REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION
****

ASIAN TRANSMISSION CORPORATION, Petitioner,	**CTA Case No. 8366**
	Members:
- versus -	**DEL ROSARIO,** P.J., **UY,** and **MINDARO-GRULLA,** JJ.
COMMISSIONER OF INTERNAL REVENUE, Respondent.	***Promulgated:*** MAR 16 2016; 1:13 p.m.

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DECISION

UY, J.:

This is a Petition for Review filed by Asian Transmission Corporation on November 3, 2011 against the Commissioner of Internal Revenue, praying for the issuance of a ruling that it is not liable for deficiency withholding tax on compensation in the amount of ₱17,725,818.59 for taxable year 2001.

THE FACTS

Petitioner Asian Transmission Corporation is a corporation duly organized and existing under Philippine laws with business address at Carmelray Industrial Park, Canlubang, Calamba City, Laguna. It was organized and registered with the Securities and Exchange Commission on January 29, 1973.[1]

Respondent is the Commissioner of the Bureau Internal Revenue (BIR) with office address at BIR National Office Building,

[1] Par. 6, Summary of Admitted Facts, Joint Stipulation of Facts and Issues (JSFI), Docket – Vol. I, p. 314.

Agham Road, Diliman, Quezon City.[2]

In June 2003, petitioner received the Letter of Authority (LOA) No. 00002564 dated June 11, 2003, informing it that certain revenue officers from the Large Taxpayers Audit and Investigation Division I of the BIR have been authorized to examine its books of accounts and other accounting records for the taxable year 2001.[3]

On November 20, 2003, petitioner, through a certain Mr. Roderick M. Tan, who is designated as VP-Personnel & Legal, executed a *Waiver of the Defense of Prescription Under the Statute of Limitations of the National Internal Revenue Code*.[4]

On December 9, 2003, petitioner received another LOA bearing No. 2000-00003516 dated December 1, 2003, informing it of the continuation of the investigation against it to be conducted by Revenue Officers L. Nagrampa / R. Ariola under Group Supervisor E. Formalejo.[5]

Petitioner further executed, again through Mr. Tan, *Waivers of the Defense of Prescription Under the Statute of Limitations of the National Internal Revenue Code* on the following dates: September 8, 2004,[6] March 3, 2005,[7] November 10, 2005,[8] March 21, 2006,[9] November 16, 2006,[10] April 18, 2007,[11] and October 25, 2007.[12]

Thereafter, respondent, through Nestor S. Valeroso, Assistant Commissioner, Large Taxpayers Service, issued an undated

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[2] Par. 1, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 313.
[3] Par. 2, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 313.
[4] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibit "19", BIR Records, p. 1564; and Exhibit "U", Docket – Vol. II, p. 764.
[5] Par. 7, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 314.
[6] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibit "18", BIR Records, p. 1566; and Exhibit "V", Docket – Vol. II, p. 765.
[7] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibit "17", BIR Records, p. 1569; and Exhibit "W", Docket – Vol. II, p. 766.
[8] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibit "16", BIR Records, p. 1571; and Exhibit "X", Docket – Vol. II, p. 767.
[9] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibit "15", BIR Records, p. 1577; and Exhibit "Y", Docket – Vol. II, p. 768.
[10] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibits "14" and "Z", BIR Records, p. 1939.
[11] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibits "13" and "OO", BIR Records, p. 2033.
[12] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibits "12" and "PP", BIR Records, p. 2038.

Preliminary Assessment Notice (PAN),[13] assessing petitioner of the following deficiency taxes, including increments, to wit:

Type of Tax	Amount
Income Tax	₱ 40,391,143.31
Value-added Tax	₱ 3,544,074.43
Expanded Withholding Tax	₱ 1,476,211.94
Withholding Tax on Compensation	₱ 15,834,400.65

On April 25, 2007, respondent, again through Mr. Valeroso, issued the Formal Letter of Demand, with accompanying Assessment Notices,[14] assessing petitioner of the following deficiency taxes, including increments, to wit:

Type of Tax	Amount
Income Tax	₱ 42,148,723.36
Value-added Tax	₱ 3,694,074.43
Expanded Withholding Tax	₱ 1,544,343.61
Withholding Tax on Compensation	₱ 15,632,797.59

