REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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WINTELECOM, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 7056

Members:

ACOSTA, *Chairperson*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:

FEB 20 2008 - 10:20AM

x - x

DECISION

BAUTISTA, *J.*:

The instant Petition for Review seeks the cancellation of the assessment notices issued by the Commissioner of Internal Revenue holding Wintelecom, Inc. liable in the aggregate amount of P553,344,468.98 allegedly representing deficiency taxes for the taxable years 2001 and 2000, namely: income tax, value-added tax (VAT), withholding tax on compensation, expanded withholding tax and fringe benefits tax.

Petitioner is a domestic corporation duly organized and existing in accordance with the laws of the Republic of the Philippines, with office address at 2339 Leon

Guinto St., Malate, Manila.[1] It is engaged in the selling and repairs o[illegible]ile phones.[2]

Respondent is the duly appointed Commissioner of the Bureau Internal Revenue (BIR) authorized under the National Internal Revenue Code (NIRC) to examine any taxpayer including *inter alia*, the power to issue tax assessments, evaluate, and decide upon protests relative thereto. His office address is at the 5th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City.[3]

On July 10, 2003, Assistant Commissioner of the BIR Enforcement Service Percival T. Salazar sent petitioner a letter[4] advising it of the Report which is the result of an investigation of its internal revenue tax liabilities for taxable years 2001 and 2000. In a letter dated July 31, 2003,[5] petitioner's counsel filed its protest to the investigation. Thereafter, on December 15, 2003, petitioner received from respondent a Pre-Assessment Notice[6] for alleged deficiency internal revenue taxes for the years 2000 and 2001, as follows:

Tax Type	**2001**	**2000**	**Total**
Income	P 136,030,256.60	P 224,463,921.27	P 360,494,177.87
VAT	52,535,443.28	107,962,409.73	160,497,853.01
W/tax Comp.	33,007.46	24,699.86	57,707.32
EWT	997,749.19	37,905.95	1,035,655.14
Fringe Benefits	1,173,102.34	-	1,173,102.34
Total	**P 190,769,558.87**	**P 332,488,936.81**	**P 523,258,495.68**

In a letter dated December 19, 2003,[7] petitioner protested the Pre-Assessment Notice alleging that:

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[1] Page 1, Petition for Review, Docket, page 1
[2] Exhibit "WW"
[3] Page 1, Petition for Review, Docket, page 1
[4] Annex "B", Petition for Review
[5] Exhibit "F"
[6] Annex "D", Petition for Review
[7] Annex "E", Petition for Review

1. It is erroneous to add to the sales figures what the BIR perceived as "Sale of Free Prepaid Cards" because these "free" prepaid cards were part of the selling price for petitioner's handset package, and were never designed, much less, intended to be sold separately to customers;

2. The alleged commission income should have been referred to as purchase discount;

3. The alleged repairs and service income have already been taken up as part of the "Sales" of petitioner;

4. The deficiency fringe benefit tax is unwarranted because the vehicle was purchased for the use of the company and not for the benefit of a particular individual; and

5. Petitioner religiously withheld and remitted all items of income subject to expanded withholding tax and filed all returns and Annual Alpha List.

On March 10, 2004, a Final Assessment Notice[8] for the deficiency internal revenue taxes for the years 2001 and 2000, with Details of Discrepancies, was received by petitioner from respondent, showing the following supposed tax deficiencies:

YEAR 2001

Tax Type	**Basic**	**Penalties**	**Total**
Income	P 69,679,915.62	P 75,398,782.16	P 145,078,697.78
VAT	26,105,338.51	29,949,674.44	56,055,012.95
W/tax Comp.	7,966.09	25,582.63	33,548.72
EWT	706,977.50	338,807.42	1,045,784.92
Fringe Benefits	705,882.35	515,181.31	1,221,063.66
Total	**P 97,206,080.07**	**P 106,228,027.96**	**P 203,434,108.03**

YEAR 2000

Tax Type	**Basic**	**Penalties**	**Total**
Income	P 100,177,175.06	P 136,048,616.15	P 236,225,791.21
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	**P 146,634,099.49**	**P 203,276,261.46**	**P 349,910,360.95**
GRAND TOTALS	**P 243,840,179.56**	**P 309,504,289.42**	**P 553,344,468.98**

[8] Exhibit "A"

Before issuing the Assessment Notices, however, the BIR examiners conducted an examination of petitioner's records. By virtue of a subpoena *duces tecum*, copies of petitioner's invoices and other documents were taken by the BIR examiners when they conducted an audit. For this reason, petitioner's counsel, in a letter dated April 1, 2004,[9] requested the BIR to return the documents of petitioner pertaining to taxable years 2000 and 2001 since they support petitioner's factual arguments in its protest on respondent's Final Assessment Notice. In a letter dated May 31, 2004,[10] Mr. Rolando Balbino, the BIR Group Supervisor handling the subject assessments, replied that the request of petitioner's counsel was referred to the BIR Legal Service for appropriate action. Thereafter, the petitioner was informed that Assistant Commissioner Milagros Regalado of the BIR Legal Service, in a Memorandum dated June 7, 2004,[11] denied the request of petitioner's counsel.

Due to the decision of the BIR Legal Service not to make the subject records available to petitioner, the latter merely adopted its previous contention in its letter dated July 31, 2003 when it filed its protest[12] on the Final Assessment Notice.

There being no action by respondent on the protest, petitioner timely filed a *Petition for Review* with this Court on September 22, 2004, pursuant to Section 228 of the NIRC. Summonses were then personally served on respondent and the office of the Solicitor General on September 30, 2004 and September 27, 2004, respectively. Respondent was thus required to file his *Answer* on or before October 15, 2004.

