REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

ALPHA 245, INCORPORATED (formerly, ARC WORLDWIDE PHILIPPINES CO. INC.),
Respondent.

CTA EB NO. 1875
(CTA Case No. 9225)

Present:
Del Rosario, *P.J.,*
Castañeda, Jr.,
Uy,
Fabon-Victorino,
Mindaro-Grulla,
Ringpis-Liban,
Manahan,
Bacorro-Villena, *and*
Modesto-San Pedro, *JJ*

Promulgated:

OCT 01 2019 3:10 pm

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DECISION

RINGPIS-LIBAN, J.:

Before the Court *En Banc* is a Petition for Review filed by petitioner[1] Commissioner of Internal Revenue (CIR) under Section 11 of Republic Act (R.A.) No. 1125, as amended by Section 18 of R. A. No. 9282, seeking nullification of the Decision[2] dated April 6, 2018 (Assailed Decision), the dispositive portion thereof reads:

> "**WHEREFORE**, the instant Petition for Review is **PARTIALLY GRANTED**. Accordingly, the deficiency income tax, expanded withholding tax (EWT) and documentary stamp tax (DST) assessments are **CANCELLED**. However, petitioner is liable to pay for deficiency VAT for the taxable year 2009 in the

[1] Respondent in CTA Case No. 9225.
[2] Rollo CTA EB Case No. 1875, pp. 18-50.

aggregate amount of P10,470,069.30, inclusive of 50% surcharge imposed under Section 248(B) of the NIRC of 1997, as amended, and deficiency and delinquency interest imposed under Section 249(B) and (C) of the NIRC of 1997, as amended, until December 31, 2017, computed as follows:

Basic Tax Due	P 2,415,687.68
Surcharge (50%)	1,207,843.84
Subtotal	P 3,623,531.53
Deficiency Interest – 1/25/2010 to 12/31/2017	
(2,415,687 x 20% x 7.94 yrs.)	3,834,656.01
Subtotal	P 7,458,187.54
Delinquency Interest – 12/25/2015 to 12/31/2017	
(P7,458,187.54 x 20% x 2.02 yrs)	3,011,881.76
TOTAL	**P10,470,069.30**

In addition, petitioner is liable to pay delinquency interest at the rate of 12%, which is double the legal interest rate for loans or forbearance of any money, on the total unpaid amount including basic deficiency value-added tax, surcharge, deficiency and delinquency interest as computed above in the aggregate amount of P7,458,187.54, computed from January 1, 2018 until full payment thereof pursuant to Section 249(C) of the NIRC of 19997, as amended by Republic Act No. 10963, also known as Tax Reform for Acceleration and Inclusion (TRAIN).

SO ORDERED."

and the Resolution[3] dated June 4, 2018 of the same Second Division of the Court (Court in Division) denying the respondent's Motion for Partial Reconsideration, the dispositive portion thereof reads:

"**WHEREFORE**, the instant Motion for Partial Reconsideration is **DENIED** for lack of merit.

SO ORDERED."

PARTIES

Petitioner is the Commissioner of the Bureau of Internal Revenue (BIR), duly appointed to exercise the powers and perform the duties of his office including, inter alia, the power to declare disputed assessments, refunds of internal revenue taxes, fees, and other charges, and penalties imposed in

[3] Rollo, pp. 52-57.

relation thereto, or other matters arising under the Tax Code. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Respondent is a domestic corporation with principal office address at the 25th Floor, Tower 2, the Enterprise Center, Ayala Avenue corner Paseo de Roxas, Makati City.

FACTS

The facts as stated in the assailed Decision[4] are as follows:

