Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

__En Banc__

COMMISSIONER OF INTERNAL REVENUE, Petitioner, - versus - **POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT (PSALM) CORPORATION** Respondent.	**EB Case No. 1088** **(CTA Case No. 8177)**

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POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION Petitioner - versus - **COMMISSIONER OF INTERNAL REVENUE,** Respondent.	**EB Case No. 1089** **(CTA Case No. 8177)** Present: DEL ROSARIO, *PJ*, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS, *and* RINGPIS-LIBAN, *JJ*. Promulgated: MAY 04 2015 2:25 p.m.

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DECISION

CASANOVA, J.

These are appeals, by way of Petitions for Review, filed by both parties seeking the partial reversal/nullification of the Decision[1] dated

[1] Division Docket, Vol. 3 , pp. 1297-1338

July 3, 2013 (the "Assailed Decision") and the Resolution[2] dated November 7, 2013 (the "Assailed Resolution") both rendered by the CTA Special Third Division denying both parties' Motion for Partial Reconsideration.

The facts of the case, as narrated in the Assailed Decision, are as follows:

> Petitioner is a government-owned and -controlled corporation created under Section 49 of RA No. 9136, otherwise known as the Electric Power Industry Reform Act of 2001 ("EPIRA"), which "shall take ownership of all existing National Power Corporation (NPC) generation assets, liabilities, Independent Power Producer (IPP) contracts, real estate and all other disposable assets" and is mandated to manage the orderly sale, disposition, and privatization of NPC generation assets, real estate and other disposable assets, and IPP contracts with the objective of liquidating all NPC financial obligations and stranded contracts costs in an optimal manner. It has its principal office at the 7th Floor, Bankmer Building, 6756 Ayala Avenue, Makati City.
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> Respondent is the duly appointed Commissioner of Internal Revenue, vested under the appropriate laws with the authority to carry out the functions, duties and responsibilities of said Office, including, inter alia, the power to decide disputed assessments, cancel, and abate tax liabilities, pursuant to the provisions of the National Internal Revenue Code (NIRC) of 1997 and other tax laws, rules and regulations. She holds office at the Bureau of Internal Revenue (BIR) National Office Building, BIR Road, Diliman, Quezon City.
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> On August 31, 2007, the BIR Large Taxpayers Audit & Investigation Division II (LTAID II) issued Letter of Authority (LOA) No. 2001-00040996, authorizing Revenue Officers Leonor P. Alcaraz, Ruby Ann B. Oradia, Ma. Theresa V. Carrillo, and Josephine A. Labarro to examine petitioner's books of accounts and other accounting records for all internal revenue taxes for the period covering January 1, 2006 to December 31, 2006.

[2] Ibid, pp. 1448-1452

On May 28, 2009, respondent issued a Notice of Informal Conference requesting petitioner to appear at an informal conference to be held on June 15, 2009.

On October 8, 2009, respondent issued a Preliminary Assessment Notice (PAN) with Details of Discrepancies, assessing petitioner for deficiency VAT, WTC, EWT, FWT, FWV, and WPT for the taxable year ending December 31, 2006.

On December 15, 2009, petitioner received the FLD and FAN Nos. VT-06-00031, CP-06-00006, WF-06-00039, WG-06-00040, WE-06-00061, and WC-06-00037, all dated December 14, 2009, issued by respondent, holding petitioner liable for alleged deficiency internal revenue taxes, in the total amount of P315,472,516.55, inclusive of interests and compromise penalties, for the taxable year ending December 31, 2006, consisting of:

Nature of Tax	Basic	Interest	Compromise Penalty	Total
Value-added Tax	P92,549,080.50	P54,224,506.26	P50,000.00	P146,823,586.76
Withholding Tax on Compensation	5,602,236.07	3,329,408.90	50,000.00	10,555,169.57
		1,482,524.60*	91,000.00**	
Expanded Withholding Tax	641,967.09	381,521.04	50,000.00	1,095,009.92
		4,021.79*	17,500.00**	
Final Withholding Tax	90,528,072.10	53,800,833.25	50,000.00	144,568,737.68
		139,832.33*	50,000.00**	
Final Withholding VAT	6,745,914.80	4,009,097.17	50,000.00	12,429,844.38
		1,562,332.41*	62,500.00	
Withholding Percentage Tax	(1,819.61)	168.24*	0.00	168.24
TOTAL				**P315,472,516.55**

* Interest for late payments
** Compromise penalty for late payments

On January 13, 2010, petitioner filed its protest letter dated January 13, 2010 against the FLD and the FAN with BIR LTAID II.

