REPUBLIC OF THE PHILIPPINES
**COURT OF TAX APPEALS**
QUEZON CITY

*Special Third Division*

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| **UPS-DELBROS TRANSPORT, INC.,** Petitioner, | **CTA CASE NO. 9063** |
| | Members: |
| - versus - | **FABON-VICTORINO,** *and* **RINGPIS-LIBAN,** *JJ.* |
| **COMMISSIONER OF INTERNAL REVENUE,** Respondent. | Promulgated: OCT 19 2018 3:52 p.m. |

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# AMENDED DECISION

**RINGPIS-LIBAN, *J*.:**

For the Court's resolution is petitioner's **Motion for Partial Reconsideration (Re: Decision dated May 22, 2018)**, filed by registered mail on June 11, 2018 and received by the Court on June 19, 2018, without respondent's comment per Records Verification Report dated July 19, 2018.

Petitioner seeks partial reconsideration of this Court's Decision dated May 22, 2018, the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, the assessments issued by respondent against petitioner for taxable year 2005 covering deficiency income tax and value-added tax are **CANCELLED** for lack of merit, while the deficiency expanded withholding tax assessment is **AFFIRMED**. Accordingly, petitioner is hereby **ORDERED TO PAY** respondent the amount of **SEVEN HUNDRED FIFTY-SIX THOUSAND SEVEN HUNDRED FIFTY-FIVE PESOS and 60/100 (₱756,755.60)** representing basic deficiency expanded withholding tax and the 25% surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended:

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| Basic Tax Due | ₱ 605,404.48 |
| Add: 25% Surcharge | 151,351.12 |

| Total Amount Due | **₱756,755.60** |
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In addition, petitioner is hereby **ORDERED TO PAY**:

(a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic expanded withholding tax computed from January 11, 2006, **<u>until December 31, 2017</u>** 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 ₱756,755.60 and on the deficiency interest which have accrued as afore-stated in (a) computed from June 5, 2015, **<u>until December 31, 2017</u>** pursuant to Section 249(C) of the 1997 NIRC, as amended; and

(c) **<u>Delinquency interest at the rate of 12% on the unpaid amount (basic tax plus surcharge plus interests computed in (a) and (b) above) from January 1, 2018 until the amount is fully paid pursuant to the relevant provision of the Republic Act No. 10963 or more commonly known as the TRAIN Law, which took effect on January 1, 2018.</u>**

**SO ORDERED.**"

In the instant motion, petitioner avers that the Court erred in sustaining and upholding respondent's deficiency expanded withholding tax assessment against petitioner for calendar year (CY) 2005, including the imposition of surcharge, as well as deficiency and delinquency interests thereon. Thus, petitioner prays for this Court to partially reconsider the above Decision based on the following grounds:

1. The waivers executed by petitioner are null and void. Thus, respondent's right to assess petitioner for deficiency income tax, value-added tax (VAT), and expanded withholding tax (EWT) had already prescribed;

2. There is no factual basis for respondent to assess petitioner deficiency EWT for CY 2005; and

3. Assuming arguendo that petitioner is liable for deficiency EWT, it is respectfully submitted that there is legal basis to revise the computation of the delinquency interest on deficiency EWT.

Petitioner argues that the Waivers dated January 6, 2009, May 18, 2009, and August 17, 2009, purportedly executed by and between petitioner and the Bureau of Internal Revenue (BIR), are null and void for failure to strictly comply with the requirements of a valid waiver under Section 222(b) of the

National Internal Revenue Code (NIRC) of 1997, as amended, and Revenue Memorandum Order (RMO) No. 20-90 in relation to Revenue Delegation Authority Order No. 05-01. Petitioner maintains that the said waivers did not extend the periods given to respondent within which to issue the deficiency tax assessments against petitioner for CY 2005.

A reading of petitioner's arguments shows that the same are mere reiteration or amplification of its contentions raised in its Petition for Review and Memorandum, which were already considered and passed upon in the assailed Decision. As ruled by the Court, the waivers executed by and between petitioner and respondent complied with the requirements of a valid waiver pursuant to RMO No. 20-90.

Further, petitioner avers that even assuming that the waivers are valid, respondent's right to assess petitioner for deficiency VAT and EWT has partially prescribed considering that the first waiver was only executed on January 6, 2009.

We agree with petitioner.

