REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

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SURPLUS MARKETING CORPORATION, Petitioner,	**CTA Case No. 9290**
	Members:
- versus -	**UY,** *Chairperson,* **RINGPIS-LIBAN,** *and* **MODESTO-SAN PEDRO,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	***Promulgated:***
	FEB 03 2021 10:02 a.m.

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AMENDED DECISION

UY, J.:

For resolution are the following:

1) Petitioner's ***Motion for Partial Reconsideration of the Decision promulgated on June 30, 2020*** filed on September 9, 2020, with respondent's ***Comment/Opposition (on Petitioner's Motion for Partial Reconsideration)*** filed on October 9, 2020; and

2) Respondent's ***Motion for Partial Reconsideration (Re: Decision dated June 30, 2020)*** filed on September 10, 2020, with petitioner's ***Comment (On the Respondent's Motion for Reconsideration)*** filed on October 16, 2020.

In both *Motions,* the parties seek for partial reconsideration of the Decision promulgated on June 30, 2020, partially granting the Petition for Review, the dispositive portion of which reads:

"**WHEREFORE**, in light of the foregoing considerations, the Petition for Review is **PARTIALLY GRANTED**. Accordingly, the assessment issued by respondent against petitioner for the calendar year ending December 31, 2020, covering deficiency Improperly Accumulated Earnings Tax is **CANCELLED and SET ASIDE.**

On the other hand, the deficiency Income Tax, VAT, EWT, WTC and DST assessments are **AFFIRMED** with MODIFICATION. Accordingly, petitioner is ordered to pay respondent the total amount of **₱50,627,809.49** representing basic deficiency, 25% surcharge, 20% deficiency interest and 20% delinquency interest imposed thereon under Sections 248(A)(3), 249(B) and (C) of the NIRC of 1997, as amended, computed until December 31, 2017, as determined below:

	Income	VAT	EWT	WTC	DST	TOTAL
Basic Tax Due	6,596,532.77	6,624,930.70	298,468.39	563,347.80	27,664.10	14,110,943.76
25% Surcharge	1,649,133.19	1,656,232.68	74,617.10	140,836.95	6,916.03	3,527,735.94
Sub-Total	8,245,665.96	8,281,163.38	373,085.49	704,184.75	34,580.13	17,638,679.70
20% Deficiency Interest:						
16-Apr-11 to 30-Sep-15						
(6,596,532.77 x 20% x 1629/365)	5,888,083.22					5,888,083.22
26-Jan-11 to 30-Sep-15						
(6,624,930.70 x 20% x1694/365)		6,149,387.73				6,149,387.73
16-Jan-11 to 30-Sep-15						
(298,468.39 x 20% x 1704/365)			278,679.53			278,679.53
15-Jan-11 to 30-Sep-15						
(563,347.80 x 20% x 1705/365)				526,305.75		526,305.75
16-Jan-11 to 30-Sep-15						
(27,664.10 x 20% x 1704/365)					25,829.93	25,829.93
Total Amount Due, Sep. 30, 2015[1]	**14,133,749.19**	**14,430,551.10**	**651,765.01**	**1,230,490.50**	**60,410.06**	**30,506,965.86**
20% Deficiency Interest:						
01-Oct-15 to 31-Dec-17						
(6,596,532.77 x 20% x 823/365)	2,974,765.19					2,974,765.19

[1] Exhibit "P-40", Due date reflected in the Assessment Notices.

01-Oct-15 to 31-Dec-17						
(6,624,930.70 x 20% x823/365)		2,987,571.49				2,987,571.49
01-Oct-15 to 31-Dec-17						
(298,468.39 x 20% x 823/365)			134,596.98			134,596.98
01-Oct-15 to 31-Dec-17						
(563,347.80 x 20% x 823/365)				254,046.71		254,046.71
01-Oct-15 to 31-Dec-17						
(27,664.10 x 20% x 823/365)					12,475.37	12,475.37
20% Delinquency Interest:						
01-Oct-15 to 31-Dec-17						
(14,133,749.19 x 20% x 823/365)	6,373,740.04					6,373,740.04
01-Oct-15 to 31-Dec-17						
(14,430,551.10 x 20% x 823/365)		6,507,585.51				6,507,585.51
01-Oct-15 to 31-Dec-17						
(651,765.01 x 20% x 823/365)			293,919.24			293,919.24
01-Oct-15 to 31-Dec-17						
(1,230,490.50 x 20% x 823/365)				554,900.65		554,900.65
01-Oct-15 to 31-Dec-17						
(60,410.06 x 20% x 823/365)					27,242.45	27,242.45
Total Amount Due, Dec. 31, 2017	**23,482,254.42**	**23,925,708.10**	**1,080,281.23**	**2,039,437.86**	**100,127.88**	**50,627,809.49**

In addition, petitioner is liable to pay delinquency interest at the rate of 12% on the unpaid amount as of September 30, 2015, 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, on the following amounts:

Income Tax	₱14,133,749.19
Value Added Tax	14,430,551.10
Expanded Withholding Tax	651,765.01
Withholding Tax on Compensation	1,230,490.50
Documentary Stamp Tax	60,410.06

SO ORDERED."

