REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

<u>SECOND DIVISION</u>

OPULENT LANDOWNERS, INC., Petitioner,	**CTA CASE NO. 8956**
	Members:
- versus -	**CASTAÑEDA, JR.**, Chairperson, **CASANOVA**, and **MANAHAN**, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: SEP 19 2017 2:15 p.m.

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DECISION

CASTAÑEDA, JR., ***J.***:

THE CASE

In this Petition for Review, petitioner Opulent Landowners, Inc. seeks for the Court to declare null and void the following deficiency assessments by respondent Commissioner of Internal Revenue:

DEFICIENCY TAX ASSESSMENT	AMOUNT OF ASSESSMENT
INCOME TAX	₱7,455,769.41
VALUE-ADDED TAX (VAT)	3,910,029.82
DOCUMENTARY STAMP TAX (DST)	1,406,866.56
IMPROPERLY ACCUMULATED EARNINGS TAX (IAET)	21,862,996.95

THE FACTS

Petitioner alleges that it is a domestic corporation duly organized and existing under and by virtue of the laws of the Philippines, with TIN 003-937-632-000 and registered with the Securities and Exchange Commission on August 4, 1989, with SEC Company Registration No. 0000166739. The principal purpose for which it was created is to acquire by purchase, lease, donation or otherwise, and to own, use, improve, develop, subdivide, sell, mortgage, exchange, lease, develop and hold for investment or otherwise, real estate of all kinds.[1]

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. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On May 25, 2010, petitioner received the Letter of Authority No. 124-2010-00000061[2] dated May 14, 2010 from respondent. Meanwhile, petitioner filed several Waivers of the Defense of Prescription.[3]

On January 17, 2014,[4] petitioner received respondent's Preliminary Assessment Notice (PAN) with attached Details of Discrepancies. On February 3, 2014,[5] petitioner filed its written reply to the PAN.

On May 5, 2014,[6] petitioner received respondent's Formal Letter of Demand (FLD) with attached Details of Discrepancies and Assessment Notice Nos. ELTAD-II-IT-09-0010, ELTAD-II-VT-09-0009, ELTAD-II-DS-0900006 and ELTAD-II-IE-09-0003, all dated April 30, 2014 and representing petitioner's deficiency Income Tax, VAT, DST and IAET, respectively.

[1] Statement of Facts, Petition For Review, Docket, Vol. I, p. 15

On June 4, 2014,[7] petitioner filed an Administrative Protest – Request for Reconsideration against the FLD and prayed for the cancellation and withdrawal of the proposed assessments. On October 28, 2014, petitioner filed a Supplemental Protest.[8]

On November 19, 2014,[9] petitioner received respondent's Final Decision on Disputed Assessment (FDDA). On December 19, 2014,[10] petitioner filed the instant Petition for Review.

On March 30, 2015, respondent filed her Answer[11] where she pertinently raised the following Special and Affirmative Defenses:[12]

"SPECIAL AND AFFIRMATIVE DEFENSES

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> 7. Petitioner is being assessed for deficiency Income Tax and Value-Added Tax resulting from alleged under declared sales amounting to P1,181,646.49. Petitioner argues that such is without merit and lacks factual basis since it was only a result of a comparison of different data reported under the VAT RELIEF System, Tax Reconciliation System (Creditable Withholding Tax Withheld from petitioner as reported by third parties), Summary Alphalist of Creditable Withholding Tax) vis-à-vis the declaration made per Summary List of Sales (SLS).
>
> 8. Petitioner's contention is devoid of merit. The RELIEF System which stands for 'Reconciliation of Listing for Enforcement' was purposely (sic) to detect tax leaks by matching the data available under the Bureau's Integrated Tax System (ITS) with data gathered from third party sources. **Through the consolidation and cross-referencing of third party information, discrepancy reports on sales and purchases can be generated to uncover under declared income and over claimed purchases (goods and services).**

[7] Par. 6, Admitted facts, JSFI, Docket p. 391

Timely recognition and accurate reporting of unregistered taxpayers and non-filers can be made possible.

9. The Tax Reconciliation System (TRS) on the other hand is geared towards enhancing revenue collection by computerized matching of data available under the Bureau's Integrated Tax System (ITS). **Through the consolidation and cross-referencing of data from withholding agents (WAs) and declaration of income recipients, discrepancy reports can be generated to uncover violations on tax rules and regulations such under declaration of income, non-declaration of income, under remittance and/or non-remittance of taxes withheld, over withholding, under withholding, over declaration of credits to name a few.** Timely recognition and accurate reporting of unregistered taxpayers and non-filers will also be possible.

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11. Respondent further submits that petitioner's sales transactions are directly related to its customers' purchases and ultimately to the Creditable Withholding Taxes withheld from the payments made to petitioner. Petitioner argued that the discrepancies were simply a result of a difference in the method of reporting income by its clients. However, based on respondent's evaluation, petitioner did not introduce any evidence to support such allegations. Therefore, the findings in the Formal Letter of Demand for deficiency Income Tax and Value-Added Tax (VAT) resulting from understated sales in the amount of P1,181,646.49 were reiterated in respondent's Final Decision on Disputed Assessment (FDDA).

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12. Petitioner is being assessed for deficiency Income Tax and Value-Added Tax resulting from alleged

Consumption, Common Utility Services Area Fees or CUSA and other charges. Petitioner further argues that these expenditures are not the operational expenses of petitioner but the operational expenses of its lessees, therefore, not subject to Income Tax and Value-Added Tax.

13. xxx By claiming these expenses as deductions, petitioner was benefited by a lowered taxable income and still received payments from its lessees to cover such expenses. Therefore, it is but proper that the corresponding income tax be assessed from those payments received by petitioner from its lessees amounting to P7,164,425.73 for taxable year 2009.

14. Consequently, petitioner is also liable to the corresponding Value-Added Tax (VAT) for such collections pursuant to Section 108 of the Tax Code which specifically provides:

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16. Petitioner is being assessed for deficiency Income Tax and Value-Added Tax resulting from alleged undeclared income out of unaccounted disbursement amounting to P4,587,870.68. Petitioner argues that such assessment is without merit and lacks factual basis. According to petitioner, the amount represents the payments of petitioner's lessees for their Electricity Consumption and are not the operational expenditures of petitioner. Petitioner further argues that such payments were not reflected in its income tax return since it has no right to claim such operational expenses.

17. xxx Respondent's examination reveals that based on the data extracted from the Conglomerate Masterfile thru the use of Computerized Accounting Audit Tools and Technique System (CAATTS), the income payment to MERALCO amounting to P4,587,870.68 was

unreflected sources of funds not accounted for in the taxpayer's returns leads to the inference that part of his income had not been reported.

19. Petitioner argued that these amounts represent payments of electricity from petitioner's lessees and that such expenses are not for the account of petitioner. Respondent strongly differs. Based on the audit examination, petitioner still claimed deductions for electricity. Therefore, this runs counter to the claim of petitioner that such expenditure is not under its account. Petitioner benefited on a reduced income tax as a result of the claimed deduction and at the same time received payments from its lessees. The corresponding assessment for deficiency income tax for such payments received is therefore proper.

20. Consequently, petitioner is also liable to the corresponding Value-Added Tax (VAT) arising from such collection from its lessees pursuant to Section 108 of the Tax Code xxx

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22. Respondent's audit examination revealed that creditable withholding tax in the amount of P25,322.26 is unsubstantiated hence disallowed as tax credit.

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24. Petitioner is being assessed for deficiency Value-Added Tax (VAT) resulting from undeclared receipts in the amount of P3,750,965.45. Petitioner contends that respondent failed to provide the facts from which it based its allegation. It further argued that it is a well-settled principle that one could not assess taxes based on mere presumptions and that conclusions made cannot be equated to actual facts for it partakes the nature of estimates which are not conclusive to establish

The credit entries are allegedly attributable to the following:

a. Collection of Rental Income initially recorded as accounts receivable;
b. Erroneous Debit Entry; and
c. Adjusting Journal Entries.

25. Petitioner also argues that the discrepancy was the result of the alleged charges for electricity, water and CUSA.

26. Respondent strongly differs. The total credit to Accounts Receivables after deducting VAT represents gross receipts. Petitioner's contention that some credit entries are attributable to collection of rental income initially recorded as accounts receivable is unmeritorious. Examination of petitioner's General Ledger reveals that there are separate accounts for Accounts Receivable-Trade and Other Receivable-Tenant. Thus, entries for collections of rental income and those arising from charges for electricity, water and CUSA from tenants are not recorded under the Accounts Receivable-Trade account rather in the Other Receivable- Tenant account. xxx

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28. Petitioner maintains its position on the alleged assessment on Documentary Stamp Tax in relation to the Lease Agreements/Contracts that the imposition of said tax would depend on the terms and conditions of the Lease Agreements executed between petitioner and its lessees and should not solely be imposed on petitioner.

