REPUBLIC OF THE PHILIPPINES
Court Of Tax Appeals
QUEZON CITY

THIRD DIVISION

WINTELECOM, INC., *Petitioner,*	**C.T.A. CASE NO. 7056**
	Members:
- versus –	BAUTISTA, Chairperson, PALANCA-ENRIQUEZ, and COTANGCO-MANALASTAS, JJ.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	**Promulgated:** JUN 7 2012

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DECISION

PALANCA-ENRIQUEZ, J.:

THE CASE

This is a Petition for Review with Prayer for Suspension of Collection filed by Wintelecom, Inc. (hereafter "petitioner") praying for the reversal and nullification of the Final Decision on Disputed Assessment dated August 20, 2004 rendered by the Commissioner of Internal Revenue.

THE PARTIES

Petitioner is a domestic corporation duly organized and existing in accordance with the laws of the Republic of the Philippines, engaged in selling and repair of mobile phones, with office address at 2339 Leon Guinto St., Malate, Manila.

Respondent, on the other hand, is the duly appointed Commissioner of Internal Revenue charged with the duty of assessing and collecting national internal revenue taxes, and holds office at the Bureau of Internal Revenue, National Office Building, Diliman, Quezon City.

THE FACTS

The facts, as culled from the records, are, as follows:

On July 10, 2003, Assistant Commissioner of the BIR Enforcement Service, Percival Salazar, sent petitioner a letter advising it of the Report, which is the result of the investigation of petitioner's internal revenue tax liabilities for taxable years 2001 and 2000, to which petitioner protested in a letter dated July 31, 2003.

On December 15, 2003, petitioner received a Pre-Assessment Notice for alleged deficiency internal revenue taxes for the years 2000 and 2001 in the total amount of P523,258,495.68.

On December 19, 2003, petitioner protested the Pre-Assessment Notice.

On March 10, 2004, petitioner received a Final Assessment Notice for deficiency internal revenue taxes for the years 2000 and 2001, with Details of Discrepancies in the total amount of P553,344,468.98.

On April 6, 2004, petitioner filed a protest to the Final Assessment.

On August 20, 2004, respondent CIR rendered its Final Decision on Disputed Assessment denying with finality petitioner's protest.

On September 22, 2004, petitioner filed a Petition for Review with the Court in Division, docketed as C.T.A. Case No. 7056.

Respondent CIR filed a series of "Motion for Extension of Time to File Answer". In its Resolution dated December 17, 2004, the former First Division denied respondent CIR's fifth motion, a copy of which was received by respondent on January 5, 2005. However, on December 20, 2004, respondent filed her Answer.

On January 13, 2005, respondent filed a "Motion for Reconsideration" of the Resolution dated December 17, 2004. In its Resolution dated May 20, 2005, the former First Division denied with finality respondent CIR's Motion For Reconsideration and set the *ex parte* presentation of evidence for the petitioner on July 5, 2005, at 9:00 a.m.

On July 4, 2005, respondent filed a "Petition (With Prayer for the Issuance of a Temporary Restraining Order and/or Writ of Preliminary Injunction)" with the Court of Appeals seeking to enjoin this Court from implementing the Resolution dated May 20, 2005 and to set aside the Resolution dated May 20, 2005 and to order this Court to admit respondent

CIR's Answer. On July 11, 2005, the Court of Appeals dismissed said petition for lack of jurisdiction declaring that respondent CIR availed of a wrong remedy in a wrong forum.

Discontented, on July 15, 2005, respondent appealed to the Supreme Court, but said petition was likewise denied by the Supreme Court on March 5, 2007 for failure to sufficiently show that the Court of Appeals had committed any reversible error on the questioned judgment.

After the termination of the *ex parte* presentation of the evidence for the petitioner, on February 20, 2008, the former First Division rendered a Decision partially granting the petition.

On March 14, 2008, respondent filed a "Motion for Reconsideration with Motion to Admit Answer and to Set Aside All Evidence Presented", which was denied by the former First Division in its Resolution dated August 5, 2008.

On September 8, 2008, respondent filed a Petition for Review with the Court *En Banc*, docketed as C.T.A. EB No. 417, seeking to set aside the Resolution dated May 20, 2005, Decision dated February 20, 2008 and Resolution dated August 5, 2008 rendered by the former First Division in C.T.A. Case No. 7056.

Respondent raised the principal issue of whether the former First Division validly allowed and ordered the *ex parte* presentation of evidence for petitioner

Wintelecom without any motion from Wintelecom to declare the CIR in default, without a hearing on such motion, and without an order declaring the CIR in default and in rendering judgment thereon.

Finding merit in respondent CIR's Petition for Review, on May 21, 2009, the Court *En Banc* granted the Petition and accordingly, annulled and set aside the assailed Resolution dated May 20, 2005, Decision dated February 20, 2008 and Resolution dated August 5, 2008 rendered by the former First Division in C.T.A. Case No. 7056. Accordingly, the answer filed by respondent CIR was admitted and C.T.A. Case No. 7056 was remanded to the former Fist Division for further proceedings.

Petitioner filed a "Motion for Reconsideration", which was denied by the Court *En Banc* in a Resolution dated July 30, 2009 for lack of merit.

