REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

SWIFT FOODS, INC., Petitioner,	CTA Case No. 8399
	Members:
- versus -	BAUTISTA, *Chairperson* FABON-VICTORINO, and RINGPIS-LIBAN, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: SEP 22 2016 9:44 a.m.

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DECISION

***Fabon-Victorino, J.*:**

In this Petition for Review[1], petitioner Swift Foods, Inc. seeks the cancellation of the deficiency Income Tax (IT) and Value-Added Tax (VAT) assessments issued by respondent Commissioner of Internal Revenue (CIR) in the respective amounts of ₱2,612,879.00 and ₱9,334,419.83 for taxable year 2007.

Petitioner Swift Foods, Inc. is a domestic corporation, with principal office at RFM Building, corner Pioneer and Sheridan Streets, Mandaluyong City.

Respondent is authorized to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto as provided in the National Internal Revenue Code (NIRC) or other laws administered by the Bureau of Internal Revenue (BIR). He holds office at the BIR National Office Building, Diliman, Quezon City.

[1] Docket, pp. 1-16.

On June 6, 1994, petitioner was incorporated to assume RFM Corporation's (RFM) business of manufacturing, marketing and distributing processed and canned meat products, poultry products, and commercial feeds. Petitioner's operation was divided into agribusiness division for poultry and feeds, and meat division for processing meat products like hotdogs and bacon, including sales and distribution of canned goods bearing the "Swift" trademark - registered in the name of and owned by RFM.

About eight (8) years thereafter or in 2002, petitioner's Board of Directors decided to transfer the marketing, selling and distribution of meat products of the meat division including that of canned goods bearing the "Swift" trademark to RFM to join the latter's branded food group business. Petitioner retained the agribusiness division for the exclusive production and sales of poultry products, namely, live and dressed/processed chicken.

On February 11, 2010, respondent issued a Notice of Informal Conference[2] to discuss with petitioner its alleged deficiency taxes for taxable year 2007, pursuant to the Letter Notice (LN) No. 116-RLF-07-00-00013 dated July 15, 2009.

On August 16, 2010, petitioner received from respondent a Preliminary Assessment Notice[3] (PAN) with Details of Discrepancies for deficiency IT and VAT for taxable year 2007 in the aggregate amount of ₱10,274,264.51, computed as follows:

I. DEFICIENCY VAT		
Discrepancy per LN (Figure 1)		
Sales per LN		132,167,585.75
Sales per VAT return		(88,867,815.25)
Net discrepancy		43,299,770.50
Multiply by VAT rate		12%
Deficiency VAT		5,195,972.46
Add: Penalties		
Interest	2,787,318.93	
Compromise	50,000.00	2,837,318.93
TOTAL AMOUNT DUE		**8,033,291.39**
II. DEFICIENCY INCOME TAX		

[2] Exhibit P-4, docket, pp. 1147-1148.
[3] Exhibit P-6.

Discrepancy per LN (Figure 1)		43,299,770.50
Less: Adjustments per Evaluation		-
Net Discrepancy		43,299,770.50
Multiply by GP rate		9.80%
Additional Gross Income		4,243,377.51
Add: Taxable Income per Annual ITR filed		-
Total Taxable Income		4,243,377.51
Multiply by Income Tax Rate		35%
Adjusted Income Tax Due		1,485,182.13
Less: Income Tax Due per ITR filed		-
Deficiency Income Tax		1,485,182.13
Add: Penalties		
Interest	730,790.99	
Compromise	25,000.00	755,790.99
TOTAL AMOUNT DUE		**2,240,973.12**

On September 1, 2010, petitioner protested[4] the PAN.

On September 13, 2010, petitioner received from respondent a Formal Letter of Demand/Assessment Notices[5] (FLD/FAN), reiterating the deficiency taxes alleged in the PAN.

On October 1, 2010, petitioner protested the FLD/FAN, with a supplement filed on February 15, 2011.

On November 18, 2011, petitioner received the Final Decision on Disputed Assessment[6] (FDDA) containing the same assessments with adjustments only on the computation of interests as shown below:

DEFICIENCY INCOME TAX		
Sales per RELIEF		132,167,585.75
Sales per Return		88,867,815.25
Discrepancy per LN		43,299,770.50
Multiply by GP rate		9.80%
Additional Gross Income		4,243,377.51
Multiply by Normal Income Tax Rate		35%
Additional Income Tax Due		1,485,182.13
Add: Interest	1,102,696.87	
Compromise Penalty	25,000.00	1,127,696.87
Still due and collectible		**2,612,879.00**
DEFICIENCY VAT		
Sales per RELIEF		132,167,585.75
Sales per Return		88,867,815.25
Discrepancy per LN		43,299,770.50

[4] Exhibit P-10, docket pp. 1177-1178.
[5] Exhibit P-8 to P-8-D.
[6] Exhibit P-14.

