REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

TAKENAKA CORPORATION PHILIPPINE BRANCH, Petitioner,	**CTA EB CASE NO. 853** **(CTA Case No. 7542)**
- *versus* -	Present: *Del Rosario, P.J.* *Castañeda, Jr.,* *Bautista,* *Uy,* *Casanova,* *Fabon-Victorino,* *Mindaro-Grulla,* *Cotangco-Manalastas, and* *Ringpis-Liban, JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** AUG 2 2 2013 cr Apolinario 11:10 a.m.

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DECISION

BAUTISTA, J.:

The Case

Before the Court *En Banc* is a Petition for Review,[1] filed by petitioner Takenaka Corporation Philippine Branch, on January 6, 2012, pursuant to Section 18[2] of Republic Act ("RA") No. 1125, as amended by RA No. 9282, and RA No. 9503, praying for the reversal and setting aside of the Decision,[3] and Resolution,[4] respectively, promulgated by

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[1] *Rollo*, CTA EB Case No. 853 (CTA Case No. 7542), pp. 1- 111, with Annexes.

[2] Sec. 18. *Appeal to the Court of Tax Appeals En Banc.* – No civil proceeding involving matters arising under the National Internal Revenue Code, the Tariff and Customs Code or the Local Government Code shall be maintained, except as herein provided, until and unless an appeal has been previously filed with the CTA and disposed of in accordance with the provisions of this Act.

A party adversely affected by a resolution of a Division of the CTA on a motion for reconsideration or new trial, may file a petition for review with the CTA en banc.

[3] *Rollo*, CTA EB Case No. 853 (CTA Case No. 7542), pp. 35-56; penned by Associate Justice Caesar A. Casanova, with Associate Justices Juanito C. Castañeda, Jr., and Cielito N. Mindaro-Grulla,, concurring, with Annexes.

the Second Division of the Court ("Court in Division") on August 25, 2011 and December 16, 2011, and accordingly, to order respondent Commissioner of Internal Revenue to cancel and terminate the corresponding tax assessments for taxable year ending December 31, 2002, including the imposition of twenty percent (20%) per annum deficiency interest under Section 249(B)[5] and twenty percent (20%) per annum delinquency interest under Section 249(C)[6] of the Tax Code.

Antecedent Facts

The relevant antecedents are succinctly recited by the Court in Division in its Decision dated August 25, 2011, as follows:

> Petitioner is a foreign corporation organized and existing under the laws of Japan, duly licensed to transact business in the Philippines with principal business address at 18th Floor, Tower 2, The Enterprise Center, 6766 Ayala Avenue corner Paseo de Roxas, Makati City, Philippines.
>
> Respondent-Commissioner of Internal Revenue (the "Commissioner") is the public officer authorized under the National Internal Revenue Code of 1997 (the "Tax Code") with the power to decide disputed assessments arising under said law and other laws or portions thereof administered by the Bureau of Internal Revenue. She holds office at the 5th Floor, Bureau of Internal Revenue, National Office Building, Agham Road, Diliman, Quezon City, where she may be served with summons, notices and other court processes.

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[4] *Ibid.*, pp. 100-111.

[5] SEC. 249. *Interest.* —

(A) *In General* — There shall be assessed and collected on any unpaid amount of tax, interest at the rate of twenty percent (20%) per annum, or such higher rate as may be prescribed by rules and regulations, from the date prescribed for payment until the amount is fully paid.

(B) *Deficiency Interest* — Any deficiency in the tax due, as the term is defined in this Code, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof.

[6] SEC. 249. *Interest.* —

(A) *In General* — There shall be assessed and collected on any unpaid amount of tax, interest at the rate of twenty percent (20%) per annum, or such higher rate as may be prescribed by rules and regulations, from the date prescribed for payment until the amount is fully paid.

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(C) *Delinquency Interest* — In case of failure to pay:

(1) The amount of the tax due on any return required to be filed, or

(2) The amount of the tax due for which no return is required, or

(3) A deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner, there shall be assessed and collected on the unpaid amount, interest at the rate prescribed in Subsection (A) hereof until the amount is fully paid, which interest shall form part of the tax.

On December 29, 2005, petitioner received from the respondent Preliminary Assessment Notice with attached Details of Discrepancies covering taxable year ending December 31, 2002 stating that petitioner has deficiency income tax of P164,354,535.58; deficiency value-added tax of P2,755,688.07; deficiency withholding tax on compensation of P2,252,756.71 and deficiency expanded withholding tax of P10,692,913.38.

On January 9, 2006, petitioner filed a protest letter to the above-mentioned Pre-Assessment Notice.

On January 14, 2006, a Formal Assessment Notice was issued against the petitioner alleging that it is liable for deficiency income tax in the amount of P166,224,626.69, value-added tax in the amount of P2,786,970.56, withholding tax on compensation in the amount of P2,278,563.92 and expanded withholding tax in the amount of P10,815,409.63 for the taxable year 2002.

Petitioner, through counsel, filed a protest letter questioning the abovementioned Final Assessment Notice on February 9, 2006 and submitted documents in support thereof on April 12, 2006.