Thus, this case was remanded to the former First Division for further proceedings. However, on January 7, 2010, pursuant to *CTA Administrative Circular No. 01-2010 ("Implementing the Fully Expanded Membership in the Court of Tax Appeals")* dated January 5, 2010, this case was transferred to the Third Division.

In her Answer, filed on December 20, 2004, respondent alleged by way of special and affirmative defenses that: Section 6 (B) of the NIRC of 1997 provides that when a report required by law as a basis for assessment of any internal revenue tax is not submitted within the time fixed by pertinent laws or rules and regulation, or when there is reason to believe that any such report is false, incomplete or erroneous, the Commissioner shall assess the proper tax on the basis of the best evidence obtainable; pursuant to the provisions of the NIRC; respondent has the power to assess proper tax on any taxpayer based on the best evidence obtainable and such evidence shall be prima facie correct and sufficient for all legal purposes; for taxable year 2000, petitioner underdeclared its sales in the amount of P150,153,394.00 in its Income Tax Return, as compared to its Payment Form under the VAAP dated October 9, 2002; for taxable year 2001, petitioner declared its sales amounting to P113,570,076.00, but in its amended ITR, it declared sales amounting to P2,221,499,968.00; based on Third Party Information, Reconciliation of Purchases per Unreported Books, and Verification from the ISOS Data Center of the BIR, petitioner incurred tax deficiencies for taxable years 2000 and 2001; and all presumptions are in favor of the correctness of tax assessments.

Petitioner presented Cherry Uyco-Ong, as witness, and documentary evidence, marked as *Exhibits "A"* to *"CCC"*, inclusive of their submarkings, which were all admitted by the Court in a Resolution dated February 28, 2011.

On the other hand, on April 4, 2011, respondent, through counsel, moved for the resetting of the scheduled initial presentation of the evidence for the respondent, which was granted by the Court with warning.

Again, on May 2, 2011, respondent, through counsel, moved for the resetting of the scheduled initial presentation of the evidence for the respondent, which was granted by the Court with final warning to counsel for the respondent.

On June 1, 2011, respondent filed an "Urgent Motion to Reset Hearing" alleging that she will not be able to present her evidence on June 6, 2011 due to heavy volume of work and she is yet to communicate with her witnesses, who are revenue examiners mostly doing field work.

On June 17, 2011, upon motion of petitioner's counsel, and considering that a final warning had already been issued against respondent against any further resetting of the initial presentation of the evidence for the respondent, respondent CIR was deemed to have waived the right to present evidence for failure to attend the scheduled hearing on June 6, 2011, despite the repeated warnings.

Thus, both parties were ordered to file their simultaneous memoranda, within thirty (30) days from notice.

On July 6, 2011, petitioner filed its Memorandum.

On July 8, 2011, respondent CIR filed a "Motion for Reconsideration (Re: Resolution promulgated 17 June 2011)", to which petitioner filed its "Opposition/Comment (To Respondent's Motion for Reconsideration of the Resolution promulgated 17 June 2011)" on July 29, 2011.

In a Resolution dated August 23, 2011, respondent's "Motion for Reconsideration (Re: Resolution promulgated 17 June 2011)" was denied for lack of merit.

On October 3, 2011, considering that petitioner had already filed its Memorandum and for failure of respondent to file her memorandum despite notice, this case was deemed submitted for decision.

ISSUE

The parties stipulated on this sole issue:

WHETHER OR NOT THE SUBJECT DEFICIENCY TAX ASSESSMENTS ARE VALID AND HAVE FACTUAL AND LEGAL BASES.

THIS COURT'S RULING

The Petition is partly meritorious.

At the outset, it must be emphasized that during the original trial of this case, respondent CIR was declared in default for failure to file her answer within the prescribed period; however, in the interest of substantial justice and for failure to conform with the procedural requirements on the declaration of

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default resulting to a denial of due process, a re-trial of the case was conducted to give respondent a chance to rebut petitioner's arguments and present her evidence in support of her assessments. In spite of this, although respondent's answer was admitted and she was given the chance to participate in the re-trial, respondent's counsel opted not to cross-examine petitioner's witness, and then again, respondent was not able to present her evidence, this time, for her counsel's repeated failure to attend the scheduled initial presentation of the evidence for the respondent. Thus, respondent was declared to have waived her right to present evidence. As a result thereof, this Court was again limited to the evidence adduced by petitioner alone.

A perusal of the evidence on record shows that petitioner adduced the same evidence and raised the same arguments, as previously presented during the original trial of this case before the former First Division. As a consequence, this Court arrived at the same findings as the former First Division after the *ex parte* presentation of the evidence for the petitioner and embodied in its Decision dated February 20, 2008. Nevertheless, this Court will discuss them in *seriatim.*

Validity of Assessment

Petitioner questions the validity of the assessments on the ground that its constitutional rights were violated when respondent deliberately withheld the documentary evidence submitted by petitioner during the investigation, hence, it was denied of an opportunity to fully contest the subject assessments.

We are not persuaded.