Multiply by VAT rate		12%
Deficiency VAT		5,195,972.46
Add: Interest	4,088,447.37	
Compromise Penalty	50,000.00	4,138,447.37
Still due and collectible		**9,334,419.83**

On December 19, 2011, petitioner filed the instant Petition for Review.

In his Answer[7], respondent invokes finality of the subject assessments depriving the Court of authority to entertain the Petition for Review. Allegedly, petitioner's letter dated September 30, 2010 requesting him to waive the assessment and provide the corresponding tax clearance certificate is far from being a protest letter as it failed to state the facts, law and jurisprudence as required under the Tax Code and Revenue Regulations (RR) No. 12-99. The same holds true with its supplement dated February 3, 2011, as it failed to conform to the requirements of RR No. 12-99. Moreover, the said supplement was filed beyond the 30-day period to protest.

And even if the protest to the FLD/FAN was seasonably filed, petitioner is still liable to pay the assessed deficiency IT and VAT. Respondent believes that the defense that sales subjected to taxes were actually made by RFM only that its customers inadvertently or erroneously used petitioner's tax identification number (TIN) in the sales invoices/receipts is self-serving. Respondent cannot also accept the same defense *sans* any proof that petitioner correctly paid its IT and VAT corresponding to the said erroneously booked sales under petitioner's TIN. Besides, both petitioner and RFM had the opportunity to correct the alleged inadvertence but did not.

The Pre-Trial Order[8] was issued on September 10, 2012 after the parties filed their Joint Stipulation of Facts and Issues[9] (JSFI).

[7] Docket, pp. 82-97.
[8] Docket, pp. 160-165.
[9] Docket, pp. 148-156.

On November 28, 2012, petitioner filed a *Motion to Suspend Proceedings*[10] citing as ground its pending application for Compromise Settlement on its alleged deficiency IT and VAT liabilities for taxable year 2007.

In his *Comment*[11] filed on December 28, 2012, respondent moved to deny the motion stating that the continuation of the trial would not prejudice petitioner's application for compromise agreement.

On January 9, 2013[12], the Court denied for lack of merit petitioner's *Motion to Suspend Proceedings.*

During the trial, petitioner presented its (1) Credit and Collection Consultant David A. Ulep; (2) Accounting Manager Alejandro B. Lopez; the (3) Credit and Collection Manager of RFM Corporation Joselito Asuncion; (4) Assistant Manager for Payables Accounting of Waltermart Supermarket, Inc. and formerly of Waltermart Ventures, Inc. Claire Cruz; (5) Chief Accountant of CVC Supermarket, Inc. and Paula's Supermarket, Inc. Randy B. Dela Cruz; and (6) Independent Certified Public Accountant (ICPA) Albert G. Alba.

Witness **David A. Ulep** testified[13] that as Credit and Collection Consultant of petitioner, he (1) assists in the audit and preparation of reports and other accounting records of petitioner; and (2) gives advice and recommendations to the Management on financial and accounting concerns of petitioner. He also assists in monitoring credit and collections for all accounts as well as coordinates and prepares documents for government agencies including the BIR.

He is the authorized representative of petitioner in the present case disputing the subject assessments on the following grounds: (1) RFM's customers, specifically, CVC Supermarket, Inc., Gant's Diamond Corporation, Paula's Supermarket, Inc., Waltermart Supermarket, Inc., Waltermart Ventures, Inc., Florence Foods Corporation,

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[10] Docket, pp. 174-177.
[11] Docket, pp. 312-318.
[12] Docket, pp. 321-324.
[13] Exhibit P-17, docket, pp. 335-345.

Puregold Price Club Parañaque, Unimart Incorporated, and Unilever RFM, inadvertently used petitioner's TIN in their purchases; (2) the listed sales of ₱1,054,512.29 were not to petitioner's customers; (3) for VAT purposes, the listed sales amounting to ₱11,168,540.22 were not subject to VAT; and (4) the subject assessments were void for failure of respondent to comply with the requirements under RMO No. 46-2004.

He blamed the inadequate information about the transfer of the marketing, sales and distribution of meat products and canned goods bearing the "Swift" trademark to the meat division of RFM for the inadvertent use of petitioner's TIN in booking RFM's sales. In any event, RFM declared and paid the corresponding IT and VAT on the said sales erroneously booked under petitioner's TIN as shown in various Certifications/Letters issued by RFM's customers stating that their purchases from RFM were erroneously booked under petitioner's TIN.

Further, the alleged purchases from petitioner in the amount of ₱1,054,512.29 have no basis. The named customers, to wit: (1) Casabuena Jr. Alejandro Encila; (2) Drive and Dine Specialist, Inc.; (3) Enjay Hotels, Inc.; (4) Grand Union Supermarket; (5) Heart and Hasting Phils., Inc. (6) Lotus Asia Food Corp.; (7) LTS City Foods, Inc.; (8) LTS Supermarket, Inc.; (9) Phil Seven Corp Head Office; (10) Printwell, Inc.; (11) Rustan Supercenters, Inc.; and (12) Tokyo Tokyo, Inc., had no transactions with petitioner.

