REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

FIRST SUMIDEN CIRCUITS, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 8924

Members:
CASTAÑEDA, JR., *Chairperson*
CASANOVA, *and*
MANAHAN, *JJ.*

Promulgated:
MAR 14 2018 10:25 am

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RESOLUTION

MANAHAN, *J.*:

This resolves respondent's *Motion for Partial Reconsideration (Re: Decision Promulgated on 03 January 2018)* filed on January 17, 2018. Respondent prays that this Court's Decision dated January 3, 2018 be partially reversed and that a new one be issued denying the Petition for Review and ordering the payment of total deficiency income tax for taxable year 2009 in the amount of Php17,655,764.08 in addition to the interests and penalties.

The dispositive portion of the Decision states:

> **WHEREFORE**, premises considered, [the] instant petition for review is **PARTIALLY GRANTED**. The assessment issued by respondent against petitioner for taxable year 2009 covering deficiency income tax is hereby **AFFIRMED but with modifications**. Accordingly, petitioner First Sumiden Circuits, Inc. is **ORDERED TO PAY** respondent the total amount of **₱976,108.23** representing basic deficiency Income Tax and the twenty five percent (25%) surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended, computed as follows:

Basic Deficiency Income Tax Due	Php 780,886.58
Add: 25% Surcharge	195,221.65
Total Tax Due	**Php 976,108.23**

In addition, petitioner is hereby **ORDERED TO PAY**:

a) Deficiency interest at the rate of 20% per annum on the basic deficiency Income Tax of Php780,886.58 computed from April 15, 2010 until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended;

b) Delinquency interest at the rate of 20% per annum on the total amount of Php976,108.23 and on the 20% deficiency interest which have accrued as aforestated in (a) computed from September 30, 2014 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED.

Respondent states that the Court erred in cancelling the portions of the deficiency income tax assessment arising from the following items:

a. Realized Forex Gain in the amount of Php13,728,945.86;

b. Disallowed Expense-Indirect Labor-welfare-retirement fund in the amount of Php3,009,389.54 (the disallowance of the remaining amount of Php63,171.33 was affirmed by the Honorable Court);

c. Disallowed Expense-Office Supplies in the amount of Php2,691,421.24 (the disallowance of the remaining Php66,811.50 was affirmed by the Honorable Court);

d. Disallowed Expense-Repairs and Maintenance-Plant-Nonstock in the amount of Php1,250,723.24 (the disallowance of the remaining Php822.50 was affirmed by the Honorable Court);

e. Disallowed Expense-Minor Equipment in the amount of Php909,406.97;

f. Disallowed Expense-Repairs and Maintenance-Plant Outsourced in the amount of Php6,872,287.81; and

g. Unsupported Importations in the amount of Php149,177,940.47 (the disallowance of the remaining Php15,617,731.53 was affirmed by the Honorable Court).

Respondent argues that the assessment for realized forex gain not subjected to tax is not a new assessment which deprived petitioner of due process; and, that said realized forex gain was part of the audit findings on Undeclared Sales and Disallowed Cost of Sales assessed as early as the issuance of the Preliminary Assessment Notice (PAN). With respect to the Disallowed Expenses, respondent maintains his position that these expenses are not considered direct costs and that the disallowance of said deductions should be upheld. Respondent also argues that the assessment for unsupported importations should be upheld. Finally, respondent argues that the Court erred in ruling that petitioner is not liable for the compromise penalty; and, that the instant compromise penalties were imposed pursuant to Revenue Memorandum Order No. 19-2007.

Petitioner filed its *Manifestation and Comment/Opposition (On Respondent's Motion for Partial Reconsideration)* on February 15, 2018, praying that respondent's Motion for Partial Reconsideration be denied. Petitioner manifests that it has already paid a total amount of Php3,637,709.83 representing the basic deficiency tax assessment, plus surcharge and interest as computed pursuant to the Court's Decision dated January 3, 2018. As to the items of the assessment, petitioner maintains that the realized forex gain appeared only in the Final Decision on Disputed Assessment (FDDA) and was not covered by the PAN and the Formal Letter of Demand/Assessment Notices (FLD/FAN); that the assessments for disallowed costs were properly cancelled following the ruling that the list of expenses in Revenue Regulations No. (RR) 11-2005 is not an exclusive list of expenses, and that the determination of whether an expense should be part of direct cost is the direct relation of such item to the rendition of the PEZA-registered services. Petitioner further argues that it has adequately proven its importations when it submitted PEZA Import Permits, PEZA Certification, Commercial Invoices, Airway Bills, Packing List, Application for Foreign Remittances, general ledger entries, and journal entries, in lieu of the Import Entry and Internal Revenue Declarations (IEIRDs), Authority to Release Goods, or Official Receipts from the Bureau of Customs. Finally, petitioner argues that the compromise penalty was correctly cancelled on the ground that no evidence was shown that petitioner consented to the imposition thereof.

