

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL THIRD DIVISION

NCR CEBU DEVELOPMENT CTA CASE NO. 9255
CENTER, INC.,

Petitioner, Members:

-versus-

FABON-VICTORINO, *and*
RINGPIS-LIBAN, JJ.

COMMISSIONER OF INTERNAL
REVENUE,

Promulgated:

Respondent.

APR 04 2019

X- - - - - 11:00 a.m. -X

DECISION

Fabon-Victorino, J.:

This is a Petition for Review¹ filed on February 9, 2016 by NCR Cebu Development Center, Inc. praying for the setting aside of the Final Decision² dated January 7, 2016 assessing it for alleged deficiency value-added tax (VAT), final withholding tax (FWT), withholding VAT (WVAT), and miscellaneous taxes aggregately valued at ₱111,241,154.77 for the year 2010, detailed below:

	Basic	Surcharge	Interest	Compromise	Total
VAT	₱ 5,636,522.14	₱ 1,409,130.54	₱ 5,321,494.60	₱ 50,000.00	₱ 12,417,147.28
WT-Final	32,026,764.24	8,006,691.06	30,412,264.34	50,000.00	70,495,719.64
WT-VAT	12,810,705.69	3,202,676.42	12,164,905.74	50,000.00	28,228,287.85
Total	₱50,473,992.07	₱12,618,498.02	₱47,898,664.68	150,000.00	₱111,141,154.77
Others - Miscellaneous					100,000.00
Total	₱50,473,992.07	₱12,618,498.02	₱47,898,664.68	₱150,000.00	₱111,241,154.77

Petitioner NCR Cebu Development Center, Inc. is an organized domestic corporation, with principal office located

¹ Docket, Vol. 1, pp. 10-34.

² Exhibit "R-15", BIR Records, pp. 881-882.

in e-Office Building, Asiatown, I.T. Park, Apas, Cebu City.³ It is registered with the Bureau of Internal Revenue (BIR) with Taxpayer Identification No. (TIN) 228-442-028-000 and Certificate of Registration issued on January 7, 2004.⁴

Per its Articles of Incorporation, petitioner's primary purpose is "to carry on all or any of the businesses of software and hardware development and services, and the provision of related technical services; to carry on the businesses of computer programmers and consultants, to act as advisers, investigators and consultants in relation to systems of, and mechanical and other aids for all kinds of calculations and measurements in connection with the promotion, arrangement, design, programming, production and compilation of data processing methods and to provide specialized training and preparation in relation to all matters pertaining thereto; to discover and develop new processes and materials and to obtain rights of development and sale in respect thereof; and to perform functions necessary or useful for carrying on the foregoing businesses or any of them or likely to be required by customers or of persons having dealings with the company except as internet service provider."⁵

On the other hand, respondent is the Commissioner of the Internal Revenue (CIR) with the power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto or other matters arising under the National Internal Revenue Code (NIRC) or other laws or portions thereof administered by the Bureau of Internal Revenue (BIR). He holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

On November 4, 2011, petitioner received Letter of Authority (LOA) No. LOA-123-2011-00000034⁶ dated October 20, 2011, authorizing the named revenue officers to examine its books of accounts and other accounting records for all internal revenue taxes for the period from January 1, 2010 to December 31, 2010, pursuant to Audit Criteria for

³ Exhibit "P-2", Docket, Vol. 9, p. 4130.

⁴ Exhibit "P-14", Docket, Vol. 10, p. 4554.

⁵ Exhibit "P-2", Docket, Vol. 9, p. 4119.

⁶ Exhibit "R-1", BIR Records, p. 223.



Taxable Years (TYs) 2009 and 2010 issued by the BIR Large Taxpayers District Office – Cebu.

On October 25, 2013, petitioner's President executed a Waiver of the Defense of Prescription under the Statute of Limitations of the NIRC⁷ extending the period to assess and collect taxes until June 30, 2014.⁸

On May 9, 2014, petitioner received a Preliminary Assessment Notice (PAN)⁹ dated May 6, 2014 with Details of Discrepancies, indicating that after examination, the BIR found deficiency income tax (IT), VAT, withholding tax-final, withholding tax-VAT, withholding tax-expanded, documentary stamp tax (DST), and others-miscellaneous taxes for the year 2010.¹⁰

On May 22, 2014, petitioner, in its Reply, protested the the finding of deficiency taxes, interest and compromise penalties as stated in the PAN.¹¹

On June 23, 2014, petitioner received the Formal Letter of Demand with attached Details of Discrepancies and Assessment Notices (FLD-FAN)¹² dated June 20, 2014 for deficiency IT, VAT, withholding tax-final, withholding tax-VAT, withholding tax-expanded, DST, and others-miscellaneous taxes for the year 2010.¹³ On July 23, 2014, petitioner filed its protest disputing the tax assessment indicated in the FLD-FAN.¹⁴

On June 17, 2015, petitioner received the Final Decision on Disputed Assessment (FDDA)¹⁵ issued by OIC-Assistant Commissioner, Large Taxpayers Service, for deficiency IT, VAT, withholding tax-final, withholding tax-VAT, withholding tax-expanded, withholding tax-

⁷ Exhibit "R-5", BIR Records, p. 299.

⁸ Par. 4, Joint Stipulation of Facts ad Issues (JSFI), Docket, Vol. 6, p. 2683.

⁹ Exhibit "R-8", BIR Records, pp. 380-387.

¹⁰ Par. 5, JSFI, Docket, Vol. 6, p. 2683.

¹¹ Par. 6, JSFI, Docket, Vol. 6, p. 2683.

¹² Exhibits "R-10" and "R-11" and sub-markings, BIR Records, pp. 403-410 and 396-402, respectively.

¹³ Par. 7, JSFI, Docket, Vol. 6, p. 2683.

¹⁴ Par. 8, JSFI, Docket, Vol. 6, p. 2684.

¹⁵ Exhibit "R-13", BIR Records, pp. 688-700.

compensation, DST, and others-miscellaneous taxes for the year 2010.¹⁶

On July 16, 2015,¹⁷ petitioner paid the deficiency assessments for withholding tax-expanded, withholding tax-compensation, DST, and penalty for alleged failure to include the TINs of seven employees in the Alphalist. On the same date, petitioner filed a Request for Reconsideration impugning the FDDA issued by respondent's authorized representative.¹⁸

On January 7, 2016, petitioner received the Final Decision issued by former BIR Commissioner Kim S. Jacinto-Henares for deficiency IT, VAT, withholding tax-final, withholding tax-VAT, and others-miscellaneous taxes.¹⁹

On February 4, 2016, petitioner paid the deficiency assessments for IT²⁰ and VAT²¹. Thereafter, or on February 9, 2016, petitioner filed the present Petition for Review with the CTA.

On April 8, 2016, respondent filed his Answer²², contending that the assessment has sufficient basis in fact and in law. Further, petitioner was accorded due process when it was served with the LOA, PAN, FLD, FDDA and the Final Decision by respondent.

Moreover, petitioner already paid the amount of P1,026,804.92 on February 4, 2016. Besides, respondent stated that the deficiency taxes were assessed after the audit investigation was conducted.

The result of the audit investigation revealed that the expenses allegedly related to a claimed deduction were not directly related to and not necessary in the production/development of software products. Employees can still

¹⁶ Par. 9, JSFI, Docket, Vol. 6, p. 2684.

¹⁷ Par. 11, JSFI, Docket, Vol. 6, p. 2684.

¹⁸ Par. 10, JSFI, Docket, Vol. 6, p. 2684.