The sales amounting to ₱11,168,540.22 attributed to petitioner for VAT purposes is as well no basis since sales of poultry products such as live and dressed chicken are not subject to VAT.

Besides, the lack of the mandatory sworn statements from the taxpayer and the third party information providers under RMO No. 46-2004 shows that the assessments were unconfirmed, hence, unsubstantiated.

Witness **Alejandro B. Lopez** corroborated the foregoing testimony and added[14] that as petitioner's Accounting Manager, he recommended the filing of the instant petition to dispute the FDDA issued by respondent. He admitted that petitioner received from respondent a Letter Notice No. 116-RLF-07-00-00013 dated July 15, 2009 pertaining to the investigation being conducted on petitioner's alleged IT and VAT deficiencies for taxable year 2007. This was followed by a Notice of Informal Conference dated February 11, 2010, with attached findings and recommendation on petitioner's alleged tax deficiencies. After several conferences with respondent's representatives, petitioner received a copy of the PAN containing assessments for deficiency IT and VAT. Petitioner protested the PAN through a letter dated August 27, 2010. Subsequently, petitioner received the FLD/FAN assessing it of deficiency IT of ₱2,612,879.00 and deficiency VAT of ₱9,334,419.83 for calendar year 2007. Again, petitioner protested the said FLD/FAN, through a letter dated September 30, 2010, with a supplement filed on February 15, 2011.

On November 18, 2011, petitioner received the FDDA with the same findings prompting it to refer the matter to its lawyer who caused the filing of the present Petition for Review.

The Credit and Collection Manager for RFM Corporation **Joselito Asuncion** declared[15] that petitioner used to be a division of RFM Corporation. In 2010, petitioner's accounting manager Alejandro Lopez requested him to certify that the taxes assessed against petitioner for taxable year 2007 included sales of RFM to its customers who erroneously utilized petitioner's TIN instead of RFM's in their summary lists of purchases. From the "Details of Taxpayer's Customer Records,"[16] provided by the BIR, bearing the names of petitioner's customers and their purchases, and from the summaries of lists of purchases submitted by each customer to the BIR, he found purchases made from RFM. Thus, he assisted in convincing the BIR that the tax assessments against petitioner for 2007 was incorrect. He

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[14] Exhibit P-21.
[15] Exhibit P-26
[16] Exhibits F-1 to F-7.

and Minerva Laforteza issued a Certification that petitioner's TIN was inadvertently used by RFM customers in recording their purchases. He also formally notified RFM customers, namely, Waltermart Ventures, Inc., Waltermart Supermarket, Inc., CVC Supermarket, Inc., Paula's Supermarket, Inc., and Gant Diamond Corporation, about the lapses committed.

Finally, the witness identified several Certificates of Creditable Tax Withheld from various customers showing that they purchased goods from RFM using petitioner's TIN.

Witness **Claire Cruz**, testified[17] that she is the Assistant Manager for Payables Accounting of Waltermart Supermarket, Inc. and priorly of Waltermart Ventures, Inc. Sometime in September of 2010, her office received various correspondences from RFM and petitioner regarding the erroneous use of the latter's TIN in the RFM's sales. The correspondences clarified that RFM's TIN 000-064-134-000 was obviously different from petitioner's TIN 003-973-161. In support thereof, she presented Certificates of Creditable Tax Withheld at Source (BIR Form No. 2307) for taxable year 2007 with RFM as the payee with TIN belonging to petitioner, and a Summary List of Purchases for 2007 from Waltermart Ventures, Inc. Based on their records, no purchase was made from petitioner for taxable year 2007.

The Chief Accountant of CVC Supermarket, Inc. and Paula's Supermarket, Inc. **Randy B. Dela Cruz**, testified[18] that per Purchase Transaction Reconciliation of Listing for Enforcement generated from their record, VAT was inadvertently imposed on their purchases of dressed chicken from petitioner albeit such sales were not subject to VAT pursuant to Section 109(A) of the NIRC of 1997, as implemented by Section 4.109-1(B) of Revenue Regulations No. 16-2005.

ICPA **Albert G. Alba** testified[19] that as commissioned by the Court, he examined petitioner's various schedules and documents and found its explanations on the erroneous

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[17] Exhibit P-22, docket, pp. 717-721.
[18] Exhibit P-23, docket, pp. 739-742.
[19] Docket, pp. 831-843.

use of its TIN in RFM's sales more credible than the assumption that the transactions represented undeclared VAT sales for petitioner. The assumption was solely based on purchase transaction reports submitted to BIR by third parties showing petitioner's TIN as the seller. These third parties however admitted against their interest that they erroneously used petitioner's TIN in their transactions. Further, not a single VAT invoice was presented to support the assumption adverse to petitioner. As regards the VAT assessment for taxable year 2007, the same was erroneously imposed as the listed sales amounting to ₱9,402,550.65 were not subject to VAT.

