**REPUBLIC OF THE PHILIPPINES**
**COURT OF TAX APPEALS**
**QUEZON CITY**

***EN BANC***

| | |
|---|---|
| ITHIEL CORPORATION, *Petitioner,* | CTA EB No. 1672 (CTA CASE No. 8872) |
| -versus- | |
| COMMISSIONER OF INTERNAL REVENUE, *Respondent.* | |

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

| | |
|---|---|
| COMMISSIONER OF INTERNAL REVENUE, *Petitioner,* | CTA EB No. 1675 (CTA CASE No. 8872) |
| -versus- | *Present*: |
| ITHIEL CORPORATION, *Respondent.* | DEL ROSARIO, P.J, CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, *JJ.* |
| | Promulgated: MAR 13 2019 |

x------------------------------------------ 4:05 p.m. --x

## DECISION

***MINDARO-GRULLA, J.:***

Submitted for decision are the Petitions for Review for the Court *En Banc* under *Section 4(b), Rule 8*[1] *of the 2005*

---

[1] **SEC. 4.** *Where to appeal; mode of appeal. –*

*Revised Rules of the Court of Tax Appeals (RRCTA), as amended,* of the Decision dated February 23, 2017,[2] and the Resolution dated June 7, 2017,[3] all rendered by the Former Second Division of this Court, the dispositive portions of which read as follows:

Decision dated February 23, 2017:

"In view thereof, the Petition for Review is **PARTIALLY GRANTED**. Accordingly, petitioner is liable to **PAY** the adjusted total amount of ₱6,406,869.78, inclusive of the 25% surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended, computed as follows:

| Tax Type | Basic | 25% Surcharge | Total |
|---|---|---|---|
| Income Tax | ₱ 3,048,863.55 | ₱ 762,215.89 | ₱ 3,811,079.44 |
| Value Added Tax | 1,209,135.40 | 302,283.85 | 1,511,419.25 |
| Expanded Withholding Tax | 867,496.87 | 216,874.22 | 1,084,371.09 |
| **TOTAL** | **₱ 5,125,495.82** | **₱ 1,281,373.96** | **₱ 6,406,869.78** |

a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency taxes computed from the dates indicated below until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended:

| Tax Type | Basic Tax Due | 20% Deficiency Interest Computed from: |
|---|---|---|
| Income Tax | ₱ 3,048,863.55 | 15-Apr-2010 |
| Value-Added Tax | 1,209,135.40 | 25-Jan-2010 |
| Expanded Withholding Tax | 867,496.87 | 13-Jan-2010 |

---

x x x x x x x x x

(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court *en banc* shall act on the appeal.

x x x x x x x x x

[2] Penned by Associate Justice Juanito C. Castañeda, Jr., concurred in by former Associate Justice Caesar A. Casanova, with Concurring and Dissenting Opinion of Associate Justice Catherine T. Manahan, *En Banc* no. 1672 Docket, pp. 36-88.
[3] *Ibid.*, pp. 54-65.

*L*

b) Delinquency interest at the rate of twenty percent (20%) per annum on the total deficiency taxes of ₱6,406,869.78 and on the deficiency interest which have accrued as aforementioned in (a), computed from August 26, 2014 until full payment thereof pursuant to Section 249(C)(3) of the NIRC of 1997, as amended.

**SO ORDERED.**"

Resolution dated June 7, 2017:

"**WHEREFORE,** petitioner's Motion for Partial Reconsideration (to the Decision dated February 23, 2017) and respondent's Motion for Partial Reconsideration are both **DENIED**, for lack of merit. Accordingly, the Decision dated February 23, 2017 is **AFFIRMED**.

**SO ORDERED.**"

The facts of the case, as recited by the Former Second Division in its Decision, read as follows:

"Petitioner (Ithiel Corporation) alleges that it is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office at #770 E. Rodriguez Extension Malibay, Pasay City.

Respondent is the Commissioner of the Bureau of Internal Revenue (BIR), duly appointed to exercise the powers and perform the duties of her office including, inter alia, the power to decide disputed assessments, refunds of internal revenue taxes, fees, other charges, and penalties imposed in relation thereto, or other matters arising under the Tax Code. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On May 20, 2010 and September 3, 2010 the BIR issued Letters of Authority Nos. 00043013 and

ℒ

eLA201000004866, respectively, against petitioner, covering petitioner's books of accounts and other accounting records for taxable year 2009. The BIR also issued the First Notice and the Second and Final Notice for Presentation of Records to petitioner. Petitioner complied thereto as per transmittal letter dated June 17, 2010.

