REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

NIKKEN PHILIPPINES, INC., Petitioner,	**CTA CASE NO. 8714**
	Members:
- versus -	**CASTAÑEDA, JR.,** *Chairperson, and* **CASANOVA,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: NOV 2 3 2016 4:17 pm

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RESOLUTION

For resolution is petitioner's **Motion for Reconsideration**, filed on July 11, 2016, without respondent's comment despite due notice as per Records Verification dated September 2, 2016.

Petitioner seeks reconsideration of the Court's Decision promulgated on June 23, 2016, which affirmed with modifications the assessments issued by respondent for taxable year 2006 and held petitioner liable to pay deficiency income tax and deficiency expanded withholding tax (EWT) in the amount of ₱10,085,402.74, inclusive of surcharge.

In assailing the aforesaid Decision, petitioner anchors its arguments on the following grounds:

I. Respondent's tax deficiency assessment is void for lack of legal and factual basis;

II. Respondent's assessment for expanded withholding tax deficiency was issued beyond the prescriptive period and/or is devoid of any valid basis; and

III. Respondent gravely erred in disallowing certain income payments to be deducted from petitioner's taxable income on the alleged ground that they were not duly subjected to expanded withholding tax.

Petitioner contends that the Preliminary Assessment Notice (PAN) and Final Assessment Notice (FAN) are bereft of any factual and legal bases. Allegedly, any advice or discussion later on given by respondent cannot cure the defect of the PAN and FAN to inform the factual and legal bases of the same. Petitioner claims that the figures stated therein are arbitrary, and has left petitioner scrambling to understand the basis of such figures.

According to petitioner, it has diligently studied, reviewed and researched the figures stated in the PAN and FAN just to come up with the best protest it could in order to defend itself. Petitioner argues that such diligence should not be used against it to presume respondent's compliance with the mandate of the law in the issuance of the PAN and FAN. Petitioner also posits that although the Final Decision on Disputed Assessment (FDDA) dated September 21, 2012 provided a breakdown of the computation for the alleged tax deficiencies, respondent failed to indicate the facts and the law on which the assessment has relied upon. Being so, it is alleged that respondent has unjustly prevented petitioner from being fully apprised of the basis for its tax liabilities. As such, the FDDA and the FAN are allegedly void and must be cancelled.

Petitioner insists that portion of the assailed Decision stating that due to failure of petitioner to establish that the subject deficiency EWT pertains to the months of January to May 2006, the entire deficiency EWT shall be considered as pertaining to the unprescribed months of June to December 2006, is confiscatory, oppressive and arbitrary. It is alleged that there is no law or provision in the Philippine tax laws that would support such conclusion. Petitioner claims that the statute of limitations on assessment and collection of taxes is for the protection of the taxpayer and, thus, shall be construed liberally in its favor.

It is further claimed by petitioner that to consider the entire deficiency EWT assessment only for the months of June to December 2006 does not protect the taxpayer and rather runs contrary with the provisions of the tax laws. In such instance, the Court allegedly extends the prescriptive period for the prescribed assessments; thus, it is contrary to law. Allegedly, respondent having failed to state with particularity the extent of petitioner's deficiency EWT for each month of taxable year 2006, the former has failed to sufficiently apprise the latter of the factual and legal basis for its EWT deficiency.

The Court finds the Motion for Reconsideration unmeritorious.

After a thorough evaluation of the arguments presented by petitioner, the Court finds the same as mere rehash of the facts and issues which have already been passed upon extensively in the assailed Decision. Nevertheless, the Court shall resolve and discuss petitioner's allegations.

Section 228 of the Tax Code provides that the taxpayer shall be informed in writing of the law and the facts on which the assessment is made, *viz*:

> "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.**" (*Emphasis supplied*)

The Court takes into consideration the case of *Commissioner of Internal Revenue vs. United Salvage and Towage (Phils.), Inc.*[1], wherein the Supreme Court ruled that the Commissioner of Internal Revenue should attach a detailed notice of discrepancy or state an explanation why a certain amount is collectible against a taxpayer and how the same was arrived at in order to inform the taxpayer of the legal and factual bases of the tax assessment, to wit:

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[1] G.R. No. 197515, July 2, 2014.