The income tax assessment was also without any basis, as the figures appearing therein were based on sales using petitioner's TIN erroneously.

After petitioner rested[20], respondent presented its lone witness Revenue Officer IV **Gilquin B. Tolentino** who testified[21] that by virtue of a Memorandum[22] dated April 19, 2010 with Referral No. D-LN-0410-008, he and his group exchanged messages via e-mail with petitioner's representative Alex Lopez regarding the data/information they gathered from the BIR data system and third party sources relative to petitioner's sales vis-à-vis tax liabilities for taxable year 2007. He requested petitioner to submit documents to aid them in their audit/investigation. He thereafter reviewed and evaluated all available data and documents submitted by petitioner in relation to the investigation.

The evidence show that petitioner was liable for deficiency taxes, hence, per their recommendation[23], a PAN was issued to which petitioner filed a pro forma protest. Since petitioner was not able to refute/rebut their audit findings, a Formal Letter of Demand with Final Assessment Notice[24] (BIR Form No. 0401) and Details of Discrepancies were later issued and served upon petitioner on September

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[20] Docket, pp. 1000-1041.
[21] Exhibit R-15, docket, pp. 1311-1319.
[22] Exhibit R-1, BIR Record, p. 24.
[23] Exhibit R-9.
[24] Exhibit R-12, BIR Record, pp. 87-96.

13, 2010 pursuant to Memorandum[25] dated September 1, 2010.

RO Tolentino perceived petitioner's protest to the FLD/FAN as pro-forma. To his mind, the issue on deficiency IT and VAT remained unresolved resulting in the issuance of the assailed FDDA.

RO Tolentino averred that their exchange of emails with petitioner was for the purpose of reconciling the alleged deficiency IT and VAT. He however denied suggesting to petitioner submission of certifications from the customers listed in the summary list of sales and purchases to prove that it made no sales to them. He added, that he only saw the Certifications after the FAN was issued and did not bother to review them as they were not notarized.

Respondent rested[26] after his exhibits were admitted by the Court in the Resolution[27] dated July 24, 2015.

THE ISSUE

The lone issue submitted by the parties for the Court's consideration is[28]:

> WHETHER THE PETITIONER IS LIABLE TO PAY DEFICIENCY INCOME TAX AND VALUE-ADDED TAX ASSESSMENTS FOR TAXABLE YEAR 2007, IN THE AMOUNT OF TWO MILLION SIX HUNDRED TWELVE THOUSAND EIGHT HUNDRED SEVENTY NINE PESOS (PHP2,612,879.00) AND NINE MILLION THREE HUNDRED THIRTY FOUR THOUSAND FOUR HUNDRED NINETEEN and 83/100 PESOS (PHP9,334,419.83), RESPECTIVELY, AS WELL AS THE CORRESPONDING PENALTY AND DEFICIENCY AND DELINQUENCY

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[25] Exhibit R-11, BIR Record, pp. 78-83.
[26] Docket, pp. 1339-1348.
[27] Docket, pp. 1372-1373.
[28] Pre-Trial Order, docket, p. 161.

INTEREST, PURSUANT TO SECTIONS 248 AND 249 OF THE 1997 TAX CODE.

Petitioner's arguments:

Petitioner claims that the assessments for deficiency IT and VAT against it have no factual and legal bases. Under the Tax Code, IT and VAT can only be assessed from income and/or sales transaction of the taxpayer. In the instant case, petitioner was assessed for deficiency IT and VAT for sales transactions made by RFM, a separate and distinct entity.

Petitioner also complains respondent's alleged failure to comply with the procedural requirements to establish the deficiency tax assessments under RMO No. 46-2004. Both the taxpayer and the third party information provider were not able to execute sworn statements attesting to the inaccuracies of the third party information and the data provided, respectively, therefore, respondent's assessments remained unconfirmed, thus, unsubstantiated.

Respondent's arguments:

Respondent insists that petitioner is liable to pay the assessed deficiency IT and VAT as the assessments were made through the consolidation and cross-referencing of third party information, discrepancy reports on sales and purchases generated precisely to uncover under declared income and over claimed purchases. Further, the alleged inadvertent and erroneous use of petitioner's TIN by RFM's customers is an empty claim, baseless and totally self-serving. Besides, petitioner, a reputable business entity, had three (3) years from the filing of its return to rectify the errors in subject sales invoices/receipts pursuant to Section 6 of the 1997 Tax Code but did not.

Moreover, the assessment has become final, executory and demandable for failure of petitioner to file a valid protest. Petitioner's letter dated September 30, 2010, requesting to waive the assessment and to provide the corresponding tax clearance certificate could hardly be deemed a protest letter as it failed to state the facts, law and jurisprudence as required by the Tax Code and Revenue Regulations (RR) No. 12-99. Neither was the letter dated February 3, 2011 against the FLD/FAN since its opening line states that it is "*In response to your Preliminary Assessment Notice with Letter Notice No. 116-RLF-0700-00013 dated July 15, 2009 xxx*" suggesting that the letter was its protest to the PAN and not to the FLD/FAN. Further, it was filed beyond the reglementary period to file protest.