Records show that in the administrative claim, respondent denied petitioner's request to withdraw the documents submitted before them during the investigation; there is no evidence, however, to show that petitioner was denied access to said documents. It must be emphasized that said documents are petitioner's documents. As such, petitioner ought to have copies, at least photocopies, of said documents considering that the same are evidence to contest an assessment against it. Petitioner has the duty to record its sales and transactions and should keep a copy of its records pertaining to its business. The fact that petitioner does not have a copy of the documents which were properly submitted to the BIR upon a subpoena during the administrative investigation is already petitioner's liability. And such circumstance cannot justify the non-presentation of controverting evidence against the assessment.

Furthermore, the presumption of regularity in the official function of government officials is not defeated by mere allegation that petitioner was deprived of the opportunity to fully contest the subject assessments. Petitioner's assertion that it was deprived of the relevant information and documents which were submitted to the BIR upon investigation and which could support its protest in contesting the assessment is not a basis for cancellation of the assessments. Such allegation will not render the subject assessments null and void.

We now determine the tax liability of petitioner on the basis of the subject assessments.

Respondent assessed petitioner for deficiency income, VAT, withholding tax on compensation, expanded withholding tax and fringe benefits tax, computed as follows:

YEAR 2001

Tax Type	Basic	Penalties	Total
Income	P69,679,915.62	P75,398,782.16	P145,078,697.78
VAT	26,105,338.51	29,949,674.44	56,055,012.95
W/tax Comp.	7,966.09	25,582.63	33,0548.72
EWT	706,977.50	338,807.42	1,045,784.92
Fringe Benefits	705,882.35	515,181.31	1,221,063.66
Total	P97,206,080.07	P106,228,027.96	P203,434,108.03

YEAR 2000

Tax Type	Basic	Penalties	Total
Income	P100,177,175.06	P136,048,616.15	P236,225,791.21
VAT	46,422,441.52	67,197,179.46	113,619,620.98
W/tax Comp.	13,703.20	11,927.73	25,630.93
EWT	20,779.71	18,538.12	39,317.83
Total	P146,634,099.49	P203,276,261.46	P349,910,360.95
TOTAL	P243,840,179.56	P309,504,289.42	**P553,344,468.98**

Deficiency Income Taxes

As regards deficiency income taxes, petitioner contends that there are no factual and legal bases in support of the BIR's findings of alleged deficiency

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income tax considering that respondent failed to present evidence to support her findings.

In her answer, respondent alleged that the assessment for deficiency income tax was the result of their investigation based on third party information, reconciliation of purchases per unreported books and verification from ISOS Data Center of the BIR. Third party information allegedly revealed undeclared purchases, sale of unaccounted prepaid cards, undeclared commission income and undeclared service and repairs income for the years 2000 and 2001. Respondent further invoked her power under *Section 6 (B) of the NIRC of the 1997, as amended*, which provides:

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

We rule for petitioner.

Although *Section 6 (B) of the NIRC of the 1997, as amended*, authorizes the BIR to assess proper tax on the best evidence obtainable, including hearsay evidence, the law, however, provides that the assessment must be based on actual facts.

Thus, in the case of *CIR vs. Hantex Trading Co. Inc. (454 SCRA 327)*, the Supreme Court ruled:

> "We agree with the contention of the petitioner that **the best evidence obtainable may consist of hearsay evidence, such as the testimony of third parties or accounts or other records of other taxpayers similarly circumstanced as the taxpayer subject of the investigation**, hence, inadmissible in a regular proceeding in the regular courts. Moreover, the general rule is that administrative agencies such as the BIR are not bound by the technical rules of evidence. It can accept documents which cannot be admitted in a judicial proceeding where the Rules of Court are strictly observed. It can choose to give weight or disregard such evidence, depending on its trustworthiness.
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> However, **the best evidence obtainable** under Section 16 of the 1977 NIRC, as amended, **does not include mere photocopies of records/documents.** The petitioner, in making a preliminary and final tax deficiency assessment against a taxpayer, cannot anchor the said assessment on mere machine copies of records/documents. Mere photocopies of the Consumption Entries have no probative weight if offered as proof of the contents thereof. The reason for this is that such copies are mere scraps of paper and are of no probative value as basis for any deficiency income or business taxes against a taxpayer. Indeed, in *United States v. Davey*, the U.S. Court of Appeals (2nd Circuit) ruled that where the accuracy of a taxpayer's return is being checked, the government is entitled to use the original records rather than be forced to accept purported copies which present the risk of error or tampering.

In *Collector of Internal Revenue v. Benipayo*, the Court ruled that the assessment must be based on actual facts. xxx

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In fine, then, the petitioner acted arbitrarily and capriciously in relying on and giving weight to the machine copies of the Consumption Entries in fixing the tax deficiency assessments against the respondent.

The rule is that in the absence of the accounting records of a taxpayer, his tax liability may be determined by estimation. The petitioner is not required to compute such tax liabilities with mathematical exactness. Approximation in the calculation of the taxes due is justified. To hold otherwise would be tantamount to holding that skillful concealment is an invincible barrier to proof. However, the rule does not apply where the estimation is arrived at arbitrarily and capriciously.

We agree with the contention of the petitioner that, as a general rule, 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.

