Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SECOND DIVISION

DAKAY CONSTRUCTION AND DEVELOPMENT CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 8265

Members:

CASTAÑEDA, JR., *Chairperson*
CASANOVA, *and*
COTANGCO-MANALASTAS, JJ.

Promulgated:
DEC 10 2014
1:11 p.m.

x---x

DECISION

CASANOVA, *J.:*

This resolves the Petition for Review[1] filed on April 8, 2011 seeking for the cancellation and withdrawal of the assessment against petitioner for alleged deficiency Income Tax, Value-Added Tax, Documentary Stamp Tax and Compromise Penalties for taxable year 2007 in the total amount of P37,620,843.86.

The facts as found in the records of this case are as follows:

Petitioner Dakay Construction and Development Corporation is a Filipino domestic corporation, duly organized and existing under and by virtue of Philippine laws with principal office address at Woolbright Drive, Sudlon, Lahug, Cebu City, Philippines.[2]

---

[1] Docket (Vol. I), pp. 1-12.
[2] Par. 1, Petition for Review, Docket (Vol.)I, p. 1.

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue who is vested with authority to administer and enforce national internal revenue laws. Her office is located at the 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City, Philippines.[3]

On November 24, 2008, petitioner received a Letter of Authority from Jose N. Tan, Regional Director of Revenue Region No. 13, Cebu City, dated October 22, 2008, informing petitioner that RO Violeto Meso and GS Aldine Paulo of Regional District Office No. 81 of Cebu City North, are authorized to examine its books of accounts and other accounting records for all internal revenue taxes for the calendar year (CY) 2007.[4]

After investigation, a Formal Letter of Demand (FLD) and Assessment Notices were issued by Regional Director Jose N. Tan on December 29, 2010[5], assessing petitioner of deficiency taxes in the total amount of P37,620,843.86, inclusive of statutory increments.

On January 28, 2011, petitioner filed its Protest Letter assailing the assessment contained in the FLD.[6]

Thereafter, a letter was issued by Regional Director Jose N. Tan, which was allegedly received by petitioner on March 9, 2011, requesting for the immediate payment of the deficiency tax assessed. The letter further states that if petitioner disagrees, it may appeal the said final decision with the Court of Tax Appeals within thirty (30) days from date of receipt thereof, otherwise, petitioner's deficiency tax assessments shall become final, executory and demandable.[7]

Accordingly, petitioner filed the instant Petition for Review on April 8, 2011.

For her part, respondent filed her Answer[8] on June 16, 2011, interposing the following defenses:

---

[3] Par. 2, Petition for Review, Docket (Vol. I), p. 2.
[4] Exhibit "B".
[5] Exhibits "G", "G-1", "G-2", "G-3", "G-4".
[6] Exhibit "H".
[7] Exhibit "A".
[8] Docket (Vol. I), pp. 94-102.

"**ARGUMENTS AND DISCUSSIONS**

The assessments for deficiency Income Tax, VAT, Documentary Stamp tax and Compromise Penalties in the respective amounts of P16,179,240.81, P21,344,766.20, P93,826.85 and P3,000.00, were issued in accordance with law, jurisprudence and existing revenue issuances.

Respondent's Letter of Authority (LOA) is valid and binding.

Petitioner argued that the issuance of respondent's Letter of Authority (LOA) as basis of respondent to audit petitioner's accounting records and the subsequent assessments covering the period CY 2007 issued on October 22, 2008 is void and without force and effect on ground that petitioner received said LOA beyond 30 days from the date thereof. It likewise argued that the respondent's revenue officers have no valid authority to conduct the examination and the subsequent assessments. Respondent begs to disagree.

It must be noted that nowhere is it mentioned in said LOA or other internal revenue issuances or audit programs and policies that the failure of revenue examiners to serve the LOA to taxpayers within 30 days from the date hereof, will give rise to taxpayer immunity from audit for that particular period. The said requirement is merely directory and is intended to enhance efficiency while at the same ensure quality of audit. It does not estop the right of the government to issue assessment notices for deficiency taxes within the period/s set by law. Therefore, at any time within the regular three-year prescriptive period for issuing assessment notices under Section 203 of the National Internal Revenue Code (NIRC) of 1997, as amended, the Commissioner of Internal Revenue or her duly authorized representatives may issue an order revalidating Letters of Authority.

Further, petitioner is estopped from questioning the validity of said LOA due to petitioner's failure to invoke its right to object or refuse to receive the alleged void LOA at the time it was served by the revenue officers. As a matter of fact, petitioner voluntarily submitted its books of accounts and accounting records for audit of respondent's revenue officers in order to comply with respondent's LOA. Likewise, petitioner did not cite the invalidity of the issuance of the LOA in its protest letter dated January 25, 2011. Hence, respondent's revenue officers have the authority to audit petitioner's book of accounts and accounting records for the taxable year 2007.

Respondent's right to assess petitioner's deficiency internal revenue tax assessments have not prescribed.

a.) **Deficiency Income Tax (IT)**

The internal revenue tax assessment involved in this case is for the taxable year 2007. BIR records show that petitioner's *(sic)* filed its income tax return on April 15, 2008; and, in accordance with Section 203 of the 1997 NIRC, as amended, the prescriptive period for assessing petitioner would end on April 15, 2011. However, respondent issued the Final Assessment on December 29, 2010, which petitioner received on the same date. Hence, the subject assessment is valid for having been issued within the prescriptive period.

b.) **Deficiency Value-Added Tax (VAT)**

The right of the respondent to assess petitioner for deficiency Value Added Tax (VAT) for the taxable year 2007 has not prescribed because it falls under Section 222(a) of the 1997 Tax Code, thus:

'SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* –

(a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time

> within ten (10) years after the discovery of the falsity, fraud or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.
>
> xxx

The abovementioned provision finds application to the present case because respondent discovered that petitioner made a false return and failed to file a return to cover number of transaction with intent to evade taxes returns *(sic)* based on the result of the investigations made by respondent's revenue officers on the books of accounts and pertinent records and documents submitted by petitioner.

In the case at bar, although petitioner filed its monthly and quarterly VAT returns as mandated by law, it failed to declare thereto cash collections subject to VAT of P40,926,892.32 and unexplained sources of cash subject to VAT of P12,344,184.85. Petitioner also declared a creditable VAT withheld in the total amount of P1,378,747.07 which were disallowed due to 'out-of-period claimed' and unsupported creditable VAT withheld, and it did not declare the right application of standard input tax of seven percent (7%) of the selling/gross receipts attributable to government sales pursuant to Q & A No. 31 of Revenue Memorandum Circular No. 62-05 in the total amount of P10,243,4380.90 *(sic)*. These facts show that the VAT returns filed by petitioner can be considered as false return because it deviated from the truth, when in truth there was some items to be considered subject to VAT and rightly to be declared. Being considered as acfalse *(sic)* return, it is immaterial if petitioner intentionally omitted to declare items to be subject to VAT or not.

Considering that petitioner's return is false, the applicable prescriptive period would be ten years from the discovery of falsity. In the case at bar, the latest quarterly returns filed was on January 25, 2008, while the FAN was issued on December 29, 2009, such period being within the ten year period it follows that the assessment had not yet prescribed.