Summarized below are the dates of filing of petitioner's quarterly VAT returns and monthly EWT returns for CY 2005 and the corresponding dates within which respondent should assess petitioner for deficiency VAT and EWT:

A. For VAT

| TAXABLE QUARTER | DUE DATE FOR FILING QUARTERLY VAT RETURNS | DATE OF FILING OF VAT RETURNS | END OF 3-YEAR PRESCRIPTIVE PERIOD |
|---|---|---|---|
| First | April 25, 2005 | April 20, 2005[1] | April 25, 2008 |
| Second | July 25, 2005 | July 21, 2005[2] | July 25, 2008 |
| Third | October 25, 2005 | October 20, 2005[3] | October 25, 2008 |
| Fourth | January 25, 2006 | January 20, 2006[4] | January 25, 2009 |

[1] Exhibit "P-2", docket, vol. 3, pp. 1003-1005.
[2] Exhibit "P-3", docket, vol. 3, pp. 1006-1008.
[3] Exhibit "P-4", docket, vol. 3, pp. 1009-1010.
[4] Exhibit "P-5", docket, vol. 3, pp. 1011-1012.

B. For EWT

| MONTH | DUE DATE FOR FILING[5] | DATE OF FILING | END OF 3-YEAR PRESCRIPTIVE PERIOD |
|---|---|---|---|
| January | February 11, 2005 | February 10, 2005[6] | February 11, 2008 |
| February | March 11, 2005 | March 10, 2005[7] | March 11, 2008 |
| March | April 11, 2005 | April 11, 2005[8] | April 11, 2008 |
| April | May 11, 2005 | May 10, 2005[9] | May 11, 2008 |
| May | June 13, 2005[10] | June 10, 2005[11] | June 13, 2008 |
| June | July 11, 2005 | July 11, 2005[12] | July 11, 2008 |
| July | August 11, 2005 | August 10, 2005[13] | August 11, 2008 |
| August | September 12, 2005[14] | September 12, 2005[15] | September 12, 2008 |
| September | October 11, 2005 | October 10, 2005[16] | October 11, 2008 |
| October | November 11, 2005 | November 10, 2005[17] | November 11, 2008 |
| November | December 12, 2005[18] | December 9, 2005[19] | December 12, 2008 |
| December | January 11, 2006 | January 14, 2006[20] | January 14, 2009 |

Considering that the first waiver was executed on January 6, 2009 and accepted on January 7, 2009[21], the deficiency VAT assessment for the first to third taxable quarters of 2005 and the deficiency EWT assessment for the months of January 2005 to November 2005 were issued beyond the 3-year prescriptive period provided in Section 203 of the NIRC of 1997, as amended. Thus, the assessments for these periods are deemed invalid.

Nevertheless, as to the deficiency VAT assessment made by respondent against petitioner, the same has already been cancelled altogether in the assailed Decision considering that the Court found that petitioner has no undeclared sales and undeclared income, and held that the imposition of VAT thereon is improper.

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5 The Court noted that petitioner's EWT returns were filed under the Electronic Filing and Payment System (EFPS) and pursuant to Revenue Regulations (RR) No. 26-2002, which amended Section 7 of RR Nos. 9-2001, as amended by RR 2-2002 and RR 9-2002, providing for the staggered filing of returns of taxpayers enrolled in the EFPS based on industry classification, Group E taxpayers are required to file their monthly withholding tax returns eleven (11) days following the end of the month.
6 Exhibit "P-6", docket, vol. 3, pp. 1013-1017.
7 Exhibit "P-7", docket, vol. 3, pp. 1027-1030.
8 Exhibit "P-8", docket, vol. 3, pp. 1040-1043.
9 Exhibit "P-9", docket, vol. 3, pp. 1054-1057.
10 June 11, 2005 fell on a Saturday.
11 Exhibit "P-10", docket, vol. 3, pp. 1068-1070.
12 Exhibit "P-11", docket, vol. 3, pp. 1094-1096.
13 Exhibit "P-12", docket, vol. 3, pp. 1081-1084.
14 September 11, 2005 fell on a Sunday.
15 Exhibit "P-13", docket, vol. 3, pp. 1097-1100.
16 Exhibit "P-14", docket, vol. 3, pp. 1109-1114.
17 Exhibit "P-15", docket, vol. 3, pp. 1125-1127.
18 December 11, 2005 fell on a Sunday.
19 Exhibit "P-16", docket, vol. 3, pp. 1137-1140.
20 Exhibit "P-17", docket, vol. 3, pp. 1149-1152.
21 Exhibit "P-18", docket, vol. 3, p. 1161.

Hence, only the EWT pertaining to the month of December 2005 shall be subjected to deficiency assessment.

We shall now address the argument raised by petitioner with respect to the validity of the EWT assessment and the correctness of the computation of the imposed delinquency interest on the assessed amount.

