REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL SECOND DIVISION

ROBINSONS DAISO DIVERSIFIED CORPORATION, Petitioner,	**CTA CASE NO. 9149**
	Members:
-versus-	**Castañeda, Jr.**, *Chairperson*, and, **Manahan**, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: APR 02 2019 2:33 pm

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RESOLUTION

CASTAÑEDA, JR., ***J.*:**

For the resolution of the Court are the following motions filed by both opposing parties:

1. "Motion for Partial Reconsideration filed by petitioner on December 21, 2018",[1] with Comment (re: Petitioner's Motion for Partial Reconsideration dated 21 December 2018) filed on February 12, 2019.[2]

2. "Motion for Partial Reconsideration Re: Decision promulgated on December 6, 2018" filed by respondent on December 27, 2018,[3] with Comment (To Respondent's Motion for Partial Reconsideration Re: Decision Promulgated on December 6, 2018) filed by registered mail on February 12, 2019.[4]

[1] Docket, Vol. III, pp. 1003-1019.
[2] Docket, Vol. III, pp. 1065-1078.
[3] Docket, Vol. III, pp. 1022-1035.
[4] Docket, Vol. III, pp. 1039-1052.

In their respective motions, the following issues were brought up:

Petitioner:

A. The Letter of Authority (LOA) is invalid as it does not comply with the respondent's own Revenue Memorandum Orders (RMOs).

B. Respondent's right to assess deficiency VAT for the first quarter of Fiscal Year (FY) 2009 has already prescribed.

C. Petitioner's input VAT arising from Herco Trading's ten invoices should have been allowed.

D. The petitioner substantiated its input VAT for May 2009 through Herco Trading's certification of existence of invoice.

E. The assessed Withholding Tax on Compensation (WTC) deficiency is invalid for failing to identify the period covered.

F. Petitioner was able to file its Summary List of Purchases with respondent.

Respondent:

1. Petitioner is liable to pay the assessed deficiency income tax.

2. Petitioner is liable to pay the assessed expanded withholding tax.

3. Petitioner is liable to pay the assessed deficiency documentary stamp tax.

4. The Honorable Court erred in using the rate of 14.7872% in computing the deficiency withholding tax on compensation.

5. The imposition of compromise penalty was in consonance with law and jurisprudence.

To begin with, the Court notes that all these issues raised by the parties have already been discussed in the assailed decision. Nonetheless, the Court deems it necessary to once again expound on them and reiterate the points in its decision.

Validity of Letter of Authority (LOA)

The Court has explained, at length, how the LOA in this case complies with all the requisite features of an electronic Letter of Authority (eLA) under RMO 44-2010. However, petitioner insists that the same does not comply with RMO Nos. 62-2010 and 69-2010.

First, it is not categorically stated or even implied in RMO 69-2010 that failure to replace the LOAs/eLAs issued from March 1, 2010 shall render the previously issued LOAs/eLAs invalid. In fact, Item No. III 7 of said RMO states:

> "7. All revenue officers ordered to conduct investigation/audit through manually issued LAs prior to July 1, 2010 <u>should continue the conduct of audit/investigation</u>, subject to the retrieval and replacement of LAs as mandated under Item No. III 6 of this Order." *(Underscoring supplied)*

Such instruction to continue the conduct of audit/investigation recognizes that the previously issued LOA/eLA is valid. The replacement of the LOA/eLA with the new eLA form (BIR Form No. 1966), which is for administrative purposes only, does not invalidate the LOA issued to petitioner.

It is apparent to the Court that petitioner wishes to leverage upon this perceived defect in the LOA/eLA to invalidate the process and benefit from the same. Petitioner exploits a technicality that, based on the review of the process during the tax examination, did not impair any rights of the taxpayer.

Second, even assuming for the sake of argument that the previously issued LOA did not indeed comply with RMO 69-2010, the non-conversion of the LOA *does not invalidate the same.*

As discussed, RMO No. 69-2010 prescribes the guidelines on the issuance of electronic Letters of Authority (eLAs), Tax Verification Notices (TVNs) and Memoranda of Assignment (MOA). However, nowhere in the RMO does it state that the conduct of the audit pursuant to the previously-issued manual LOA will be invalidated absent immediate compliance with the retrieval and replacement of eLAs. Also, the RMO does not state that the replacement of eLAs is a precondition for the continuance of the audit investigation. In fact, Item 9 of Heading III thereof states:

> "9. TVNs/MOA/Referral Memos issued for the period March 1, 2010 up to the present should all be retrieved and converted to the appropriate documents to be issued under this Order (e.g. LAs issued for estate should be converted to TVN, TVN issued for Donation or other ONETT transactions should be converted to MOA). The replacement eLA/TVNs/MOA should bear the current date but should refer to the investigation authority that preceded it, and have such cancelled document as an attachment. <u>Though currently dated, the replacement eLA/TVN /MOA will thus be deemed as issued at the same date with the preceding document and will **not nullify the investigation or proceedings conducted under the authority of the previously issued document**</u>." (*Underscoring and emphasis supplied*)

Third, the facts show that the eLA was issued on June 17, 2010 and was received by petitioner on June 18, 2010.[5] RMO No. 69-2010 was issued on August 11, 2010, about two months thereafter. By the time petitioner executed the first waiver on March 18, 2012, 585 days or 1 year 7 months and 1 week had passed since the RMO was issued. Given that length of time, therefore, petitioner had all the opportunity to question the validity of the eLA but conveniently remained silent. If it were really so concerned with the validity of the eLA vis-a-vis the RMO 69-2010, it should have done so at the earliest opportunity given that, in its opinion, there was cloud hanging over the investigation being conducted by the respondent. It cannot be denied that petitioner allowed respondent's revenue officers to continue with the examination *for almost two years* based on the same eLA which is only now belatedly being impugned in this case.

Fourth, the Court notes further that petitioner also failed to question the validity of the eLA during three other occasions when it was served the:

- Notice of Informal Conference on April 15, 2013,
- Preliminary Assessment Notice (PAN) on May 20, 2014, and,
- Final Letter of Demand (FLD) on June 24, 2014.

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[5] Exhibit "P-4"/Exhibit "R-1".

Again, if there had been any lingering doubt on the validity of the eLA and the legitimacy of the examination made pursuant to it, petitioner should have raised the issue *immediately and repeatedly* during those *missed* opportunities.

Estoppel, therefore, bars the petitioner from questioning the validity of the process to which it participated actively from 2010 to 2014, *after issuing five (5) waivers*, without complaint on the alleged defect of the eLA.

On this point, the principle of estoppel discussed in the case of *Commissioner of Internal Revenue v. Next Mobile, Inc. (formerly Nextel Communications Phils., Inc.)*[6] is worth emphasizing as it applies to the instant case by analogy:

> "*Third*, respondent is estopped from questioning the validity of its Waivers. While it is true that the Court has repeatedly held that the doctrine of estoppel must be sparingly applied as an exception to the statute of limitations for assessment of taxes, the Court finds that the application of the doctrine is justified in this case. Verily, the application of estoppel in this case would promote the administration of the law, prevent injustice and avert the accomplishment of a wrong and undue advantage. Respondent executed *five* Waivers and delivered them to petitioner, one after the other. It allowed petitioner to rely on them and did not raise any objection against their validity until petitioner assessed taxes and penalties against it. Moreover, the application of estoppel is necessary to prevent the undue injury that the government would suffer because of the cancellation of petitioner's assessment of respondent's tax liabilities.
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> *Finally*, the Court cannot tolerate this highly suspicious situation. In this case, the taxpayer, on the one hand, after voluntarily executing waivers, insisted on their invalidity by raising the very same defects it caused. On the other hand, the BIR miserably failed to exact from respondent compliance with its rules. The BIR's negligence in the performance of its duties was so gross that it amounted to malice and bad faith. Moreover, the BIR was so lax such that it seemed that it consented to the mistakes in the Waivers. Such a situation is dangerous and open to abuse by unscrupulous taxpayers who intend to escape their responsibility to pay taxes by mere expedient of hiding behind technicalities." *(Underscoring supplied)*

[6] G.R. No. 212825, December 7, 2015.

VAT for 1st Quarter of 2009

It is represented that petitioner started commercial operations only on April 29, 2009.[7] Consequently, its submission of quarterly VAT Returns started in the *second quarter* of 2009.[8] In addition, respondent's assessment covered the period April to December 2009, to wit:[9]

> Undeclared sales, P938.11 – Sales per VAT returns is compared to sales per books, disclosing an undeclared sales in the amount of P938.11, hence, subjected to income tax pursuant to Section 32 of the tax code, as amended.