29. Respondent strongly submits that the assessment on Documentary Stamp Tax is strongly anchored under Section 173 of the Tax Code which provides:

30. Based on the above quoted provision, the execution of the Lease Agreements is subject to the Documentary Stamp Tax (DST) and is imposed upon the person signing the same. The assessment therefore against petitioner is proper being a party signatory. Any agreement between the parties signing the contract on who will assume the liability is already between the parties. Contracts take effect only between the parties, their heirs and assigns (Art. 1311 of the New Civil Code). **The taxable transaction is provided for by law and the government is not privy to the stipulations agreed by the parties signing the contract.**

31. On the matter of Documentary Stamp Tax attributable to Loan Contracts (Loan Receivable), petitioner alleges that the amount of P52,500 was already paid on June 9, 2005. The same has been verified with the submitted DST return. Respondent however submits that DST paid by petitioner was at the rate of P0.30 for every P200.00. Pursuant to Revenue Regulation No. 13-2004, the DST on loan contracts was increased from P0.30 to P1.00 for every P200.00 or fractional part thereof. Thus, there is still due DST arising from the Loan Contracts.

32. xxx Petitioner citing several BIR Rulings and the decision of the Court of Appeals in the case of Commissioner of Internal Revenue vs. Filinvest Development Corporation and Filinvest Alabang, Inc. (CA-G.R. No. SP No. 74510, January 26, 2005) argues that inter-corporate advances are analogous to capital contribution and are not subject to documentary stamp tax as there is no taxable instrument issued to evidence or document the loan obligation.

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35. Based on the foregoing decision and the above quoted Revenue Regulation, it is not a prerequisite that there exist a formal debt instrument in order for the loan

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38. Petitioner cited several jurisprudence to disprove respondent's findings that petitioner failed to pass the immediacy test. It further argued that in order to determine the reasonable needs of the corporation, it is best to look into the intent, purpose, financial liquidity and stability of the business and not on the immediate disposition of its excess profits.

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42. Respondent's audit examination reveals that petitioner failed to prove the accumulation of earnings is based on the reasonable needs of the company. Petitioner alleged that there exist an actual plan as to disposition of excess profits, however, such contention was supported by a mere photocopy of secretary's certificate certifying the appropriation of retained earnings in the amount of P110,000,000.00 to serve as standby funds of the corporation for the implementation of its contemplated projects.

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44. Petitioner also argues that the computation of respondent on the Improperly Accumulated Earnings Tax (IAET) is erroneous as it failed to include the amount of P177,036,144.00 as part of the paid-up capital for purposes of determining the amount that may be retained (100% of paid-up capital).

45. Respondent strongly differs. Pursuant to Revenue Memorandum Circular No. 35-2011, paid-up capital is defined as follows:

> For purposes of this RMC, and in accordance with RR No. 2-2001, the amount that may be

> **<u>the amount contributed to the corporation representing the par value of the shares of stock, hence, any excess capital over and above the par shall be excluded.</u>**
>
> 46. Petitioner submits that these deposits are related to the eventual issuance of petitioner's shares of stock hence should be part of petitioner's share capital. Respondent maintains the definition of paid-up capital as referring only to the par-value of the shares of stock. In addition, the amount of deposit paid as subscription may include the excess over in above the par value of the subscribed shares which are explicitly excluded by the above quoted provision of the RMC.
>
> 47. While respondent admits the existence of Philippine Accounting Standards (PAS), rules and regulations issued purposely to implement the provisions of the Tax Code should be given much weight. In case of conflict, the latter should prevail."

On July 7, 2015, the parties submitted their Joint Stipulation of Facts and Issues.[13] On July 20, 2015, the Court issued a Pre-Trial Order.[14]

During the hearing, petitioner presented witnesses Ms. Josephine G. Bautista[15] – Finance Officer of petitioner, and Mr. Prudencio F. Tatunay[16] – Court-commissioned Independent Certified Public Accountant (ICPA). Petitioner also filed its Formal Offer of Evidence[17] on December 22, 2015.

On the other hand, respondent presented witness Ms. Melinda M. Rugayan[18] – Revenue Officer II of the BIR. On March 10, 2016, respondent filed her Formal Offer of Evidence.[19]

Consequently, on May 18, 2016,[20] petitioner presented its rebuttal witness, Mr. Gary Tan Jao[21] - Head of the Engineering

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[13] Docket, Vol. I, pp. 290-298.
[14] Docket, Vol. I, pp. 301-307.

Department of Basic Holdings, Inc. On May 25, 2016, petitioner filed its Formal Offer of Evidence for the Petitioner (Arising from the Presentation of Rebuttal Witness).[22]

On June 3, 2016, the Court issued a Resolution[23] directing the parties to submit their memoranda, among others. On September 5, 2016, respondent filed his Memorandum[24] while on September 19, 2016, petitioner filed its Memorandum.[25]

On September 22, 2016,[26] the Court issued a Resolution submitting the case for decision. Hence, this Decision.

THE ISSUE

The parties submitted this lone issue for the consideration of the Court:

> "Whether the petitioner is liable to pay Thirty Four Million Six Hundred Thirty Five Thousand Six Hundred Sixty Two Pesos and 19/100 (P34,635,662.19) representing alleged deficiency Income Tax, Value-Added Tax, and Documentary Stamp Tax, and Improperly Accumulated Earnings Tax, inclusive of surcharges and interest for taxable year 2009."[27]

THE RULING

The Court partially grants the instant Petition.

I. Deficiency Income Tax

Petitioner was assessed for deficiency income tax in the amount of ₱7,455,769.41, inclusive of increments, computed as follows: *gr*

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[21] Exhibit "P-37", Docket, Vol. II, pp. 594-599

Taxable Income per return		₱ 24,379,143.14
Add: Discrepancies per investigation		
Undeclared Income (RLF/TRS/SAWT vs. SLS)	₱ 1,181,646.49	
Collection of Other Receivables – Tenants	7,164,425.73	
Unaccounted Disbursement (SAWT of Meralco)	4,587,870.68	12,933,942.90
Taxable Income per Investigation		₱ 37,313,086.04
Tax Rate		30%
Income Tax Due thereon		₱ 11,193,925.81
Less: Tax Credits/Payment per return		
Tax Credit per return	₱ 1,646,161.01	
Less: Unsupported CWT	25,322.66	
Allowed Creditable Withholding Tax	₱ 1,620,838.35	
Add: Payment	5,667,582.53	7,288,420.88
Deficiency tax		₱ 3,905,504.93
Add: 20% Interest per annum from 4.16.10 to 10.31.14)		3,550,264.48
Total Amount Due		**₱ 7,455,769.41**

Respondent found petitioner liable for deficiency income tax based on the following:

a. Undeclared Income (RLF/TRS/SAWT vs. SLS)	₱1,181,646.49
b. Collection of Other Receivables – Tenants	7,164,425.73
c. Unaccounted Disbursements (SAWT of Meralco)	4,587,870.68
d. Unsupported Creditable Withholding Tax (CWT)	25,322.66

a. Undeclared Income (RLF/TRS/SAWT vs. SLS) in the amount of ₱ 1,181,646.49

Respondent computed the undeclared income of ₱1,181,646.49 by comparing the purchases made by third parties to petitioner thru Reconciliation of Listing for Enforcement (RELIEF) system - Summary List of Purchases of Third Parties, Tax Reconciliation System (TRS) - Creditable Withholding Tax Withheld from petitioner as reported by Third Parties, Summary Alphalist of Creditable Withholding Tax

Registered Name	RELIEF	TRS	SAWT	Highest of RELIEF, TRS, SAWT	SLS	Undeclared Income
Air Philippines Corp.	₱795,797.92	-	₱445,878.18	₱795,797.92	₱443,148.42	₱352,649.50
Garcia, Rodrigo H.	-	-	108,000.00	108,000.00	-	108,000.00
Go, Dy Lam Keh	-	212,460.00	-	212,460.00	-	212,460.00
Rivera, Roy C.	-	-	82,210.00	82,210.00	-	82,210.00
St. Peter Life Plan, Inc.	629,851.67	568,720.73	333,864.00	629,851.67	416,899.68	212,951.99
Uy, Mady T.	-	-	293,375.00	293,375.00	80,000.00	213,375.00
TOTAL	**₱1,425,649.59**	**₱781,180.73**	**₱1,263,327.18**	**₱2,121,694.59**	**₱940,048.10**	**₱1,181,646.49**

On the other hand, petitioner asserts that the discrepancies found through the procedure performed by respondent, wherein it compared data obtained under the VAT relief system and in the Summary Alphalist of Creditable Withholding Tax, do not justify the conclusion that it failed to declare its income.

Further, it contends that the comparison of the amounts arising from (a) the Summary List of Purchases of Third Parties thru the VAT relief system; (b) the TRS or via the Creditable Withholding Tax Withheld by petitioner as reported by third parties; (c) the SAWT or Summary Alphalist of Creditable Withholding Tax; and (d) the declaration made per SLS or Summary List of Sales extracted from the VAT Relief system, would not result to the same amount. Third party taxpayers do not necessarily adopt the same accounting method in keeping their books of accounts with that of the petitioner.

