REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL SECOND DIVISION

BENCHMARK MARKETING CORP.,
Petitioner,

-*versus*-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 9296

Members:

CASTAÑEDA, JR., *Chairperson, and*
MANAHAN, *JJ.*

Promulgated:

JAN 02 2020

1:30 p.m.

x- x

AMENDED DECISION

MANAHAN, *J.:*

Submitted for the Court's resolution are the following:

1. Petitioner's Motion for Partial Reconsideration (of the Decision Promulgated on September 4, 2019) filed on September 23, 2019[1], without respondent's Comment; and

2. Respondent's Motion for Reconsideration of the Decision dated 04 September 2019 filed on September 23, 2019[2], with petitioner's Comment filed on October 11, 2019[3].

The parties move for the reconsideration of the Court's Decision promulgated on September 4, 2019, the dispositive portion of which is quoted as follows:

> "**WHEREFORE**, the instant Petition for Review is **PARTIALLY GRANTED**. The assessments issued by respondent against petitioner covering deficiency VAT, EWT and compromise penalties for TY 2011 are **CANCELLED AND WITHDRAWN**.

[1] Docket, Vol. IV, pp. 2058-2081.
[2] *Id.*, pp. 2082-2105.
[3] *Id.*, unpaged.

However, the assessment issued against petitioner for deficiency income tax for TY 2011 is **UPHELD IN PART.** Accordingly, petitioner is **ORDERED TO PAY** respondent the aggregate amount of **ONE HUNDRED NINE MILLION EIGHT HUNDRED TWENTY-SEVEN THOUSAND EIGHTY-FIVE PESOS AND 82/100 (Php109,827,085.82)**, inclusive of the 25% surcharge, 20% deficiency interest and 20% delinquency interest imposed under Sections 248(A)(3), 249(B) and (C) of the NIRC of 1997, as amended, respectively, computed until December 31, 2017, as follows:

Basic Deficiency Income Tax	₱ 33,113,267.56
25% Surcharge	8,278,316.89
20% Deficiency Interest from April 17, 2012 to July 31, 2015 (₱33,113,267.56 x 20% x 1,201 days/365 days)	21,791,251.69
Total Amount Due, July 31, 2015	**₱ 63,182,836.14**
Add: 20% Deficiency Interest from August 1, 2015 to December 31, 2017 (₱33,113,267.56 x 20% x 884 days/365 days)	16,039,522.48
20% Delinquency Interest from August 1, 2015 to December 31, 2017 (₱63,182,836.14 x 20% x 884 days/365 days)	30,604,727.20
Total Amount Due as of December 31, 2017	**₱109,827,085.82**

In addition, petitioner is liable to pay delinquency interest at the rate of 12% on the total unpaid amount of **Php63,182,836.13**, as of July 31, 2015, as determined above, computed from January 1, 2018 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended by Republic Act No. 10963, also known as Tax Reform for Acceleration and Inclusion (TRAIN) and as implemented by RR No. 21-2018."

Petitioner's Motion for Partial Reconsideration

Petitioner seeks reconsideration on the following assessment items retained by the Court per the assailed Decision, which resulted to the computed basic deficiency income tax of ₱33,113,267.56:

Ref.	Basis for the Assessment in the FLD	Findings Retained Per Decision by the Honorable Court
IT-3	Unallowable Sales Returns & Allowances	₱ 16,281,370.23
IT-4	Unsupported Freight-in, Fuel & Transportation expenses	29,181,966.24
IT-5	Unsupported Advertising & Other Outside Services	22,089,137.55
IT-6	Sales to Gov't (not included in the SLS)	176,387.43
IT-7	Excess of std input over actual input (to be closed to expense)	(10,475.73)
IT-8	Disallowed expenses due to nonwithholding (Sec. 34K, NIRC)	41,230,990.26
IT-9	GP on undeclared sales per recon of SLS, SAWT & TPI Data	1,428,182.54
	Total Adjustments Per Audit	₱ 110,377,558.52
	Taxable Income per return	4,236,787.70

	Taxable Income per Audit	₱ 114,614,346.22
	Income Tax Rate	30%
	Income Tax Due Per Audit	₱ 34,384,303.87
	Allowable Credits	1,271,036.31
	Basic Deficiency Income Tax	₱ 33,113,267.56

IT-3 Unallowable Sales Returns & Allowances – ₱16,281,370.23

Petitioner rehashes that although the Court-commissioned Independent Certified Public Accountant (ICPA) verified sales returns & discounts only to the extent of ₱39,258,500.52, it does not necessarily mean that the unverified portion of ₱16,281,370.23 as found by the Honorable Court may already be disallowed for purposes of deduction; and that the Formal Letter of Demand (FLD) merely cites Revenue Administrative Memorandum Order (RAMO) No. 01-1999 without actually stating which portion provides for such requirement of the production of *"Debit/Credit Memo and Certificate of Deductibility"*, thus, said FLD failed to provide the legal basis for disallowance of "sales discounts" as a valid deduction from gross sales, as required under Section 228 of the NIRC, as amended.

