revenue Examiner Jose Trampe, whether authorised or not by respondent is not disclosed by the records, conducted a surveillance of El Dorado on July 13, 1966 but went beyond the scope of their alleged mission by confiscating certain invoices of the said establishment bearing Serial Nos. 1501 to 1550; (3) Before the said surveillance, Supervising Revenue Examiner Honorato Inting conducted an investigation of petitioners' tax liability and submitted a memorandum on June 15, 1966; (4) On July 22, 1966, Revenue Inspector Romeo Salalima and Examiners Jose Trampe and Rodolfo Serraon secured from respondent Letter of Authority No. 20871-AD addressed to El Dorado and, after investigation, finally recommended that a more comprehensive investigation be conducted; (5) On May 26, 1967, Special Agent Conrado Quesada recommended after previous investigation that an assessment notice be issued against the petitioners requiring the payment of ₱45,567.20, supra, as fixed and percentage taxes; and (6) Based on the report and recommendation of Special Agent Conrado Quesada and Examiner Rodolfo Serraon, respondent Commissioner of Internal Revenue issued a revised and reduced assessment of ₱39,773.24 (Exh. 11, pp. 448-449 BIR rec.) without even cancelling and countermanding the original assessment of ₱26,510.31

against the same petitioners covering the same period of December, 1964 to December, 1965. Finally, respondent Commissioner Misael P. Vera, in a signed formal letter addressed to the Provincial Fiscal of Rizal, dated July 28, 1967, (BIR rec. pp. 135-140), recommended the criminal prosecution of the spouses Mr. Jose V. Herrera and Mrs. Ester Ochangco-Herrera as operators of El Dorado despite the certificate issued by Mr. Jose P. Sanchez, Asst. Municipal Treasurer (In-Charge of Office), Parañaque, Rizal, dated May 17, 1967, showing that Mr. Jose Herrera is the sole licensee and operator of El Dorado. Why should the wife be included in the criminal prosecution where the licensee and operator is the husband? The original letter recommending the prosecution of the spouses remains in the BIR records for reasons not disclosed therein. This Court cannot, therefore, understand and comprehend the purposes and motivations which impelled responsible officials and personnel of the BIR to entangle themselves in a sordid mess of affair like the case at bar.

Respondent took refuge in justifying the disputed assessment on cover charges by claiming that the said assessment is presumptively correct. The Court cannot subscribe to the said pretension. Respondent's conflicting assessments were uncertain and variable - from an original assessment of ₱26,090.31, exclusive of compromise penalties, to ₱45,567.20 and then to ₱39,773.24. Moreover, to stand the test of judicial scrutiny, the assessment must be based on actual facts and not on mere inferences and presumptions no matter how reasonable or logical they may be. Thus, in the case of A. Benipayo v. Collector of Internal Revenue, CTA Case No. 251, Jan. 23, 1958, which was affirmed by the Supreme Court in G.R. No. L-13616, Jan. 31, 1962 (4 SCRA 182-185), this Court held as follows:

> "While an assessment, in the absence of direct evidence, may be based upon the best evidence available in order to clearly reflect the true liability of the taxpayer (see Section 15, National Internal Revenue Code; see also Mindanao Bus Co. v. Collector of Internal Revenue, C.T.A. Case No. 312, August 26, 1957), however, the presumption of the correctness of the assessment must be predicated upon facts and the same must be obtaining at the time for which the assessment is sought to be enforced. We are not unmindful of the danger to the revenues of the government, if we were to permit taxpayers to resort to unscrupulous methods to evade taxes such as would be possible in a situation similar to the instant case. However, when the Collector, by reason of such absence of direct evidence, has reason to believe that the taxpayer's tax returns are false or erroneous, he may resort to the employment of the best evidence obtainable such as ratios and like statistical data to arrive at a determination of a tax to the extent that the same may be approximately correct in the premises if not perfectly accurate. This, we believe is the intendment of Section 15 of the Tax Code in order to avoid sanctioning of evasion of taxes. But, as already observed; the ratios and the like statistical data must be the outcome of facts existing during the period for which the tax liability is sought to be enforced.

"Respondent contends that the determination or assessment of the Collector of Internal Revenue is presumptively correct and the taxpayer has the burden of proving its incorrectness. It is true that all presumptions are in favor of the correctness of tax assessments. However, such presumption is proper only if the assessment is based on facts but does not arise if it is based on mere inferences. Moreover, this presumption is disputable and may be contradicted and overcomed by other evidence. In the case at bar, petitioner has successfully shown that the assessment under review has no basis in fact. Since the presumption is founded upon an alleged fact or set of facts which have not been actually found to exist and believing that it is better for one taxpayer to be able to evade payment of a tax legally due from him than to require a taxpayer to pay one centavo more than what is due and demandable from him, the protested deficiencyamusement tax assessment should be withdrawn." (Underscoring supplied.)

Accordingly, we hold that the estimated gross receipts of ₱111,660.00 as alleged cover charges from December, 1964 to December, 1965 are not subject to the 10% tax imposed by Section 191 of the Revenue Code and should be excluded from petitioners' taxable gross receipts.

