REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

THIRD DIVISION

WINTERNITZ ASSOCIATES INSURANCE BROKERS CORP., Petitioner,	**CTA CASE NO. 7971**
	Members:
- versus -	**BAUTISTA,** *Chairperson* **PALANCA-ENRIQUEZ,** *and* **COTANGCO-MANALASTAS,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** JUN 9 2011 ABFernando 11:30 a.m.

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DECISION

BAUTISTA, *J.:*

Before the Court is a Petition for Review seeking to set aside the Final Decision on Disputed Assessment (FDDA) issued on August 12, 2009 by respondent finding petitioner liable for deficiency taxes for taxable year 2003.

Petitioner Winternitz Associates Insurance Brokers Corporation is a domestic corporation with principal office at the 3rd Floor S&L Building, Esteban corner Dela Rosa Streets, Legaspi Village, Makati City. It is registered with the Securities and Exchange Commission (SEC) under SEC Registration No. 34409.[1]

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[1] Exhibit "I"

On the other hand, respondent is the head of the Bureau of Internal Revenue (BIR), and is sued herein in her official capacity. Her official address is at the BIR National Office Building Agham Road, Diliman Quezon City.

On October 27, 2004, respondent issued a Letter Notice No. 047-R-03-00-S-00053 together with the attached Annual Report on Third Party Information on Purchases addressed to petitioner, advising the latter that based on the partial tally from computerized matching conducted by the BIR, it is liable for deficiency taxes due to under-declared sales in the amount of ₱15,654,298.92.[2]

On February 22, 2006, respondent issued another letter advising petitioner that based on the report of investigation submitted by Revenue Officer Mario C. Lapuebla, it is liable for deficiency Income Tax and Value-added Tax (VAT) for the year 2003. In the same letter, respondent requested an informal conference to discuss the findings of the investigation.[3]

During the informal conference, petitioner argued that as an insurance broker, it did not under-declare its income because the undeclared sales in the amount of ₱15,654,298.92 were all due to the insurance companies, not to petitioner. To prove its claim, petitioner submitted various documents and computations to establish the lack of bases of the alleged deficiency tax.

On March 27, 2007, respondent issued a Preliminary Assessment Notice (PAN) against petitioner. Based on said PAN, petitioner was found liable for

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[2] Exhibits "B" and "B-1"
[3] Exhibit "C"

deficiency taxes for taxable year 2003 in the total amount of P2,854,042.23, broken down as follows:[4]

I. Income Tax		
Taxable Income (Loss) per Annual ITR		P (714,070.00)
Add: Additional Taxable Sales		3,223,220.15
Total		P 2,509,150.15
Add: NOLCO		714,070.00
Adjusted Taxable Income		P 3,223,220.15
Income Tax Due (32%)		P 1,031,430.45
Less: Tax Credits/Payment per Return		
Creditable Income Tax Withheld claimed per ITR	P 1,830,149.13	
Less: Amount carried forward to succeeding year	1,830,149.13	
Deficiency Income Tax		P 1,031,430.45
Add: Surcharge (50%)	P 515,715.22	
Interest (04.16.04 to 04.12.07)	616,597.60	1,132,312.82
TOTAL AMOUNT DUE		**P 2,163,743.27**
II. Value Added Tax		
Additional Taxable Sales		P 3,223,220.15
Output Tax due thereon (10%)		P 322,322.02
Add: Surcharge (50%)	P 161,161.01	
Interest (01.26.04 to 04.12.07)	206,815.93	367,976.94
TOTAL AMOUNT DUE		**P 690,298.96**

Thereafter, respondent issued a Formal Assessment Notice (FAN) together with the Details of Discrepancies and Assessment Notices reiterating the findings in the PAN, except for the adjustment on the computation of interest.[5]

Consequently, petitioner filed its letter-protest attaching the pertinent documents supporting its claim.[6]

On August 12, 2009, respondent issued a FDDA reaffirming the findings in the FAN.[7]

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[4] Exhibit "E"
[5] Exhibit "F"
[6] Exhibits "G", "G-1", and "G-2"
[7] Exhibit "A"

Hence, petitioner filed its Petition for Review[8] on September 14, 2009, praying that the FDDA issued by respondent be set aside by this Court.