Petitioner further appeals to the Court to revisit the disallowance of the difference between the Sales Return and Discounts accounted by the ICPA and the Sales Return and Discounts recorded by petitioner for the months of February and April 2011, in the aggregate amount of ₱2,489,328.35. According to petitioner, while the amounts accounted by the ICPA for the said months were higher than that recorded in the ledger, this does not remove the fact that these returns and discounts are from 2011. Allegedly, it is a normal occurrence in bookkeeping for posting of transactions to be made in other periods, and in this situation, since the ICPA was able to validate less returns and discounts than what were recorded in the ledger for the other months of 2011, the ₱2,489,328.35 excess validated returns and disallowances could very well be from these other months.

Petitioner's appeal is bereft of merit.

As gleaned from the Details of Discrepancies[4] attached to the FLD, petitioner was properly informed of the factual and

[4] Exhibit "P-37-a", BIR Records, Folder No. 2, p. 1603, item IT-3.

legal bases of the subject assessment pursuant to Section 228 of the NIRC of 1997, as amended. In fact, petitioner was able to effectively refute the assessment and explain its side thereon, which means that it had substantial understanding of the factual and legal bases of the same. Hence, substantial compliance with the requirement as laid down under Section 228 of the NIRC suffices, for what is important is that the taxpayer has been sufficiently informed of the factual and legal bases of the assessment so that it may file an effective protest against the assessment.[5]

Further, the Court already explained in the Decision that sales returns and discounts require proper substantiation for it to be allowed as deduction from gross sales to arrive at gross income. Accordingly, the sales returns and discounts of ₱16,281,370.23 being unsupported were correctly disallowed by the Court.

Moreover, petitioner's allegation that the ₱2,489,328.35 excess validated sales returns and discounts pertain to the other months of 2011 is a mere allegation without showing proof to that effect. Bare allegations, unsubstantiated by evidence, are not equivalent to proof; in short, mere allegations are not evidence.[6] Thus, the ₱2,489,328.35 Sales Returns and Discounts over-accounted by the ICPA for the months of February and April 2011 were correctly excluded by the Court in determining the allowable claimed deductions from gross income since the same did not form part of the ₱46,338,319.08 claimed sales returns and discounts by petitioner and disallowed by respondent.

IT-4 Unsupported Freight-in, Fuel & Transportation Expenses - ₱29,181,966.24

Petitioner posits that respondent's finding in the FLD that *"This procedure revealed that freight-in, fuel & transportation expenses were not fully supported in BMC's SLP, hence disallowed."* does not call for the production of the source documents, but rather, only for a complete listing of suppliers in the SLP relating to freight-in, fuel & transportation expenses. It asserts that based on respondent's computation, by comparing the totals for suppliers listed in the SLP of ₱30,377,555.84 against the balance per FS/ITR/TB of

[5] *Commissioner of Internal Revenue v. Asalus* Corporation, G.R. No. 221590, Feb 22, 2017.
[6] *Ermelinda C. Manaloto, et. al. vs. Ismael Veloso III,* G.R. No. 171365, October 6, 2010.

₱59,559,522.08 respondent concluded that there are no other suppliers for freight-in, fuel & transportation expenses to fill the gap of ₱29,181,966.24, hence disallowed. Petitioner now believes that the question is whether the alleged difference of ₱29,181,966.24 were supported in petitioner's SLP or, otherwise stated, listed in petitioner's SLP.

Furthermore, petitioner avers that the audit approach adopted by the ICPA, in totally relying on the SLP listing and not going down to the source document, was only responsive to and necessitated by respondent's findings. Out of the ₱59,559,522.08, the ICPA was able to verify the amount of ₱58,563,790.52, which includes Freight, Fuel and Transportation suppliers per SLP in the amount of ₱54,292,071.57 and Non-VAT Freight, Fuel & Transportation Expenses not reflected in the SLP in the amount of ₱4,271,718.95. While it would seem that there is a difference of ₱995,731.79, allegedly, this was only because the ICPA cannot match the particular supplier to the particular expenditure item the supplier should be categorized.

The Court is not persuaded.

It is clear per the FLD[7] and attached Details of Discrepancy[8], that the Freight, Fuel and Transportation Expense of ₱29,181,966.24 was disallowed for being "unsupported". Accordingly, for the said expense amount to be allowed as deduction from gross income, it is imperative for petitioner to prove that the same was properly substantiated. Even if the ICPA was able to verify that certain amounts per SLP were related to Freight, Fuel and Transportation but was not considered by respondent in the computation or certain amounts were not reflected per SLP but pertain to Freight, Fuel and Transportation, petitioner should still provide the invoices/ORs just the same to prove the nature of the same. Since petitioner failed to present sufficient evidence to disprove respondent's finding, the disallowance of the ₱29,181,966.24 Freight, Fuel and Transportation Expense was properly upheld by the Court.

IT-5 Unsupported Advertising & Other Outside Services – ₱22,089,137.55

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[7] Exhibit "P-37", BIR Records, Folder No. 2, p. 1607.
[8] Exhibit "P-37-a", BIR Records, Folder No. 2, p. 1603.