On March 12, 2010, petitioner filed with the BIR LTAID II a supplemental protest, reiterating its substantive defenses and disagreement with the subject withholding tax assessments and submitting therewith all the relevant documents to support its position against the merit of the assessments.

Since no decision was issued by respondent on petitioner's protest letter dated January 13, 2010, petitioner filed the instant Petition for Review docketed as CTA Case No. 8177 on October 8, 2010.

On December 2, 2010, respondent filed her Answer to the Petition for Review and raised the following special and affirmative defenses:

> "8. Respondent reiterates and re-pleads the preceding paragraphs of this Answer as part of her Special and Affirmative Defenses.
>
> 9. Petitioner Power Sector Assets and Liabilities Management (PSALM) Corporation (PSALM, for brevity) is liable to pay its deficiency VAT and withholding taxes for calendar year 2006 in the aggregate amount of Three Hundred Fifteen Million Four Hundred Seventy-Two Thousand Five Hundred Sixteen Pesos and 55/100 (Php315,472,516.55) including penalties, surcharges and interest for the following reasons:
>
> 8.1 The instant petition should not be given due course by this Honorable Court for lack of merit.
>
> 8.2 Respondent respectfully avers that the assessment for taxable year 2006 in the aggregate amount of Php315,472,516.55 was issued in accordance with law and regulations.
>
> 8.3 Comprehensive study of petitioner's books of accounts and pertinent accounting records disclosed that it is liable to pay the total deficiency VAT and income tax assessments. The pertinent portions of the Memorandum Report dated November 27, 2009 of the examiner who conducted the

investigation of petitioner's case are quoted hereunder: to wit:

RESULTS OF REINVESTIGATION:

I. VALUE-ADDED TAX

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Our Position:

On November 1, 2005, R.A. 9337 came into law and placed the electric power industry under the VAT system. Section 24 thereof expressly repealed Section 13 of NPC's Charter (R.A. 6395) which relates to the exemption of NPC from VAT. Thus, for the main business of selling power and all transactions incidental thereto entered into by NPC and its successors-in-interest, namely; PSALM and TRANSCO starting November 1, 2005, the same are subject to 10% VAT and 12% effective February 1, 2006.

Since the legal title in the generation assets and facilities and other disposable assets still remains with the NPC although the ownership was already vested with PSALM pursuant to the provisions of the EPIRA, NPC shall report in the return the sale for VAT purposes and pay the appropriate tax therewith. Verification disclosed that NPC reported the sale of assets which materialized in 2006 for VAT purposes.

Relative to the sale of asset of NPC, forfeiture of bond in case of cancellation of the transaction due to non-performance of an obligation by the other party is a condition which is an integral part of the Deed of Sale of Asset. In view thereof, we maintained our position that the proceeds from the forfeited bond totaling to 757,720,181.07 which was declared as income by PSALM in their Annual Income Tax Return is subject to 12% VAT being an incidental income pursuant to Sec. 105 of the Tax Code, as amended and Sec. 4.105-3 of RR No. 16-2005, as amended which states that:

Sec. 4.105-3. Meaning of 'In the Course of Trade or Business'. — the term 'in the course of trade *or business' means the regular conduct or pursuit of a commercial or economic activity,* ***including transactions incidental thereto,*** *by any person regardless of whether or not the person engaged therein is a non-stock non-profit private organization, or government entity.*

On the other hand, their claims that only P85,823.44 of the input tax being claimed per return has **insufficient documentation** on the VAT-registration of the supplier/contractor-payee was upheld upon scrutiny of the newly submitted documents. However, such allegations (no. 3 above) in order to rebut the disallowance of P1,121,583.66 for failure to impose the limitation set forth in Section 4.110.3 of RR No. 16-2005 could not be given due course since there were vatable revenues during the period which they failed to subject to 12% VAT. Accordingly, disallowance of input taxes aggregating to P1,220,611.92 is hereby reiterated pursuant to Sections 110 and 113 of the Tax Code, as amended and RR No. 16-2005, as amended.