¹⁹ Par. 12, JSFI, Docket, Vol. 6, p. 2684.

²⁰ Par. 13, JSFI, Docket, Vol. 6, p. 2685.

²¹ Par. 14, JSFI, Docket, Vol. 6, p. 2685.

²² Docket, Vol. 1, pp. 386-403.

develop software programs/products without the add-on benefits and not mandatorily required under labor laws. Hence, the corresponding deficiency assessment for IT was assessed against petitioner for such related expenses disallowed as part of the direct costs.

On the VAT assessment, petitioner's act of extending loans to its local affiliates was not among its PEZA registered activities. Per BIR Ruling (DA-053-08) dated January 30, 2008, income derived not from a registered activity of the PEZA company, shall be subject to regular corporate income tax and the PEZA company shall also be liable for 12% VAT.

The tax treatment of petitioner pursuant to BIR Ruling (DA-053-08) likewise finds basis under Revenue Regulation (RR) No. 20-2002, which clarified the tax treatment of income earned from unregistered activities by enterprises registered under the Bases Conversion and Development Act of 1992 and the Philippine Economic Zone Act of 1995. Hence, the subject transaction is subject to VAT.

Petitioner was also subjected to FWT on its foreign transactions since it failed to file a tax treaty relief application before availing the benefit of exemption from FWT on the said foreign transactions as required under Revenue Memorandum Order (RMO) No. 1-2000. It is for the same reason that petitioner is liable for deficiency WVAT on its payments of service fees and software license fees for services rendered abroad as well as royalties from property located outside the Philippines.

Finally, the imposition of compromise penalty is in order as petitioner failed to register as VAT taxpayer pursuant to Revenue Regulation (RR) 16-2005, as amended by RR No. 3-2012. Petitioner likewise failed as a VAT taxpayer, to file the corresponding VAT returns and to submit the requisite Summary Lists of Sales/ Purchases as required under Section 4.114-3 of RR 16-2005. Petitioner is as well liable for compromise penalties for violation of the provision in the Tax Code and Revenue Memorandum Order (RMO) No. 19-2007.



On April 22, 2016, petitioner filed a Reply²³ refuting respondent's argumentation in his Answer.

On August 26, 2016, a Pre-Trial Order²⁴ was issued after the parties filed their Joint Stipulation of Facts and Issues²⁵ on August 3, 2016 punctuating the pre-trial proceeding.

In support of its case, petitioner presented its Tax Accountant, Marietta B. Ticagan²⁶, and the Independent Certified Public Accountant (ICPA), Atty. Adan T. Delamide²⁷. Prabal Mitra²⁸, Richard McKenzie²⁹, and Ajay Jhamb³⁰, were presented as witnesses via their respective written interrogatories/deposition.

Witness **Marietta B. Ticagan** testified³¹ that petitioner is part of the NCR group of companies in the Asia Pacific Region, engaged in providing various consumer transaction technologies worldwide. Its ultimate parent company is NCR Corporation, which was incorporated in the United States of America.

Allegedly, petitioner was assessed for deficiency VAT on the interest income realized from a loan extended in favor of NCR Philippines. Admittedly, petitioner also granted a loan to NCR Dutch BV, however, it is not engaged in the business of financing or extending loans, nor is such activity incidental to its corporate functions, as indicated in its primary purpose stated in its Articles of Incorporation.

The witness explained that petitioner extended a loan to NCR Philippines when it suffered extraordinary financial losses. The loan was not intended to generate income but petitioner charged interest thereon in compliance with the

²³ Docket, Vol. 1, pp. 416-425.

²⁴ Docket, Vol. 6, pp. 2713-2722.

²⁵ Docket, Vol. 6, pp. 2682-2696.

²⁶ Minutes of the hearing dated January 17, 2017, Docket, Vol. 6, p. 2966.

²⁷ Minutes of the hearing dated April 3, 2017, Docket, Vol. 7, p. 3453.

²⁸ Docket, Vol. 6, pp. 2882-2886 and Exhibits "P-16" to "P-16-d", Docket, Vols. 7 and 8, pp. 3459-3480 and 3552-3570.

²⁹ Docket, Vol. 6, pp. 2882-2886 and Exhibits "P-21" to "P-21-d", Docket, Vol. 8, pp. 3956-3971.

³⁰ Docket, Vol. 6, pp. 2882-2886 and Exhibits "P-20" to "P-20-d", Docket, Vols. 7 and 8, pp. 3481-3508.

³¹ Judicial Affidavit dated July 14, 2016, Docket Vol. 4, pp. 1890-1907.

transfer pricing requirements of the BIR, as in fact, the loan and the interest imposed were not supported by a written contract. In view of the foregoing, deficiency VAT should not be imposed.

Petitioner was likewise assessed for deficiency FWT and VAT on the alleged ground that it failed to file a tax treaty relief application before paying non-resident foreign entities for services rendered and software license fees. She believed that there was no need for a prior tax treaty relief application because the services and license fees were rendered by non-resident foreign entities and services were performed outside of the Philippines, hence, not subject to tax, and consequently not subject to withholding taxes.

The witness further declared that compromise penalties were imposed on petitioner for non-registration for VAT, non-filing of VAT returns, and non-submission of Summary Lists of Sales and Purchases. But petitioner, who was then a VAT-registered taxpayer was advised by Revenue District Office (RDO) No. 81, that before it can qualify as a large taxpayer, it should cancel its VAT Registration. More importantly, as a PEZA-registered corporation whose Income Tax Holiday (ITH) has already expired, petitioner is entitled to the preferential 5% tax rate on its gross income in lieu of other taxes, hence, not liable for VAT, and the reportorial requirements that go with it.

The Court-commissioned ICPA, Attorney **Adan T. Delamide**, testified³² that he audited petitioner's voluminous documentary evidence pertaining to the present case, and interviewed petitioner's tax accountant, Marietta B. Ticagan. Thereafter, he prepared the ICPA Report containing his findings which was submitted to the Court on December 19, 2016.

As to the assessment for deficiency IT, petitioner would no longer contest the same as in fact it already paid the amount of ₱1,026,804.92, evidenced by BIR (Payment) Form No. 0605, and BIR eFPS confirmation of payment.

³² Judicial Affidavit dated March 27, 2017, Docket Vol. 7, pp. 3431-3441.



Petitioner likewise already paid the amount of ₱12,763,059.87 comprising the assessment for deficiency VAT imposed on the interest income earned from the loan granted to NCR Philippines notwithstanding its stance that it should not be liable for the same. The payment is likewise evidenced by BIR (Payment) Form No. 0605, and BIR eFPS confirmation of payment.

As to the assessment for FWWAT and FWT imposed on petitioner's payment of service fees and software license fees, he found that debit notes were issued prior to the said payments, acknowledged through sales Invoices wherein both debit notes and sales invoices were issued from abroad by foreign entities. The certifications issued by the Securities and Exchange Commission (SEC) state that the foreign companies are not registered in the Philippines. These debit notes and sales invoices also indicated that the services in relation to the billings and payments made were rendered outside the Philippines.

Witness **Prabal Mitra**,³³ a citizen of India and residing therein, testified³⁴ through written interrogatories, that he is the Accounting Manager of the NCR group of companies in the Asia Pacific Region, which includes herein petitioner.

Petitioner NCR Cebu Development Center, Inc. was registered with the PEZA as an Ecozone Information Technology Enterprise to provide software, mechanical, and electrical engineering services at the Asiatown I.T. Park.

He corroborated the testimony of petitioner's previous witness that petitioner granted a loan in favor of NCR Philippines which became the basis for the imposition of deficiency VAT on the interest income earned from the said loan.