Moreover, the Supreme Court had ruled that the filing of deficient returns which prevent the Commissioner of Internal Revenue from computing the proper taxes is tantamount to non-filing. The Commissioner had to determine and assess the taxes on data obtained, not from the return, but from other sources. (*Commissioner of Internal Revenue vs. Gonzales*, No. L-19495, November 24, 1966). Hence, the assessment for deficiency VAT has not prescribed.

c. Deficiency Documentary Stamp Tax (DST)

Based on the audit findings of respondent's revenue officers that petitioner had an increase in the Capital Stock for the year 2006 as per audited Balance Sheet attached to its Annual Income Tax Return amounting to P9,200,000.00, and no DST payments were posted in the BIR-Integrated Tax System on said increase in capital stock, it is reasonable to deduce that petitioner evidently failed to file DST Returns in violation of Section 175 of the NIRC of 1997, as amended. Hence, for **failure to file DST return, the corresponding taxes may be assessed at any time within ten (10) years after the discovery of such omission** pursuant to Section 222(a) of the 1997 Tax Code.

Assessments are presumed to be correct unless the contrary is shown, and the burden of proof rest upon the taxpayer to overcome this presumption (Tan Guan vs. The Court of Tax Appeals and the Commissioner of the Bureau of Internal Revenue, No. L-23676, April 27, 1967). For failure of petitioner to present evidences that will overpower such presumption, the Honorable Court should therefore stand by the truthfulness of respondent's assessment for deficiency income tax, VAT, deficiency DST and compromise penalties.

<u>Respondent's deficiency internal revenue tax assessments have factual and legal basis</u>

Petitioner assailed the assessment notices for having been issued without factual and legal basis. Respondent respectfully submits that petitioner's assertions lacks of merit.

Section 228 of the NIRC provides that the taxpayer shall be informed in writing of the law and the facts on which the assessment was based. It bears stressing that the purpose of Section 228 of the 1997 Tax Code in requiring that the taxpayer be informed of the law and the facts on which the assessment is made is to give the taxpayer the opportunity to refute the findings of the examiner and give a more accurate and detailed explanation regarding the proposed assessment(s)., *(sic)*

The purpose of the above law was served in the instant case. A perusal of petitioner's Protest Letter on respondent's PAN dated December 22, 2010 as well as its Protest Letter on respondent's Assessment Notice and FAN dated January 25, 2011, reveals that petitioner was able to present its arguments intelligently as well as prepare documentary evidence to support its protest in assailing the PAN and assessment notices issued by respondent for petitioner's deficiency IT, VAT, DST and compromise penalties assessments. Hence, Section 228 of the 1997 Tax Code is deemed to have been complied with. (*Philippine Stock Exchange, Inc., vs. Commissioner of Internal Revenue,* CTA Case No. 5995, promulgated October 15, 2002, citing *Belle Corporation vs. Commissioner of Internal Revenue,* CTA Case No. 5930, promulgated April 4, 2002)."

Thereafter, the case was set for Pre-Trial Conference on January 19, 2012.[9] Pre-Trial Brief For Petitioner was filed on January 10, 2012[10] while Respondent's Pre-trial Brief was filed on February 22, 2012.[11]

---

[9] Notice of Pre-Trial Conference issued on November 28, 2011, Docket (Vol. I), p. 153.
[10] Docket (Vol. I), pp. 154-169.
[11] Docket (Vol. I), pp. 132-139.

On August 22, 2012, the Court issued a Pre-Trial Order which deemed terminated the pre-trial of the case.[12]

During trial, both parties presented their respective documentary and testimonial evidence.

After presentation, marking and identification, the Court admitted Exhibits "A" to "R"[13] as part of petitioner's documentary evidence while Exhibits "1" to "12-A"[14] were admitted as part of respondent's documentary evidence.

Subsequently, petitioner filed its Memorandum[15] on December 20, 2013 while respondent failed to file her Memorandum as per Records Verification[16] dated January 6, 2014. Thus, in a Resolution[17] dated January 13, 2014, the case was submitted for decision without respondent's memorandum.

The Court simplified the issues in this case as follows:

1. Whether or not the examination of the books as well as the assessments made by respondent CIR is null and void for the following reasons, among others:

    a. The tax deficiency assessment is based on a void Letter of Authority for having been served on petitioner beyond thirty (30) days from the date of issuance thereof;

    b. The tax deficiency assessment is void for having prescribed;

    c. The tax deficiency assessment was issued without factual and legal bases. a

---

[12] Docket (Vol. I), pp. 217-220.
[13] Resolution dated January 29, 2013, Docket (Vol. I), pp. 457-458.
[14] Resolution dated October 16, 2013, Docket (Vol. II), pp. 556-557.
[15] Docket (Vol. II), pp. 573-625.
[16] Docket (Vol. II), p. 626.
[17] Docket (Vol. II), p. 627.

2. Whether petitioner is liable for the deficiency Income Tax (IT), Value Added Tax (VAT), and Documentary Stamp Tax (DST) in the aggregate amount of P37,620,843.86 for the CY 2007.

As to the issue that the Letter of Authority (LOA) issued by respondent is void for having been served on petitioner beyond thirty (30) days from the date of issuance thereof, the Court finds the same bereft of merit.

According to petitioner, the LOA was served on November 24, 2008, or thirty-three (33) days from October 22, 2008. In view thereof, petitioner believes that the LOA is void for having been served beyond the thirty (30)-day mandatory period provided under Revenue Audit Memorandum Order No. 1-00 (RAMO No. 1-00).

Furthermore, petitioner alleges that the belatedly issued revalidation notice did not work to cure the void Letter of Authority. Petitioner maintains that the subject LOA is allegedly void from its inception and it necessarily follows that it cannot be cured nor ratified by a subsequent act. Petitioner adds that the revalidation was defectively made considering that the Notice of Revalidation was belatedly issued and that it did not comply with the directives of no less than the BIR with respect to proper revalidation procedures.

Petitioner further mentions that respondent failed to comply with the manner of accomplishing a revalidation as provided under Revenue Memorandum Order No. 38-88. Petitioner alleges that a subsequent and/or new LOA was never issued to petitioner and that the Notice was issued way beyond the one hundred twenty (120) day period granted by the BIR Rules.

To address the foregoing issues, the Court finds it relevant to cite RAMO No. 1-00 which provides as follows:

> "2.3 A Letter of Authority must be served or presented to the taxpayer within 30 days from its date of issue; otherwise, it becomes null and void unless revalidated. The taxpayer has all the right to refuse its service if presented beyond the 30-day period depending on the policy set by top management. Revalidation is done by issuing a new Letter of Authority or by just simply

stamping the words "Revalidated on ____________" on the face of the copy of the Letter of Authority issued.

Clearly, an LOA served beyond the 30-day period provided above does not automatically make it null and void if the same is revalidated. Furthermore, revalidation may be done not only by issuing a new LOA but also by simply stamping the words "Revalidated on ___________" on the face of the copy of the Letter of Authority issued.

While it is true that the LOA in this case was served beyond the 30-day period provided in the RAMO, records of the case, however, show that the LOA was subsequently revalidated as can be seen on the face of the copy of respondent's LOA with stamp "REVALIDATED ON: JULY 24, 2009." Clearly, the LOA issued on October 22, 2008 is not null and void in view of its revalidation on July 24, 2009.