In view thereof, deficiency VAT amounting to P92,549,080.50 exclusive of penalties thereto was assessed from herein taxpayer.

II. WITHHOLDING TAX

Compliance with the withholding tax rules and regulations was verified thru reconciliation of the amount subjected to applicable withholding tax rates per various withholding tax returns duly filed with the Bureau as against the amount of income payments claimed as purchases/expense and capitalized per ITR/FS.

In order to reconcile various discrepancies found still due per PAN, various reconciliation schedules and returns submitted thereafter were carefully evaluated the result of which are as follows:

a) Withholding Tax on Compensation

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Our position:

Various arguments and supporting documents submitted after PAN were carefully evaluated and reconciled with the findings per PAN. Per documents submitted it was verified that herein taxpayer maintained a separate alphalist for recipient of CPB. Both CPB and CIB were booked under Other Maintenance and Operating Expense. Scrutiny of the said alphalist disclosed that the P30,000.00 allowable threshold exemption was applied against the CPB of each recipient which led to lower taxable bonus/rate. Since the P30,000.00 threshold exemption was already applied against the employee benefits booked under Personal Services and reported per Alpha List of Employees, we reiterate our stand on the issue that gross amount of CPB and CIB be subjected to 32% rate. On the other hand, various payments made in 2008 (6/12/08 — P111,566.83 [part of 19M] and 8/12/08 — P1,821,021.11) including remittance of tax withheld from 2005 expenses for P1,801,636.39 on 4/14/08 were now considered upon scrutiny of the documents submitted to support the same.

Accordingly, deficiency basis withholding tax on compensation for **P5,602,236.07** was assessed pursuant to Sec. 79(A) of the Tax Code, as amended, and RR No. 2-98, as amended.

b) Expanded Withholding Tax (EWT):

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Our Position:

Upon careful appraisal of the schedules and supporting documents attached to their position paper dated October 23, 2009, such claim regarding certain expenses being mere reimbursement of expenses was given due course. However, the amount of P18,061,909.00 representing PPE was still subjected to EWT since Note 8 of FS clearly shows that these were additions to PPE during the year. In view thereof, after considering payments made in the succeeding year (Feb. '07 — P112,575.96 & March '07 — P5,385.15), deficiency expanded withholding for **P641,967.09** exclusive of penalties thereto was assessed from herein taxpayer pursuant to Sec. 57 (B) of the Tax Code, as amended, and RR No. 2-98, as amended.

c) Final Withholding Tax

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Our Position:

Upon careful scrutiny of the documents submitted to support the aforesaid allegations payment to CSFB was subjected to EWT (15%) instead of final withholding tax (25%). Also, final tax withheld from payments to Baker Botts LLP was now applied against final withholding tax due from payments to Renton. Other issues were reiterated since the taxpayer did not interpose any objections against the assessments. Interest Expense on foreign loans was subjected to 20% final withholding tax pursuant to Sec. 57(A) of the Tax Code, as amended, in relation to Sec. 28(B)(5)(a) of the same Tax Code. Various payments in the succeeding year were considered in the computation of deficiency tax. In view of the foregoing, deficiency final withholding tax totaling to P90,528,072.10 exclusive of penalties thereto was assessed from herein taxpayer pursuant to Sec. 57(A) of the Tax Code, as amended, and RR No. 2-98, as amended.

d) Final Withholding VAT/Percentage Tax

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Our Position:

After careful evaluation of the arguments and various documents presented after PAN deficiency withholding percentage tax was deleted from the assessments. With regards to professional fees of foreign advisors, it was verified that, contrary to their allegations, the same have been subjected to final withholding VAT however there was underwithholding of tax. Accordingly, after considering certain tax payments made in 2008, it was determined that the taxpayer is still deficient of withholding final VAT amounting to **P6,745,914.80** pursuant to Sec. 114(C) of the Tax Code, as amended.