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[9] Exhibit "J"
[10] Exhibit "K"
[11] Exhibit "L"
[12] Exhibit "F"

On October 14, 2004, respondent filed a *Motion for Extension of Time to File Answer*, requesting an additional period of fifteen (15) days from October 15, 2004 or until October 30, 2004 to file *Answer*. In its Order dated October 20, 2004, this Court granted respondent's Motion and advised respondent to certify and forward to the Court, within (10) days after submitting his *Answer*, all the records of this case in his possession.

On October 27, 2004, respondent filed another *Motion for Extension of Time to File Answer*, requesting another period of fifteen (15) days from October 29, 2004 or up to November 14, 2004 to file an *Answer*. This Court, in its Order dated November 2, 2004, granted the second *Motion for Extension of Time to File Answer* by respondent and again advised it to certify and forward to the Court within ten (10) days after filing his *Answer*, all the records of this case in his possession.

On November 16, 2004, respondent belatedly filed a *Motion for Final Extension of Time to File Answer*, requesting for the third time another period of fifteen (15) days from November 14, 2004 or until November 29, 2004 to file his *Answer*. This Court, in its Order dated November 17, 2004, gave respondent a *final* extension and again advised it to certify and to forward to the Court within ten (10) days after filing his *Answer*, all the records of this case in his possession.

On November 26, 2004, respondent despite the final extension given by this Court filed a *Motion for Further Extension of Time to File Answer*, requesting an extension of ten (10) days from November 29, 2004 or until December 9, 2004 to file his *Answer*. This Court exercised to the extreme its liberality and allowed extension but expressly and unequivocally stated in its Order dated November 30, 2004 that the extension would be the ***last***.

On December 9, 2004, respondent, unfazed by the previous warning from the Court, filed a *Motion for Extension of Time to File Answer*, requesting an extension of ten (10) days from December 9, 2004 or until December 19, 2004 to file his Answer. Taking into consideration that respondent filed its fifth *Motion for Extension of Time to File Answer*, the Court, in its December 17, 2004 Order, ***denied*** the Motion of respondent. Respondent then filed a *Motion for Reconsideration* on the Order dated December 17, 2004 but the Court, in its Resolution dated May 20, 2005, denied the Motion with finality.

The Court then set the case for hearing on July 5, 2005 for the *ex-parte* presentation of petitioner's evidence. After adducing testimonial and documentary evidence with Ms. Cherry Uyco-Ong, Vice-President and General Manager of petitioner, as lone witness, petitioner was required by the Court to file its Memorandum. After submission by petitioner of its Memorandum on February 8, 2007, the case was submitted for decision on February 26, 2007.

The issues of the case submitted for this Court's resolution are the following:

A. Whether or not the subject assessments from the BIR are null and void considering that petitioner's constitutional rights were violated when it was prevented from sufficiently contesting the assessments after respondent deliberately withheld from the petitioner the documentary evidence it submitted to respondent during investigation.

B. Whether or not there is a factual and legal basis for the imposition of deficiency income tax and value added tax.

C. Whether or not the finding of deficiency fringe benefit tax on the purchase of petitioner's vehicle is proper.

D. Whether or not the imposition of deficiency withholding and expanded withholding tax for the years 2000 and 2001 has factual and legal basis considering that petitioner has not been remiss in the filing and remittance of payments thereon.

E. Whether or not the imposition of a fifty percent (50%) civil penalty is warranted.

In the first issue, petitioner submits that the assessments issued by respondent are null and void because the latter denied petitioner the opportunity to fully contest the subject assessments. According to petitioner, respondent did not return the accounting records, invoices, official receipts, and other documentary evidence previously obtained by his examiners during the conduct of their audit of petitioner's business. Accordingly, petitioner concluded that it was denied an opportunity to answer the questioned Final Assessment, point-by-point and in a more detailed manner.

In addition, petitioner argues that when respondent deprived it of its own documentary evidence, respondent violated its right to public records and information as protected by Section 7, Article III of the 1987 Constitution, which provides:

> "**Section 7.** The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law."

This Court finds no merit in petitioner's argument.

Respondent's failure to return the documents to petitioner would not make the assessment conducted by the BIR null and void. The presumption of regularity in the official function of government officials is not defeated by a mere allegation that petitioner was deprived of the opportunity to fully contest the subject assessments. Petitioner was given the chance to present its position before this Court with the option to require respondent to bring the alleged documentary evidence.[13] Respondent could not be considered at fault for petitioner's negligence in failing to retain copies of the subject documentary evidence. In fact, petitioner's lone witness admitted that it was her mistake that she did not make an inventory of the documents that the BIR took from their office.[14] Notwithstanding the absence of these documents, petitioner was able to rebut the findings of the BIR. Thus, petitioner was not deprived of its right as it was able to protest the same administratively and file the case before this Court.

More importantly, the constitutional rights to public records and of information are not violated in this particular case considering that the subject documentary evidence came from petitioner itself. This shows that the non-return of documents would not limit the validity of the assessment made by the BIR. Hence, it will not render the assessment null and void.

As for the remaining issues which deal with the merits of the assessments, the Court shall discuss the same jointly.

1. DEFICIENCY INCOME TAX FOR 2001 and 2000

Petitioner asserts that no factual and legal bases exist on the findings of the alleged deficiency income tax and VAT. This is allegedly compounded by the fact that no evidence whatsoever was formally presented by the BIR to support its findings, respondent having been declared in default.