As to petitioner's allegation that respondent failed to comply with the manner of accomplishing a revalidation, the Court finds it relevant Revenue Memorandum Circular No. 023-09 dated April 16, 2009 which provides:

> "I. Revalidation of LAs
>
> The revalidation of LA shall give rise to the extension of the period within which the Revenue Officer (RO) assigned to the case shall submit the report of investigation to higher authorities for review and approval, without the imposition of applicable administrative sanctions. Depending on the classification of the pending tax case, said extension period shall be equivalent to the original prescribed number of days within which to report the case under existing revenue issuances. **Failure on the part of the RO to request for the revalidation of LA or the expiration of the 'revalidation period' does not nullify the LA nor will it affect or modify the rules on the reglementary period within which an assessment may be validly issued.** However, this shall be considered as a ground for the imposition of disciplinary action and demerit in the performance rating of the

> concerned RO, including the reassignment of the case to another RO if the Regional Director, upon the recommendation of the Revenue District Officer, deems it necessary."

Clearly, the irregularity in the manner of accomplishing the revalidation of the LOA, specifically the alleged failure of respondent to request for revalidation within the "revalidation period" does not nullify the LOA nor affect the issuance of a valid assessment and may only be considered as a ground for imposition of disciplinary action on the concerned revenue officer.

Thus, petitioner's allegation that the failure to properly accomplish the revalidation of the LOA makes the LOA invalid is unmeritorious.

Moving on to the issue of prescription, the period within which to assess internal revenue taxes is governed by Section 203 of the National Internal Revenue Code (NIRC) of 1997, as amended, the pertinent provision of which reads:

> "SEC. 203. *Period of Limitation Upon Assessment and Collection.* — Except as provided in the Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: Provided, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day."

It is clear from the foregoing that the three (3)-year period to assess internal revenue taxes commences from the date of actual filing of the return; or from the last day prescribed by law for the filing of such return, whichever comes later. Accordingly, if the return was filed earlier than the last day allowed by law, the period to assess shall still be counted from the last day prescribed for filing of the return. However, if the return was filed beyond the period prescribed by law, the three-year period shall be counted from the day the return was filed.

The instant petition for review involves the assessment issued by respondent against petitioner for deficiency Income Tax, deficiency Value-Added Tax and deficiency Documentary Stamp Tax for the taxable year 2007.

As to petitioner's income tax, the return is required to be filed and the payment is to be made on or before the fifteenth (15th) day of April.[18] The Annual Income Tax Return for the taxable year 2007 was filed on April 15, 2008.[19] Hence, counting from the said date, respondent had until April 15, 2011 within which to assess petitioner for the subject deficiency income tax for the taxable year 2007. Clearly, the deficiency income tax assessment issued by respondent on December 29, 2010 was issued within the 3-year period provided by law.

On the other hand, the law requires that the Value-Added Tax Return be filed quarterly within twenty-five (25) days following the close of each taxable quarter prescribed for each taxpayer.[20] In this regard, records reveal that petitioner filed its Quarterly Value-Added Tax Return covering the 1st, 2nd, 3rd, and 4th quarters of taxable year 2007 on April 25, 2007[21], July 25, 2007[22], October 24, 2007[23] and January 25, 2008[24], respectively. Hence, respondent had until April 25, 2010, July 25, 2010, October 25, 2010 and January 25, 2011 within which to assess petitioner for deficiency Value-Added Tax for 1st, 2nd, 3rd and 4th quarters of the taxable year 2007.

Based on the foregoing dates, respondent's deficiency VAT assessment for the 1st, 2nd and 3rd quarters of the taxable year 2007 were issued beyond the 3-year prescriptive period provided by law while the deficiency VAT assessment for the 4th quarter was issued within the 3-year prescriptive period.

[18] In accordance with Section 77 (B) of the NIRC of 1997, as amended.
[19] Exhibit "L".
[20] Section 114 of the NIRC of 1997, as amended by R.A. 9337.
[21] Exhibit "M".
[22] Exhibit "N".
[23] Exhibit "O".
[24] Exhibit "P".

Nevertheless, considering that the bases for the deficiency VAT assessment are the entries in petitioner's Financial Statements and Alphalist of payees subject to withholding tax pertaining to the whole taxable year of 2007, and considering that petitioner failed to overcome the presumption of regularity in the performance of the respondent's duties, the deficiency VAT assessment is deemed to have been made on the unprescribed period for the taxable year 2007.

On the other hand, as to the prescription of assessment for deficiency documentary stamp tax, the assessment was based on the alleged failure of petitioner to pay documentary stamp tax on the increase in its Capital Stock as per its Audited Balance Sheet pertaining to the whole taxable year of 2007. According to petitioner, the original issuance of shares of stocks were issued sometime on March 2007, and pursuant to Section 200 (B) of the Tax Code, the DST is due within ten (10) days after the close of the month. Thus, petitioner concludes that the assessment has already prescribed.

Respondent opposes petitioner's allegation, claiming that petitioner's failure to pay DST on said increase in capital stock implies that petitioner failed to file DST Returns in violation of Section 175 of the NIRC of 1997, as amended. Hence, respondent believes that petitioner may be assessed of DST at any time within ten (10) years after the discovery of such omission pursuant to Section 222(a) of the 1997 Tax Code.

On this matter, it must be noted that petitioner failed to show evidence to prove that the assessment for DST pertains to the original issuance of shares of stocks issued sometime on March 2007. There is, likewise, nothing in the records of this case which would show that petitioner filed the corresponding DST return for such transaction. Consequently, what is applicable here is the ten-year period to assess provided in Section 222 of the 1997 Tax Code, which states:

> "SEC. 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes. —
>
> (a) In the case of a false or fraudulent return with intent to evade tax or of failure to file return, the

> tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof." (*Emphasis supplied*)

Since no return for DST was filed, the Court finds no error in respondent's claim that the DST may be assessed anytime within ten years after the discovery of the omission. In view of petitioner's failure to overcome the presumption of regularity of the performance of respondent's duties, the deficiency documentary stamp tax assessment for the taxable year 2007 is deemed to have been made within the prescriptive period provided by law to assess.

Moving on to the correctness of the assessment issued against petitioner, it must be noted that tax assessments by tax examiners are presumed correct and made in good faith. All presumptions are in favor of the correctness of a tax assessment. It is to be presumed, however, that such assessment was based on sufficient evidence. Upon the introduction of the assessment in evidence, a *prima facie* case of liability on the part of the taxpayer is made. **If a taxpayer files a petition for review in the CTA and assails the assessment, the *prima facie* presumption is that the assessment made by the BIR is correct, and that in preparing the same, the BIR personnel regularly performed their duties.** This rule for tax initiated suits is premised on several factors other than the normal evidentiary rule imposing proof obligation on the petitioner-taxpayer: the presumption of administrative regularity; the likelihood that the taxpayer will have access to the relevant information; and the desirability of bolstering the record-keeping requirements of the NIRC.[25]

However, the *prima facie* correctness of a tax assessment does not apply upon proof that an assessment is utterly without foundation, meaning it is arbitrary and capricious. Where the BIR has come out with a "naked assessment," i.e., without any foundation character, the determination of the tax due is without rational basis. In such a

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

situation, the U.S. Court of Appeals ruled that the determination of the Commissioner contained in a deficiency notice disappears. **Hence, the determination by the CTA must rest on all the evidence introduced and its ultimate determination must find support in credible evidence.**[26] (*Emphasis supplied.*)