In the assailed Decision[22], the Court upheld the basic deficiency EWT assessment against petitioner in the amount of ₱605,404.48, computed as follows:

| | |
|---|---|
| ***Schedule 5*** | |
| Income Payments with Withholding Tax-Charged under Accounts Payable (A/P) | |
| October | ₱ 2,400,774.84 |
| November | 3,080,261.17 |
| December | 2,086,519.96 |
| Total | ₱ 7,567,555.97 |
| Divided by | 3 months |
| **Monthly Average** | **₱ 2,522,518.66** |
| Tax Rate (EWT) | 2% |
| **Average Monthly Tax Due-Income payments charged under A/P** | **₱ 50,450.37** |
| Multiplied by | 12 months |
| **Tax Due on Income payments charged under A/P** | **₱ 605,404.48** |

Petitioner asserts that respondent's manner in computing the deficiency EWT based on the last three (3) month balance of accounts indicates that the assessment is based on mere conjecture and speculation. Petitioner alleges that the presumption of correctness of assessment cannot be applied in this case.

Thus, petitioner submits that the deficiency EWT assessment be cancelled for being null and void as it is based on mere presumptions and not based on actual facts. Petitioner further asserts that it properly withheld the taxes due on its income payments in CY 2005, thus, it is not liable for deficiency EWT.

We are not persuaded.

As can be recalled, the amounts of income payments for the months of October, November and December 2005 were derived by the BIR from the Accounts Payable (A/P) register of the petitioner. Respondent resorted in analyzing the entries in the A/P Register for a three-month period, which was in consultation with petitioner's own Finance Controller, Ms. Dina B. Corvera, since petitioner's system is unavailable for verification, and multiplied the findings by 12 (months) to arrive at the preliminary findings. The unavailability of petitioner's system was not denied nor controverted by petitioner.

[22] Docket, vol. 4, p. 1820.

Needless to say, such manner of assessment is valid pursuant to Section 6(B) of the NIRC of 1997, as amended, which authorizes the Commissioner to assess taxes on the basis of the *best evidence obtainable* in case of failure on the part of the taxpayer to submit the required returns, statement, records and other documents, to wit:

> "SEC. 6. *Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.—*
>
> xxx xxx xxx
>
> (B) *Failure to Submit Required Returns, Statements, Reports and other Documents.*—When a report required by law as a basis for the assessment of any national internal revenue tax shall not be forthcoming within the time fixed by laws or rules and regulations or when there is reason to believe that any such report is false, incomplete or erroneous, the Commissioner shall assess the proper tax on the best evidence obtainable."

As provided in Revenue Memorandum Circular No. 23-00[23], in the absence of accounting records or other documents necessary for the proper determination of the taxpayer's internal revenue tax liability, Section 6(B) of the NIRC of 1997 requires that the assessment of the tax be determined based on the "Best Evidence Obtainable".

Assessments based on estimates or approximates are valid under the *Best Evidence Obtainable Rule.* As held by the Supreme Court in the case of *Sy Po vs. Hon. Court of Tax Appeals, et al.*[24], the rule on the *"best evidence obtainable"* applies when a tax report required by law for the purpose of assessment is not available or when the tax report is incomplete or fraudulent. Hence, the questioned documents may be used by the respondent as basis for the assessment of any internal revenue tax. Assessments made as such are deemed *prima facie* correct and sufficient for all legal purposes. The burden of proving the illegality of the assessment lies upon the petitioner alleging it to be so.

As held in the assailed Decision, petitioner failed to prove its contentions and contradict the findings of respondent by solely basing its defense on the nature of the assessment being an estimate or average of the accounts payable amounts of the last three months of CY 2005. Even in the proceedings of this case, petitioner was not able to fully substantiate its claim. Petitioner was also unsuccessful in proving proper withholding and remittance of the withholding taxes of every item listed and considered in the tax deficiency computation. There was no evidence presented to support that petitioner indeed withheld and paid the BIR the corresponding withholding

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[23] SUBJECT: Existing Revenue Procedures on the Assessment of Deficiency Internal Revenue Taxes Based on the "Best Evidence Obtainable".

[24] G.R. No. 81446, August 18, 1988.

taxes due on all its income payments. As such, petitioner failed to satisfactorily show the fact upon which it based its claim.