"Indeed, Section 228 of the Tax Code provides that the taxpayer shall be informed in writing of the law and the facts on which the assessment is made. Otherwise, the assessment is void. To implement the aforesaid provision, Revenue Regulation No. 12-99 was enacted by the BIR, of which Section 3.1.4 thereof reads:

> 3.1.4. *Formal Letter of Demand and Assessment Notice.* –The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. ***The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void.*** The same shall be sent to the taxpayer only by registered mail or by personal delivery. x x x

It is clear from the foregoing that a taxpayer must be informed in writing of the legal and factual bases of the tax assessment made against him. The use of the word 'shall' in these legal provisions indicates the mandatory nature of the requirements laid down therein.

In the present case, **a mere perusal of the FAN for the deficiency EWT for taxable year 1994 will show that other than a tabulation of the alleged deficiency taxes due, no further detail regarding the assessment was provided by petitioner. Only the resulting interest, surcharge and penalty were anchored with legal basis. Petitioner should have at least attached a detailed notice of discrepancy or stated an explanation why the amount of P48,461.76 is collectible against respondent and how the same was arrived at. Any short-cuts to the prescribed content of the assessment or the process thereof should not be countenanced**, x x x." (*Emphasis supplied*)

Likewise, the Supreme Court has reiterated the aforesaid ruling in the case of *Samar-I Electric Cooperative vs. Commissioner of Internal Revenue* [2], that when the Commissioner of Internal Revenue provided a taxpayer of the detailed notice of discrepancy and a computation on how deficiency taxes were computed, the latter was informed of the factual and legal bases of the assessment, *viz*:

"Both Section 228 of the NIRC of 1997 and Section 3.1.4 of RR No. 12-99 clearly require the written details on the nature,

[2] G.R. No. 193100, December 10, 2014.

factual and legal bases of the subject deficiency tax assessments. The reason for the mandatory nature of this requirement is explained in the case of *Commissioner of Internal Revenue v. Reyes*:

> A void assessment bears no valid fruit.
>
> The law imposes a substantive, not merely a formal, requirement. To proceed heedlessly with tax collection without first establishing a valid assessment is evidently violative of the cardinal principle in administrative investigations: that taxpayers should be able to present their case and adduce supporting evidence. In the instant case, respondent has not been informed of the basis of the estate tax liability. **Without complying with the unequivocal mandate of first informing the taxpayer of the government's claim, there can be no deprivation of property, because no effective protest can be made.** The haphazard shot at slapping an assessment, supposedly based on estate taxation's general provisions that are expected to be known by the taxpayer, is utter chicanery.
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> Even a cursory review of the preliminary assessment notice, as well as the demand letter sent, reveals the lack of basis for – not to mention the insufficiency of – the gross figures and details of the itemized deductions indicated in the notice and the letter. **This Court cannot countenance an assessment based on estimates that appear to have been arbitrarily or capriciously arrived at.** Although taxes are the lifeblood of the government, their assessment and collection 'should be made in accordance with law as any arbitrariness will negate the very reason for government itself.' (Emphasis supplied; citations omitted)

In *Commissioner of Internal Revenue v. Enron Subic Power Corporation,* we held that the law requires that the legal and factual bases of the assessment be stated in the formal letter of demand and assessment notice, and that the alleged 'factual bases' in the advice, preliminary letter and 'audit working papers' did not suffice. Thus:

> Both the CTA and the CA concluded that the deficiency tax assessment merely itemized the deductions disallowed and included these in the gross income. It also imposed the preferential rate of 5% on some items categorized by Enron as costs. The legal and factual bases were, however, not indicated.

> The CIR insists that an examination of the facts shows that Enron was properly apprised of its tax deficiency. During the pre-assessment stage, the CIR advised Enron's representative of the tax deficiency, informed it of the proposed tax deficiency assessment through a preliminary five-day letter and furnished Enron a copy of the audit working paper allegedly showing in detail the legal and factual bases of the assessment. The CIR argues that these steps sufficed to inform Enron of the laws and facts on which the deficiency tax assessment was based.
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> We disagree. **The advice of tax deficiency, given by the CIR to an employee of Enron, as well as the preliminary five-day letter, were not valid substitutes for the mandatory notice in writing of the legal and factual bases of the assessment.** These steps were mere perfunctory discharges of the CIR's duties in correctly assessing a taxpayer. The requirement for issuing a preliminary or final notice, as the case may be, informing a taxpayer of the existence of a deficiency tax assessment is markedly different from the requirement of what such notice must contain. **Just because the CIR issued an advice, a preliminary letter during the pre-assessment stage and a final notice, in the order required by law, does not necessarily mean that Enron was informed of the law and facts on which the deficiency tax assessment was made.** (Emphasis supplied)