I. INCOME TAX – ₱16,179,240.81

As reflected in the FLD[27] dated December 29, 2010, the deficiency income tax was computed as follows:

Taxable Income per return		₱ 14,067,041.35
Add: Audit Findings		
Construction Income not subjected to income tax	₱ 1,292,107.93	
Recoupment on Mobilization Payable not subjected to income tax	24,565,516.45	
Disallowed salaries and wages	128,617.32	25,986,241.70
Total adjusted taxable income per audit		₱ 40,053,283.05
Income tax due thereon		₱ 14,018,649.07
Less: Income Tax credits:		
Prior year's excess credits	₱ 25,123,835.95	
Creditable Withholding Tax per return	9,724,032.96	
Total Income Tax Credits per Return	34,847,868.91	
Less: Disallowed creditable tax certificates – double claims	1,360,592.48	
Allowable Income Tax Credits per audit	33,487,276.43	
Less: Amount Carried over to succeeding year per return	29,924,404.44	3,562,871.99
Basic Deficiency Income Tax Due		₱ 10,455,777.08
Add: 20% interest from 04.16.08-01.15.11		5,723,463.73
Total Deficiency Income Tax Due		**₱16,179,240.81**

As can be seen from the above computation, the assessment arose from the following items:

A.	Construction Income not subjected to income tax	₱ 1,292,107.93
B.	Recoupment on Mobilization Payable not subjected to income tax	24,565,516.45
C.	Disallowed salaries and wages	128,617.32

[26] *Ibid.*
[27] Exhibit "G".

D.	Disallowed Creditable Tax Certificates-double claims	1,360,592.48
E.	Amount carried-over to succeeding year per return	29,924,404.44

The Court shall discuss the validity of the said assessment by looking into the propriety of each item.

A. Construction Income not subjected to income tax - ₱1,292,107.93

Based on the Details of Discrepancies[28] attached to the FLD, respondent arrived at the discrepancy by comparing construction income recorded under petitioner's Collection Book Entries and construction income reported in petitioner's Financial Statements and Annual Income Tax Return (ITR), as shown below:

Construction Income per Collection Book Entries	₱510,758,177.42
Construction Income per Financial Statements/ITR	509,466,069.49
Construction Income not subjected to income tax	₱ 1,292,107.93

Petitioner contends that it is engaged in the construction of buildings under long-term contracts, wherein the income is spread over the length of time it takes to complete the project, thus petitioner uses the percentage of completion method which is the method required by the Tax Code[29].

In support thereof, petitioner presented its Annual ITR for TY 2007 to prove, among others, that its gross receipts for the said year in the amount of ₱509,466,069.49 exceeded ten (10) million pesos[30]. No other evidence was presented by petitioner to refute respondent's finding.

It is worthy to note how Section 48 of the NIRC of 1997, as amended, provides for the reporting of income for long-term construction contracts, to wit:

> "SEC. 48. *Accounting for Long-Term Contracts.* - Income from long-term contracts shall be reported for tax

[28] Exhibit "G".
[29] Docket (Vol. I), p. 274.
[30] Exhibit "L".

purposes in the manner as provided in this Section. As used herein, the term 'long-term contracts' means building, installation or construction contracts covering a period in excess of one (1) year. Persons whose gross income is derived in whole or in part from such contracts shall report such income upon the basis of percentage of completion. **The return should be accompanied by a return certificate of architects or engineers showing the percentage of completion during the taxable year of the entire work performed under contract.** There should be deducted from such gross income all expenditures made during the taxable year on account of the contract, account being taken of the material and supplies on hand at the beginning and end of the taxable period for use in connection with the work under the contract but not yet so applied. If upon completion of a contract, it is found that the taxable net income arising thereunder has not been clearly reflected for any year or years, the Commissioner may permit or require an amended return." *(Emphasis supplied)*

Considering that there was no documentary evidence of a return certificate of architects or engineers showing percentage of completion, which is a required attachment to the income tax return, and that no schedule was provided by petitioner showing how it computed its revenues, costs and expenses for the year using the percentage of completion method, petitioner's reliance on mere oral testimonies fails to disprove the findings of the respondent.

Hence, the Court finds for the respondent, and the deficiency income tax on construction income should be upheld.

B. Recoupment on Mobilization Payable not subjected to income tax – ₱24,565,516.45

The discrepancy was computed as follows:

Mobilization Payable, beginning	₱ 38,483,668.64
Total Mobilization Payable set up during the year	79,986,074.35
Total	₱ 118,469,742.89
Less: Mobilization Payable, ending	18,485,929.39
Total Recoupment per reconciliation	₱ 99,983,813.60
Total Recoupment per Collection Book Entries	75,418,297.15

Recoupment on Mobilization Payable not subjected to income tax	**₱24,565,516.45**

Petitioner alleges that the income tax deficiency assessed was erroneously made for the reason that respondent improperly considered the Recoupment on Mobilization Payable as income on the part of petitioner.

Petitioner states that a "Mobilization Payment" refers to a cash advance made by the client to the contractor to answer for future expenses and services for a particular period of time. Petitioner maintains that if after the lapse of this period of time, the amount advanced is not fully consumed, the excess is given back or refunded to the client. Petitioner alleges that a "Mobilization Payable" is when a contractor collects the mobilization payment but has yet to render the services equivalent to this mobilization payment.

Thus, petitioner concludes that a "Mobilization Payable" cannot per se be taxed as income because no gain is realized by the contractor and is, in fact, a liability on the part of the contractor because it represents an amount the contractor is bound to return if the contemplated services are not rendered.

Petitioner, likewise, alleges that respondent used the "cash basis method" of accounting as opposed to the "percentage of completion method" which was used by petitioner in its computation. In using the "cash basis method", petitioner averred that respondent treated all cash received by petitioner (whether or not the service has been rendered) as income, resulting in a recoupment on its mobilization payable.

Petitioner avers that the use of "cash basis method" completely disregards the nature of a recoupment upon a mobilization payable which recognizes income only upon the rendering of services by the contractor and that the percentage of completion method is the method espoused by the Tax Code for long-term construction contracts such as those involved in petitioner's case.

As discussed earlier under item (A), petitioner failed to provide documentary evidence to prove the use of percentage of completion method, thus disputing respondent's finding on recoupment of Mobilization Payable may prove futile. The testimony of petitioner's witness [31] as well as its allegations in the memorandum are insufficient to support its claim that respondent's assessment for income tax arising from the Recoupment on Mobilization Payable is incorrect.

Basic is the rule that mere testimonies are self-serving if they are not supported by documentary evidence. Corollary thereto is the settled rule that the presumption is always and inevitably against a litigant who fails to furnish evidence within his reach, and it is stronger when documents, writings, etc., would be conclusive in establishing his case. This is indeed an occasion to emphasize once again that the superiority of written evidence, compared with oral, is so pronounced, obvious and well known, that in most cases the deliberate and inexcusable withholding of written evidence, and effort to secure favorable consideration of oral testimony in the place of it, is an affront to the intelligence of the court.[32]

Thus, the presumption of correctness of respondent's assessment on this item is upheld.