Consequently, the BIR issued a Notice of Informal Conference. On October 5, 2012, petitioner received a Preliminary Assessment Notice (PAN) from the BIR dated September 28, 2012, finding petitioner liable for deficiency Income Tax, Value-Added Tax (VAT) and Expanded Withholding Tax (EWT). On October 18, 2012, petitioner filed its protest to the PAN dated October 17, 2012.

On December 7, 2012, petitioner received Assessment Notice Nos. IT-ELA4866-09-12-0892, VT-ELA4866-09-12-0892 and WE-ELA4866-09-12-0892, assessing petitioner for deficiency Income Tax, VAT and EWT, respectively.

On January 4, 2013, petitioner filed its Protest questioning the timeliness of the FAN, among others. On July 18, 2014, petitioner received the FDDA denying petitioner's protest. As such, on August 18, 2014, petitioner filed the instant Petition for Review.

xxx xxx xxx

The parties submitted the following issues for the consideration of the Court:

> "a. Whether or not the Bureau of Internal Revenue's right to assess petitioner for Deficiency Value Added Tax covering the first, second and third quarters of taxable year 2009 has prescribed.
>
> b. Whether or not the Bureau of Internal Revenue's right to assess

h

> petitioner for Deficiency Expanded Withholding Tax for the months January to December of2009 has prescribed.
>
> c. Whether or not petitioner is liable for deficiency internal revenue taxes for Income Tax, Value Added Tax and Expanded Withholding Tax, all for taxable year 2009.""

The Former Second Division partly ruled in favor of Ithiel Corporation (Ithiel). It ruled that the Final Assessment Notice (FAN) with respect to Ithiel's deficiency Value Added Tax (VAT) for the 1st to 3rd quarters of taxable year 2009, as well as for the deficiency Expanded Withholding Tax (EWT) from January to October 2009, was issued beyond the 3-year prescriptive period.

However, the Former Second Division applied the exception to the 3-year prescriptive period to assess and thus applied 10 years for the CIR to assess Ithiel with respect to its deficiency EWT since there was fraud in filing of the returns. With respect to the professional fees, there was a substantial difference in the amount of payments between the schedule provided in the ICPA report *vis-a-vis* Schedule 4 of BIR Form 1604-E.[4] The alleged payments to GPP and non-stock, non-profit organization that are supposed to be exempted from tax were also doubtful as Ithiel failed to present proof of payment to these entities.

The Court in Division also found out that Ithiel failed to withhold and remit the corresponding EWT due on rental expense and professional fees. These circumstances constitute falsity in the EWT Returns. As such, the Former Second Division applied the 10-year prescriptive period.

The Court in Division further ruled that Ithiel was partially liable for deficiency income tax, save for those cancelled by virtue of the lapse of the prescriptive period to assess, the partial amount from undeclared revenues that

---

[4] BIR Records, pp. 92-96.

k

were properly substantiated and the amount that were properly substantiated by creditable withholding tax (CWT) certificates. Lastly, the Court in Division ruled that Ithiel was partially liable for deficiency VAT based on disallowed input tax.

As *per* assailed Resolution herein, the Former Second Division denied both parties' Motions for Partial Reconsideration.

The CIR filed his Petition for Review[5] before the Court *En Banc* on July 7, 2017 while Ithiel filed its Petition for Review[6] before the Court *En Banc* on July 17, 2017.

As alleged in his Petition for Review, the CIR claims that the 10-year prescriptive period to assess is properly applied in this case since in the FAN and as embodied in the FDDA, it could be readily seen that Ithiel was assessed an equivalent to 50% surcharge on its deficiency income tax and VAT pursuant to the provision of Section 248(B) of the 1997 NIRC, as amended, for failure to report in an amount exceeding 30% of that declared return, indicating false or fraudulent return with intent to evade. The CIR also insists that with respect to deficiency CWT of Ithiel, CWT Certificates are not sufficient. The Court in Division was also mistaken in not applying the 10-year prescriptive period to assess with respect to Ithiel's deficiency VAT.

On the other hand, Ithiel, in its Petition for Review, insists that the EWT returns are not false and fraudulent, thus, the 10-year prescriptive period does not apply and that since the assessment is silent as to the application of the 10-year prescriptive period, Ithiel was denied of due process to be informed of the facts and law in which the assessment was made, making the assessment void. With respect to its remaining VAT deficiency, Ithiel claims that the official receipts (ORs) and invoices were named under "Suki Market," a name in which Ithiel is authorized to operate based on its Securities and Exchange Commission

---

[5] *En Banc* No. 1675 Docket, pp. 5-18.
[6] *En Banc* No. 1672 Docket, pp. 6-34.

h

Registration, which should be sufficient for substantiation requirements.