	PER VAT RETURNS		PER BOOKS	
MONTH	SALES	OUTPUT TAX	NET SALES	OUTPUT TAX
January	₱ -	₱ -	₱ -	₱ -
February	-	-	-	-
March	-	-	-	-
April	239,517.86	28,742.14	239,517.86	28,742.14
May	5,173,871.07	620,864.53	5,173,871.07	619,813.93
June	3,883,106.57	465,972.79	3,884,044.64	466,085.39
July	3,503,897.42	420,467.69	3,503,897.42	420,467.68
August	3,819,698.00	458,363.76	3,819,698.03	458,363.77
September	3,091,117.75	370,934.13	3,091,117.71	370,934.08
October	3,830,312.59	459,637.51	3,830,312.59	459,637.49
November	4,094,343.83	491,321.26	4,094,343.85	491,321.25
December	7,143,491.16	857,218.94	7,143,491.19	857,218.90
Total	₱34,779,356.25	₱4,173,522.75	₱34,780,294.36	₱ 4,172,584.63
Sales per return			34,779,356.25	4,173,522.75
Difference			**₱ 938.11**	**₱ (938.12)**

> Unaccounted source of cash, per CAATTS, P5,000.00 – Discrepancy noted per master file extract for EWT (CAATTS) as against SAWT submitted by the taxpayer is considered as unaccounted source of cash, hence, the corresponding income tax due was assessed pursuant to Section 32 of the tax code, as amended.

Since the assessment did *not* cover the *1st quarter* of 2009, before the taxpayer started commercial operations, it is unnecessary to discuss whether respondent's right to assess petitioner's deficiency VAT for the 1st quarter of 2009 has prescribed. Je

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[7] Q51, Judicial Affidavit of Jessica C. Bugnot, Docket, Vol. I, p. 169 and Decision, December 6, 2018, p. 3, Docket, Vol. III, p. 970.

[8] Exhibit "P-23", Docket, Vol. II, p. 639.

[9] Exhibit "P-10", Annex-A Details of Discrepancies, Docket, Vol. II, p. 623 and Decision, December 6, 2018, pp. 19-20, Docket, Vol. III, pp. 986-987.

Input Taxes Arising from Purchases from Herco Trading

The Court disallowed input taxes from petitioner's purchases from Herco Trading as follows:[10]

Disallowed input tax for being incorrectly supported (VAT not separately indicated)	₱ 3,005,872.12
Disallowed input tax related to the unsupported purchases	1,856,473.40
TOTAL	**₱ 4,862,345.52**

Petitioner avers that it is not its fault that the VAT invoices of Herco did not separately indicate the amount of tax and that the assessment penalizes petitioner for actions that it has no control over. It, likewise, insists that disallowing input VAT on these transactions is to allow the double payment of tax. Moreover, it asserts that the certification issued by Herco meets the requisites of the law.

The reasons for the foregoing disallowances have been adequately addressed in the assailed decision.[11] Section 110(A) of the 1997 NIRC, as amended, is clear that input taxes, to be creditable, must be evidenced by a VAT invoice for every sale of goods or properties and VAT official receipt for every lease or sale of services issued in accordance with Section 113. The information that should be contained in the VAT invoice or VAT official receipt are plainly enumerated in Section 113 of the 1997 NIRC, as amended, which includes the provision that the amount of tax shall be shown as a separate item in the invoice or receipt.[12]

As the Court already explained in the assailed decision:[13]

> Under the clear mandate of the law, the Court reiterates that to ensure proper payment of taxes, the invoicing requirements should be strictly followed since these were designed to create an orderly VAT system without prejudice to both the taxpayers and the government. Contrary to petitioner's view, it is, therefore, the petitioner's duty to ensure that the VAT invoices and/or official receipts issued to it are fully compliant with the requirements, especially since they provide the

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[10] Exhibit "P-7", Docket, Vol. II, p. 581.
[11] Decision, December 6, 2018, pp. 21-23, Docket, Vol. III, pp. 988-990.
[12] Section 113(B)(2)(a) of the NIRC of 1997, as amended.
[13] Decision, December 6, 2018, p. 23, Docket, Vol. III, p. 990.

> necessary documentary support for its input tax credits. *(Underscoring supplied)*

Considering the amounts of input taxes involved, petitioner should have exercised due diligence:

- In its transactions with suppliers to ensure that VAT invoices and/or VAT official receipts issued to it are fully compliant with the invoicing requirements, and,

- In its record keeping and custody of supporting documents for said transactions.