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 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***." (Emphasis Ours)

Considering the above ruling of the Supreme Court nullifying an assessment based on mere photocopied documents, it is with more reason, that the subject assessment in this case should be nullified considering that respondent failed to present evidence on which the said assessments were based.

At this point, it must be emphasized that respondent failed to present evidence to support her findings as she was declared to have waived her right to present evidence for the repeated failure of respondent's counsel to present her evidence.

Although respondent was able to pre-mark her evidence and even though respondent was able to present and offer the same, we find the provisionally marked evidence insufficient as the same consists of mere photocopies of the assessments, which were already admitted by petitioner (*C.T.A. Case No. 7056 Docket, Volume 3, pp. 1629-1633)*. Respondent failed to present documents to prove the basis of her assessments.

As regards the BIR records, although it was elevated to this Court on May 19, 2011, the same cannot be considered as evidence for the respondent, as ruled by the Supreme Court in the case of *Dizon vs. CTA (553 SCRA 126):*

> "Under Section 8 of RA 1125, the CTA is categorically described as a court of record. As cases filed before it are litigated *de novo*, party-litigants shall prove every minute aspect of their cases. Indubitably, no evidentiary value can be given the pieces of evidence submitted by the BIR, as the rules on documentary evidence require that these documents must be formally offered before the CTA. Pertinent is Section 34, Rule 132 of the Revised Rules on Evidence which reads:
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> SEC. 34. *Offer of evidence.* -- The court shall consider no evidence which has not been formally offered. The purpose for which the evidence is offered must be specified.
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> xxx xxx
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> While the CTA is not governed strictly by technical rules of evidence, as rules of procedure are not ends in themselves and are primarily intended as tools in the administration of justice, the presentation of the BIR's evidence is not a mere procedural technicality which may be disregarded considering that it is the only means by which the CTA may ascertain and verify the truth of BIR's claims against the Estate. The BIR's failure to formally offer these pieces of evidence, despite CTA's directives, is fatal to its cause. Such failure is aggravated by the fact that not even a single reason was advanced by the BIR to justify such fatal omission. This, we take against the BIR.
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> Per the records of this case, the BIR was directed to present its evidence in the hearing of February 21, 1996, but BIR's counsel failed to appear. The CTA denied petitioner's motion to consider BIR's presentation of evidence as waived, with a warning to BIR that such presentation would be considered waived if BIR's evidence would not be presented at the next hearing. Again, in the

hearing of March 20, 1996, BIR's counsel failed to appear. Thus, in its Resolution dated March 21, 1996, the CTA considered the BIR to have waived presentation of its evidence. In the same Resolution, the parties were directed to file their respective memorandum. Petitioner complied but BIR failed to do so. In all of these proceedings, BIR was duly notified. Hence, in this case, we are constrained to apply our ruling in *Heirs of Pedro Pasag v. Parocha:*

> "**A formal offer is necessary because judges are mandated to rest their findings of facts and their judgment only and strictly upon the evidence offered by the parties at the trial**. Its function is to enable the trial judge to know the purpose or purposes for which the proponent is presenting the evidence. On the other hand, this allows opposing parties to examine the evidence and object to its admissibility. Moreover, it facilitates review as the appellate court will not be required to review documents not previously scrutinized by the trial court.
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> xxx xxx."

Citing the case of *Vda. de Oñate vs. Court of Appeals (250 SCRA 287),* the Dizon case admits an exception to the general rule in *Section 34 of Rule 132 of the Revised Rules on Evidence*, when the following requisites are present: 1) the document must have been duly identified by testimony duly recorded; and 2) the document must have been incorporated in the records of the case.

The factual circumstances in the Dizon case are the same as the instant case in so far as the BIR was considered to have waived her right to present evidence for the repeated failure of her counsel to appear during the scheduled initial presentation of the evidence for the respondent and for failure to submit her memorandum despite notice. Moreover, respondent also failed to prove compliance with the exception to the general rule, as provided in the Dizon case. Thus, this Court cannot consider the BIR records as basis of the subject assessments.

For failure of the respondent to present evidence in support of her assessment for deficiency income tax, the *prima facie* correctness of a tax assessment will not apply. Mere allegation of third party information is not sufficient to justify the assessment, as petitioner was not given a chance to refute said information.

As regards the deficiency income tax, petitioner's lone witness, Cherry Uyco-Ong on direct examination testified that the alleged findings of unaccounted prepaid cards have no basis and the said cards were not sold separately, but were given as incentives, as evidenced by the sales invoices, which were in the possession of the respondent; that the alleged undeclared commission incomes are actually purchased discounts, which should be treated as a reduction of the cost of purchases and not income; that as regards the alleged findings of undeclared service and repairs income, the witness explained that the same was already included in the reported sales of petitioner for the years 2000 and 2001 *(Exhibit "WW")*.

The Court is inclined to give weight and credence to the above testimony of petitioner's witness for being clear, and convincing and uncontroverted.

Accordingly, for respondent's failure to present evidence of the alleged third party information, the assessment for deficiency income taxes for the years 2001 and 2000 in the amount of P145,078,691.78 and P236,225,791.21, respectively, are hereby cancelled for lack of factual and legal bases. As to the imposition of the fifty percent (50%) civil penalty, the same is rendered moot.