Petitioner avers that apart from the summaries for the Non-VAT Outside Services and Advertising & Promotions Expenses, these were likewise supported by the source documents which were captured and submitted through the USB (Exhibits "P-122-A" and "P-122-B") filed with the Honorable Court, to wit:

EXHIBIT		***PER FS/TB***	
Summary	**Source Docs.**		
		Non - Vatable Outside Services	
P-96-d	**P-96-d and series**	*Commission – OP*	*201,737.81*
P-96-e	**P-96-e and series**	*Janitorial & Security*	*12,000.00*
P-96-f	**P-96-f and series**	*Sales Men Expenses*	*5,456,878.89*
		Non - Vatable Advertising & Promotions	
P-96-g	**P-96-g and series**	*Promotions – Sponsorship*	*5,420,199.36*

With respect to the purchases from Asia Brewery (₱4,676,301.75) and Interbev Philippines (₱939,937.48) which were charged to advertising (total of ₱5,616,239.23), petitioner submits that while these purchases would have formed part of the Cost of Sales, the total was deducted from the Cost of Sales and reclassified instead as advertising expenses, which are more appropriate considering the nature of these expenses as evident from the supporting documents captured in the USB submitted by the ICPA and were marked accordingly as *Exhibits "P-99 and series"* for the purchases from Asia Brewery and *Exhibits "P-100 and series"* for the purchases from Interbev Philippines.

Further, petitioner argues that the matter of classifying legitimate costs and expenses in the books of accounts (i.e., either as Cost of Sales or expenses) is a discretion left on the management. Any which way, these would have been deducted just the same from the taxable income of the taxpayer. The bottom line is that there was no double deduction for these group of expenses as the petitioner chose to charge these to Advertising Expenses rather than to Cost of Sales.

Petitioner's argument related to the Non-VAT Outside Services and Advertising & Promotions Expenses is worthy of consideration. Notably, although the source documents ("P-96-d and series" to "P-96-g and series") supporting its Non-VAT Outside Services and Advertising & Promotions Expenses were not offered to and admitted by the Court nor was included in the Table of Exhibits[9] examined, reviewed, validated and verified by the ICPA as faithful reproductions of the originals, the same may be considered being included in one of the USBs, marked as Exhibits "P-122-A" and "P-122-B" and described as "USB containing the soft copies/scanned copies of the source documents examined, verified, and marked by the ICPA and the schedules prepared by the ICPA in support of his ICPA Report"[10], which were admitted by the Court.

Upon verification of the source documents for the Non-Vatable Outside Services and Advertising & Promotions Expenses, only the amount of ₱676,088.02 pertaining to Advertising & Promotions Expenses were found to be properly substantiated by sales invoices/official receipts, as detailed below:

Exhibit No.	Payee	OR/Inv. No.	Amount
P-96-g-9-12	Philippine Fisheries Development Authority	12588	₱ 450.00
P-96-g-9-17	Julia Outdoor Advertising	2661	15,000.00
P-96-g-9-21	Philippine Fisheries Development Authority	12697	270.00
P-96-g-9-24	Philippine Fisheries Development Authority	12719	360.00
P-96-g-9-36	Goldprint Publishing House Inc	3376	1,205.36
P-96-g-9-39	Princeton Enterprises	91230	500.00
P-96-g-9-42	Iriga Ice Plant & Cold Storage Inc	14741	446.43
P-96-g-9-45	Iriga Ice Plant & Cold Storage Inc	14743	446.43
P-96-g-9-65	Cepeda Advertising	3997	720.00
P-96-g-9-70	Ramores Sound System	0351	700.00
P-96-g-18-3	Jy Tabaco Supermarket & Dept Store	1430; 1431	3,571.43
P-96-g-18-4	Jy Legazpi Mini Mart	0538; 0539	3,571.43
P-96-g-18-5	Jy Legazpi Mini Mart	2508; 2509	3,571.43
P-96-g-18-6	Joy Daraga Supermarket	2512; 2513	3,571.43
P-96-g-18-7	Jy Legazpi Mini Mart	0537	1,785.71
P-96-g-18-7	Jy Tabaco Supermarket & Dept Store	1429	1,785.71
P-96-g-18-8	Joy Daraga Supermarket	2511	1,785.71
P-96-g-18-8	Jy Legazpi Mini Mart	2507	1,785.71
P-96-g-19-2	Robertson Department Store & Supermart	408763	892.86
P-96-g-20-2	Plastic & General Merchandise	192487	714.29
P-96-g-21-2	Mastersquare Supermart	176120	892.86
P-96-g-21-3	Sincere Staff Management Services	01430	7,839.32
P-96-g-21-5	Sincere Staff Management Services	1429	7,934.64
P-96-g-21-10	Philippine Fisheries Development Authority	13272; 13293	180.00
P-96-g-21-11	Philippine Fisheries Development Authority	13307; 13354	180.00
P-96-g-29-2	Mastersquare Supermart	176121	892.86

[9] Exhibit "P-124", Docket, Vol. IV, pp. 1793-1797.
[10] Formal Offer of Evidence for the Petitioner, Docket, Vol. IV, pp. 8-9.