Finally, petitioner also asserts that the accounting of transactions for Income Tax and Value Added Tax creates a discrepancy because for income tax purposes, petitioner reports its income using the accrual method while for VAT purposes, it applies the cash method of accounting which results to a timing difference in the reporting of its income per ITR vis-à-vis its gross receipts per VAT returns.[29]

After careful evaluation, the Court finds petitioner's contention partly correct.

> "**SECTION 5.** *Power of the Commissioner to Obtain Information, and to Summon, Examine, and Take Testimony of Persons.* - **In ascertaining the correctness of any return, or in making a return when none has been made, or in determining the liability of any person for any internal revenue tax**, or in collecting any such liability, or in evaluating tax compliance, the Commissioner is authorized:
>
> B) To obtain on a regular basis from any person other than the person whose internal revenue tax liability is subject to audit or investigation xxx" *(Emphasis supplied)*

Based on the above cited provision, to ascertain the correctness of any return or to determine the tax liability of any person, the Commissioner of Internal Revenue is authorized to obtain any information, on a regular basis, from any person other than the petitioner whose tax liability is subject to audit or investigation.

Consequently, respondent may rely on the third party information generated through its RELIEF system based on the data submitted by the third parties.

In *Medicard Philippines, Inc. v. Commissioner of Internal Revenue*[30] citing *SMI-Ed Philippines Technology, Inc. v. Commissioner of Internal Revenue* ,[31] the Supreme Court held:

> "xxx under the RELIEF System, the presumption that the tax returns are in accordance with law and are presumed correct since these are filed under the penalty of perjury are easily rebutted and the taxpayer becomes instantly burdened to explain a purported discrepancy."

Thus, the burden of proof rests upon petitioner to prove otherwise. *gr*

The Court-commissioned Independent CPA (ICPA) testified that he failed to obtain a copy of the basis of the assessment. As such, he relied on petitioner's records of SLS, SAWT, SLP and MAP submitted with the BIR. A comparative analysis and the findings of the ICPA are presented below:

Registered Name	Per verification – Reported by OLI			Discrepancy (SLS vs. SAWT)
	SLS	**2307 (Hard Copies)**	**SAWT-EWT Summary**	
Air Philippines Corp.	₱443,148.42	₱364,809.42	₱445,878.18	(₱2,729.76)
Garcia, Rodrigo H.	113,357.16	108,000.00	108,000.00	5,357.16
Go, Dy Lam Keh	-	-	-	-
Rivera, Roy C.	92,254.66	-	82,210.00	10,044.66
St. Peter Life Plan	416,899.68	333,864.00	333,864.00	83,035.68
Uy, Mady T.	80,000.00	80,000.00	80,000.00	-
TOTAL	**₱1,145,659.92**	**₱886,673.42**	**₱1,049,952.18**	**₱95,707.74**

- "***AIR PHILIPPINES CORP*** – based on our verification, we have noticed the following:

  SLS vs. 2307 – 2307 hard copies represent withholding tax on collections by OLI but not necessarily represents sales for the current tax year.

  2307 vs. SAWT – SAWT is a summary of expanded withholding tax deducted by customers from OLI's collection but some customers did not provide hard copies of 2307.

  SLS vs. SAWT – the difference of ₱2,729.76 represents Value Added Tax portion of Other Charges.

- ***GARCIA, RODRIGO H.*** – per our validation, the creditable withholding tax claimed by the Company was declared under the name of "Garcia, Rodrigo." However, the Company reported the related sales on its 2009 Summary List of Sales (SLS) as "Homebankers Realty" – wholly-owned by Garcia, Rodrigo H. (the same TIN appears in the COR). The difference refers to the common charges which were not subjected to withholding taxes.

- ***GO, DY LAM KEH*** – no supporting documents was obtained to verify and validate that there were transactions with this particular information. We found no other factual basis to

Per inquiry, there is no document to prove that they have any business transaction with this particular taxpayer.

- ***RIVERA, ROY C.*** – per our validation, the creditable withholding tax claimed by the Company was declared under the name of "Rivera, Roy C." However, the Company reported the related sales on its 2009 Summary List of Sales (SLS) as "RDEX Food Int'l Phil., Inc." – wholly-owned by Rivera, Roy C. (the same TIN appears in the COR). The difference refers to common and other charges which were not subjected to withholding taxes.

- ***ST. PETER LIFE PLAN, INC.*** – based on our verification, we have noticed the following:

  SLS vs. 2307 & SAWT – per our verification, the difference refers to common charges, parking and other charges (included in the SOA) which were not subjected to withholding taxes.

  SLS vs. SAWT – the difference of ₱83,035.68 represents Other Charges not subjected to EWT.

- ***UY, MADY T.*** – as per our verification, the claimed creditable withholding taxes amounting to ₱4,000.00 is equivalent to ₱80,000.00 sales (₱4,000.00/5%), this was reported by the company on its 2009 Summary List of Sales (SLS). No documents found to prove the discrepancy amounting to ₱213,375.00 (₱293,375.00 less ₱80,000.00) as alleged by the BIR[32]."

Upon verification, the Court notes the following observations:

- ***AIR PHILIPPINES CORP and ST. PETER LIFE PLAN, INC.***

The Court Commissioned ICPA, as an alternative procedure, simply performed a reconciliation of petitioner's record of SAWT[33], SLS[34] and BIR Form No. 2307.

While the findings of the ICPA were partly true, it does not

Philippines Corp. in the amount of ₱352,649.50 and sales of St. Peter Life Plan, Inc. in the amount of ₱212,951.99. Although petitioner presented its official receipts[35] and billing statements,[36] these documents do not fully substantiate its alleged undeclared sales.

The *prima facie* presumption is that the assessment made by 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[37].

Thus for petitioner's failure to substantiate, respondent's assessment is sustained.

- ***GARCIA, RODRIGO H.***

As explained by the ICPA, the reporting of creditable withholding tax claimed by petitioner as reflected in the SAWT were declared under the name of "Garcia, Rodrigo H.", while the sales reported in its SLS were declared under the trade name "Homebankers Realty". In this regard, a perusal of the Summary List of Sales (SLS)[38], official receipts[39], and billing statements[40] shows that Homebankers Realty is wholly-owned by Mr. Garcia, Rodrigo.

However, upon checking the Certificate of Registration (COR) with the BIR[41] of Mr. Garcia, Rodrigo H., the TIN appearing therein is 100-182-459-000 which is different from the TIN 001-292-994 used in the documents presented by the petitioner as asserted by the ICPA.

Nonetheless, petitioner sufficiently proved that the income declared under the name of "Garcia, Rodrigo H." and income declared under the trade name "Homebankers Realty" is considered

[35] Exhibit "P-20-5", pp. 16-23 and pp. 885-910

one and the same. The billing statements[42] bear the company name Homebankers Realty with owner name Garcia, Rodrigo H. while the official receipts[43] were issued to Garcia, Rodrigo H. with business style/name Homebankers Realty. Thus, petitioner's argument must be given merit.

Section 4.114-3(a)(c) of Revenue Regulations No. 16-2005, requires the submission of the summary list of sales which must contain the **monthly total sales/income subject to VAT**.

On the other hand, Section 2(A) of Revenue Regulations No. 2-2006 defines Summary Alphalist of Withholding Agents of Income Payments Subjected to Withholding Tax at Source (SAWT) as a consolidated alphalist of withholding agents from whom **income was earned or received and subjected to withholding tax**.

Thus, the difference between the SAWT and SLS in the amount of ₱5,357.16 refers to common charges not subjected to withholding tax, to wit:

Month	Income per SAWT	Income per SLS	Common Charges	Exhibit No.	Page
January	₱9,000.00	₱9,446.43	₱446.43	P-29-4	415
February	9,000.00	9,446.43	446.43	P-29-4	416
March	9,000.00	9,446.43	446.43	P-29-4	417
April	9,000.00	9,446.43	446.43	P-29-4	418
May	9,000.00	9,446.43	446.43	P-29-4	419
June	9,000.00	9,446.43	446.43	P-29-4	420
July	9,000.00	9,446.43	446.43	P-29-4	421
August	9,000.00	9,446.43	446.43	P-29-4	422
September	9,000.00	9,446.43	446.43	P-29-4	423
October	9,000.00	9,446.43	446.43	P-29-4	424
November	9,000.00	9,446.43	446.43	P-29-4	425
December	9,000.00	9,446.43	446.43	P-29-4	426
Total	**₱108,000.00**	**₱113,357.16**	**₱5,357.16**		

On the basis of the foregoing, petitioner has no undeclared sales in the amount of ₱108,000.00.

- ***GO, DY LAM KEH***

The ICPA found no supporting document to verify and validate

Thus, the alleged undeclared sales in the amount of ₱212,460.00 is sustained.