Deficiency Value-Added Tax

As we have previously ruled, we cancelled the assessments on income based on alleged undeclared sales on account of undeclared purchases, sale of unaccounted prepaid cards, undeclared commission income, and undeclared service and repairs income for respondent's failure to present evidence on the alleged third party information on which the assessment was based. Consequently, we hold that the assessment for deficiency VAT on the alleged undeclared sales has no factual and legal bases.

However, in its protest letter dated July 31, 2003 with attached computation sheets *(Exhibits "F" to "F-4")* and reiterated in its Memorandum, petitioner categorically admitted that it is liable for deficiency VAT in the amounts of P250,692.48 and P2,611,763.36 for the years 2001 and 2000, respectively. Petitioner acknowledged that the deficiency VAT liabilities are a

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result of errors made in its bookkeeping of sales transactions for the years 2001 and 2000, as testified to by its witness Ms. Cherry Uyco-ong, to wit:

> "24.Q. Ms. Witness, I'm showing to you a copy of the Audited Financial Statements of Wintelecom for the year 2001. The total sales therein amounted to P2,221,499,968.00. The same amount is also shown in the Voluntary Assessment and Abatement Program (VAAP) Application form dated October 10, 2002. How come you mention that the amount of sales is P2,704,129,833.10 and not P2,221,499,968.00 as indicated in the 2001 Audited Financial Statements?
>
> A: The bookkeeping of Wintelecom is not 100% precise. Thus, before the BIR examiners got our invoices, I took it upon myself to prepare a sales list in excel format. I then came up with the amount of P2,704,129,833.10, which I asked to be reflected as the amount of sales in Wintelecom's protest.
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> 25.Q: Ms. Witness, I'm showing to you a copy of the document indicating the amount of sales with names of the buyers, their addresses and corresponding invoices. What relation does this have with the document you mentioned earlier?
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> A: That is the sales list I was referring to.
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> xxx xxx
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> 35.Q: How much is the total sales of petitioner for the year 2000?
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> A: P476,515,029.64 which we indicated in Annex "C" of the Letter of Protest to the BIR.
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> 36.Q: How much is the output tax for the year 2000?
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> A: 10% of P476,515,029.64 or P47,651,502.96.
>
> 37.Q: How much should be the VAT payable for the year 2000?

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A: By deducting the input tax on the purchases which amounted to P45,405,916.60 from the output tax, then the VAT payable for the year 2000 should be P2,245,586.36." *(Exhibit "WW")*

Petitioner, therefore, is liable, by its own admission, to pay deficiency VAT on the discrepancies between the sales reported in its audited financial statements and VAAP returns, as compared to the total sales computed from the sales invoices issued for the years 2000 and 2001.

In addition to petitioner's admission, the Court finds that the input tax on the purchase of equipment amounting to P446,217.46 included input tax of P150,000.00 for the purchase of a Ford Expedition. Since the Ford Expedition is considered a luxury car, input tax credits on the purchase thereof are not allowed, under *Section 4.104-1 of Revenue Regulations No. 7-95*, which provides:

"SEC. 4.104-1. Credits for input tax. —

'Input tax' means the value-added tax due from or paid by a VAT-registered person on importation of goods or local purchases of goods or services, including lease or use of property, from another VAT-registered person in the course of his trade or business. It shall also include the transitional or presumptive input tax determined in accordance with Section 105 of the Code.

It includes input taxes which shall be directly attributed to transactions subject to the value-added tax plus a ratable portion of any input tax which cannot be directly attributed to either the taxable or exempt activity.

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Any input tax evidenced by a VAT invoice or official receipt issued by a VAT-registered person in accordance with Section 108 of the Code, on the following transactions, shall be creditable against the output tax:

(a) Purchase or importation of goods
1. For sale; or
2. For conversion into or intended to form part of a finished product for sale, including packaging materials; or
3. For as supplies in the course of business; or
4. For use as raw materials supplied in the sale of services; or
5. For use in trade or business for which deduction for depreciation or amortization is allowed under the Code, **except automobiles**, aircraft and yachts.

'Automobile' as contemplated in this section, shall mean a 4-wheeled luxury motor vehicle, which is used in the trade or business of the VAT taxpayer, propelled by any motive fuel with engine displacement of 2,000 cc or more, and specially designed for the transport of persons and not use primarily for the carrying of freight or merchandise; Provided, however, that the definition shall not apply to those required in the trade or business or the VAT taxpayer, such as hotel limousines, funeral hearse, ambulances and similar vehicles." (Emphasis Ours)

Therefore, petitioner is liable to pay deficiency VAT in the amounts of P553,177.64 and P2,898,767.65 for the years 2001 and 2000 or in the total amount of P3,451,945.29, as follows:

2001

Taxable Sales subject to VAT			P2,704,129,833.10
VAT Rate			10%
Output Tax Due			P270,412,983.31
Less: Input Tax			
Purchases per records	P2,695,471,267.25	P269,547,126.73	
Administrative expenses		125,576.36	
Equipment		446,217.46	