THE COURT'S RULING

First, the timeliness of filing of the instant Petition for Review must be ascertained. In this regard, Section 228[29] of the NIRC of 1997, as amended, provides that a taxpayer adversely affected by the decision of the CIR may appeal to the Court of Tax Appeals (CTA) within thirty (30) days from receipt of the adverse decision; otherwise, the same shall become final, executory and demandable.

It is undisputed that petitioner received the assailed FDDA on November 18, 2011. Thus, it had thirty (30) days or until December 18, 2011, within which to file its appeal with the Court. Hence, the instant Petition for Review was seasonably filed on December 19, 2011, given that the thirtieth (30th) day, December 18, 2011, fell on a Sunday.

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[29] 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 pre-assessment 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. (*Emphasis supplied*)

This established fact negates respondent's contention that the assessment became final, executory and demandable.

On the merits of the case, petitioner is being assessed of deficiency IT and VAT in the amounts of ₱2,612,879.00 and ₱9,334,419.83, respectively, for taxable year 2007, computed as follows:[30]

DEFICIENCY INCOME TAX		
Sales per RELIEF		₱ 132,167,585.75
Sales per Return		88,867,815.25
Discrepancy per Letter Notice		**₱ 43,299,770.50**
Multiply by Gross Profit Rate		9.80%
Additional Gross Income		₱ 4,243,377.51
Multiply by Normal Income Tax Rate		35%
Additional Income Tax Due		**₱ 1,485,182.13**
Add: Interest	₱ 1,102,696.87	
Compromise Penalty	25,000.00	1,127,696.87
Still due and collectible		**₱ 2,612,879.00**

DEFICIENCY VALUE-ADDED TAX		
Sales per RELIEF		₱ 132,167,585.75
Sales per Return		88,867,815.25
Discrepancy per Letter Notice		**₱ 43,299,770.50**
Multiply by VAT Rate		12%
Deficiency VAT		**₱ 5,195,972.46**
Add: Interest	₱ 4,088,447.37	
Compromise Penalty	50,000.00	4,138,447.37
Still due and collectible		**₱ 9,334,419.83**

The deficiency tax assessments issued against petitioner were based on the discrepancy noted from the computerized matching conducted by respondent on the purchases made by petitioner's customers against petitioner's declared sales per VAT Returns for taxable year 2007.

However, petitioner claims that the discrepancy in the amount of ₱43,299,770.50 is attributed to the following:

(a) Continued erroneous use of RFM's customers – CVC Supermarket, Inc., Gant Diamond Corporation, Paula's Supermarket, Inc., Waltermart Supermarket, Inc., Waltermart Ventures, Inc., Florence Foods Corporation, Puregold Price Club Parañaque, Unimart

[30] Exhibit P-14 and Annex A of the FDDA, Docket, Vol. 1, pp. 70 to 72.

Incorporated and Unilever RFM - of petitioner's TIN in their purchases;

(b) The sales amounting to ₱1,054,512.29 were made to entities not customers of petitioner; and

(c) On VAT assessment, the sales amounting to ₱9,402,550.65, for which non-VAT sales invoices were issued, are not subject to VAT.

Petitioner also impugns the validity of the assessments since both the taxpayer and the third party information provider failed to execute sworn statements as required under RMO No. 46-2004, rendering the assessments void.

The Court finds petitioner's arguments partly meritorious.

Per record,[31] the discrepancy of ₱43,299,770.50 consists of the following:

Companies found in the BIR's summary list but not in the petitioner's list		₱ 42,335,738.54
Companies found in the petitioner's summary list but not in the BIR's list		(8,437,910.89)
Companies found in both Summary Lists with different transaction amounts:		
Per BIR's List	₱ 89,318,463.28	
Per petitioner's List	79,915,912.63	9,402,550.65
Unexplained difference		(607.80)
Discrepancy		**₱ 43,299,770.50**

Companies found in the BIR's summary list but not in the petitioner's list

The companies indicated in the BIR's summary list but not found in petitioner's list are as follows:

Customer Name	Net Amount	VAT Amount	Gross Amount

[31] See Exhibits P-7-A to P-7-I; P-10-B to P-10-G for Details.