Respondent did not act with finality on the protest, hence, petitioner filed its Petition for Review on November 8, 2006.

Respondent filed her Answer on December 20, 2006 and alleged the following Special and Affirmative Defenses:

> "4. The assessments in question were made and issued in accordance with law, rules and regulations.
>
> 5. Verification disclosed that there was an understatement of purchases in the amount of P82,700,340.72 as reflected in the partial tally of the computerized matching conducted by the Bureau on the sales by its suppliers against the purchases declared in petitioner's tax returns. The said amount resulted to an undeclared purchases and

treated as an undeclared income pursuant to Section 32 of the NIRC, as amended.

6. It was discovered that rentals subjected to withholding tax per 1601-E was higher than the amounts reflected per Financial Statements and Income Tax Returns, hence, was also considered as unaccounted source of cash which is treated as undeclared income pursuant to Section 32 of the NIRC, as amended.

7. Reconciliation of Salaries and Wages per Financial Statements vs. per Alpha Lists disclosed that there were compensation not subjected to Withholding Tax amounting to P5,573,055.25. Hence, this was disallowed as deduction from gross income for income tax purposes pursuant to Section 34 of the NIRC, as amended.

8. Verification revealed petitioner failed to subject to expanded withholding tax certain income payments (i.e., professional fees; payment to subcontractors, security expenses; and rental of equipments). Hence, these expenses were disallowed as deductions from gross income pursuant to Section 34 of the NIRC, as amended.

9. As previously discussed on undeclared income from undeclared purchases, the same amount was subjected to VAT under Sections 105 and 108 of the NIRC, as amended.

10. Since the petitioner has failed to remit the corresponding withholding tax on the Salaries and Wages previously disallowed from gross income, petitioner is found liable to pay the withholding tax on compensation pursuant to Section 79(A) of the NIRC, as amended and implemented under Section 2.78 of the Revenue Regulations No. 2-98. Moreover, since petitioner failed to remit the correct withholding tax due on compensation, petitioner was assessed of deficiency withholding tax in the amount of P5,568.36.

> 11. Petitioner was assessed of deficiency expanded withholding tax in the amount of P10,815,409.63 for its failure to withhold on its certain income payments claimed as deductions in its income tax return.
>
> 12. All presumptions are in favor of the correctness of the tax assessment. (*Interprovincial Autobus vs. Collector of Internal Revenue*, 98 Phil. 290)."

During trial, petitioner presented its testimonial and documentary evidence in support of its position. On February 14, 2008, petitioner filed a "Motion to Withdraw Petition" stating that it has availed of the remedy under Republic Act No. 9480 ("RA 9480"), otherwise known as the "Tax Amnesty Law of 2007." The said motion was partially granted by this Court in a Resolution dated March 19, 2008.

In a Resolution dated September 22, 2010, this case is submitted for decision after considering petitioner's Memorandum, filed on September 8, 2010, sans respondent's Memorandum.[7]

The Ruling of the Court in Division

On August 25, 2011, the Court in Division promulgated a Decision denying petitioner's Petition for Review by ruling that:

> **WHEREFORE**, premises considered, the assessment against petitioner covering deficiency expanded withholding tax and withholding tax on compensation is hereby **AFFIRMED** with some modifications.
>
> Accordingly, petitioner is **ORDERED** to pay respondent the amount of P4,165,260.07 representing deficiency withholding taxes for taxable year 2002, inclusive of 25% surcharges imposed pursuant to Section 248(3) of the NIRC of 1997, computed as follows:

	Basic	Surcharge	Total

[7] *Rollo*, pp. 35-39.

WTC	P1,409,420.98	P352,355.25	P1,761,776.23
EWT	1,922,787.07	480,696.77	2,403,483.84
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Total	**P3,332,208.05**	**P833,052.02**	**P 4,165,260.07**
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Likewise, petitioner is **ORDERED** to pay (a) deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency WTC in the amount of P1,409,420.98 and EWT in the amount of P1,922,787.07 computed from January 15, 2003 and January 25, 2003, respectively, until full payment thereof pursuant to Section 249(B) of the NIRC of 1997; and (b) delinquency interest at the rate of twenty percent (20%) per annum on the 20% deficiency interest which have accrued from the dates aforestated in (a) until February 16, 2006 and on the total deficiency taxes of P4,165,260.07, computed from February 16, 2006 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997.

SO ORDERED.[8]

On September 16, 2011, petitioner filed its "Motion for Reconsideration with Motion to Re-open the Case." On December 16, 2011, the Court in Division issued a Resolution denying petitioner's claim, the dispositive portion is as follows:

WHEREFORE, premises considered, petitioner's "**Motion for Reconsideration with Motion to Re-open the Case,**" is hereby **DENIED** for lack of merit.

SO ORDERED.[9]

The Issues

Hence, the present Petition for Review where petitioner proffers the following grounds:

A. WHETHER OR NOT PETITIONER'S PAYMENTS FOR (1) PROFESSIONAL FEES; (2) SECURITY EXPENSES; (3)

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[8] *Rollo*, pp. 55-56.
[9] *Ibid.*, p. 111.