- ***RIVERA, ROY C.***

As previously discussed, the reporting of creditable withholding taxes claimed by petitioner as reflected in the SAWT were declared under the name of "Rivera, Roy C." while the sales reported in its SLS were declared under the trade name "RDEX Food Intl. Phil., Inc.". In support thereof, petitioner presented the Certificate of Registration[44] with the BIR of RDEX Food Intl. Phil., Inc. The TIN 005-979-710-11 appearing therein is the TIN used in the official receipts and billing statements under the name of Mr. Rivera, Roy C.

Records clearly show that the findings of the ICPA is correct.

The difference between the SAWT and SLS in the amount of ₱10,044.66 refers to common and other charges not subjected to withholding tax, to wit:

Month	Income per SAWT	Income per SLS	Common/Other Charges	Exhibit No.	Page(s)
October	₱12,210.00	₱12,879.64	₱669.64	P-29-4	874
November	35,000.00	36,339.29	1,339.29	P-29-4	875
December	35,000.00	43,035.73	8,035.73	P-29-4	876-879
Total	**₱82,210.00**	**₱ 92,254.66**	**₱10,044.66**		

Thus, petitioner has no undeclared sales in the amount of ₱82,210.

- ***UY, MADY T.***

A perusal of the SAWT[45] and SLS[46] reveals that the total sales of the petitioner to Ms. Uy, Mady T. is only ₱80,000.00 and not ₱293,375.00, as shown below:

Month	Income per SAWT	Income per SLS	Exhibit No.	Page
January	₱8,000.00	₱8,000.00	P-29-4	1039
February	8,000.00	8,000.00	P-29-4	1040

April	8,000.00	8,000.00	P-29-4	1042
May	8,000.00	8,000.00	P-29-4	1043
June	8,000.00	8,000.00	P-29-4	1044
July	8,000.00	8,000.00	P-29-4	1045
August	8,000.00	8,000.00	P-29-4	1046
September	8,000.00	8,000.00	P-29-4	1047
October	8,000.00	8,000.00	P-29-4	1048
Total	**₱80,000.00**	**₱80,000.00**		

Based therefrom, the total income declared per SAWT is only ₱80,000.00 and not ₱293,375.00 as claimed by the BIR. The assessment can be considered capricious and arbitrary which must render the assessment void. Hence, there is no undeclared sales.

Considering the foregoing, the Court partially upholds the respondent's findings of under declared income in the revised amount of ₱778,061.49, as follows:

Registered Name	RELIEF	TRS	SAWT	Highest of RELIEF, TRS, SAWT	SLS	Undeclared Income
Air Philippines Corp.	₱795,797.92	-	₱445,878.18	₱795,797.92	₱443,148.42	₱352,649.50
Garcia, Rodrigo H.	-	-	108,000.00	108,000.00	113,357.16	-
Go, Dy Lam Keh	-	212,460.00	-	212,460.00	-	212,460.00
Rivera, Roy C.	-	-	82,210.00	82,210.00	92,254.66	-
St. Peter Life Plan, Inc.	629,851.67	568,720.73	333,864.00	629,851.67	416,899.68	212,951.99
Uy, Mady T.	-	-	80,000.00	80,000.00	80,000.00	-
TOTAL	**₱1,425,649.59**	**₱781,180.73**	**₱1,049,952.18**	**₱1,908,319.59**	**₱1,145,659.92**	**₱778,061.49**

b. Collection of Other Receivables-Tenants in the amount of ₱7,164,425.73

Respondent contends that petitioner failed to include as part of taxable income for taxable year 2009 the receivables received from tenants in the amount of ₱7,164,425.73[47], computed as follows:

Month	Amount
January	₱518,497.59
February	406,249.27
March	549,943.37
April	553,770.11
May	608,305.31

September	496,627.95
October	479,952.46
November	441,295.03
December	1,507,346.20
Total	**₱7,164,425.73**

Respondent also avers that petitioner claimed those charges for electricity, water and CUSA as deductions in its income statement and income tax return[48].

On the other hand, petitioner argues that the amount represents payment of its lessees for their electricity consumption, water consumption, common utility services area fees or CUSA and other charges. As such, those expenditures are not their operational expenses but the operational expenditures of its lessees and therefore, not subject to Expanded Withholding Tax, Income Tax and Value Added Tax.

Moreover, it also asserts that it is inherent in the real estate business, more particularly those engaged in lease operations, that the electricity and water meter is registered under the name of the lessor considering that the nature of its lessees' tenacy is temporary. The common set up is the existence of main electricity and water meter. To determine the actual usage of each lessee, a sub-meter is installed by the lessor[49].

The ICPA disclosed that electricity and water bills charged to tenants were not included in the claimed expenses of petitioner, computed as follows[50]:

Month	Total Water Bills	Water Bills Charged To Tenants	OPEX	Total Electricity Bill	Electricity Bills Charged to Tenants	OPEX
January	₱47,687.05	₱29,028.09	₱18,658.96	₱456,460.82	₱492,488.78	₱(36,027.96)
February	49,801.52	20,285.76	29,515.76	605,080.59	382,552.74	222,527.85
March	51,908.08	25,359.24	26,548.84	603,981.30	525,044.75	78,936.55
April	56,859.07	20,372.10	36,486.97	643,482.81	533,531.62	109,951.19
May	52,903.22	28,748.03	24,155.19	608,401.95	567,218.52	41,183.43
June	46,123.62	23,874.08	22,249.54	586,399.34	552,298.50	34,100.84
July	49,237.87	19,596.75	29,641.12	590,283.37	492,752.52	97,530.85
August	53,678.45	29,980.57	23,697.88	532,714.42	514,638.71	18,075.71
September	49,016.09	27,803.90	21,212.19	506,693.17	470,090.13	36,603.04
October	38,399.96	25,190.78	13,209.18	465,296.59	446,848.83	18,447.76
November	42,908.31	28,184.37	14,723.94	486,210.59	415,399.10	70,811.49

Based on ICPA's examination, petitioner over-claimed its Operating Expenses by ₱14,400.20, computed as follows:

Month	Total Bill (Water & Electricity)	Charged to Tenants	Claimed Operating Expense (Light, Water & Power)
January	₱504,147.87	₱521,516.87	₱(17,369.00)
February	654,882.11	402,838.50	252,043.61
March	655,889.38	550,403.99	105,485.39
April	700,341.88	553,903.72	146,438.16
May	661,305.17	595,966.55	65,338.62
June	632,522.96	576,172.58	56,350.38
July	639,521.24	512,349.27	127,171.97
August	586,392.87	544,619.28	41,773.59
September	555,709.26	497,894.03	57,815.23
October	503,696.55	472,039.61	31,656.94
November	529,118.90	443,583.47	85,535.43
December	540,897.54	410,977.21	129,920.33
Total Light, Water,& Power of OPI	₱7,164,425.73	₱6,082,265.08	₱1,082,160.65
Less: Light, Water & Power per AFS			₱1,096,560.85
Difference			**₱(14,400.20)**

While petitioner adduced before this Court its Billing Statements to its tenants[51], Meralco Statement of Accounts[52], Manila Water Statement of Accounts[53] and reconciliation[54] to account the difference of ₱14,400.20, these pieces of evidence are insufficient. The Court cannot ascertain how the amounts presented therein were arrived.

At any rate, despite the insufficiency of the reconciliation to account the difference of ₱14,400.20, petitioner still proved that the Collection of Other Receivables – Tenants were mere reimbursements of electricity and water consumptions.

In *Greenhills Properties, Inc. vs. Commissioner of Internal Revenue*[55] citing *Officemetro Philippines, Inc. (formerly Regus Centres, Inc.) vs. Commissioner of Internal Revenue*[56], the CTA Second Division held:

> "The BIR in its various rulings, held that association/condominium dues, membership fees and other assessment/charges collected from the members, which are **merely held in trust** and which are to be used solely for administrative expenses in implementing their purpose(s), viz., to protect and safeguard the welfare of the owners, lessees and occupants; provide utilities and amenities for their members, and from which **the corporation could not realize any gain or profit as a result of their receipt thereof, must not be included in said corporation's gross income. This means that the same are not subject to income tax and to withholding tax."**

Thus, the assessment on Collection of Other Receivables – Tenants is upheld but in the reduced amount of ₱14,400.20.

c. Unaccounted Disbursements (SAWT of Meralco) in the amount of ₱4,587,870.68

Respondent alleged that based on data extracted from the Conglomerate Masterfile thru Computerized Accounting Audit Tools and Technique System (CAATTS), the income payment to Meralco amounting to ₱4,587,870.68 was discovered. This amount was reported by Meralco on its SAWT, however, this was not reported/accounted by petitioner both in its Income Tax Return and Financial Statements.[57]

Petitioner counter-argued that the allegation lacks factual basis because the amount represents the payment of its lessees for their electricity consumption. As such, the subject cost is not its expenditure but the expenditure of its lessees. Petitioner adds that the main electric meter that measures the electric consumption is registered under its name. Therefore, it follows that the monthly billing issued by Meralco and the payment made will be for its account.[58]