While it appears that the basis of respondent is not strong, petitioner, nevertheless, should not rely on the weakness of such evidence but on the strength of its own documents. The facts essential for the proper disposition of the said controversy were available to petitioner. Petitioner should have endeavored to make the facts clear to this Court. However, it failed to satisfactorily dispute the same with clear and convincing proof.[25]

Nevertheless, as previously discussed above, considering that the first waiver was executed by petitioner only on January 6, 2009 and accepted on January 7, 2009, only the **EWT of ₱41,730.40** pertaining to the month of **December 2005** shall be subjected to deficiency assessment, computed as follows:

| | |
|---|---|
| Income payments per A/P – December 2005 | ₱ 2,086,519.96 |
| EWT Rate | 2% |
| Basic Tax Due | **₱ 41,730.40** |

Lastly, we shall discuss the issue on whether the provisions of Republic Act (RA) No. 10963 or known as the "Tax Reform for Acceleration and Inclusion" (TRAIN) Law have any impact on the interests imposed by this Court on the amount payable by the petitioner.

In the assailed Decision, aside from the 20% deficiency and 20% delinquency interests computed until December 31, 2017 imposed under Sections 249(B) and 249(C), respectively, of the NIRC of 1997, as amended, this Court also imposed delinquency interest at the rate of 12% from January 1, 2018 until fully paid pursuant to the relevant provision of the TRAIN Law, on the total unpaid amount, representing the basic EWT due plus surcharge, plus deficiency and delinquency interests which were computed until December 31, 2017.

In its motion, petitioner alleges that for purposes of computing interest from January 1, 2018, pursuant to the relevant provision of the TRAIN Law, only the basic tax due should be considered, without the surcharge and interest as this is more in keeping with the clear and unambiguous language of Section 75, RA No. 1096[3].

According to petitioner, Section 75 of the TRAIN Law, which amended Section 249 of the NIRC of 1997, provides the imposition of twelve percent (12%) interest only on the unpaid amount of tax. Petitioner posits that

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

surcharge and interest are not unpaid amount of tax. Rather, interest and surcharges are imposed upon failure of the taxpayer to pay the tax on the date fixed in the law for the payment thereof. Allegedly, interest and surcharges, not being taxes, are not subject to interest.

Section 249(A) and (B) of the NIRC of 1997 was amended by the TRAIN Law as follows:

> "Section 249. *Interest.* —
>
> (A) *In General.* — There shall be assessed and collected on any unpaid amount of tax, interest at the rate of **double the legal interest rate for loans or forbearance of any money in the absence of an express stipulation as set by the Bangko Sentral ng Pilipinas** from the date prescribed for payment until the amount is fully paid: ***Provided,*** **That in no case shall the deficiency and the delinquency interest prescribed under Subsections (B) and (C) hereof, be imposed simultaneously**.
>
> (B) *Deficiency Interest.* — Any deficiency in the tax due, as the term is defined in this Code, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof, **or upon issuance of a notice and demand by the Commissioner of Internal Revenue, whichever comes earlier.**
>
> (C) *Delinquency Interest.* —
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> xxx." *(Emphasis supplied on the amended portions)*

The foregoing provisions are implemented by Revenue Regulations (RR) No. 21-2018, which provides:

> "**SECTION 2. RATE OF INTEREST.**—There shall be assessed and collected on any unpaid amount of tax, interest at the rate of **double the effective legal interest rate for loans or forbearance of any money in the absence of an express stipulation as set by the Bangko Sentral ng Pilipinas (BSP)** from the date prescribed for payment until the amount is fully paid.
>
> The rate of interest per BSP Memorandum No. 799 series of 2013 for loans or forbearance of any money in the absence of an express stipulation is six percent (6%). Thus, **the rate of legal interest imposable under Section 249 of the Tax Code, as amended, shall be twelve percent (12%)**. A Circular shall be issued by the Commissioner in case BSP prescribes new rate of interest.
>
> xxx xxx xxx

**SECTION 6. TRANSITORY PROVISION.**—In cases where the tax liability/ies or deficiency tax/es became due before the effectivity of the TRAIN Law on January 1, 2018, and where the full payment thereof will only be accomplished after the said effectivity date, the interest rates shall be applied as follows:

| ***Period*** | ***Applicable Interest Type and Rate*** |
|---|---|
| For the period up to December 31, 2017 | Deficiency and/or delinquency interest at 20% |
| For the period January 1, 2018 until full payment of the tax liability | Deficiency and/or delinquency interest at 12% |

The double imposition of both deficiency and delinquency interest under Section 249 prior to its amendment will still apply in so far as the period between the date prescribed for payment until December 31, 2017." *(Emphasis supplied)*

Basically, the basis of the imposition of the delinquency interest remained unchanged under Section 249(C) of the NIRC of 1997, as amended, even after the passing of the TRAIN Law. As provided under Section 249(C), delinquency interest is imposed on the delay in payment of the unpaid amount which consists of the basic tax, surcharge, and deficiency interest and runs from the time prescribed for their payment until full payment of the unpaid amount[26], to wit:

"(C) *Delinquency Interest.* - In case of failure to pay:

1. The amount of the tax due on any return to be filed, or

2. The amount of the tax due for which no return is required, or

3. A deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner, there shall be assessed and collected on the unpaid amount, interest at the rate prescribed in Subsection (A) hereof until the amount is fully paid, which interest shall form part of the tax."