In this case, we agree with the respondent that petitioner was sufficiently apprised of the nature, factual and legal bases, as well as how the deficiency taxes being assessed against it were computed. Records reveal that on October 19, 2001, prior to the conduct of an informal conference, **petitioner was already informed of the results and findings of the investigations made by the respondent, and was duly furnished with a copy of the summary of the report submitted by Revenue Officer Elisa G. Ponferrada-Rapatan of the Special Investigation Division. Said summary report contained an explanation of Findings of Investigation stating the legal and factual bases for the deficiency assessment. In a letter dated February 27, 2002 petitioner requested for copies of working papers indicating how the deficiency withholding taxes were computed.** Respondent promptly responded in a letter-reply dated February 28, 2002 stating:

> please be informed that the cooperative's deficiency withholding taxes on compensation were due to the failure of the cooperative to withhold taxes on the taxable 13th month pay and other benefits in excess

> of P30,000.00 threshold pursuant to Section 3 of Revenue Regulation No. 2-95 implementing Republic Act No. 7833 and Section 2.78/1 B 11 of Revenue Regulation 2-98 implementing Section 32 B e of Republic Act No. 8424. Further, we are providing you hereunder the computational format on how deficiency withholding taxes were computed and sample computation from our working papers, for your information and guidance.

On April 9, 2002, petitioner received the PAN dated February 28, 2002 which contained the computations of its deficiency income and withholding taxes. Attached to the PAN was the detailed explanation of the particular provision of law and revenue regulation violated, thus:

DETAILS OF DISCREPANCIES

1. Deficiency income taxes for 1998 and 1999 respectively result from non-payment of the minimum corporate income tax (MCIT) imposed pursuant to Section 27(E) of the 1997 Tax Reform Act.

2. Deficiency Withholding Taxes on Compensation for 1997-1999 are the total withholding taxes on compensation of all employees of SAMELCO[-]I resulting from failure of employer to withhold taxes on the taxable 13th month pay and other benefits in excess of [₱]30,000.00 threshold pursuant to Revenue Regulation 2-98.

The above information provided to petitioner enabled it to protest the PAN by questioning respondent's interpretation of the laws cited as legal basis for the computation of the deficiency withholding taxes and assessment of minimum corporate income tax despite petitioner's position that it remains exempt therefrom. In its letter-reply dated May 27, 2002, respondent answered the arguments raised by petitioner in its protest, and requested it to pay the assessed deficiency on the date of payment stated in the PAN. A second protest letter dated June 23, 2002 was sent by petitioner, to which respondent replied (letter dated July 8, 2002) answering each of the two issues reiterated by petitioner: (1) validity of EO 93 withdrawing the tax exemption privileges under PD 269; and (2) retroactive application of RR No. 8-2000. The FAN was finally received by petitioner on September 24, 2002, and protested by it in a letter dated October 14, 2002 which reiterated in lengthy arguments its earlier interpretation of the laws and regulations upon which the assessments were based."

In this case, the Court finds that the Details of Discrepancies attached to the Formal Letter of Demand issued by respondent sufficiently show how the deficiency taxes were computed and contained an explanation why the same were collectible against the petitioner, to wit:

"DETAILS OF DISCREPANCIES

I. DEFICIENCY INCOME TAX

a. ***Undeclared Sales (₱833,959.33)*** – Verification disclosed that sales reported per ITR is understated by ₱833,959.33, per analysis hereunder, hence, assessed pursuant to Section 31, in relation to Section 32 of the Tax Code, as amended.

Sales per VAT Return	₱	107,236,627.33
Sales per FS/ITR		106,402.668.00
Undeclared Sales	**₱**	**833,959.33**

b. ***Income payments not subjected to withholding tax (₱42,482,391.16)*** – Verification disclosed that you failed to subject the following income payments to withholding tax as required under Revenue Regulations No. 2-98, as amended, thus, disallowed as deductions from your gross income pursuant to Section 34(K) of the Tax Code, as amended.