C. Disallowed Salaries and Wages – ₱128,617.32

On respondent's income tax assessment relating to the disallowed salaries and wages, the Details of Discrepancies attached to the FLD states that a reconciliation of salaries and wages account per audit revealed an over statement of said expenses computed as follows:

Salaries and Wages claimed per Financial Statements	₱ 35,802,384.75
Salaries per alphalist of employees	35,673,767.43
Disallowed Salaries	₱ 128,617.32

Petitioner's witness, Atty. Raymond L. Bertulfo, testified, by way of Judicial Affidavit, that the BIR merely compared the salaries and wages per financial statements and that of per alphalists.[33] Without the corresponding details, Atty. Bertulfo alleged that it is difficult to reply to the assessment.

[31] Exhibit "K".
[32] *Republic vs. Sandiganbayan*, G.R. No. 112708-09, March 29, 1996.
[33] Exhibit "K".

From the above testimony of petitioner's witness, it can be deduced that petitioner is actually aware of the basis for the disallowance of salaries and wages which is the comparison of its own financial statements and alphalists. Thus, the Court cannot give credence to the testimony of the witness that it was difficult for them to reply since it could have easily verified from its own records, specifically its financial statements and alphalists, how the disallowed salaries and wages was computed.

For failure to present credible evidence to refute the disallowance of salaries and wages in the amount of ₱128,617.32, the same is upheld.

D. Double claimed creditable withholding tax certificates – ₱1,360,592.48

In the details of discrepancy, respondent stated that the total income tax credits per return amounted to ₱34,847,868.91. Respondent, however, found that there were double claimed creditable withholding tax certificates in the total amount of ₱1,360,592.48. Hence, respondent concluded that the total allowable income tax credits amounted to only ₱33,487,276.43.

Petitioner assails the above-mentioned findings, averring that it made repeated requests for respondent to prove it with a breakdown or details of the alleged double claim, as they were never provided during audit. Petitioner avers that as a result, the assessment in connection with the alleged double claimed creditable withholding tax partakes the nature of a "naked assessment", or an assessment which is reached without rational foundation or basis.

Notably, the law requires that the taxpayers should be informed of the legal and factual bases of the assessment. However, the assessment notices need not be a full narration of the facts and laws on which the assessment is based. Thus, so long as the parties are notified and were given the opportunity to explain their side, the requirements of due process are satisfactorily complied with.[34]

[34] *Calma, et al. vs. Court of Appeals*, G.R. No. 122787, February 9, 1999.

Applying the foregoing, the mere fact that respondent failed to provide petitioner of a breakdown or details of the alleged double claim of creditable withholding tax certificates does not make the assessment "a naked assessment".

Also, it cannot be said that the assessment for the double claim of creditable withholding tax certificates has no factual basis since the assessment itself shows that respondent based the assessment on petitioner's Income Tax Return and Creditable Tax Certificates which petitioner could have easily verified. In view thereof, petitioner's allegation that the assessment in connection with the alleged double claimed creditable withholding tax partakes the nature of a "naked assessment", or an assessment which is reached without rational foundation or basis, is unmeritorious.

E. Disallowed excess income tax credits for the year 2007- ₱29,924,404.44

Respondent mentioned that she deducted excess income tax credits for the year 2007 in the amount of ₱29,924,404.44 from the total allowable income tax credits amounting to ₱33,487,276.43. Thus, the income tax credits allowed against the deficiency income tax per audit amounted only to ₱3,562,871.99.

On the other hand, petitioner claims that it was surprised when respondent did not consider its unutilized income tax credits and added the above-mentioned amount to petitioner's taxable income which was allegedly not explained in respondent's assessment.

Verification of the FLD shows that the prior year's excess credits in the amount of ₱29,924,404.44 were considered by respondent to have been carried over by petitioner to the succeeding year. As reflected in the FLD, respondent deducted the foregoing amount from the amount of ₱33,487,276.43 representing the allowable income tax credits per her audit.

However, if the Court would follow the assumption implied in respondent's computation that petitioner actually applied/utilized/carried over the amount of ₱29,924,404.44 representing its unutilized tax credits for 2007 to offset its income tax due in the succeeding year 2008 and that it was found to be improper as petitioner has no prior year's excess credits, such erroneous application of unutilized tax credit can only be the subject of assessment at the time when the tax credit was actually applied/utilized, which is in the year 2008 and not in the year 2007, for such is beyond the scope of the present assessment. Hence, respondent's disallowance of petitioner's prior years excess credits in the amount of ₱29,924,404.44 for the year 2007 is erroneous.

In fine, considering that petitioner's valid tax credits for the year 2007 are more than sufficient to cover the income tax due on the assessed Construction Income of ₱1,292,107.93 and Recoupment on Mobilization Payable of ₱24,565,516.45 and disallowed Salaries and Wages of ₱128,617.32, petitioner is not liable for any deficiency income tax, as determined below:

Taxable Income Per Return		₱ 14,067,041.35
Add: Audit Findings		
Construction Income Not Subjected to Income Tax	₱ 1,292,107.93	
Recoupment on Mobilization Payable Not Subjected to Income Tax	24,565,516.45	
Disallowed Salaries and Wages	128,617.32	25,986,241.70
Total Adjusted Taxable Income Per Audit		₱ 40,053,283.05
Income Tax Due Thereon		₱ 14,018,649.07
Less: Income Tax Credits		
Prior Year's Excess Credits	₱ 25,123,835.95	
Creditable Tax Withheld Per Return	9,724,032.96	
Total Income Tax Credits Per Return	34,847,868.91	
Less: Disallowed Creditable Tax Certificates – Double Claims	1,360,592.48	
Allowable Income Tax Credits		33,487,276.43
Excess Tax Credits		**₱19,468,627.36**

II. VALUE-ADDED TAX – ₱21,344,776.20

As shown in the FLD, the deficiency VAT assessment was computed as follows[35]:

Total output tax per VAT returns			₱ 50,635,178.52
Add: Output tax on collections not subjected to VAT		₱ 4,911,227.08	
Output tax on the unexplained sources of cash in subcontractor and		1,481,302.18	6,392,529.26

[35] Exhibit "G".

rental expenses			
Total Output Tax per audit			₱ 57,027,707.78
Less: Input Tax per audit			
Input tax attributable to private sales		₱ 28,125,005.82	
Standard Input Tax on government sales		10,243,438.91	38,368,444.73
Net VAT Payable			₱ 18,659,263.05
Less: VAT credits			
VAT payments		₱ 611,456.61	
Creditable VAT withheld per return	₱ 7,516,946.02		
Less: Disallowed VAT withheld certificates	1,378,747.07	6,138,198.95	6,749,655.56
Basic Deficiency VAT due thereon			₱ 11,909,607.49
Add: 20% Interest from 01.26.08-01.15.11		₱ 7,041,351.50	
20% Interest on VAT on downpayment/mobilization payable not remitted on time		2,393,817.21	9,435,168.71
Total Deficiency Value-added Tax Due			**₱21,344,776.20**

The Court shall determine the propriety of the following items pertaining to the deficiency VAT assessment:

1	Collections not subjected to VAT	₱40,926,892.32
B.	Output Tax on the unexplained sources of cash in subcontractor and rental expenses	1,481,302.18
C.	Standard Input Tax on Government Sales	10,243,438.90
D.	Disallowed Creditable VAT Withheld	1,378,747.07

A. Collections not subjected to VAT- ₱40,926,892.32

The Details of Discrepancies shows the audit findings of respondent as to the total collections allegedly not subjected to VAT computed as follows:

Construction Income per Collection Book Entries			₱510,758,177.42
Less:	Retention Receivables for the year per audit		64,529,598.51
Net Collections			₱446,228,578.91
Add:	Retention Receivable Collected		55,183,029.08
Collections per audit			₱501,411,607.99
Add:	Discrepancy on Recoupment on Mobilization	₱24,565,516.45	
	Proceeds from the sale of fixed assets	1,017,502.01	
	Gross Receipts on Accounts Receivable	899,794.85	26,482,813.31
Total Collections per audit			₱ 527,894,421.30
Less:	Zero-rated sales		65,007,707.97
Collections Subject to VAT per audit			₱ 462,886,713.33

Less:	Zero-rated sales		421,959,821.01
Collections not subjected to VAT per audit			₱ 40,926,892.32
Multiply by VAT rate			12%
Output Tax due thereon			**₱ 4,911,227.08**

Petitioner alleges that the entry reflected in the above computation relating to the assessment on the discrepancy on recoupment on mobilization payable allegedly cannot work to generate any taxes as it is a liability, as opposed to taxable income.