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[13] These documents had become part of the BIR records that respondent had submitted to this Court and later on elevated to the Supreme Court as per directive of the Office of the Honorable Chief Justice in connection with the Petition for *Certiorari* filed by the BIR with the Supreme Court docketed as G.R. No. 168669.

[14] Exhibit "WW"

The deficiency income taxes of P145,078,697.78 and P236,225,791.21 for years 2001 and 2000, respectively, inclusive of penalties, were computed by the BIR examiner as follows:

2001			
Taxable Income per return			P 4,320,448.00
Add: Adjustments			
Gross Profit on Unrecorded Purchases			
Total Purchases Per TPI		P2,735,479,872.94	
Less: Purchases Per Return		2,218,457,349.00	
Unrecorded Purchases		P 517,022,523.94	
Gross Profit Rate		1.192%	6,226,665.00
Unrecorded Service Income/ Receipts			
Service Income - TSI		P124,452,963.80	
Repairs Income - Globe		115,249.98	
Commission Income			
Smart		16,408.00	
Globe		8,983,860.33	
Philips Electronics		205,277.18	133,773,759.29
Adjusted Sales/ Receipts			P144,320,872.29
Add: Other Income			
Sales of Unaccounted Prepaid Cards - TSI	P124,452,963.80		
Less: Prepaid Cards given - Piltel	79,077,500.00		
Unaccounted Prepaid Cards	P 45,375,463.80		
GP Rate	1.19%	P 546,471.00	
Sales of Unaccounted Prepaid Cards - TSI			
Globe	P 108,443,636.36		
Islacom	2,332,700.00		
Total	P 110,776,336.36		
Less: Prepaid Cards given			
Smart	14,531,600.00		
Globe	18,459,000.00	77,785,736.36	78,332,207.36
Adjusted Taxable Sales			P222,653,079.65
Income Tax Rate			32%
Income Tax Due			P 71,248,985.49
Less: Tax Credits			
Tax Withheld (Per Access to Record)		P 1,376,450.87	
Income Tax Payment (Per Amended ITR)		113,445.00	1,489,895.87
Total			P 69,759,089.62
Add: Penalties			
50% Surcharge		P34,879,544.81	
20% Interest (4.16.02 - 10.10.02)		6,268,762.03	41,148,306.83
Total Tax Due			P110,907,396.45
Less: VAAP Payment			79,174.00
Total			P110,828,222.45
Add: 20% Interest (10.11.02 - 4.30.04)			34,250,475.32
Total Deficiency Income Tax Due - 2001			**P145,078,697.78**

2000			
Taxable Income per return			P 3,405,149.00
Add: Adjustments			
Gross Profit on Unrecorded Purchases			

Total Purchases Per TPI		P 506,092,529.55	
Less: Purchases Per Return		81,045,131.00	
Unrecorded Purchases		P 425,047,398.55	
Gross Profit Rate		4.894%	P 21,853,451.57
Unrecorded Service Income/ Receipts			
Service Income			
TSI	P 4,993,624.60		
Smart	143,066,687.00	P 148,060,311.60	
Repairs Income - Globe		188,290.91	
Commission Income			
Smart	60,637,064.00		
Globe	11,389,170.00	72,026,234.00	220,274,836.51
Adjusted Sales/ Receipts			P 245,533,437.08
Add: Other Income			
Gross Profit on Sale of Unaccounted Prepaid Cards			
Smart - Phonekitting fees	P143,066,687.00		
GP Rate	4.89%	P 7,355,652.40	
Sales of Unaccounted Prepaid Cards			
Globe	P 65,472,954.50		
Smart	5,004,363.64		
TSI	4,993,624.60	75,470,942.74	82,826,595.14
Adjusted Taxable Sales			P 328,360,032.22
Income Tax Rate			32%
Basic Tax Due			P 105,075,210.31
Less: Tax Credits			
Tax Withheld (Per Audit)			4,163,035.31
Total			P 100,912,175.00
Add: Penalties			
50% Surcharge		P 50,456,087.50	
20% Interest (4.16.01 - 10.09.02)		29,748,356.25	80,204,443.75
Total Tax Due			P 181,116,618.75
Less: VAAP Payment			734,999.94
Total			P 180,381,618.81
Add: 20% Interest (10.10.02 - 4.30.04)			55,844,172.40
Total Deficiency Income Tax Due - 2000			**P 236,225,791.21**

Respondent alleged that the assessment was purportedly based on third party information which revealed undeclared purchases, sale of unaccounted prepaid cards, undeclared commission income and undeclared service and repairs income for the years 2001 and 2000. As a result, respondent found petitioner subject to deficiency income tax. In justifying his assessment, respondent invokes his power as provided in Section 6(B) of the NIRC which states:

> "Section 6. Power of the Commissioner to Make assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.

> x x x
>
> (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.
>
> In case a person fails to file a required return or other document at the time prescribed by law, or willfully or otherwise files a false or fraudulent return or other document, the Commissioner shall make or amend the return from his own knowledge and from such information as he can obtain through testimony or otherwise, which shall be *prima facie* correct and sufficient for all legal purposes."

Respondent's arguments have no merit.

While Section 6(B) empowers the Commissioner to make assessments based on the best evidence obtainable, he must also be able to present such evidence before the Court in the event that litigation ensues. Best evidence obtainable which the Commissioner may use as his basis includes those which cannot be admitted in a judicial proceeding where rules on evidence are strictly observed. In *Commissioner of Internal Revenue vs. Hantex Trading Co., Inc.*[15], 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.