Because it failed to do so, petitioner is now asking the Court to relax the rules, even disregard the provisions of the 1997 NIRC pertaining to the invoicing and substantiation requirements of input VAT.

In the case of *Makati Shangri-La Hotel and Resort, Inc. v. Ellen Johanne Harper, et al.*,[14] the Supreme Court ruled:

> "The principle of substantial compliance recognizes that exigencies and situations do occasionally demand some flexibility in the rigid application of the rules of procedure and the laws. That rules of procedure may be mandatory in form and application does not forbid a showing of substantial compliance under justifiable circumstances, because substantial compliance does not equate to a disregard of basic rules. For sure, substantial compliance and strict adherence are not always incompatible and do not always clash in discord. The power of the Court to suspend its own rules or to except any particular case from the operation of the rules whenever the purposes of justice require the suspension cannot be challenged. <u>In the interest of substantial justice, even procedural rules of the most mandatory character in terms of compliance are frequently relaxed.</u> Similarly, the procedural rules should definitely be liberally construed if strict adherence to their letter will result in absurdity and in manifest injustice, or <u>where the merits of a party's cause are apparent and outweigh considerations of non-compliance with certain formal requirements</u>. It is more in accord with justice that a party-litigant is given the fullest opportunity to establish the merits of his claim or defense than for him to lose his life, liberty, honor or property on mere technicalities. Truly, the rules of procedure are intended to promote substantial justice, not to defeat it, and should not be applied in a very rigid and technical sense." *(Underscoring supplied)*

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[14] G.R. No. 189998, August 29, 2012.

Surely, the Supreme Court did not have in mind petitioner's negligence in the performance of duties holds merit that is apparent and can outweigh considerations of non-compliance with certain formal requirements.

Hence, the disallowance of petitioner's input taxes amounting to ₱4,862,345.52 must remain.

Validity of Deficiency WTC Assessment

The Court found that deficiency WTC assessment for January to March 2009 is barred by prescription.[15] However, respondent's computation of the deficiency WTC was taken from petitioner's financial statements and alphalist of employees for the whole year of 2009. Petitioner argues that the total discrepancy found should be dismissed for being barred by prescription.

Petitioner is mistaken in its belief that respondent has the burden to prove which portion of the purported deficiency WTC pertains to the remaining months of taxable year 2009 (April to December 2009). The burden to overturn the presumption of correctness of the assessment lies on the petitioner.

It should be emphasized that tax assessments for alleged tax deficiencies are presumed correct and the taxpayer always bears the burden of proving that the correct taxes have been paid and that the assessment is incorrect.

In this case, the deficiency WTC assessment is presumed correct. Considering that petitioner has executed five waivers, respondent issued the Formal Letter of Demand (FLD) thinking that his right to assess was not barred by prescription. However, petitioner contends that respondent's right to assess has prescribed. Eventually, the Court ruled that WTC assessment for January to March 2009 is barred by prescription.

Petitioner cannot expect respondent or the Court to ascertain the amount corresponding to the portion that has not yet prescribed. Being the holder of all the records, documents and/or books of accounts pertaining to its business operations, petitioner has all the means to determine which portion of the total deficiency WTC assessment apply to the prescribed period.

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[15] Decision, December 6, 2018, pp. 13-18, Docket, Vol. III, pp. 980-985.

At this point, it is worthy to note the citation made by the Supreme Court in the case of *Commissioner of Internal Revenue vs. Hon. Raul M. Gonzalez, Secretary of Justice, L. M. Camus Engineering Corporation (Represented by Luis M. Camus and Lino D. Mendoza)*,[16] which reads:

> "As we held in *Marcos II v. Court of Appeals*:
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> > 'The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed. Even an assessment based on estimates is *prima facie* valid and lawful where it does not appear to have been arrived at arbitrarily or capriciously. <u>The burden of proof is upon the complaining party to show clearly that the assessment is erroneous. Failure to present proof of error in the assessment will justify the judicial affirmance of said assessment</u>....'" *(Underscoring supplied)*

In fine, the deficiency WTC assessment must be sustained.