Petitioner's Motion for Partial Reconsideration

In its ***Motion for Partial Reconsideration***, petitioner submits that this Court erred in sustaining the alleged deficiency tax assessments. Thus, it moves for the partial reconsideration of the assailed Decision as shall be discussed hereafter.

Respondent in his ***Comment/Opposition*** counter-argues that petitioner's allegation, that the under-declaration of sales arising from discount fees brought and disallowed sales return and allowances arising from the same discount fees given to credit card companies, is without basis and cannot be given credit. Allegedly, petitioner failed to substantiate the following : that indeed discount fees were actually received by its customers; its advertising expenses; and that the said expenses are valid deductible expense for income tax purposes.

Moreover, respondent asserts that the assessments on disallowed payments to contractors for non-withholding tax at 2%, and disallowed rent expense for non-withholding of tax at 5% against petitioner are valid because of the difference that arose between the Income Tax Return (ITR) and Financial Statements against the income payment reflected in the Alphalist per 1604E.

On the disallowed professional fees for non-withholding of tax at 15% and on other fees subjected to 15% Expanded Withholding Tax (EWT), respondent argues petitioner failed to substantiate the same.

Respondent further argues that the deficiency VAT assessment is correct because of petitioner's undeclared sales pursuant to Revenue Memorandum Order (RMO) No. 42-2003. Respondent also insists that petitioner violated invoicing requirements pursuant to Section 113 of the National Internal Revenue Code (NIRC), as amended, as stated in the Final Decision on Disputed Assessment (FDDA) issued by respondent.

According to respondent, the assessment on EWT against petitioner was correct because petitioner failed to withhold resulting to disallowed expenses.

On the assessment on Withholding Tax Compensation (WTC), respondent argues that the difference between the Salaries per

Financial Statement (FS) and Gross compensation per alphalist were not subjected to withholding tax.

Lastly, respondent submits that all presumptions are in favor of the correctness of tax assessments; that good faith of tax assessors and the validity of their actions are presumed; that the same are presumed to have taken into consideration all the facts to which their attention was called; and that it is incumbent upon the taxpayer to prove the contrary and failure to do so shall vest legality on respondent's action and assessments.

We resolve petitioner's motion.

VALUE-ADDED TAX

A. *Disallowed Input VAT due to violation of invoicing requirement – ₱6,624,930.67.*

Petitioner argues that there is no basis in adding to the actual findings made by the Court and Independent Certified Public Accountant (ICPA), a further estimated assessment of ₱1,371,642.46 based on extrapolation. Allegedly, resorting to extrapolation as basis for computing petitioner's deficiency VAT suffers legal infirmity because it was premised only on a mere presumption and not on evidence.

We find for petitioner.

The findings of the Court in the assailed Decision are quoted as follows:

> "Upon examination of supplier's invoices, the Court finds that the invoices/official receipts presented by petitioner are generally compliant with invoicing requirements except for some invoices/official receipts with total equivalent input VAT of ₱5,253,288.21 that are found to be not in compliance with invoicing requirement.
>
> Furthermore, considering that the examination of the ICPA only covered 79.295% of the supplier's invoices subject to the disallowed input VAT, an extrapolation of the estimated input VAT to be allowed due to failure to comply with invoicing requirements was made as follows:

Actual disallowed input VAT per review and verification		5,253,288.21
Add: Prorated disallowed input VAT		
Disallowed input VAT by BIR	69,280,694.50	
Less: Total input VAT verified vs. supplier's invoice available on file	54,936,643.69	
Input VAT without supplier's invoice available on file	14,344,050.81	
Multiply by: (5,253,288.21/54,936,643.69)	9.56%	1,371,642.46
Total disallowed estimated input VAT for failure to comply with invoicing requirements		6,624,930.67

The Court finds that the disallowed input tax for non-compliance with invoicing requirements assessed by respondent amounting to ₱69,280,694.50 should be reduced to ₱6,624,930.67."[2]

After due consideration and re-verification of the findings of ICPA Elrey T. Ramos, the Court finds merit in petitioner's contention that there is no basis in adding to the actual finding of the Court and the ICPA, a further estimated assessment of ₱1,371,642.46 based on extrapolation. Thus, the disallowance in the amount of ₱1,371,642.46 (or the 9.56%) based on extrapolation shall be disregarded. This being the case, petitioner must realize that the adverse effect thereof is that the disallowance will increase correspondingly. Additionally, the Court's disallowance of petitioner's input VAT amounting to ₱14,344,050.81, those without available invoices/official receipts on file, shall remain.

Hence, the Court is constrained to modify the disallowed input tax for non-compliance with invoicing requirements assessed by respondent from ₱6,624,930.67 to **₱19,597,339.02**, broken down as follows:

Actual disallowed input VAT per review and verification		5,253,288.21
Add: Prorated disallowed input VAT		
Disallowed input VAT by BIR	69,280,694.50	
Less: Total input VAT verified vs. supplier's invoice	54,936,643.69	

[2] Decision dated June 30, 2020, Docket – Vol. 6, pp. 3067 of 3068.