After reviewing the parties' arguments and evidence, the Court finds the instant motion for partial reconsideration without merit.

Respondent maintains that the item on Realized Forex Gain Not Subjected to Tax is not a new assessment considering that the same was part of the "audit findings on Undeclared Sales and Disallowed Cost of Sales" contained in the PAN. The Court disagrees. The PAN[1] and FLD[2] do not contain an assessment item for realized forex gain. Said assessment item only appears in the FDDA.[3] Considering that the FDDA constitutes respondent's final decision on the assessment, petitioner was not given the chance to refute the said assessment within the administrative level. Hence, this assessment should be cancelled.

As to the assessments for disallowed expenses which the Court cancelled, respondent maintains that these disallowed expenses are indirect labor/costs which should not be deducted for purposes of computing the preferential tax based on five percent (5%) of the gross income. The Court reiterates that in *East Asia Utilities Corporation v. Commissioner of Internal Revenue*,[4] it has been held that the enumeration of direct costs under RR 11-05[5] is not an exclusive or closed list of expenses that may be deducted by PEZA-registered enterprises from their gross sales for the purpose of computing the 5% gross income tax (GIT). Instead, the enumeration of direct costs is intended as a guide in determining the items that may be considered direct costs or costs of sales. RR 11-05 also revoked Section 7 of RR 02-05 by deleting the words "**consist only**" and restating the pertinent phrase to "**the following direct costs are included in the allowable deductions xxx**". If the item of cost or expense can be directly attributed in providing the PEZA-registered services, then it should be treated as direct cost.[6]

[1] Docket, Vol. 3, Exhibit "P-5", pp. 952-962.
[2] Docket, Vol. 3, Exhibit "P-9", pp. 1083-1090.
[3] Docket, Vol. 1, Exhibit "P-11", pp. 29-35.
[4] CTA Case No. 8179, May 21, 2014.
[5] Regulations Defining "Gross Income Earned" to Implement the Tax Incentive Provision in Section 24 of Republic Act No. 7916, otherwise known as "The Special Economic Zone Act of 1995" Revoking Section 7 of Revenue Regulations No. 2-2005, and Suspending the Effectivity of Certain Provisions of Revenue Regulations No. 2-2005, April 25, 2005.
[6] *East Asia Utilities Corporation v. Commissioner of Internal Revenue*, CTA Case No. 8179, May 21, 2014.

In the instant case, the alleged disallowed expenses were traced to petitioner's registered activities which were not rebutted by respondent. Hence, the Court reiterates the cancellation of the assessments on said items.

With respect to the alleged unsupported importations, the Court reiterates that the amount of Php149,177,940.47 was adequately substantiated by valid supporting documents other than the IEIRD. This was not rebutted by respondent. On the other hand, the amount of Php15,617,731.53 remains subject to deficiency tax.

Finally, the Court reiterates that compromise penalties are only amounts suggested in settlement of criminal liability, and may not be imposed or exacted on the taxpayer in the event that a taxpayer refuses to pay the same. It is well settled that the Court 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.[7] Absent a showing that herein petitioner consented to the compromise penalty, its imposition should be deleted. The imposition of the same without the conformity of the taxpayer is illegal and unauthorized.[8]

WHEREFORE, respondent's *Motion for Partial Reconsideration (Re: Decision Promulgated on 03 January 2018)* filed on January 17, 2018 is hereby **DENIED**.

SO ORDERED.

CATHERINE T. MANAHAN
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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[7] *Phil. International Fair, Inc. vs. The Collector of Internal Revenue*, G.R. Nos. L-12928 and L-12932, March 31, 1962, 4 SCRA 781.
[8] *Commissioner of Internal Revenue vs. Liangga Bay Logging Co., Inc.*, G.R. No. 35266, January 21, 1999, 193 SCRA 92-93.