The ICPA provided a summary[59] of the official receipts representing payments made by petitioner to Meralco and its corresponding statements of account[60] under the account name of the petitioner, as follows:

Billing Period	O.R. No.	Vatable	VAT Exempt	VAT	EWT	Payments
January	106770	₱213,647.42	₱1,045.94	₱21,886.97		₱236,580.35
	97799	120,826.32	620.88	12,324.53		133,771.75
	97800	84,400.46	445.76	8,580.05	674.90	92,751.35
February	111227	308,952.71	1,642.94	33,409.59		344,005.25
	111228	139,951.34	754.61	15,154.75		155,860.70
	111229	101,642.80	547.65	11,005.03[61]	759.14	112,436.36
March	120201	321,154.53	(8.57)	27,872.51		349,018.45
	112400	142,057.91	(3.81)	12,569.75		154,623.85
	120202	97,270.76	(2.66)	8,711.51	670.06	105,309.54
April	122590	335,967.75	(8.09)	30,044.74		366,004.40
	122589	152,528.77	(3.78)	14,101.03		166,626.00
	122591	107,668.06	(2.66)	9,966.19	770.47	116,861.13
May	473225	331,171.87	(4,706.97)	30,429.10		356,894.00
	473224	133,025.16	(1,913.40)	12,515.97		143,627.75
	473226	105,572.14	(1,539.23)	10,012.06	671.44	113,373.51
June	475835	323,548.81	(4,694.21)	25,738.92		344,593.50
	475833	133,443.49	(1,947.41)	10,867.65		142,363.75
	475834	101,469.54	(1,522.21)	8,344.71	566.74	107,725.31
July	478085	320,121.07	(4,681.45)	27,529.58		342,969.20
	478084	131,584.20	(1,921.91)	11,542.04		141,204.35
	478086	106,623.55	(1,624.27)	9,492.98	562.48	113,929.77
August	480449	277,449.16	(4,132.95)	25,119.62		298,435.85
	480450	126,056.30	(1,913.40)[62]	11,732.23		135,875.15
	480448	97,755.53	(1,522.21)	9,204.96	561.27	104,877.03
September	483016	262,052.12	(3,979.87)	22,564.54		280,516.80
	142434	127,256.20	(1,947.41)	11,213.06		136,401.85
	142435	88,915.07	(1,488.20)	8,238.84	549.66	94,996.04
October	486299	240,317.94	(1,560.87)	20,066.12	280.53	258,542.67
	486296	118,173.38	(776.77)	10,130.82		127,527.45
	486295	77,639.66	(501.97)	6,644.93	345.63	83,436.97
November	490336	251,552.64	(1,593.84)	22,819.48	265.62	272,512.68
	160340	125,672.01	(806.08)	11,676.06		136,542.00
	160341	77,822.71	(498.31)	7,256.42	327.12	84,253.68
December	493231	223,175.19	35,793.13	23,717.63	274.01	282,411.94
	160523	104,507.54	15,288.36	11,139.75		130,935.65
	160522	62,537.21	9,396.31	6,678.31	281.07	78,330.78
	Total	**₱ 6,073,511.32**	**₱ 20,233.07**	**₱ 560,302.43**	**₱ 7,560.14**	**₱ 6,646,126.81**

Based therefrom, the total amount due to Meralco in the amount of ₱6,654,046.82[63] is higher than the amount of ₱4,587,870.68 extracted from the CAATS as income payments to Meralco.

On this score, the following are the elements for the imposition of income:

1. there must be gain or profit,
2. that the gain or profit is realized or received, actually or

constructively, and

3. it is not exempted by law or treaty from income tax

Income tax is assessed on income received from property, activity or service.[64] As such, the imposition or assessment of income tax is not based on an undeclared disbursement, but only when there was an income, and such income was received or realized by the taxpayer.[65]

In the instant case, there was no clear proof of realized income and that such income was received or realized by OLI. Respondent merely assumed that the alleged unaccounted disbursements are analogous to hidden income.

Furthermore, it must be emphasized that for income tax purposes, a taxpayer is free to deduct from its gross income a lesser amount, or not claim any deduction at all. What is prohibited by the income tax law is to claim a deduction beyond the amount authorized therein.[66]

In *Commissioner of Internal Revenue vs. Hantex Trading Co., Inc.*[67] citing *Collector of Internal Revenue vs. Benipayo*[68], the Supreme Court held:

> "xxx in order to stand judicial scrutiny, the assessment must be based on facts. The presumption of the correctness of an assessment, being a mere presumption, cannot be made to rest on another presumption."

Thus, the unaccounted disbursement should not be treated as undeclared income for being presumptive in nature.

d. Unsupported Creditable Withholding Tax (CWT) in the amount of ₱25,322.66 ge

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64 *Commissioner of Internal Revenue v. The Court of Appeals, Court of Tax Appeals and A. Soriano Corp*

Respondent's audit examination revealed that creditable withholding tax in the amount of ₱25,322.66 is unsubstantiated. On the other hand, petitioner does not dispute[69] respondent's assessment and as such, the Court upholds the same.

In sum, petitioner is liable for deficiency income tax in the revised amount of ₱263,060.57 computed as follows:

Taxable Income per return		₱24,379,143.14
Add: Discrepancies per investigation		
Undeclared Income	₱778,061.49	
Collection of Other Receivables-Tenants	14,400.20	792,461.69
Taxable Income		25,171,604.83
Tax Rate		30%
Income Tax Due		₱7,551,481.45
Less: Tax Credit/payment per return		
Tax Credit per return	1,646,161.01	
Less: Unsupported CWT	25,322.66	
Allowed Creditable Withholding Tax	₱1,620,838.35	
Add: Payment	5,667,582.53	7,288,420.88
Deficiency Income Tax		**₱263,060.57**

II. Deficiency Value Added Tax

Petitioner was assessed of the deficiency Value Added Tax in the amount of ₱3,910,029.82 inclusive of increments, computed as follows:

Receipts per return			₱35,252,717.59
Add: Discrepancies per investigation			
	Undeclared Receipts (A-2)	₱3,750,965.45	
	Collection of Other Receivables – Tenants (B-1)	7,164,425.73	
	Undeclared Income (RLF/TRS/SAWT vs. SLS)	1,181,646.49	
	Undeclared Income from Meralco	4,587,870.68	16,684,908.35
Total receipts subject to VAT per investigation			₱51,937,625.94
Tax Rate			12%
VAT Due thereon			₱6,232,515.11
Less: Input Tax			421,157.01
VAT payable			₱5,811,358.10
Less: VAT payment			3,809,168.31

Respondent assessed the petitioner of deficiency value added tax based on the following:

a. Undeclared Receipts	₱3,750,965.45
b. Collection of Other Receivables	7,164,425.73
c. Undeclared Income (RLF/TRS/SAWT vs. SLS)	1,181,646.49
d. Undeclared Income from Meralco	4,587,870.68

a. Undeclared receipts in the amount of ₱3,750,965.45

Respondent found that petitioner had undeclared receipts by deducting from gross receipts declared per VAT returns the total credits to Accounts Receivables after deducting output VAT, computed as follows:

Collection of Accounts Receivable-Total Credits (per GL)	₱43,684,125.00
Less: VAT portion	4,680,441.96
Gross Receipts Subject to VAT	₱39,003,683.04
Less: Gross Receipts per VAT returns	35,252,717.59
Discrepancy	₱3,750,965.45

On the other hand, petitioner argued that the discrepancy was the result of the alleged charges for electricity, water and CUSA and presented the schedule/computation as follows:

Collection of Accounts Receivable-Total Credits for 2009	₱43,684,125.00
Less: Gross Receipts per VAT returns	35,252,717.59
Discrepancy	₱8,431,407.41
Less: Alleged Reimbursable Expenses	7,164,425.73
Discrepancy	₱1,266,981.68

Petitioner asserts that not all credit entries found in their General Ledger represent collection of accounts receivable. Further, the conclusions made by respondent cannot be equated to actual facts for it partakes the nature of estimates which are not conclusive to establish that it is liable for the payment of tax.[70]

However, respondent counter-argued that it should be noted that the Accounts Receivable – Trade (AR-Trade) is inclusive of VAT while gross receipts per VAT return is net of VAT. Respondent stated that in the aforesaid computation, petitioner did not deduct the output tax portion of the AR-Trade collection. He also added that there is a separate account for AR-Trade and Other Receivables – Tenant which are distinct from each other, hence, the discrepancy cannot be offset by the other.[71]

Section 108(A) of the NIRC of 1997, as amended, in relation to Sections 4.108-1, 4.108-2(3) & 4.108-3(a) of Revenue Regulations No. 16-05, as amended, imposes a 12% VAT on sale of services based on the taxpayer's gross receipts, thus:

> "SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties.* -
>
> (A) *Rate and Base of Tax.* - There shall be levied, assessed and collected, a value-added tax equivalent to ten percent (10%) of gross receipts derived from the sale or exchange of services, including the use or lease of properties: *Provided*, That the President, upon the recommendation of the Secretary of Finance, shall, effective January 1, 2006, raise the rate of value-added tax to twelve percent (12%), after any of the following conditions has been satisfied:
>
> xxx xxx xxx
>
> "The phrase **'sale or exchange of services'** means the performance of all kinds of services in the Philippines for others for a fee, remuneration or consideration, xxx xxx xxx The phrase 'sale or exchange of services' shall likewise include:
>
> xxx xxx xxx
>
> **"Lease of properties shall be subject to the tax herein imposed irrespective of the place where the contract of lease or licensing agreement was executed if the property is leased or used in the Philippines.**

the contract price, compensation, service fee, rental or royalty, including the amount charged for materials supplied with the services and deposits and advanced payments **actually or constructively received during the taxable quarter for the services performed or to be performed for another person, excluding value-added tax.**" *(Emphasis Supplied.)*

"Revenue Regulations No. 16-05

SECTION 4.108-2. ***Meaning of "Sale or Exchange of Services".*** — The term "sale or exchange of services" means the performance of all kind of services in the Philippines for others for a fee, remuneration or consideration, whether in kind or in cash, including those performed or rendered by the following:

xxx xxx xxx

(3) lessors of property, whether personal or real;

xxx xxx xxx

SECTION 4.108-3. ***Definitions and Specific Rules on Selected Services.*** —

a. Lessors of Property. — All forms of property for lease, whether real or personal, are liable to VAT subject to the provisions of Sec. 4.109-1(B)(1)(v) of these Regulations.

"Real estate lessor" includes any person engaged in the business of leasing or subleasing real property.

Lease of property shall be subject to VAT

> VAT on rental and/or royalties payable to non-resident foreign corporations or owners for the sale of services and use or lease of properties in the Philippines shall be based on the contract price agreed upon by the licensor and the licensee. The licensee shall be responsible for the payment of VAT on such rentals and/or royalties in behalf of the non-resident foreign corporation or owner in the manner prescribed in Sec. 4.114-2(b) hereof." *(Emphasis Supplied.)*

The ICPA showed the reconciliation of the Accounts Receivable Trade with the amount reported as per VAT returns-on cash (collection) method, as follows:[72]

Total Credits (per AR GL) net of EWT	₱43,684,125.00
Add: Accounts Receivable, ending	1,806,664.99
Less: Accounts Receivable, beginning	(1,582,881.12[73])
Add: Creditable Tax Withheld	1,645,543.53
	524.09
Total Collection (inclusive of VAT)	₱45,553,976.49
Less: Reimbursement of Utility Expenses	(6,082,265.08)
Total	₱39,471,711.41
VAT	(4,229,111.94)
Sales – on accrual method	35,242,599.47
Total Sales per VAT returns	(35,252,717.59)
Over reported Sales	**(₱10,118.12)**

Based on the table presented, the ICPA found that there was an over reported sales in the amount of ₱10,118.12. It was arrived at by deducting the total sales per VAT returns (cash basis) vis-à-vis the Sales on accrual basis.

The Court is not persuaded.

Based on the above-cited provision, the income of petitioner is subject to 12% VAT based on its gross receipts. Thus, the comparison receipts, and the computed Sales on accrual basis to arrive at the over reported sales, is inappropriate.

As previously discussed (See Discussion I. b) there is a separate account for Other Receivables-Tenants which lodge the receivables from tenants representing reimbursements from utility expenses. Hence, the deduction of the reimbursement of utility expenses is incorrect.

Thus, the Court upholds the assessment on undeclared receipts in the amount of ₱3,750,965.45.

b. Collection of Other Receivable - Tenants in the amount of ₱7,164,425.73

This assessment is based on the same findings under the deficiency income tax assessment (See Discussion I. b).

As previously discussed, petitioner proved that the alleged amount of ₱7,164,425.73 were reimbursements of electricity and water consumption from its tenants. As such, it should not be treated as an income. However, ICPA's verification showed that petitioner over-claimed its Operating Expenses by ₱14,400.20.

Although petitioner's over-claimed operating expense has an income tax effect, the same cannot be construed as income subject to VAT because, precisely, it is an expense that does not involve gross receipts derived from the use or lease of properties of petitioner. Thus, VAT assessment arising from the overclaimed expenses should be cancelled.

c. Undeclared Income (RLF/TRS/SAWT vs. SLS) in the amount of ₱1,181,646.49

As previously discussed in deficiency income tax assessment (See Discussion I. a), respondent assessed petitioner by comparing third party information vis-'a-vis petitioner's declaration on its Summary List of Sales (SLS). Respondent's findings on undeclared

Hence, the amount of ₱778,061.49 should be subjected to VAT.

d. Undeclared Income from Meralco in the amount of ₱4,587,870.68

In relation to the above-discussion on deficiency income tax assessment (See Discussion I. c), respondent alleged that the data extracted thru CAATS revealed that there were income payments to Meralco amounting to ₱4,587,870.68. Respondent also added that the amount was reported by Meralco on its SAWT, but was not reported/accounted for by petitioner in its Income Tax Return and Financial Statements.

However, the unaccounted disbursement should not be treated as undeclared income for being presumptive in nature. Hence, the deficiency VAT assessment on this item should be cancelled.

In sum, petitioner is liable for deficiency Value Added Tax in the reduced amount of ₱543,484.02, computed as follows:

Receipts per return		₱35,252,717.59
Add: Discrepancies per Investigation		
Undeclared Receipts	₱3,750,965.45	
Undeclared Income	778,061.49	4,529,026.94
Total Receipts subject to VAT		₱39,781,744.53
Tax Rate		12%
VAT Due thereon		₱4,773,809.34
Less: Input Tax		421,157.01
VAT Payable		₱4,352,652.33
Less: VAT Payment		3,809,168.31
Deficiency VAT		**₱543,484.02**

III. DST Liability in the amount of ₱652,736.18

Petitioner admits[74] its DST liability, as follows:

Particulars	**DST Due**
Lease Contract	₱ 8,006.99

Thus, the Court upholds respondent's assessment in the amount of ₱630,506.99 representing petitioner's deficiency DST.

On the other hand, petitioner prays for the removal of the surcharge and interest corresponding to its deficiency DST in relation to its advances to stockholders. Petitioner cites the case of *Tambunting Pawnshop, Inc. v. Commissioner of Internal Revenue*,[75] where the Supreme Court cited good faith as a ground for the removal of the imposition of surcharges and interest.

However, the Court finds that *Tambunting* is not applicable in the instant case. In *Tambunting*, the taxpayer relied on the rulings of the CIR and the CTA that pawn tickets are not subject to DST. In the instant case, there is no showing that petitioner relied on any rule which could establish its good faith reliance. Therefore, the Court likewise upholds the imposition of surcharge and interest with respect to petitioner's deficiency DST in relation to its advances to stockholders.

IV. Improperly Accumulated Earnings Tax

Respondent assessed petitioner for improperly accumulated earnings tax in the amount of ₱21,862,996.95, inclusive of increments computed as follows:

Taxable Income for the Year		**₱24,379,143.14**
Add:		
a. Income Subjected to Final Tax	₱0.00	
b. NOLCO	0.00	
c. Income Exempt from Tax	0.00	
d. Income Excluded from Gross Income	0.00	0.00
Total		**₱24,379,143.14**
Less:		
Income Tax Paid	₱7,313,742.94	
Dividends Declared/Paid	0.00	7,313,742.94
Total		**₱17,065,400.20**
Add: Retained Earnings from Prior Years		93,545,798.00
Accumulated Earnings as of December 31, 2009		**₱110,611,198.20**

Tax Rate		10%
Improperly Accumulated Earnings Tax Due		₱10,861,119.82
Less: Payment		0.00
Deficiency Improperly Accumulated Earnings Tax		₱10,861,119.82
Add: 25% Surcharge		2,715,279.96
20% Interest per Annum (01.16.11-10.31.14)		8,236,597.17
Compromise Penalty		50,000.00
Total Amount Due		**₱21,862,996.95**

As found by respondent, petitioner's Board of Directors passed a resolution on March 31, 2010 to increase the appropriated retained earnings by ₱17,000,000.00 from the existing ₱93,000,000.00 retained earnings as of 2009, to serve as standby funds for the implementation of its contemplated projects.