However, the Court already sustained the assessment on the item Recoupment on Mobilization Payable as mentioned in this Court's discussion on petitioner's Income Tax liability. (See discussion in item I.B above) Accordingly, the VAT assessed on the alleged discrepancy on Recoupment on Mobilization Payable shall likewise be sustained.

Petitioner further assails respondent's computation on petitioner's deficiency VAT assessment on the following grounds:

1. That no details were presented regarding certain entries, specifically (a) Proceeds from the sale of fixed assets amounting to ₱1,017,502.01; and (b) Gross receipts on accounts receivable amounting to ₱899,794.85. As such, petitioner alleged that it cannot formulate an intelligent explanation and/or protest as the said details were never furnished by respondent despite repeated requests.

2. That the item "Zero Rated Sales" appeared twice in the computation provided by respondent. First in the amount of ₱65,007,707.97 and second, in the amount of ₱421,959,821.01. According to petitioner, respondent never explained this in any of its assessments.

On the foregoing matters, it was already mentioned that assessment notices need not be a full narration of the facts and laws on which the assessment is based. As long as the parties are notified and were given the opportunity to explain their side, the requirements of due process are satisfactorily complied with.[36]

[36] Supra note 34.

Moreover, the Proceeds from the sale of fixed assets amounting to ₱1,017,502.01 and Gross receipts on Accounts Receivable amounting to ₱899,794.85 are clearly identified in petitioner's Statement of Cash Flows for the year ended December 31, 2007.[37] As regards the "Zero Rated Sales" which appeared twice in respondent's computation, the second amount of ₱421,959,821.01 actually represents the total amount of petitioner's declared VATable sales/receipts in its Quarterly VAT Returns[38] for the year 2007.

Accordingly, the allegation alone that no details were presented to petitioner on the amounts reflected in the assessment, without further proof that the same is utterly without foundation, meaning it is arbitrary and capricious, shall not cause the cancellation of the assessment.

B. Output Tax on the unexplained sources of cash in subcontractor and rental expenses – ₱1,481,302.18

Respondent's reconciliation of the subcontractor and rental expenses per Financial Statements against the subcontractor expense per Alphalist of Payees subject to withholding tax reveals a discrepancy construed as unexplained sources of cash subject to VAT, computed as follows:

Subcontractor Expense per Alphalist of Payees	₱205,376,545.00	
Subcontractor Expense per Financial Statements	193,095,891.37	₱12,280,653.63
Rental Expense per Alphalist of Payees	₱ 332,555.40	
Rental Expense per Financial Statements	269,024.18	63,531.22
Total Unexplained Sources of Cash		₱12,344,184.85
Multiply by VAT Rate		12%
Output Tax on the unexplained sources of cash		**₱1,481,302.18**

According to petitioner, this was arrived at by comparing the figures as reported in the Alphalist of Petitioner's Payees with the expense amounts as presented in petitioner's Audited Financial Statements.

[37] BIR Records, p. 339.
[38] Exhibits "M", "N", "O" and "P".

To explain the discrepancy, petitioner adopts its arguments in its Protest[39] wherein it was stated that the figures as reported in the Alphalist of Payees (₱205,376,545.00) is higher as compared to the Subcontractors Expense reported in the Audited Financial Statement (₱193,095,891.37) as the former is arrived at by dividing by the withholding tax rate of 2% the amounts actually withheld and remitted to arrive at the reported Amount of Income Payment. Petitioner alleged that the amounts actually withheld and remitted are based on the actual billing of the subcontractors, **including billings chargeable to the works or contracts of the other subcontractors** which are entered into the books as **Accounts Receivable (AR)-Subcon (Name of Subcon to be Charged)**. Petitioner maintained that even if it is still charged to a particular subcontractor, petitioner would still withhold 2% as required based on the total billing, thus, the report on the "Amount of Income Payment" on the Alphalist of Payees, as explained above, would be bigger compared to the amount declared in the Financial Statements (i.e. Subcontractors Expense account). According to petitioner, the amount of the subcontractors expense as entered into the books would, however, not include the said billing charged to another subcontractor as it is booked as a Receivable Account (AR-Subcon), thus, petitioner concluded that the total figure is lesser as compared to the one reported in the Alphalist of Payees.

The Court finds the assessment unmeritorious.

Since the expenses reflected per petitioner's alphalist were higher than the amounts reported in its ITR/FS, respondent concluded that the difference pertains to petitioner's undeclared income subject to output VAT. By doing so, respondent merely relied on assumptions without obtaining any evidence corroborating such findings. This is contrary to the doctrine laid down by the Supreme Court in *Collector of Internal Revenue vs. Benipayo*[40], wherein it was held that:

> "xxx An assessment fixes and determines the tax 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, assessments should not be based on mere presumptions

[39] Exhibit "H".
[40] G.R. No. L-13656, January 31, 1962.

no matter how reasonable or logical said presumptions may be. xxx."

In order to stand the test of judicial scrutiny, 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 xxx."

Furthermore, even if the subject expenses per alphalist were to be considered as income subject to output VAT, the same shall be offset by treating the equivalent payments as purchases for which input tax credits may be claimed. Hence, no VATable income will result from the said transactions.

C. Standard Input Tax on Government Sales – ₱10,243,438.90

In the Details of Discrepancies attached to the FLD, it was stated that the above amount pertains to the application of the standard input tax of seven percent (7%) of the selling price/gross receipts attributable to government sales pursuant to Q & A No. 31 of Revenue Memorandum Circular No. 62-05.

Sales to Government per VAT returns	₱ 146,334,841.50
Standard Input Tax Rate	7%
Standard Input Tax allowed on Government Sales	**₱ 10,243,438.91**

In the Judicial Affidavit of petitioner's witness, Atty. Raymond L. Bertulfo testified that respondent have understated the figures for "Input tax attributable to private sales" and the figures for "Standard Input Tax on government sales". According to Atty. Bertulfo, petitioner's Quarterly VAT Returns reflect the correct figures as follows[41]:

Input tax attributable to private sale	₱ 32,253,723.62
Input tax attributable to government sale	10,253,700.57
Total	**₱ 42,507,424.19**

[41] Docket (Vol. I), p. 430.