Ithiel also claims that it is not liable for income tax. It explains that the difference in the amount of disallowed expenses of Ithiel under "Professional and Outside Services" between the ICPA report and Schedule 4 of Form 1604-E is due to income payments under Form 1604-E that are related to expenses and asset accounts in the financial statements other than "Professional and Outside Services," particularly listed in the ICPA Report as "non-trade Receivables" and "Renovation in Progress." Such were claimed to be reflected also in the books of accounts and alphalist. Ithiel also claims that part of the rental amount indicated in the assessment pertains to 2008 advance rental and already subjected to withholding tax for 2008, while the remaining amount formed part of its rent expense in 2009 that was already subjected to withholding tax for the said year. For the undeclared revenue, Ithiel claims that the allowance for credit losses considered by the Court in Division as non-trade receivable, which resulted to a discrepancy declared by the Court in Division as undeclared revenue, is actually related to trade receivables, as evidenced by its Audited Financial Statements, Note 7 thereof,[7] and pertains to 100% doubtful receivables on past due accounts with Shield Credit and Loans, Inc., a trade customer.

We rule to deny both petitions.

Internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, or where the return is filed beyond the period, from the day the return was actually filed.[8] The exceptions to this rule are in the case of a false or fraudulent return with intent to evade tax or of failure to file a return.[9] For those exceptions, the assessment period becomes ten (10) years from the discovery of the falsity, fraud or omission.

---

[7] Page 13, marked as Exhibit "P-10-V-ICPA".
[8] Section 203 of the NIRC.
[9] Section 222 of the NIRC.

L

Under Section 248(B) of the 1997 NIRC, the substantial under declaration of sales, receipts of income, constitutes a *prima facie* evidence of filing a false or fraudulent return, thus:

> "SEC. 248. Civil Penalties. –
>
> xxx xxx xxx
>
> (B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case, any payment has been made on the basis of such return before the discovery of the falsity or fraud: <u>Provided, That a substantial underdeclaration of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, shall constitute prima facie evidence of a false or fraudulent return: Provided, further, That failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding (30%) of actual deductions, shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions, as mentioned herein</u>." (Underlining supplied.)

In a fairly recent case of *Commissioner of Internal Revenue vs. Asalus Corporation (the "Asalus Case"),*[10] the Supreme Court had the opportunity to discuss the presumption of filing a false return under Section 248(B)[11] of the 1997 NIRC, thus:

> "Under Section 248(B) of the NIRC, <u>there is a *prima facie* evidence of a false return if there is a</u>

[10] G.R. No. 221590, February 22, 2017.

ℒ

> substantial underdeclaration of taxable sales, receipt or income. The failure to report sales, receipts or income in an amount exceeding 30% what is declared in the returns constitute substantial underdeclaration. A *prima facie* evidence is one which that *(sic)* will establish a fact or sustain a judgment unless contradictory evidence is produced.
>
> In other words, when there is a showing that a taxpayer has substantially underdeclared its sales, receipt or income, there is a presumption that it has filed a false return. As such, the CIR need not immediately present evidence to support the falsity of the return, unless the taxpayer fails to overcome the presumption against it." (Underlining supplied.)

The Supreme Court further ruled in *Asalus* that upon presumption that a false return was filed due to taxpayer's substantial underdeclaration of its sales, receipt or income, the CIR is not required to present evidence to support the falsity of the return, unless the taxpayer overcomes the presumption against it, and upon failure of the taxpayer to overcome such presumption, the Supreme Court ratiocinated the application of the exceptional prescriptive period to assess, thus:

> "xxx Its failure to overcome the same warranted the application of the ten (10)-year prescriptive period for assessment under Section 222 of the NIRC. To require the CIR to present additional evidence in spite of the presumption provided in Section 248(B) of the NIRC would render the said provision inutile."

Applied in this case, the CIR revealed that there is a substantial discrepancy between the figures indicated in Ithiel's returns/alphalist, which is only ₱868,605.03 *vis-a-vis* per ITR, which is ₱9,379,916.87. Ithiel failed to report receipt in an amount exceeding 30% of that declared per return, thus, the *prima facie* presumption of filing a false return on the part of Ithiel. Moreover, as found by the Court in Division, Ithiel failed to overcome the *prima facie* presumption when it was not convinced that the ₱9,379,916.87 findings per ITR for its professional fees

ℒ

includes amounts for other services that were subjected to withholding tax or exempted from payment of such. Considering the discrepancy in Ithiel's return which, given the discourse of the Supreme Court in *Asalus*, is *prima facie* evidence of substantial underdeclaration pointing to a falsity in the return. Failure to satisfactorily prove otherwise calls for the application of the ten-year prescriptive period for assessment.