RENTAL OF EQUIPMENT; AND (4) PAYMENTS TO SUBCONTRACTORS WERE PROPERLY SUBJECTED TO EXPANDED WITHHOLDING TAX;

B. WHETHER OR NOT PETITIONER'S AUDITED FINANCIAL STATEMENTS, WHICH CLEARLY SHOWS THAT THE SUPPOSED DISCREPANCY GIVING RISE TO THE ASSESSMENT FOR DEFICIENCY WITHHOLDING TAX ON COMPENSATION WAS DUE TO PAYMENTS NOT SUBJECT TO WITHHOLDING, ENJOYS THE PRESUMPTION OF REGULARITY; and

C. WHETHER OR NOT THERE IS A LEGAL BASIS FOR THE DOUBLE IMPOSITION OF 20% PER ANNUM INTEREST.[10]

Petitioner's Arguments

Petitioner argues in the following manner:

(1) That the interest of substantial justice is better served with the re-opening of the case and the recall of its witness for:

1. Professional Fees

A substantial portion of its payments to General Professional Partnerships ("GPP's") are supported by payment vouchers and that the supporting documents showing payments to GPP's and other payments for professional fees were inadvertently omitted from the pieces of evidence that were submitted and formally offered.

2. Security Expenses

As shown in the Independent Certified Public Accountant's ("ICPA") report, it correctly withheld and remitted 2% EWT on all payments for security services; it withheld and remitted P272,485.79 out of the P333,464.89 EWT due; and, the difference representing unremitted withholding tax for Security Expenses in the amount of P60,979.10 was already remitted on January 2003.

[10] *Ibid.*, pp. 10-11.

3. Rental of Equipment

Its Expanded Withholding Tax pertaining to rentals paid prior to 2002 was properly withheld and remitted.

4. Payments to Subcontractors

It received a copy of Annex "B" of the assailed Decision only on September 13, 2011 and based on its preliminary evaluation of the transactions therein enumerated, it found out that there was no under-withholding in a number of the enumerated transactions. Furthermore, this Court has subjected to 2% EWT the entire amount stated in the vouchers and corresponding invoice/receipt which should not be the case, considering that a single voucher/invoice/receipt may cover both payments to subcontractors partially for subcontracted services and partially for the supply of materials and only the portion pertaining to subcontracted services can be subjected to 2% EWT.

(2) That there are salaries and wages not listed in the "Alphalist" but are properly included in the Audited Financial Statements; that it is not required to substantiate the accounts appearing on the Audited financial Statements otherwise it would be auditing the work of the ICPA; and that the burden of proof shifted to respondent when it was able to account for the discrepancy using the same documents;

(3) That the Questioned Decision made two separate impositions of interest on petitioner's alleged deficiency tax: (a) twenty percent (20%) per annum based on Section 249(B) of the Tax Code; and (b) another twenty percent (20%) per annum based on Section 249(C). In effect, petitioner is being made to pay at least 40% per annum interest.

On March 30, 2012, respondent was ordered to file her Comment on the Petition for Review. However, records show that respondent failed to file her Comment within the period granted.

On June 18, 2012, both parties were required to submit their respective Memoranda within a period of thirty (30) days from receipt this Resolution. On July 26, 2012, petitioner filed its Memorandum, while respondent failed to file her Memorandum.

The Ruling of the Court En Banc

The Court *En Banc* finds the Petition for Review bereft of merit.

In the Decision dated August 25, 2011, the Court in Division unanimously ruled as follows:

> "By reason of petitioner's availment of tax amnesty pursuant to the provisions of RA 9480, and as confirmed by the Court in its March 19, 2008 Resolution, the only remaining issues submitted for decision are the following:
>
> (a) Whether or not petitioner is liable for alleged deficiency expanded withholding tax in the amount of P10,932,370.09;
>
> (b) Whether or not petitioner is liable for alleged deficiency withholding tax on compensation in the amount of P2,278,563.92 both for the taxable year 2002.
>
> The issues raised in this case will be discussed in seriatim.
>
> ***A. Deficiency Expanded Withholding Tax***
>
> Respondent assessed petitioner for deficiency expanded withholding tax, inclusive of increments, in the amount of P10,815,409.63 (sic), computed as follows:
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> | | |
> |---|---|
> | Basic Tax Due | P6,689,944.09 |
> | Add: 20% Interest (01.16.03 to 02.16.06) | 4,125,465.54 |
> | | -------------- |
> | **Total Amount Due** | **P10,815,409.63** |
> | | ============ |
>
> Respondent alleged that petitioner failed to subject to expanded withholding tax certain income payments, pursuant to Section 2.57.2 of Revenue Regulations No. 2-98. The disallowed income payments are presented below:

Income Payments	**Per F/S/IT**	**Per 1601-E**	**Discrepancy**	**Rate**	**EWT Due**
Professional Fees	P 7,906,618.00	P 286,568.60	P 7,620,049.40	10%	P 762,004.94
Payment to Subcontractors (Subcontracted Labor)	1,701,263,050.00	1,422,121,948.50	279,141,101.50	2%	5,582,822.03

Security Expenses	15,939,041.00		15,939,041.00	2%	318,780.82
Rental of Equipment	4,126,726.00		4,126,726.00	5%	206,336.30
TOTAL	**P 1,729,235,435.00**	**P1,422,408,517.10**	**P306,826,917.90**		**P6,869,944.09**[11]

1. *Professional Fees*

Petitioner argues that respondent's finding is incorrect. For this item of the FAN, respondent compared some expense accounts on the Financial Statements (FS) as against the expenses subject to expanded withholding tax per BIR Form 1601-E. As a result of such comparison, it was alleged that petitioner has deficiency taxes.