He believed that the imposition of deficiency VAT was erroneous since petitioner was and is not engaged in the business of financing or extending loans, nor are such activities the primary purpose of petitioner as shown in its

³³ Judicial Affidavit dated July 14, 2016, Docket Vol. 8, pp. 3552-3570.

³⁴ Without cross-interrogatories from respondent.



Articles of Incorporation. The loan was not covered by a written contract and interest was charged to comply with the transfer pricing requirements of the BIR, with normal income tax properly reported on said interest without VAT charged on the same.

The assessment for deficiency FWT and VAT on petitioner's payments to non-resident foreign entities for services rendered and software license fees, on the basis that petitioner failed to file a tax treaty relief before implementing exemption from withholding on the said payments, is likewise erroneous.

These payments were for the services rendered by non-resident foreign corporations and the services were performed wholly outside of the Philippines, hence, not taxable and therefore without need to withhold taxes.

Similarly witness **Ajay Jhamb** testifying via written interrogatories³⁵, declared that he is the Finance Director of NCR India and residing therein,³⁶ that by reason of his functions involving accounting and bookkeeping, he is knowledgeable of the various services rendered by NCR India to its internal and external clients. Petitioner is a foreign affiliate of NCR India, both entities being part of the NCR group of companies belonging to the NCR Asia Pacific Group.

In 2010, petitioner secured the services of NCR India for bookkeeping and reporting purposes including Information Technology services for which services NCR India collected service fees. The details of the services were summarized through debit notes. No personnel from NCR India came to the Philippines to render such services and no physical work was conducted in the Philippines, hence, all services were performed outside the Philippines. To back up his testimony, the witness executed a Certification on Offshore Services.

³⁵ Judicial Affidavit dated July 14, 2016, Docket Vol. 8, pp. 3501-3508.

³⁶ Without cross-interrogatories from respondent.



Witness **Richard McKenzie**, testified³⁷ that he is the Finance Vice President and Head of Tax of NCR Corporation, a corporation incorporated in the United States of America, and the parent company of petitioner. In such capacity, he oversees the tax activities across all jurisdictions where NCR has a presence, including the jurisdiction of petitioner.

In 2010, petitioner obtained the services of NCR Corporation and by reason thereof, NCR Corporation collected from petitioner. The services involved information technology processing and application services which were all performed in the United States of America. No personnel of NCR Corporation came to the Philippines to render the services, and no physical work was conducted in the country. In other words, all the services rendered were performed outside the Philippines. The witness issued a Certification on Offshore Services and the services performed were summarized in debit notes.

On June 20, 2017, petitioner filed Offer of Documentary Evidence³⁸, resolved in the Resolution³⁹ dated August 8, 2017, wherein the Court admitted all of petitioner's documentary exhibits except Exhibits "P-1-b" and "P-3-a". Petitioner filed Tender of Excluded Evidence⁴⁰ on December 13, 2017.

On the other hand, respondent presented his sole witness, Revenue Officer **Angelita A. De Guzman**.⁴¹ She testified that she conducted the audit of petitioner for the year 2010 as authorized under Letter of Authority (LOA) No. LOA-123-2011-000000.34 dated October 20, 2011, which was served on petitioner on November 4, 2011. Subsequently, a First Notice, a Second and Final Notice were sent to petitioner for its presentation of its accounting records. Petitioner executed a Waiver of the Defense of Prescription extending the period to assess for the year 2010 until June 30, 2014.

³⁷ Judicial Affidavit dated July 27, 2016, Docket Vol. 6, pp/ 2730-2736.

³⁸ Docket, Vol. 9, pp. 4101-4112.

³⁹ Docket, Vol. 10, pp. 4568-4569.

⁴⁰ Docket, Vol. 10, pp. 4610-4614.

⁴¹ Minutes of the hearing dated December 4, 2017, Docket, Vol. 10, p. 4600; Judicial Affidavit dated July 12, 2016, Docket, Vol. 1, pp. 431-441.



After the audit, petitioner was found liable for deficiency taxes, thus, a Preliminary Assessment Notice (PAN) was recommended. The PAN issued on May 6, 2014 was served on petitioner on May 9, 2014, finding petitioner liable for deficiency IT, VAT, FWT, FWTAT, EWT and DST.

Since petitioner did not protest the PAN, the issuance of a Final Assessment Notice (FAN) and Formal Letter of Demand (FLD) was recommended. However, it appeared from the record that petitioner filed a Reply to the PAN which was unknown to her when she made her recommendation. On June 20, 2014, the FLD with FAN were issued and served on petitioner on June 23, 2014. Petitioner protested the FLD with the FAN. After review of petitioner's arguments and upon recommendation, a Final Decision on Disputed Assessment (FDDA) was issued on June 15, 2015 and received on June 17, 2015, assessing petitioner for deficiency IT, VAT, FWT, FWTAT, EWT, WTC, and DST. Petitioner moved for the reconsideration of the FDDA but the same was denied in the Letter dated January 7, 2016.

In the Resolution⁴² dated January 12, 2012, the Court admitted all the documents formally offered by respondent on December 11, 2017⁴³.

The case was submitted for decision on April 6, 2018.⁴⁴

STATEMENT OF THE ISSUE

The parties submitted the following issue⁴⁵ for the resolution of the Court:

Whether petitioner is liable to pay the aggregate amount of One Hundred Twelve Million Two Hundred Thirty-Six Thousand Seven Hundred Seventy Four Pesos and Seventy Four Centavos (P112,236,774.74) for deficiency income tax, VAT, Withholding Tax-Final, Withholding Tax-VAT and Compromise Penalties for taxable year 2010, as

⁴² Docket, Vol. 10, pp. 4625-4626.

⁴³ Docket, Vol. 10, pp. 4602-4609.

⁴⁴ Resolution dated April 6, 2018, Docket, Vol. 10, p. 4671.

⁴⁵ JSFI, Docket, Vol. 6, p. 2685.



well as the corresponding 25% surcharge and 20% deficiency and delinquency interest pursuant to Sections 248 and 249 of the Tax Code.

DISCUSSION/RULING

Section 228 of the NIRC of 1997, as amended, pertinently provides, thus:

SEC. 228. *Protesting of Assessment.* – When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however,* That a preassessment notice shall not be required in the following cases:

xxx

xxx

xxx

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

Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.

Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the



lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable.”

Clearly under the foregoing provision that a taxpayer has thirty (30) days from receipt of the FAN within which to file its administrative protest. It also has sixty (60) days from the filing of the administrative protest to submit all relevant supporting documents.

Section 228 states that if the protest is not acted upon within 180 days from submission of documents, the taxpayer adversely affected by the inaction of the CIR may appeal to the CTA within 30 days from the lapse of the 180-day period.⁴⁶ Therefore, petitioner had 30 days to appeal respondent's denial of its protest to the CTA.⁴⁷

Evidence show that petitioner received the FLD-FAN on June 23, 2014. It had 30 days from receipt of the FLD-FAN or until July 23, 2014 to file a protest. In fine, petitioner timely filed its administrative protest on July 23, 2014.

On June 17, 2015, petitioner received the FDDA issued by OIC-Assistant Commissioner, Large Taxpayers Service, for deficiency income tax, VAT, withholding tax-final, withholding tax-VAT, withholding tax-expanded, withholding tax-compensation, DST, and others-miscellaneous taxes for the year 2010. Petitioner moved for a reconsideration on July 16, 2015.