It is also clear that the revenue examiners already imposed a 50% surcharge in the PAN[12] and the FAN[13] issued against Ithiel, for failure to report receipt in an amount exceeding 30% of that declared per return, again justifying the application of the ten-year period to assess. A close reading of the FAN would disclose that there is a statement that a 50% surcharge was imposed on top of the tax deficiencies subject of the assessment pursuant to Section 248 (B) of the 1997 NIRC. This would negate the claim of Ithiel that fraud was a mere afterthought of the CIR because as early as the PAN stage, the 50% surcharge for fraudulent returns already formed part of the total liabilities assessed against Ithiel.

As to deficiency income tax from professional fees and other outside services, the BIR found out that as per ITR, Ithiel had income payments for the year 2009 in the amount of ₱9,379,916.87, but declared only in its returns/alphalist ₱868,605.03. Ithiel reiterates its argument before the Court in Division that the computation of the BIR includes payment to contractors for other outside services as well in the amount of ₱8,529,025.93 that was already subjected to withholding tax.

The Court in Division has already elaborated its findings. The ICPA broke down the said amount of ₱8,529,025.93, to wit:

| | Amount | Withholding Tax |
|---|---|---|

[12] *Division Docket,* Vol. I, pp. 32-33.
[13] *Ibid.,* pp. 46-47.

L

| | | |
|---|---|---|
| Alemania Allan | ₱ 487.50 | ₱ 9.75 |
| Armadillo Holdings | 8,291,281.70 | 165,825.63 |
| Christian Environment | 36,788.60 | 735.77 |
| Collado Rodrigo | 9,141.00 | 182.82 |
| Comoda Renato | 11,887.50 | 237.75 |
| Deita Aireen Duenas | 98,724.79 | 1,974.50 |
| Jandoc Randy | 3,285.31 | 65.71 |
| Mabborang Adona | 19,203.52 | 384.07 |
| Mercado Catherine | 48,492.32 | 969.85 |
| Patriot Security & Investment | 9,733.69 | 194.67 |
| **Total** | **₱8,529,025.93** | **₱170,580.52** |

However, the Court in Division found that per Schedule 4 of BIR Form 1604-E, Ithiel made income payments in different amounts to the same suppliers, thus:

| **Payee** | **Amount** | **Withholding Tax** |
|---|---|---|
| Alemania Allan | ₱ 16,790.51 | ₱ 335.81 |
| Armadillo Holdings | 8,833,732.00 | 176,674.64 |
| Christian Environment | 414,481.50 | 8,289.63 |
| Collado Rodrigo | 9,141.00 | 182.82 |
| Comoda Renato | 82,024.00 | 1,640.48 |
| Deita Aireen Duenas | 98,724.79 | 1,974.50 |
| Jandoc Randy | 3,285.31 | 65.71 |
| Mabborang Adona | 23,156.00 | 463.12 |
| Mercado Catherine | 48,492.32 | 969.85 |
| Patriot Security & Investment | 1,351,006.35 | 27,020.13 |
| **Total** | **₱10,880,833.78** | **₱217,616.69** |

Thus, there is a difference of ₱2,351,807. between the amounts found by the Court of ₱10,880,833.78 and that reported by the ICPA of ₱8,529,025.93. Ithiel accounted[14] for this difference under "renovation in progress-labor," "renovation in progress-overhead," "non-trade receivables-CUSA," "Materials, Supplies and facilities," and "Research and Development."

However, as correctly ruled by the Court in Division, the reconciliation submitted by Ithiel is not sufficient to prove that the income payments in its alphalist indeed

[14] Motion for Partial Reconsideration, *Division Docket,* Vol. II, p. 738; Petition for Review, *En Banc* No. 1672 Docket, p. 26.

formed part of the professional and other outside services account in its audited financial statements. Absent the ledger of the subject expense account together with the Monthly Alphalist of Payees (MAP), the Court cannot ascertain whether the income payments recorded therein were subjected to withholding tax. Thus, the disallowance of Ithiel's professional fees and other outside services expense amounting to ₱8,511,311.84 should be maintained.

As to rental expenses, which forms part of the deficiency income tax, the BIR found a discrepancy of ₱327,313.70 and Ithiel reiterates in its Petition for Review its argument before the Court in Division that the amount of ₱66,315.79 is an advanced payment to the Quezon City Treasurer's Office (QCTO) that was already subjected to withholding tax in year 2008 while ₱226,468.88 is an advanced payment to Manolito/Procesa de Castro. Ithiel submitted its 2008 EWT Alphalist, reflecting therein the payment to QCTO, arguing that withholding tax therein was already paid in accordance with Section 2.57.4 of the Revenue Regulations No. 2-98, which provides:

> "SECTION 2.57 .4. Time of Withholding.-The obligation of the payor to deduct and withhold tax under Section 2.57 of these regulations arises <u>at the time an income is paid or payable, whichever comes first</u>, the term 'payable' refers to the date the obligation become[s] due, demandable or legally enforceable." (Underlining Supplied.)