Petitioner explains that the discrepancy of P7,620,049.40 represents payments made to general professional partnerships which are not subject to withholding tax.

Records reveal that the professional fees in the amount of P7,906,618.00 were derived from the total amount of P15,701,124.74 per general ledger (GL). For financial statement purposes, this account was reclassified as follows:

Charged to Operating Expense	P7,907,232.82
Charged to Cost of contracts — Subcontracted labor	7,793,891.92
Total	**P15,701,124.74**

Petitioner asserts that out of the total amount of P15,701,124.74, P2,482,908.93 represents payments to general professional partnerships (GPPs) which are exempt from withholding tax; while for the remaining amount of P13,218,215.81, petitioner either withheld 10% in the case of payments to consultants, or 2% in the case of payments to maintenance services.

Verification disclosed that of the alleged payment to GPPs, only the amount of P1,475,764.00 can be considered as professional fees exempt from expanded withholding taxes. The remaining amount of P1,007,144.93, as presented in detail below, should be subjected to ten percent (10%) expanded

[11] Erroneously indicated as P6,689,944.09 in the Formal Letter of Demand and Assessment Notice.

withholding tax for petitioner's failure to substantiate the same with proper supporting documents.

Supplier/Payee	Exhibit	Amount	Remarks
Abello Concepcion Regala & Cruz Law office		P 245,284.93	No supporting documents
Joaquin Cunanan & Co.	QQQ-1-a-9	180,000.00	No proof that the payment made was indeed for professional fee
Emil Lamprea	RRR-3-a-41	140.00	No proof that the payment made was indeed for professional fee
SGV & Co.	QQQ-1-a-40	290,000.00	No proof that the payment made was indeed for professional fee
SGV & Co.		291,720.00	No supporting documents
Total		**P 1,007,144.93**	

Moreover, the remaining amount of P13,218,215.81 allegedly subjected to 10% and 2% withholding taxes, this court finds that petitioner was not able to fully remit the withholding taxes due thereon. Presented herein below is the additional deficiency withholding tax on professional fee of P67,458.02 due from petitioner.

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In sum, the deficiency withholding tax on professional fees amounts to P168,172.51, broken down as follows:

Withholding tax due on the unsubstantiated payments to GPPs (P1,007,144.93 x 10%)	P100,714.49
Additional Withholding tax subject to 2% and 10% rates	67,458.02
Total deficiency withholding tax on professional fees	**P168,172.51**

2. *Security Expenses*

Based on records, the "Security Guard Cost" per GL amounting to P15,939,040.80 was reflected in the ITR/FS of the petitioner as follows:

Charged to Operating Expense	P8,932,139.00
Charged to Cost of contracts – Subcontracted labor	7,006,902.00
Total	**P15,939,041.00**

The "Security Guard Cost" amount of P15,939,041.00 represents payments made to the following security agencies for the security services rendered:

Supplier	Amount
Core Watchmen Security & Detective Agency	P12,508,339.07
Discovery Tours, Inc.	99,334.07
Philippine Aviation Security Services Corp	2,754,875.13
St. Anthony Security & Protective Agency	576,492.52
Total	**P15,939,040.79**

According to respondent, petitioner failed to withhold and remit in full the amount of P318,780.82 representing withholding tax due on the said security expenses of P15,939,041.00, pursuant to Section 2.57.2 of RR No. 2-98.

In its protest letter, petitioner argued that the company properly withheld tax/es on its income payments to security agencies, and that respondent failed to take into consideration that in the BIR Form 1601-E, these expenses were included in the payment to prime contractors/subcontractors.

A scrutiny of the schedule of expanded withholding taxes supporting petitioner's BIR Form 1601-E or the Monthly Remittance Return of Creditable Income Taxes Withheld (Expanded), for the period January to December 2002, reveals that petitioner made certain remittances pertaining to "Security Guard Cost" which were, indeed, included in the payment to prime contractors/subcontractors leaving the amount of P3,327,977.43, with the corresponding expanded withholding tax of P66,559.55, unremitted, computed as follows:

Payee	Exhibit No.	Amount	Rate	EWT Due

Core Watchmen Security & Detective Agency	PPP-1-27	P 931,850.75	2%	P 18,637.02
Core Watchmen Security & Detective Agency	PPP-1-28	931,850.75	2%	18,637.02
Core Watchmen Security & Detective Agency	PPP-1-29	179,690.88	2%	3,593.82
Discovery Tours, Inc	PPP-1-30	99,334.07	2%	1,986.68
Philippine Aviation Security Services Corp.	PPP-1-41	179,690.88	2%	3,593.82
Philippine Aviation Security Services Corp	PPP-1-44	173,894.40	2%	3,477.89
Philippine Aviation Security Services Corp.	PPP-1-45	173,894.40	2%	3,477.89
Philippine Aviation Security Services Corp.	PPP-1-46	639,800.57	2%	12,796.01
St. Anthony Security & Protective Agency	PPP-1-69	17,970.73	2%	359.41
Total		**P3,327,977.43**		**P 66,559.55**

Hence, petitioner's deficiency withholding tax on security expenses amounts only to P66,559.55.