Thus, based on the foregoing provision, the Court cannot accede to petitioner's contention that the inclusion of surcharge and interest in the interest computation has no legal basis.

However, the 20% deficiency interest upon which the delinquency interest is imposed shall now be computed from the date prescribed for its payment until the issuance of a notice and demand by the Commissioner of Internal Revenue, which was June 5, 2015 in this case. The amount so computed becomes the basis of the imposition of the 20% delinquency

[26] *Moog Controls Corporation-Philippine Branch vs. Commissioner of Internal Revenue*, CTA Case No. 9077, February 22, 2018.

interest, computed from June 6, 2015 until December 31, 2017 and the 12% delinquency interest computed from January 1, 2018 until the amount is fully paid.

Note that the TRAIN Law made a substantial modification on the rate of interest vis-à-vis the end date of the charging of interest for both deficiency and delinquency interest. The TRAIN law prescribes 12% interest, which is double the legal interest rate for loans or forbearance of money, while the old provision prescribes the rate of 20% per annum. Considering that the TRAIN Law becomes effective on January 1, 2018, the logical approach of applying the old rate and new rate in the computation of the delinquency interest is to impose the old rate of 20% on the unpaid amount before the effectivity of the amendment and the new rate of 12% after such effectivity.

To harmonize the application of the provisions of Section 249 under the NIRC of 1997, as amended, and the TRAIN Law on the interests charged from the date prescribed for its payment up to the time of the full payment of the unpaid amount, we, therefore, find it necessary to modify the dispositive portion of the assailed Decision dated May 22, 2018.

**WHEREFORE**, premises considered, petitioner's **Motion for Partial Reconsideration (Re: Decision dated May 22, 2018)** is **PARTIALLY GRANTED.**

Accordingly, the Decision dated May 22, 2018 is amended to read as follows:

> "**WHEREFORE**, premises considered, the assessments issued by respondent against petitioner for taxable year 2005 covering deficiency income tax and value-added tax are **CANCELLED** for lack of merit, while the deficiency expanded withholding tax assessment is **AFFIRMED with modification.** Accordingly, petitioner is hereby **ORDERED TO PAY** respondent the amount of **Two Hundred Nineteen Thousand Four Hundred Twenty One Pesos and 7/100 (₱219,421.07)**, representing basic expanded withholding tax, 25% surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended, 20% deficiency interest and 20% delinquency interest imposed under Sections 249(B) and (C), respectively, of the same Code, computed until December 31, 2017, to wit:

| | |
|---|---|
| Basic Tax Due | ₱ 41,730.40 |
| Add: 25% Surcharge | 10,432.60 |
| 20% Deficiency Interest from January 12, 2006 to June 5, 2015 (3,432 days) | 78,476.02 |
| **Total Amount Due, June 5, 2015** | **₱ 130,639.02** |

| | |
|---|---|
| Add: 20% Deficiency Interest from June 6, 2015 to December 31, 2017 (940 days; based on basic tax of ₱41,730.40) | 21,494.01 |
| 20% Delinquency Interest from June 6, 2015 to December 31, 2017 (940 days; based on total amount due of ₱130,639.02 as of June 5, 2015) | 67,288.04 |
| **Total Amount Due as of December 31, 2017** | **₱ 219,421.07** |

In addition, petitioner is liable to pay delinquency interest at the rate of 12% on the total unpaid amount of ₱130,639.02 as of June 5, 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 Law and as implemented by RR No. 21-2018.

**SO ORDERED.**"

**SO ORDERED.**

**MA. BELEN M. RINGPIS-LIBAN**
Associate Justice

**I CONCUR:**

**ESPERANZA R. FABON-VICTORINO**
Associate Justice

## ATTESTATION

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

**ESPERANZA R. FABON-VICTORINO**
*Associate Justice*
*Acting Chairperson*

## CERTIFICATION

Pursuant to Section 13 of Article VIII of the Constitution, and the Acting Division Chairperson's Attestation, is it 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*