> "Petitioner[5] alleges that sometime in October 2010, the BIR issued Letter of Authority No. LOA-047-2010-00000501 dated October 28, 2010, authorizing Revenue Officer Alwino R. Daga under Group Suprevisor Reynaldo Causapin of Revenue District Office No. 47, East Makati, to examine petitioner's books of accounts and other accounting records for internal revenue taxes covering taxable year 2009.
>
> On October 2, 2012, petitioner received a Notice of Informal Conference. On December 10, 2012, petitioner received a Preliminary Notice of Assessment (PAN) issued by the BIR. Then, on January 8, 2013, petitioner received the Formal Assessment Notice (FAN) with attached Details of Discrepancies.
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> On January 28, 2013, petitioner, through its Finance Controller Ms. Ellen Gonzaga, submitted its Protest Letter dated January 22, 2013. On February 12, 2013, the BIR, through Regional Director Nestor S. Valeroso, issued a letter to petitioner requiring it to submit the necessary supporting documents to its Protest.
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> On February 24, 2013, the BIR sent another letter dated February 20, 2013 to petitioner, requesting it to submit all relevant supporting documents within sixty (60) days from filing of the protest. Consequently, on July 8, 2013, the BIR received petitioner's Reply dated April 23, 2013 to the said BIR's Letter, which essentially reiterated the issues in its Protest Letter dated January 22, 2013. Petitioner further requested the availability of BIR personnel to examine their documents.

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[4] CTA Case No. 9445, pp. 1287-1319. Citations omitted.
[5] "Respondent" in this case.

On September 30, 2013, petitioner received the Final Decision on Disputed Assessment (FDDA) issued by Regional Director Nestor S. Valeroso, where it was found that petitioner failed to submit all relevant supporting documents to its protest. Thus, on October 30, 2013, petitioner filed a request for reconsideration before respondent. This time, petitioner submitted the following documents, among others: 2009 and 2010 Audited Financial Statements (AFS) and Annual Income Tax Return (ITR), respectively.

Allegedly, on November 25, 2015, petitioner received a copy of respondent's assailed Decision on its request for reconsideration. Consequently, on December 28, 2015, petitioner filed the instant Petition before this Court. On February 26, 2016, petitioner filed its Supplement [To the Petition for Review dated December 16, 2015.]

On February 26, 2016, respondent filed his Answer through registered mail, where he essentially argued that the Court has no jurisdiction over the instant Petition because petitioner is already barred from dispatching the correctness of the assessment by reason of its failure to submit the required supporting documents within sixty (60) days from filing of its Protest Letter. On March 14, 2016, petitioner filed its Reply (To the Answer dated February 26, 2016).

On April 11, 2016, petitioner filed its Pre-Trial Brief *Ad Cautelam* while on June 14, 2016, respondent filed his Respondent's Pre-Trial Brief. On August 24, 2016, the Court issued a Pre-Trial Order.

During the hearing, petitioner presented the following witnesses: (1) Maria Ellen H. Bonzaga – Finance Controller of petitioner; and (2) Emmanuel Y. Mendoza – Court-appointed Independent Certified Public Accountant. Petitioner likewise filed its Offer of Documentary Evidence.

On the other hand, respondent presented the following witnesses: (1) Revenue Officer Alwino R. Daga, and (2) Revenue Officer Kristine R. Ami. Respondent likewise filed his Formal Offer of Evidence."

In the Joint Stipulation of Facts and Issues[6], the parties agreed that the issues to be resolved by the Court in Division are as follows:

[6] Filed by the parties on August 5, 2016.

(a) Whether or not petitioner's Protest substantially complied with the requirements prescribed under Section 228 of the National Internal Revenue Code of 1997, Revenue Regulations No. 12-99, as amended, and relevant case law;
(b) Whether or not respondent correctly upheld Regional Director's Final Decision on Disputed Assessment dated September 30, 2013 imposing on petitioner alleged deficiency income tax, Value-Added Tax, and surcharges for the taxable year 2009;
(c) Whether or not petitioner is liable for the deficiency income tax assessment for taxable year 2009 as stated in respondent's Decision dated November 11, 2015 and in the FDDA;
(d) Whether or not petitioner is liable for the deficiency VAT assessment for taxable year 2009 as stated in the Decision and in the FDDA; and
(e) Whether or not petitioner is liable for the surcharges stated in the Decision and in the FDDA.

On April 6, 2018 and June 4, 2018, the Court in Division rendered the questioned Decision and Resolution respectively.

Aggrieved, the CIR filed before the Court *En Banc* within the extended period to appeal, this Petition for Review[7] on July 9, 2018.

In the Resolution[8] dated July 31, 2018, respondent Alpha was directed by the Court *En Banc* to file its comment in this case.

On September 9, 2018, respondent Alpha filed its "Comment [on the Petition for Review dated July 4, 2018]."

In the Resolution dated October 18, 2018,[9] the Court gave due course to the Petition for Review. In view thereof, the instant case was deemed submitted for decision.