Input VAT without supplier's invoice available on file	14,344,050.81
Adjusted Total disallowed estimated input VAT for failure to comply with invoicing requirements	19,597,339.02

Correspondingly, the amount of ₱19,597,339.02 shall be subject to deficiency and delinquency interest.

INCOME TAX

A. *Under-declaration of sales arising from discount fees - ₱5,566,318.00 and*
B. *Disallowed Sales Returns and Allowances – Discount – ₱5,566,318.00.*

Petitioner maintains that the alleged Under-declaration of Sales arising from Disallowed Discount Fees brought about by the comparison of petitioner's Summary List of Sales (SLS) against Sales and Other Income per petitioner's ITR amounting to ₱5,566,318.00 and the Disallowed Sales Return and Allowances – Discount Fees amounting to ₱5,566,318.00, all arose from the same discount fees given to credit card companies.

Granting without admitting that indeed the Discount Fees amounting to ₱5,566,318.00 cannot be traced in the submitted General ledger, petitioner submits that adding ₱5,566,318.00 twice would be unjust and would jeopardize the taxpayer twice for the same transaction.

Petitioner insists that the discount fees arose as a difference in the SLS as against the Sales and Other Income reported in its ITR; that these discounts are not granted and not indicated in the tape receipts at the time of sale; that while the said discount fees are valid deduction for income tax purposes, the same, however is non-deductible for purposes of computing the 12% VAT on sales.

In support of its argument, petitioner invokes the ICPA's findings that sales before credit card companies' discounts were reported in the petitioner's SLS and VAT returns for the year 2010; but were deducted from the revenue reported in the ITR resulting to higher SLS figures compared to the reported sales figures in the ITR.

Petitioner quotes the following report of the Court-commissioned ICPA, *viz:*

"(a) Discount Fees – Php5,566,318.00

Our verification of discount fees, showed that these represent discounts given by the Petitioners to credit cards companies for the card transactions of their cardholders. The discounts are not granted not indicated in the tape receipts at the time of sale but are deducted from the credit card company's credit card settlement payments. For income tax purposes the said discount fees are valid deductible business expense but are not deductible for VAT purposes. Sales before credit card companies' discounts were reported in the Petitioner's SLS and VAT returns for the year 2010 but were deducted from the revenue in the ITR resulting to a higher SLS figures compared to the reported sales figures in the ITR. Attached hereto as **Exhibit "P-48" to "P-48-6"** are documents authorizing the granting of discounts given by the Petitioner to its customers using credit cards as mode of payment and Certification from BDO representing Merchant Discount in 2010 (**Exhibit "P-50"**)."

We agree with petitioner.

To recall, We ruled in the assailed Decision that out of the total disallowed sales return and allowances amounting to ₱8,550,666.00, only the amount of ₱2,984,349.00 representing sales discount were considered by this Court as valid deductions against petitioner's taxable gross income for the year 2010.

However, with regard to Discount Fees in the amount of ₱5,566,318.00, We maintain that petitioner failed to substantiate the same. It can be recalled that to refute these items of assessment, petitioner presented documents such as Merchant Agreement, Memorandum of Agreement, Promotion Announcement and Schedule of sales discount generated from the general ledger.

Relative thereto, the Court finds that these documents alone are insufficient to prove that said discount fees were actually recorded in petitioner's books. In the absence of corroborating documents such as general ledger of discount fees account, reconciliations, and schedules that would enable the Court to trace to

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the general ledger and other documents with the merchant agreements, the Court cannot ascertain and confirm, if indeed, discounts were actually granted to its customers. Thus, the findings of the Court shall remain.

With respect to the alleged Under-declaration of Sales amounting to ₱5,566,318.00, We agree with petitioner that the said amount pertains to the same discount fees which was already considered by the Court as not valid deductions against petitioner's taxable gross income as discussed in the preceding paragraph.

In light thereof, petitioner's basic taxable income will be reduced from ₱79,100,330.14 to **₱73,534,012.14**.

C. *Disallowed Advertising Expenses – ₱1,889,777.15.*

With regard to this item of assessment, petitioner invokes the recommendation of the ICPA, to wit:

> "(a) Advertising expense - ₱6,351,858.62
>
> We obtained details and documents supporting the recorded advertising expense. We further verified and validated that the tax required to be deducted and withheld therefrom has been remitted to the BIR by examining the alphalist of payees (1604-E) submitted to the BIR during the year. A detailed listing of the advertising expense per supplier/provider are listed below:
>
> xxx xxx xxx
>
> Verification of the above transactions showed that said expenses were supported by suppliers/service providers' invoices/billings and were included in the Petitioner's Alphalist of Payees (BIR Form 1604-E) supporting the withholding tax payments and remittances to the BIR. The difference of P608,118.02 between the recorded expense in the GL versus the amount reflected in BIR Form 1640-E (1604-E reported amount higher) is due to timing difference in the recording of expenses and the remittance of the corresponding EWT. Please refer to **Exhibit "P-44"** for alphalist of payees (MAP) and **Exhibit "P-45" to Exhibit "P-45-12"** for the copies of monthly remittances to Expanded Withholding Taxes.

> Copies of suppliers invoices and other pertinent documents to support the Petitioner's claim to the validity of the said expenses for income tax purposes were examined. Attached hereto under **Exhibit "P-52"** are summary of advertising expense extracted from the general ledger.