As to the rate of tax used in the computation of deficiency WTC, the Court cannot adhere to respondent's use of the 32% income tax rate without any basis or explanation. Respondent cited Section 80(A) of the NIRC of 1997, as amended, as the legal basis of the imposition of deficiency WTC in the PAN,[17] FLD[18] and FDDA,[19] which provides:

> "SECTION 80. *Liability for Tax.* -
>
> (A) *Employer.* – The employer shall be liable for the withholding and remittance of the correct amount of tax required to be deducted and withheld under this Chapter. <u>If the employer fails to withhold and remit the correct amount of tax</u> as required to be withheld under the provision of this Chapter, <u>such tax shall be collected from the employer together with the penalties or additions to the tax otherwise applicable</u> in respect to such failure to withhold and remit." *(Underscoring supplied)*

The foregoing provision does not allow respondent to use the income tax rate of 32% in computing the amount of tax to be paid by

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[16] G.R. No. 177279, October 13, 2010.
[17] Exhibit "P-5", Docket, Vol. II, p. 564.
[18] Exhibit "P-7", Docket, Vol. II, p. 581.
[19] Exhibit "P-10", Docket, Vol. II, p. 624.

the employer. The law requires the *correct amount of tax* to be collected.

Since respondent's computation of deficiency WTC arose from the mere comparison of the total salaries and wages reported in petitioner's financial statements and the alphalist of employees for the year 2009, the amount of WTC per employee cannot be ascertained. From the alphalist[20] submitted by petitioner, it is clear to see that petitioner's employees do not all belong to the same income bracket. The same alphalist and the related monthly remittance returns of withholding tax on compensation can be found in the BIR Records of the instant case.[21] Thus, to use the 32% rate will have no factual basis.

Penalty for Failure to Supply Information in SLSP

Petitioner insists that it is not liable for the penalty for failure to supply information in SLSP because it submitted a photocopy of its Summary List of Purchases. The subject offer of secondary evidence was appropriately denied admission by the Court.[22]

It is represented that petitioner cannot locate the original printout in its premises and DAT file in its computer system.[23] It should be noted that the LOA was issued to petitioner in 2010, just over a year since it started business operations in 2009, which was the period subject to respondent's audit. Had petitioner been diligent in its record-keeping, it could have readily overturned respondent's findings and avoided the payment of penalty.

Unfortunately, the Court cannot relax the rules of procedure to accommodate petitioner's failure to exercise due diligence in keeping its records.

Deficiency Income Tax and DST Assessments

As discussed in the decision, the Court found that assessments for deficiency income tax and deficiency documentary stamp tax have prescribed, notwithstanding the execution of five (5) waivers by petitioner. Reckoned from the dates required by law for the taxes to

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[20] Exhibit "P-25", Docket, Vol. II, pp. 713-721.
[21] BIR Records, Folder 2, pp. 134-134 and pp. 140-170.
[22] Resolutions dated December 2, 2016 and March 24, 2017, Docket, Vol. II, pp. 798-799 and 833-837.
[23] Q7 & A7, Exhibit "P-33", Docket, Vol. II, p.451.

be filed and paid, respondent had until the following dates to issue an assessment:

Tax Type	Period Covered	Date Actually Filed & Paid	Last day to File & Pay	Last Day to Assess
Income Tax	Jan. – Dec. 2009	April 6, 2010[24]	April 15, 2010	April 15, 2013
Documentary Stamp Tax			January 11, 2010[25]	January 11, 2013

On April 17, 2013, respondent's bureau accepted the fourth waiver, which covered all internal revenue taxes, executed by petitioner on April 5, 2013. By that time, both income tax and DST assessments had already prescribed.

Respondent now comes with the argument that the subject assessments fall under the exceptions to the period of limitation provided in Section 222 of the NIRC of 1997, as amended, and corollary to the Supreme Court ruling in the case of *Aznar v. CTA*.[26]

The Court notes that in the PAN, FLD and FDDA, there was no finding of fraud. In fact, there was no imposition of a 50% surcharge for willful neglect to file a return or in case of a false or fraudulent return pursuant to Section 248(B) of the 1997 NIRC, as amended. The issue of fraud was only raised by respondent in his Motion for Partial Reconsideration. Respondent should be well aware that "fraud is never presumed, otherwise, courts would be indulging in speculations and surmises. It must be established by clear and convincing evidence xxx. A mere preponderance of evidence is not even adequate to prove fraud".[27]

Deficiency Expanded Withholding Tax (EWT)

The Court cancelled the deficiency EWT assessment for lack of factual basis. In the case of *Island Garment Manufacturing Corporation v. Commissioner of Internal Revenue*,[28] the Supreme Court upheld this Court's decision and agreed with its reasoning in this wise: *jr*

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[24] Exhibit "P-16-A", Docket, Vol. II, pp. 634-635.
[25] Section 200, 1997 NIRC, as amended. On the assumption that the taxable transaction occurred in December 2009, the DST due is payable within ten (10) days after the close of December 2009, or January 10, 2010, Sunday.
[26] G.R. No. L-20569. August 23, 1974.
[27] *Josefa CH. Maestrado, et al. v. The Honorable Court of Appeals, et al.*, G.R. Nos. 133345 & 133324, March 9, 2000.
[28] G.R. No. L-46644, September 11, 1987.