I. NON-VAT			
Atkins Import and Export Resources Inc.	₱ 837,913.66	₱ 100,549.64	₱ 938,463.30
Joe Kuan Food Corporation	6,586.07	790.33	7,376.40
Lenbert Mfg. Inc.	8,925.00	1,071.00	9,996.00
Nobia Incorporated	10,583.04	1,269.96	11,853.00
Sea Merchants Inc.	2,850.00	342.00	3,192.00
Sub-total	***₱ 866,857.77***	***₱ 104,022.93***	***₱ 970,880.70***
II. WITH CERTIFICATION FROM CUSTOMERS			
Gant Diamond Corporation	₱ 1,528,221.93	₱ 183,386.63	₱ 1,711,608.56
CVC supermarket, Inc.	34,840.00	4,180.80	39,020.80
Paula's Supermarket Inc.	83,519.00	10,022.28	93,541.28
Waltermart Supermarket Inc.	12,115,252.18	1,365,046.07	13,480,298.25
Waltermart Ventures Inc.	26,653,920.68	2,838,929.21	29,492,849.89
Sub-total	***₱ 40,415,753.79***	***₱ 4,401,564.99***	***₱ 44,817,318.78***
III. WITH CERTIFICATION FROM RFM			
Florence Foods Corporation	₱ 81,453.15	₱ 9,774.38	₱ 91,227.53
Puregold Price Club Paranaque	8,145.09	977.41	9,122.50
Unimart Incorporated	11,785.75	1,414.29	13,200.04
Unilever RFM	10,214.16	1,225.70	11,439.86
Sub-total	***₱ 111,598.15***	***₱ 13,391.78***	***₱ 124,989.93***
IV. NON-CUSTOMERS			
Casabuena Jr. Alejandro Encila	₱ 1,731.87	₱ 207.82	₱ 1,939.69
Drive & Dine Specialist Inc.	2,705.33	324.64	3,029.97
Enjay Hotels Inc.	11,730.33	1,407.64	13,137.97
Grand Union Supermarket	(3,378.83)	(405.46)	(3,784.29)
Heart & Hasting Phils Inc.	278.08	33.37	311.45
Lotus Asia Food Corp	3,179.91	381.59	3,561.50
LTS City Foods Inc.	10,316.25	1,237.95	11,554.20
LTS Supermarket Inc.	885,908.91	106,309.07	992,217.98
Phil Seven Corp Head Office	(153.92)	(18.47)	(172.39)
Printwell Inc.	1,409.11	169.09	1,578.20
Rustan Supercenters Inc.	(857.00)	(102.84)	(959.84)
Tokyo Tokyo Inc.	28,658.79	3,439.05	32,097.84
Sub-total	***₱ 941,528.83***	***₱ 112,983.45***	***₱ 1,054,512.28***
TOTAL	**₱ 42,335,738.54**	**₱ 4,631,963.15**	**₱ 46,967,701.69**

As to the first item on the table, the Court cannot subscribe to petitioner's allegation that the amount of ₱866,857.77 is not subject to VAT as it pertains to sales of live and dressed chicken. There are no supporting documents such as duly registered sales invoices and official receipts issued to its customers to substantiate the same. Bare allegations, unsubstantiated by evidence, are not equivalent to proof.[32] In other words, the Court finds no cogent reason to disturb the finding of respondent in this item of assessment.

[32] *Real v. Belo*, G.R. No. 146224, January 26, 2007.

As to the second item, petitioner alleged that the amount of ₱40,415,753.79 arose from the inadvertent use of RFM's customers of petitioner's TIN instead of RFM's in recording their purchases, thus RFM's sales were attributed to petitioner.

Under the present set up, petitioner only produces, markets, sells and distributes poultry products, i.e., live and dressed/processed chicken. Note that the sale transactions upon which the alleged tax deficiency assessments were based were for processed meat products and canned goods which were obviously not part of petitioner's business activities as it had long been transferred to meat division of RFM.

In a letter[33] dated February 2, 2011, petitioner, through its Accounting Manager Alex B. Lopez, accounted the continued inadvertent use by RFM customers of its TIN, in this wise:

> "Swift Foods used to be part of RFM Corporation as one of its division. Later on, it was made to be one of its subsidiaries. However, in June 1994, Swift Foods was incorporated to be an independent company from RFM Corporation. In that year, SFI as the company is commonly called became a publicly-listed company. SFI was then comprised of two (2) divisions; the Agri Business Division and the Meat Division of RFM. The Agri Business Division operated and maintained the poultry and feeds business whose products were mostly VAT-exempt while the Meat Division operated and maintained the manufacturing, distribution and sales of processed meat products such as hotdogs, hams, bacons, etc. whose products were usually subject of VAT transaction. Both Agri and SDD use Swift Foods as brand label of their respective products. Moreover, Meat Division also operated and

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[33] Exhibit "P-13".

> maintained the distribution and sales of RFM products such as pasta, noodles, flour-based products, etc. which were also subject of VAT.
>
> From its inception up to becoming an independent company, RFM Corp. retained its control over SFI as RFM remained as its major stockholder. Yet another event in the history of SFI happened in October 2002 when Agri Business Division was decidedly spun-off by the controlling stockholder. The Agri Business Division was left alone to become the sole owner and operator of Swift Foods, Incorporated while its Meat Division was re-acquired by RFM to join its Branded Food Group. Hence, the sales and distribution of vatable Swift labeled products have been controlled and maintained by RFM since then.
>
> This caused the inadvertent use by RFM customers of SFI's Taxpayer Identification Number. There was a failure on the part of RFM to properly communicate with its customers the changes to be made in their records. Nonetheless, this was already addressed by RFM when we brought up the matter for their immediate action."