20) Thus, the ICPA recommended:

> Based on our examination of the Petitioner's records, it is our opinion that the claimed advertising ...xxx... expenses amounting to Php6,351,858.62 xxx... are **fairly stated and duly supported reasonable business expenses and should be considered valid income tax deductions.**"

The Court is not swayed. It is noted that petitioner merely invokes the findings and recommendation of the ICPA on Advertising Expenses but failed to present justifiable basis for the Court to reconsider its assailed findings. Hence, the Court maintains its ruling on the disallowance of the amount of P1,889,777.15 as Advertising Expense.

Petitioner is reminded that this Court is not bound by the findings of the ICPA as provided under Section 3 of Rule 13 of the Revised Rules of the Court of Tax Appeals (RRCTA), as amended,[3] as the same are subject to the Court's verification and/or appreciation as to their accuracy, veracity and merit. In the end, the Court may either adopt or reject the ICPA Report, wholly or partly.

D. *Disallowed Payments to Contractors for Non-Withholding of Tax at 2% - ₱8,360,145.00.*

1) *Advertising and promotions - ₱6,010,851.86*

Petitioner reiterates that it can be seen in petitioner's books of accounts, separate general ledger codes/accounts (Exhibit "P-57") identifying the marketing-newspaper have been reflected with a total

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[3] Sec. 3. *Findings of the Independent CPA.* – "x x x. The findings and conclusions of the independent CPA may be challenged by the parties and shall not be conclusive upon the Court, which may, in whole or in part, adopt such findings and conclusion subject to verification."

amount of ₱1,235,782.00, which was also verified by the ICPA in his report. A brief summary of which is as follows:

GL accounts	Description	Amount
6009090	Marketing-Newspaper	1,235,782

We are not convinced.

Upon perusal of Exhibit "P-57" or the schedule of Marketing-Newspaper account, the Court finds that nowhere in the said schedule is the item with account number 6009090 and the amount of ₱1,235,782.00 reflected, nor were there any document/s such as invoices or official receipts presented by petitioner. Thus, the Court cannot ascertain and verify the transaction. Hence, We sustain the assessment.

2) *Interest Expense/Finance Charge (₱3,106,651.00)*
3) *Other Charges (₱1,948,288.00)*

Anent these items, petitioner reiterates that the BIR examiners erroneously assessed the above amount to 2% EWT. Allegedly, the Interest Expense/Finance Charge reflected in the financial statement in the amount of ₱3,106,651.00 already includes the Other Charges of ₱1,948,288.00. However, the BIR examiners considered both the Other Charges and the total Interest expense, which include the Other Charges, in its computation. According to petitioner, there is double take-up as to the said amount. The same was verified by the ICPA in the ICPA report. Thus, petitioner argues that the amount of ₱1,948,288.00 representing Other Charges should not be considered as a separate item subject to withholding tax as the same is already part of Interest Expense/Finance Charge per petitioner's Audited Financial Statement.

The Court is not convinced.

We reiterate that petitioner presented no documents to support its claim that indeed Interest Expense/Finance Charge in the amount of ₱3,106,651.00 reflected in the financial statement already includes the Other Charges of ₱1,948,288. The Court cannot solely rely on the findings of the ICPA in the absence of supporting documents and other appropriate evidence.

Similarly, We sustain Our findings that in petitioner's 2010 Statement of Comprehensive Income and Notes to Financial Statements No. 8, it is not indicated therein, whether "Other Charges of ₱1,948,288.00" was included in the Finance Charges account. Hence, the assessments shall remain.

4) *Representation Expense (₱1,035,958.00)*

Petitioner reiterates that representation expense of ₱1,033,958.00 refers to the reimbursement of various expenses made to the petitioner's employees which were incurred in pursuit of its business. Reimbursement-of-cost are allegedly not considered as income payment. Hence, not subjected to EWT.

We find that petitioner merely rehashes its argument without submitting supporting documents to bolster its claim. We reiterate that in the absence of supporting documents, the Court could not validate or ascertain whether these expenses are indeed representation expenses that are not subject to 2% EWT.

5) Transportation and Travel (₱1,818,028.00)

Pertaining to this item, petitioner reiterates that the transportation expense of ₱1,818,028.00, assessed by respondent subject to 2% EWT, includes income payments which are exempt from EWT amounting to ₱202,319.09, representing Per Diem Allowance. In support of its argument, petitioner referred back to its submitted policy or matrix on Per Diem allowance.[4]

Again, petitioner rehashes its argument and fails to raise new matters or grounds to support its claim. A closer look at petitioner's *Policy of Per Diem Allowance* shows that it is merely a guideline and notice providing the rates of per diem allowance and incidental travel expenses. It does not show the actual Per Diem Allowance given to its employees. Thus, the Court stands on its previous findings.

Petitioner also contends that the reconciliation on the difference noted in the comparison of purchase of services reflected in its financial statements against the income payment subjected to 2% EWT reported in the BIR Form 1604E shows a reduced amount of ₱3,939,798.44, details of which are as follows:

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[4] Exhibit "P-59".