P-96-g-29-3	Robertson Department Store & Supermart	18892	1,785.71
P-96-g-29-4	Sincere Staff Management Services	02397	10,686.82
P-96-g-30-2	Arbee's Store	02381	35.00
P-96-g-30-3	Philippine Fisheries Development Authority	13491	360.00
P-96-g-30-8	Philippine Fisheries Development Authority	13504	180.00
P-96-g-30-12	Pante's Store	14753	32.14
P-96-g-30-16	Freemont Foods Corporation	063563	1,087.50
P-96-g-30-18	Libertad Consumers Corporation (LCC)	2457; 2458	2,675.89
P-96-g-30-19	Related Investment & Developmet Company Inc	25995	1,785.71
P-96-g-30-28	Arbee's Store	01689	40.00
P-96-g-30-29	D'Golden Touch Advertising	1821	34,500.00
P-96-g-30-30	Francia Centrum Trading	327370	48.21
P-96-g-30-31	Hiro's Store	13261	49.55
P-96-g-30-31	Mercury Drug	4159	33.93
P-96-g-30-32	New JGC Trading Co	112720	40.00
P-96-g-30-33	Mindpro Hardware & Gen. Merchandise		89.29
P-96-g-30-33	Bacsain Agri-business Inc	237894	116.07
P-96-g-30-34	Denrick Q. Rodriguez-Prop	0555	35.00
P-96-g-30-37	Arbee's Store	02371	100.00
P-96-g-30-39	Julia Outdoor Advertising	2717	15,000.00
P-96-g-30-40	D'Golden Touch Advertising	1835	34,500.00
P-96-g-30-41	RDU Store	3301	85.00
P-96-g-38-19	Lim Enterprises Inc	475895	562.50
P-96-g-38-20	Lim Enterprises Inc	475881; 1584	602.67
P-96-g-38-21	M.E. Dy Trading	1171	446.43
P-96-g-38-22	LCC	0110	1,517.86
P-96-g-38-23	LCC	0111	1,428.57
P-96-g-39-2	D'Golden Touch Advertising	1811	34,500.00
P-96-g-39-2	Julia Outdoor Advertising	2618	15,000.00
P-96-g-39-3	Mara General Merchandise	0460	50.00
P-96-g-39-5	Hong Enterprises	13012	892.86
P-96-g-39-7	Mudbugs Sports Bar & Café	17876	12,053.57
P-96-g-39-8	Goldprint Publishing House Inc	33934	714.29
P-96-g-39-9	Richwood Construction	3519	62.50
P-96-g-39-11	Philippine Fisheries Development Authority	13177	270.00
P-96-g-39-13	Hong Enterprises	13230	1,562.50
P-96-g-39-15	Robertson Mall	218001	132.59
P-96-g-39-15	Greenstone General Merchandise	15688	60.00
P-96-g-39-15	E. Barceba Store	4991	100.00
P-96-g-39-16	CTO-Naga	0503289	500.00
P-96-g-39-17	Hong Enterprises	13013	1,339.29
P-96-g-39-18	General Merchandise	21772	19.64
P-96-g-39-20	Hong Enterprises	13229	1,785.71
P-96-g-40-1	D'Golden Touch Advertising	1839	53,571.43
P-96-g-40-3	H.G. Hardware & General Merchandise	132292	40.18
P-96-g-40-5	Mercury Drug	4190	49.55
P-96-g-40-6	Admanan Trade Center	45714	44.64
P-96-g-40-13	Refer Advertising	0279	250.00
P-96-g-40-14	Arsen's Textile Upholstery Supply	22348	133.93
P-96-g-40-15	Cepeda Advertising	3717	540.00
P-96-g-41-1	Mastersquare Supermart	220068	892.85

P-96-g-41-2	Sincere Staff Management Services	1778	15,558.92
P-96-g-42-6	Charisma Snack House	3580	767.86
P-96-g-42-12	Pack Master Cent	17407	154.00
P-96-g-42-14	Jy Legazpi Mktg Corp	13043	6,160.71
P-96-g-43-5	Charisma Snack House	3581	2,150.00
P-96-g-43-10	... & Concrete Products	23940	78.00
P-96-g-43-10	Halixel Marketing & Fishing Supply	344075	44.64
P-96-g-43-11	Rawis Enterprises	05102	35.00
P-96-g-43-11	Oro Steelcen Builders	14089	35.71
P-96-g-43-12	Belen Amurao Grocery	11582	250.00
P-96-g-43-12	Legazpi Tong Hua Trading	57737	88.00
P-96-g-43-13	M.E. Dy Trading	1173	178.57
P-96-g-44-3	Cel's Advertising & Service	0655	10,000.00
P-96-g-45-2	Joy Daraga Supermarket	2538	1,941.96
P-96-g-45-2	Jy Legazpi Mini Mart	2525	1,941.96
P-96-g-45-3	Jy Legazpi Mini Mart	0653	1,941.96
P-96-g-45-3	Jy Tabaco Supermarket & Dept Store	1445	1,941.96
P-96-g-46-5	Xuthus Hardware & Gen. Merchandise	3390	65.00
P-96-g-46-8	Xuthus Hardware & Gen. Merchandise	3104	130.00
P-96-g-46-13	LCC	0170	1,366.07
P-96-g-47-8	..Horse hardware & General Merchandise	001588	50.00
P-96-g-47-9	Lim Enterprises Inc	477239	267.85
P-96-g-47-13	Mike Ner Store	002016	32.00
P-96-g-48-2	Lim Enterprises Inc	477712	116.07
P-96-g-48-3	Popular Marketing	006708	58.00
P-96-g-48-4	Xuthus Hardware & Gen. Merchandise	4308	170.00
P-96-g-48-9	Dodong Liok Hardware Inc	395377	89.29
P-96-g-49-2	D'Golden Touch Advertising	1855	34,500.00
P-96-g-49-4	Julia Outdoor Advertising	2745	15,000.00
P-96-g-49-8	D'Golden Touch Advertising	1856	93,750.00
P-96-g-49-9	Hiro's Store	13379	58.04
P-96-g-49-10	R. Cabilin's Store	21521	18.00
P-96-g-49-11	Robertson Mall	222107	87.95
P-96-g-49-13	Fusingan-Bautista hardware and Auto Supply	4913	53.57
P-96-g-49-15	D'Golden Touch Advertising	1860	34,500.00
P-96-g-49-17	Julia Outdoor Advertising	2763	15,000.00
P-96-g-49-22	Philippine Fisheries Development Authority	14865	180.00
P-96-g-49-23	Philippine Fisheries Development Authority	14889	180.00
P-96-g-49-27	Philippine Fisheries Development Authority	14910	180.00
P-96-g-49-29	Philippine Fisheries Development Authority	14960	180.00
P-96-g-49-32	Philippine Fisheries Development Authority	14974	135.00
P-96-g-49-35	.....Center	165088	379.46
P-96-g-49-36	Mindpro Hardware & Gen. Merchandise	6638	232.15
P-96-g-49-37	Philippine Fisheries Development Authority	14961; 14954	810.00
P-96-g-49-38	Philippine Fisheries Development Authority	14959; 14978; 14995	2,700.00
P-96-g-49-39	Fusingan-Bautista hardware and Auto Supply	108103	53.57
P-96-g-49-39	Lucky 9 Convenience Store	6216	41.25
P-96-g-49-40	Wood R Us Trading	1577	75.00
P-96-g-49-40	C.T.N. Store	3580	40.00
P-96-g-49-42	Wood R Us Trading	1605	3,663.00