The following Certifications presented by petitioner also seal its claim, to wit:

1. RFM's Certification[34] that (i) petitioner's TIN was inadvertently used by its customers in recording their purchases; and (ii) it duly acknowledges and recognizes such purchases as their own sales;

2. Waltermart Supermarket, Inc. and Waltermart Ventures, Inc.'s respective Certification[35] stating that the TIN of petitioner was used for both

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[34] Exhibit P-11, Docket, Vol. 3, p. 1185
[35] Exhibits P-15 and P-15-A, Docket, Vol. 3, pp. 1189-1190.

petitioner and RFM in their VAT list and Withholding Tax Remittances for BIR;

3. CVC Supermarket, Inc. and Paula's Supermarket, Inc.'s Certification that the amount of ₱39,020.80 and ₱93,541.28, respectively reported to the BIR were purchases from RFM, bearing the Swift Foods label, consisting of processed meat like hotdogs, hams, corned beef, etc. and were not poultry products purchased from petitioner; and

4. Gant Diamond Corporation's Certification[36] dated September 18, 2010, that its purchases from RFM was erroneously reported as purchases from petitioner as the same brand/label was used by RFM and petitioner for processed meat, such as hotdogs, hams and corned beef. It also certifies that it had no purchases from petitioner for taxable year 2007.

With the foregoing Certifications pertaining to the sales amounting to ₱40,415,753.79, duly authenticated by RFM customers and duly acknowledged by RFM as its own sales, petitioner should not be held liable to pay any deficiency tax in connection with such sale transactions.

Anent the third item, RFM, through its Credit and Collection Manager, Mr. Joselito Asuncion,[37] owned the sales amounting to ₱111,598.15 to its customers who erroneously booked their purchases under the petitioner's TIN. However, no other supporting documents were provided by either petitioner or RFM upon which the Court could verify such claim, *e.g.*, Certifications from the purported customers or official receipts/invoices issued by RFM to the latter. In other words, RFM's acknowledgement remains unverifiable and of very little weight insofar as such contention is concerned. Therefore, respondent's assessment thereon must be sustained.

On the last item, petitioner posits that the purported customers are total strangers and their purchases

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[36] Exhibits P-12, Docket, Vol. 3, p. 1186.
[37] Judicial Affidavit, Docket, Vol. 2, pp. 601-512.

amounting to ₱941,528.83 never transpired as testified to by its Accounting Manager and record custodian Alex Lopez, who confirmed that the named customers and the related transactions were not in petitioner's records.

Again, bare allegations, *sans* substantiation by competent evidence, are not proof. In this particular item, petitioner failed to present supporting documents like accounting records, for purposes of verification by the Court to airtight the claim. In fine, the Court finds petitioner liable for deficiency taxes relative thereto.

Companies found in the summary list of both the BIR and petitioner

Companies found in the summary list of both BIR and petitioner		
Fresh and Famous Foods, Inc.		
Per BIR	₱ 84,330,197.57	
Per petitioner	74,928,906.59	₱ 9,401,290.98
Wenphil Corporation		
Per BIR	₱ 4,843,599.41	
Per petitioner	4,842,947.58	651.83
RFM Corporation		
Per BIR	51,060.72	
Per petitioner	₱ 50,453.48	607.24
Phil Eds Techno-Service, Inc.		
Per BIR	93,605.58	
Per petitioner	93,604.98	0.60
Total		**₱ 9,402,550.65**

The huge part of the discrepancy found by respondent lies with the alleged sales to Fresh and Famous Foods, Inc. amounting to ₱9,401,290.98. Petitioner claims that the said amount pertains to its sales of live and dressed chicken which are not subject to VAT, as indicated in the corresponding sales invoices. However, no such sales invoices are in the record of the case to verify petitioner's claim. In the absence of any evidence to back-up petitioner's contention, the assessment must be sustained.