[15] G.R. No. 136975, March 31, 2005

However, the best evidence obtainable under Section 16 of the 1977 NIRC[16], 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,*[17] 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,*[18] the Court ruled that the assessment must be based on actual facts. The rule assumes more importance in this case since the xerox copies of the Consumption Entries furnished by the informer of the EIIB were furnished by yet another informer. x x x"

In this case, respondent failed to present any evidence to prove the alleged third party information. In fact, there were also no evidence to point out what were the items purchased, who were these suppliers and how much was actually purchased. In obtaining the best evidence, respondent is given vast powers which he could have exercised under Section 5 of the NIRC which provides:

"Section 5. *Power of the Commissioner to Obtain Information, and to Summon, Examine, and Take Testimony of Persons.* - In ascertaining the correctness of any return, or in making a return when none has been made, or in determining the liability of any person for any internal revenue tax, or in collecting any such liability, or in evaluating tax compliance, the Commissioner is authorized:

(A) To examine any book, paper, record, or other data which may be relevant or material to such inquiry;

(B) To obtain on a regular basis from any person other than the person whose internal revenue tax liability is subject to audit or

[16] now Section 6(B) of the NIRC of 1997
[17] 543 F.2d 996 (1976).
[18] 4 SCRA 182 (1962).

investigation, or from any office or officer of the national and local governments, government agencies and instrumentalities, including the *Bangko Sentral ng Pilipinas* and government-owned or -controlled corporations, any information such as, but not limited to, costs and volume of production, receipts or sales and gross incomes of taxpayers, and the names, addresses, and financial statements of corporations, mutual fund companies, insurance companies, regional operating headquarters of multinational companies, joint accounts, associations, joint ventures or consortia and registered partnerships, and their members;

(C) To summon the person liable for tax or required to file a return, or any officer or employee of such person, or any person having possession, custody, or care of the books of accounts and other accounting records containing entries relating to the business of the person liable for tax, or any other person, to appear before the Commissioner or his duly authorized representative at a time and place specified in the summons and to produce such books, papers, records, or other data, and to give testimony;

(D) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry; and

(E) To cause revenue officers and employees to make a canvass from time to time of any revenue district or region and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care, management or possession of any object with respect to which a tax is imposed.

The provisions of the foregoing paragraphs notwithstanding, nothing in this Section shall be construed as granting the Commissioner the authority to inquire into bank deposits other than as provided for in Section 6(F) of this Code."

Considering the enormous power given to respondent and the leniency in the kinds of evidence respondent may accept as basis for his assessments, he had no excuse in failing to present to this Court the third party information on which the BIR examiners based the assessments. It must not be forgotten that an assessment must be based on actual facts.[19] For his failure to support his allegation as regards

[19] Collector of Internal Revenue v. Benipayo, 4 SCRA 182

the third party information, the assessment for deficiency income taxes for years 2001 and 2000 in the amount of P145,078,697.78 and P236,225,791.21, respectively, is cancelled for lack of basis. As for the imposition of the fifty percent (50%) civil penalty, the same is moot since there is no assessment to speak of.

2. DEFICIENCY VALUE-ADDED TAX FOR YEARS 2001 AND 2000

The deficiency value-added taxes in the amount of P56,055,012.95 and P113,619,620.98, inclusive of increments for years 2001 and 2000, respectively, were computed as follows:

2001			
Sales Per Amended Return			P2,221,499,968.00
Add: Adjustments			
Unrecorded Purchases			
Total Purchases Per TPI		P2,735,479,872.94	
Less: Purchases Per Return		2,218,457,349.00	
Unrecorded Purchases		517,022,523.94	
Gross Profit Rate		1.192%	523,249,188.94
Unrecorded Service Income/ Receipts			
Service Income - TSI		P 124,452,963.80	
Repairs Income - Globe		115,249.98	
Commission Income			
Smart		16,408.00	
Globe		8,983,860.33	
Philips Electronics		205,277.18	133,773,759.29
Adjusted Sales/ Receipts			P2,878,522,916.23
Add: Other Income			
Sales of Unaccounted Prepaid Cards - TSI	P124,452,963.80		
Less: Prepaid Cards given - Piltel	79,077,500.00		
Unaccounted Prepaid Cards	P45,375,463.80		
GP Rate	1.19%	P 45,921,934.80	
Sales of Unaccounted Prepaid Cards			
Globe	108,443,636.36		
Islacom	2,332,700.00		
Total	110,776,336.36		
Less: Prepaid Cards given			
Smart	14,531,600.00		
Globe	18,459,000.00	77,785,736.36	123,707,671.16
Adjusted Taxable Sales subject to VAT			P3,002,230,587.39
Tax Rate			10%
Total Output tax			P 300,223,058.74
Less: Input tax			
Purchases per TPI	P2,735,479,872.94	P 273,547,987.29	