III. PENALTIES FOR LATE REMITTANCE

Verification of the alleged unremitted withholding taxes totaling to P19,542,763.51 as of 12/31/06 per COA report disclosed that, except for P340,445.06 (part of the above assessments), the same were remitted in various months in 2007 and 2008 as per various returns and schedules submitted by the taxpayer. Also, there was additional remittance of withholding tax on compensation amounting to P1,821,021.11 in August 2008 (not part of P19,542,763.51). In view thereof, penalty interest and compromise totaling to **P3,409,879.37** were imposed for late remittance pursuant to Sections 249 and 250 of the Tax Code, as amended.

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8.4 It is well-settled rule in taxation that the burden of proof is on the taxpayer to present evidence to show the incorrectness of the assessment.

8.5 In case of disputed assessments, the burden of proof is on the taxpayer to establish the fact that it is indeed not liable for any deficiency taxes subject of the assessment. The failure to show documents that would substantiate a claim that no deficiency taxes are due, would result to upholding the validity of the assessment for deficiency income taxes ***(Camara Steel Industries, Inc. vs. Commissioner of Internal Revenue).***

8.6 Well-settled is the rule that tax assessments are entitled to the presumption of correctness and made in good faith. The taxpayer has the duty to prove otherwise. In the absence 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 ***(Sy Po vs. Court of Tax Appeals).*** Dereliction on the part of petitioner to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notices." *(Citations omitted)*

On December 7, 2010, this Court issued a Notice of Pre-Trial Conference, notifying the parties that the case is set for pre-trial conference on January 21, 2011 and directing the parties and their respective counsels to be present at the pre-trial and to file with this Court their respective Pre-Trial Briefs at least three (3) days before the date of pre-trial.

On January 17, 2011, petitioner filed its Pre-Trial Brief; while respondent filed her Pre-Trial Brief on January 18, 2011.

During the pre-trial proceedings held on January 21, 2011, this Court gave the counsel for petitioner a period of fifteen (15) days from January 21, 2011 or until February 5, 2011 within which to submit the Joint Stipulation of Facts and Issues.

On March 7, 2011, the parties submitted their Joint Stipulation of Facts and Issues.

On March 28, 2011, this Court issued the Pre-Trial Order, summarizing the facts and issues stipulated by the parties, the evidence to be presented by the parties, and the hearing dates; and stating that the pre-trial is deemed terminated.

During trial, the parties presented and formally offered their respective witnesses and documentary evidence in support of their respective claims and contentions. The case was submitted for decision on October 3, 2012, taking into consideration petitioner's Memorandum filed on September 17, 2012 and Memorandum (for Respondent) filed on September 28, 2012.

On July 3, 2013, The CTA Special Third Division rendered the Assailed Decision which partially granted petitioner-PSALM's Petition for Review.

Not satisfied with the Decision both parties filed their respective Motion for Partial Reconsideration. Petitioner-PSALM filed its Motion for Partial Reconsideration[3] through registered mail on July 22,2013 with respondent-CIR's OPPOSITION and/or COMMENT (RE: Motion for Partial Reconsideration[4] dated 19 July 2013) filed through registered mail on September 9, 2013. Respondent-CIR's MOTION FOR PARTIAL RECONSIDERATION[5] was filed on July 25, 2013, with petitioner-PSALM's OPPOSITION TO RESPONDENT's MOTION FOR PARTIAL RECONSIDERATION[6] filed on August 16, 2013.

The CTA Special Third Division rendered the Assailed Resolution on November 7, 2013, which denied both parties', Motions.