			Per FS		*Per Alphalist*		*Difference*
Rent		₱	3,069,949.00	₱	3,056,700.00	₱	12,349.00
Purchase of Goods							
	Local purchases	₱	37,921,733.80				
	Stationery & supplies		371,273.00				
	Representation and entertainment		183,066.00				
	Miscellaneous		98,130.00				
		₱	38,574,202.80		3,161,188.32		35,413,014.48
Purchase of Services							
	Travel and transportation	₱	3,393,344.00				
	Marketing		2,848,066.00				
	Utilities		1,463,878.00				
	Communications		1,440,487.00				
	Dues & subscriptions		843,732.00				
	Training		455,825.00				
	Repairs and maintenance		344,151.00				
	Security		315,692.00				
		₱	11,105,175.00		4,048,147.32		7,057,027.68
Income payments not subjected to withholding tax						**₱**	**42,482,391.16**

c. ***Unaccounted Income payments (₱20,207,318.52)*** – Verification disclosed that the following income payments were not fully reported in the financial statements which was considered as unaccounted source of cash which led to the inference that part of your income have not been declared as enunciated by the Court in the case of Perez vs. CTA & CIR L-10507 dated May 30, 1958. Therefore, the amount is added in your reported taxable income pursuant to Section 31 of the Tax Code, as amended.

		Per Alphalist		*Per FS*		*Difference*
Professional fee	₱	6,248,111.82	₱	414,500.00	₱	5,833,611.82
Merchant/commission fee		19,377,803.70		5,004,097.00		14,373,706.70
Unaccounted income payments					₱	**20,207,318.52**

d. ***Salaries and wages not subjected to compensation withholding tax (₱543,638.49)*** – Verification disclosed that you failed to subject part of the income payments on salaries and wages to withholding tax on compensation, thus, disallowed as deductions from your gross income pursuant to Section 34(K) of the Tax Code, as amended.

		Per FS		*Per Alphalist*		*Difference*
Salaries and wages	₱	11,267,031.00	₱	10,723,392.51	₱	543,638.49

II. DEFICIENCY VALUE ADDED TAX

Unaccounted income payments (₱20,207,318.52) – Verification disclosed that the unaccounted income payments as discussed under I.c. above is subject to 12% VAT, hence, assessed pursuant to Section 106 and 108 of the Tax Code, as amended.

III. DEFICIENCY EXPANDED WITHHOLDING TAX

Verification disclosed that you failed to subject fully your income payments to expanded withholding tax, hence, assessed pursuant to Revenue Regulations No. 2-98, as amended."

It is clear from the foregoing that petitioner was sufficiently informed of the factual and legal bases of the assessment.

As regards petitioner's argument that the statute of limitations on assessment and collection of taxes is for the protection of the taxpayer, it should be stressed that the Supreme Court, in a number of cases[3], likewise held that the statute of limitation in the assessment of taxes benefits both the government and the taxpayer, not just the taxpayer.

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[3] *Commissioner of Internal Revenue vs. Kudos Metal Corporation*, GR No. 178087, May 5, 2010, *Commissioner of Internal Revenue vs. Philippine Global Communication, Inc.,* G.R. No. 167146, October 31, 2006, and *Republic of the Phils. vs. Ablaza,* G.R. No. L-14519, July 26, 1960.

In *Commissioner of Internal Revenue vs. BASF Coating + Inks Phils., Inc.*[4], the Supreme Court held that the statute of limitations on the collection of taxes primarily benefits the taxpayer, and that the legal provisions on prescription should be liberally construed to protect taxpayers. Nevertheless, in the same case, the Supreme Court likewise discussed that prescription in the assessment is provided by the legislature for the benefit of both the government and the taxpayer, to wit:

> "It bears stressing that, in a number of cases, this Court has explained that the statute of limitations on the collection of taxes primarily benefits the taxpayer. In these cases, the Court exemplified the detrimental effects that the delay in the assessment and collection of taxes inflicts upon the taxpayers. Thus, in *Commissioner of Internal Revenue v. Philippine Global Communication, Inc.*, this Court echoed Justice Montemayor's disquisition in his dissenting opinion in *Collector of Internal Revenue v. Suyoc Consolidated Mining Company*, regarding the potential loss to the taxpayer if the assessment and collection of taxes are not promptly made, thus:
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> > **Prescription in the assessment and in the collection of taxes is provided by the Legislature for the benefit of both the Government and the taxpayer**; for the Government for the purpose of expediting the collection of taxes, so that the agency charged with the assessment and collection may not tarry too long or indefinitely to the prejudice of the interests of the Government, which needs taxes to run it; and for the taxpayer so that within a reasonable time after filing his return, he may know the amount of the assessment he is required to pay, whether or not such assessment is well founded and reasonable so that he may either pay the amount of the assessment or contest its validity in court x x x. It would surely be prejudicial to the interest of the taxpayer for the Government collecting agency to unduly delay the assessment and the collection because by the time the collecting agency finally gets around to making the assessment or making the collection, the taxpayer may then have lost his papers and books to support his claim and contest that of the Government, and what is more, the tax is in the meantime accumulating interest which the taxpayer eventually has to pay." (*Emphasis supplied*)

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[4] G.R. No. 198677, November 26, 2014.

It is true that the right of respondent to assess petitioner for deficiency EWT has prescribed for the months of January to May 2006. However, respondent's right to asses has not yet prescribed as to the months of June to December 2006.

In this case, respondent assessed petitioner for deficiency EWT due to the discrepancy between petitioner's Financial Statement and Alphalist of Payees Subject to EWT[5]. The Alphalist is categorized by the name of payees and not by month.

"Tax assessments by tax examiners are presumed correct and made in good faith, and all presumptions are in favor of the correctness of a tax assessment **unless proven otherwise**."[6]

Thus, the burden of proof rests upon petitioner to overcome the presumption of correctness of the tax assessment. Accordingly, petitioner failed to present any evidence to prove that the amount being assessed pertained to the months of January to May 2006.

With respect to petitioner's argument that respondent gravely erred in disallowing certain income payments to be deducted from petitioner's taxable income due to its failure to subject the same to expanded withholding tax, the Court is not convinced.

A careful perusal of petitioner's arguments against the disallowance of certain income payments as deduction from gross income reveals that the same are but a mere rehash of its previous arguments which have already been considered and adequately addressed in the assailed Decision. The Court likewise notes that the arguments in petitioner's Memorandum[7] and Motion for Reconsideration are the same.

As to the discrepancy in Commission (₱15,420,704.13), petitioner argues that respondent's statement that "the payment to international sponsor is truly a commission in its proper sense being dependent on the sales consummated" is untrue. The presumption of regularity of duty may only be relied upon if the assessment is supported by factual and legal basis. Petitioner alleges that respondent did not prove the existence of any sale on which the

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[5] Docket, vol. IV, pp. 1648 to 1668.
[6] *Commissioner of Internal Revenue vs. Gonzalez*, G.R. No. 177279, October 13, 2010.
[7] Docket, vol. IV, pp. 1899 to 1913.

commission depends on and had not shown the source of the commission and the assessed tax.

The Court reiterates the finding in the assailed Decision that respondent was able to provide a detailed computation of how the amount of discrepancy arrived at, *viz*:

> "However, contrary to petitioner's allegation, respondent was able to provide a detailed computation of how she arrived at such amount of discrepancy, *to wit*:

Commission/Incentives		
Per ITR - credit cards[8]	₱	5,004,097.00
Accounted under Purchases[9]		35,163,521.92
Less: Subjected to 15% WE (WC/WI051)		(5,369,111.09)
Total	**₱**	**34,798,507.83**

> xxx xxx xxx
>
> Petitioner claims that the difference found was not actually in the nature of an income payment for commissions as contemplated under our withholding tax laws.
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> xxx xxx xxx
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> However, no other documentary evidence was presented by petitioner to prove that indeed the subject commission should not be subjected to withholding tax. It is an elementary rule that in the absence of proof of any irregularity in the performance of official duties, an assessment will not be disturbed. All presumptions are in favor of tax assessments. Failure to present proof of error in the assessment will justify judicial affirmance of said assessment."

Accordingly, there is no cogent reason or overwhelming justification to disturb the assailed Decision.

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[8] Exhibit "P-19", Line 87, Section D, Annual ITR docket, vol. IV, p. 1612; Merchant Fees, Statement of Income, AFS, docket, vol. IV, p. 1619.
[9] Exhibit "P-25", docket, vol. IV, p. 1642.

WHEREFORE, premises considered, petitioner's **Motion for Reconsideration** is **DENIED** for lack of merit.

SO ORDERED.

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

CAESAR A. CASANOVA
Associate Justice