On October 21, 2009, respondent filed her Answer[9] and interposed the following Special and Affirmative Defenses:

> "4. Petitioner claims that the Final Decision on Disputed Assessment dated August 12, 2009 is erroneous, as such, petitioner is no longer liable for deficiency Income Tax and Vat in the amount of ₱ 3,512,179.65 for taxable year 2003.
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> 5. As per records of the Bureau of Internal Revenue, Revenue Region 8, Makati City, it was found out that after the computerized matching conducted by the Bureau on the purchases by the Petitioner as against the declared sales in its income return, per LN No. 047-R-03-00-S-00053 dated October 27, 2007, there has been found a deficiency (2003 taxable year) of Income Tax in the amount of ₱ 2,163,743.27 and Value Added Tax in the amount of ₱ 690,298.96, inclusive of interest and surcharge.
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> 6. During the audit or investigation, petitioner has been afforded with due process of notice and ample opportunity to present its documentary evidence to rebut the findings of the Bureau. It was proven that there was glaring discrepancies or understatement in the sales of the petitioner in the amount of ₱15,654,298.92. This was reflected in the partial tally of the computerized matching on the purchases made by the petitioner's customers as against the sales declared in its tax returns. The said amount was treated as undeclared income pursuant to Section 32 of the NIRC. Thus, the findings that the petitioner has an undeclared sales in the amount of ₱15,654,298.92 plus the corresponding value added taxes thereon.
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> 7. During the reinvestigation of the subject assessment, the petitioner failed to submit the required documents relative to the protest despite the considerable length of time afforded to the petitioner. By reason thereof, the Bureau proceeded with the reinvestigation based on the best evidence, documents, income tax returns, sales and other transactions on record.

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[8] *Rollo*, pp. 1-14
[9] *Id.* at 169-174

8. Evidently, the Bureau has come out with a Final Decision on Disputed Assessment of Income Tax Due in the amount of ₱ 2,666,046.74 and Value Added Tax Deficiency in the amount of ₱ 847,132.91.

9. In addition to the aforementioned final assessment Petitioner is likewise found out to be liable for 50% surcharge pursuant to Section 248 of the National Internal Revenue Code for the failure of the Petitioner to report its sales, receipts or income in an amount exceeding 30% of that declared per return which is considered prima facie evidence of false or fraudulent return. Moreover, a 20% interest has been imposed on the aforementioned tax due pursuant to Section 249 of NIRC for failure of the petitioner to pay the tax within the time prescribed by law for its payment.

10. It is incumbent upon the petitioner to prove by substantial and credible evidence that the subject disputed assessment has no factual basis.

11. With respect to the BIR rulings cited in the Petition, it is well-settled is the rule that the interpretation placed upon a statute by executive officers, whose duty is to enforce it, is entitled to great respect by the courts. Nevertheless, such interpretation is not conclusive and will be ignored if judicially found to be erroneous. Thus, the courts will not countenance administrative issuances and rulings that override, instead of remaining consistent and in harmony with the law which they seek to apply and implement (Philippine Bank Communications v. Commissioner of Internal Revenue, G.R. No: 112024, 302 SCRA 241, January 28, 1999).

12. Final Assessment is presumed to be made in accordance with the laws and regulations and based on the best evidence available at the time of the investigation.

13. It is incumbent upon the Petitioner to show that it has complied with the provisions of Sections 228, 248 and 249 of the NIRC, as amended.

14. In an action for protest in tax assessment or deficiency, the burden is upon the taxpayer to prove that the Bureau has no evidence to support its findings. (Emmanuel & Zenaida Aguilar v. Commissioner, CA-GR No. Sp. 16432, March 30, 1990 cited in Aban, Law of Basic Taxation in the Philippines, 1st Edition, p. 206).

15. Protest on Disputed Assessment is construed strictly against the claimant, the same partake the nature of exemption from taxation (Commissioner of Internal Revenue vs. Ledesma, 31 SCRA 95)."

Thereafter, the Court required the parties to file their Pre-Trial Briefs.

On March 23, 2010, the Court issued a Resolution allowing petitioner to present its evidence *ex parte* on the ground that counsel for respondent failed to appear for four consecutive times during the scheduled pre-trial hearing, despite warning. Thereafter, the *ex parte* presentation of petitioner's evidence ensued.

In a Resolution dated November 9, 2010, the Court admitted all the evidence offered by petitioner and thereafter required it to file its Memorandum.

Upon receipt of petitioner's Memorandum, the instant petition was submitted for decision on December 7, 2010.

In its Memorandum, petitioner submitted the following issues for the Court's resolution:

"WHETHER RESPONDENT COMMITTED SERIOUS REVERSIBLE ERRORS IN ISSUING THE FDDA INSOFAR AS PETITIONER IS FOUND LIABLE FOR THE FOLLOWING DEFICIENCY TAXES:

Nature of Tax Liability	Assessment Notice No.	Amount
Income Tax	IT-00053-03-07-0139	P 2,665,046.74
Value-added Tax	VT-00053-03-07-0139	847,132.91
TOTAL		P 3,512,179.65

WHETHER OR NOT THE ALLEGED UNDECLARED INCOME FOUND BY RESPONDENT IN THE AMOUNT OF P15,654,298.92 REPRESENTS PREMIUM PAYMENTS MADE BY CLIENTS WHICH WERE RECEIVED BY

THE PETITIONER AS BROKERS-OF-RECORD OF DIFFERENT INSURANCE COMPANIES; and

WHETHER OR NOT PETITIONER IS REQUIRED TO DECLARE AS PART OF ITS TAXABLE INCOME PREMIUM PAYMENTS MADE BY CLIENTS, WHICH WERE RECEIVED BY PETITIONER AS BROKER-OF-RECORD AND REMITTED TO THE CORRESPONDING INSURANCE COMPANIES.[10]"

In essence, the issue for resolution is whether or not petitioner, an insurance broker, is liable for deficiency taxes on income and value-added tax for taxable year 2003.