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Less: Disallowed input tax		(150,000.00)	269,968,920.55
VAT Payable			P444,062.76
Less: VAT payments (per returns)			123,197.30
Basic VAT Due			P320,865.46
Add: 25% surcharge		P80,216.36	
20% interest (1.25.02 - 10.11.02)		45,712.34	125,928.70
Total VAT Due			P446,794.16
Less: VAAP payment			24,741.82
Net VAT Due			P422,052.34
Add: 20% Interest (10.12.02 - 04.30.04)			131,125.30
Total Deficiency VAT — 2001			**P553,177.64**
2000			
Taxable Sales subject to VAT			P476,515,029.64
tax rate			10%
Output Tax Due			P47,651,502.96
Less: Input Tax			
Purchases per audit	454,059,166.00		45,405,916.60
VAT Payable			P2,245,586.36
Add: 25% surcharge		P561,396.59	
20% interest (1.25.01 - 10.11.02)		769,036.43	1,330,433.02
Total VAT Due			P3,576,019.38
Less: VAAP payment			1,364,376.00
Net VAT Due			P2,211,043.38
Add: 20% Interest (10.12.02 - 04.30.04)			687,124.27
Total Deficiency VAT — 2000			**P2,898,767.65**
TOTAL — DEFICIENCY VAT DUE — 2001 and 2000			**P3,451,945.29**

Deficiency Withholding Taxes

a) Withholding Taxes on Compensation

Respondent alleged that the adjustments on the January 2001 and 2000 remittance of P7,966.09 and P13,703.20, respectively, were unsupported for petitioner's failure to present the alphalist of previous years to justify the

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adjustments made on January 2001 and 2000 returns. Respondent, likewise, imposed penalties against petitioner for late remittance of withholding taxes for the months of February 2001 and December 2001.

Petitioner presented its Monthly Remittance Return of Income Taxes Withheld on Compensation for the months of January to December 2001 *(Exhibits "Z" and "AA" to "JJ")* and for the months of January to November 2000 (*Exhibits "N" to "X")* and the Annual Information Return of Income Taxes Withheld on Compensation and Final Withholding Taxes for years 2001 and 2000 *(Exhibits "Y" and "M")*, as well as the alphalist of employees for the same years.

We rule for the respondent.

A perusal of the monthly returns presented by petitioner shows that it filed and paid income taxes withheld on compensation and final withholding taxes.

However, the total amount in the alpha list for 2000 (P178,609.91) is not consistent with the amount reflected in the Annual Return (P208,554.17) and the actual payment made per Monthly Return (P199,554.17) to support the adjustment made on the January 2001 remittance. Moreover, the alpha list for year 1999 was not presented to support the adjustment made for the month of January 2000 remittance in the amount of P13,703.20.

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Considering that petitioner failed to present documents which will reconcile its adjustments, the assessment for deficiency withholding taxes on compensation for the years 2001 and 2000 is upheld, with the corresponding surcharges and interest.

We also find respondent's imposition of surcharges and interests for petitioner's late remittance of withholding taxes on compensation for the months of February 2001 and December 2001, proper. *Section 2.58 (A) (2) of Revenue Regulations No. 2-98, implementing Section 57 (A) of the NIRC of 1997, as amended*, provides:

> "Sec. 2.58 RETURNS AND PAYMENT OF TAXES WITHHELD AT SOURCE.
>
> (A) Monthly return and payment of taxes withheld at source —
>
> xxx xxx
>
> (2) When to file —
> (a) The withholding tax return, whether creditable or final, shall be filed and payments should be made within ten (10) days after the end of each month except for taxes withheld for December which shall be filed on or before January 25 of the following year."

Pursuant to the above provision, the last days to file and pay withholding taxes on compensation for the months of February 2001 and December 2001 were on March 12, 2001 *(March 10, 2001 being a Saturday)* and January 25, 2002, respectively.

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Applying the foregoing to the instant case, petitioner's Monthly Remittance Returns of Income Taxes Withheld on Compensation for the months of February 2001 and December 2001 *(Exhibits "JJ", and "Z")* show that petitioner belatedly remitted the said withholding taxes on March 14, 2001 and January 28, 2002, respectively. Hence, petitioner is liable for surcharges and interests for its belated remittances on March 14, 2001 and January 28, 2002.

Records further show that the Assessment Notice for deficiency withholding taxes on compensation for 2000 does not include a twenty-five percent (25%) surcharge. Pursuant to *Section 248 (A)(3) of the NIRC of 1997, as amended,* in addition to the tax required to be paid, a penalty of 25% of the amount due shall be imposed for failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment. Thus, we hereby impose a surcharge of 25% on petitioner's deficiency withholding taxes on compensation for the year 2000.