3. *Rental of Equipment*

An examination of petitioner's ITR/FS shows that the total rent amounts to P8,268,452.00, broken down as follows:

Rent-COS	P	4,126,726.00
Rent-OE		4,141,726.00
Total Rent	**P**	**8,268,452.00**

On the other hand, the balance of the rent account per General Ledger amounts to P8,253,452.64 which, for financial statement purposes, was reclassified as follows:

Charged to Operating Expenses	P 4,126,726.00
Charged to Rental of Equipment used in Construction	4,126,726.00
Total Rent	**P 8,253,452.00**

Transactions charged to this account are mainly amortization of rentals which were allegedly paid and subjected to withholding tax upon prepayment.

The discrepancy of P15,000.00 between the ITR/FS and the GL amounts is attributed to the rental classified in the GL as Land and Housing Cost of P30,000.00 (P15,000.00) of which is under the Other contract costs, while the other P15,000.00 was charged to Rental of equipment used in construction, both under Cost of Contracts per ITR/FS).

The amount of P8,268,452.00 may be further broken down as follows:

Prior Years Rent Amortized in Year 2002			
Adrian Ocampo	P	590,526.30	
Angelita Lhuiller		634,800.00	
Elizabeth Kassiri		92,630.00	
Emmanuel Ledesma		720,000.00	
Jerry Chang		57,900.00	
JTL Development Corp.		630,000.00	
Manuel Quiogue		748,000.00	
Margarita Properties		886,930.00	
Roberto Ramiscal		852,210.51	
Ma. Cassandra Tankiang		175,000.00	P5,387,996.81
2002 Rent			
Angelita Lhuiller		634,800.00	
Elizabeth Kassiri		441,000.00	
Emmanuel Ledesma		396,000.00	
Irene Siopongco		631,578.95	
Margarita Properties		177,386.00	
Roberto Ramiscal/ Anna Belinda Ramiscal		447,530.88	
KSA Realty Corporation		137,160.00	
Metro Parking Management (Phils.), Inc.		15,000.00	2,880,455.83
Total	**P**		**8,268,452.64**

Aside from the amortizations of rentals under the "Rent Account," the following pertains to rentals classified under various accounts:

Renting Cost for Temporary Work Use		
Integrated Waste Management	RRR-28-a-3 to 14; RRR-1-a-35	P1,520,403.01
Land and House Renting Cost		
Metro Parking Management Corp.		15,000.00
Other Temporary works		
Siemens Fujihaya Consortium	RRR-2-a-25	450,000.00
Total		**P1,985,403.01**

The foregoing rentals are subject to five percent (5%) expanded withholding tax pursuant to Section 2.57.2(C) of Revenue Regulations No. 2-98. Likewise, the prepayments on the rentals (unexpired portion of rentals paid in year 2002) amounting to P2,077,033.85, as detailed below, are subject to 5% expanded withholding tax:

Suspense Payment (Prepaid Rent)

KSA Realty Corp.	P 583,011.00
KSA Realty Corp.	274,320.00
Irene Siopongco	100,000.00
Angelita Lhuiller	317,400.00
Margaritta Properties, Inc.	354,772.00
Anna Belinda Ramiscal	447,530.85
Total	**P 2,077,033.85**

Thus, the expanded withholding tax pertaining to rentals amounts to P616,544.48, computed as follows:

	Tax Base	**Rate**	**Tax Due**
Prior Years Rent Amortized in Year 2002	P5,387,996.81	5%	P269,399.84
2002 Rent	2,880,455.83	5%	144,022.79
Suspense Payment (Prepaid Rent)	2,077,033.85	5%	103,851.69
Renting Cost for Temporary Work	1,520,403.01	5%	76,020.15

Use			
Land and House Renting Cost	15,000.00	5%	750.00
Other Temporary works	450,000.00	5%	22,500.00
Total	**P12,330,889.50**		**P 616,544.48**

On the other hand, petitioner was able to show that it withheld the corresponding 5% withholding tax of P300,337.28 on its rental payment of P6,006,754.60.