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Interest expense/Finance charge	₱ 3,106,651.00
Janitorial and messengerial services	1,599,757.00
Outside Services	2,130,640.00
Advertising and Promotions	4,775,070.00
Communication, light and travel	43,445,324.00
Miscellaneous	92,713.00
Handling, and delivery charges	2,916,777.00
Other charges	0.00
Repairs and maintenance	2,330,535.32
Security services	1,014,538.12
Insurance expense	818,012.00
Representation expense	0.00
Transportation expense	1,615,709.00
Leasehold Improvement	9,142,389.00
Total	72,988,115.44
Less: Income payment per 1604E	69,048,317.00
Difference	₱ 3,939,798.44

Petitioner avers that the reduced difference in the amount of ₱3,939,798.44 does not represent income payments not subjected to EWT. That the difference is a result of timing difference between the withholding tax and the recognition of expense. If anything, the said amount should only be subjected to interest on late remittance of EWT.

We are not convinced.

With regard to the reduced difference, the Court notes that when there is a substantial difference between the amounts reflected in the financial statements and the BIR Form 1604E, there is uncertainty as to whether indeed, the amount of ₱3,939,798.44 do not represent income payments not subjected to EWT. Relative thereto, petitioner did not offer any explanation or reconciliation of the difference that may be brought about by timing difference.

E. *Disallowed Rent Expense for Non-Withholding of Tax at 5% - ₱233,724.60.*

In the assailed Decision, the Court found that the difference of rent expense amounting to ₱233,724.60 is a valid assessment upon examination of rent expense account per Financial Statement and BIR Form 1604-E, to wit:

Rent expense per FS	₱109,135,101.00
Less: Income payment per BIR Form 1604-E	108,901,376.40
Difference	**₱233,724.60**

Petitioner argues that the difference amounting to ₱233,724.60 does not represent income payments not subjected to EWT, but rather it is a result of timing difference between the withholding of tax and the recognition of expense; and that said amount should only be subject to interest on late remittance of EWT. Furthermore, petitioner avers that the ICPA verified that the difference in rent expense represents rental expense recognized in 2010 but were accounted in the subsequent year 2011. In support, petitioner invites the Court to look at its Summary of Rent Expense with Subsequent Withholding of Taxes.[5]

Again, the Court is not convinced.

The Court finds that petitioner's Summary of Rent Expense with Subsequent Withholding of Taxes alone is insufficient to enable the Court to trace and establish its allegation on timing difference. In the absence of other corroborating document such as general ledger of rent expense for the year 2011, the Court cannot ascertain and validate petitioner's allegation.

Further, it bears noting that the items in petitioner's Summary of Rent Expense with Subsequent Withholding of Taxes[6] are nowhere listed in petitioner's Summary of Expenses with Subsequent Withholding of Taxes (Services)[7]. Thus, the Court finds petitioner's allegation on timing difference without merit.

F. *Disallowed Professional Fees for Non-Withholding of Tax at 15% - ₱326,999.55.*

1) *Professional Fees – ₱333,000.00 and Other Fees subjected to 15% EWT – ₱675,876.14.*

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[5] Exhibit "P-60", refer to the USB (Petitioner's FOE).
[6] Exhibit "P-60", refer to the USB (Petitioner's FOE).
[7] Exhibit "P-47-308", refer to the USB (Petitioner's FOE).

Petitioner's arguments anent these items of assessment are mere rehash of its previous arguments in its Petition for Review which the Court has already addressed in the assailed Decision. Having invoked no new grounds in support of its argument, We reiterate Our findings, and We quote:

"d.1) Professional fees –₱333,000.00

Upon verification of the records, the composition of assessed professional fees is as follows:

GL Code	Account	Amount
6016100	Prof Fees-Audit	₱158,000.00
6016600	Prof Fees- Others	175,000.00
Total		**₱333,000.00**

The above composition of professional fees includes accounts which are exempted from EWT specifically the professional fees – audit amounting to ₱158,000.00 and some of the other professional fees amounting to ₱169,000.00. These represents income payments made to a General Professional Partnership (GPP) which is exempted from expanded withholding taxes pursuant to RR No. 2-98, as amended by RR No. 14-02, which provides as follows:

'SECTION 2.57.5. *Exemption from Withholding.* – The withholding of creditable withholding tax prescribed in these Regulations shall not apply to income payments made to the following:

xxx xxx xxx

(B) Persons enjoying exemption from payment of income taxes pursuant to the provisions of any law, general or special, such as but not limited to the following:

xxx xxx xxx

(4) General professional partnerships.'

However, upon perusal of the records, the Court finds that the professional fees are supported only by billing statements instead of official receipts. Petitioner also submitted documents such as BIR Certificate of

Registration and Articles of Partnerships, but these documents are not sufficient to prove that professional fees have been paid to the general professional partnership. Hence, the assessment shall remain.

d.2) Other Fees subjected to 15% EWT - ₱675,876.14

Petitioner alleges that income payments made to individual professionals amounting to ₱675,876.14 were properly subjected to 15% EWT, but were reflected under the FS account of Marketing-Others.

We cannot sustain petitioner's argument.