On January 7, 2016, petitioner received the Final Decision issued by former BIR Commissioner Jacinto-Henares for deficiency income tax, VAT, withholding tax-final, withholding tax-VAT and others- miscellaneous taxes. Counting 30 days from receipt of respondent's Final Decision on January 7, 2016, petitioner had until February 9, 2016⁴⁸ within which to file its Petition for Review with the Court.

⁴⁶ Commissioner of Internal Revenue vs. First Express Pawnshop, G.R. Nos. 172045-46, June 16, 2009.

⁴⁷ Fishwealth Canning Corporation vs. Commissioner of Internal Revenue, G.R. No. 179343, January 21, 2010.

⁴⁸ February 6 and 7 fell on a Saturday and Sunday and February 8, 2016 was declared a special non-working day (Chinese New Year), Proclamation No. 1105, August 20, 2015.



Therefore, the instant Petition for Review was also seasonably filed on February 9, 2016.

On the merits of the case.

On June 17, 2015, petitioner received the FDDA, which indicated the following assessments:⁴⁹

Coverage of the FDDA	Basic	Increments	Total
Income Tax	₱ 689,846.38	₱ 604,934.99	₱ 1,294,781.37
VAT	5,636,522.14	6,404,827.49	12,041,349.64
Withholding Tax - Final	32,026,764.24	36,327,988.15	68,354,752.39
Withholding Tax - VAT	12,810,705.69	14,561,195.26	27,371,900.95
Withholding Tax - Expanded	11,740.22	13,363.56	25,103.78
Withholding Tax - Compensation	44,914.44	49,647.76	94,562.20
Documentary Stamp Tax	734.09	1,652.03	2,386.12
Others-Miscellaneous Taxes	-	78,500.00	78,500.00
Total	₱51,221,227.21	₱58,042,109.24	₱109,184,836.45

On July 16, 2015, petitioner paid the deficiency assessment involving withholding tax-expanded, withholding tax-compensation, DST, and the penalty for alleged failure to include the TINs of seven employees in the Alphalist.

On the same date, petitioner filed a Request for Reconsideration to contest respondent's finding pertaining to the unpaid deficiency tax assessments on income tax, VAT, withholding tax-final, withholding tax-VAT, and portion of the miscellaneous taxes.⁵⁰

On January 7, 2016, petitioner received respondent's Final Decision, finding petitioner liable to pay the following deficiency taxes and compromise penalties:

	Basic	Surcharge	Interest	Compromise	Total
IT	₱ 508,147.76	₱ -	₱ 457,472.20	₱ 30,000.00	₱ 995,619.96
VAT	5,636,522.14	1,409,130.54	5,321,494.60	50,000.00	12,417,147.28
WT-Final	32,026,764.24	8,006,691.06	30,412,264.34	50,000.00	70,495,719.64
WT-VAT	12,810,705.69	3,202,676.42	12,164,905.74	50,000.00	28,228,287.85

⁴⁹ Par. 9, JSFI, Docket, Vol. 6, p. 2684; BIR Records, pp. 688-700.

⁵⁰ Page 2 of the Request for Reconsideration; Annex A of the Petition for Review, Docket, Vol. 1, p. 202; Par. 10, JSFI, Docket, Vol. 6, p. 2684.

Total	₱50,982,139.83	₱12,618,498.02	₱48,356,136.88	₱180,000.00	₱112,136,774.73
Others - Miscellaneous					100,000.00
Total	₱50,982,139.83	₱12,618,498.02	₱48,356,136.88	₱180,000.00	₱112,236,774.73

In its Memorandum⁵¹, petitioner manifested that it will no longer contest respondent's assessment for deficiency income tax and VAT, as in fact it already paid them on February 4, 2016.

The deficiency income tax and VAT assessments are deemed extinguished by virtue of petitioner's payment on February 4, 2016. Thus, the Court shall only discuss the remaining deficiency tax assessments, *i.e.*, withholding tax-final, withholding tax-VAT, and others-miscellaneous taxes.

As stated in the Final Decision⁵², respondent found petitioner liable for deficiency withholding tax-final, withholding tax-VAT, and others-miscellaneous taxes, computed as follows:

WITHHOLDING TAX – FINAL		
Service Fees paid by NCR Cebu to the NCR Group		₱105,220,594.79
Software License Fees		1,535,286.00
Total amount subject to Withholding Tax-Final		₱106,755,880.79
Basic WT-Final at 30%		₱ 32,026,764.24
Add: 25% Surcharge	₱8,006,691.06	
20% Interest (1/16/11-10/15/15)	30,412,264.36	
Compromise Penalty	50,000.00	38,468,955.40
TOTAL FINAL TAX DUE		₱ 70,495,719.64

WITHHOLDING TAX – VAT		
Service Fees paid by NCR Cebu to the NCR Group		₱105,220,594.79
Software License Fees		1,535,286.00
Total		106,755,880.79
12% VAT thereof		₱ 12,810,705.69
Add: 25% Surcharge	₱3,202,676.42	
20% Interest (1/16/11-10/15/15)	12,164,905.74	
Compromise Penalty	50,000.00	15,417,582.16
TOTAL WV DUE		₱28,228,287.85

⁵¹ Docket, Vol. 10, pp. 4647-4648.

⁵² Exhibit "R-15", BIR Records, p. 881.

OTHERS - MISCELLANEOUS TAXES	
Nature of Violation	Amt. of suggested Compromise Penalty
Non-registration of Value Added Tax type	₱ 25,000.00
Non-filing of VAT returns	25,000.00
Non-Submission of Summary Listings-Sales/Purchases	50,000.00
Total Penalties	₱ 100,000.00

Respondent assessed Final Withholding Tax on the payment of Service Fees made by petitioner to NCR Group in the amount of ₱105,220,594.79, as well as, the Software License Fees of ₱1,535,286.00, on the ground that petitioner failed to file a Tax Treaty Relief Application (TTRA) before the transaction in violation of Revenue Memorandum Order (RMO) No. 1-2000 and 72-2010. For this reason, both transactions were subjected to Final Withholding Tax at 30% pursuant to Sections 28(B)(1) of the NIRC of 1997, as amended.

The said Service Fees and Software License Fees were likewise subjected by respondent to VAT Withholding on the same ground. Respondent claims that the use of Software License is considered royalties subject to VAT pursuant to Section 7(B) of RMC No. 44-2005.

**Service Fees from NCR
Group Corp. -
₱105,220,594.79**

Petitioner argues that a prior tax treaty relief application is unnecessary since the subject transactions are not taxable, not on the basis of an international treaty, but based on express provisions of the NIRC, as amended. Petitioner further states that only income derived from sources within the Philippines are subject to withholding tax. Thus, compensation for labor or personal services performed outside the Philippines by non-resident foreign corporation shall not be taxable, as in this case pursuant to Sections 22(I)⁵³ and 23(F),⁵⁴ in relation to Sections 42(A)(3) and (C)(3).⁵⁵

⁵³ SEC. 22. *Definitions.* - When used in this Title:

Petitioner claims that the Service Fees it paid to NCR Group were for services rendered abroad thus, should not be subject to Philippine income tax, and consequently, should not be subject to withholding tax.

Further, petitioner avers that the service fees were accrued or paid in consideration of the back-office support services performed outside the Philippines, which included general administrative, management, advisory, technical, and professional services, which were made pursuant to the Integrated Service Agreement (ISA) between petitioner and NCR Corporation, the terms of which petitioner also implemented in respect of the other non-resident foreign affiliates.⁵⁶

It must be noted at this point that the obligation to comply with a tax treaty must take precedence over the objective of RMO No. 1-2000,⁵⁷ and that a prior application for tax treaty relief is not mandatory before a taxpayer may enjoy the relief provided under Philippine tax treaties⁵⁸.