Administrative expenses		125,576.36	
Equipment	446,217.46		
Less: Disallowed Input tax	150,000.00	296,217.46	273,969,781.11
VAT Payable			P 26,253,277.63
Less: VAT Payments (per return)			123,197.30
Basic Tax Due			P 26,130,080.33
Add: Penalties			
50% Surcharge		P 13,065,040.16	
20% Interest (1.16.02 - 10.11.02)		3,651,052.32	16,716,092.48
Total			P 42,846,172.81
Less: VAAP payment			24,741.82
Net Tax Due			P 42,821,430.99
Add: Interest (10.12.02 - 04.30.04)			13,233,581.96
Total Deficiency VAT - 2001			**P 56,055,012.95**
2000			
Sales Per Amended Return			P 90,891,736.00
Add: Adjustments			
Unrecorded Purchases			
Total Purchases Per TPI		P 506,092,529.55	
Less: Purchases Per Return		81,045,131.00	
Unrecorded Purchases		425,047,398.55	
Gross Profit Rate		4.894%	446,900,850.12
Unrecorded Service Income/ Receipts			
Service Income - TSI	P 4,993,624.60		
Smart	143,066,687.00	P 148,060,311.60	
Repairs Income - Globe		188,290.91	
Commission Income			
Smart	P60,637,064.00		
Globe	11,389,170.00	72,026,234.00	220,274,836.51
Adjusted Sales/ Receipts			P 758,067,422.63
Add: Other Income			
Sales of Unaccounted Prepaid Cards			
Smart - Phonekitting fees	143,066,687.00		
GP Rate	4.894%	P 150,422,339.40	
Sales of Unaccounted Free Prepaid Cards			
Globe	P 65,472,954.50		
Smart - Simpack Discounts	5,004,363.64		
TSI	4,993,624.60	75,470,942.74	225,893,282.14
Adjusted Taxable Sales subject to VAT			P 983,960,704.77
Tax Rate			10%
Total Output tax			P 98,396,070.48
Less: Input tax			
Purchases per TPI		P 506,092,529.60	50,609,252.96
VAT Payable			P 47,786,817.52
Less: VAT Payments (per return)			-
Basic Tax Due			P 47,786,817.52
Add: Penalties			
50% Surcharge		P 23,893,408.76	
20% Interest (1.26.01 - 10.11.02) / (1.26.01 - 10.09.02)		16,443,902.14	40,337,310.90
Total			P 88,124,128.42
Less: VAAP payment			1,364,376.00

Net Tax Due	P 86,759,752.42
Add: Interest (10.12.02 - 04.30.04)	26,859,868.56
Total Deficiency VAT - 2000	**P 113,619,620.98**

As previously discussed in the first item, undeclared sales traceable to undeclared purchases, sale of unaccounted prepaid cards, undeclared commission income, and undeclared service and repairs income were cancelled for respondent's failure to present the third party information on which the assessment was based. Accordingly, petitioner cannot be assessed for deficiency VAT on the alleged undeclared sales. However, petitioner admitted in its protest letter dated July 31, 2003 with attached computation sheets[20] - and reiterated in its Memorandum - 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, computed as follows:[21]

2001				
Taxable Sales subject to VAT				P2,704,129,833.10
tax rate				10%
Total Output Tax				P 270,412,983.31
Less:	Input tax			
	Purchases per records	P2,695,471,267.25	P269,547,126.73	
	Administrative expenses		125,576.36	
	Equipment		446,217.46	270,118,920.55
VAT Payable				P 294,062.76
Less:	VAT payments (per returns)			123,197.30
Basic tax due				P 170,865.46
Add:	25% surcharge		P 42,716.36	
	20% interest (1.26.02 - 10.11.02)		24,155.23	66,871.59
Total				P 237,737.06
Less:	VAAP payment			24,741.82
Net tax due				P 212,995.24
Add:	20% Interest (10.12.02-08.31.03)			37,697.24
Total Deficiency VAT - 2001				**P 250,692.48**

2000				
Taxable Sales subject to VAT				P 476,515,029.64
tax rate				10%
Total Output Tax				P 47,651,502.96
Less:	Input Tax			

[20] Exhibits "F" to "F-4"
[21] Exhibits "F-1" and "F-3"

	Purchases per audit	P454,059,166.00		45,405,916.60
VAT Payable				P 2,245,586.36
Add:	25% surcharge		P 561,396.59	
	20% interest (1.26.01 - 10.11.02)		776,419.18	1,337,815.77
Total				P 3,583,402.13
Less:	VAAP payment			1,364,376.00
Net tax due				P 2,219,026.13
Add:	20% Interest (10.12.02 - 08.31.03)			392,737.23
Total Deficiency VAT - 2000				**P 2,611,763.36**

According to petitioner, the deficiency VAT liabilities arose from errors it made in the bookkeeping of its sales transactions for the years 2001 and 2000 as testified by its Vice-President and Assistant General Manager, Ms. Cherry Uyco-ong[22], 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.

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?

A: That is the sales list I was referring to.

x x x

35. Q: How much is the total sales of petitioner for the year 2000?

A: P476,515,029.64 which we indicated in Annex "C" of the Letter of Protest to the BIR.

36. Q: How much is the output tax for the year 2000?

[22] Exhibit "WW"

A: P10% of P476,515,029.64 or P47,651,502.96.

37. Q: How much should be the VAT payable for the year 2000?
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."

Therefore, petitioner 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 *vis-à-vis* the sales appearing in the sales invoices it issued for the years 2001 and 2000.

In addition to petitioner's admission, the Court finds that the input tax on 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 is not allowed pursuant to Section 4.104-1 of Revenue Regulations No. 7-95 which provides:

> "SECTION 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 can 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.
>
> 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 of the VAT taxpayer, such as hotel limousines, funeral hearse, ambulances and similar vehicles.

x x x." (*Emphasis supplied*)

Thus, 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, computed as follows:

2001				
Taxable Sales subject to VAT				P2,704,129,833.10
VAT Rate				10%
Output Tax Due				P 270,412,983.31
Less:	Input Tax			
	Purchases per records	P2,695,471,267.25	P269,547,126.73	
	Administrative expenses		125,576.36	
	Equipment		446,217.46	
	Less: Disallowed input tax		(150,000.00)	269,968,920.55
VAT Payable				P 444,062.76
Less:	VAT payments (per returns)			123,197.30
Basic VAT Due				P 320,865.46
Add:	25% surcharge		P 80,216.36	
	20% interest (1.25.02 - 10.11.02)		45,712.34	125,928.70
Total VAT Due				P 446,794.16
Less:	VAAP payment			24,741.82
Net VAT Due				P 422,052.34
Add:	20% Interest (10.12.02 - 04.30.04)			131,125.30
Total Deficiency VAT - 2001				**P 553,177.64**