This Court reiterates the findings of the Court in Division, to wit:

> "While the alphalist of payees subjected to withholding tax for the taxable year 2008 reflected payments to QCTO, the income payment reflected therein is in the amount of ₱862,105.40 with the corresponding withholding tax of ₱43,105.27. Petitioner did not submit the breakdown of the foregoing nor presented supporting documents that include an advance payment for the month of January 2009.

ℒ

xxx xxx xxx

Moreover, a careful scrutiny of the alpha list of payees subjected to withholding tax for taxable year 2008 showed an income payment of the same amount to Procesa F. De Castro and income payments to Manolito De Castro amounting to ₱2,631,352.20. Per ICPA report, petitioner made rental payments to Manolito De Castro, and not to Procesa F. De Castro. Petitioner failed to submit the details of the income payments to Manolito De Castro in 2008 or to prove that payments made to Procesa F. De Castro formed part of its rent expense in the year 2009.

Aside from failing to present evidence that the payments were made in 2008, petitioner likewise failed to prove that taxes were withheld therefrom. Hence, the disallowance of petitioner's rent expense in the amount of ₱327,313.70 should remain.

xxx xxx xxx"

Ithiel also rehashed its assertion that the Allowance for Credit Losses of ₱1,097,742.00 should be deducted from the Trade Receivables for the year 2009 to come up with the ending balance of Accounts Receivable. As it pointed out, Note 7 of its audited financial statements shows that:

"The average credit period on rentals is 30 days. No interest is charged on trade receivables. The Company has recognized an allowance for doubtful debts of 100% against all receivables from Shield Credit and Loans, Inc. because historical experience shows that receivables that are past due beyond 2006 are not recoverable.

The concentration of credit risk is limited due to the customer base being large and unrelated. Accordingly, the directors believe that there is no further credit provision required in excess of the allowance for credit losses."

L

However, as correctly ruled by the Court in Division, Ithiel failed to substantiate the same as the Court cannot ascertain whether the receivables from Shield Credit and Loans, Inc. indeed formed part of the Trade Receivables balance for the year 2009. Thus, this Court maintains the deficiency income tax assessment arising from undeclared revenue in the amount of ₱761,238.54.

As to its VAT deficiency, Ithiel asks this Court to deviate from the strict compliance of the substantiation requirements with respect to the disallowed input taxes for the fourth quarter of 2009 amounting to ₱1,899,993.29, since it is not applying for tax credit certificate or tax refund. Moreover, Ithiel claims that the ORs and invoices were named under "Suki Market," and Ithiel was registered in the SEC and was authorized to operate under the name and Style of Suki Market, Suki-Market - San Pedro Branch, Suki Market - Alaminos Branch and Suki Market - Cuenca, Batangas Branch.

However, as correctly ruled by the Court in Division, the substantial requirements indicated in Sections 110 and 113 of the 1997 NIRC in order for the input taxes to be credited against output taxes, which is precisely what is asked by Ithiel in this case, must be complied with. Moreover, input tax that is being credited by Ithiel is the VAT due from or paid by it, as a VAT-registered person in the course of its trade or business on importation of goods or local purchase of goods or services, including lease or use of property. Being a VAT-registered person, it must comply with the registration requirements under Section 236(A) of the 1997 NIRC, to wit:

> "Section 236. Registration Requirements. -
>
> (A) Requirements. -
>
> xxx xxx xxx
>
> The registration shall contain <u>the taxpayer's name, style, place of residence, business and such</u>

ℒ

other information as may be required by the Commissioner in the form prescribed therefor.

A person maintaining a head office, branch or facility shall register with the Revenue District Officer having jurisdiction over the head office, branch or facility. xxx" (Underlining supplied.)

Thus, without proof of compliance with the above-mentioned provision that Ithiel's so-called Suki Market, Suki-Market - San Pedro Branch, Suki Market - Alaminos Branch and Suki Market - Cuenca, Batangas Branch were registered with the respective Revenue District Officers having jurisdiction over the head office, branch or facility, its argument is without contention.

As to Ithiel's tax credit of its creditable withholding tax, such were duly supported by BIR Form No. 2307 or the CWT certificates. The application of cases raised by the CIR in his Petition for Review is also misplaced as such are claims for refund/tax credit.