As to whether these transactions are subject to withholding tax, the First Division of the Court has eloquently discussed this matter as follows:

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(I) The term '*nonresident foreign corporation*' applies to a foreign corporation not engaged in trade or business within the Philippines.

⁵⁴ SEC. 23. *General Principles of Income Taxation in the Philippines.* – Except when otherwise provided in this Code:

xxx xxx xxx

(F) A foreign corporation, whether engaged or not in trade or business in the Philippines, is taxable only on income derived from sources within the Philippines.

⁵⁵ SEC. 42. *Income from Sources Within the Philippines.* –

(A) *Gross Income From Sources Within the Philippines.* – The following items of gross income shall be treated as gross income from sources within the Philippines:

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(3) *Services.* – Compensation for labor or personal services performed in the Philippines;

xxx xxx xxx

(C) *Gross Income From Sources Without the Philippines.* – The following items of gross income shall be treated as income from sources without the Philippines:

xxx xxx xxx

(3) Compensation for labor or personal services performed without the Philippines; x x x

⁵⁶ Exhibit "P-19", Judicial Affidavit of Marietta B. Ticagan, Q32 & A32, Docket, Vol. 4, pp. 1898-1899; Exhibit "P-16-d", Judicial Affidavit of Mr. Prabal Mitra, Q32 and A32, Docket, Vol. 8, p. 3560.

⁵⁷ *Deutsche Bank AG Manila Branch vs. Commissioner of Internal Revenue*, G.R. No. 188550, August 19, 2013.

⁵⁸ *CBK Power Company Limited vs. Commissioner of Internal Revenue*, G.R. Nos. 193383-84 and 193407-08, January 14, 2015.



In general, a non-resident foreign corporation is liable for gross income tax on income derived from all sources within the Philippines. Section 28(B)(1) of the NIRC of 1997, as amended, provides:

SEC. 28. *Rates of Income Tax on Foreign Corporations.* –

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(B) *Tax on Nonresident Foreign Corporation.* –

(1) *In General.* – Except as otherwise provided in this Code, a foreign corporation not engaged in trade or business in the Philippines shall pay a tax equal to thirty-five percent (35%) of the gross income received during each taxable year from all sources within the Philippines, such as interests, dividends, rents, royalties, salaries, premiums (except reinsurance premiums), annuities, emoluments or other fixed determinable annual, periodic or casual gains, profits and income, and capital gains, except capital gains subject to tax under subparagraphs 5(c): *Provided, That* effective January 1, 2009, the rate of income tax shall be thirty percent (30%).

On the other hand, to be liable for VAT, a non-resident foreign corporation should render service in the Philippines. Sections 105 and 108(A) of the NIRC of 1997, as amended, state:

SEC. 105. *Persons Liable.* – Any person who, in the course of trade or business, sells, barter, exchanges, leases goods or properties, renders services, and any person who imports shall be subject to the value-added tax (VAT) imposed in Sections 106 to 108 of this Code.

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The rule of regularity, to the contrary notwithstanding, services as defined in this

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Code rendered in the Philippines by nonresident foreign persons shall be considered as being rendered in the course of trade or business.

xxx xxx xxx

SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties.* –

(A) *Rate and Base of Tax.* – 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 xxx

Based on above-mentioned provisions of the NIRC, **in order for petitioner not to be subject to FWT, it must prove that MidAmerican Energy Holdings Company is (1) a foreign corporation not engaged in business in the Philippines; and (2) its source of income came from outside of the Philippines. On the other hand, in order for petitioner not to be subject to WVAT, it must prove that MidAmerican Energy Holdings Company is (1) a non-resident foreign corporation; and (b) it rendered services outside of the Philippines."**⁵⁹ (*Emphasis supplied*)

As consistently ruled by this Court in a number of cases⁶⁰, to be considered as non-resident foreign corporation doing business outside the Philippines, such must be proven by presenting, for each corporation involved, at the very least, **both** Securities and Exchange Commission (SEC) Certification of Non-Registration **and** proof of incorporation

⁵⁹ Visayas Geothermal Power Company vs. Commissioner of Internal Revenue, CTA Case No. 8425, November 17, 2014, as affirmed in CTA EB No. 1291, September 21, 2016.

⁶⁰ Deutsche Knowledge Services Pte. Ltd. vs. Commissioner of Internal Revenue, CTA Case No. 9079, January 9, 2018; Deutsche Knowledge Services Pte. Ltd. vs. Commissioner of Internal Revenue, CTA Case No. 8065, September 20, 2017; Deutsche Knowledge Services Pte. Ltd. vs. Commissioner of Internal Revenue, CTA Case Nos. 8623, 8656, 8661 & 8685, August 4, 2017; Emerson Electric (Asia) Limited-ROHQ vs. Commissioner of Internal Revenue, CTA Case No. 8657, December 21, 2016; and Procter & Gamble Asia, Pte. Ltd. vs. Commissioner of Internal Revenue, CTA Case No. 7820, June 22, 2016.



or registration, and that there is no other indication which would disqualify said entity in being classified as a non-resident foreign corporation.

According to petitioner, the non-resident foreign affiliates to whom it paid service fees in the total amount of ₱105,220,594.79 are the following:

1. NCR Corporation;
2. NCR (Beijing) Financial Equipment System Company Limited;
3. NCR Korea Ltd.;
4. NCR Corporation India Pvt Ltd.;
5. NCR Malaysia Sdn Bhd;
6. NCR Singapore Pte Ltd.;
7. NCR Australia Pty Limited;
8. NCR Asia Pacific Pte Ltd.;
9. NCR Thailand Ltd.; and
10. NCR Japan Ltd.

Petitioner claims that NCR Corporation is the ultimate parent company of NCR Cebu. The other entities are petitioner's non-resident foreign affiliates belonging to the NCR APAC Group.⁶¹

To prove that the above-named entities are not registered corporations/partnerships in the Philippines and were incorporated/organized/domiciled abroad, petitioner presented in evidence the SEC Certifications of Non-Registration of Company,⁶² as well as the copies of Certificates of Registration of each company⁶³.

Except for "NCR (Beijing) Financial Equipment System Company Limited", where the SEC Certification provided by petitioner pertains to "NCR Beijing Sales and Management"⁶⁴, the rest of its foreign affiliated companies are considered as non-resident foreign corporations not engaged in business in the Philippines, to wit:

⁶¹ Exhibit "P-19", Judicial Affidavit of Marietta B. Ticagan, Q25 & A25, Docket, Vol. 4, pp. 1897-1898; Exhibit "P-16-d", Judicial Affidavit of Mr. Prabal Mitra, Q25 and A25, Docket, Vol. 8, p. 3559.

⁶² Exhibits "P-3" to "P-3-I".

⁶³ Exhibits "P-4" to "P-4-I".

⁶⁴ Exhibit "P-3-a".