However, we find no legal basis on respondent's imposition of compromise penalty. Compromise is a penalty to avoid prosecution for violation of the provisions of the Tax code *(Philippine International Fair, Inc. v. Collector of Internal Revenue, et al., 4 SCRA 782)*. The Court has no jurisdiction to compel a taxpayer to pay the compromise penalty because by its very nature, it implies a mutual agreement between the parties in respect to the thing or subject matter which is so compromised, and the choice of paying it or not paying it distinctly belongs to the taxpayer. Thus, absent any showing that petitioner consented to the compromise penalty, said imposition should be cancelled. The imposition of the compromise penalty without the conformity of the taxpayer is illegal and unauthorized *(Commissioner of Internal Revenue vs. Lianga Bay Logging Co., Inc., 193 SCRA 92).* Considering that there is no evidence to prove that petitioner consented to pay the compromise penalty, the imposition of the same has no basis.

Therefore, we find petitioner liable to pay deficiency withholding taxes on compensation for the years 2001 and 2000, computed, as follows:

2001

Unsupported adjustment appearing in the Jan. remittance return					
Basic Tax Due			P7,966.09		
Add:	25% Surcharge		1,991.52		
	20% Interest (01.26.02 - 04.30.04)		3,596.74		P13,554.35
Late remittance					
a.	Due Date:	03/12/01			
	Date Paid:	03/14/01			
	Amount:			P44,416.12	
	25% Surcharge			P11,104.06	
	20% Interest (3.12.01 - 3.14.01)			48.68	
b.	Due Date:	01/25/02			
	Date Paid:	01/28/02			
	Amount:			P11,258.58	
	25% Surcharge			2,814.05	
	20% Interest (1.26.02 - 1.28.02)			18.51	P13,985.90
Total Deficiency W/tax on Compensation — 2001					**P27,540.25**

2000

Unsupported adjustment appearing in the Jan. remittance return			
Basic Tax Due			P13,703.20
Add:	25% Surcharge		3,425.80

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20% Interest (01.26.01 - 04.30.04)	8,927.73
Total Deficiency W/tax on Compensation — 2000	**P26,056.73**

TOTAL-DEFICIENCY W/TAX ON COMPENSATION -2001 & 2000 P53,596.98

b)Expanded Withholding Taxes

The audit made by respondent disclosed that there were unremitted expanded withholding taxes in the amount of P3,204.47 for the year 2001. Also, an examination of the expenses subject to expanded withholding tax per financial statements as against the monthly returns shows that there were income payments, such as commission, purchase of supplies (printing), professional fee, brokerage and advertising which were not subjected to the required withholding tax rates. The deficiency withholding taxes amounted to P1,045,784.92 and P39,317.83 for the years 2001 and 2000, respectively.

Petitioner failed to present any evidence to the contrary, hence, the presumption of correctness of assessment applies. Although petitioner presented Monthly Remittance Returns of Creditable Income Taxes Withheld (Expanded) *(Exhibits "KK" to "VV")*, we find the same insufficient to clarify the discrepancy found by respondent in relation to her Financial Statements.

As regards the compromise penalty, again, in the absence of consent from petitioner, the same is hereby deleted for lack of basis.

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However, we find that respondent did not impose a 25% surcharge on the deficiency expanded withholding taxes; thus, the assessment is hereby modified to include the surcharge on the deficiency expanded withholding tax for the year 2000.

Thus, this Court finds that petitioner is liable for deficiency expanded withholding taxes, recomputed, as follows:

2001					
Unremitted withholding tax					
	Per Unregistered Books		P5,346.98		
	Per Remittance		2,142.51		
	Unremitted			P3,204.47	
Add:	50% Surcharge		P1,602.24		
	20% Interest (1.26.02 to 4.30.04)		1,446.84	3,049.08	P6,253.55
Underwithholding					
	Commission	P5,862,286.26	10%	P586,228.63	
	Supplies	224,201.37	1%	2,242.01	
	Professional Fee	56,613.85	1%	566.14	
	Brokerage	2,294,725.08	5%	114,736.25	
Total Basic Tax Due				P703,773.03	
Add:	25% Surcharge		P175,943.26		
	20% Interest (1.26.02 - 4.30.04)		317,758.34	493,701.60	1,197,474.63
Total Deficiency Expanded Withholding Tax — 2001					**P1,203,728.18**
2000					
Underwithholding					
	Commission	P66,133.00	10%		P6,613.30
	Supplies	39,551.00	1%		395.51
	Advertising	1,377,090.00	1%		13,770.90
Total Basic Tax Due					P20,779.71
Add:	25% Surcharge		P5,194.93		
	20% Interest 1.26.01 - 1.30.04		13,538.12		18,733.05
Total Deficiency Expanded Withholding Tax — 2000					**P39,512.76**
TOTAL — DEFICIENCY EWT — 2001 & 2000					**P1,243,240.94**

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Deficiency Fringe Benefit Tax

As regards the alleged deficiency fringe benefits tax, respondent's audit showed that petitioner purchased a Ford Expedition vehicle in the name of Cherry Uyco-Ong, amounting to P1,500,000.00. Petitioner claims that the Ford Expedition was purchased for the use and benefit of the company and not for the use or benefit of a particular individual.

We do not agree.