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P-96-g-49-42	Francis Madera Coco Lumber	0827	1,440.00
P-96-g-49-46	Philippine Fisheries Development Authority	14988	180.00
P-96-g-49-48	Mindpro Hardware & Gen. Merchandise	6630; 6637	754.46
P-96-g-49-51	Cepeda Advertising	3569	540.00
P-96-g-49-52	Arsen's Textile Upholstery Supply	25388	133.93
P-96-g-50-5	D'Golden Touch Advertising	1862	93,750.00
P-96-g-50-8	Charisma Snack House	6440	6,000.00
P-96-g-50-11	Charisma Snack House	2601	3,150.00
P-96-g-51-2	Lim Enterprises Inc	478611; 479095	1,620.53
P-96-g-51-3	Lim Enterprises Inc	021385	232.14
P-96-g-51-4	Fabulous Jeans & Shirts & Gen. Merchandise	244562	10,665.18
P-96-g-51-5	LCC	0271	16,525.02
P-96-g-51-6	Dodong Liok Hardware Inc	398462	223.21
	Total		**₱676,088.02**

As to the remaining alleged Non-Vatable Outside Services and Advertising & Promotions Expenses, a perusal of the supporting source documents thereof reveals that these are mostly paying/petty cash vouchers and expense reports, which are not sufficient to establish the fact of incurrence or payment of the claimed expenses as these are internally produced documents that may be considered self-serving and can be easily manipulated to favor petitioner. Some of the documents submitted are even dated in the year 2010, which is outside the scope of the taxable year subject of the assessment.

As regards the purchases from Asia Brewery and Interbev Philippines allegedly charged to advertising, the Court is not swayed. To reiterate, the submitted sales invoices marked as Exhibits *"P-99 and series"* and *"P-100 and series"* only prove its purchases from Asia Brewery and Interbev Philippines but do not establish the fact that a portion of such purchases indeed pertain to freebies necessary for the promotion of its business. There is no showing that the nature of these purchases is for advertising. Neither can it be ascertained whether the claimed advertising expense are actually pertaining to purchases from Asia Brewery and Interbev Philippines as petitioner did not even present the breakdown of the alleged amounts of ₱4,676,301.75 and ₱939,937.48 for verification.

To be entitled to claim a tax deduction, the taxpayer must competently establish the factual and documentary bases of its claim.[11] Deductions for income tax purposes partake of the nature of tax exemptions and are strictly construed against the

[11] *H. Tambunting Pawnshop, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 173373, July 29, 2013.

taxpayer, who must prove by convincing evidence that he is entitled to the deduction claimed.[12]

Considering that petitioner was able to properly substantiate Non-Vatable Advertising & Promotions Expense only to the extent of ₱676,088.02, the assessed Unsupported Advertising & Other Outside Services in the amount ₱21,413,049.53 remains, as computed below:

Unsupported Advertising & Other Outside Services upheld in the assailed Decision	₱ 22,089,137.55
Less: Non-Vatable Advertising & Promotions reconsidered by the Court	676,088.02
Remaining Unsupported Advertising & Other Outside Services	**₱21,413,049.53**

IT-6 Sales to Gov't (not included in the SLS) – ₱176,387.43

Petitioner maintains that the subject sales made to the Provincial Government of Camarines Sur were reported in the Summary List of Sales (SLS) for 2011 under the name Camarines Sur Water Sports Complex (CWC). It further argues that the BIR Form 2307 or Certificate of Withholding Tax issued by the Provincial Capitol Complex of Camarines Sur reflects the same address as that of CWC or Camarines Sur Water Complex as indicated in the SLS, which allegedly supports its contention that the CWC listed in the SLS actually pertains to the Provincial Government of Camarines Sur.