ASSIGNMENT OF ERRORS

Petitioner CIR raised this issue for resolution of the Court *En Banc*:

Whether or not the Second Division of this Court blatantly erred in partially granting the Petition for Review of respondent Alpha 245,

[7] Rollo CTA EB Case No. 1875, pp. 5-17, with Annexes.
[8] Ibid pp. 59-60.
[9] Ibid pp. 601-602.

Incorporated, in CTA Case No. 9225, insofar as it cancelled and set aside the assessed deficiency income tax assessment of respondent for taxable year 2009 in the amount of Php4,603,454.53 for alleged lack of basis.

ARGUMENTS

The CIR contends that it was established after investigation that respondent's operation showed a taxable income instead of net operating loss as claimed by respondent in its income tax return for taxable year 2009; that the minimum corporate income tax of respondent was not allowed as tax credit against the computed deficiency income tax for three (3) immediately succeeding taxable years in accordance with the provision imposed under Section E(1)(2) of the Tax Code; that the excess tax credit carried over to succeeding period in the amount of P5,929,429.00 was deducted from the total allowable tax credit considering that the amount has been credited against the estimated quarterly income tax liabilities of respondent for the taxable quarter of the succeeding taxable years pursuant to Section 76 of the Tax Code; that the Court in Division erred when it assumed that respondent has suffered a net operating loss for taxable year 2009 without the latter presenting any concrete evidence during trial that it suffered a net operating loss for taxable year 2009 as well as the succeeding years 2010, 2011 and 2012; and that the deficiency tax assessment issued by the CIR to respondent for taxable year 2009 is prima facie presumed correct and was made in good faith.

On the other hand, respondent counter-argues that the instant petition is a mere rehash of petitioner's Motion for Partial Reconsideration before the Court in Division; that it had sufficiently established the invalidity of petitioner's assessment on deficiency income tax; and petitioner failed to substantiate its claim that NOLCO and MCIT were carried over the taxable years subsequent to 2009; and that an income tax return is sufficient evidence to prove net operating loss for a taxable year absent any compelling evidence to the contrary.

RULING OF THE COURT

TIMELINESS OF THE PETITION

On April 11, 2018, the CIR received the Decision of the Court in Division. On April 26, 2018, the CIR filed a Motion for Partial Reconsideration of the said Decision. On June 4, 2018, the Court in Division issued the assailed Resolution denying the CIR's motion. Said Resolution was received by the CIR on June 8, 2018.

From receipt of the said Resolution on June 8, 2018, the CIR has until June 23, 2018 within which to file the Petition for Review. On June 19, 2018, the CIR filed before this Court a "Motion for Extension of Time to File Petition for Review," praying for an extension of fifteen (15) days from June 23, 2018 or until July 8, 2018,[10] within which to file the Petition for Review. On June 22, 2018, the Court *En Banc* issued a Minute Resolution granting the CIR's motion.

On July 9, 2018, the CIR filed the instant Petition for Review. Hence, this Petition for Review was timely filed.

The Court shall now proceed to determine the merits of the Petition for Review.

After a careful review of petitioner CIR's arguments and the records of the case, the Court *En Banc* finds no reason to reverse the Decision and Resolution of the Court in Division. The records of the case show that the Court in Division had fully and exhaustively resolved the issues raised in the petition. This Court notes that the arguments presented by the CIR are a mere rehash of the arguments in his Motion for Partial Reconsideration.

The cancellation of deficiency income tax assessment of respondent in the amount of P4,603,454.53 is proper

The CIR mainly argues that the Court erred in cancelling the deficiency income tax assessment. The CIR insists that based on their investigation, the respondent's operation showed a taxable income instead of net operating loss.

However, after consideration, the Court *En Banc* finds that the cancellation of income tax assessment is proper because there is no basis for such assessment. The computation of petitioner's taxable income resulted to a net loss of P7,811,985.76. Records show that the CIR failed to present evidence to support the income tax assessment upon respondent.

The Court *En Banc* reiterates the discussion of the Court in Division in the assailed Decision[11] as follows:

I. Income Tax

The BIR assessed petitioner for deficiency income tax, as follows:

Taxable Income (loss) per ITR	P(22,688,614.00)

[10] July 8, 2018 is a Sunday.
[11] Decision, pp. 12-22.