Thereafter, both parties filed their respective Petition for Review, as follows:

> a. CTA EB Case No. 1088 (CTA Case No. 8177) - Commissioner of Internal Revenue, petitioner vs. Power Sector Assets and Liabilities Management (PSALM) Corporation, respondent, filed on December 11, 2013 with respondent–PSALM's COMMENT filed on March 20, 2014.[7]
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> b. CTA EB Case No. 1089 (CTA Case No. 8177)- Power Sector Assets and Liabilities Management Corporation, petitioner vs. Commissioner of Internal Revenue, respondent, filed on November 26, 2013, with respondent-CIR's COMMENT[8] filed on May 28, 2014.

On January 2, 2014, the Court En Banc resolved to consolidate CTA EB No. 1089, filed on November 6, 2013 with CTA EB No. 1088, filed on December 11, 2013, the case bearing the lower docket number.

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4 Id., 1440-1446

5 Id., pp. 1376-1386

6 Id., pp. 1415-1424

7 En Banc Rollo, pp. 101-112

8 Ibid, pp. 133-137

On July 9, 2014, the Court En Banc promulgated a Resolution[9] admitting respondent-CIR's belatedly filed Comment and ordering the parties to file their respective Consolidated Memorandum within 30 days from receipt of the resolution. Upon the filing thereof or the lapse of the period given the consolidated petitions shall be submitted for decision.

On September 15, 2014, PSALM filed its Consolidated Memorandum while the CIR failed to file her Consolidated Memorandum per Records Verification dated September 24, 2014.

The consolidated Petitions for Review were deemed submitted for decision per Resolution[10] dated October 16, 2014.

In support of their respective Petition for Review, PSALM and CIR presented the following ground/arguments, to wit:

CTA EB Case No. 1088 (CIR, Petitioner)

1. The sale by respondent of the NPC generation assets and other real properties is subject to VAT by virtue of RA 9337.

2. Petitioner is liable for ₱315,472,516.55 as deficiency VAT and withholding taxes for calendar year 2006.

CTA EB Case No. 1089 (PSALM, petitioner)

1. PSALM humbly maintains that the CTA Third Division erred in its 3 July 2013 Decision, which this Honorable Court must correct forthwith.

After a careful and thorough evaluation and consideration of the parties' arguments as well as the records of the case, the CTA En Banc finds no merit in both Petitions for Review.

The arguments raised by both parties in their respective Petition for Review in CTA EB No. 1088 and CTA EB No. 1089, are

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[9] Id., pp. 140-142
[10] En Banc Rollo, pp. 183-184

mere reiterations of their arguments in their respective Motion for Partial Reconsideration.

The CTA En Banc finds no new matters which have not yet been considered and passed upon by the CTA Special Third Division in its Assailed Decision and Assailed Resolution.

WHEREFORE, finding no cogent reason to reverse the Assailed Decision dated July 3, 2013 and the Assailed Resolution dated November 7, 2013, of the CTA Special Third Division, the Petitions for Review are hereby **DISMISSED** for lack of merit. Accordingly, the July 3, 2013 Decision and November 7, 2013 Resolution of the CTA Special Third Division are hereby **AFFIRMED.**

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

with separate concurring opinion

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, 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

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT (PSALM) CORPORATION,
Respondent.

CTA EB NO. 1088
(CTA Case No. 8177)

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POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT (PSALM) CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1089
(CTA Case No. 8177)

Present:

DEL ROSARIO, *PJ,*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS, *and*
RINGPIS-LIBAN, *JJ.*

Promulgated:
MAY 04 2015
2:25 p.m.