In its Memorandum, petitioner avers that the alleged undeclared income found by respondent in the amount of ₱15,654,298.92 represent premium payments made by clients which were received by petitioner as broker-of-record of different insurance companies. As such, it argues that it is not required to declare as part of its taxable income premium payments made by clients, which were received by petitioner as insurance broker.

Section 301 of Presidential Decree No. 612[11] defines an "insurance broker" as "any person who for any compensation, commission or other thing of value acts or aids in any manner in soliciting, negotiating or procuring the making of any insurance contract or in placing risk or taking out insurance, on behalf of an insured other than himself."

This definition was further expounded by the Court of Appeals in the case of *Anscor Insurance Brokers, Inc. vs. The Commissioner of Internal*

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[10] *Id.* at 1264-1265
[11] The Insurance Code of the Philippines

Revenue and the Court of Tax Appeals[12]. In the said case, the court held that an insurance broker is different from an insurance agent since the former acts as a **middleman** between the insured and the insurance company, and who solicits insurance from the public **under no employment from any special company** and places order of insurance with company selected by insured or in the absence of any selection, with company selected by broker.

From the foregoing, it can be clearly conceived that an insurance broker does not receive any income or salary from the insurance company but rather derives income mainly from commissions for insurance policies that it places with the insurance company upon remittance of the premiums collected from its clients.

With that resolved, the question now boils down on how to tax the income derived by insurance brokers.

Section 2.57.2(G) of Revenue Regulations No. 2-98[13] is instructive on the matter, to wit:

> "SECTION 2.57.2. *Income Payment Subject to Creditable Withholding Tax and Rates Prescribed Thereon.* – Except as herein otherwise provided, there shall be withheld a creditable income tax at the rates herein specified for each class of payee from the following items of income payments to persons residing in the Philippines:
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> xxx xxx xxx
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> (G) *Income payments to certain* ***brokers*** *and agents.* – On **gross commissions** or service fees of customs, **insurance**, stock,

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[12] CA-SP Nos. 15559-60, May 15, 1989

[13] "Implementing Republic Act No. 8424, '*An Act Amending the National Internal Revenue Code, as Amended* Relative to the Withholding on Income Subject to the Expanded Withholding Tax and Final Withholding Tax, Withholding of Income Tax on Compensation, Withholding of Creditable Value-Added Tax and Other Percentage Taxes."

> real estate, immigration and commercial brokers and fees of agents of professional entertainers – Ten percent (10%).[14] (*Emphasis supplied*)

In the present case, it is indisputable that petitioner's income arises from commissions, and not from premium payments. Hence, the basis for the imposition of tax on petitioner should be the **commissions** received by it and not the premium payments remitted to the insurance company.

As admitted by petitioner's clients who are listed in respondent's "Annual Report on Third Party Information on Purchases," they have only mistakenly reported the premium payments due to the insurance companies as payments to petitioner since the payments were coursed through petitioner as an insurance broker. From the evidence and testimonies of petitioner's clients, it is clear that they labored under the impression that petitioner is the payee and not the insurance company. Respondent cannot therefore base her computation for assessing deficiency income tax on the premium payments made by the clients.

Since the purported undeclared sales represent premium payments received by petitioner as insurance broker of the insurance companies, the said undeclared sales constitute part of the taxable income of the insurance companies and not of petitioner considering that petitioner is not the insurance company itself in the said transactions but merely acts as a broker for the insurance companies.

[14] As amended by Revenue Regulations Nos. 14-2002 and 17-2003

Consequently, only commissions received by petitioner for services rendered to the insurance company are subject to VAT since the insurance broker is subject to output tax only on the commission it receives and not on the premium payments given by clients. Thus, it is the insurance company that is liable for the VAT on premium payments and should issue the VAT receipt which can be the basis for a VAT input credit.

WHEREFORE, the instant Petition for Review is hereby **GRANTED**. Accordingly, the FDDA dated August 12, 2009 issued by respondent is hereby **SET ASIDE**.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

OLGA PALANCA-ENRIQUEZ
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

LOVELL R. BAUTISTA
Associate Justice
Chairperson

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's Division.

ERNESTO D. ACOSTA
Presiding Justice