Add: Adjustments/Disallowance			
Undeclared Income (Schedule 1)		P6,842,789.00	
Undeclared income from unaccounted rent expense (Schedule 2)		468,220.20	
Disallowed Expenses for Non- withholding of tax (Schedule 3)		8,033,839.24	15,344,848.44
Taxable Income per investigation			P (7,343,765.56)
Add: Net Operating Loss Carry-Over			22,688,614.00
Taxable income as adjusted			P 15,344,848.44
Income tax due			P 4,603,454.53
Less: Tax credits/payments			
Prior Year's Excess Credit		P 5,206,958.00	
Creditable Withholding Tax		847,837.00	
Total		P 6,054,795.00	
Less: Minimum Corporate Income Tax	P 125,366.00		
Excess Credits Carried Forward to Succeeding Year	5,929,429.00	6,054,795.00	
Basic Tax Due			**P 4,603,454.53**

A. Undeclared income in the amount of P6,842,789.00

xxx xxx xxx

B. Undeclared income in the amount of P468,220.20 based on petitioner's rent expense

Respondent assessed petitioner for undeclared income in the amount of P468,220.20 based on petitioner's rent expense, as follows:

Rent expense per returns (1601 E)	P 5,327,812.20
Less: Rent expense per books/FS	4,859,592.00
Undeclared Income	**P 468,220.20**

Petitioner asserts that the difference in rent expense in its BIR Form No. 1601-E and in its 2009 AFS and Annual ITR did not constitute income. Even if respondent's imputation of taxable income due to undeclared expenses were to be accepted, the imputed income of P468,220.20 would be offset by recording the equivalent amount as expense.

The Court agrees with petitioner.

It must be emphasized that for income tax purposes, a taxpayer is allowed to claim deductions from its gross income to compute its taxable income subject to income tax. What is prohibited by the income tax law is a deduction beyond the amount authorized therein.

Furthermore, it is worthy to note that the imputation of alleged undeclared income is based on a mere presumption that since there are undeclared expenses, there are corresponding undeclared sources of income. Even if these alleged unaccounted expenses are to be treated as undeclared income, the same will be offset by recording the equivalent payments as expenses. As such, no taxable income will result for the said transactions.

While it is axiomatic that all presumptions are in favor of the correctness of tax assessments, the assessment itself should not be based on presumptions no matter how logical the presumption might be. In order to stand the test of judicial scrutiny, the assessment must be based on actual facts.

For lack of factual basis, the deficiency income tax assessment pertaining to the alleged undeclared income from petitioner's rent expenses of P468,220.20 is cancelled.

xxx xxx xxx

D. Net Operating Loss Carry-Over (NOLCO) in the amount of P22,688,614.00, Minimum Corporate Income Tax (MCIT) in the amount of P125,366.00 and Excess Credits Carried Forward to Succeeding Year in the amount of P5,929,429.00

As a result of respondent's investigation, petitioner's operation showed taxable income instead of net operating loss as claimed in petitioner's 2009 Annual ITR. Respondent added back petitioner's net operating loss of P22,688,614.00 under the presumption that the tax benefit of this amount has already been forwarded to succeeding periods as provided for under Section 34(D)(3) of the NIRC of 1997, as amended.

For the same reason, respondent likewise disallowed petitioner's Minimum Corporate Income Tax (MCIT) and the excess creditable withholding taxes at the end of taxable year 2009.

The Court finds respondent's argument untenable.

Respondent failed to present the factual basis of the claim that the 2009 net loss was carried over and applied by petitioner as NOLCO and deducted from the gross income of the succeeding taxable periods and that the MCIT and excess credits were carried over and credited by petitioner against its regular corporate income tax.

Moreover, the application of the said NOLCO, MCIT, and excess credits in the subsequent taxable periods is beyond the scope of the present assessment. The same can only be the subject of assessment on the taxable year when they are claimed as deductions.

On the other hand, petitioner submitted its annual income tax returns for the years 2010, 2011 and 2012, which showed that petitioner suffered net operating losses for each of the taxable period following the year 2009. In 2011, it applied NOLCO from the year 2008 in the amount of P6,859,010.00, but as shown in the ITR for the year 2012, the net operating loss from the year 2009 in the amount of P22,688,614.00 remained unapplied and has expired.