Section 4.114-2 of Revenue Regulations No. 04-07, implementing Section 114(C) of the NIRC of 1997, as amended, mandates the withholding of 5% final VAT on government money payments as follows:

> "SEC. 4.114-2. *Withholding of VAT on Government Money Payments and Payments to Non-Residents. —*
>
> (a) The government or any of its political subdivisions, instrumentalities or agencies including government-owned or controlled corporations (GOCCs) shall, before making payment on account of each purchase of goods and/or of services taxed at twelve percent (12%) VAT pursuant to Secs. 106 and 108 of the Tax Code, deduct and withhold a final VAT due at the rate of five percent (5%) of the gross payment thereof.
>
> The five percent (5%) final VAT withholding rate shall represent the net VAT payable of the seller. The remaining seven percent (7%) effectively accounts for the standard input VAT for sales of goods or services to government or any of its political subdivisions, instrumentalities or agencies including GOCCs in lieu of the actual input VAT directly attributable or ratably apportioned to such sales. Should actual input VAT attributable to sale to government exceeds seven percent (7%) of gross payments, the excess may form part of the sellers' expense or cost. On the other hand, if actual input VAT attributable to sale to government is less than seven percent (7%) of gross payment, the difference must be closed to expense or cost."

The five percent (5%) final VAT withholding rate shall represent the net VAT payable of the seller. The remaining seven percent (7%) effectively accounts for the standard input VAT for sales of goods or services to government or any of its political subdivisions, instrumentalities or agencies including GOCCs, in lieu of the actual input VAT directly attributable or ratably apportioned to such sales to the Government. Should actual input VAT exceed the standard input VAT of seven percent (7%) of gross payments, the excess may form part of the sellers' expense or cost. Conversely, if actual input VAT is less than the standard input VAT of 7% of gross payment, the difference must be treated as taxable income.[42]

In its Quarterly VAT Returns for taxable year 2007, petitioner reflected the following VATable sales/receipts to private and government entities totalling ₱421,959,820.92:

Exh.	Taxable Quarter Year 2007	VATable Sales/Receipts to Private Entities	VATable Sales/Receipts to Government	Total Sales/Receipts	% of VATable Sales/Receipts to Private Entities to Total Sales/Receipts	% of VATable Sales/Receipts to Government to Total Sales/Receipts
"M"	1st Qtr	₱ 96,140,799.67	₱ 20,262,919.83	₱ 116,403,719.50	82.5925495%	17.4074505%
"N"	2nd Qtr	60,827,396.42	24,838,508.75	85,665,905.17	71.0053741%	28.9946259%
"O"	3rd Qtr	60,548,083.50	43,917,686.00	104,465,769.50	57.9597353%	42.0402647%
"P"	4th Qtr	58,108,699.83	57,315,726.92	115,424,426.75	50.3435031%	49.6564969%
		₱275,624,979.42	**₱146,334,841.50**	**₱421,959,820.92**		

Based on the percentage of each type of sales/receipts to total sales/receipts, petitioner's reported input VAT for the year 2007 of ₱42,506,775.88 shall be allocated as follows:

Exh.	Taxable Quarter Year 2007	Input VAT	Input VAT Attributable to VATable Sales/Receipts to Private Entities	Input VAT Attributable to VATable Sales/Receipts to Government
"M"	1st Qtr	₱ 12,760,711.76	₱ 10,539,397.18	₱ 2,221,314.58
"N"	2nd Qtr	8,836,403.91	6,274,321.65	2,562,082.26
"O"	3rd Qtr	10,100,297.49	5,854,105.69	4,246,191.80
"P"	4th Qtr	10,809,362.72	5,441,811.85	5,367,550.87
		₱42,506,775.88	**₱28,109,636.38**	**₱ 14,397,139.50**

Inasmuch as the actual input VAT in each of the taxable quarters of 2007 is greater than the 7% standard input VAT, the difference shall be closed to petitioner's cost or expense. Thus, the amount of input VAT that may be credited against petitioner's output VAT on sales/receipts to government for the year 2007 amounts to only ₱10,243,438.91, broken down as follows:

---

[42] REVENUE MEMORANDUM CIRCULAR NO. 29-05, Q&A No. 17.

Exh.	Taxable Quarter Year 2007	Input VAT Per Return	Input VAT Attributable to VATable Sales/Receipts to Private Entities	Input VAT Attributable to VATable Sales/Receipts to Government	7% Standard Input	Input VAT Closed to Cost/Expense
"M"	1st Qtr	₱ 12,760,711.76	₱ 10,539,397.18	₱ 2,221,314.58	₱ 1,418,404.39	₱ 802,910.19
"N"	2nd Qtr	8,836,403.91	6,274,321.65	2,562,082.26	1,738,695.61	823,386.65
"O"	3rd Qtr	10,100,297.49	5,854,105.69	4,246,191.80	3,074,238.02	1,171,953.78
"P"	4th Qtr	10,809,362.72	5,441,811.85	5,367,550.87	4,012,100.88	1,355,449.98
		₱42,506,775.88	**₱28,109,636.38**	**₱14,397,139.50**	**₱10,243,438.91**	**₱4,153,700.60**

Contrary to petitioner's claimed input VAT of ₱42,507,424.19, the amount that may be credited against its VATable sales/receipts to private and government entities for taxable year 2007 is only ₱38,353,075.28, detailed as follows:

Taxable Quarter Year 2007	Allowable Input VAT on VATable Sales/Receipts to Private Entities	Allowable Input VAT on VATable Sales/Receipts to Government	Total Allowable Input VAT
1st Qtr	₱ 10,539,397.18	₱ 1,418,404.39	₱ 11,957,801.57
2nd Qtr	6,274,321.65	1,738,695.61	8,013,017.26
3rd Qtr	5,854,105.69	3,074,238.02	8,928,343.71
4th Qtr	5,441,811.85	4,012,100.88	9,453,912.74
Total	**₱28,109,636.38**	**₱10,243,438.91**	**₱38,353,075.28**

D. Disallowed Creditable VAT Withheld – ₱1,378,747.07

BIR Records reveal that the following withholding VAT certificates claimed by petitioner for taxable year 2007 were disallowed by respondent[43]:

Payee	Description	Sales Amount	VAT withheld	Respondent's comments
PPA	VAT withholding on gov't public works	₱ 6,024,381.93	₱ 301,219.10	*Prior period govt sales*
Danao City Govt	VAT withholding on gov't public works	3,471,680.00	154,985.71	*NO PERIOD INDICATED*
PPA-PDO Visayas	VAT withholding on gov't public works	3,943,441.93	197,172.10	*NO PERIOD INDICATED*
PPA-PDO Visayas	VAT withholding on gov't public works	1,118,586.06	55,929.30	*NO PERIOD INDICATED*
PPA-PDO Visayas	VAT withholding on gov't public works	1,075,331.23	53,766.58	*NO PERIOD INDICATED*
PPA-PDO Visayas	VAT withholding on			*NO PERIOD*

[43] BIR Records, p. 371.

	gov't public works	3,604,918.55	204,278.72	*INDICATED*
PPA-PDO Visayas	VAT withholding on gov't public works	5,153,411.53	292,026.65	*NO PERIOD INDICATED*
Barangay Lahug	VAT withholding on gov't public works	1,112,468.80	55,623.44	*NO PERIOD INDICATED*
-			63,745.47	*Not substantiated*
TOTAL		**₱25,504,220.03**	**₱1,378,747.07**	

On the other hand, petitioner provided BIR Forms No. 2306, marked as Exhibits "Q" to "Q-12"[44] to prove, among others, that: 1.) the disallowed VAT withheld certificates in the aggregate amount of ₱1,378,747.07 were filled out by the Philippine Ports Authority; and 2) these were declared in the Quarter in which the payments were received by petitioner.