Respondent avers that mere appropriation of retained earnings, without implementation, will fail the immediacy test. Allegedly, there is no concrete plan as to the disposition of excess profits. Petitioner has one year from the end of the taxable year within which to dispose of or remedy the excess retained earnings.[76]

Petitioner, on the other hand, argues that the reasonable needs of a business can be best determined by looking into the intent, purpose, financial liquidity and stability of the business and not on the immediate disposition of its excess profits. Petitioner adds that it is primarily engaged in real estate activities where its main source of income is from rental. Therefore, it is vital for their operations to maintain and expand its Non-Current Assets. However, undertaking any construction or expansion project entails availability of funding and as such, mobilization of a project can be initiated if sufficient funds are already on hand. Thus, an additional ₱17,000,000.00 was appropriated by its Board of Directors (BOD) on March 26, 2010, as certified by its Corporate Secretary on March 31, 2010.[77]

Section 29 of the NIRC of 1997, as amended, in relation to RR No. 2-2001, provides the basis for imposing the improperly accumulated earnings tax, as follows: *gr*

"SEC. 29. *Imposition of Improperly Accumulated Earnings Tax.—*

(A) *In General.*—In addition to other taxes imposed by this Title, there is hereby imposed for each taxable year on the improperly accumulated taxable income of each corporation described in Subsection B hereof, an improperly accumulated earnings tax equal to ten percent (10%) of the improperly accumulated taxable income.

(B) *Tax on Corporations Subject to Improperly Accumulated Earnings Tax. -*

(1) *In General.* - The improperly accumulated earnings tax imposed in the preceding Section shall apply to every corporation formed or availed for the purpose of avoiding the income tax with respect to its shareholders or the shareholders of any other corporation, by permitting earnings and profits to accumulate instead of being divided or distributed.

(2) *Exceptions.* - The improperly accumulated earnings tax as provided for under this Section shall not apply to:

(a) Publicly-held corporations;
(b) Banks and other nonbank financial intermediaries; and
(c) Insurance companies.

(C) *Evidence of Purpose to Avoid Income Tax. -*

(1) *Prima Facie Evidence.* - the fact that any corporation is a mere holding company or investment company shall be *prima facie* evidence of a purpose to avoid the tax upon its shareholders or members.

(2) ***Evidence Determinative of Purpose.* - The fact that the earnings or profits of a corporation are permitted to accumulate beyond the reasonable needs of the business shall be determinative of the purpose to avoid the tax upon its shareholders or members** unless the

(D) *Improperly Accumulated Taxable Income.* - For purposes of this Section, the term 'improperly accumulated taxable income' means taxable income' adjusted by:

(1) Income exempt from tax;
(2) Income excluded from gross income;
(3) Income subject to final tax; and
(4) The amount of net operating loss carry-over deducted;

And reduced by the sum of:

(1) Dividends actually or constructively paid; and
(2) Income tax paid for the taxable year.

Provided, however, That for corporations using the calendar year basis, the accumulated earnings under tax shall not apply on improperly accumulated income as of December 31, 1997. In the case of corporations adopting the fiscal year accounting period, the improperly accumulated income not subject to this tax, shall be reckoned, as of the end of the month comprising the twelve (12)-month period of fiscal year 1997-1998.

(E) *Reasonable Needs of the Business.* - For purposes of this Section, the term 'reasonable needs of the business' includes the reasonably anticipated needs of the business. "*(Emphasis supplied.)*

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SEC 3. **Determination of Reasonable Needs of the Business**. – An accumulation of earnings or profits (including undistributed earnings or profits of prior years) is unreasonable if it is not necessary for the purpose of the business, considering all circumstances of the case. **To determine the "reasonable needs" of the business in order to justify an accumulation of earnings, these Regulations hereby adhere to the**

immediate needs of the business, including reasonably anticipated needs. In either case, the corporation should be able to prove an immediate need for the accumulation of the earnings and profits, or the direct correlation of anticipated needs to such accumulation of profits. Otherwise, such accumulation would be deemed to be not for the reasonable needs of the business, and the penalty tax would apply.

For purposes of these Regulations, the following constitute accumulation of earnings for the reasonable needs of the business:

a. Allowance for the increase in the accumulation of earnings up to 100% of the paid-up capital of the corporation as of Balance Sheet date, inclusive of accumulation taken from other years;
b. Earnings reserved for definite corporate expansion projects or programs requiring considerable capital expenditure as approved by the Board of Directors or equivalent body;
c. Earnings reserved for building, plants or equipment acquisition as approved by the Board of Directors or equivalent body;
d. Earnings reserved for compliance with any loan covenant or pre-existing obligation established under a legitimate business agreement;
e. Earnings required by law or applicable regulations to be retained by the corporation or in respect of which there is legal prohibition against its distribution;
f. In the case of subsidiaries of foreign corporations in the Philippines, all undistributed earnings intended or reserved for investments within the Philippines as can be proven by corporate records and/or relevant documentary evidence.

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SEC 5. **Tax Base of Improperly Accumulated**

by adding to that year's taxable income the following:

> **a. income exempt from tax;**
> **b. income excluded from gross income;**
> **c. income subject to final tax; and**
> **d. the amount of net operating loss carry-over (NOLCO) deducted.**
>
> **The taxable income as thus determined shall be reduced by the sum of:**
>
> **a. income tax paid/payable for the taxable year;**
> **b. dividends actually or constructively paid/issued from the applicable year's taxable income;**
> **c. amount reserved for the reasonable needs of the business as defined in these Regulations emanating from the covered year's taxable income.**

The resulting *"Improperly Accumulated Taxable Income"* is thereby multiplied by 10% to get the Improperly Accumulated Earnings Tax (IAET).

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SEC. 6. *Period for Payment of Dividend/Payment of IAET.* – The dividends must be declared and paid or issued not later than one year following the close of the taxable year, otherwise, the IAET, if any, should be paid within fifteen (15) days thereafter.

SEC. 7. *Determination of Purpose to Avoid Income Tax.* - The fact that a corporation is a mere holding company or investment company shall be *prima facie* evidence of a purpose to avoid the tax upon its shareholders or members. Likewise, **the fact that the earnings or profits of a corporation are permitted to accumulate beyond the reasonable needs of the** preponderance of evidence in its favor, prove the contrary.

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The following are *prima facie* instances of accumulation of profits beyond the reasonable needs of a business and indicative of purpose to avoid income tax upon shareholders:

a. Investment of substantial earnings and profits of the corporation in unrelated business or in stock or securities of unrelated business;
b. Investment in bonds and other long-term securities;
c. **Accumulation of earnings in excess of 100% of paid-up capital, not otherwise intended for the reasonable needs of the business as defined in these Regulations.**

In order to determine whether profits are accumulated for the reasonable needs of the business as to avoid the imposition of the improperly accumulated earnings tax, the controlling intention of the taxpayer is that which is manifested at the time of accumulation, not subsequently declared intentions which are merely the product of afterthought. A speculative and indefinite purpose will not suffice. The mere recognition of a future problem or the discussion of possible and alternative solutions is not sufficient. Definiteness of plan/s coupled with action/s taken towards its consummation are essential." *(Emphasis supplied.)*

According to the Court-Commissioned ICPA, there was an existing development plan to rehabilitate petitioner's building and upgrade its facilities to conform to the Building Code of the Philippines, with a total estimated cost of ₱573,687,670.00. However, the plan is yet to commence.[78]

regarding the budgetary cost estimate;[79] b.) Budgetary Cost Estimate;[80] c.) Perspective;[81] and d.) Floor plans[82].

Additionally, as summarized by ICPA in his report[83], petitioner presented various Secretary's Certificate issued by its Corporate Secretary Ms. Lucy C. Lim to substantiate the approval of Board Resolutions on appropriation of its Retained Earnings (RE) as standby funds for the implementation of its contemplated projects, to wit:

Date of Meeting	**BOD Resolution No.**	**RE Appropriation**	**Reference (Exhibit P-29-3)**
March 15, 2005	OPLANI-31505-01	₱10,500,000.00	IC-97 (I.d), p. 441
March 15, 2006	OPLANI-31506-01	14,000,000.00	IC-98 (I.d), p. 442
May 4, 2007	OPLANI-050407-01	13,000,000.00	IC-99 (I.d), p. 443
April 11, 2008	OPLANI-041108-01	15,000,000.00	IC-100 (I.d), p. 444
May 2, 2009	OPLANI-050209-01	15,000,000.00	IC-101 (I.d), p. 445
March 26, 2010	OPLANI-032610-01	17,000,000.00	IC-102 (I.d), p. 446
	Total	**₱84,500,000.00**	

In establishing the reasonable needs of business, the Supreme Court explained in *Cyanamid Philippines, Inc. v. Court of Appeals, et. al*[84], citing the case of *Manila Wine Merchants, Inc. v. Commissioner of Internal Revenue*, that:

> "In order to determine whether profits are accumulated for the reasonable needs of the business to avoid the surtax upon shareholders, **it must be shown that the controlling intention of the taxpayer is manifested at the time of accumulation, not intentions declared subsequently, which are mere afterthoughts. Furthermore, the accumulated profits must be used within a reasonable time after the close of the taxable year.** In the instant case, petitioner did not establish, by clear and convincing evidence, that such accumulation of profit was for the immediate needs of the business."
>
> In *Manila Wine Merchants, Inc. vs. Commissioner of Internal Revenue,* we ruled:

> "To determine the reasonable needs of the business in order to justify an accumulation of earnings, the Courts of the United States have invented the so-called Immediacy Test which construed the words reasonable needs of the business to mean the immediate needs of the business, and it was generally held that if the corporation did not prove an immediate need for the accumulation of the earnings and profits, the accumulation was not for the reasonable needs of the business, and the penalty tax would apply. (Mertens, *Law of Federal Income Taxation,* Vol. 7, Chapter 39, p. 103)." *(Emphasis supplied.)*

Said test laid down in *Cyanamid* is essentially reiterated in Section 7 of RR No. 2-2001, as quoted above. Verily, *Cyanamid* and Section 7 of RR No. 2-2001 provide that in order for the accumulated profits to be categorized under reasonable needs of the business, the controlling intention of the taxpayer, *i.e.*, definiteness of plan, *i.e.*, not merely speculative or indefinite, coupled with action taken towards its consummation, must be manifest at the time of accumulation, not subsequently, which are mere afterthoughts. Further, the accumulated profits must be used within a reasonable time after the close of the taxable year.