2000			
Taxable Sales subject to VAT			P 476,515,029.64
tax rate			10%
Output Tax Due			P 47,651,502.96
Less: Input Tax			
Purchases per audit	P 454,059,166.00		45,405,916.60
VAT Payable			P 2,245,586.36
Add: 25% surcharge		P 561,396.59	
20% interest (1.25.01 - 10.11.02)		769,036.43	1,330,433.02
Total VAT Due			P 3,576,019.38
Less: VAAP payment			1,364,376.00
Net VAT Due			P 2,211,643.38
Add: 20% Interest (10.12.02 - 04.30.04)			687,124.27
Total Deficiency VAT - 2000			**P 2,898,767.65**
Grand Total – Deficiency VAT due – 2001 and 2000			**P 3,451,945.29**

3. DEFICIENCY WITHHOLDING TAXES

A. Withholding Taxes on Compensation for Year 2001 and 2000

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 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. The alleged deficiency was computed as follows:

2001			
Unsupported adjustment on Jan. remittance			P7,966.09
Add: Penalties			
20% interest (1.26.02 – 04.30.04)		P 3,596.74	
Compromise	P 2,000.00		
for failure to file Annual Alpha list	1,000.00	3,000.00	
Total Penalties			6,596.74
Late remittance			
Due Date 03/12/01			
Date Paid 03/14/01			
Amount P44,416.22			
25% surcharge		P11,104.06	
20% interest (3.12.01 – 3.14.01)		48.68	
Compromise		4,000.00	15,152.73

Due Date 01/25/02				
Date Paid 01/28/02				
Amount P11,258.58				
25% surcharge		P 2,814.65		
20% interest (1.26.02 – 1.28.02)		18.51		
Compromise		1,000.00	3,833.16	
Total Deficiency W/tax on Compensation – Year 2001			**P33,548.72**	
2000				
Unsupported adjustment appearing on January return			P13,703.20	
Add: Penalties				
20% interest (1.26.01 – 04.30.04)		P 8,927.73		
Compromise	P 1,000.00			
for failure to file Dec. return	1,000.00			
for failure to file Annual Alpha list	1,000.00	3,000.00	11,927.73	
Total Deficiency W/tax on Compensation – Year 2000			**P25,630.93**	

To refute respondent's findings, petitioner presented the *Monthly Remittance Return of Income Taxes Withheld on Compensation* for the months of January to December 2001[23] and for the months of January to November 2000[24] and the *Annual Information Return of Income Taxes Withheld on Compensation and Final Withholding Taxes* for years 2001[25] and 2000[26], as well as the alphalist of employees for the same years.

This Court rules for respondent.

Undeniably, the monthly returns presented showed that petitioner religiously filed the same and paid the taxes due thereon. However, the total amount in the alphalist for 2000 (P178,609.91) did not tally 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. An alphalist for year 1999 was not presented before this Court to support the

[23] Exhibits "AA," "JJ," "II," "HH," "GG," "FF," "DD," "EE," "CC," "BB," and "Z"
[24] Exhibits "X," "W," "V," "U," "T," "S," "R," "Q," "P," "O," and "N"
[25] Exhibit "Y"
[26] Exhibit "M"

adjustment made on the January 2000 remittance in the amount of P13,703.20. For petitioner's failure to show documents that would reconcile its adjustments, the assessment for deficiency withholding taxes on compensation for years 2001 and 2000 is upheld with the corresponding surcharges and interest.

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 must likewise be sustained. Section 2.58(A)(2) of Revenue Regulations No. 2-98, implementing Section 57(A) of the NIRC, provides:

> "***Sec. 2.58 RETURNS AND PAYMENT OF TAXES WITHHELD AT SOURCE.***
>
> (A) Monthly return and payment of taxes withheld at source —
>
> x x x
>
> (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."

Clearly, the withholding taxes on compensation for the months of February 2001 and December 2001 should have been remitted on March 12, 2001[27] and January 25, 2002, respectively. A scrutiny of petitioner's *Monthly Remittance Returns of Income Taxes Withheld on Compensation* for the months of February 2001 and December 2001[28] shows that petitioner belatedly remitted the said withholding taxes on March 14, 2001 and January 28, 2002, respectively. Hence, petitioner is liable for

[27] March 10, 2001, being a Saturday
[28] Exhibits "JJ," and "Z"

surcharges and interests for its belated remittances on March 14, 2001 and January 28, 2002.

