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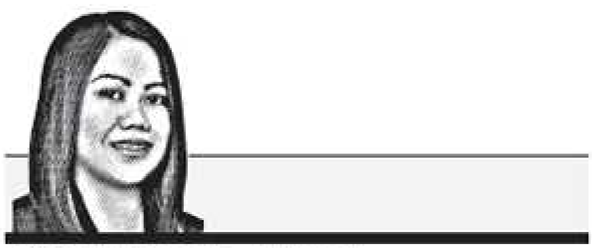

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TAX LAW FOR BUSINESS

BDB Law's "Tax Law for Business" *appears in the opinion section of* ***Business Mirror*** *every Thursday.*

Naked assessment

NAKEDNESS is everywhere, literally or figuratively that is. To illustrate a few, the Philippine Senate is currently preoccupied with finding out the 'naked truth' in what really transpired in the Mamapasapano incident that resulted in the untimely demise of the forty-four brave Special Action Forces (SAF) of the Philippine National Police in the hands of the Moro Islamic Liberation Front (MILF) and Bangsamoro Islamic Freedom Fighters (BIFF). Likewise, the box office adult film Fifty Shades of Grey starring Anastasia Steel and Christian Grey, no doubt overflowing with intimate nude scenes, has stirred so much media hype and attention when the motion picture's showing coincided with Valentine's Day celebration.

Also, in negotiable instruments and law on property, the delineation of what constitutes 'naked title' often becomes relevant and a pivotal issue that may resolve property conflicts. Apart from these, there is as well stark nakedness in the world of tax. This is the concept of 'naked assessment.'

I need not belabor discussing the naked truth with respect to the 44 fallen SAF commandos, that's what the fact finding committee of the Senate is for. Nor will I critique the extent of the nudity involved in the film Fifty Shades, we already have the Movie and

Television Review and Classification Board. However, I shall endeavor to expound on the concept of naked assessment.

As the name implies, naked assessment arises when the assessment is bare or bereft of any foundation, meaning it is arbitrary and capricious. As elucidated in the case of Collector of Internal Revenue vs. Benipayo, where the Bureau of Internal Revenue (BIR) has come out with a ‘naked assessment,’ i.e., without any foundation character, the determination of the tax due is without rational basis. Accordingly, if the taxpayer’s assessment is barren of factual basis, arbitrary and illegal, such failure on the part of the Tax Bureau cannot serve as a basis for a finding by the Court that the taxpayer is liable for the amount contained in the said assessment; otherwise, the Court would thereby be committing a travesty.

In a recent decision promulgated last February 3, 2015 in CTA Case No. 8367, the Tax Court once again emphasized the significance of the Best Obtainable Evidence Rule vis-à-vis the concept of a naked assessment.

In said case, the taxpayer was assessed for alleged income tax deficiency for the taxable year 2007. Taxpayer promptly assailed the validity of the Formal Letter of Demand and Assessment Notice (FAN) issued to it clarifying that its failure to submit documents is not willful but due to reasonable and justifiable causes, in particular, that its records were destroyed by neck-deep waters and ankle-deep mud caused by typhoons Ondoy and Pepeng. Nonetheless, taxpayer still submitted some reconstructed documents such as worksheets and schedule of purchases and expenses.

On the other hand, the Tax Bureau contended, among others, that in issuing the FAN, it resorted to the Best Evidence Obtainable Rule in view of the taxpayer’s alleged failure to furnish the BIR of the requested supporting documents.

With this scenario, it becomes crucial to determine whether the assessment was valid or not. It bears recalling that the Best Evidence Obtainable Rule is anchored on Section 6 (B) of the Tax Code of 1997, as amended, and Section 2.3 of the Revenue Memorandum Circular 23-2000. This empowers the Commissioner of Internal Revenue to assess the proper tax based on the best evidence obtainable in cases where: (a) the report or records requested from the taxpayer is not forthcoming i.e. records are lost; refusal of taxpayer to submit such records; or (b) the reports submitted are false, incomplete or erroneous.

In the instant case, the Court pointed out that while the law allows wide latitude to the BIR Commissioner to the Best Evidence Obtainable Rule, such power is not without limitation. In deciding in favor of the taxpayer, the Court applied the rule laid down by the Supreme Court in the case of Commissioner of Internal Revenue vs. Hantex Trading Co., Inc. (G.R. No. 136975, March 31, 2005) declaring that the Tax Bureau could have determined the taxpayer’s liability through estimation considering the latter’s absence of accounting records, which were destroyed by typhoons. However, such estimation should be based on sufficient evidence.

Thus, as aptly held by the Supreme Court in the Hantex case citing the Benipayo case, the presumption of correctness of an assessment, being a mere presumption, cannot be made to rest on another presumption. Since the BIR failed to present any evidence which it used as a basis or foundation for the subject deficiency assessment, the Court found BIR's assessment void for lack of factual basis.

With these in mind, it behooves upon taxpayers beset with tax assessments to be very vigilant and to see to it that no naked assessments are issued against them.

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The author is a senior associate of Du-Baladad and Associates Law Offices, a member firm of World Tax Services Alliance. The article is for general information only and is not intended, nor should be construed, as a substitute for tax, legal or financial advice on any specific matter. Applicability of this article to any actual or particular tax or legal issue should be supported therefore by a professional study or advice. If you have any comments or questions concerning the article, you may email the author at filamer.miguel@bdblaw.com.ph or call 403-2001 local 360.