Name of Company	SEC Certification of Non-Registration of Company	Certificate of Registration
NCR Corporation	Exhibit "P-3"	Exhibit "P-4"
NCR (Beijing) Financial Equipment System Company Limited	NONE	Exhibit "P-4-A"
NCR Korea Ltd.	Exhibit "P-3-b"	Exhibit "P-4-B"
NCR Corporation India Pvt Ltd.	Exhibit "P-3-c"	Exhibit "P-4-C"
NCR Malaysia Sdn Bhd	Exhibit "P-3-d"	Exhibit "P-4-D"
NCR Singapore Pte Ltd.	Exhibit "P-3-e"	Exhibit "P-4-E"
NCR Australia Pty Limited	Exhibit "P-3-f"	Exhibit "P-4-F"
NCR Asia Pacific Pte Ltd.	Exhibit "P-3-g"	Exhibit "P-4-G"
NCR Thailand Ltd.	Exhibit "P-3-h"	Exhibit "P-4-H"
NCR Japan Ltd.	Exhibit "P-3-i"	Exhibit "P-4-I"

Further, it was ruled that "source of income" relates to the property, activity or service that produced the income. With respect to rendition of labor or personal service, it is the place where the labor or service was performed that determines the source of income.⁶⁵

In the present case, the source of income of NCR Group are the general administrative, management, advisory, technical, and professional services that were provided to petitioner. In other words, it is paramount to determine where such services were performed.

Petitioner presented the ISA⁶⁶ it entered into with NCR Corporation to purportedly prove the nature of the services performed by its foreign affiliates and that the same were performed outside the Philippines. In defining the service to be rendered, Section 1.1 of the said agreement provides that "[t]he Service Provider ('referring to NCR Group'), as directed and requested by the Service Recipient, agrees that it shall render the Services, that are specified and described in 'Appendix A' which is attached hereto, to the Service Recipient." However, upon examination of the said "Appendix A", nothing is contained therein except the name and address of petitioner, *i.e.*, "eBloc 1 Tower, Cebu IT Park, Apas, Lahug, Cebu City, Philippines".

⁶⁵ Commissioner of Internal Revenue vs. Juliane Baier-Nickel, as represented by Marina Q. De Guzman (Attorney-in-fact), G.R. No. 153793, August 29, 2006.

⁶⁶ Exhibit "P-5", Docket, Vol. 9, pp. 4265-4270.

Nonetheless, the Certifications on Offshore Services⁶⁷ executed by the Tax Director, Manager, or other authorized representative of petitioner's foreign affiliates provide a clearer view of the nature of services provided to the latter. Also, as stated in their certifications "no physical work was conducted in the Philippines, as all the services rendered by the Corporation or its employees and representatives, as summarized in Appendix A attached hereto, were performed outside the Philippines and are not effectively connected to a permanent establishment in the Philippines."

A scrutiny of the appendices or annexes attached in each certifications shows that the same refer to the "2010 ISA Cost Contribution – Service Provider Documentation" which indicated the detailed description of the nature of the services that a particular NCR entity may perform to its affiliated company, such as Global IT Services – Data and Application Servers, Workgroup Services, Applications, Human Resources Service Delivery Centers, Technology Support, Compensation Benefits, Human Resources Global HR – Regional Service Delivery Management and Support, Asia Pacific Account to Reporting Team and Associate Service Team, Compensation and Benefits, and Treasury Functions and Operations for Asia Pacific, Japan and Eastern Europe Regions.

Petitioner also presented the Schedule of Service Fees⁶⁸ showing the name of the alleged service provider and the corresponding service fees paid thereto, to wit:

Month	FML-CSUB	Service Fees/Allocated Charges	PhP	US\$
201001	6768-9620	ISA CHARGE TRUE-UP	1,567,451.24	33,596.64
201004	6768-9620	ISA CHARGE ADJ 2009	3,584,227.68	80,780.43
201004	6768-9620	ISA CHARGE Q1 2010	21,760,285.04	490,427.88
201004	6768-9620	GSL-INDIA Q1 2010	576,880.99	13,001.60
201007	6768-9620	ISA CHARGE Q2 2010	22,953,791.78	494,001.76
201007	6768-9620	GSL-INDIA Q2 2010	874,276.15	18,815.80
201010	6768-9620	ISA CHARGE Q3 2010	23,836,349.52	554,011.61
201010	6768-9620	GSL-INDIA Q3 2010	907,074.99	21,082.51
201012	6768-9620	ISA CHARGE Q4 2010 ASIAN CORRECTION	(45,470.35)	(1,038.61)
201012	6768-9620	ISA CHARGE Q4 2010	28,380,791.28	648,259.28

⁶⁷ Exhibits "P-6" to "P-6-I", Docket, Vol. 9, pp. 4271-4494.

⁶⁸ Exhibit "P-7", Docket, Vol. 9, pp. 4495-4496.

201012	6768-9620	GSL-INDIA Q4 2010	824,936.47	18,842.77
Total			₱105,220,594.79	\$2,371,781.67

To corroborate the foregoing, petitioner presented the Debit Notes⁶⁹ which states that the *"Services were rendered within the country location of the servicing NCR entities. Please see supporting details."*

The Court noticed that these Debit Notes were issued by Global ISA Pool and NCR Global Solutions Limited, which are not among those affiliated companies to which the ₱105,220,594.79 service fees were paid. Despite such fact, however, the "supporting details" attached thereto clearly provide a list of NCR entities with the corresponding countries where the services were rendered.

The data in the schedule of service fees and the supporting details attached to the Debit Notes may be summarized as follows:

Amount	Budget Description	Budget ID	Country where the service was rendered	Service Provider
<i>Invoice No. 1001000004 dated 23-Jan-10 issued by Global ISA Pool</i>				
\$ 27,734.84	ITS Applications Development and Support	I201	United States	NCR Corporation
5,861.80	Workgroup Services	I208	United States	NCR Corporation
\$ 33,596.64				
<i>Invoice No. 1001000013 dated 22-Apr-10 issued by Global ISA Pool</i>				
(\$ 53,454.25)	ITS Applications Development and Support - Gurgaon	I202	India	NCR Corporation India Pvt Ltd. - Gurgaon India Facility (STPI)
65,094.30	ITS Applications Development and Support - Gurgaon			
69,140.38	ITS Applications Development and Support - Gurgaon			
\$ 80,780.43				
<i>Invoice No. 1001000003 dated 22-Apr-10 issued by Global ISA Pool and Invoice No. 1004000001 dated 23-Apr-10 issued by NCR Global Solutions Limited</i>				
\$ 4,248.51	APAC & CEE RTC (Treasury)	D701	Singapore	Asia Pacific Region Office
1,753.32	HR C&B	G704	United	NCR Corporation

⁶⁹ Exhibit "P-8", Docket, Vol. 9, pp. 4497-4500, Vol. 10, pp. 4501-4513.

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			States	
			Singapore	NCR Singapore Pte Ltd
25,058.93	HR Shared Service Centers	G705	United States	NCR Corporation
41,162.53;	HR Region/Service Centers APAC	G706	China	NCR Beijing Sales and Marketing
10,216.78			Korea	NCR Korea Ltd
			Malaysia	NCR Malaysia Sdn Bhd
			Singapore	NCR Singapore Pte Ltd
			Australia	NCR Australia Pty Limited
			Thailand	NCR Thailand Ltd
219,718.57	ITS Applications Development & Support	I201	United States	NCR Corporation
38,368.84	ITS Applications Development & Support – Gurgaon	I202	India	NCR Corporation India Pvt Ltd - Gurguaon India Facility (STPI)
47,109.96	ITS Workgroup Services	I203	United States	NCR Corporation
(8,554.36)	GNS Data Circuits	I209	United States	NCR Corporation
105,660.28	Global Processing - Data Servers	I210	United States	NCR Corporation
15,901.32	Information Security	I211	United States	NCR Corporation
2,784.81	ITS Help Desk India	I205	India	NCR Corporation India Pvt Ltd
\$ 503,429.49				
<i>Invoice No. 1001000004 dated 23-Jul-10 issued by Global ISA Pool and Invoice No. 1004000001 dated 15-Jul-10 issued by NCR Global Solutions Limited</i>				
\$ 4,459.81	APAC & CEE RTC (TREASURY)	D701	Singapore	Asia Pacific Region Office
1,740.49	HR C&B	G704	United States	NCR Corporation
			Singapore	NCR Singapore Pte Ltd
24,658.18	HR Shared Service Centers	G705	United States	NCR Corporation
40,716.03; 15,195.35	HR Region/Service Centers APAC	G706	China	NCR Beijing Sales and Marketing
			Korea	NCR Korea Ltd
			Malaysia	NCR Malaysia Sdn Bhd
			Singapore	NCR Singapore Pte Ltd
			Australia	NCR Australia Pty Limited
			Thailand	NCR Thailand Ltd