**WHEREFORE,** both Petitions for Review are hereby **DENIED** for lack of merit. The assailed Decision and Resolution dated February 23, 2017 and June 7, 2017, respectively are hereby **AFFIRMED WITH MODIFICATIONS** in the computation of deficiency interest and delinquency interest in view of the effectivity of Republic Act No. 10963 (TRAIN Law) on January 1, 2018 and the issuance of Revenue Regulation No. 21-2018.[15] No pronouncement as to costs.

Accordingly, the Decision dated February 23, 2017 is modified and shall read as follows:

"In view thereof, the Petition for Review is **PARTIALLY GRANTED**. Accordingly, petitioner is liable to **PAY** the adjusted total amount of **TWENTY**

[15] Regulations Implementing Section 249 (Interest) of the National Internal Revenue Code (NIRC) of 1997, as amended under Section 75 of the Republic Act (RA) No.10963 or the "Tax Reform for Acceleration and Inclusion (TRAIN Law)".

ℓ

**ONE MILLION SEVEN HUNDRED FIFTY NINE THOUSAND THREE HUNDRED SIXTY SEVEN PESOS AND NINETY EIGHT CENTAVOS (₱21,759,367.98)**, for the taxable year 2009, inclusive of the 25% surcharge and deficiency and delinquency interests imposed under Sections 248(A)(1)(3) and 249(B) and (C) of the NIRC of 1997, as amended, respectively computed until December 31, 2017 as follows:[16]

| | Income Tax | Value-Added Tax | Expanded Withholding Tax | Total Due |
|---|---|---|---|---|
| Basic Tax | 3,048,863.55 | 1,209,135.40 | 867,496.87 | 5,125,495.82 |
| 25% surcharge | 762,215.89 | 302,283.85 | 216,874.22 | 1,281,373.96 |
| 20% Deficiency Interest | | | | |
| April 16, 2010 to August 26, 2014 (1593 days) (basic tax x .20 x 4.364 years) | 2661048.106 | | | 2,661,048.11 |
| January 26, 2010 to August 26, 2014 (1673 days) (basic tax x .20 x 4.5835 years) | | 1108414.421 | | 1,108,414.42 |
| January 14, 2010 to August 26, 2014 (1685 days) (basic tax x .20 x 4.6164 years) | | | 800942.5101 | 800,942.51 |
| **Total Amount due as of August 26, 2014** | **6,472,127.55** | **2,619,833.67** | **1,885,313.60** | **10,977,274.82** |
| Add: | | | | |
| 20% Deficiency Interest | | | | |
| August 27, 2014 to December 31, 2017 (1222 days) (basic tax x .20 x 3.3479 years) | 2041458.056 | 809612.8811 | 580858.5542 | 3431929.491 |
| 20% Delinquency Interest | | | | |
| August 27, 2014 to December 31, 2017 (1222 days) (total amount due as of August 26, 2014 x .20 x 3.3479 years) | 4333607.163 | 1754188.23 | 1262368.28 | 7350163.672 |
| **Total Amount due as of December 31, 2017** | **12,847,192.76** | **5,183,634.78** | **3,728,540.43** | **21,759,367.98** |

In addition, Ithiel Corporation is liable to pay delinquency interest at the rate of 12% on the total unpaid basic deficiency tax, surcharge and deficiency interest as of August 26, 2014 amounting to ₱6,472,127.55 for Income Tax, ₱2,619,833.67 for

---

[16] Section 6 of Revenue Regulations No. 21-2018 dated September 14, 2018.

h

VAT, and ₱1,885,313.60 for Expanded Withholding Tax, or in the aggregate amount of ₱10,977,274.82, computed from January 1, 2018 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended by Republic Act No. 10963, also known as Tax Reform for Acceleration and Inclusion (TRAIN)."

**SO ORDERED.**

**CIELITO N. MINDARO-GRULLA**
Associate Justice

WE CONCUR:

**(with Concurring and Dissenting Opinion)**
**ROMAN G. DEL ROSARIO**
Presiding Justice

**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

**ERLINDA P. UY**
Associate Justice

**ESPERANZA R. FABON-VICTORINO**
Associate Justice

**MA. BELEN M. RINGPIS-LIBAN**
Associate Justice

**(I join Presiding Justice Del Rosario's Concurring and Dissenting Opinion)**
**CATHERINE T. MANAHAN**
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 among the members of the Court En Banc before the case was assigned to the writer of the opinion of the Court En Banc.