> "An assessment fixes and determines the liability of a taxpayer. As soon as it is served, an obligation arises on the part of the taxpayer concerned to pay the amount assessed and demanded. Hence, <u>assessment should not be based on mere presumptions no matter how reasonable or logical said presumptions may be. The assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption.</u> *(Collector of Internal Revenue vs. Benipayo, L-13656, January 31, 1962, 4 SCRA 182)....* Likewise, it is already a well-established doctrine that fraud cannot be presumed but must be proven. *(Aznar vs. Court of Tax Appeals, L-20569, August 23, 1974, 58 SCRA 519).*" *(Underscoring supplied)*

The Court reiterates that due process dictates that the taxpayer shall be informed of the factual basis of the assessment so as to give the taxpayer a chance to refute the same. Section 228 of the 1997 NIRC, as amended, and Section 3 of Revenue Regulations (RR) No. 12-99, as amended by RR 18-13, provide:

> "**Section 228.** *Protesting of Assessment.* – When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however,* That a preassessment notice shall not be required in the following cases:
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> (a) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the face of the return; or
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> (b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or
>
> (c) When a taxpayer who opted to claim a refund or tax credit of excess creditable withholding tax for a taxable period was determined to have carried over and automatically applied the same amount claimed against the estimated tax liabilities for the taxable quarter or quarters of the succeeding taxable year; or
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> (d) When the excise tax due on excisable articles has not been paid; or
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> (e) When the article locally purchased or imported by an exempt person, such as, but not limited to vehicles, capital equipment, machineries and spare parts, has been sold, traded or transferred to non-exempt persons.

The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void." *(Underscoring supplied.)*

"**SECTION 3.** ***Due Process Requirement in the Issuance of a Deficiency Tax Assessment.* —**

3.1 Mode of procedure in the issuance of a deficiency tax assessment:

3.1.1 ***Preliminary Assessment Notice (PAN).*** — If after review and evaluation by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, the said Office shall issue to the taxpayer a Preliminary Assessment Notice (PAN) for the proposed assessment. It shall show in detail the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based (see illustration in ANNEX "A" hereof).

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3.1.3 ***Formal Letter of Demand and Final Assessment Notice (FLD/FAN).*** — The Formal Letter of Demand and Final Assessment Notice (FLD/FAN) shall be issued by the Commissioner or his duly authorized representative. The FLD/FAN calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based; *otherwise, the assessment shall be void* (see illustration in ANNEX "B" hereof).

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3.1.5 ***Final Decision on a Disputed Assessment (FDDA).*** — The decision of the Commissioner or his duly authorized representative shall state the (i) facts, the applicable law, rules and regulations, or jurisprudence on which such decision is based, *otherwise, the decision shall be void* (see illustration in ANNEX "C" hereof), and (ii) that the same is his *final decision*." *(Underscoring supplied)*

A mere list of suppliers with amounts that was supposed to represent the discrepancy found by the examiners does not constitute factual basis of the assessment. Respondent did not even state how the amounts were computed and what documents were examined that resulted in the alleged discrepancy.

Respondent also maintains that its right to assess petitioner's deficiency EWT was not barred by prescription then went on to explain the withholding tax system and that petitioner was assessed as a withholding agent.

The Court finds it unnecessary to discuss the issue of prescription of the deficiency EWT assessment because there is no valid assessment to begin with.