In this item of assessment, petitioner failed to provide the general ledger reclass entry to verify whether it was properly recorded and subjected to 15% EWT. Hence, the assessment on this item shall remain." [8]

In summary, the Court finds petitioner liable for deficiency Income Tax in the reduced amount of **₱4,926,636.87**, instead of ₱6,596,537.27, computed as follows:

Taxable Income Per Return		57,156,877.00
Add: Adjustments		
A. Under-Declaration of Sales		
1. Gross Profit on Local Purchases	-	
2. Gross Income (Per Books vs. ITR)	5,566,488.79	
B. Sales Returns and Allowances	-	
C. Disallowed Expenses		
1. Advertising	1,889,777.15	
2. Depreciation	-	
D. Not Subjected to EWT	8,920,869.20	16,377,135.14
Taxable Income Per Audit		73,534,012.14
Income Tax Rate		30%
Tax Due Per Audit		22,060,203.64
Less:		
Unexpired Excess of Prior Year's MCIT	16,397,961.00	
Payment (1st to 3rd Quarters)	1,401,663.00	
CWT per Audit	1,230,976.00	
Total Pere Return	19,030,600.00	
Less:		

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[8] Docket – Vol. 6, pp. 3057 to 3058.

Unsupported CWT	13,506.23	
CWT carried over to the next quarter	1,883,527.00	17,133,566.77
Deficiency Income Tax		**4,926,636.87**

EXPANDED WITHHOLDING TAX – ₱298,468.39.

The Court finds that petitioner failed to raise new and substantial issues in the present Motion with regard to this item of assessment to warrant the reversal of the ruling of the Court in the assailed Decision. Bare and unsubstantiated allegations do not constitute substantial evidence and have no probative value.[9] As such, petitioner's bare allegations unsubstantiated by sufficient documentary evidence, cannot be given credence by the court.

WITHHOLDING TAX ON COMPENSATION – ₱563,348.80.

1) *Disallowed Salaries and Wages (SSS, PHIC & PAG-IBIG) – ₱2,561,852.27.*

In the assailed Decision, the Court found petitioner liable for the amount of ₱2,561,852.27 (₱6,332,864.53 less ₱3,771,012.26) for Withholding Tax on Compensation.

Petitioner contends that the Court erred in subjecting the amount of ₱2,561,852.27 to WTC. Petitioner cites as basis the findings of the ICPA, to wit:

> "(a) Employer share of SSS, PHIC & PAGIBIG
>
> The SSS & PAG-IBIG totaling to Php6,332,864.53 represent employer share of mandatory statutory contributions. These amount were verified against the transaction balances reflected in the General Ledger of the Petitioner."

We do not agree.

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[9] LNS International Manpower Services vs. Padua, Jr., G.R. No. 179792, March 5, 2010.

We reiterate Our findings that the SSS, PHIC & PAG-IBIG totaling to ₱6,332,864.53 represents employer's share of mandatory statutory contributions. However, petitioner's Alphalist on Compensation[10] revealed that only ₱3,771,012.26 were duly reported. Thus, the difference of ₱2,561,852.27 (₱6,332,864.53 less ₱3,771,012.26) shall be subjected to withholding tax on compensation.

Again We reiterate that the Court is not bound by the findings of the ICPA.

Respondent's Motion for Partial Reconsideration

In his *Motion for Partial Reconsideration*, respondent raises the following grounds, to wit:

i. The Court erred in ruling that the assessment issued against petitioner based on its undeclared sales representing undeclared purchases must be cancelled.

ii. The Court erred in ruling that the disallowed expenses were substantiated.

iii. The Court erred in ruling that petitioner is not liable for Improperly Accumulated Earnings Tax (IAET) and Compromise Penalties.

On the other hand, petitioner counter-argues that respondent has no basis for computing undeclared sales from alleged undeclared purchases; that the Court was correct in ruling that to a great extent the disallowed expenses were in fact substantiated; and that petitioner is not liable for IAET and compromise penalties.

We resolve respondent's Motion for Partial Reconsideration.

After due consideration, the Court finds no merit in respondent's Motion.

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[10] Exhibit "P-67".

The cancellation arising from petitioner's alleged under-declaration of sales shall remain for lack of factual basis.

Respondent contends that the assessment against petitioner on the undeclared sales is correct. Allegedly, petitioner failed to submit all the required documents to overturn the assessment that there was a discrepancy which resulted in unrecorded gross profit from respondent's verification from petitioner's Summary of List of Purchases (SLP) vis-à-vis petitioner's suppliers or income payments per SLS.

Respondent also argues that seeking third-party information (TPI) is a valid ground to help in the audit/examination of petitioner's tax liability pursuant to Section 5(B) of the NIRC of 1997. Pursuant thereto, respondent acted within its right when it determined the existence of under declaration of purchases by using information obtained from TPI from the BIR.

Further, respondent contends that the assessment did not arise from presumption that the discrepancies were all inexistent purchases. Respondent's verification disclosed that a difference arose from a comparison between the sales reported by petitioner's suppliers reported in the SLS extract and the SLP. Hence, allegedly considered as undeclared purchases. Respondent, using the cost ratio, assessed petitioner for imputed gross profits pursuant to RMO No. 13-2012.