An examination of petitioner's audited financial statements for taxable years 2004, 2005, 2006, 2007, 2008, and 2009 reveals the accumulation of its appropriated retained earnings, as follows:

Year	**Appropriated Retained Earnings**	**Appropriated Retained Earnings for the Year**
2003		₱25,500,000.00
2004	₱10,500,000.00	36,000,000.00
2005	14,000,000.00	50,000,000.00
2006	13,000,000.00	63,000,000.00
2007	15,000,000.00	78,000,000.00
2008	15,000,000.00	93,000,000.00
2009	17,000,000.00	110,000,000.00
Total	**₱84,500,000.00**	**₱110,000,000.00**

₱25,500,000.00 as of December 31, 2003 with a total of ₱110,000,000.00 as of December 31, 2009[85].

It is notable that as early as 2004, petitioner continuously appropriated its retained earnings without evidence of implementation of its contemplated projects.

However, petitioner claims that looking into their financial position for taxable year 2009, it is clear that most of its equity has been placed into their intended purpose. Further, its equity is not even sufficient to cover the same, to wit:

	2009		**2008**	
Total Non-Current Assets	₱271,798,943.00		₱233,413,346.00	
Total Equity	193,071,877.00	71%	133,946,839.00	57%
	₱78,727,066.00	29%	₱99,466,507.00	43%

Based therefrom, petitioner explained that for the year 2009, the increase in Total Equity amounting to ₱20,734,441.00[86](sic) and the increase in Total Non-Current Assets amounting to ₱38,385,597.00, are clear indications that non-current asset upgrading is being undertaken by the management. As such, it disproves the allegation that no concrete plan as to the disposition of excess profits was undertaken by petitioner[87].

After careful evaluation, the Court finds for respondent.

A perusal of the audited financial statements of the petitioner shows that the following account comprises its Non-Current Assets[88], to wit:

	2009	**2008**	**Increase (Decrease)**
Investment Properties	₱142,763,945.00	₱146,457,806.00	(3,693,861.00)
Available-for-sale financial assets	99,553,840.00	57,474,382.00	42,079,458.00
Loans Receivable	28,000,000.00	28,000,000.00	0.00
Other non-current assets	1,481,158.00	1,481,158.00	0.00
Total Non-Current Assets	**₱271,798,943.00**	**₱233,413,346.00**	**₱38,385,597.00**

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As per evaluation of the Court, the net decrease in Investment Properties account of (₱3,693,861.00) pertains to additions in building improvements amounting to ₱669,643.00 and to additions in Office Equipment & Furniture amounting to ₱118,692.00, with an aggregate amount of ₱788,335.00 less accumulated depreciation of investment properties in the total amount of ₱4,482,196.00.

On the other hand, the net increase in Available-for-sale financial assets in the amount of ₱42,079,458.00 pertains to the unrealized gain from changes in fair value of the available-for-sale financial assets.

As such, while the investment in properties account shows additions in building improvements and office equipment & furniture, there are no additions in the building account of petitioner. Clearly, there is no indication that the management has undertaken any action to prove that the contemplated project, *i.e.*, the construction of building, has taken place.

Furthermore, petitioner presented various Secretary's Certificate to support its contention that the Board of Directors approved the appropriation of its retained earnings "to proceed with the implementation of its contemplated projects."[89] However, said Secretary's Certificate reveals no clear information regarding the alleged plan for a specific project.

Likewise, petitioner presented the following: (1) budgetary cost estimate dated April 19, 2006 and (2) perspective and floor plans prepared by Architect Ruben Co for the construction of the proposed 15 storey commercial building in the estimated total construction cost of ₱573,687,670.00.[90]

In regard thereto, the Court finds that petitioner had a contemplated expansion project as early as 2006.[91] However, from 2006 to 2009, such expansion project was merely speculative or indefinite because, as testified to by petitioner's rebuttal witness, the expansion projects will be pursued as soon as petitioner's finances permit.[92]

Also, the ICPA reported that "there was an existing development plan to rehabilitate petitioner's building and upgrade its facilities to conform with the Building Code of the Philippines with the total estimated cost of ₱573,687,670.00. However, **the plan is yet to commence.**" [93] Clearly, these findings lead to the conclusion that the alleged expansion project is speculative or indefinite.

Moreover, petitioner failed to disclose in its Notes to the Financial Statements the appropriations made, which are significant transactions and/or information of which the stockholders, government and the public should be apprised about. On this score, the CTA Second Division had the occasion to rule in this wise:

> "Further, for the years 2007, 2008 and 2009, petitioner failed to disclose in the Notes to the Financial Statements the appropriations made, which are significant transactions and/or information of which the stockholders, government and the public should be apprised about. This is in violation to Philippine Accounting Standards (PAS) 1: *Presentation of Financial Statements*, paragraph 103, stating that the notes shall:
>
> (a) present information about the basis of preparation of the financial statements and the specific accounting policies used in accordance with paragraphs 108-115;
>
> (b) Disclose any information required by IFRS that is not presented on the face of the balance sheet, income statement, statement of changes in equity, or cash flow statement; and
>
> (c) **Provide additional information that is not presented on the face of the balance sheet, income statement, statement of changes in equity, or cash flow statement that is deemed relevant to an understanding of any of them.**" [94] *(Emphasis Supplied)*

As such, the Court finds that petitioner failed to pass the "Immediacy Test". Hence, petitioner is liable to pay the deficiency Improperly Accumulated Earnings Tax.

With respect to the compromise penalty in the amount of ₱50,000.00, the same should be cancelled. Under Revenue Memorandum Order No. 1-90, compromise penalties are only amounts suggested in settlement of criminal liability, and may not therefore be imposed or exacted on the taxpayer in the event that a taxpayer refuses to pay the suggested compromise penalties. It is well-settled that the Court has no jurisdiction to compel a taxpayer to pay the compromise penalty because by its very nature, it implies a mutual agreement between the parties in respect to the thing or subject matter which is so compromised, and the choice of paying or not paying it distinctly belongs to the taxpayer.[95] Without showing that petitioner consented to the compromise penalty, its imposition should be deleted.

WHEREFORE, the instant Petition for Review is **PARTIALLY GRANTED**. Accordingly the Compromise Penalty imposed upon petitioner is **CANCELLED**. On the other hand, the assessments issued by respondent against petitioner for deficiency Income Tax, deficiency Value Added Tax, deficiency Documentary Stamp Tax, and deficiency Improperly Accumulated Earnings Tax are **UPHELD**, but in the reduced amount of ₱15,372,714.26 inclusive of 25% surcharge, computed as follows:

Tax Type	Basic Tax	25% Surcharge	Total
Income Tax	₱263,060.57	₱65,765.14	₱328,825.71
Value Added Tax	543,484.02	135,871.01	679,355.03
Documentary Stamp Tax	630,506.99	157,626.75	788,133.74
Improperly Accumulated Earnings Tax	10,861,119.82	2,715,279.96	13,576,399.78
Total	**₱12,298,171.40**	**₱3,074,542.86**	**₱15,372,714.26**

In addition, petitioner is liable to pay:

(a) Deficiency interest at the rate of 20% per annum on the following basic deficiency taxes pursuant to Section 249(B) of the NIRC of 1997, as amended:

Deficiency Tax	**Basic Tax**	**20% Deficiency Interest computed from**
Income Tax	₱263,060.57	April 15, 2010
Value Added Tax	543,484.02	January 25, 2010
Documentary Stamp Tax	630,506.99	January 5, 2010
Improperly Accumulated Earnings Tax	10,861,119.82	January 15, 2011[96]

(b) Delinquency interest at the rate of 20% per annum in the total amount due of ₱15,372,714.26 representing basic deficiency income tax, deficiency value added tax, deficiency documentary stamp tax, Improperly Accumulated Earnings Tax, and on the deficiency interest which has accrued as stated above in (a) computed from November 19, 2014[97] until full payment thereof, pursuant to Section 249(C) of the NIRC of 1997.

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

CAESAR A. CASANOVA
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
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.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, 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