**ROMAN G. DEL ROSARIO**
Presiding Justice

REPUBLIC OF THE PHILIPPINES
**Court of Tax Appeals**
QUEZON CITY

*EN BANC*

**ITHIEL CORPORATION,**
*Petitioner,*

**CTA EB NO. 1672**
*(CTA Case No. 8872)*

*-versus-*

**COMMISSIONER OF INTERNAL REVENUE,**
*Respondent.*

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

**COMMISSIONER OF INTERNAL REVENUE,**
*Petitioner,*

**CTA EB NO. 1675**
*(CTA Case No. 8872)*

*Present:*

**Del Rosario, P.J.,**
**Castañeda, Jr.,**
**Uy,**
**Fabon-Victorino,**
**Mindaro-Grulla,**
**Ringpis-Liban, and**
**Manahan, JJ.**

*-versus-*

**ITHIEL CORPORATION,**
*Respondent.*

**Promulgated:**
MAR 1 3 2019
4:05 p.m.

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

## CONCURRING AND DISSENTING OPINION

***DEL ROSARIO, P.J.:***

I concur with the *ponencia* in denying the Petition for Review in CTA EB No. 1675 for lack of merit.

I likewise concur with the finding that the Final Assessment Notice (FAN) No. VAT-LA430313/ELA4866-09-12-0892 dated December 5, 2012, in so far as it assesses Ithiel Corporation (Ithiel) for deficiency **Value-Added Tax (VAT)** for the *first* to *third* quarters of taxable year 2009, is VOID for having been issued beyond the three (3)-year prescriptive period.

I am constrained, however, to withhold my assent to the finding that the ten (10)-year prescriptive period applies to the assessment of Ithiel for deficiency Expanded Withholding Tax (EWT) for taxable year 2009.

In ***Commissioner of Internal Revenue vs. Asalus Corporation***,[1] the application of the ten (10)-year prescriptive period to assess was applied therein on the basis of the following rationalization:

(1) Pursuant to ***Aznar vs. CTA***,[2] the mere filing of false returns by a taxpayer, **notwithstanding the absence of intent to defraud**, is sufficient to warrant the application of the ten (10) year prescriptive period under Section 222 of the National Internal Revenue Code (NIRC);

(2)Under Section 248(B) of the NIRC, there is ***prima facie* evidence of a false return** if there is substantial underdeclaration of taxable sales, receipt or income in an amount exceeding 30% of what is declared in the returns. When there is a showing that the taxpayer underdeclared its sales, receipt or income, there is a presumption that a false return was filed and the Commissioner of Internal Revenue (CIR) is not required to present evidence to support the falsity of the return, unless the taxpayer overcomes the presumption against it;

(3)The **mere failure of the taxpayer to overcome the presumption of the "falsity of the returns" warrants the application of the ten (10)-year prescriptive period** to assess; and,

(4)Most importantly, there was **substantial compliance with the due process requirement of Section 228 of the NIRC[3] as the application of the extraordinary period of ten (10)**

---

[1] G.R. No. 221590, February 22, 2017.
[2] 157 Phil. 510 (1974).
[3] SECTION 228. Protesting of Assessment. — When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: xxx xxx

xxx xxx

**The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void**. xxx xxx

**years was categorically stated in the PAN which was cited in subsequent communications of the CIR to the taxpayer**. Thus, the taxpayer was able to file a protest addressing the issue on prescription in its supplemental protest to the FAN.

Thus, in applying the ten-year prescriptive period to assess, the Supreme Court in ***Asalus***, ultimately declared as follows:

> "Considering the **existing circumstances**, the assessment was timely made because the applicable prescriptive period was the ten (10)-year prescriptive period under Section 222 of the NIRC. To reiterate, **there was a *prima facie* showing that the returns filed by Asalus were false, which it failed to controvert**. Also, **it was adequately informed that it was being assessed within the extraordinary prescriptive period.**" (Boldfacing and underscoring supplied)

The doctrinal pronouncement in *Asalus* highlights the following vital circumstances: **one, there was *prima facie* showing that the returns filed by Asalus were false; and, two, Asalus was adequately informed that it was being assessed within the ten (10)-year prescriptive period**.

In the present case, records disclose that **there is nothing in the PAN and FAN issued against Ithiel or in any subsequent communications from the CIR, such as the FDDA, which stated or even suggested that the ten (10)-year prescriptive period to assess Ithiel for deficiency taxes for the year 2009 was being applied**. While the CIR imposed 50% surcharge on the basic deficiency income tax and on VAT in the Formal Letter of Demand (FLD) and in the attached FAN, **no 50% surcharge was imposed on the basic deficiency EWT**. Moreover, a scrutiny of the Details of Discrepancies attached to the FLD and FAN reveals that what the CIR imposed on the deficiency taxes, including on the deficiency EWT, was 25% surcharge (not 50% surcharge); its last paragraph states: "[f]ailure to file a valid protest or pay the tax within the time prescribed, the assessment shall become final and therefore subject to 25% surcharge xxx." This inconsistent rates of surcharge only reveals the CIR's uncertainty as to whether or not the existence of fraud or falsity in Ithiel's return, if any, was willfully made.