FIFTH ISSUE:

The collection and imposition of 25% and 50% surcharges on percentage taxes are embodied in Section 183 of the National Internal Revenue Code which provides as follows:

"SEC. 183. Payment of percentage taxes. - (a) In general. - It shall be the duty of every person conducting a business on which a percentage tax is imposed under

> this Title, to make a true and complete return of the amount of his, her or its gross monthly sales, receipts or earnings, or gross value of output actually removed from the factory or mill warehouse and within twenty days after the end of each month, pay the tax due thereon: xx xx xx.
>
> "If the percentage tax on any business is not paid within the time specified above, the amount of the tax shall be increased by twenty-five per centum, the increment to be a part of the tax.
>
> "In case of willful neglect to file the return within the period prescribed herein, or in case a false or fraudulent return is willfully made, there shall be added to the tax or to the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud, a surcharge of fifty per centum of its amount. The amount so added to any tax shall be collected at the same time and in the same manner and as part of the tax unless the tax has been paid before the discovery of the falsity or fraud, in which case the amount so added shall be collected in the same manner as the tax. (As amended by sec. 7, Republic Act No. 48; sec. 1, Republic Act No. 253; sec. 5, Republic Act No. 1612; and sec. 3, Republic Act No. 2025.)"

Petitioners contend that they are not subject to the surcharges of 25% and 50% because they acted in good faith with respect to the delinquency in the payment of the percentage tax and there is no evidence of fraud as a basis for the imposition of the 50% surcharge.

Section 183 of the Revenue Code, supra, requires a taxpayer subject to percentage taxes to file a return of his gross receipts, sales, or earnings and pay the tax due thereon within 20 days after the end of each month. If the tax due is not paid on time, the same shall be increased by 25%. The records show that petitioner Jose Herrera complied with the said provisions of the law with respect to his gross receipts from December, 1964 to February, 1965. It is clear, therefore, that the said taxpayer is aware of his duties and obligations under the said law. From March to December, 1965, when said petitioner failed to file the monthly return of gross receipts and pay the percentage tax on time, the defense of good faith becomes untenable. Hence, Mr. Herrera's taxable gross receipts are subject to 25% surcharge for delinquency in the payment of the percentage tax, in line with the settled jurisprudence on the matter. (Lim Co Chui v. Posadas, 47 Phil. 460; Jamora v. Meer, 74 Phil. 22; Koppel (Phil.) Inc. v. Collector of Internal Revenue, 87 Phil. 349.)

Petitioners opposed the imposition of the 50% surcharge as fraud penalty because respondent failed to prove the existence of fraud. We agree with petitioners' contention that fraud, an issue which has to be proven by respondent, has not been legally and validly established in this case. However, Section 183 of the Revenue Code, supra, prescribed two (2) instances where the 50% surcharge may be imposed, namely: (1) In case of willful neglect to file the return prescribed therein; or (2) in case a false or fraudulent return is willfully made. The first case involves willful neglect or omission of a duty while the second involves an overt act of fraud. The two cases are, therefore, distinct and different from each other. As petitioner Jose Herrera, licensee and operator of El Dorado, willfully neglected to file his percentage tax return from March to December, 1965, the percentage tax due from him is subject to 50% surcharge despite the absence of fraud.

For the foregoing considerations, we find petitioner Jose V. Herrera liable for the payment of the fixed and percentage taxes amounting to ₱20,232.70, itemized and computed as follows:

Fixed Tax Due (1964-1967)

	1964 (2nd Sem)	1965	1966 (2nd Sem)	1967 (1st Sem)	
As operator of a night-club	₱10.00	₱ 20.00	₱20.00	₱10.00	
As beer retailer ...	25.00	50.00	25.00	25.00	
As liquor retailer ...	50.00	100.00	50.00	50.00	
Total amount due	₱85.00	₱170.00	₱95.00	₱85.00	
Less: amount paid ...	10.00	20.00	40.00	20.00	
Deficiency fixed taxes due	₱75.00	₱150.00	₱55.00	₱65.00	
Total fixed taxes due and collectible ....₱					345.00

Percentage Tax as a nightclub operator:

	1964	1965	
Gross receipts	₱8,748.40	₱163,323.95	
10% tax due thereon	874.84	16,332.39	
Less: tax already paid ...	563.58	5,279.24	
Deficiency tax due	₱ 311.26	₱ 11,053.15	
Add: surcharges:			
50% for willful neglect to file return	155.63	5,526.57	
25% for late payment	77.81	2,763.28	
Total percentage tax due	₱ 544.70	₱ 19,343.00	19,887.70
Total Fixed and Percentage Taxes due & collectible			₱20,232.70

WHEREFORE, the decision of respondent Commissioner of Internal Revenue appealed from is modified. Petitioner Ester Cchangco-Herrera is declared exempt from any fixed and percentage tax liability as she is not, not the operator and licensee of El Dorado during the period covered by the assessment. However, petitioner Jose V. Herrera is hereby ordered to pay respondent or his duly authorized collection agent the total sum of ₱20,232.70, representing fixed and percentage taxes, inclusive of surcharges, as itemized and computed above.

Let the Honorable, the Secretary of Finance, Manila, be furnished a copy of this decision conformably with the provisions of Section 17 of Republic Act No. 1125.

SO ORDERED.

Quezon City, June 27, 1972.

Estanislao R. Alvarez
ESTANISLAO R. ALVAREZ
Associate Judge

WE CONCUR:

R. M. Umali
ROMAN M. UMALI
Presiding Judge

RAMON L. AVANCEÑA
Associate Judge