In sum, petitioner is liable to pay deficiency withholding taxes on compensation for the years 2001 and 2000 in the respective amounts of P27,540.25 and P26,056.73, or in the total amount of P53,596.98, computed as follows:

2001		
Unsupported adjustment appearing in the Jan. remittance return		
Basic Tax Due	P 7,966.09	
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: P44,416.22		
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	2,814.65	
20% Interest (1.26.02 – 1.28.02)	18.51	13,985.90
Total Deficiency W/tax on Compensation - 2001		**P27,540.25**
2000		
Unsupported adjustment appearing in the Jan. remittance return		
Basic Tax Due	P 13,703.20	
Add: 25% Surcharge	3,425.80	
20% Interest (01.26.01 – 04.30.04)	8,927.73	
Total Deficiency W/tax on Compensation - 2000		**P26,056.73**
Grand Total - Deficiency W/tax on Compensation - 2001 & 2000		**P53,596.98**

In imposing surcharge for the deficiency withholding tax on compensation for 2000, this Court in the case of *Banco de Oro vs. Commissioner of Internal Revenue*[29] had occasion to justify the imposition of surcharge in this wise:

> "The imposition of surcharge is mandatory. This is justified because the intention of the law is precisely to discourage delay in the payment of taxes due to the State. The delay in the payment of the deficiency tax within the time prescribed for its payment in the notice of assessment justifies the imposition of a 25% surcharge in consonance with Section 248(A)(3) of the Tax Code.(*Dr. Felisa L. Vda de San Agustin, in substitution of Jose Y. Feria, in his capacity as Executor of the Estate of San Jose Agustin vs. Commissioner of Internal Revenue*, G. R. 138485, September 10, 2001). Even the alleged good faith of the taxpayer in failing to pay the tax upon advice of counsel is not sufficient justification for seeking exemption from the payment of surcharges (*Commissioner of Internal Revenue vs. Royal Interocean Lines and the CTA,* L-26806, July 30, 1970).
>
> It is worth emphasizing that 'surcharge' is an overcharge or exaction imposed by law as an addition to the main tax required to be paid. It is not really a penalty as used in criminal law but a civil administrative sanction provided primarily as a safeguard for the protection of the State revenue and to reimburse the government for the expenses in investigating and the loss resulting from the taxpayer's fraud (*Helvering vs. Mitchell,* 303 U.S. 390*; Spies vs. U.S.* 314 U.S. 492). In other words, the imposition of a surcharge is not penal but compensatory in nature — they are compensation to the State for the delay in the payment, or for the concomitant use of the funds by the taxpayer beyond the date he is supposed to have paid them to the State (*Republic vs. The Phil Bank of Commerce*, L-20951, July 31, 1970*; Vera vs. Navarro,* L-27745, October 18, 1977)."

Since the Assessment Notice of petitioner for deficiency withholding taxes on compensation for 2000 did not demand for a twenty-five percent (25%) surcharge, it is hereby modified to include a 25% surcharge pursuant to Section 248(A)[30] of the NIRC, in addition to the basic tax due.

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[29] C.T.A. Case No. 6390, July 1, 2004

[30] SEC. 248. *Civil Penalties.* —

A. There shall be imposed, in addition, to the tax required to be paid, a penalty equivalent to twenty-five percent (25%) of the amount due, in the following cases:

Respondent's imposition of compromise penalty cannot be sustained. 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.[31] Absent any showing that petitioner consented to the compromise penalty, its imposition should be deleted. The imposition of the compromise penalty without the conformity of the taxpayer is illegal and unauthorized.[32] Considering that respondent had not shown that petitioner conformed to the imposition of the compromise penalty, the compromise penalty is deleted.

B. Expanded Withholding Taxes for Year 2001 and 2000

An audit made by respondent disclosed that there were unremitted expanded withholding tax in the amount of P3,204.47 for year 2001. Also, an analysis of expenses subject to expanded withholding tax per financial statements as against the monthly returns showed 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 amounting to P1,045,784.92 and P39,317.83 for years 2001 and 2000,

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1. Failure to file any return and pay the tax due thereon as required under the provisions of this Code or rules and regulations on the date prescribed; or
2. Unless otherwise authorized by the Commissioner, filing a return with an internal revenue officer than those with whom the return is required to be filed; or
3. Failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment; or
4. Failure to pay the full or part of the amount of tax shown on any return required to be filed under the provisions of this Code or rules and regulations, or the full amount of tax due for which no return is required to be filed, on or before the date prescribed for its payment.

[31] Philippine International Fair, Inc. v Collector of Internal Revenue, *et al.,* G.R. Nos. L-12928 and L-12932, March 31, 1962
[32] Commissioner of Internal Revenue vs. Lianga Bay Logging Co., Inc., G.R. No. 35266, January 21, 1999

respectively, due under withholding of various income payments were computed as follows:

2001				
Unremitted withholding tax				
Per Unregistered Books		P 5,346.98		
Per Remittance		2,142.51		
Unremitted			P 3,204.47	
Add: Penalties				
50% Surcharge		P 1,602.24		
20% Interest (1.26.02 to 4.30.04)		1,446.84	3,049.08	P 6,253.55
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			P703,773.03	
Add: Penalties				
20% Interest (1.26.02 - 4.30.04)		P317,758.34		
Compromise		10,000.00		
For failure to file Jan-July Return		7,000.00		
For failure to file alpha list		1,000.00	335,758.34	1,039,531.37
Total Deficiency Expanded Withholding Tax - 2001				**P1,045,784.92**

2000			
Underwithholding			
Commission	P 66,133.00	10%	P 6,613.30
Supplies	39,551.00	1%	395.51
Advertising	1,377,090.00	1%	13,770.90
Total Basic tax			P 20,779.71
Add: Penalties			
20% Interest 1.26.01 - 4.30.04		P13,538.12	
Compromise		2,000.00	
For failure to file Nov. and Dec. Return		2,000.00	
For failure to file alpha list		1,000.00	18,538.12
Total Deficiency Expanded Withholding Tax - 2000			**P 39,317.83**

In this case, petitioner failed to adduce an iota of evidence to refute the assessment. Once again, it failed to overcome the presumption of correctness of an assessment. Thus, the assessment for expanded withholding tax is upheld but in an increased amount of P1,203,728.18 and P39,512.76 for years 2001 and 2000, respectively, re-computed as follows:

2001

Unremitted withholding tax				
Per Unregistered Books		P 5,346.98		
Per Remittance		2,142.51		
Unremitted			P 3,204.47	
Add: 50% Surcharge		P 1,602.24		
20% Interest (1.26.02 to 4.30.04)		1,446.84	3,049.08	P 6,253.55
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	P 66,133.00	10%		P 6,613.30
Supplies	39,551.00	1%		395.51
Advertising	1,377,090.00	1%		13,770.90
Total Basic Tax Due				P 20,779.71
Add: 25% Surcharge			P 5,194.93	
20% Interest 1.26.01 - 4.30.04			13,538.12	18,733.05
Total Deficiency Expanded Withholding Tax - 2000				**P 39,512.76**
Grand Total – Deficiency EWT – 2001 & 2000				**P1,243,240.94**

Similarly with the deficiency withholding tax on compensation, the compromise penalties imposed is hereby deleted absent petitioner's consent to the same.

Considering that respondent did not impose a 25% surcharge on the deficiency expanded withholding taxes, the assessment is modified to include the surcharge as earlier discussed in the deficiency expanded withholding tax for 2000.

C. Fringe Benefits Tax

Respondent's audit of petitioner disclosed that it purchased a Ford Expedition vehicle in the name of Cherry Uyco-Ong, an officer, amounting to P1,500,000.00. According to petitioner, the Ford Expedition was purchased for the use and benefit of the company and not for the use or benefit of a particular individual.

Petitioner's argument does not convince this Court.

The 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 on a calendar quarterly basis as provided under Sections 57(A)[33] and 58(A)[34] of the NIRC. The term *"fringe benefit"* means any good, service, or other benefit furnished or granted by an employer in cash or in kind, in addition to basic salaries, 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;

---

[33] SEC. 57. *Withholding of Tax at Source.* –

(A) *Withholding of Final Tax on Certain Incomes.* - Subject to rules and regulations the Secretary of Finance may promulgate, upon the recommendation of the Commissioner, requiring the filing of income tax return by certain income payees, the tax imposed or prescribed by Sections 24(B)(1), 24(B)(2), 24(C), 24(D)(1); 25(A)(2), 25(A)(3), 25(B), 25(C), 25(D), 25(E), 27(D)(1), 27(D)(2), 27(D)(3), 27(D)(5), 28 (A)(4), 28(A)(5), 28(A)(7)(a), 28(A)(7)(b), 28(A)(7)(c), 28(B)(1), 28(B)(2), 28(B)(3), 28(B)(4), 28(B)(5)(a), 28(B)(5)(b), 28(B)(5)(c); **33**; and 282 of this Code on specified items of income shall be withheld by payor-corporation and/or person and paid in the same manner and subject to the same conditions as provided in Section 58 of this Code. (*Emphasis supplied*)

[34] SEC. 58. *Returns and Payment of Taxes Withheld at Source.* -

(A) *Quarterly Returns and Payments of Taxes Withheld.* - Taxes deducted and withheld under Section 57 by withholding agents shall be covered by a return and paid to, except in cases where the Commissioner otherwise permits, an authorized agent bank, Revenue District Officer, Collection Agent, or duly authorized Treasurer of the city or municipality where the withholding agent has his legal residence or principal place of business, or where the withholding agent is a corporation, where the principal office is located.

The taxes deducted and withheld by the withholding agent shall be held as a special fund in trust for the government until paid to the collecting officers.

The return for final withholding tax shall be filed and the payment made within twenty-five (25) days from the close of each calendar quarter, while the return for creditable withholding taxes shall be filed and the payment made not later than the last day of the month following the close of the quarter during which withholding was made: *Provided,* That the Commissioner, with the approval of the Secretary of Finance, may require these withholding agents to pay or deposit the taxes deducted or withheld at more frequent intervals when necessary to protect the interest of the government.

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;
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.[35]

Section 2.33(A) of Revenue Regulations No. 3-98 also provides:

"**SECTION 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%

x x x

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 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.

[35] Section 2.33(B) of Revenue Regulations No. 3-98

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 if 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 show that the Ford Expedition, a luxury vehicle, is necessary in its trade or business or that the use thereof is for its convenience or advantage. This leads to the conclusion that the Ford Expedition purchased in the name of Ms. Cherry Uyco-Ong was for her personal use only. Thus, the Ford Expedition purchased for P1,500,000.00 is subject to fringe benefits tax in the amount of P1,201,063.66, computed as follows:

Ford Expedition in the name of Cherry Uyco-Ong		P1,500,000.00
Gross Up Monetary Value		P 2,205,882.35
Tax Rate		32%
Basic Tax Due		P 705,882.35
Add: Penalties		
25% Surcharge	P 176,470.59	
20% Interest (1.26.02 - 4.30.04)	318,710.72	495,181.31
TOTAL DEFICIENCY FINAL TAX - FRINGE BENEFIT		**P 1,201,063.66**

WHEREFORE, the instant Petition for Review is **PARTIALLY GRANTED**. The assessments for deficiency income tax for years 2001 and 2000 are hereby **CANCELLED.** However, petitioner is hereby **ORDERED TO PAY** respondent 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 in the aggregate but 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	P 553,177.65	P 2,898,767.65	P 3,451,945.30
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	1,201,063.66	-	1,201,063.66
	P 2,985,509.74	**P 2,964,337.14**	**P 5,949,846.88**

In addition, petitioner is hereby **ORDERED TO PAY** an additional 20% delinquency interest on the total amount of P5,949,846.88, computed from August 23, 2004 until fully paid, pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division