Interestingly, **the issue on the existence of fraud / falsity in Ithiel's tax returns to justify the applicability of the ten (10)-year period to assess was only raised by the CIR in his Answer**. If the

om

CIR truly had valid reason to apply the ten (10)-year prescriptive period to assess Ithiel, then he should have **adequately informed Ithiel** of such fact at the earliest possible opportunity, or at the very least, at the time of the issuance of the PAN, consistent with the doctrine laid down in ***Asalus***. Due process demands no less.

Anent the CIR's argument that the ten (10)-year prescriptive period is applicable as Ithiel failed to rebut the *prima facie* showing that its income and VAT returns were false due to its failure to report its receipts in an amount exceeding 30% of that declared per its returns, **I submit that the mere purported existence of *prima facie* evidence of the falsity of tax returns is not sufficient to warrant the application of the ten (10)-year prescriptive period to assess.**

To be sure, when *Asalus* was promulgated on February 22, 2017, it made reference to the doctrine laid down in *Aznar* which states that **"false return implies deviation from the truth, <u>whether intentional or not</u>"**. Thus, *Asalus* declared that:

> "Thus, a mere showing that the returns filed by the taxpayer were false, **notwithstanding the absence of intent to defraud**, is sufficient to warrant the application of the ten (10) year prescriptive period under Section 222 of the NIRC." (Boldfacing supplied)

Since there was a deviation from the truth on the part of the taxpayer, **whether it was intentional or not**, the Supreme Court in *Asalus* found the application of the ten-year prescriptive period warranted.

One (1) month after ***Asalus*** was promulgated, however, the same Division of the Supreme Court made a clarification in ***Commissioner of Internal Revenue vs. Philippine Daily Inquirer*,**[4] **declaring that mere entry of wrong information in tax returns due to mistake, carelessness, or ignorance, without intent to evade tax, does <u>not</u> constitute a false return,** *viz.*:

> "Thus, while the filing of a fraudulent return necessarily implies that the act of the taxpayer was intentional and done with intent to evade the taxes due, **the filing of a false return can be intentional or due to honest mistake**. In *CIR v. B.F. Goodrich Phils., Inc.*, the Court stated that **the entry of wrong information due to mistake, carelessness, or ignorance, without intent to evade tax, does not constitute a false return**. In this case, we do not find enough evidence to prove fraud or intentional falsity on the part of PDI." (Boldfacing supplied; citation omitted)

[4] G.R. No. 213943, March 22, 2017.

In light of the pronouncement in ***Philippine Daily Inquirer***, I submit that in applying the ten (10)-year prescriptive period to assess, it is not sufficient that the returns filed by the taxpayer be false but **there must be sufficient evidence to prove that the taxpayer intended to evade tax.**

As applied to the present controversy, while there may be evidence of substantial underdeclaration of receipts, the *prima facie* presumption that arose therefrom does not extend to the existence of an intent to evade tax that may characterize the return as "false". Otherwise stated, **notwithstanding the *prima facie* evidence of falsity, intent to evade tax is not presumed. It remains indispensable for CIR to prove that the falsity was done with intent to evade tax.** Thus, to warrant the application of the ten (10)-year prescriptive period to assess, it is incumbent upon the CIR to establish that the filing of the false returns was intentional and not due to honest mistake.

Consistent with ***Philippine Daily Inquirer*****, the ten (10)-year prescriptive period could not be applied in this case *sans* any showing that the false returns were filed by Ithiel with intent to evade tax.**

On the basis of the foregoing, I submit that FAN No. WE-LA430313/ELA4866-09-12-0892 dated December 5, 2012, in so far as it assesses Ithiel for deficiency EWT for the months of January 2009 to October 2009, is VOID for having been issued beyond the three-year prescriptive period.

All told, I VOTE to: (i) DENY the Petition for Review in CTA EB No. 1675 for lack of merit; (ii) PARTIALLY GRANT the Petition for Review in CTA EB No. 1672; (iii) AFFIRM with MODIFICATION the assailed Decision and Resolution, that is, by cancelling the deficiency **EWT** assessment for the months of January 2009 to October 2009 and by re-computing the deficiency interest and delinquency interest pursuant to Section 249 (B) and (C) of the NIRC of 1997, as amended by Republic Act (RA) No. 10963 (otherwise known as the Tax Reform for Acceleration and Inclusion [TRAIN] Law) and as implemented by Revenue Regulations (RR) No. 21- 2018.

**ROMAN G. DEL ROSARIO**
Presiding Justice