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SEPARATE CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* of my esteemed colleague, Associate Justice Caesar A. Casanova, which affirms the assailed Decision of the Special Third Division in CTA Case No. 8177. May I, however, discuss some of the arguments raised by Power Sector Assets and Liabilities Management (PSALM). Corporation

Under Remittance of Withholding Tax on Salaries and Wages

PSALM argues that the Court in Division effectively assessed it with deficiency withholding tax on compensation (WTC) even as the under remittance of withholding tax on salaries and wages referred to by the Court in Division in the assailed Decision was neither an issue PSALM raised in its Petition for Review filed on October 8, 2010 nor was it included in the Commissioner of Internal Revenue's (CIR) computation of PSALM's deficiency Withholding Tax on Compensation (WTC) assessment under the Formal Letter of Demand (FLD) dated December 14, 2009. PSALM posits that its right to due process was violated because it was not afforded the opportunity to present its arguments and evidence to disprove said "under remittance" during the proceedings conducted before the Court in Division.

PSALM's contention that its right to due process was violated is without merit. A perusal of the records shows that the CIR assessed PSALM for deficiency WTC in the amount of ₱10,555,169.57 in the FLD, as follows:[1]

Taxable Basis per Alphalist		₱ 98,073,440.41
Add: Compensation not subjected to WT		23,533,000.05
Total Taxable Basis per Audit		121,606,440.46
Withholding Tax Due on Compensation		28,594,404.38
Less: Tax Paid – 2006	₱ 15,446,687.72	
Succeeding Years' Payments	7,545,480.59	22,992,168.31
Deficiency Tax		₱ 5,602,236.07
Add: Interest (1/11/2007 to 12/30/2009=59.43%)		3,329,408.90
Interest for late payments		1,482,524.60
Compromise Penalty		50,000.00

[1] Exhibit "9".

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Compromise Penalty for late payments		91,000.00
Total Deficiency WTC		**₱ 10,555,169.57**

The basic deficiency WTC in the amount of P5,602,236.07 was further summarized in the assailed Decision, as follows:

	Tax Base	**Withholding Tax**
Withholding tax on Salaries and Wages per Alphalist	₱98,073,440.41	₱ 19,262,207.97
Less: Tax payments per 2006 Monthly Remittance Returns	81,614,479.30	15,446,687.72
Under remittance of withholding tax on Salaries and Wages		₱ 3,815,520.25
Add: Corporate Performance Bonus	16,858,396.05	5,394,686.74
Corporate Incentive Bonus	6,674,604.00	2,135,873.28
Tax Due for 2005 Expense		1,801,636.39
Total		**₱13,147,716.66**
Less: Succeeding year's payments		* 7,545,480.59
Deficiency Tax		**₱ 5,602,236.07**

Though PSALM did not specifically raise the under remittance of withholding tax on salaries and wages in the amount of P3,815,520.25 in its Petition for Review and said amount was not particularly shown in the FLD, the under remittance forms part of the deficiency WTC assessment in the amount of P5,602,236.07, as shown in the table above.

The under remittance of P3,815,520.25 was arrived at by deducting the tax withheld per Alphalist of employees in the amount of P19,262,207.97 against the taxes paid for 2006 in the amount of P15,446,687.72, as follows:

Withholding tax on Salaries and Wages per Alphalist	₱ 19,262,207.97
Less: Tax payments per 2006 Monthly Remittance Returns	15,446,687.72
Under remittance of withholding tax on Salaries and Wages	₱ 3,815,520.25

The amount of P19,262,207.97 is the corresponding withholding tax that should have been withheld by petitioner from the total gross compensation of P98,073,440.41 per alphalist. The gross compensation of P98,073,440.41 and tax paid of P15,446,687.72 can be clearly seen in the FLD.

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Clearly, the amount of P3,815,520.25 forms part of the basic deficiency withholding tax of P5,602,236.07. Moreover, the under remittance was included in the details of tax deficiency attached in the Preliminary Assessment Notice (PAN).[2]

In this regard, PSALM's right to due process was not violated since from the very start it should have disproved the total basic deficiency tax in the amount of P5,602,236.07 where the under remittance of P3,815,520.25 was included.

Deficiency Expanded Withholding Tax (EWT)

PSALM claims that it offered as evidence Memorandum dated 29 January 2007 from the Financial Services Department addressed to the Controllership Department which contained the list of Certified Obligations for FY 2006 in the amount of Php23,418,922.76 with the corresponding Budget Utilization Request as well as supporting documents. PSALM asserts that the documents prove that although such transactions were made in FY 2006, these were not yet paid as of 31 December 2006, in accordance with government accounting requirements.