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In addition, the tax of P73,820.50 was also properly withheld on the tax rate of 5% but reflected in the Monthly Remittance Return as withholding on payments made to prime contractors/subcontractors, accounted as follows:

xxx xxx xxx

The Court-Commissioned Independent CPA, Ms. Myra Celeste Dabalos, in her supplemental Report stamped received by this Court on April 15, 2008, states that:

> "We verified whether the amount of rental amortized were already subjected to withholding tax upon prepayment by examining the vouchers evidencing payment of rent and tracing the amount of tax withheld to the schedules attached to the withholding tax return to ascertain that the tax withheld has been remitted."

Indeed, for the prepayments of rentals made in year 2002, the corresponding taxes were withheld and remitted to the BIR. However, for the prepayments of rentals made in prior years which were amortized during the year 2002 in the amount of P5,387,996.81, no proof of withholding and remittance thereof was presented before this Court. Petitioner presented only the payment vouchers pertaining to the amortizations, but such are not conclusive proof that the corresponding taxes thereon were actually withheld and remitted to the BIR.

In sum, this court finds that petitioner fell short in remitting the expanded withholding tax due on rentals in the amount of P242,386.25, computed as follows:

Expanded Withholding Tax Due		**P616,544.48**	
Less:	Tax Withheld		
	Tax Withheld classified under rentals	P300,337.73	
	Tax Withheld classified under prime contractors/subcontractors	73,820.50	374,158.23
Deficiency Expanded Withholding Tax on Rentals			**P242,386.25**

4. *Payment to Subcontractors (Subcontracted Labor)*

The P279,141,101.50 discrepancy on payment to subcontractors was arrived at by comparing the subcontracted labor cost per ITR/FS as against the payments made to prime contractors/sub-contractors as per BIR Form 1601-E. However, the amount of P1,422,121,948.50 used by respondent in comparison with the subcontracted labor cost per ITR/FS is in fact not limited to such account, *i.e.*, it also includes other income payments such as, but not limited to, payments for professional fees, rentals and security services to certain contractors, which were subjected to withholding tax but were classified as payments to prime contractors/sub-contractors as per BIR Form 1601-E.

On the other hand, records show that subcontracting cost per financial statements amounts to P1,701,263,050.00, the breakdown of which is presented under Exhibit "UU." Although generally most of the transactions recorded in this account is subject to 2% EWT, some of the components of this account are subject to 5% EWT such as in the case of renting cost for temporary work use or 10% EWT such as in the case of professional fees (already accounted for under the titles Rental of Equipment and Professional Fees). The same account also includes payments to joint ventures such as Siemens Fuji Haya, and to non-residents such as Lufthansa Systems Infratec GMBH which were subjected to final tax.

Moreover, the tax base per BIR Form 1601-E of P1,422,121,948.50 appears to be incorrect. Although the correct amount of tax withheld was remitted, the tax base was erroneously computed. For instance, for the month of

September 2002, Legal Information Network Corp. rendered services for the petitioner. Instead of reflecting a tax base of P209,120.00 (P20,912.00/.10) under professional fee, the BIR Form 1601-E reflected a tax base of P1,045,600.00 (P20,912.00/.02) under subcontractors. This resulted in an overstatement in the tax base for the payment to subcontractors account while understating the tax base for the professional fees.

Thus, by verifying the transactions based on the supporting schedules and available supporting documents, this court finds that the deficiency expanded withholding tax on subcontracted labor amounts only to P1,445,668.76, details of which are presented in Annex B of this Decision.

In sum, petitioner is liable to pay the deficiency expanded withholding taxes in the amount of P1,922,787.07, computed as follows:

Income Payments		EWT Due
Professional Fees	P	168,172.51
Security Expenses		66,559.55
Rental of Equipment		242,386.25
Payment to Subcontractors (Subcontracted Labor)		1,445,668.76
TOTAL	**P**	**1,922,787.07**

B. *Deficiency Withholding Tax on Compensation*

Pursuant to Section 79(A) of the NIRC of 1997 and Section 2.78 of Revenue Regulations No. 2-98, respondent assessed petitioner of deficiency withholding tax on compensation amounting to **P2,278,563.92**, inclusive of interest, computed as follows:

Salaries and Wages Claimed per FS/ITR:		
Salaries and Other Employees Benefits-OE	P15,334,664.00	
Salaries and Other Employees Benefits-COS	91,662,543.00	P 106,997,207.00
Salaries and Wages Per Alphalist:		
Employees Terminated Before	15,768,526.26	

Dec. 31		
Foreign Employees Terminated	20,689,463.50	
Employees with No Previous Employer	20,983,354.59	
Foreign Employees with No Previous Employer	43,982,807.40	101,424,151.75
Discrepancy on Salaries and Wages		**P 5,573,055.25**
Multiply by Percentage of Tax Compliance		
Tax Due/Total Taxable Compensation		
(P24,166,890.99/P95,924,759.03)		25.19%
Withholding Tax Due Thereon		**1,403,852.62**
Add: Underemitted Withholding Tax:		
Tax Withheld per Alphalist	24,172,459.35	
Tax Remitted per Returns	24,166,890.99	5,568.36
Basic Deficiency Withholding Tax		**1,409,420.98**
Add: 20% Interest (01.16.03 to 02.16.06)		869,142.94
Total Amount Due		**P 2,278,563.92**

Petitioner asserts that it properly withheld taxes on all its salaries and wages subject to withholding tax on compensation. Petitioner argues that the BIR examiner did not take into consideration the fact that there are some employee benefits that are not subjected to withholding taxes but nonetheless included in the account title Salaries and Wages in the FS.

Based on the petitioner's FS, the 'Salaries and other employee benefits' account consisted of the following:

Salaries & other employee benefits COS			
Salaries and wages	P	88,392,476.00	
Termination pay		2,338,342.00	
Bonuses & 13th month pay		931,725.00	P 91,662,543.00

Salaries & other employee benefits OE		
Salaries and wages	8,840,006.00	
Termination pay	247,740.00	
Bonuses & 13th month pay	977,354.00	
SSS, Medicare, ECC and HDMF	1,250,555.00	
Reversal of Provision for termination benefit	(752,545.00)	
Other employee benefits (FB)	4,771,554.00	15,334,664.00
Total		**P106,997,207.00**

Of the above amount, petitioner claims that payments for SSS, Medicare, ECC and HDMF; reversal of provision for termination benefit; other employee benefits and a portion of bonuses & 13th month pay are non-taxable compensation, which amount to P5,573,055.25 — the same amount subjected by respondent to deficiency withholding tax on compensation, to wit:

SSS, Medicare, ECC and HDMF	P	1,250,555.00
Reversal of Provision for termination benefit		(752,545.00)
Other employee benefits (FB)		4,771,554.00
Bonuses & 13th month pay		303,491.25
Non-taxable compensation	**P**	**5,573,055.25**

Verification of records shows that petitioner failed to sufficiently substantiate its stand.

Contributions remitted to SSS, Medicare (Philhealth) and Pag-ibig are excluded from the computation of taxable income, thus, not subject to withholding tax. Section 32(B)(7)(f) of the NIRC of 1997 provides:

> *SEC. 32. Gross Income. —*
>
> xxx xxx xxx
>
> (B) *Exclusions from Gross Income.* — The following items shall not be included in gross income and shall be exempt from taxation under this title:
>
> xxx xxx xxx
>
> (7) *Miscellaneous Items.* —

xxx xxx xxx

(f) *GSIS, SSS, Medicare and Other Contributions.* — GSIS, SSS, Medicare and Pag-ibig contributions, and union dues of individuals.

However, petitioner failed to present any supporting source document that will prove actual remittance of the P1,250,555.00 contributions to SSS, Philhealth and Pag-ibig.

As for the Other Employee/Fringe Benefits in the amount of P4,771,554.00, under Section 33(A) of the NIRC of 1997, the gross-up monetary value of fringe benefit furnished or granted to the employee (except rank and file employees) by the employer, whether an individual or a corporation, is subject to final tax. On the other hand, the same provision of the Code also provides that fringe benefits which are "required by the nature of, or necessary to the trade, business or profession of the employer, or when the fringe benefit is for the convenience or advantage of the employer" are not subject to the fringe benefit tax. In some instances, there are fringe benefits that are not taxable as provided for in Section 33(C) of the NIRC of 1997.

Based on the records, it can be surmised that the Other Employee/Fringe Benefits of P4,771,554.00 claimed by petitioner as non-taxable are those benefits falling under Section 33(C) of the NIRC of 1997. However, petitioner failed to establish that the fringe benefits granted are indeed not subject to tax, as it did not present any document to support such claim. Thus, we are constrained to include the same to salaries and wages subject to tax on compensation.

With reference to the amount of P303,491.25, it cannot be ascertained if the same, indeed, pertains to non-taxable bonuses & 13th month pay granted to employees, in the absence of any supporting document.

In sum, for petitioner's failure to present documentary proof to substantiate the alleged non-taxable compensation of P5,573,055.25, the respondent's assessment for deficiency withholding tax on compensation in the amount of

P1,409,420.98 shall be upheld."[12]

After a careful consideration of the factual milieu in the case at bench, the Court sitting *En Banc* finds no reason to depart from the Court in Division's ruling.

However, this Court deems it proper to further discuss the issues raised by petitioner.

Anent the first issue, reopening of a case is not merely rooted on the interest of justice but rest within the sound discretion of the Court. And the Court cannot simply relax the rules without justifiable grounds as held by the Supreme Court in the case of *Republic of the Philippines vs. The Hon. Sandiganbayan*,[13] to wit:

> "xxx Admission of additional evidence is addressed to the sound discretion of the trial court. Indeed, in the furtherance of justice, the court may grant the parties the opportunity to adduce additional evidence bearing upon the main issue in question. The remedy of reopening a case for presenting further proofs was meant to prevent a miscarriage of justice.
>
> While it is true that the 1997 Rules of Civil Procedure, as amended, prescribed an order of trial (Section 5, Rule 30), relaxation of the rule is permitted in sound discretion of the court. According to Justice Jose Y. Feria in his annotations on civil procedure:
>
>> After the parties have produced their respective direct proofs, they are allowed to offer rebutting evidence only, but, it has been held, the court, **for good reasons** in the furtherance of justice, may permit them to offer evidence upon their original case, and its ruling will not be disturbed in the appellate court where no abuse of discretion appears. So, generally, **additional evidence is allowed when it is newly discovered, or where it has been omitted through inadvertence or mistake, or where the purpose of**

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[12] *Rollo*, pp. 39-55.
[13] G.R. No. 159275, August. 25, 2010, 629 SCRA 55.

the evidence is to correct evidence previously offered."

Based from the foregoing, some of the justifiable grounds are: (1) newly discovered evidence; (2) where it has been omitted through inadvertence or mistake; and (3) where the purpose is to correct evidence previously offered.

In the instant case, the basis of petitioner for reopening the case is the second (2nd) ground.

However, a perusal of the records reveals that there was no proof presented by petitioner to bolster its allegation. Mere allegation is not evidence.[14]

Since no proof was presented, this Court cannot subscribe to petitioner's allegations that withholding taxes due on Professional Fees in the amount of Php67,458.02; Security Expenses in the amount of Php66,559.55; Rental of Equipment in the amount Php242,386.25; and Payments to Subcontractors in the amount of Php1,445,668.76, were properly withheld.

Anent the second issue, petitioner failed to present any supporting document that will substantiate its claim that it actually remitted contributions to SSS, Philhealth and Pag-ibig, and that its payment for "Other Employee/Fringe Benefits (FB)" and "Bonuses & 13th month pay" were non-taxable.

Moreover, this Court is not precluded in seeking further evidence in order to verify petitioner's Audited Financial Statement as the documents submitted by a CPA are still subject to verification and comparison with the original documents.[15] In addition, the finding of the CPA is not conclusive upon the Courts. Thus, any documents presented by the CPA such as the Audited Financial Statements are subject to verification.

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[14] *Sarona vs. NLRC, Royale Security Agency (Formerly Sceptre Security Agency) and Cesar Tan*, G.R. No. 185280, January 18, 2012, 663 SCRA 394.

[15] Sec. 3. *Findings of independent CPA.* – The submission by the independent CPA of pre-marked documentary exhibits shall be subject to verification and comparison with the original documents, the availability of which shall be the primary responsibility of the party possessing such documents and, secondarily, by the independent CPA. The findings and conclusions of the independent CPA may be challenged by the parties and shall not be conclusive upon the Court, which may, in whole or in part, adopt such findings and conclusions subject to verification.

Also, We cannot agree on petitioner's view that the burden of proof shifted to respondent, as tax assessments by tax examiners are presumed correct and made in good faith, and all presumptions are in favor of the correctness of a tax assessment unless proven otherwise.[16] Hence, the duty to disprove that assessment was irregularly made rest on petitioner.

Finally, anent the third issue, the law is clear, the imposition of deficiency interests and delinquency interests can be simultaneous pursuant to Sections 249(A)(B)(C) of the 1997 NIRC, as amended, to wit:

> "SEC. 249. *Interest.* –
>
> (A) *In General* – There shall be assessed and collected on any unpaid amount of tax, interest at the rate of twenty percent (20%) per annum, or such higher rate as may be prescribed by rules and regulations, from the date prescribed for payment until the amount is fully paid.
>
> (B) *Deficiency Interest* – Any deficiency in the tax due, as the term is defined in this Code, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof.
>
> (C) *Delinquency Interest* – In case of failure to pay:
>
> (1) The amount of the tax due on any return required to be filed, or
>
> (2) The amount of the tax due for which no return is required, or
>
> (3) A deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner, there shall be assessed and collected on the unpaid amount, interest at the rate prescribed in Subsection (A) hereof until the amount is fully paid, which interest shall form part of the tax."

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[16] CIR vs. Gonzalez, G.R. No. 177279, October 13, 2010, 633 SCRA 139.

Based from the foregoing, there is a difference in the basis of imposition and when these interests accrue.

As to its imposition, in deficiency interest, it is imposed on the unpaid tax until the deficiency is fully paid, while in delinquency interest it is imposed on the failure to pay (i) the amount of tax due on any return required to be filed, (ii) the amount of tax due for which no return is required, or (iii) deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner.[17]

As to when the interests legally accrue, in deficiency interest, it is on any deficiency tax assessed "from the date prescribed for its payment until the full payment thereof"; while the assessment of the delinquency interest is imposed upon failure to pay a deficiency tax, or any surcharge or interest thereon reckoned from "the due date appearing in the notice and demand of the Commissioner until the amount is fully paid."[18]

Henceforth, deficiency interests in Section 249(B) and delinquency interests in Section 249(C)(3) are separate and distinct from each other. Therefore, petitioner could not possibly pay forty percent (40%) interests.

In sum, the Court *En Banc* finds no cogent reason to rule the contrary.

WHEREFORE, premises considered, the Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the Decision and Resolution dated August 25, 2011 and December 16, 2011, respectively, are hereby **AFFIRMED** in toto.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

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[17] *Ibid.*
[18] Section 249(B) and (C)(3) of the NIRC of 1997, as amended.

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

(On Leave)
AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13 of Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of this Court.

ROMAN G. DEL ROSARIO
Presiding Justice