211,895.10	ITS Applications Development & Support	I201	United States	NCR Corporation
44,516.74	ITS Applications Development & Support - Gurgaon	I202	India	NCR Corporation India Pvt Ltd - Gurguaon India Facility (STPI)
52,460.22	ITS Workgroup Services	I203	United States	NCR Corporation
3,620.46	ITS Help Desk India	I205	India	NCR Corporation India Pvt Ltd
(10,526.84)	GNS Data Circuits	I209	United States	NCR Corporation
103,050.77	Global Processing - Data Servers	I210	United States	NCR Corporation
21,031.25	Information Security	I211	United States	NCR Corporation
\$ 512,817.56				
<i>Invoice No. 1001000001 dated 28-Oct-10 Issued by Global ISA Pool and Invoice No. 1004000001 dated 28-Oct-10 issued by NCR Global Solutions Limited</i>				
\$ 956.05	APAC & CEE RTC (TREASURY)	D701	Singapore	Asia Pacific Region Office
12,418.26; 12,621.74	2010 FSSC APAC - FIN	G703	India	NCR Corporation India Pvt Ltd
			Japan	NCR Japan Ltd
3,424.04	HR C&B		United States	NCR Corporation
		G704	Singapore	Asia Pacific Region Office
28,942.18	HR Shared Service Center	G705	United States	NCR Corporation
46,222.03; 5,151.10	HR Region/Service Centers APAC	G706	China	NCR Beijing Sales and Marketing
			Korea	NCR Korea Ltd
			Malaysia	NCR Malaysia Sdn Bhd
			Singapore	NCR Singapore Pte Ltd
			Australia	NCR Australia Pty Limited
			Thailand	NCR Thailand Ltd
226,220.70	ITS Applications Development & Support	I201	United States	NCR Corporation
40,982.20	ITS Applications Development & Support - Gurgaon	I202	India	NCR Corporation India Pvt Ltd - Gurguaon India Facility (STPI)
54,175.68	ITS Workgroup Services	I203	United States	NCR Corporation
3,309.66	ITS Help Desk India	I205	India	NCR Corporation India Pvt Ltd
(5,492.89)	GNS Data Circuits	I209	United States	NCR Corporation
120,146.37	Global Processing - Data Servers	I210	United States	NCR Corporation

26,017.00	Information Security	I211	United States	NCR Corporation
\$ 575,094.12				
<i>Invoice Nos. 1001000001 dated 28-Oct-10 and 30-Dec-10 issued by Global ISA Pool and Invoice No. 1004000001 dated 29-Dec-10 issued by NCR Global Solutions Limited</i>				
\$ 1,479.79	APAC & CEE RTC (TREASURY)	D701	Singapore	Asia Pacific Region Office
(7,888.52)	2010 FSSC APAC - FIN	G703	India	NCR Corporation India Pvt Ltd
7,817.07			Japan	NCR Japan Ltd
7,724.60	HR C&B	G704	United States	NCR Corporation
			Singapore	Asia Pacific Region Office
28,431.69	HR Shared Service Center	G705	United States	NCR Corporation
62,246.30; 7,533.25	HR Region/Service Centers APAC	G706	China	NCR Beijing Sales and Marketing
			Korea	NCR Korea Ltd
			Malaysia	NCR Malaysia Sdn Bhd
			Singapore	NCR Singapore Pte Ltd
			Australia	NCR Australia Pty Limited
			Thailand	NCR Thailand Ltd
250,762.24	ITS Applications Development & Support	I201	United States	NCR Corporation
87,956.08	ITS Applications Development & Support - Gurgaon	I202	India	NCR Corporation India Pvt Ltd - Gurguaon India Facility (STPI)
50,005.18	ITS Workgroup Services	I203	United States	NCR Corporation
3,492.45	ITS Help Desk India	I205	India	NCR Corporation India Pvt Ltd
(7,800.14)	GNS Data Circuits	I209	United States	NCR Corporation
111,964.66	Global Processing - Data Servers	I210	United States	NCR Corporation
24,948.18	Information Security	I211	United States	NCR Corporation
23,197.39	ITS Application - ERP	I212	United States	NCR Corporation
15,231.85	ITS Field Operations	I213	United States	NCR Corporation
(1,038.61)	Asian Correction Part 2	CORR2		
\$ 666,063.44				
\$2,371,781.67				

Consequently, petitioner was able to prove that the service fees in the amount of ₱105,220,594.79 were paid to non-resident foreign corporations not engaged in business in the Philippines for services rendered outside the Philippines. Thus, respondent's assessment subjecting petitioner to deficiency withholding tax-final and withholding tax-VAT on the Service Fees paid to NCR Group must necessarily be cancelled.

***Software License
Fees – ₱1,535,286.00***

Similar to the Service Fees paid to NCR Group, petitioner submits that the Software License Fees, being income derived from sources outside the Philippines, should not be subject to Philippine income tax and consequently, should not be subject to final tax in the Philippines.

Petitioner maintains that royalties from property located in the Philippines or from any interest in such property are considered as income from sources within the Philippines and thus, will be subject to Philippine income tax and consequently, final tax. Conversely, royalties from property located without the Philippines or from any interest in such property including royalties for the use of or for the privilege of using without the Philippines, patents, copyrights, secret processes and formulas, goodwill, trademarks, trade brands, franchises and other like properties are considered as income from sources outside the Philippines, thus, should not be subject to Philippine income tax and final tax.

Petitioner hinges its contentions on the provisions of the NIRC of 1997, as amended, particularly, Sections 42(A)(4) and (C)(4)⁷⁰ in relation to Section 23(F).

⁷⁰ SEC. 42. *Income from Sources Within the Philippines.* –

(A) *Gross Income From Sources Within the Philippines.* – The following items of gross income shall be treated as gross income from sources within the Philippines:

xxx xxx xxx

(4) *Rentals and Royalties.* – Rentals and royalties from property located in the Philippines or from any interest in such property, including rentals or royalties for –

(C) *Gross Income From Sources Without the Philippines.* – The following items of gross income shall be treated as income from sources without the Philippines.

xxx xxx xxx

(4) Rentals or royalties from property located without the Philippines or from any interest in such property including rentals or royalties for the use of or for the privilege of using without

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Petitioner claims that said software license fees relate to services rendered by the following foreign entities: (a) TechSource Systems Pte. Ltd., (b) Insight Direct USA, Inc., and (c) MKS Systems Limited. Further, these license fees were accrued or paid in consideration of the use of accounting software acquired from the said enumerated foreign entities; and that the fees arose from the lease and use of their properties outside the Philippines.

Petitioner alleges that it was provided the installation package to enable the installation and implementation of the software by downloading it; that software license fees also included costs for the support services related to the software, including charges for the license maintenance and server maintenance; and that maintenance charges included the provision of software updates, periodic fixes and error corrections for the software products.⁷¹

Moreover, petitioner asserts that the software support services were performed by said foreign entities in the countries where they were located; and that they did not send any personnel in the Philippines to provide support services to petitioner in 2010.⁷²

The Court is not persuaded.