PSALM also insists that these 2006 Certified Obligations are amounts not yet billed to PSALM, or remitted or paid by PSALM to its suppliers of goods and services, but are booked as such, merely for budget cover and financial accounting purposes. It argues that these Certified Obligations are not yet due and legally demandable due to lack of supporting documents as required by government accounting rules, and hence, not yet subject to EWT for the taxable year 2006.

Basic is the rule that tax assessments by tax examiners are presumed correct and made in good faith, with the taxpayer having the burden of proving otherwise.

In this case, PSALM was assessed deficiency EWT in the amount of P1,095,009.92, as follows:

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[2] Exhibit "7", BIR Records, folder I-B.

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Taxable Basis per Return		₱ 79,656,682.07
Add: Income payments not subjected to EWT		14,375,234.49
Total Taxable Basis per Audit		₱ 94,031,916.56
Expanded Withholding Tax Due		₱ 4,824,623.58
Less: Tax Paid – 2006	₱ 4,064,695.38	
Succeeding Year's Payments	117,961.11	4,182,656.49
Deficiency Expanded Withholding Tax		₱ 641,967.09
Add: Interest (1/11/2007 to 12/30/2009=59.43%)		381,521.04
Interest for late payments		4,021.79
Compromise Penalty		50,000.00
Compromise Penalty for late payments		17,500.00
Total Deficiency Expanded Withholding Tax		**₱ 1,095,009.92**

PSALM is insisting that the Certified Obligations for FY 2006 in the amount of Php23,418,922.76 is not subject to EWT. PSALM, however, failed to show which of its accounts per FS pertain to the said obligations and reimbursements and how much should not be subjected to withholding taxes. The amount of P23,418,922.76 does not correspond to the assessed amount to substantiate its claim and to prove that no deficiency taxes are due.

Moreover, the duty of a payor to withhold arises when the income payments were paid, becomes payable, or were accrued/recorded as expense in payor's books, whichever comes first.[3] Considering that PSALM already booked the Certified Obligations for FY 2006, it is mandated to withhold the corresponding taxes.

Deficiency Final Withholding Tax (FWT) - Income payments to Malcolm Groom

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[3] SECTION 2.57.4 Time of Withholding. – The obligation of the payor to deduct and withhold the tax under Section 2.57 of these regulations arises at the time an income payment is paid or payable, or the income payment is accrued or recorded as an expense or asset, whichever is applicable, in the payor's books, whichever comes first. The term "payable" refers to the date the obligation becomes due, demandable or legally enforceable.

Provided, however, that where income is not yet paid or payable but the same has been recorded as an expense or asset, whichever is applicable, in the payor's books, the obligation to withhold shall arise in the last month of the return period in which the same is claimed as an expense or amortized for tax purposes.

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PSALM maintains that since Malcolm Groom only had one engagement with PSALM during the period covered by the assessment, there can be no doubt that the out-of-pocket expenses (OPE) being claimed by PSALM as evidenced by Mr. Groom's bill corresponds to the OPE found by the CIR in its audit. According to PSALM, while the CIR's assessment enjoys the presumption of correctness, PSALM's officers as officials of a government-owned and controlled corporation (GOCC) should also be accorded presumption of regularity in the performance of their functions, including proper accounting of revenues and expenses.

PSALMs allegation that it had only one engagement with Malcolm Groom does not prove that the amount constituting the out-of-pocket expenses claimed by petitioner also pertains to the out of pocket cost found by CIR to be subjected to FWT. A perusal of Payment Instruction[4] shows that the amount of P288,444.26 pertains to professional service fees and out-of-pocket expenses incurred by Malcolm Groom as Legal Consultant. PSALM did not present any breakdown to allocate which part of the P288,444.26 pertains to professional fees and out-of-pocket expenses. Thus, there is no way for the Court to ascertain which amounts constitute out-of-pocket expenses.