Respondent further claims that because the correct sales of petitioner did not appear in his income and VAT returns, there was substantial under-declaration of sales in petitioner's income tax and VAT returns. Allegedly, petitioner did not submit any record, invoices/official receipts to rebut the findings of respondent.

The Court is not swayed.

To reiterate, the assessment against petitioner based on under-declaration of sales must be cancelled for lack of factual basis as the same was based on unverified amounts extracted from respondent's own database. Records do not show that the amount from the purported TPI provided by respondent was confirmed or verified.

Without confirmation from third parties, the findings become doubtful as to the reliability and correctness of the assessment on the alleged undeclared sales.

While tax assessments have the presumption of correctness and regularity in its favor. However, it is equally true that assessments should not be based on mere presumptions no matter how reasonable or logical the presumption might be.

The assessment arising from petitioner's disallowed expenses in the reduced amount of ₱1,889,777.15 shall remain.

Respondent argues that petitioner's disallowed expenses in the total amount of ₱27,724,704.62 should be upheld considering that it was not properly substantiated.

Further, respondent contends that the Formal Letter of Demand (FLD) issued by respondent clearly showed the discrepancy between the purchase of goods and services reported in petitioner's ITR and Financial Statements, which resulted in a difference of ₱10,373,770.33. The difference therein was not properly subjected to EWT, hence, it was disallowed as deductible expense for Income Tax purpose and was assessed for deficiency Income Tax.

Respondent's arguments deserve scant consideration.

In Our Decision dated June 30, 2020, We have thoroughly discussed the following, *viz*:

> "With regard to ***(a) Advertising Expenses***, records show that the advertising expense incurred or paid by petitioner pertains to the various display expenses, namely: the indoor and outdoor signages, stickers for the package counter, tarpaulins and billboards for the promotion of new and sale product merchandise. xxx
>
> xxx xxx xxx
>
> However, upon verification and scrutiny of the above transaction, it appears that only advertising

> expenses amounting to ₱4,462,081.47 are duly supported by proper documents, while there is a difference of ₱1,889,777.15 that must be disallowed xxx.
>
> xxx xxx xxx
>
> Therefore, the Court finds that this assessment item must be cancelled partially. The disallowed advertising expenses shall be modified and reduced to **₱1,889,777.15** (₱6,351,858.62 less ₱4,462,081.47), which shall remain.
>
> With respect to ***(b) Depreciation expenses*** in the amount ₱21,372,846.00, the Court finds that petitioner was able to establish the validity and reasonableness of the claimed depreciation expenses by presenting Lapsing Schedule of Property and Equipment as well as the Lapsing Schedule of Fixed Assets Acquired Year 2010 which was reconciled with the Audited Financial Statements of the petitioner for the year 2010. Hence, this assessment shall be cancelled."[11]

Considering that this Court has arrived at the said findings after a careful evaluation of the evidence presented, it behooves respondent to specifically pinpoint any error thereon. The general averment of respondent that petitioner failed to properly substantiate its disallowed expenses, cannot constitute a reversible error on the part of this Court as the same remains unsubstantiated, vague, highly speculative, and uncertain. As between the above-stated findings of this Court, and the general averment of respondent, the former must perforce prevail.

Petitioner is not liable for deficiency IAET.

Respondent argues that the FDDA clearly manifested and explained that petitioner accumulated earnings and profits instead of distributing said earnings through dividends declarations. Thus, petitioner is liable for deficiency IAET; that during the audit examination conducted, petitioner failed to prove their allegation of dividend distribution. Hence, petitioner allegedly accumulated profits

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[11] Docket – Vol. 6, pp. 3050 to 3052.

and is liable for deficiency IAET pursuant to Revenue Memorandum Circular (RMC) No. 35-2011.

Respondent's argument is bereft of merit.

Under Section 29 of the NIRC of 1997, as amended and as implemented by Section 3 of Revenue Regulations No. 2-2001, the computation of improperly accumulated earnings excludes, among others, the earnings and profits of a corporation set aside for the reasonable needs of the business.

Notably, this issue had already been addressed and thoroughly discussed by the Court. The Court's finding was that petitioner's retained earnings were appropriated by petitioner for the reasonable needs of its business expansion and that respondent's allegation that petitioner accumulated profits instead of dividend distribution was unfounded.

The imposition of compromise penalty by respondent against petitioner is without basis.

Respondent argues that the administrative penalty amounting to ₱178,000.00 was correctly imposed for failure to pay internal revenue taxes at a certain time required by law, and for failure to withhold or remit withheld taxes.

We do not agree.

We reiterate that the Court cannot compel a taxpayer to pay the compromise penalty because by its very nature, it implies a mutual agreement between the parties in respect to thing or subject matter that is so compromised, and the choice of paying or not paying it distinctly belongs to the taxpayer.[12] Jurisprudence held that the imposition of compromise penalty without the conformity of the taxpayer is illegal and unauthorized.[13] It therefore follows that a compromise penalty may be imposed if the taxpayer has agreed to it, and there is nothing in the records which would show that petitioner

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[12] *The Philippines International Fair, Inc. vs. The Collector of Internal Revenue, et al.*, G.R. Nos. L-12928 and L-12932, March 31, 1962.