Fringe benefits tax is a final tax on the employee, other than a rank-and-file employee, that shall be withheld and paid by the employer as provided under *Sections 57 (A) and 58 (A) of the NIRC of 1997, as amended.* Under *Section 33 (B) of the NIRC of 1997, as amended*, the term "fringe benefit" means any good, service, or other benefit furnished or granted in cash or in kind by an employer to an individual employee (except rank and file employee) such as, but not limited to the following:

1) Housing;
2) Expense Account;
3) **Vehicle of any kind;**
4) Household personnel, such as maid, driver and others;
5) Interest on loan at less than market rate to the extent of the difference between the market rate and actual rate granted;
6) Membership fees, dues and other expenses borne by the employer for the employee in social and athletic clubs or other similar organizations;
7) Expenses for foreign travel;
8) Holiday and vacation expenses;

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9) Educational assistance to the employee or his dependents; and
10) Life or health insurance and other non-life insurance premiums or similar amounts in excess of what the law allows.

Corollary thereto, *Section 2.33 (A) of Revenue Regulation No. 3-98* provides:

"SEC. 2.33. Special Treatment of Fringe Benefits. —

(A) Imposition of Fringe Benefits Tax — A final withholding tax is imposed on the grossed-up monetary value of fringe benefit furnished, granted or paid by the employer to the employee, except rank and file employees as defined in these Regulations, whether such employer is an individual, professional partnership or a corporation, regardless of whether the corporation is taxable or not, or the government and its instrumentalities except when: (1) the fringe benefit is required by the nature of or necessary to the trade, business or profession of the employer; or (2) when the fringe benefit is for the convenience or advantage of the employer. The fringe benefit tax shall be imposed at the following rates:

Effective January 1, 1998—	34%
Effective January 1, 1999—	33%
Effective January 1, 2000—	32%

xxx xxx

The grossed-up monetary value of the fringe benefit shall be determined by dividing the monetary value of the fringe benefit by the following percentages and in accordance with the following schedule:

Effective January 1, 1998—	66%
Effective January 1, 1999—	67%
Effective January 1, 2000—	68%

The grossed-up monetary value of the fringe benefit represents the whole amount of income realized by the employee

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> which includes the net amount of money or net monetary value of property which has been received plus the amount of fringe benefit tax thereon otherwise due from the employee but paid by the employer for and in behalf of his employee, pursuant to the provisions of this Section.
>
> Coverage — These Regulations shall cover only those fringe benefits given or furnished to managerial or supervisory employees and not to the rank and file.
>
> The term, 'RANK AND FILE EMPLOYEES' means all employees who are holding neither managerial nor supervisory position. The Labor Code of the Philippines, as amended, defines 'managerial employee' as one who is vested with powers or prerogatives to lay down and execute management policies and/or to hire, transfer, suspend, lay-off, recall, discharge, assign or discipline employees. 'Supervisory employees' are those who, in the interest of the employer, effectively recommend such managerial actions in the exercise of such authority is not merely routinary or clerical in nature but requires the use of independent judgment."

In this case, petitioner failed to establish that the Ford Expedition, a luxury vehicle, is necessary to its trade or business or that the use thereof is for its convenience or advantage. Thus, we hold that the Ford Expedition purchased in the name of Cherry Uyco-Ong, petitioner' s Vice President and Assistant General Manager, was for her personal use only, and is therefore, subject to fringe benefits tax in the amount of P1,201,063.00, computed as follows:

Ford Expedition in the name of Cherry-Uyco-Ong	P1,500,000.00
Gross Up Monetary Value	P2,205,882.35
Tax Rate	32%
Basic Tax Due	P 705,882.35

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Add: Penalties		
25% Surcharge	P176,470.59	
20% Interest (1 26.02 - 4.30.04)	P318,710.72	P 495,181.31
TOTAL DEFICIENCY FINAL TAX — FRINGE BENEFIT		**P1,201,063.66**

WHEREFORE, premises considered, the instant Petition for Review is hereby **PARTLY GRANTED,** as follows:

1) The assessments for deficiency income tax for taxable years 2000 and 2001 – are hereby **CANCELLED** and **SET ASIDE**;

2) As regards the assessments for deficiency VAT, withholding tax on compensation, expanded withholding tax and final withholding tax on fringe benefits for the years 2001 and 2000, petitioner is hereby **ORDERED TO PAY** respondent CIR the reduced amount of **FIVE MILLION NINE HUNDRED FORTY NINE THOUSAND EIGHT HUNDRED FORTY SIX PESOS AND EIGHTY EIGHT CENTAVOS (P5,949,846.88),** computed, as follows:

	YEAR 2001	YEAR 2000	TOTAL
Deficiency VAT	P553,177.65	P2,898,767.65	P3,451,945.30
Deficiency Withholding Taxes			
Compensation	27,540.25	26,056.73	53,596.98
Expanded Withholding Tax	1,203,728.18	39,512.76	1,243,240.94
Final Withholding Tax — Fringe Benefits	P1,201,063.66	—	1,201,063.66
	P2,985,509.74	P2,964,337.14	**P5,949,846.88**

3) In addition, petitioner is hereby **ORDERED TO PAY** an additional 20% delinquency interest on the total amount of P5,949,846.88

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computed from August 23, 2004 until fully paid, pursuant to *Section 249 (C) of the NIRC of 1997, as amended.*

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

LOVELL R. BAUTISTA
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.

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice