REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SPECIAL SECOND DIVISION

TRANS-ASIA POWER GENERATION, Petitioner,	**CTA CASE NO. 8289**
	Members:
- versus -	**CASTAÑEDA, JR.,** *Chairperson* **CASANOVA,** *and* **MINDARO-GRULLA,** *JJ.*
THE COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** SEP 2 6 2013 4:30 p.m.

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DECISION

CASTAÑEDA, JR., J.:

Before the Court is a Petition for Review filed by Trans-Asia Power Generation (petitioner) praying for the reversal, cancellation, and withdrawal of the Final Decision on Disputed Assessment dated January 31, 2011 and the assessment for deficiency value-added tax (VAT) in the amount of ₱9,277,187.58 issued by the Commissioner of Internal Revenue (respondent) for the period covering January 1, 2008 to March 31, 2008.

Petitioner is a domestic corporation duly organized under and by virtue of the laws of the Republic of the Philippines, with its principal office at Level 11, Phinma Plaza, 39 Plaza Drive, Rockwell Center, Makati. It is the owner and operator of the 52 MW power plant located in Norzagaray, Bulacan that primarily supplies electricity to a cement plant in Norzagaray, Bulacan owned by Holcim Philippines, Inc.[1]

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[1] Pars. 1 and 3, Stipulated Facts, Joint Stipulation of Facts and Issues (JSFI), docket, p. 177

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR), empowered to perform the duties of her office, including, among others, the power to decide disputed assessments, and such other matters vested in her in the National Internal Revenue Code (NIRC) and other special laws. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On June 1, 2009, petitioner received a Preliminary Assessment Notice (PAN) dated May 9, 2009[2] from respondent proposing to assess petitioner the amount of ₱8,848,426.50 for deficiency VAT for the period covering January to March 2008. Shortly thereafter, on June 16, 2009, petitioner sent a letter[3] detailing its disagreement over the proposed assessment.[4]

On September 16, 2009, petitioner received an Assessment Notice and a Formal Letter of Demand[5] from respondent assessing petitioner for deficiency VAT (including interest as of August 31, 2009) in the amount of ₱9,086,799.29, allegedly due to undeclared gross receipts of ₱58,831,163.52.

On October 16, 2009, petitioner filed a Protest Letter[6] against the said Assessment Notice and Formal Letter of Demand.

On April 12, 2011, petitioner received a Final Decision on Disputed Assessment (FDDA)[7] dated January 31, 2011, denying petitioner's protest.

On the basis of the FDDA, which constitutes as a denial of petitioner's protest, petitioner filed its Petition for Review before this Court on May 12, 2011, in accordance with Section 3(a) of Rule 8 of the Revised Rules of the Court of Tax Appeals and Section 228 of the National Internal Revenue Code of 1997, which provide:

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[2] Exhibit "A"
[3] Exhibit "B"
[4] Par. 5, Stipulated Facts, JSFI, docket, p. 178
[5] Exhibits "C" and "D"
[6] Exhibit "E"
[7] Exhibit "F"

"SEC. 3. *Who May Appeal; period to file petition.* –

(a) A party adversely affected by a decision, ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claims for refund of internal revenue taxes, or by a decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry, the Secretary of Agriculture, or a Regional Trial Court in the exercise of its original jurisdiction may appeal to the Court by petition for review filed within thirty days after receipt of a copy of such decision or ruling, or expiration of the period fixed by law for the Commissioner of Internal Revenue to act on disputed assessments. In case of inaction of the Commissioner of Internal Revenue on claims for refund of internal revenue taxes erroneously or illegally collected, the taxpayer must file a petition for review within the two year period prescribed by law from payment or collection of the taxes."

"SEC. 228. *Protesting of Assessment.* –

xxx xxx xxx

If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable."

In her Answer[8] filed on June 9, 2011, respondent interposed the following Special and Affirmative Defenses:

"4. The assessment for deficiency VAT in the amount of P9,277,187.58 was issued in accordance with the law and implementing rules and regulations. *gr*

[8] Docket, pp. 155-159

5. Section 4.108-3 of Revenue Regulations No. 16-2005 or the Consolidated Value-Added Tax Regulations of 2005 defined and set specified rules on selected services. Paragraph (f) thereof provides that sale of electricity shall be subject to twelve percent VAT on their Gross Receipts.

6. The same paragraph defines Gross Receipts of these industries are including and referring to the following:

   a) Total amount charged by the generation companies for the sale of electricity and related ancillary services; and/or

   b) Total amount charged by the transmission companies for transmission of electricity and related ancillary services; and/or

   c) Total amount charged by distribution companies and electric cooperatives for distribution and supply of electricity, and related electric service. The universal charged passed on and collected by distribution companies and electric cooperatives shall be excluded from the computation of Gross Receipts.

7. The same paragraph provides that sale of electricity by generation, transmission, and distribution companies shall be subject to twelve percent (12%) VAT on their gross receipts.

8. Section 4.108-4 defines Gross Receipts as the total amount of money or its equivalent representing the contract price, compensation, service, fee, rental or royalty, including the amount charged for materials supplied with the services and deposits applied as payment for services rendered and advance payments actually or constructively received during the taxable period for the services performed or to be performed for another person, excluding VAT.

9. Section 4.110-6 provides for the determination of the output tax for sellers of services by multiplying the gross receipts by the regular rate of VAT. In all cases where the basis for computing the output tax is either the gross selling price or the gross receipts, but the amount of VAT is erroneously billed in the invoice, the total invoice amount shall be presumed to be the comprised of the gross selling price/gross receipts plus the correct amount of the VAT.

10. While it is true that universal charges and benefits to host communities do not form part of taxable gross receipts, however, petitioner failed to establish the basis as to how the said amount identified as universal charges and benefits to host communities was computed, to who said amount was paid and proof of such payments. In the absence thereof, said contention is without factual basis to merit the exclusion of said amount from the taxable gross receipt.

11. The assessments was based on the official receipts issued covering the period under audit, hence, the issuance of Ors presupposes actual receipts of the amount indicated thereon.

12. The issue in this case is the findings on deficiency value-added tax as result of an audit investigation of the subject taxpayer by virtue of a Letter of Authority issued by the BIR in exercising its power as provided by law. This is not an issue involving rates charged by an electric DU, NPC and TRANSCO. Section 2 of the National Internal Revenue Code of 1997 as amended enumerates the power of the powers and duties of the Bureau of Internal Revenue. Its powers and duties shall comprehend the assessment and collection of all internal revenue taxes, fees and charges, and the enforcement of all forfeitures, penalties and fines connected therewith, including the execution of judgments in all cases decided in its favor by the Court of Tax Appeals and the ordinary courts. The Bureau shall give effect to and administer the supervisory police powers conferred to it by this

Code or other laws. Therefore, a mere Issuance or Resolution of the Energy Regulatory Commission cannot amend the Tax Code nor may diminish the powers granted by law to the Bureau of Internal Revenue.

13. Well-settled is the rule that tax assessments are entitled to the presumption of correctness and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments *(Sy Po vs. Court of Tax Appeals, 164 SCRA 524).*"

On September 5, 2011, the parties filed their Joint Stipulation of Facts and Issues[9], which this Court approved in a Resolution[10] dated September 7, 2011; thus, terminating the pre-trial.

During trial, the parties presented their respective testimonial and documentary evidence to prove their case.

In a Resolution[11] dated September 3, 2012, this Court ordered the parties to file their respective Memorandum within thirty (30) days from receipt of said Resolution.

On November 7, 2012, the case was submitted for decision after respondent filed her Memorandum[12] on October 2, 2012 and petitioner filed its Memorandum[13] on November 5, 2012.

The parties submitted the following issues[14] for this Court's resolution:

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[9] Docket, pp. 177-180
[10] Docket, p. 181
[11] Docket, p. 402
[12] Memorandum (for Respondent), docket, pp. 412-423
[13] Memorandum (For the Petitioner), docket, pp. 425-444
[14] Docket, p. 179

"1. Whether or not the Honorable Court has jurisdiction over the instant case.

2. Whether or not the total amount of Php53,803,729.86 representing collection made by Petitioner from the Philippine Electricity Market Corporation (PEMC) should have been excluded from the Petitioner's gross receipts.

3. Whether or not the VAT on the subject amount has already been paid by the Petitioner.

4. Whether or not Respondent included in Petitioner's Gross Receipts items classified as Universal Charges and Benefits to Host Communities, which shall be excluded from the generator's gross receipts for purposes of computation of VAT

5. Whether or not Petitioner is liable for deficiency VAT in the amount of Php9,277,187.58 for the period of January 1, 2008 to March 31, 2008, plus surcharges and interest thereto."

Before resolving the other substantive issues, this Court shall address first the issue of jurisdiction.

Well-settled is the rule that jurisdiction over the subject matter is fundamental for a court to act on a given controversy. It is conferred by law and not by consent of the parties. To inquire into the existence of jurisdiction over the subject matter is the primary concern of a court, for thereon would depend the ability of its entire proceedings.[15]

Republic Act (RA) No. 1125, as amended by RA Nos. 9282 and 9503, creating the Court of Tax Appeals, did not grant this Court blanket authority to decide any and all tax disputes. In defining the CTA's jurisdiction, RA No. 1125, as amended, necessarily limited the

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[15] *Commissioner of Internal Revenue vs. Leonardo S. Villa and The Court of Appeals*, G.R. No. L-23988, January 2, 1968

CTA's authority to those matters enumerated therein.[16] Thus, with regard to internal revenue tax assessments, the jurisdiction of the CTA is limited to those enumerated under Section 7(a)(1) and (2) of RA No. 1125, as amended, to wit:

> "SEC. 7. *Jurisdiction.* – The CTA shall exercise:
>
> (a) Exclusive appellate jurisdiction to review by appeal, as herein provided:
>
> (1) **Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments**, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;
>
> (2) Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code provides a specific period for action, in which case the inaction shall be deemed a denial;"*(Emphasis supplied)*

Likewise, Section 3(a)(1) of Rule 4 of the Revised Rules of the Court of Tax Appeals provides:

> "SEC. 3. *Cases within the jurisdiction of the Court in Division.* - The Court in Division shall exercise:
>
> (a) Exclusive original over or appellate jurisdiction to review by appeal the following:

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[16] *Genaro Ursal, as City Assessor of Cebu vs. Court of Tax Appeals and Consuelo Noel; Genaro Ursal, as City Assessor of Cebu vs. Court of Tax Appeals and Jesusa Samson*, G.R. Nos. L-10123 and L-10355, April 26, 1957

> (1) **Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments**, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;" *(Emphasis supplied)*

Based on the foregoing, the Court in Division shall exercise original jurisdiction in cases involving decisions of the Commissioner of Internal Revenue in cases involving disputed assessments.

Section 228 of the NIRC of 1997, as amended, provides for the procedure in issuing tax assessments as well as in protesting the same, to wit:

> "SEC. 228. *Protesting of Assessment*. - When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however*, That a preassessment notice shall not be required in the following cases:
>
> xxx xxx xxx
>
> Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.
>
> Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable."

Relative to the foregoing, Section 3.1.5 of Revenue Regulations (RR) No. 12-99 provides for the administrative remedies available to a taxpayer in cases where protests against assessments issued are filed before the Commissioner of Internal Revenue's duly authorized representatives. Section 3.1.5 is quoted hereunder:

"3.1.5 *Disputed Assessment*. - The taxpayer or his duly authorized representative may protest administratively against the aforesaid formal letter of demand and assessment notice within thirty (30) days from date of receipt thereof. If there are several issues involved in the formal letter of demand and assessment notice but the taxpayer only disputes or protests against the validity of some of the issues raised, the taxpayer shall be required to pay the deficiency tax or taxes attributable to the undisputed issues, in which case, a collection letter shall be issued to the taxpayer calling for payment of the said deficiency tax, inclusive of the applicable surcharge and/or interest. No action shall be taken on the taxpayer's disputed issues until the taxpayer has paid the deficiency tax or taxes attributable to the said undisputed issues. The prescriptive period for assessment or collection of the tax or taxes attributable to the disputed issues shall be suspended.

xxx xxx xxx

If the protest is denied, in whole or in part, by the Commissioner, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from date of receipt of the said decision, otherwise, the assessment shall become final, executory and demandable. gr

> In general, **if the protest is denied, in whole or in part, by the Commissioner or his duly authorized representative, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from date of receipt of the said decision**, otherwise, the assessment shall become final, executory and demandable: Provided, however, that if the taxpayer elevates his protest to the Commissioner within thirty (30) days from date of receipt of the final decision of the Commissioner's duly authorized representative, the latter's decision shall not be considered final, executory, and demandable, in which case, the protest shall be decided by the Commissioner.
>
> If the Commissioner or his duly authorized representative fails to act on the taxpayer's protest within one hundred eighty (180) days from date of submission, by the taxpayer, of the required documents in support of his protest, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from the lapse of the said 180-day period, otherwise, the assessment shall become final, executory and demandable."*(Emphasis supplied)*

From the foregoing, it is clear that if the protest is denied, in whole or in part, by the Commissioner or his duly authorized representative, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from date of receipt of the said decision.

It is undisputed that petitioner received a Preliminary Assessment Notice dated May 9, 2009 from respondent for deficiency VAT for the period January to March 2008 on June 1, 2009. Thereafter, petitioner received on September 16, 2009 an Assessment Notice and a Formal Letter of Demand for deficiency VAT (including interest as of August 31, 2009), allegedly due to undeclared gross receipts. Pursuant to Section 228 of the NIRC of 1997, as amended, as well as Section 3.1.5 of RR No. 12-99, petitioner had thirty days or until October 16, 2009 to file a protest. Consequently, petitioner filed a Protest Letter on October 16, 2009.

On April 12, 2011, petitioner received a Final Decision on Disputed Assessment dated January 31, 2011, denying petitioner's protest. As provided by Section 228 of the NIRC of 1997, as amended, and Section 3.1.5 of RR No. 12-99, petitioner had thirty days to appeal reckoned from the issuance of the final decision denying petitioner's protest; thus, the instant Petition for Review was timely filed on May 12, 2011. As a result, the Court has jurisdiction to entertain the present claim.

The Court will discuss now the other issues raised by the parties.

As may be recalled, petitioner received a Final Decision on Disputed Assessment on April 12, 2011, finding petitioner liable for deficiency VAT for the first quarter of 2008 in the amount of ₱9,277,187.58, computed as follows:

Gross Receipts per Official Receipts Issued		₱324,468,405.00
Gross Receipts per Summary List of Sales		276,553,964.08
Discrepancy		₱ 47,914,440.92
Deficiency Value-added Tax		₱ 5,749,732.91
Add: Disallowed Input Tax		
Per Summary List of Purchases	₱ 6,012,508.04	
Per OR/Invoice	5,915,105.70	97,402.34
Total Amount Due		₱ 5,847,135.25
Add: Interest as of 03/31/11		3,430,052.33
TOTAL AMOUNT DUE		**₱ 9,277,187.58**

The assessment arose from the alleged undeclared gross receipts of petitioner in the amount of ₱47,914,440.92 and respondent's disallowance of petitioner's claimed input taxes in the amount of ₱97,402.34.

The Court will now resolve if the said assessment for deficiency VAT arising from petitioner's purported undeclared gross receipts is proper.

A. UNDECLARED GROSS RECEIPTS - ₱47,914,440.92

Invoking Section 108 of the NIRC of 1997, as amended, Sections 4.108-3(f), 4.108-4, and 4.110-6 of RR No. 16-05, as amended, and RMC No. 61-05, respondent imputed against petitioner undeclared gross receipts in the amount of ₱47,914,440.92 representing the discrepancy between the gross receipts of ₱324,468,405.00 reflected in the official receipts it issued covering the period of January 1, 2008 to March 31, 2008 and the gross receipts of ₱276,553,964.08 as shown in its Summary List of Sales attached to its Quarterly VAT Return for the same period.

Petitioner contends that the alleged discrepancy was due to the following: (1) timing difference in the recognition of VAT per respondent's assessment and per petitioner's Summary List of Sales supporting its 2008 first Quarterly VAT Return; and (2) respondent's erroneous inclusion of Universal Charges and Benefits to Host Communities as part of petitioner's gross receipts.

It is undisputed that petitioner is the owner and operator of the 52 MW power plant located in Norzagaray, Bulacan that primarily supplies electricity to a cement plant in Norzagaray, Bulacan owned by Holcim Philippines, Inc.[17] Petitioner avers that since not all generated power are consumed by the said cement plant, it sells the excess generated power to various participants in the Wholesale Electricity Spot Market (WESM), which is operated by the Philippine Electricity Market Corp (PEMC). All of petitioner's sales through the WESM are coursed through PEMC, which deals directly with the ultimate buyers of electricity; thus, there is no direct contact between the sellers and buyers of electricity in the WESM. Like any other seller in the WESM, petitioner has no information as to the identity of the buyer prior to the transaction.

Petitioner contends that it issues its invoice for electricity sold in the WESM in the name of PEMC, indicating the amount of electricity sold and the VAT due thereon. PEMC then pays for or advances to petitioner the cost of electricity sold based on the amount stated in the invoice. However, PEMC does not pay petitioner the VAT component of such invoice until it has actually collected the same from the ultimate end-users of the electricity. The end-users are billed by the distribution utilities or "DUs", which purchased the electricity through WESM. The DUs then remit the VAT collected from the end-users to PEMC, which eventually remits the same to petitioner.

In view of the foregoing practice, petitioner explains that it only recognizes the VAT on such sales, upon collection of the VAT from PEMC following the cash basis of accounting. Hence, petitioner does not remit to the BIR the VAT portion of its sales of electricity until it actually collects such amounts from PEMC. Petitioner explains that

[17] Par. 3, Stipulated Facts, JSFI, docket, p. 177

said practice is allowed under RR No. 16-05, as amended by RR No. 4-07, RMC No. 61-05, and Energy Regulation Commission (ERC) Resolution No. 20-05.

Further, petitioner maintains that even assuming that the electricity cost advanced by PEMC should have been included in its gross receipts for the first quarter of 2008, petitioner should only be liable for interest on late payment of VAT since the VAT component had already been remitted to the BIR when this was actually collected by petitioner. Moreover, petitioner argues that respondent should not have included the Universal Charges and Benefits to Host Communities amounting to ₱2,878,314.27[18] in its gross receipts for VAT purposes, as provided in RMC No. 61-05. Petitioner points out that the Universal Charges it collected were subsequently remitted to the National Transmission Corporation (NTC) and the National Grid Corporation of the Philippines (NGCP); while the amounts of Benefits to Host Communities it collected were remitted to the Department of Energy (DOE).

Records show that the Court-commissioned Independent CPA, Mr.Protacio T. Tacandong, accounted the discrepancy of ₱47,914,440.92 as follows[19]:

<table>
<tr>
<td>Discrepancies due to the difference in the timing of the recognition of VAT on advances of cost of electricity by PEMC per BIR assessment and per Company's Summary List of Sales supporting the Company's 2008 First Quarter VAT Return
<table>
<tr><th>OR No.</th><th>Amount of Discrepancy</th></tr>
<tr><td>3084</td><td>₱ 13,562,038.50</td></tr>
<tr><td>3091</td><td>(15,051,995.00)*</td></tr>
<tr><td>3097</td><td>40,240,279.18</td></tr>
<tr><td>Total</td><td>₱ 38,750,322.68</td></tr>
</table>
*No advances of cost of electricity. However, PEMC remitted VAT amounting to ₱1,806,239.40 on cost of electricity advanced during previous periods.</td>
<td>Annex A,
Pages:

2
4
6</td>
<td>₱ 38,750,322.68</td>
</tr>
<tr>
<td>Discrepancies due to the inclusion of Universal Charges and Benefits to Host Communities as part of the Company's gross receipts per BIR assessment
<table>
<tr><th>OR No.</th><th>Amount of Discrepancy</th></tr>
<tr><td>3082</td><td>₱ 759,680.05</td></tr>
<tr><td>3090</td><td>1,080,366.03</td></tr>
</table></td>
<td>Annex A,
Pages:
1 to 2</td>
<td>2,878,314.27</td>
</tr>
</table>

[18] The sum of ₱759,680.05, ₱1,080,366.03 and ₱1,038,268.19, docket, p. 16
[19] Exhibit "PP", pp. 16-17

<table>
<tr><td><table><tr><td>3095</td><td>1,038,268.19</td></tr><tr><td>Total</td><td>₱ 2,878,314.27</td></tr></table></td><td>3 to 4
4 to 6</td><td></td></tr>
<tr><td>Discrepancy due to the inclusion of reimbursement of the amount advanced by the Company for TA-Oil's purchase of electricity from WESM (coursed through PEMC) as part of the Company's gross receipts per BIR assessment
<table><tr><td>OR No.</td><td>Amount of Discrepancy</td></tr><tr><td>3088</td><td>₱ 5,736,147.93</td></tr></table></td><td>Annex A,
Pages 2 to 3</td><td>5,736,147.93</td></tr>
<tr><td>Discrepancy due to the inclusion of collections of Energy Net Settlement Surplus and VAT Net Settlement Surplus from PEMC as part of the Company's gross receipts per BIR assessment
<table><tr><td>OR No.</td><td>Amount of Discrepancy</td></tr><tr><td>3091</td><td>₱ 545,243.84</td></tr><tr><td>3097</td><td>1,412.18</td></tr><tr><td></td><td>₱ 546,656.02</td></tr></table></td><td>Annex A,
Pages:
4
6</td><td>546,656.02</td></tr>
<tr><td>Discrepancy due to inclusion of the collection from Holcim of the unpaid balance of a previous month's billing (considered as other income by the Company) as part of the Company's gross receipts per BIR assessment
<table><tr><td>OR No.</td><td>Amount of Discrepancy</td></tr><tr><td>3090</td><td>₱ 2,999.99</td></tr></table></td><td>Annex A,
Pages 3 to 4</td><td>2,999.99</td></tr>
<tr><td>Total</td><td></td><td>₱ 47,914,440.89</td></tr>
<tr><td>Add: Rounding-Off Difference</td><td></td><td>.01</td></tr>
<tr><td>Total</td><td></td><td>₱47,914,440.90</td></tr>
</table>

The Court shall examine each of the aforesaid items and determine whether the same should form part of petitioner's VATable gross receipts for the first quarter of 2008.

1) Difference in the timing of recognition of VAT on advances of cost of electricity from PEMC - ₱38,750,322.68

For the first quarter of 2008, petitioner's collections from PEMC consisted of the following: *[initials]*

OR No.	Date of OR	Advance Payment for Cost of Electricity	Billing Period	Energy and VAT Net Settlement Surplus	Billing Period	VAT	Billing Period	Total Amount Received Per OR
3084[20]	Jan. 29, 2008	20,741,777.75	Nov 26, 2007- Dec 25, 2007			861,568.71	May 26, 2007- June 25, 2007	21,603,346.46
3091[21]	Feb. 28, 2008			545,243.84	Dec 26, 2007 - Jan 25, 2008	1,806,239.40	May 26, 2007- June 25, 2007	2,351,483.24
3097[22]	Mar. 27, 2008	44,717,033.01	Jan 26, 2008 - Feb 25, 2008	1,412.18	Dec 26, 2007 - Jan 25, 2008	537,210.46	May 26, 2007- June 25, 2007	45,255,655.65
		65,458,810.76		**546,656.02**		**3,205,018.57**		**69,210,485.35**

As mentioned earlier, petitioner recognizes its gross receipts from sale of electricity coursed through WESM/PEMC only after the corresponding VAT was collected from the end-users and subsequently remitted by PEMC to petitioner.

Perusal of the records reveals that petitioner, in its Quarterly VAT Return[23] for the first quarter of 2008, reported VATable gross receipts from sale of electricity through PEMC in the amount of ₱26,708,488.08; which is equivalent to the grossed-up amount of the ₱3,205,018.57 VAT received by petitioner from PEMC during the same quarter. The said grossed-up amount actually pertains to the VAT due on the cost of electricity advanced by PEMC for the billing period covering May 26 to June 25, 2007. However, petitioner did not declare in its Quarterly VAT Return for the first quarter of 2008 the cost of electricity advanced by PEMC for the periods covering November 26, 2007 to December 25, 2007 and January 26, 2008 to February 25, 2008 in the amount of ₱65,458,810.76 since the VAT component thereof has not been collected yet from the end-users and remitted to petitioner by PEMC.

On the other hand, respondent argues that the amount of ₱65,458,810.76 received by petitioner from PEMC as advance payments for cost of electricity should have formed part of petitioner's VATable gross receipts for the first quarter of 2008. Hence, respondent assessed petitioner of deficiency VAT corresponding to the undeclared gross receipts of ₱38,750,322.68 representing the difference between the ₱65,458,810.76 advances from PEMC and the ₱26,708,488.08 declared by petitioner as gross receipts from PEMC for the first quarter of 2008, computed as follows: Jr

[20] Exhibits SS", p. 10 and "UU", p. 1
[21] Exhibits "SS", p. 17 and "UU", pp. 2-3
[22] Exhibits "SS", p. 23 and "UU", pp. 4-6
[23] Exhibit "RR"

Exhibit "SS"	OR No.	GR per OR (Collection of cost of electricity this quarter but for which VAT has not yet been received)	GR from previous quarters for which VAT was remitted in the current period[24]	Discrepancy
Page 10	3084	₱ 20,741,777.75	₱ (7,179,739.25)	₱ 13,562,038.50
Page 17	3091		(15,051,995.00)	(15,051,995.00)
Page 23	3097	44,717,033.01	(4,476,753.83)	40,240,279.18
		₱ 65,458,810.76	**₱(26,708,488.08)**	**₱38,750,322.68**

Section 108(A) of the NIRC of 1997, as amended, imposes 12% VAT on sale of services based on the taxpayer's gross receipts as follows:

> "SEC. 108. *Value-added Tax on Sale of Services and Use or Lease of Properties.* -
>
> (A) *Rate and Base of Tax.* - There shall be levied, assessed and collected, a value-added tax equivalent to ten percent (10%)[25] of the gross receipts, derived from the sale or exchange of services, including the use or lease of properties.
>
> xxx xxx xxx
>
> The term *'gross receipts'* means the total amount of money or its equivalent representing the contract price, compensation, service fee, rental or royalty, including the amount charged for materials supplied with the services and deposits and **advanced payments actually** or constructively **received during the taxable quarter for the services performed or to be performed for another person, excluding value-added tax**." *(Emphasis supplied)*

Based on the above-quoted provision, it is clear that the amount of ₱65,458,810.76 constituting as advance payments received by petitioner from PEMC during the first quarter of 2008 for cost of electricity falls within the definition of gross receipts subject to 12% VAT.

[24] Computed by dividing the amount of VAT per OR by 12%

[25] Effective February 1, 2006 the VAT rate was increased from 10% to 12% (Revenue Memorandum Circular No. 7-06)

It bears stressing that while VAT is an indirect tax which can be passed-on to the purchaser of goods or services, the liability still remains with the seller. Petitioner, being the seller of services, is mandated to pay the output tax due on its gross receipts notwithstanding the fact that the VAT due thereon has not been paid yet by its buyers. Thus, although petitioner has not yet collected the 12% VAT on the ₱65,458,810.76 cost of electricity advanced by PEMC during the first quarter of 2008, it was duty-bound to declare the said amount as part of its VATable gross receipts for the first quarter of 2008 and pay the corresponding 12% VAT.

As borne by the records, petitioner subsequently collected the 12% VAT related to the ₱65,458,810.76 advance payment from PEMC on the following dates:

Collection of VAT on cost of electricity advanced for the billing period November 26, 2007 to December 25, 2007 covered by OR No. 3084:			
OR No.	**Exhibit**	**OR Date**	**VAT**
3140	"CCC", Page 1 and "DDD", Page 1	September 30, 2008	₱ 1,092,543.79[26]
3149	"CCC", Page 2 and "DDD", Page 2	October 31, 2008	1,400,391.09
Subtotal			**₱ 2,492,934.88**
Collection of VAT on cost of electricity advanced for the billing period January 26, 2008 to February 25, 2008 covered by OR No. 3097			
OR No.	**Exhibit**	**OR Date**	**VAT**
3149	"CCC", Page 2 and "DDD", Page 2	October 31, 2008	₱ 870,850.12
3155	"CCC", Page 3 and "DDD", Page 4	December 2, 2008	180,284.22
3162	"CCC", Page 4 and "DDD", Page 5	December 24, 2008	5,309.38
3163	"CCC", Page 5 and "DDD", Page 5	January 6, 2009	5.95
3164	"CCC", Page 6 and "DDD", Pages 5 to 6	January 6, 2009	66,171.83
3169	" CCC", Page 7 and "DDD", Page 8	January 27, 2009	4,251,397.52
Subtotal			**₱5,374,019.02**
Total			**₱7,866,953.90**

Jr

[26] Computed as follows:

VAT on Energy	₱1,182,372.71
Adjustment	(89,828.92)
Total VAT Collected	₱1,092,543.79

Upon receipt of the aforesaid VAT collections, petitioner remitted the same to the BIR as reflected in its VAT returns filed on the following periods:

OR No.	OR Date	VAT per OR	VAT Return		
			Period Covered		Exhibit
3140	Sept 30,2008	₱ 1,092,543.79	3rd Quarter 2008	Oct. 23, 2008	"EEE", Pages 3 and 6, "DDD", Page 1
3149	Oct 31, 2008	2,271,241.21	October 2008	Nov. 21, 2008	"FFF", Pages 3 and 4, "DDD", Page 2
3155	Dec. 2, 2008	180,284.22	4th Quarter 2008	Jan. 23, 2009	"GGG", Pages 3 and 6, "DDD", Page 4
3162	Dec 24, 2008	5,309.38	4th Quarter 2008	Jan. 23, 2009	"GGG", Pages 3 and 6, "DDD", Page 5
3163	Jan. 6, 2009	5.95	January 2009	Feb. 20, 2009	"HHH", Pages 3 and 4, "DDD", Page 5
3164	Jan. 6, 2009	66,171.83	January 2009	Feb. 20, 2009	"HHH", Pages 3 and 4, "DDD", Page 5
3169	Jan. 27, 2009	4,251,397.52	January 2009	Feb. 20, 2009	"HHH", Pages 3 and 4, "DDD", Page 8
		₱7,866,953.90			

A comparison of the VAT due on the cost of electricity advanced by PMC during the first quarter of 2008 *vis-à-vis* the VAT subsequently remitted to the BIR reveals an over-remittance of ₱11,896.61, computed as follows:

Cost of Electricity Advanced by PEMC		12 % VAT Due	VAT Actually Collected	VAT Actually Remitted to the BIR	Over-Remitted VAT
OR No.	**Gross Receipts per OR**				
3084	₱ 20,741,777.75	₱ 2,489,013.33	₱ 2,492,934.88	₱ 2,492,934.88	(₱ 3,921.55)
3097	44,717,033.01	5,366,043.96	5,374,019.02	5,374,019.02	(7,975.06)
Total	**₱65,458,810.76**	**₱7,855,057.29**	**₱7,866,953.90**	**₱7,866,953.90**	**(₱11,896.61)**

However, for belatedly remitting the 12% VAT due on the ₱65,458,810.76 cost of electricity advanced by PEMC during the first quarter of 2008, petitioner shall be held liable for the 20% deficiency interest imposed under Section 249(B) of the NIRC of 1997, as amended.

Pursuant to Section 114(A) of the NIRC of 1997, as implemented by Section 4.114-1 of RR No. 16-05, the prescribed period for the filing (through Electronic Filing and Payment System or EFPS) of petitioner's Monthly VAT Declarations and payment of the

VAT is within twenty-two (22) days following the end of the month. For the Quarterly VAT Return, the same should be filed and the corresponding VAT should be paid within twenty-five (25) days following the close of the taxable quarter.

Evidence shows that petitioner received from PEMC the advance payments of ₱20,741,777.75 and ₱44,717,033.01 on January 29, 2008 and March 27, 2008, respectively. The 12% VAT of ₱2,489,013.33 pertaining to the advance payment of ₱20,741,777.75 should have been remitted to the BIR on February 22, 2008, at the latest. On the other hand, the 12% VAT of ₱5,366,043.96 pertaining to the advance payment of ₱44,717,033.01 should have been remitted to the BIR at the latest on April 25, 2008, to wit:

Exhibit	OR No.	Date of OR	Advance Payment for Cost of Electricity	12% VAT Due	Due Date for Filing of VAT Return and Payment of VAT
"SS", p.10 and "UU", p. 1	3084	Jan. 29, 2008	20,741,777.75	2,489,013.33	Feb. 22, 2008
"SS", p. 23 and "UU", pp. 4-6	3097	Mar. 27, 2008	44,717,033.01	5,366,043.96	April 25, 2008
			65,458,810.76	**7,855,057.29**	

Based on the due dates and petitioner's actual dates of VAT payments on the ₱65,458,810.76 cost of electricity advanced by PEMC for the first quarter of 2008, petitioner is liable to pay deficiency interest in the amount of ₱1,193,727.19, computed as follows:

Due Date for Filing of VAT Return and Payment of VAT(a)	Actual Date of Filing of VAT Return and Payment of VAT to the BIR(b)	Exhibit	Number of Days Late (c) = (b) – (a)	12% VAT Actually Remittedto the BIR	Shouldbe 12% VAT (d)	20% Interest (e)=(c)÷365 days × (d) × 20%
2/22/2008	10/23/2008	"EEE", p. 3	244	1,092,543.79	1,092,543.79	146,071.61
	11/21/2008	"FFF", p. 3	273	1,400,391.09	1,396,469.54[27]	208,896.54
Subtotal				**2,492,934.88**	**2,489,013.33**	**354,968.15**
4/25/2008	11/21/2008	"FFF", p. 3	210	870,850.12	870,850.12	100,207.41
	1/23/2009	"FFF", p. 3	273	180,284.22	180,284.22	26,968.54
	1/23/2009	"GGG", p. 3	273	5,309.38	5,309.38	794.23
	2/20/2009	"GGG", p. 3	301	5.95	5.95	0.98
	2/20/2009	"HHH", p. 3	301	66,171.83	66,171.83	10,913.82
	2/20/2009	"HHH", p. 3	301	4,251,397.52	4,243,422.46[28]	699,874.06
Subtotal				**5,374,019.02**	**5,366,043.96**	**838,759.04**
Total				**7,866,953.90**	**7,855,057.29**	**1,193,727.19**

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[27] Arrived at by deducting the excess of ₱2,492,934.88 over ₱2,489,013.33 or the amount of ₱3,921.55 from ₱1,400,391.09

[28] Arrived at by deducting the excess of ₱5,374,019.02 over ₱5,366,043.96 or the amount of ₱7,975.06 from ₱4,251,397.52

2) Universal Charges and Benefits to Host Communities - ₱2,878,314.27

Section 34 of Republic Act No. 9136 otherwise known as the "Electric Power Industry Reform Act of 2001" (EPIRA) provided for the imposition and collection of Universal Charges to all electricity end-users, which amount shall be determined, approved and fixed by the Energy Regulatory Commission and to be remitted to the National Transmission Corporation, to wit:

> "SECTION 34. *Universal Charge*. - Within one (1) year from the effectivity of this Act, a universal charge to be determined, fixed and approved by the ERC, shall be imposed on all electricity end-users for the following purposes:
>
> (a) Payment for the stranded debts in excess of the amount assumed by the National Government and stranded contract costs of NPC and as well as qualified stranded contract costs of distribution utilities resulting from the restructuring of the industry;
>
> (b) Missionary electrification;
>
> (c) The equalization of the taxes and royalties applied to indigenous or renewable sources of energy vis-à-vis imported energy fuels;
>
> (d) An environmental charge equivalent to one-fourth of one centavo per kilowatt-hour (P0.0025/kWh), which shall accrue to an environmental fund to be used solely for watershed rehabilitation and management. Said fund shall be managed by NPC under existing arrangements; and
>
> (e) A charge to account for all forms of cross-subsidies for a period not exceeding three (3) years.
>
> The universal charge shall be a non-bypassable charge which shall be passed on and collected from all end-users on a monthly basis by the distribution utilities.

> Collections by the distribution utilities and the TRANSCO in any given month shall be remitted to the PSALM Corp. on or before the fifteenth (15th) of the succeeding month, net of any amount due to the distribution utility. Any end-user or self-generating entity not connected to a distribution utility shall remit its corresponding universal charge directly to the TRANSCO.
>
> The PSALM Corp., as administrator of the fund, shall create a Special Trust Fund which shall be disbursed only for the purposes specified herein in an open and transparent manner. All amounts collected for the universal charge shall be distributed to the respective beneficiaries within a reasonable period to be provided by the ERC."

On the other hand, Section 66 of RA No. 9136, as detailed in Rule 29, Part V of the Rules and Regulations to Implement RA No. 9136, required generation facilities to set aside one centavo per kilowatt-hour (₱0.01/kWh) of the total electricity sales as financial benefit of the host communities of such generation facilities, where applicable, to be remitted to the Department of Energy, thus:

> "SECTION 66. *Benefits to Host Communities*. - The obligations of generation companies and energy resource developers to communities hosting energy generating facilities and/or energy resource developers as defined under Chapter II, Sections 289 to 294 of the Local Government Code and Section 5(i) of Republic Act No. 7638 and their implementing rules and regulations and applicable orders and circulars consistent with this Act shall continue: *Provided*, That the obligations mandated under Chapter II, Section 291 of Republic Act No. 7160, shall apply to privately-owned corporations or entities utilizing the national wealth of the locality.
>
> To ensure the effective implementation of the reduction in cost of electricity in the communities where the source of energy is located, the mechanics and procedures prescribed in the Department of the Interior and Local Government (DILG)-DOE Circulars No. 95-01 and 98-01 dated October 31, 1995 and September 30, ✓

1998, respectively, and other issuances related thereto shall be pursued.

Towards this end, the fund generated from the eighty percent (80%) of the national wealth tax shall, in no case, be used by any local government unit for any purpose other than those for which it was intended.

In case of any violation or noncompliance by any local government official of any provision thereof, the DILG shall, upon prior notice and hearing, order the project operator, through the DOE, to withhold the remittance of the royalty payment to the host community concerned pending completion of the investigation. The unremitted funds shall be deposited in a government bank under a trust fund."

"RULE 29

Benefits to Host Communities

Pursuant to Section 66 of the Act, the obligations of Generation Companies and energy resource developers to communities hosting the Generation Facilities and/or energy resource development projects as defined under Chapter II, Section 289 to 294 of the Republic Act No. 7160 (Local Government Code) and Section 5 (i) of Republic Act No. 7638 (DOE Law) and their implementing rules and regulations shall continue: *Provided*, That the obligations mandated under Chapter II, Section 291 of Local Government Code, shall apply to privately-owned corporations or entities utilizing the national wealth of the locality.

A. *Rules for the Benefits to Host Communities Pursuant to Section 5(i) of Republic Act 7638*

SECTION 1. *Scope of Application.* -

This Rule shall apply to Generation Facilities and/or energy resource development projects located in all barangays, municipalities, cities, provinces and regions.

SECTION 2. *Obligation to Provide Financial Benefits*. -

The Generation Facilities and/or energy resource development facilities, such as but not limited to the following, are required to provide the financial benefits under Energy Regulations No. 1-94 (E.R. 1-94) of the DOE:

xxx xxx xxx

SECTION 4. *Nature of Benefits Provided under E.R. 1-94*. -

(a)The Generation Company and/or energy resource developer shall set aside one centavo per kilowatt-hour (P0.01/kWh) of the total electricity sales as financial benefit of the host communities of such Generation Facility, where applicable.

xxx xxx xxx

SECTION 7. *Administration of Trust Accounts.* -

xxx xxx xxx

(b)The obligation of the Generation Companies to DOE with regard to the remittance of funds shall be settled in the following manner:"

Based on the afore-quoted law and regulations, the Universal Charges and Benefits to Host Communities are merely passed-on charges that will be remitted to their proper beneficiaries; hence, should not be included in the gross receipts subject to 12% VAT.

Gross receipts for computing tax, specifically VAT, should exclude any money which is specially earmarked by law, regulations or contract for someone other than the taxpayer.[29] Moreover, in

[29] *Commissioner of Internal Revenue vs. Manila Jockey Club*, G.R. Nos. L-13887 and L-13890, June 30, 1960

Commissioner of Internal Revenue vs. Tours Specialists, Inc. and The Court of Tax Appeals[30], the Supreme Court held that:

> "**(G)ross receipts subject to tax under the Tax Code do not include monies or receipts entrusted to the taxpayer which do not belong to them and do not redound to the taxpayer's benefit**; and it is not necessary that there must be a law or regulation which would exempt such monies and receipts within the meaning of gross receipts under the Tax Code." *(Emphasis supplied)*

Revenue Memorandum Circular No. 61-2005 further clarified that Universal Charges and Benefits to Host Communities shall be excluded in determining the gross receipts of the generation, transmission, and distribution companies and electric cooperatives, to wit:

> **"Q2 How do you compute Gross Receipts, for VAT purposes, of generation, transmission, and distribution companies, as well as electric cooperatives?**
>
> **A2** For purposes of this RMC, Gross Receipts shall refer to the following:
>
> xxx xxx xxx
>
> Gross Receipts shall not include the Energy Tax under Batas Pambansa 36, the Universal Charges implemented under the EPIRA (RA 9136), Benefits to Host Companies under Energy Regulation 1-94; and security deposit for metering machine including interest *provided* that when applied to the consumer's liability it shall be subject to VAT.
>
> Gross Receipts shall be net of discounts and gross of penalties."

---

[30] G.R. No. L-66416, March 21, 1990

For the first quarter of 2008, petitioner collected Universal Charges and Benefits to Host Communities (including Franchise Tax) from Holcim Philippines, Inc. [then Union Cement Corporation (UCC) Bulacan] amounting to ₱1,781,600.44 and ₱1,096,713.84, respectively, totaling ₱2,878,314.28, broken down as follows:

Exhibit	OR No.	Universal Charges Collected per OR	Benefits to Host Communities Collected (including Franchise Tax of ₱0.0145/KWH)per OR	Total Universal Charges and Benefits to Host Communities Collected per ORs
"TT", pp. 3-6, "SS", p.8, "XX", p. 4,	3082	₱ 470,221.87[31]	₱ 289,458.19[32]	₱ 759,680.06
"TT", pp. 19-22, "SS", p. 16, "XX", p. 11	3090	668,718.01	411,648.02	1,080,366.03
"TT", pp. 25, 26, 29, 30, and 32, "SS", p. 21, "XX", p. 13	3095	642,660.56	395,607.63	1,038,268.19
	Total	**₱ 1,781,600.44**	**₱ 1,096,713.84**	**₱ 2,878,314.28**

As aptly noted by the Independent CPA, the Universal Charges collected by petitioner from Holcim Philippines, Inc. during the first quarter of 2008 in the total amount of ₱1,781,600.44 were all remitted to NTC and NGCP[33] as evidenced by the official receipts, Universal Charge Bills, Statements of Account issued by the said entities to petitioner and other related documents[34] as well as the pertinent billings issued by petitioner with computation details[35]. Below is the summary of petitioner's remittances of Universal Charges[36]:

OR No.	Reference	OR Date	Payee	Amount	Details of Payment	
15737-1	Exhibit "XX", Page 1	January 24, 2008	NTC	1,120,199.28	Universal Charge (UC) Bill No.	Amount
					UC-T00000058	**484,764.81**
					UC-T00000057	635,434.46
					Total	1,120,199.27
0013613	Exhibit "XX", Page 6	August 27, 2010	NGCP	2,698,559.71	UC Bill No.	Amount

[31] Net of 3% Prompt Payment Discount (₱484,764.81 x 97%=₱470,221.87)

[32] Net of 3% Prompt Payment Discount (₱298,410.50 x 97%=₱289,458.19)

[33] Successor of the National Transmission Corporation pursuant to R.A. No. 9511, otherwise known as "An Act Granting the National Grid Corporation of the Philippines a Franchise to Engage in the Business of Conveying or Transmitting Electricity through High Voltage Back-Bone System of Interconnected Transmission Lines, Substations and Related Facilities, and for Other Purposes"

[34] Exhibit "XX"

[35] Power Bill No. 230, Exhibits "AA" to "AA-2"; Power Bill No. 235, Exhibits "BB" to "BB-2"; and Power Bill No. 239, Exhibits "GG" to "GG-2"

[36] Exhibit "PP", pp. 19-20

					UC-T00000034	658,028.96
					UC-T00000034	667,525.47
					UC-T000000-1	**668,718.01**
					UC-T000000-4	704,287.27
					Total	2,698,559.71
16320-3	Exhibit "XX", Page 13	April 8, 2008	NTC	642,660.54	UC Bill No.	Amount
					UC-T000000-2	**642,660.54**

Total Remittance of Universal Charges Collected for the First Quarter of 2008

OR No.	Reference	Amount
15737-1	Exhibit XX, Page 1	₱ 484,764.81
0013613	Exhibit XX, Page 6	668,718.01
16320-3	Exhibit XX, Page 13	642,660.54
		₱1,796,143.36

It is apparent from the foregoing that that petitioner's total remittance of Universal Charges amounting to ₱1,796,143.36 was higher by ₱14,542.92 when compared with petitioner's ₱1,781,600.44 total collection of Universal Charges. The over-remittance of ₱14,542.92 pertains to the 3% prompt payment discount granted in relation to the payment of Power Bill No. 230 covered by OR No. 3082, (*i.e.*, the full amount of Universal Charges was remitted gross of the discount not collected) computed as follows:

Universal Charge	₱ 484,764.81
Multiplied by: Discount Rate	3%
Prompt Payment Discount	14,542.94
Less: Rounding-off Difference	0.02
Discrepancy	**₱ 14,542.92**

Since the Universal Charges of ₱1,781,600.44 had been fully remitted by petitioner to the NTC and NGCP, the same should not form part of petitioner's VATable gross receipts for the first quarter of 2008.

Now, the Court will discuss the total Franchise and Benefits to Host Communities collected by petitioner for the first quarter of 2008 in the amount of ₱1,096,713.84.

Based on the pertinent billings and Details for the Billing Computation, the amount of Franchise (₱.0145/KWH) and Benefits to Host Communities (₱0.01/KWH) billed by petitioner to Holcim Philippines, Inc. amounted to ₱1,105,666.15 but only the amount of ₱1,096,713.84 was collected by petitioner. The difference of ₱8,952.31 refers to the 3% prompt payment discount granted to Holcim Philippines, Inc. for Power Bill No. 229, as shown below:

Power Bill No.	Exhibit "TT"	Electricity Sold (in KWH)	Franchise & Benefits to Host Communities (₱0.0245/KWH)		OR No.	Exhibit "SS"
			Amount Billed	Amount Collected		
229	Pages 3 to 4	12,180,020.40	₱ 298,410.50	₱ 289,458.19*	3082	Page 8
237	Pages 21 & 22	16,801,960.00	411,648.02	411,648.02	3090	Page 16
238	Pages 25, 26, 29,30 & 32	16,147,250.00	395,607.63	395,607.63	3095	Page 21
Total			**₱1,105,666.15**	**₱1,096,713.84**		

*Net of 3% Prompt Payment Discount (₱298,410.50 x 97% = ₱289,458.19)

Evidence shows that petitioner made the following payments to the Department of Energy:

DOE OR No.	Exhibit "YY"	OR Date	Payee	Amount	Particulars
3096857	Page 1	July 20, 2010	DOE	2,002,500.21	Financial Benefits - Electricity Fund
					(EF) for the period 12/26/2006 to 12/25/2009
3096859	Page 4	July 20, 2010	DOE	1,001,250.11	Financial Benefits - Development and
					Livelihood Fund (DLF) for the period
					12/26/2006 to 12/25/2009
3096860	Page 6	June 20, 2010	DOE	1,001,250.11	Financial Benefits - Reforestation, Watershed Management, Health and/or Environment Enhancement Fund (RWMHEEF) for the period 12/26/2006 to 12/25/09)
				4,005,000.43	

Petitioner's Summary of Electricity Sold[37] for calendar years 2007, 2008, and 2009 provided the breakdown of the amounts remitted to the DOE as follows:

[37] Exhibit "ZZ", p. 1

Year	Exh. ZZ	Total Electricity Produced (in KWH)	Benefits to Host Communities (₱.01/KWH)	Allocation to EF (50% of (₱.01/KWH)	Allocation to DLF (25% of ₱.01/KWH)	Allocation to RWMHEEF (25% of ₱.01/KWH)
2007	Page 1	205,694,854.17	2,056,948.54	1,028,474.27	514,237.14	514,237.14
2008	Page 1	117,778,041.20	1,177,780.41	588,890.21	294,445.10	294,445.10
2009	Page 1	77,027,147.47	770,271.47	385,135.74	192,567.87	192,567.87
			4,005,000.42	**2,002,500.22**	**1,001,250.11**	**1,001,250.11**

As verified by the Independent CPA, out of the ₱1,177,789.41 Benefits to Host Communities remitted by petitioner to the DOE for the year 2008, only the amount of ₱221,098.22 pertained to the first quarter of 2008. Thus, there's a discrepancy of ₱875,615.62 between the amount of ₱1,096,713.84 Franchise and Benefits to Host Communities collected by petitioner during the first quarter of 2008 and the amount of ₱221,098.22 Benefits to Host Communities actually remitted to the DOE for the same quarter, computed as follows[38]:

Bill No.	Summary of Electricity Sold (SES) Schedule	Total Electricity Produced (in KWH) per SES Schedule	Total Benefits to Host Communities (₱0.01 per KWH) per Summary of Electricity Sold	Franchise & Benefits to Host Communities per Billing	Discrepancy
229	2007 (December)	8,343,764.40	₱ 83,437.64	₱ 289,458.19*	₱ 206,020.55
237	2008 (January)	2,832,280.00	28,322.80	411,648.02	383,325.22
238	2008 (February)	10,933,778.00	109,337.78	395,607.63	286,269.85
			₱221,098.22	**₱1,096,713.84**	**₱875,615.62**
*Net of 3% Prompt Payment Discount (₱298,410.50x97%=₱289,458.19)					

The Court-commissioned Independent CPA explained the discrepancy as follows[39]:

Discrepancies between the rate used per KWH not subjected to VAT The rate used in the Summary of Electricity Sold,which supports the remittances to DOE, is ₱.01 per KWH as provided under Energy Regulations No. 1-94. On the other hand, the rate used per Billings issued by the Company, which is the basis for the amounts of collection per ORs is ₱0.0245 per KWH. We were informed by the Company's Chief Accountant, Mr.DominadorQuitadio, that the rate used by the Company includes Franchise Tax of ₱0.0145 per KWH. However, were also informed by Mr.Quitadio that the Company records the amount pertaining to the ₱0.0145 per KWH as other income.			₱ 654,373.85

[38] Exhibit "PP", pp. 22-23
[39] Exhibit "PP", pp. 23-24

We noted that the said other income were not considered part of the Company's gross receipts for VAT purposes, thus not included in the SLS.

Power Bill No.	Electricity Sold (in KWH)	₱0.0145 per KWH
229	2,180,020.40	₱ 176,610.30
237	16,801,960.00	243,628.42
238	16,147,250.00	234,135.13
Total		₱ 654,373.85

Exhibit TT, Pages:

3 to 4
21 to 22
25 to 26, 29 to 30 and 32

Discrepancies between the base (in KWH) used

230,194.08

We understand the base used in computing the Benefits to Host Communities in the Summary of Electricity Sold is the amount of electricity sold that was internally generated by the Company (i.e., excluding electricity purchased from WESM). However, the base used in the Billings is the amount of total electricity sold by the Company to Holcim (including electricity purchased from WESM). We were informed by Mr. Dominador Quitadio, Chief Accountant, that the Company considers the amount not remitted to the DOE as other income.

Power Bill No.	Total Electricity Sold to Holcim (including purchased from WESM) (in KWH)	Total internally Generated Electricity Sold* (in KWH)	Discrepancy (in KWH)
229	12,180,020.40	8,343,764.40	3,836,256.00
237	16,801,960.00	2,832,280.00	13,969,680.00
238	16,147,250.00	10,933,778.00	5,213,472.00

Exhibit AAA, Pages:
1
2
3

**We were able to trace the amount of total internally generated electricity sold in the Summary of Monthly Energy Production covering the following billing periods: (a) December 26, 2007 [Bill No. 229]; (b) January 26, 2008 [Bill No. 237]; (c) February 26, 2008 [Bill No. 238] (Exhibit AAA). We noted the following:*

Power Bill No.	*Total Electricity Sold (in KWH) [A]*	*Total Electricity Sold purchased from WESM (in KWH) [B]*	*Total Internally Generated Electricity Sold [A-B]*
229	*14,884,388.40*	*6,540,624.00*	*8,343,764.40*
237	*17,472,376.00*	*14,640,096.00*	*2,832,280.00*
238	*21,879,266.00*	*10,945,488.00*	*10,933,778.00*

Exhibit AAA, Pages:
1
2
3

Power Bill No.	Discrepancy (in KWH)	(₱0.01 per KWH)
229	3,836,256.00	₱ 38,362.56
237	3,969,680.00	139,696.80

238	5,213,472.00	52,134.72		
		₱ 230,194.08		
3% Prompt Payment Discount granted in relation to the payment of Power Bill No. 229 covered in OR No. 3082 (i.e., the Benefits to Host Communities collected by the Company was net of the discount granted) computed as follows:			*Exhibit A, Pages1 to 2*	(8,952.32)
Benefits to Host Communities	₱ 298,410.50			
Multiplied by: Discount Rate	3%			
Prompt Payment Discount	₱ 8,952.32			
Total				875,615.61
Add: Rounding-off Difference				0.01
Discrepancy				**₱ 875,615.62**

Thus, out of the total Benefits to Host Communities (including Franchise Tax of ₱0.0145/KWH) collected by petitioner during the first quarter of 2008 in the amount of ₱1,096,713.84, only ₱221,098.22 (all pertaining to Benefits to Host Communities) was subsequently remitted to the DOE. The remaining amount of ₱875,615.62 was retained by petitioner and treated as other income. Consequently, only ₱221,09.22 shall be excluded from petitioner's VATable gross receipts. The amount of ₱875,615.62 shall be subjected to 12% deficiency VAT.

3) Reimbursement of the amount advanced by petitioner for TA-Oil's purchase of electricity from WESM (coursed through PEMC) - ₱5,736,147.93

The amount of gross receipts per VAT OR No. 3088[40] issued to Trans-Asia Oil and Energy Development Corporation (TA-Oil) pertains to the following:

Receivable from WESM	₱ 5,502,849.94
WESM Billing	5,736,147.93
Gross Receipts per OR NO. 3088	**₱11,238,997.87**

Petitioner's Chief Accountant, Mr. Dominador Quitadio, informed the Independent CPA that the Receivable from WESM amounting to ₱5,502,849.94 pertains to gross receipts for the sale of electricity to TA-Oil. On the other hand, the WESM Billing amounting

[40] Exhibits "SS", p. 14 and "PP", p. 11

to ₱5,736,147.93 refers to reimbursement of the amount advanced by petitioner for TA-Oil's purchase of electricity from WESM (coursed through PEMC). Petitioner advanced the payment for TA-Oil since the latter was not yet a registered participant in the WESM.[41]

The amount of VAT in the official receipt includes the following:

VAT on gross receipts from sales of electricity to TA-Oil	₱ 660,341.99
Reimbursement of the VAT on TA-Oil's purchases of electricity advanced by petitioner	438,958.20
Total VAT per OR No. 3088	**₱ 1,099,300.19**

In the Summary List of Sales[42] and Quarterly VAT Return[43] for the first quarter of 2008, petitioner only declared the amount of gross receipts of ₱5,502,849.94 and the related VAT of ₱660,341.99 since petitioner treated the balance as mere reimbursement of advances made.[44]

The total amount reimbursed to petitioner by TA-Oil is as follows:

Cost of electricity advanced by petitioner for TA-Oil	₱ 5,736,147.93
VAT on cost of electricity advanced by petitioner for TA-Oil	438,958.20
Total Reimbursements	**₱6,175,106.13**

Petitioner submitted the WESM Bill No. INV0000434[45] dated February 12, 2008 issued by PEMC which disclosed that the total VATable sale is ₱3,657,985.00 and the total zero-rated sale is ₱2,078,162.93, to wit:

Total Trading Amount	₱ 5,736,147.93
VATable	3,657,985.00
VAT Zero Rated	2,078,162.93
VAT on Energy	438,958.20
Total Trading Amount inclusive of VAT	₱ 6,175,106.13
Market Fees	-
VAT on Market Fees	-

[41] Exhibit "PP", p. 11
[42] Exhibit "RR", p. 5
[43] Exhibit "RR", p. 1
[44] Exhibit "PP"
[45] Exhibit "WW-1", p. 1

Gross Receipts per OR No. 3088	₱6,175,106.13

To show the recording of the amount advanced and the reimbursement of the same, petitioner submitted General Ledger Extractions for Accounts Receivable-Trade (TA-Oil) and Accounts Payable Trade Accounts[46] wherein the following journal entries were made:

a. On January 31, 2008, petitioner recorded a receivable from TA-Oil amounting to ₱6,175,106.13 and payable of the same amount;

b. On February 21, 2008, petitioner recorded a payment of ₱6,175,106.13 (petitioner debited its Account Payable-Trade Account); and

c. On February 22, 2008, petitioner recorded a collection of ₱6,175,106.13 from TA-Oil (petitioner credited its Accounts Receivable-Trade-TA-Oil account).

The above journal entries indicate that petitioner did not claim any input tax on the advance payment of ₱6,175,106.13.

However, it is provided under Section 113(A) of the NIRC of 1997, as amended, that every VATable sale of goods and services must be covered by a VAT invoice and VAT official receipt, respectively. The issuance by petitioner of a VAT official receipt to TA-Oil for ₱6,175,106.13 presupposes that such amount pertains to petitioner's VATable sale of services and includes 12% VAT. Such 12% VAT became petitioner's output VAT which in turn became the input tax of TA-Oil to whom the VAT official receipt was issued. Clearly, petitioner is liable to pay 12% VAT on the amount of ₱5,513,487.62 (₱6,175,106.13 ÷ 112%).

4) Collections of Energy and VAT Settlement Surplus from PEMC - ₱546,656.02

[46] Exhibit "WW-2"

During the first quarter of 2008, petitioner collected from PEMC the amount of ₱546,656.02 representing Energy and VAT Net Settlement Surplus, detailed as follows:

Exhibit	OR No.	Billing Period	Energy Net Settlement Surplus	Billing Period	VAT Net Settlement Surplus	Total Amount Received Per OR
"SS", p. 17, "UU", p. 2	3091	12/26/07 to 1/24/08	₱ 538,382.80	09/26/07 to 11/25/07	₱ 6,861.04	₱ 545,243.84
"SS", p. 23, "UU", p. 4	3097	12/26/07 to 1/25/09	1,412.18			1,412.18
Total			**₱539,794.98**		**₱6,861.04**	**₱546,656.02**

The Court-commissioned Independent CPA explained the nature of the Energy Net Settlement Surplus and VAT Net Settlement Surplus in the following manner:

> "Based on ERC Resolution No. 06-09, which provides for the rules for the distribution of Net Settlement Surplus, the Net Settlement Surplus is the difference between the total amount to be collected by the Market Operator (PEMC) from the trading participants for energy transactions in the market for the given trade interval (Collectibles) and the total amount to be paid by the Market Operator (PEMC) to the trading participants for energy transactions (Payables). The said resolution also states that the said surplus remaining after replenishing the 10% retention required under Article 6 of the same resolution shall be allocated and distributed at the wholesale level by PEMC to certain WESM participants.
>
> We were informed that the Company treated the above collection of Energy Settlement Surplus as other income. We noted that the Company did not include the same as part of its VATable gross receipts in its Summary List of Sales.
>
> xxx xxx xxx
>
> On the other hand, applying the definition of Net Settlement Surplus, provided in ERC Resolution No. 06-09, discussed earlier, we understand that the VAT Net Settlement Surplus of ₱6,861.04 (₱5,378.29 + ₱1,482.75)

> collected by the Company is the difference between the total amount of VAT collected by PEMC from the trading participants for energy transactions in the market for the given trade interval (Collectibles) and the total amount of VAT to be paid by the PEMC to the trading participants for energy transactions (Payables) that is allocated and distributed at the wholesale level by PEMC to certain WESM participants."[47]

Since the Energy and VAT Settlement Surplus were collected by petitioner in connection with its sale of generated power, the related gross receipts in the respective amounts of ₱539,794.98 and ₱57,175.33[48] should form part of petitioner's VATable gross receipts for the first quarter of 2008.

5) Collection of the unpaid balance of a previous month's billing considered as other income - ₱2,999.99

The amount of gross receipts per VAT OR No. 3090 issued to Holcim Philippines includes the remittance of unpaid balance of previous month's billing amounting to ₱2,999.99, which was treated by petitioner as Other Income.[49] Thus, the amount of ₱2,999.99 shall be considered as having been received by petitioner in the course of its trade or business and shall be subjected to 12% VAT.

B) DISALLOWED INPUT VAT - ₱97,402.34

Pursuant to Section 110(A)(1) of the NIRC of 1997, as amended, respondent disallowed petitioner's claimed input tax in the amount ₱97,402.34 for being unsupported by VAT invoice or official receipt. Since petitioner did not dispute respondent's disallowance of the ₱97,402.34 input VAT, the deficiency VAT assessment thereon shall be upheld.

In sum, petitioner is liable to pay basic deficiency VAT and interest for late remittance of VAT for the first quarter of 2008 in the respective amounts of ₱936,091.16 and ₱1,193,727.19 or in the total amount of ₱2,129,818.35, computed as follows:

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[47] Exhibit "PP", pp. 13-14
[48] Computed by dividing ₱6,861.04 by 12%
[49] Exhibit "PP", p. 9

Basic Deficiency VAT on:			Amount
1.Undeclared Gross Receipts			
2.	Franchise & Benefits to Host Communities Collected by petitioner during the first quarter of 2008 but was not remitted to the DOE	₱ 875,615.62	
	Reimbursement of the amount advanced by petitioner for TA-Oil's purchase of electricity from WESM coursed through PEMC	5,513,487.62	
	Energy Net Settlement Surplus	539,794.98	
	Gross Receipts related to the VAT Net Settlement Surplus	57,175.33	
	Collection of the unpaid balance of a previous month's billing considered as Other Income by petitioner	2,999.99	
	Total Undeclared Gross Receipts	₱6,989,073.54	
	Multiplied by 12% VAT Rate	x 12%	₱ 838,688.82
	Disallowed Input VAT		97,402.34
Basic Deficiency VAT			₱ 936,091.16
Add:	20% Interest for late remittance of VAT		1,193,727.19
Total Amount Due			**₱2,129,818.35**

WHEREFORE, premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED**. The assessment issued by respondent against petitioner covering deficiency VAT for the first quarter of 2008 is hereby **REDUCED** to ₱936,091.16. Accordingly, petitioner is hereby **ORDERED TO PAY** basic deficiency VAT in the amount of ₱936,091.16, twenty-five percent (25%) surcharge in the amount of ₱234,022.79 pursuant to Section 248(A)(3) of the NIRC of 1997, as amended, and twenty percent (20%) deficiency interest for late remittance of VAT in the amount of ₱1,193,727.19 pursuant to Section 249(B) of the NIRC of 1997, as amended, or in the total amount of ₱2,363,841.14, computed as follows:

Basic Deficiency VAT	₱ 936,091.16
Add: 25% Surcharge	234,022.79
Subtotal	**₱1,170,113.95**
Add: 20% Interest for late remittance of VAT	1,193,727.19
Total	**₱2,363,841.14**

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

a) Deficiency interest at the rate of 20% per annum on the basic deficiency VAT of ₱936,091.16 computed from April 25, 2008 until full payment thereof pursuant to Section 249(B) of the NIRC of 1997; ge

b) Delinquency interest at the rate of 20% per annum on the amount of the ₱1,170,113.95 representing the basic deficiency VAT of ₱936,091.16 and 25% surcharge of ₱234,022.79 computed from March 31, 2011 until full payment thereof pursuant to Section 249(C)(3) of the NIRC of 1997, as amended; and

c) Delinquency interest at the rate of 20% per annum on the deficiency interest which have accrued as afore-stated in (a) and on the 20% deficiency interest for late remittance of VAT in the amount of ₱1,193,727.19 computed from March 31, 2011 until full payment thereof pursuant to Section 249(C)(3) of the NIRC of 1997, as amended.

SO ORDERED.

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

WE CONCUR:

CAESAR A. CASANOVA
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

ATTESTATION

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

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

ROMAN G. DEL ROSARIO
Presiding Justice