It is elementary that "(t)ax assessments by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments."[38]

In sum, petitioner's undeclared sales amount to ₱2,884,016.71, computed as follows:

Discrepancy per BIR	₱ 43,299,770.50
Less: Sales attributed to RFM as certified by the customers	40,415,753.79
Undeclared Sales	**₱ 2,884,016.71**

Consequently, petitioner shall be held liable for basic deficiency IT and VAT in the amounts of ₱98,921.77 and ₱346,082.01, respectively, computed as follows:

	Income Tax
Undeclared Sales	₱ 2,884,016.71
Multiply by Gross Profit Rate	9.80%
Additional Gross Income	282,633.64
Multiply by Normal Income Tax Rate	35%
Basic Deficiency Income Tax	**₱ 98,921.77**

	Value-Added Tax
Undeclared Sales	₱ 2,884,016.71
Multiply by VAT Rate	12%
Basic Deficiency VAT	**₱ 346,082.01**

Meanwhile, the compromise penalties on deficiency income tax and VAT in the amounts of ₱25,000.00 and ₱50,000.00 imposed by respondent against petitioner cannot be sustained absent any showing that both parties agreed to such imposition. 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 that is so compromised, and the choice of paying or not paying it distinctly belongs to the taxpayer.[39]

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[38] *Commissioner of Internal Revenue vs. Bank of the Philippine Islands*, G.R. No. 134062, April 17, 2007, citing *Sy Po vs. Court of Appeals*, G.R. No. L-81446, August 18, 1988.
[39] *The Philippines International Fair, Inc. v. The Collector of Internal Revenue, et al.*, G.R. Nos. L-12928 and L-12932, March 31, 1962.

As regards petitioner's contention that the subject assessments are void for failure of respondent to comply with the requirements of RMO No. 46-2004, suffice it to say that the failure of respondent to require both the petitioner and the third party information provider to submit their respective Sworn Statements does not make the deficiency tax assessments void.

Indeed, there is no indication that respondent required petitioner and the third party information providers to execute their respective Sworn Statements relative to the subject tax assessments. However, the subject deficiency tax assessments may not be treated as void on such ground alone, there being no legal provision on the matter.

The pertinent provision of RMO 46-2004[40] reads:

> II. POLICIES AND GUIDELINES
>
> xxx xxx xxx
>
> 4. In the event a taxpayer who has been issued an LN[41] protests the accuracy of the data provided by third party sources (as opposed to erroneous encoding of return information in the ITS), the RO concerned shall, upon receipt of the Protest Letter of the taxpayer, evaluate the protest and require the latter to execute a Sworn Statement attesting to the alleged inaccuracies or errors in the TPI. The TPI[42] 9 provider (except BOC) shall also be required to execute a Sworn Statement attesting to the data provided.
>
> Enforcement action shall be undertaken in instances when, on the

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[40] SUBJECT: Additional Supplement and Guidelines in Handling Letter Notices with Discrepancies Arising from Data Matching Processes as defined in Revenue Memorandum Order (RMO) Nos. 34-2004 and 30-2003, as amended by RMO Nos. 42-2003 and 24-2004, which remain Unserved, have been Served but are Without Response, or are Under Protest by Taxpayers.

[41] Letter Notice.

[42] Third Party Information.

> basis of the documents submitted by both the TPI providers and the taxpayer concerned, as well as other information available to him/her, the Regional Director/Head of the Large Taxpayers Service has reason to believe that there is an evasion of taxes that warrants said action. The Regional Director/Head of the Large Taxpayers Service shall decide on the most appropriate enforcement action (such as audit/investigation, surveillance, stock-taking) that will expedite the recovery of the unpaid taxes.
>
> The above enforcement action shall be in addition to the filing of criminal charges as may be warranted by the Commissioner or the Office of the Deputy Commissioner for Criminal Prosecution. For this purpose, the documents obtained by the RO from the taxpayer and the TPI source(s), as well as the evaluation of the Regional Director/Head of the Large Taxpayers Service, must be forwarded to the Deputy Commissioner within one (1) month from completion of the evaluation.

Clearly, there is nothing in the above-quoted paragraphs, or in the other provisions of RMO 46-2004 that states that the absence of the alleged sworn statements will render the subject assessment void.

WHEREFORE, the instant Petition for Review filed by Swift Foods, Inc. is **PARTIALLY GRANTED**. Accordingly, petitioner is hereby **ORDERED TO PAY** deficiency income and value-added taxes in the aggregate amount of ₱556,254.72, inclusive of the 25% surcharge imposed under Section 248 (A)(3) of the NIRC of 1997, as amended, computed as follows:

Tax Type	Basic	Surcharge	Total
Income Tax	₱ 98,921.77	₱ 24,730.44	₱ 123,652.21
Value Added Tax	346,082.01	86,520.50	432,602.51
TOTAL	**₱ 445,003.78**	**₱ 111,250.94**	**₱ 556,254.72**

In addition, petitioner is ordered to pay:

(a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency income tax of ₱98,921.77 and value added tax of ₱346,082.01, computed from the dates indicated below until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended:

Tax Type	Basic Tax	Deficiency Interest Computed From
Income Tax	₱ 98,921.77	April 15, 2008
Value Added Tax	₱ 346,082.01	January 25, 2008

(b) Delinquency interest at the rate of 20% per annum on the total amount of ₱556,254.72 and on the 20% deficiency interest which have accrued as aforestated in (a), computed from January 1, 2012 until full payment thereof, pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We concur:

LOVELL R. BAUTISTA
Associate Justice

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.

LOVELL R. BAUTISTA
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