Petitioner's contention deserves scant consideration.

As aptly discussed by the Court in the assailed Decision[13], save for the amount of ₱35,223.21, it cannot be ascertained whether the remaining sales to CWC per SLS actually pertain to sales to the Provincial Government of Camarines Sur absent any proof showing to that effect. Even granting that the registered name CWC per SLS indeed pertain to the Provincial Government of Camarines Sur, still, petitioner failed to prove that the remaining assessed sales to government in the amount of ₱176,387.43, which pertain to the months of February and May, are actually the same amount of sales to CWC reported per SLS for the same period. Hence, the assessed deficiency income tax on the undeclared sales to government was properly sustained.

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[12] *Philex Mining Corporation v. Commissioner of Internal Revenue*, G.R. No. 148187, April 16, 2008.
[13] Docket, Vol. IV, pp. 2040-2041.

IT-7 Excess of std input over actual input (to be closed to expense) – (₱10,475.73)

Petitioner continues to disagree with this deficiency income tax assessment, which is related to the sales to government (not included in the SLS). It asserts that respondent's allegation that petitioner did not report its Sales to the Provincial Government of Camarines Sur in its SLS and the former's act of disallowing a portion of the input tax claimed by petitioner has no factual and legal bases; that it remitted the amount of 10,580.53 as output tax and did not claim any input tax as alleged by respondent; that even the ICPA confirmed, after careful review of the supporting documents in relation to the previous item (*IT-6* above), that the said assessments should be cancelled for lack of factual basis.

A reading of the above arguments shows that these are actually repetitions of the same arguments raised by petitioner in its Memorandum[14]. Nonetheless, the Court wants to emphasize that this item is not an addition to but a deduction from petitioner's taxable income per return, which does not result to a deficiency income tax liability on the part of the latter. And since this was already considered by respondent as a deduction in its computation, to the benefit of the petitioner, the Court deems it proper not to be disturbed.

IT-8 Disallowed expenses due to nonwithholding (Sec. 34K, NIRC) – ₱41,230,990.26

Petitioner maintains its position that the said expenses should not have been disallowed because it properly subjected all income payments covered by the withholding tax system thereto as presented in its reconciliation; that the income payments not subjected to expanded withholding tax (EWT) are either (1) casual purchases or from a person who is not considered as a regular supplier, (2) petty cash disbursements incurred by salesmen and sales offices such as, but not limited to meals, representation and entertainment, gasoline, out-of-town fieldwork expenses and supplies or (3) expenses that were paid in cash such as, but not limited to prepaid cellphone loads, registered mails transmitted to customers and the like; that assuming that certain expenses were not subjected to

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[14] Docket, Vol. IV, pp. 1983-1984.

withholding taxes, respondent should, at the very least, assess it for deficiency in withholding taxes and not disallow the expenses altogether as this certainly is a deprivation of property without due process of law which no less than the Constitution proscribes; and that any assessment, if at all, should be based on the prevailing rule during the taxable year under audit which is Revenue Regulations No. 14-2002.

A careful review of petitioner's arguments reveals that these are mere rehash of the issues raised in its Memorandum[15] filed before this Court, which had already been passed upon and resolved in the assailed Decision. On this note, the Court reiterates that petitioner failed to brace its position by presenting the pertinent documents to verify the details of its reconciliation and the alleged casual purchases not subject to withholding tax. Bare allegations, unsubstantiated by evidence, does not hold water.

Moreover, it must be stressed that the disallowance of the subject expenses is clearly justified by the provision of a law, particularly Section 34(K) of the NIRC of 1997, as amended, which explicitly states that *"Any amount paid or payable which is otherwise deductible from, or taken into account in computing gross income..., shall be allowed as deduction only if it is shown that the tax required to be deducted and withheld therefrom has been paid"*. Considering that petitioner failed to prove that the subject expenses were subjected to or are not subject to withholding tax, the same cannot be allowed as deduction from its gross income. Hence, the assessed disallowance was properly upheld.

IT-9 GP on undeclared sales per recon of SLS, SAWT & TPI Data – ₱1,428,182.54

Petitioner contests that the assessment is downright speculative; that the fact that the total income payment received as appearing in the Summary Alphalist of Withholding Taxes (SAWT) is higher than the income payment received based on SLS does not necessarily imply unrecorded sales for it may be due to timing difference or variance in accounting system adopted by the payor and payee of income; that it is irregular and baseless to compare the SAWT with SLS in order to come up with a speculative unrecorded taxable income from sales;

[15] Id., pp. 1984-1987.

that it is doubly speculative when respondent also used the Gross Profit Ratio or "Percentage Method" based on Revenue Audit Memorandum Order (RAMO) No. 01-2000 as the said RAMO only acknowledged that the comparison will provide an indication on a mere possibility of revenue being understated, thus, it is not certain, definite and foolproof.