Compromise Penalties

Anent the compromise penalties imposed by respondent, the Court ruled thus:[29]

> "It must be stressed that a compromise penalty is imposed to avoid prosecution for violation of the provision of the Tax Code. Pursuant to Revenue Memorandum Order (RMO) No. 01-90, as amended by RMO No. 19-07, <u>compromise penalties are only suggested in settlement of criminal liability, and may not be imposed or exacted on the taxpayer in the event that a taxpayer refuses to pay the same</u>. Clearly, the compromise penalty implies a mutual agreement between the parties in respect of the thing or subject matter which is so compromised. The imposition of the compromise penalty without the conformity of the taxpayer is illegal and unauthorized." *(Underscoring supplied.)*

Respondent asserts that the imposition of compromise penalties was pursuant to RMO No. 19-2007 and that the compromise penalties are not only for settlement of criminal liability but for certain violations of the NIRC of 1997. The FLD and FDDA state:

> **<u>FLD</u>**[30]
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> "The compromise penalty was imposed pursuant to Sections 250 & 255 of the Tax Code, with reference to RMO No. 1-90, as amended by RMO No. 19-2007."
>
> **<u>FDDA</u>**[31]
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> "The compromise penalty has been imposed in view of your failure to file and/or pay an internal revenue tax at the time or times required by law or regulation pursuant to Section 255 of the NIRC, as amended, as determined using the schedule of suggested compromise

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[29] Decision, December 6, 2018, p. 33, Docket, Vol. III, p. 1000.
[30] Exhibit "P-7", Docket, Vol. II, p. 579.
[31] Exhibit "P-10", Docket, Vol. II, p. 622.

penalties prescribed under Revenue Memorandum Order (RMO) No. 19-2007."

For easy reference, Sections 250 and 255 of the 1997 NIRC, as amended, are quoted below:

"**SEC. 250.** *Failure to File Certain Information Returns.*—In the case of each failure to file an information return, statement or list, or keep any record, or supply any information required by this Code or by the Commissioner on the date prescribed therefor, unless it is shown that such failure is due to reasonable cause and not to willful neglect, there shall, upon notice and demand by the Commissioner, be paid by the person failing to file, keep or supply the same, One thousand pesos (P1,000) for each such failure: *Provided, however,* That the aggregate amount to be imposed for all such failures during the calendar year shall not exceed Twenty-five thousand pesos (P25,000). *(Underscoring supplied)*

"**SEC. 255.** *Failure to File Return, Supply Correct and Accurate Information, Pay Tax, Withhold and Remit Tax and Refund Excess Taxes Withheld on Compensation.*—Any person required under this Code or by rules and regulations promulgated thereunder to pay any tax make a return, keep any record, or supply correct the accurate information, who willfully fails to pay such tax, make such return, keep such record, or supply correct and accurate information, or withhold or remit taxes withheld, or refund excess taxes withheld on compensation, at the time or times required by law or rules and regulations shall, in addition to other penalties provided by law, upon conviction thereof, be punished by a fine of not less than Ten thousand pesos (P10,000) and suffer imprisonment of not less than one (1) year but not more than ten (10) years.

"Any person who attempts to make it appear for any reason that he or another has in fact filed a return or statement, or actually files a return or statement and subsequently withdraws the same return or statement after securing the official receiving seal or stamp of receipt of internal revenue office wherein the same was actually filed shall, upon conviction therefor, be punished by a fine of not less than Ten thousand pesos (P10,000) but not more than Twenty thousand pesos (P20,000) and suffer imprisonment of not less than one (1) year but not more than three (3) years." *(Underscoring supplied.)*

To review, respondent imposed the following compromise penalties:[32] ℛ

[32] Exhibit "P-10", Docket, Vol. II, pp. 620-621.

Tax Assessment	Compromise Penalty
Deficiency Income Tax	₱ 25,000.00
Deficiency VAT	25,000.00
Deficiency EWT	16,000.00
Deficiency WTC	16,000.00
Deficiency DST	200.00
Total	**₱ 82,200.00**

The assessments for deficiency income tax, documentary stamp tax and expanded withholding taxes for the year 2009 were barred by prescription and cancelled for lack of factual basis. Consequently, compromise penalties corresponding to the said assessments must be cancelled.

The remaining VAT and WTC assessments cannot be imposed with the penalty stated in Section 250 considering that there were no allegations of failure to file such returns much less any proof thereof. Moreover, respondent already imposed the maximum amount of ₱25,000.00 penalty for non-filing of Summary List of Purchases for 2009.

Finally, the fine provided for in Section 255 cannot be imposed on petitioner for it is clear that the same can only be imposed *upon conviction* of the crime under said provision of law.

WHEREFORE, considering the foregoing, the Court finds no reason to modify the assailed decision. Both the Motions for Partial Reconsideration filed by the parties are **DENIED** for lack of merit.

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

I CONCUR:

CATHERINE T. MANAHAN
Associate Justice