As earlier discussed, for petitioner not to be subjected to withholding tax, it must prove that the service providers are (1) foreign corporations not engaged in business in the Philippines, and (2) its source of income came from outside of the Philippines.

However, other than the Schedule of the Software License Fees⁷³ and the corresponding Invoices⁷⁴ issued by Techsource Systems Pte Ltd., Insight Direct USA, Inc., and MKS System Limited, as well as the Judicial Affidavit⁷⁵ of petitioner's Tax Accountant, Marietta B. Ticagan and the

the Philippines, patents, copyrights, secret processes and formulas, goodwill, trademarks, trade brands, franchises and other like properties; and x x

⁷¹ Exhibit "P-16-d", Judicial Affidavit of Mr. Prabal Mitra, Q57 and A57, Docket, Vol. 8, p. 3564.

⁷² Exhibit "P-16-d", Judicial Affidavit of Mr. Prabal Mitra, Q58 and A58, Docket, Vol. 8, p. 3565.

⁷³ Exhibit "P-9".

⁷⁴ Exhibit "P-10".

⁷⁵ Exhibit "P-19", Docket, Vol. 4, pp. 1890-1906, particularly, Answers to Q50 to Q52.

Judicial Affidavit of the Accounting Manager of the NCR APAC Group, Prabal Mitra, no other evidence was provided by petitioner to prove that the entities which rendered the services were foreign corporations not engaged in business in the Philippines and that the services were indeed performed outside the Philippines.

Thus, respondent's assessment subjecting the software license fees to withholding tax must be upheld. Accordingly, petitioner is liable to pay the basic deficiency withholding tax-final and withholding tax-VAT in the amounts of ₱460,585.80 and ₱184,234.32, respectively, as determined below:

	Withholding Tax-Final	Withholding Tax-VAT
Software License Fees	₱1,535,286.00	₱1,535,286.00
x Rate	30%	12%
Basic Tax Due	₱460,585.80	₱184,234.32

***Others - Miscellaneous
Taxes - ₱100,000.00***

Respondent imposed compromise penalty amounting to ₱100,000.00 against petitioner for its failure to file the returns/attachments required by law or regulation, pursuant to Section 255 of the NIRC of 1997, as amended, as determined using the schedule of suggested compromise penalties prescribed under RMO No. 19-2007, detailed as follows:

Nature of Violation	Amount	Violated Provision	Amount of suggested compromise penalty
No registration of VAT type	₱25,000.00	Sec 236(G) NIRC	₱ 25,000.00
Non-filing of VAT Returns	25,000.00	Sec 114 NIRC	25,000.00
Non-submission of Summary Listings-Sales/Purchases	₱50,000.00	RR 16-2005 Sec.4.114-3(1)	50,000.00
Total Penalties			₱100,000.00

Such imposition cannot be sustained.

Per RMO No. 01-90, compromise penalties are only amounts suggested in settlement of criminal liability, and may not be imposed or exacted on the taxpayer in the event that a taxpayer refuses to pay the same. It is well-settled that the Court cannot 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 that is so compromised, and the choice of paying or not paying it distinctly belongs to the taxpayer.⁷⁶ Absent a showing that herein petitioner consented to the compromise penalty, its imposition should be deleted. The imposition of the compromise penalty without the taxpayer's conformity is illegal and unauthorized.⁷⁷

Since there is nothing in the records which shows that petitioner agreed to pay the compromise penalty, the amount of suggested compromise penalties of ₱100,000.00 cannot be sustained.

WHEREFORE, premises considered, the instant Petition for Review is **PARTIALLY GRANTED**.

Accordingly, the assessment for miscellaneous taxes (compromise penalty) is **CANCELLED** and **SET ASIDE**.

On the other hand, the deficiency withholding tax-final and withholding tax-VAT are **AFFIRMED but with MODIFICATION**. Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of **₱2,280,882.09**, representing basic deficiency withholding tax-final and withholding tax-VAT and the twenty-five percent (25%) surcharge, twenty percent (20%) deficiency interest and 20% delinquency interest imposed on the deficiency withholding tax-final and withholding tax-VAT under Sections 248(A)(3) and 249(B) and (C) of the NIRC of 1997,

⁷⁶ *The Philippines International Fair, Inc. vs. The Collector of Internal Revenue, et al.*, G.R. Nos. L-12928 and L-12932, March 31, 1962.

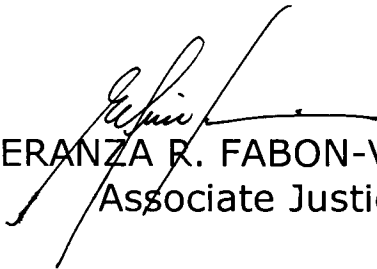
⁷⁷ *Commissioner of Internal Revenue vs. Lianga Bay Logging Co., Inc., et al.*, G.R. No. L-35266, January 21, 1991.

as amended, respectively, computed until December 31, 2017, as determined below:

	FWT	FVAT	TOTAL
Basic	₱ 460,585.80	₱ 184,234.32	₱ 644,820.12
Surcharge (25%)	115,146.45	46,058.58	161,205.03
Deficiency Interest (20%) until January 7, 2016 ⁷⁸			
FWT - 1/11/2011 to 1/7/2016 (₱460,585.80 x 20% x 1,822 days/365 days)	459,828.67		459,828.67
FWVAT - 1/10/2011 to 1/7/2016 (₱184,234.32 x 20% x 1,823 days/365 days)		184,032.42	184,032.42
Total Amount Due, January 7, 2016	₱1,035,560.92	₱414,325.32	₱1,449,886.24
20% Deficiency Interest from January 8, 2016 until December 31, 2017			
FWT - 1/8/2016 to 12/31/2016 (₱460,585.80 x 20% x 724 days/365 days)	182,720.07		182,720.07
FWVAT - 1/8/2016 to 12/31/2016 (₱184,234.32 x 20% x 724 days/365 days)		73,088.03	73,088.03
20% Delinquency Interest from January 8, 2016 until December 31, 2017			
FWT - 1/8/2016 to 12/31/2017 (₱1,035,560.92 x 20% x 724 days/365 days)	410,819.79		410,819.79
FWVAT - 1/8/2016 to 12/31/2017 (₱414,325.32 x 20% x 724 days/365 days)		164,367.96	164,367.96
Total	₱1,629,100.78	₱651,781.31	₱2,280,882.09

In addition, petitioner is **ORDERED TO PAY** delinquency interest at the rate of twelve percent (12%) on the total amount due of ₱1,449,886.24 as of January 7, 2016, as determined above, computed from January 1, 2018 until full payment thereof, pursuant to Section 249(C) of the NIRC of 1997, as amended by Republic Act No. 10963, also known as Tax Reform for Acceleration and Inclusion (TRAIN) and as implemented by Revenue Regulations No. 21-2018.

SO ORDERED.


ESPERANZA R. FABON-VICTORINO
Associate Justice

⁷⁸ Due date of payment per Final Decision, Exhibit "R-15".

I Concur:



MA. BELEN M. RINGPIS-LIBAN
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.



ESPERANZA R. FABON-VICTORINO
Associate Justice
Acting Chairperson

CERTIFICATION

Pursuant to Section 13 of Article VIII of the Constitution, and the Division Acting 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's Division.



ROMAN G. DEL ROSARIO
Presiding Justice