However, per comparison between the schedule found in the BIR Records and the set of Exhibits offered by petitioner, only the following withholding VAT certificates were relevant:

Exhibit	Payee	Sales Amount	VAT Withheld	Quarter Claimed
Q-3	PPA-PDO Visayas	₱ 1,118,586.06	₱ 55,929.30	2nd
Q-4	PPA-PDO Visayas	3,943,441.93	197,172.10	2nd
Q-6	PPA-PDO Visayas	1,075,331.23	53,766.58	3rd
Q-7	PPA-PDO Visayas	3,604,918.55	204,278.72	3rd
Q-8	PPA-PDO Visayas	5,153,411.53	292,026.65	3rd
Total		**₱14,895,689.30**	**₱803,173.35**	

Notably, respondent's audit working papers reveal that the above certificates did not indicate the taxable quarter for which the exemption is being applied, hence, a valid finding from respondent. However, upon admission of the evidence by this Court, the same certificates offered as evidence were properly filled out. Petitioner alleges that these were filled out by Philippine Ports Authority.

Nonetheless, due to respondent's failure to controvert the evidence presented by petitioner, the Court finds that portion of disallowed final withholding VAT in the amount of ₱803,173.35 for which valid support was admitted, should be granted. Thus,

---

[44] Docket (Vol. I), pp. 405-417.

petitioner's disallowed final withholding VAT for taxable year 2007 amounts to only ₱575,573.72.

In sum, petitioner is liable to pay basic deficiency VAT for taxable year 2007 in the amount of ₱9,640,501.40, computed as follows:

Total Ouput Tax per VAT Returns				₱ 50,635,178.51
Add:	Output tax on collections not subjected to VAT			4,911,227.08
Total Output Tax per Audit				₱ 55,546,405.59
Less:	Input Tax per Audit			
	Input Tax attributable to sales to private entities		₱28,109,636.38	
	Input Tax attributable to sales to government entities		10,243,438.91	38,353,075.28
Net VAT Payable				₱ 17,193,330.31
Less:	VAT Credits/Payments			
	VAT Payments		₱ 611,456.61	
	Creditable VAT withheld per return	₱7,516,946.02		
	Less: Disallowed VAT withheld certificates	575,573.72	6,941,372.30	7,552,828.91
Basic Deficiency VAT				**₱ 9,640,501.40**

III. DOCUMENTARY STAMPS TAX – ₱93,826.85

Per review, respondent notes that there was an increase in the Capital Stock for the year as per audited Balance Sheet attached to the Annual Income Tax Return filed amounting to ₱9,200,000.00. Respondent, however, found that no documentary stamp tax payment was posted in the BIR-Integrated Tax System. Thus, respondent computed that the documentary stamps tax due amounts to ₱93,826.85, inclusive of statutory penalties, computed as follows:

Increase in Capital Stock			₱ 9,200,000.00
Documentary Stamps Tax Due thereon			₱ 46,000.00
Less:	Tax paid		-
Basic Deficiency Documentary Stamps Tax Due			₱ 46,000.00
Add:	25% Surcharge	₱ 11,500.00	
	20% Interest (fr. 01.06.08 to 01.15.11)	27,826.85	
	Compromise penalty	8,500.00	47,826.85
Total Deficiency Documentary Stamps Tax Due			**₱ 93,826.85**

Petitioner alleged that the assessment for DST pertains to the original issuance of shares of stock issued sometime on March 2007. However, the same was already found not supported by substantial evidence. Further, petitioner did not question the correctness of the assessment for deficiency documentary stamps tax issued by respondent. Lastly, there is nothing in the records of this case which would show that petitioner filed the corresponding DST return for such transaction. Thus, the assessment against petitioner for basic deficiency documentary stamps tax for taxable year 2007 in the amount of P46,000.00 remains.

IV. SUGGESTED COMPROMISE PENALTIES – ₱3,000.00 AND COMPROMISE PENALTY INCLUDED IN THE DEFICIENCY DST ASSESSMENT - ₱8,500.00

The suggested compromise penalties are computed in the FLD as follows:

Non-submission of Summary Lists of Sales (1st and 3rd quarters)	₱ 2,000.00
Non-submission of Summary Lists of Purchases (3rd quarter)	1,000.00
Total Suggested Compromise Penalties	₱ 3,000.00

Likewise, the deficiency DST assessment of ₱93,826.85 discussed earlier, included compromise penalty of ₱8,500.00.

On the above compromise penalties assessed, it must be stressed that the same is being imposed to avoid prosecution for violation of the provisions of the Tax Code.[45] Pursuant to Revenue Memorandum Order (RMO) No. 01-90, as amended by RMO No. 19-07, 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. Clearly, the compromise penalty implies a mutual agreement between the parties in respect to the thing or subject matter which is so compromised. The imposition of compromise penalty without the conformity of the taxpayer is illegal and unauthorized.[46]

---

[45] *Philippine International Fair, Inc. v. Collector of Internal Revenue, et al.*, G.R. No. L-12928 and G.R. L-12932, March 31, 1962.

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

In this case, there was nothing in the records which would show that petitioner consented to the compromise penalty. Consequently, the compromise penalty should not be imposed and must be cancelled.

WHEREFORE, premises considered, the assessments issued by respondent against petitioner for taxable year 2007 covering deficiency income tax in the amount of ₱16,179,240.81 and compromise penalties in the amount of ₱11,500.00 are hereby **CANCELLED AND/OR WITHDRAWN**. However, the deficiency VAT and deficiency DST assessments for taxable year 2007 are hereby **AFFIRMED** but with some modifications. Accordingly, petitioner is **ORDERED to PAY** respondent the amount of **TWELVE MILLION ONE HUNDRED EIGHT THOUSAND ONE HUNDRED TWENTY SIX PESOS & 75/100 (₱12,108,126.75)** representing deficiency VAT and DST for taxable year 2007, inclusive of the 25% surcharge imposed under Section 248(3) of the NIRC of 1997, computed as follows:

	Basic Tax	25% Surcharge	Total
Deficiency VAT	₱ 9,640,501.40	₱ 2,410,125.35	₱ 12,050,626.75
Deficiency DST	46,000.00	11,500.00	57,500.00
Total	**₱9,686,501.40**	**₱ 2,421,625.35**	**₱12,108,126.75**

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

a) Deficiency interest at the rate of 20% per annum on the basic deficiency VAT and DST computed from the dates indicated below until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended;

Tax Type	Basic Tax	Deficiency Interest computed from
Deficiency VAT	₱ 9,640,501.40	April 25, 2008
Deficiency DST	46,000.00	January 5, 2008

b) Delinquency interest at the rate of 20% per annum on the total amount of ₱12,108,126.75 and on the 20% deficiency interest which have accrued as aforestated in (a), computed from January 15, 2011 until full payment thereof

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ROMAN G. DEL ROSARIO
Presiding Justice

pursuant to Section 249 (C) of the NIRC of 1997, as amended.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
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.

JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson, Second Division