Petitioner's contestations lack merit. While it is true that a discrepancy may be due to timing difference or variance in accounting systems adopted by the payor and payee of income, merely stating the same does not carry weight without any proof thereof.

Moreover, it bears stressing that tax assessments by tax examiners are presumed correct and made in good faith, with the taxpayer having the duty of proving otherwise. The burden of proof is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the Commissioner of Internal Revenue is wrong but the taxpayer is right. Otherwise the presumption of correctness of tax assessment stands.[16] In as much as petitioner failed to reconcile the remaining discrepancy and overturn respondent's finding that it has undeclared sales by presenting proof to the contrary, the Court affirms its ruling on the subject item of assessment in the assailed Decision.

In sum, finding merit on petitioner's motion, the latter's basic income tax deficiency for TY 2011 shall be reduced to ₱32,910,441.15, computed as follows:

Basic Income Tax Deficiency per September 4, 2019 Decision	₱ 33,113,267.56
Less: Income Tax Due on Reconsidered Unsupported Advertising & Other Outside Services (₱676,088.02 x 30%)	202,826.41
Adjusted Basic Income Tax Deficiency	**₱32,910,441.15**

Respondent's Motion for Reconsideration

1. *The Honorable Court erred in ruling that the assessments for deficiency VAT for the 1st quarter of TY 2011 and deficiency EWT for the months of January 2011 to May 2011 have already prescribed.*

[16] *Commissioner of Internal Revenue vs. Hantex Trading Co. Inc*, G.R No. 136975, March 31, 2005.

Respondent contends that the three (3) year period of limitation to assess shall not apply in the case at hand due to petitioner's filing of a false return there being substantial under declaration of said return. Instead, the applicable provision should be Section 222(a) of the NIRC of 1997, as amended, which provides that the period to make an assessment may be made within ten (10) years after the discovery of falsity, fraud or omission. Hence, petitioner posits that in the case at hand, the counting of the ten-year prescriptive period shall be reckoned from the discovery of the omission specifically at the time of the issuance of the Preliminary Assessment Notice (PAN).

The Court notes that the issue on the applicability of the ten-year prescriptive period was raised by respondent for the first time only in the instant motion. Based on the PAN[17], FLD[18], its Answer[19] and its Memorandum[20], respondent never invoked the application of the ten-year prescriptive period to the deficiency tax assessments made by the latter.

Nonetheless, respondent's contention is implausible. Pursuant to Section 222(a)[21] of the NIRC of 1997, as amended, in relation to Section 248(B)[22] of the same Code, the failure on the part of the taxpayer to report sales, receipts or income in an amount exceeding 30% of what is declared in its returns constitutes substantial under-declaration, which is a *prima*

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[17] Exhibit "P-36", BIR Records, Folder 1, pp. 401-409.
[18] Exhibit "P-37", BIR Records, Folder No. 2, pp. 1599-1607.
[19] Docket, Vol. III, pp. 1227-1247.
[20] Docket, Vol. IV, pp. 1936-1956.
[21] SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.-*

(a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: *Provided,* That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

[22] SEC. 248. *Civil Penalties.-xxx*

(B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud: *Provided,* That a substantial underdeclaration of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, shall constitute *prima facie* evidence of a false or fraudulent return: *Provided, further,* That failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding thirty percent (30%) of actual deductions, shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions, as mentioned herein.

facie evidence of a false return. However, in the instant case, the remaining VAT assessment items related to the income tax assessment items upheld by the Court do not amount to 30% of the sales reported per VAT returns, as shown below:

Exhibit No.	**Period**	**Total Sales**
P-29-b (Docket 3, p.1450)	1st Quarter of CY 2011	₱ 79,170,905.30
P-29-e (FOE Folder)	2nd Quarter of CY 2011	117,221,650.83
P-29-h (FOE Folder)	3rd Quarter of CY 2011	97,389,832.58
P-87-c (ICPA exh.-soft copy)	4th Quarter of CY 2011	100,854,317.52
Total Sales per VAT Returns		**₱394,636,706.23**

Sales Reported per VAT Returns		**₱394,636,706.23**
Add: Findings per FLD[23] related to the income tax items upheld by the Court in the assailed Decision		
Unallowable Sales Returns & Allowances[24]	₱16,281,370.23	
Sales to Gov't (not included in the SLS)[25]	176,387.43	
Undeclared sales per recon of SLS, SAWT & TPI data[26]	9,085,130.68	**25,542,888.34**
Remaining Vatable Sales per Audit		₱ 420,179,594.57
Percentage of Assessed Additional Sales to Total Sales Reported per Return: (₱25,542,888.34 / ₱394,636,706.23)		**6.4725%**

Since there is no substantial under declaration of sales, there is no *prima facie* evidence of false return which may warrant the application of the ten-year prescriptive period to assess.

Thus, the Court correctly ruled that the right of respondent to assess petitioner for deficiency VAT for the first quarter of TY 2011 and deficiency EWT for January to May 2011 have already prescribed in accordance with Section 203 of the NIRC of 1997, as amended.

2. *The Honorable Court erred in ruling that the tax assessments for deficiency VAT and EWT are void for allegedly not containing a definite due date for payment.*

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[23] Exhibit "P-37", BIR Records, Folder No. 2, p. 1606.
[24] Decision, Docket, Vol, IV, p. 2034.
[25] *Id.*, p. 2041.
[26] *Id.*, p. 2053.