The ICPA likewise reached the same findings.

Thus, adding the net loss back to the taxable period per investigation and the disallowance of petitioner's MCIT and excess tax credits, are erroneous.

In sum, the Court finds it appropriate to cancel the deficiency income tax assessment for the taxable year 2009 in the amount of P4,603,454.53 for lack of basis, considering that the computation of petitioner's taxable income per investigation results to a net loss of P7,811,985.76, as shown below:

Taxable Income (Loss) per ITR		P (22,688,614.00)
Add: Adjustments/Disallowance		
Undeclared Income	P 6,842,789.00	
Undeclared income from unaccounted rent expense	-	
Disallowed Expenses for Non-withholding of tax	8,033,839.24	14,876,628.24
Taxable Income per investigation		**P (7,811,985.76)**

Inasmuch as that the CIR did not offer evidence to prove the basis of the income tax assessment upon respondent, the said assessment is considered a naked assessment. In *Commissioner of Internal Revenue vs. Hantex Trading Co.,* *Inc.*,[12] the Supreme Court emphasized the concept of naked assessment *vis-a-vis* the *prima facie* correctness of a tax assessment:

> "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.*"

The findings of fact by the CTA in Division are not to be disturbed without any showing of grave abuse of discretion considering that the members of the Division are in the best position to analyze the documents presented by the parties.[13]

In view of the foregoing discussions, the Court *En Banc* finds no reversible error to disturb the assailed Decision and Resolution of the Court in Division.

However, in view of the issuance of Revenue Regulations No. 21-2018 on September 14, 2018, which is the implementing rule of Republic Act (RA)

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[12] G.R. No. 136975, March 31, 2005.

[13] *Republic of the Philippines, represented by the Commissioner of Internal Revenue vs. Team (Phils.) Energy Corporation (formerly Mirant (Phils.) Energy Corporation)*, G. R. No. 188016, January 14, 2015, citing Sea-Land Service, Inc. vs. Court of Appeals, G.R. No. 122605, April 30, 2001.

No. 10963, otherwise known as the "Tax Reform for Acceleration and Inclusion (TRAIN) Law", a recomputation of the amount of P10,470,069.30 representing respondent's liability for deficiency VAT for taxable year 2009 is warranted. As recomputed, the amount of P10,470,069.30 is modified as follows:

Basic Tax Due	₱2,415,687.68
Add: 50% Surcharge	1,207,843.84
20% Deficiency Interest from January 26, 2010 to December 25, 2015	
[₱2,415,687.68 x 20% x 2160/365 days]	2,859,115.28
Total Amount Due, December 25, 2015	**₱6,482,646.80**
Add: 20% Deficiency Interest from December 26, 2015 to December 31, 2017	
[₱2,415,687.68 x 20% x 737/365 days]	975,540.72
20% Delinquency Interest from December 26, 2015 to December 31, 2017	
[₱6,482,646.80 x 20% x 737/365 days]	2,617,923.67
Total Amount Due, December 31, 2017	**₱10,076,111.19**

WHEREFORE, the Petition for Review is hereby **DENIED for lack of merit**. The Decision dated April 6, 2018 and Resolution dated June 4, 2018 are **AFFIRMED**, with modification.

Accordingly, respondent is **ORDERED TO PAY TEN MILLION SEVENTY-SIX THOUSAND ONE HUNDRED ELEVEN AND 19/100 PESOS (₱10,076,111.19)** representing deficiency VAT for taxable year 2009, inclusive of fifty percent (50%) surcharge imposed under Section 248(B) of the Tax Code, as amended, and twenty percent (20%) deficiency interest and 20% delinquency interest imposed under Section 249(A) and (B), respectively, of the same Code, computed until December 31, 2017.

In addition, respondent is **ORDERED TO PAY** delinquency interest at the rate of twelve percent (12%), which is double the legal interest rate for loans or forbearance of any money, on the total amount due as of December 25, 2015 in the amount of **₱6,482,646.80**, as determined above, computed from January 01, 2018 until full payment thereof pursuant to Section 249(C) of the Tax Code, as amended by RA No. 10963, and implemented by Revenue Regulations No. 21-2018.

SO ORDERED.

Ma. Belen M. R. L.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, 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