[13] *Commissioner of Internal Revenue vs. Lianga Bay Logging Co. Inc., et al.*, G.R. No. L-35266, January 21, 1991.

consented to the compromise penalty. Hence, the compromise penalties imposed by respondent in the amount of ₱178,000.00 against petitioner for alleged deficiency must be cancelled.

WHEREFORE, in light of the foregoing considerations, petitioner's *Motion for Partial Reconsideration* is **PARTIALLY GRANTED**. On the other hand, respondent's *Motion for Partial Reconsideration* is **DENIED** for lack of merit.

Accordingly, the Court's Decision dated June 30, 2020, is hereby amended to read as follows:

> "**WHEREFORE**, in light of the foregoing considerations, the Petition for Review is **PARTIALLY GRANTED**. Accordingly, the assessment issued by respondent against petitioner for the calendar year ending December 31, 2010, covering deficiency Improperly Accumulated Earnings Tax is **CANCELLED and SET ASIDE**.
>
> On the other hand, the deficiency Income Tax, VAT, EWT, WTC and DST assessments are **AFFIRMED with MODIFICATION**. Accordingly, petitioner is ordered to pay respondent the total amount of **₱91,532,739.07** representing basic deficiency, 25% surcharge, 20% deficiency interest and 20% delinquency interest imposed thereon under Sections 248(A)(3), 249(B) and (C) of the NIRC of 1997, as amended, computed until December 31, 2017, as determined below:

	Income[14]	VAT[15]	EWT	WTC	DST	TOTAL
Basic Tax Due	**4,926,636.87**	**19,597,339.02**	298,468.39	563,347.80	27,664.10	25,413,456.18
25% Surcharge	**1,231,659.22**	**4,899,334.76**	74,617.10	140,836.95	6,916.03	6,353,364.05
Sub-Total	**6,158,296.09**	**24,496,673.78**	373,085.49	704,184.75	34,580.13	31,766,820.23
20% Deficiency Interest:						
16-Apr-11 to 30-Sep-15 (4,926,636.87 x 20% x 1629/365)	**4,397,529.57**					4,397,529.57

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[14] With Modification.
[15] With Modification.

26-Jan-11 to 30-Sep-15 (19,597,339.02 x 20% x1694/365)		**18,190,625.92**				18,190,625.92
16-Jan-11 to 30-Sep-15 (298,468.39 x 20% x 1704/365)			278,679.53			278,679.53
15-Jan-11 to 30-Sep-15 (563,347.80 x 20% x 1705/365)				526,305.75		526,305.75
16-Jan-11 to 30-Sep-15 (27,664.10 x 20% x 1704/365)					25,829.93	25,829.93
Total Amount Due, Sep. 30, 2015	**10,555,825.66**	**42,687,299.69**	**651,765.01**	**1,230,490.50**	**60,410.06**	**55,185,790.92**
20% Deficiency Interest:						
01-Oct-15 to 31-Dec-17 (4,926,636.87 x 20% x 823/365)	**2,221,710.76**					2,221,710.76
01-Oct-15 to 31-Dec-17 (19,597,339.02 x 20% x823/365)		**8,837,594.53**				8,837,594.53
01-Oct-15 to 31-Dec-17 (298,468.39 x 20% x 823/365)			134,596.98			134,596.98
01-Oct-15 to 31-Dec-17 (563,347.80 x 20% x 823/365)				254,046.71		254,046.71
01-Oct-15 to 31-Dec-17 (27,664.10 x 20% x 823/365)					12,475.37	12,475.37
20% Delinquency Interest:						
01-Oct-15 to 31-Dec-17 (10,555,825.66 x 20% x 823/365)	**4,760,243.57**					4,760,243.57

01-Oct-15 to 31-Dec-17 (42,687,299.69 x 20% x 823/365)		**19,250,217.89**				19,250,217.89
01-Oct-15 to 31-Dec-17 (651,765.01 x 20% x 823/365)			293,919.24			293,919.24
01-Oct-15 to 31-Dec-17 (1,230,490.50 x 20% x 823/365)				554,900.65		554,900.65
01-Oct-15 to 31-Dec-17 (60,410.06 x 20% x 823/365)					27,242.45	27,242.45
Total Amount Due, Dec. 31, 2017	**17,537,779.99**	**70,775,112.11**	**1,080,281.23**	**2,039,437.86**	**100,127.88**	**91,532,739.07**

In addition, petitioner is liable to pay delinquency interest at the rate of 12% on the unpaid amount as of September 30, 2015, 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, on the following amounts:

Income Tax	₱10,555,825.66[16]
Value Added Tax	42,687,299.69[17]
Expanded Withholding Tax	651,765.01
Withholding Tax on Compensation	1,230,490.50
Documentary Stamp Tax	60,410.06

SO ORDERED.

ERLINDA P. UY
Associate Justice

[16] With Modification.
[17] With Modification.

WE CONCUR:

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
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.

ERLINDA P. UY
Associate Justice
Chairperson, 3rd Division

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution and the 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.

ROMAN G. DEL ROSARIO
Presiding Justice