Respondent argues that the Assessment Notices have fixed and definitely set the basic deficiency tax liabilities of petitioner as well as the surcharge and interest; that as provided for by law, if petitioner still fails to pay the definitely stated tax liability on or before the date up to where the interests were computed, the deficiency interest will have to be adjusted accordingly; that the Assessment Notices it issued against petitioner are compliant with the basic requisites provided for under Section 228 of the NIRC of 1997; and that the assessment is valid as long as it states the fact, the law, the rules and regulations or jurisprudence on which it is based irrespective of an additional requirement purportedly being prescribed by a regulation.

Respondent further submits that the doctrine laid down in the decision of the Honorable Supreme Court in the case of *Fitness by Design* should be revisited as the wordings of the decision therein reveals that the ratio is based mainly on the decision of the Honorable Supreme Court in the case of *Commissioner of Internal Revenue vs. Menguito (Menguito);* that the ruling in *Menguito* was misapplied in the decision of the Honorable Supreme Court in *Fitness by Design;* that *Fitness by Design* used *Menguito* as legal basis for this new postulate that to be valid, a FAN must contain a singular definite amount and period; and that the portion lifted by *Fitness by Design* from *Menguito* is actually a snippet from a resolution of a very dissimilar issue pertaining to the post reporting notice and PAN.

It is reiterated that two different due dates indicated in the VAT and EWT assessment notices leaves the taxpayer in a quandary as to when payment should be made. Thus, similar to when no due date is indicated in the FAN, as in the *Fitness By Design* case, two (2) due dates indicated in the FANs negates the respondent's demand for payment of the deficiency tax liabilities. Absent such demand, the assessments for VAT and EWT are fatally infirm.

3. *The Honorable Court erred in ruling that part of the income tax lacks factual basis.*

Respondent maintains that petitioner is liable for deficiency income tax, value-added tax (VAT), expanded withholding tax (EWT) and the corresponding interest and compromise penalty.

However, a reading of the arguments in its motion, in relation to petitioner's assessed liability for deficiency income tax, VAT, EWT, interest and compromise penalty, reveals that respondent did not raise any new matters for reconsideration by the Court but merely copied word per word the arguments in its Memorandum[27].

Verily, the merits of the deficiency income tax assessment was already exhaustively discussed in the assailed Decision. Thus, the ruling of the Court thereon, inclusive of surcharge and interests stands.

To end, the Court finds no cogent reason to disturb the ruling in the assailed Decision based on the grounds raised by respondent.

WHEREFORE, in view of the foregoing, the Motion for Reconsideration filed by the respondent is **DENIED** for lack of merit, while the Motion for Partial Reconsideration filed by the petitioner is **PARTIALLY GRANTED**.

Accordingly, the Court's Decision dated September 4, 2019, is hereby amended to read as follows:

> **WHEREFORE**, the instant Petition for Review is **PARTIALLY GRANTED**. The assessments issued by respondent against petitioner covering deficiency VAT, EWT and compromise penalties for TY 2011 are **CANCELLED AND WITHDRAWN**.
>
> However, the assessment issued against petitioner for deficiency income tax for TY 2011 is **UPHELD IN PART.** Accordingly, petitioner is **ORDERED TO PAY** respondent the aggregate amount of **ONE HUNDRED NINE MILLION ONE HUNDRED FIFTY-FOUR THOUSAND THREE HUNDRED SIXTY-NINE PESOS AND 56/100 (₱109,154,369.56)**, inclusive of the 25% surcharge, 20% deficiency interest and 20% delinquency interest imposed under Sections 248(A)(3), 249(B) and (C) of the NIRC of 1997, as amended, respectively, computed until December 31, 2017, as follows:

Basic Deficiency Income Tax	₱ 32,910,441.15
Surcharge (25%)	8,227,610.29
20% Deficiency Interest from April 17, 2012 to July 31, 2015 (₱32,910,441.15 x 20% x 1,201 days/365 days)	21,657,775.24
Total Amount Due, July 31, 2015	**₱ 62,795,826.68**
Add: 20% Deficiency Interest from August 1, 2015 to December 31, 2017 (₱32,910,441.15 x 20% x 884 days/365 days)	15,941,276.70
20% Delinquency Interest from August 1, 2015 to December 31, 2017 (₱62,795,826.68 x 20% x 884 days/365 days)	30,417,266.18

[27] Docket, Vol. IV, pp. 1941-1952.

Total Amount Due as of December 31, 2017	**₱109,154,369.56**

In addition, petitioner is liable to pay delinquency interest at the rate of 12% on the total unpaid amount of **₱62,795,826.68** as of July 31, 2015, as determined above, computed from January 1, 2018 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended by Republic Act No. 10963, also known as Tax Reform for Acceleration and Inclusion (TRAIN) and as implemented by RR No. 21-2018.

SO ORDERED.

CATHERINE T. MANAHAN
Associate Justice

I CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ATTESTATION

I attest that the conclusions in the above Amended Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

JUANITO C. CASTAÑEDA, JR.
Associate Justice
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 Amended Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ROMAN G. DEL ROSARIO
Presiding Justice