Deficiency FWT - Income payments to Citibank N.A. London

PSALM avers that JP Morgan Trustee Ltd., before being replaced by Citibank NA London, was engaged as bonds trustee precisely because of its international if not global stature for its Global Trust and Agency Services. PSALM insists that a reading of the Trust Agreement would readily disclose that the services to be provided would necessarily take place outside the Philippines as these involve the surrender of the Global Bonds (denominated in Japanese Yen) by the international bondholders to the Citibank NA's (vice JP Morgan) office in London for the trustee to coordinate with the Issuer for the processing of payment. It contends that the Trust Agreement itself should be sufficient proof that services rendered by Citibank N.A. London were made outside of the Philippines, and thus not subject to Philippine withholding tax.

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[4] Exhibit "WW-1".

A careful reading of the Trust Deed[5] shows that said deed does not indicate that JP Morgan Trustee Ltd.'s services will be rendered outside the Philippines. Thus, PSALM's failure to prove that the services rendered were exclusively done outside the Philippines warrants the upholding of the deficiency FWT assessment.

Deficiency Final Withholding VAT (FWV)

PSALM argues that the presumption of regularity only attaches to the CIR's deficiency assessment if supported with the facts and law on which it is based, and if the assessment is not issued with patent arbitrariness. PSALM stresses that the CIR did not provide any details with regard to its deficiency FWV assessment. PSALM points out that it would be readily seen in the Details of Discrepancy of the FLD that the CIR provided a single statement which does not afford PSALM sufficient explanation to intelligently rebut the deficiency assessment, *viz.*:

> "E. FINAL WITHHOLDING VAT/PERCENTAGE TAX
>
> Verification disclosed underwithholding of VAT on certain income payments hence, the assessments of P6,745,914.80 exclusive of penalties thereto pursuant to Sec 114 (C) of the Tax Code, as amended."

Records show that respondent assessed petitioner deficiency FWV in the amount of ₱12,429,844.38, computed as follows:

Taxable Basis per Return		₱ 66,639,522.06
Add: Income Payments not Subjected to FWV		87,070,165.81
Total Taxable Basis per Audit		₱153,709,687.87
VAT Withholding Tax Due - ₱11,148,983.84(2006) + ₱2,451,670.20(2005)		13,600,654.04
Less: Tax Paid - 2006	₱ 3,331,976.10	
Succeeding Years' Payments	3,522,763.14	6,854,739.24
Deficiency VAT Withholding Tax		₱ 6,745,914.80
Add: Interest (1/11/2007 to 12/30/2009 = 59.43%)		4,009,097.17
Interest for Late Payments		1,562,332.41
Compromise Penalty		50,000.00
Compromise Penalty for Late Payments		62,500.00
Total Deficiency Final Withholding VAT		**₱ 12,429,844.38**

[5] Exhibit "PPPP".

Though PSALM is insisting that it was not afforded sufficient explanation to intelligently rebut the deficiency FWV assessment, records show that PSALM, in its Supplemental Protest,[6] was able to provide the composition of the P153,709,687.87[7] Total Taxable Basis Per Audit[8] and present its counter-arguments thereto. Clearly, PSALM knew the facts and law on which the deficiency FWV was based.

With regard to the other arguments raised by PSALM and CIR, as aptly found by the *ponente,* the same are mere reiterations of their arguments in their respective Motion for Partial Reconsideration which do not warrant the reversal or modification of the assailed Decision by the Court *En Banc*.

All told, I **VOTE** to **DISMISS** the Petitions for Review filed by Commissioner of Internal Revenue in CTA EB No. 1088 and Power Sector Assets and Liabilities Corporation in CTA EB No. 1089.

ROMAN G. DEL ROSARIO
Presiding Justice

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[6] BIR Records, Folder 1B, pp.1269 to 1164.
[7] P153,759,688.07, resulting in a discrepancy of P50,000.20.
[8] Supra Note 6, pp.1232 to 1225.