Consequently, on June 14, 2007, petitioner filed its Protest addressed to Mr. Valeroso, assailing the above-stated assessments, and requesting for the cancellation thereof.[15] Petitioner likewise filed its Supplemental Protest addressed to the Chief of the Large Taxpayers Service, on August 13, 2007.[16]

On July 15, 2008, petitioner received a copy of the undated Final Decision on Disputed Assessment (FDDA), containing the decision of the BIR, signed by Olivia O. Lao, OIC-Head Revenue Executive Assistant (Excise), Large Taxpayers Service, finding the Protest and Supplemental Protest filed by petitioner unmeritorious.[17]

Subsequently, on July 24, 2008, petitioner paid the amount of ₱1,751,201.23, representing alleged deficiency withholding tax liability for the year 2001.[18] Apparently, this payment corresponds to the assessment for the Expanded Withholding Tax.[19]

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[13] Exhibit "D", Docket – Vol. II, pp. 606 to 611.
[14] Exhibits "E" and "F-1" to "F-4", Docket – Vol. II, pp. 612 to 620.
[15] Exhibits "G", Docket – Vol. II, pp. 621 to 631.
[16] Exhibits "H", Docket – Vol. II, pp. 641 to 650.
[17] Par. 3, Summary of Admitted Facts, JSFI, Docket – Vol. I, pp. 313 to 314.
[18] Par. 4, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 314.
[19] Exhibit "I", Docket – Vol. II, p. 655.

Nonetheless, petitioner appealed the said FDDA directly to respondent on August 14, 2008, requesting for the reconsideration and/or cancellation of the deficiency withholding tax on compensation issued against petitioner for taxable year 2001.[20]

On July 1, 2011, respondent issued her Decision on petitioner's administrative appeal, denying petitioner's request for reconsideration and ordering petitioner to pay the amount of ₱17,775,818.59, representing deficiency Withholding Tax on Compensation for taxable year 2001.[21]

Petitioner filed the instant Petition for Review on November 3, 2011, or after three (3) years, two (2) months, three (3) weeks and one (1) day from receipt of the said FDDA signed by Ms. Olivia O. Lao.[22]

Respondent filed her Answer[23] on December 2, 2011, interposing the following special and affirmative defenses:

> "6. Respondent reiterates and re-pleads the preceding paragraphs of this Answer as part of her Special and Affirmative Defenses.
>
> 7. Petitioner Asian Transmission Corporation, is liable to pay its deficiency withholding taxes for calendar year 2001 in the total amount of Seventeen Million Seven Hundred Seventy-Five Thousand Eight Hundred Eighteen Pesos and 59/100 (PhP17,775,818.59) including penalties and interests for the following reasons:
>
> 7.1 The instant petition should not be given due course by this Honorable Court for lack of jurisdiction. Respondent humbly submits that the instant petition is bereft of merit for being filed out of time.
>
> 7.2 Indubitably, the FDDA issued by respondent was received by petitioner on July 13, 2008. The pertinent portion of the FDDA is quoted hereunder, *to wit*:
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> xxx xxx xxx

[20] Exhibits "K", Docket – Vol. II, pp. 661 to 666.
[21] Exhibits "T", Docket – Vol. II, pp. 756 to 763.
[22] Par. 11, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 316.
[23] Docket – Vol. I, pp. 163 to 181.

> It is requested that your aforesaid deficiency tax be paid immediately upon receipt hereof, inclusive of penalties incident to delinquency. **This is our final decision. If you disagree, you may appeal this decision with the Court of Tax Appeals within thirty (30) days from receipt hereof**, otherwise our said deficiency tax assessment shall become final, executory and demandable.' *(Emphasis supplied)*

It is clear from the above-quoted portion of the FDDA that petitioner only had until August 12, 2008 within which to file its Petition for Review to the Honorable Court of Tax Appeals. Petitioner only filed the instant petition before the Honorable Court on November 3, 2011 or after 3 years 2 months 3 weeks and 1 day from receipt of respondent's adverse decision (*i.e.* FDDA). Section 228 of the NIRC of 1997 succinctly provides that if the administrative protest is denied in whole or in part, the **taxpayer adversely affected by the decision may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision**. Hence, the instant petition was filed beyond the reglementary period provided under the Tax Code.

7.3 Even assuming that petitioner's alleged administrative appeal dated August 14, 2008 from the receipt of the adverse decision to the Commissioner of Internal Revenue to be genuine, still, such allegation does not change the fact that petitioner's right to appeal to the Honorable Court of Tax Appeals had long been prescribed. It bears stressing that a **motion for reconsideration**, in this case petitioner's alleged appeal dated August 14, 2008, **of the denial of the administrative protest does not toll the 30-day period to appeal to the CTA**. Thus, the Honorable Supreme Court in the case of ***Fishwealth Canning Corporation vs. Commissioner of Internal Revenue*** had the occasion to rule that:

> 'In the case at bar, **petitioner's administrative protest was denied by Final Decision on Disputed Assessment** dated August 2, 2005 issued by respondent and which petitioner received on August 4, 2005. Under the above-quoted Section 228 of the 1997 Tax Code, **petitioner had 30 days to appeal respondent's denial of its protest to the CTA.**
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> Since petitioner received the denial of its administrative protest on August 4, 2005, it had until

> September 3, 2005 to file a petition for review before the CTA Division. It filed one, however, on October 20, 2005, hence, it was filed out of time. For a **motion for reconsideration of the denial of the administrative protest does not toll the 30-day period to appeal to the CTA**.' *(Emphasis supplied; Underscoring in the original)*

Based on the aforementioned considerations, respondent respectfully submits that the Honorable Court has no jurisdiction to rule upon the instant petition. While the right to appeal a decision of the Commissioner to the Court of Tax Appeals is merely a statutory remedy, nevertheless the requirement that it must be brought within 30 days is **jurisdictional**. If a statutory remedy provides as a condition precedent that the action to enforce it must be commenced within a prescribed time, such requirement is jurisdictional.

In fine, the failure to comply with the 30-day statutory period would bar the appeal and deprive the Court of Tax Appeals of its jurisdiction to entertain and determine the correctness of the assessment.

8. Assuming arguendo that petitioner's right to appeal respondent's adverse decision has not yet prescribed, respondent respectfully avers that the assessment for taxable year 2001 in the amount of Php17,775,818.59 was issued in accordance with law and regulations.

8.1 Comprehensive study of petitioner's books of accounts and pertinent accounting records disclosed that it is liable to pay the total deficiency withholding tax assessment. The complete details of the discrepancies established during the investigation of petitioner's case as embodied in respondent's Final Decision on Disputed Assessment ('FDDA', for brevity) are quoted as follows:

'xxx xxx xxx xxx

> Referring to your letter dated June 14, 2007, please be informed that after evaluation of the arguments raised therein in support of your protest against our deficiency tax assessment for the taxable year 2001 in the amount of P61,246,092.43, the subject matter of our covering Formal Letter of Demand dated April 25, 2007, there is still found due from you deficiency tax, computed as follows:

Tax Type	Basic Tax	Surcharge	Interest	Compromise	Total
W/Tax on Compensation	P7,669,421.27	-	10,056,397.32	50,000.00	17,775,818.59
Expanded Withholding Tax	749,037.99	-	982,163.24	20,000.00	1,751,201.23
Total	**8,418,459.26**		**11,038,560.56**	**70,000.00**	**19,527,019.82**

The above assessment is premised on the following:

I. WITHHOLDING TAX ON COMPENSATION

1. Discrepancy on salaries subjected to withholding tax vs. per FS- P23,966,941.48

The above claimed amount represents unaccounted salaries as a result of the reconciliation between the compensation per audited financial statement and the alphalist, hence, assessed pursuant to Sections 79 and 80 of the same Tax Code.

II. EXPANDED WITHHOLDING TAX

1. Income payments not subjected to Expanded Withholding Tax – P37,424.565.10

Income payments subjected to creditable withholding tax under Revenue Regulations No. 2-98 were identified in order to ascertain the correctness of the amount withheld and remitted to BIR. The result of such examination and verification revealed that the subject taxpayer failed to withhold expanded withholding tax on income payments amounting to P37,424,565.10, hence, assessed a deficiency expanded withholding tax amounting to P749,037.99 (excluding increments) pursuant to Section 57(B) of the National Internal Revenue Code.

It is requested that your aforesaid deficiency tax be paid immediately upon receipt hereof, inclusive of penalties incident to delinquency. This is our final decision. If you disagree, you may appeal this decision with the Court of Tax Appeals within 30 days from receipt hereof, otherwise our said deficiency tax assessment shall become final, executory and demandable.'

Corollary thereto, the Decision rendered by the Commissioner of Internal Revenue in response to petitioner's request for reconsideration of the decision denying its protest is hereunder quoted, *to wit*:

'xxx xxx xxx

The issues to be resolved are:

1. Whether or not ATC is liable for deficiency withholding tax on compensation in the amount of P17,775,818.59 based on the discrepancy on salaries subjected to withholding tax and the amount of salaries reported in the Financial Statements.

2. Whether or not ATC is liable for deficiency expanded withholding tax in the amount of P1,751,201.23.

This Office after thoroughly reviewing the facts of the case and the applicable laws and jurisprudence pertinent thereto, finds the herein request for reconsideration bereft of merit.

The pertinent provisions in this case are Section 79 and Section 80 of the National Internal Revenue Code (Tax Code) of 1997, as amended, which provide:

Section 79. Income tax Collected at Source.-

(A) Requirement of Withholding. **Except in the case of a minimum wage earner as defined in Section 22 (HH) of this Code**, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with, the rules and regulations to be prescribed by the Secretary of Finance, upon recommendation of the Commissioner.

(B) Tax Paid by Recipient.- if the employer, in violation of the provisions of this Chapter, fails to deduct and withhold the tax as required under this Chapter, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer; but this Subsection shall in no case relieve the employer from liability for any penalty or addition to the tax otherwise applicable in respect of such failure to deduct and withhold.

Section 80. Liability of Tax-

(A) Employer- The employer shall be liable for the withholding and remittance of the correct amount of tax required to be deducted and withheld under this Chapter. If the employer fails to withhold and remit the correct amount of tax as required to be withheld under the provision of this Chapter, such tax shall be collected from the employer together with the penalties or additions to the tax otherwise applicable in respect to such failure to withhold and remit.

Briefly, the law says that every employer making payment of wages shall deduct and withhold upon such wages a tax in accordance with the rules and regulations to be prescribed by the Secretary of Finance, upon recommendation of the Commissioner.

The employer is responsible for the withholding and remittance of the correct amount of tax required to be deducted from the salaries and/or wages of its employees under the Tax Code.

The purpose of the withholding of the tax on wages is designed to ensure the collection at source of income tax on wages. What is required to be withheld is not a new tax but the income tax on individual taxpayers imposed under Section 24(A) of the Tax Code. The employer is constituted as the withholding agent.

In the instant case, evidence shows that there was a discrepancy on salaries subjected to withholding tax. ATC's total salaries reported per Financial Statement/Income Tax Return was P231,225,153.00 while the total salaries reported per Alphalist was only P207,258,211.52, thus, resulting to a discrepancy in the amount of P23,966,941.48. Per audit and verification of the investigating examiners, said amount of P23,966,941.48 represents ATC's unaccounted salaries as a result of the reconciliation between the compensation per audited Financial Statements and alphalist.

Though ATC contended that the examiners did not include in their analysis termination pay it made during the year which was classified under Employee's Benefits in the audited Financial Statements in the aggregate amount of P7,281,409.79, nevertheless, ATC failed to substantiate by clear and convincing evidence its contention. The termination pay classified under employees benefits amounting to P7,281,409.79 was not presented in the Audited Financial Statements as opposed to what the taxpayer is claiming. Consequently, such amount cannot be considered by the investigating examiners since it was neither presented in the Financial Statements nor in the Income Tax Return.

As regards to ATC's argument that the total salaries and wages expense account reflected in its Financial Statements for the taxable year 2001 amounted to P238,506,562.86 of which the taxable year 2001 amounted to P238,506,562.86 of which P31,248,351.27 represented non-compensation items which are not subject to withholding tax, this Office does not agree. The non-compensation items were reported as part of the direct labor, salaries and wages per Cost of Goods Sold. If these items were non-compensatory in nature why would ATC include such items in the direct labor? Also, ATC should have provided a schedule enumerating these non-compensation items to support its claim.

Therefore, ATC's unsupported argument cannot prevail over the result of the investigation made by the assigned investigating examiners. There was indeed a discrepancy on ATC's salaries per Financial Statements and alphalist which must be subjected to withholding tax. Thus, the assessment on deficiency withholding tax is proper.

xxx xxx xxx

With regard to the assessment on deficiency expanded withholding tax, ATC paid the amount of P1,751,201,23 on July 24, 2008 as evidenced by payment form 0605. Consequently, the deficiency withholding tax liability in the amount of P1,751,201.23 is hereby extinguished while the deficiency withholding tax on compensation in the amount of P17,775,818.59 is sustained.

IN VIEW WHEREOF, ATC's request for reconsideration of the decision denying its protest is hereby DENIED. The assessment demanding payment of the amount of P17,775,818.59 as deficiency withholding tax on compensation for the taxable year 2001 is hereby AFFIRMED in all respects. Consequently, ATC is hereby ordered to pay the aforestated amount to the Large Taxpayers-Collection and Enforcement Division,

> BIR National Office, Diliman, Quezon City within thirty (30) days from receipt hereof; otherwise, collection thereof shall be effected through the summary remedies provided by law. *(Emphasis in the original)*
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> xxx xxx xxx'

8.2 In case of disputed assessments, the burden of proof is on the taxpayer to establish the fact that it is indeed not liable for any deficiency taxes subject of the assessment. The failure to show documents that would substantiate a claim that no deficiency taxes are due, would result to upholding the validity of the assessment for deficiency income taxes (***Càmara Steel Industries, Inc. vs. Commissioner of Internal Revenue)***.

8.3 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 the 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***). Dereliction on the part of petitioner to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notices.

Petitioner is estopped from assailing the validity of the waiver with respect to the assessment of its deficiency withholding tax.

9. Indubitably, petitioner is now questioning the validity of the waiver for the first time on appeal. It is clear from the records of the case that petitioner did not raise the issue of the validity of the waiver in its alleged letter protest nor did it raise the said defense in its alleged Supplemental Protest.

10. Moreso, it is worth stressing that petitioner immediately paid the amount of Php1,751,201.23 representing its assessed deficiency Expanded

Withholding Tax on July 24, 2008 or 1 week 4 days from the time it received a copy of the Final Decision on Disputed Assessment, a fact which is undeniably admitted by petitioner in its Petition for Review.

11. Respondent humbly submits that petitioner's act of paying its assessed Expanded Withholding Tax as reflected in the Formal Letter of Demand and the Final Decision on Disputed Assessment now renders petitioner estopped to question the validity of the waiver. Thus, the Honorable Supreme Court eloquently ruled in this wise:

> 'xxx xxx xxx
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> Under Article 1431 of the Civil Code, the doctrine of estoppel is anchored on the rule that 'an admission or representation is rendered conclusive upon the person making it, and cannot be denied or disproved as against the person relying thereo.' A party is precluded from denying his own acts, admissions or representations to the prejudice of the other party in order to prevent fraud and falsehood.
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> Estoppel is clearly applicable to the case at bench. RCBC, **through its partial payment of the revised assessments issued within the extended period as provided for in the questioned waivers, impliedly admitted the validity of those waivers. Had petitioner truly believed that the waivers were invalid and that the assessments were issued beyond the prescriptive period, then it should not have paid the reduced amount of taxes in the revised assessment. RCBC's subsequent action effectively belies its insistence that the waivers are invalid.** The records show that on December 6, 2000, upon receipt of the revised assessment, RCBC immediately made payment on the uncontested taxes. Thus, RCBC is estopped from questioning the validity of the waivers. To hold otherwise and allow a party to gainsay its own act or deny rights which it had previously recognized would run counter to the principle of equity which this institution holds dear.11 (Emphasis supplied)
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> xxx xxx xxx'"

On December 13, 2011, petitioner filed its Reply,[24] arguing the following:

[24] Docket – Vol. I, pp. 226 to 236.

Its Petition for Review was filed with this Court on time;

1) It can raise the issue on the invalidity of the waiver even for the first time on appeal; and

2) It cannot be held in estoppel from raising the invalidity of the waiver.

Thereafter, on December 20, 2011, the Court issued a Notice of Pre-Trial Conference addressed to the parties.[25] Thus, petitioner filed its Pre-Trial Brief on January 10, 2012,[26] while respondent filed her Pre-Trial Brief on January 17, 2012.[27]

The parties submitted their Joint Stipulation of Facts and Issues (JSFI) on February 27, 2012,[28] and the Supplemental JSFI on April 10, 2014.[29] On April 13, 2012, the Court approved both the said JSFI and the Supplemental JSFI and terminated the pre-trial.[30] A Pre-Trial Order, with the conformity of the parties, was likewise issued by this Court on June 18, 2012.[31]

During trial, the parties presented and formally offered their respective documentary and testimonial evidence.

In the Resolution dated July 3, 2014,[32] the Court ordered the parties to submit their respective memorandum. Thus, on September 23, 2014, petitioner filed its Memorandum;[33] while on September 29, 2014, respondent filed her Memorandum.[34]

The case was submitted for decision on March 16, 2015.[35]

Hence, this Decision.

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[25] Docket – Vol. I, p. 238.
[26] Docket – Vol. I, pp. 242 to 253.
[27] Docket – Vol. I, pp. 266 to 273.
[28] Docket – Vol. I, pp. 313 to 318.
[29] Docket, pp. 334 to 341.
[30] Resolution dated April 13, 2012, Docket – Vol. I, p. 343.
[31] Docket – Vol. I, pp. 377 to 392.
[32] Docket – Vol. II, pp. 1076 to 1077.
[33] Docket – Vol. II, pp. 1126 to 1169.
[34] Docket – Vol. II, pp. 1194 to 1225.
[35] Docket – Vol. II, p. 1264

THE ISSUES

The parties submitted the following stipulated issues[36] for this Court's resolution, to wit :

"1. Whether or not the *Waivers of the Defense of Prescription Under the Statute of Limitations of the National Internal Revenue Code* validly extended the government's right to assess deficiency taxes against the petitioner.

2. Whether or not the right of the government to issue the challenged assessment has already prescribed.

3. Whether the instant petition was filed out of time.

4. Whether or not petitioner is liable for the deficiency withholding taxes for calendar year 2001 in the total amount of Seventeen Million Seven Hundred Seventy-Five Thousand Eight Hundred Eighteen Pesos and Fifty-Nine Centavos (PhP17,775,818.59) including penalties and interests.

5. Whether or not ATC failed to substantiate by clear and convincing evidence its position that a substantial portion of the salaries and expense accounts reflected in its Financial Statements for the year 2001 in the amount of PhP31,248,351.27 represented non-compensation items and whether the same is subject to withholding tax.

6. Whether or not the BIR examiners erred in not including in their analysis the termination pay benefits granted by the petitioner to some of its employees in the amount of PhP7,281,409.79 despite being included under the item 'Employees' Benefits' in its Financial Statements for the year 2001.

7. Whether or not the Honorable Court has jurisdiction over the instant petition.

8. Whether or not the petitioner's act of paying alleged deficiency withholding tax as reflected in the Final

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[36] JSFI, Docket – Vol. I, pp. 316 to 317.

> Decision on Disputed Assessment a few days after receipt thereof renders the petitioner estopped from questioning the validity of the waiver."

Petitioner's arguments:

Petitioner argues that this Court has jurisdiction over the instant Petition for Review, for being timely filed.

Furthermore, according to petitioner, the government's right to issue the assailed assessments had prescribed since these were made beyond the three-year prescriptive period. In this connection, petitioner points out that the alleged waivers of prescriptive period do not bind petitioner, since the person who executed these waivers was never authorized to do so; and that the said waivers are void since these were never validly notarized, and failed to comply with the requirements of Revenue Memorandum Order (RMO) No. 20-90 and Revenue Delegation Authority Order (RDAO) No. 05-01.

Finally, petitioner asserts that there was neither notice of informal conference nor an informal conference held which renders the assessment null and void.

Respondent's counter-arguments:

Respondent contends that the waivers are valid in all respect. According to respondent, petitioner is estopped from assailing the validity of the waivers with respect to the assessments of its deficiency withholding taxes.

In addition, respondent avers that the withholding tax is not an internal revenue tax but is only a system used to collect income tax in advance and thus, the period within which to assess finds no application in the present case. Respondent then points out that petitioner was not assessed for internal revenue taxes directly related in the operations of its business, but for its liability as withholding agent.

Lastly, respondent stresses that petitioner is liable to pay its deficiency withholding taxes for calendar year 2001 in the total amount of ₱17,775,818.59.

THE COURT'S RULING

The instant Petition for Review is partly meritorious.

Considering that the third and seventh issues raised by the parties involve the jurisdiction of this Court, the same shall be primarily dealt with.

This Court has jurisdiction.

Jurisdiction is the power or capacity given by the law to a court or tribunal to entertain, hear and determine certain controversies. Jurisdiction over the subject matter is conferred by law.[37]

Section 228 of the National Internal Revenue Code (NIRC) of 1997 confers jurisdiction upon this Court with regard to decisions of the respondent on disputed assessments, to wit:

> "SEC. 228. *Protesting of Assessment.*— xxx
>
> xxx xxx xxxx
>
> 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 <u>within thirty (30) days from receipt of the said decision</u>, or from the lapse of the one hundred eighty (180)-day period**; otherwise, the decision shall become final, executory and demandable." *(Emphasis and underscoring supplied)*

In relation thereto, Section 11 of Republic Act (RA) No. 1125,[38] as amended by RA No. 9282,[39] read as follows:

> "SEC. 11. *Who May Appeal; Mode of Appeal; Effect*

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[37] *Dela Cruz vs. Court of Appeals, et al.*, G.R. No. 139442, December 6, 2006.

[38] AN ACT CREATING THE COURT OF TAX APPEALS.

[39] AN ACT EXPANDING THE JURISDICTION OF THE COURT OF TAX APPEALS (CTA), ELEVATING ITS RANK TO THE LEVEL OF A COLLEGIATE COURT WITH SPECIAL JURISDICTION AND ENLARGING ITS MEMBERSHIP, AMENDING FOR THE PURPOSE CERTAIN SECTIONS OF REPUBLIC ACT NO. 1125, AS AMENDED, OTHERWISE KNOWN AS THE LAW CREATING THE COURT OF TAX APPEALS, AND FOR OTHER PURPOSES.

> *of Appeal.*— **Any party adversely affected by a decision, ruling or inaction of the Commissioner of Internal Revenue, xxx may file an appeal with the CTA within thirty (30) days after the receipt of such decision or ruling or after the expiration of the period fixed by law** for action as referred to in Section 7(a)(2) herein.
>
> xxx xxx xxx." *(Emphasis and underscoring supplied)*

It is clear from the foregoing provisions that the party adversely affected by a decision or ruling of the Commissioner of Internal Revenue may file an appeal with this Court **within thirty (30) days from receipt of the said decision or ruling**. This 30-day period within which to file an appeal is jurisdictional and failure to comply therewith would bar the appeal and deprive this Court of its jurisdiction to entertain and determine the correctness of the assessments. Such period is not merely directory but mandatory and it is beyond the power of the courts to extend the same.[40]

In this connection, Section 3.1.5 of Revenue Regulations No. 12-99[41], which has the force of law and is entitled to great weight,[42] reads:

> "3.1.5 Disputed Assessment. — xxx
>
> xxx xxx xxx
>
> In general, if the protest is denied, in whole or in part, by the Commissioner of Internal Revenue or his duly authorized representative, the taxpayer may appeal to the Court of Tax Appeals within thirty (30) days from the 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**

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40 *Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue*, G.R. No. 168498, April 24, 2007.

41 SUBJECT: Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extrajudicial Settlement of a Taxpayer's Criminal Violation of the Code through Payment of a Suggested Compromise Penalty.

42 Refer to *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue*, G.R. No. 159490, February 18, 2008.

> **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.**" *(Emphasis supplied)*

In this case, petitioner appealed the Decision dated July 1, 2011 issued by respondent herself, as Commissioner of Internal Revenue. This is clear in one of the prayers of petitioner in the instant Petition for Review, to wit:

> "4. The Decision dated 01 July 2011 of the respondent be set aside and that this Honorable Court rule that the petitioner is not liable to the deficiency withholding tax on compensation in the amount of PhP17,725,818.59;"[43]

Contrary to respondent's stance, the said Decision dated July 1, 2011 is the decision appealable to this Court, and not the FDDA issued and signed by Ms. Olivia O. Lao, OIC-Head Revenue Executive Assistant (Excise), Large Taxpayers Service of the BIR, for the latter's decision cannot be considered as final, executory, and demandable, since petitioner's protest was elevated on August 14, 2008[44] to respondent within thirty (30) days from receipt of the said FDDA, *i.e.*, on July 15, 2008[45].

Correspondingly, since the instant Petition for Review was filed within thirty (30) days from receipt of respondent's Decision dated July 1, 2011,[46] this Court has jurisdiction.

Finding that this Court has jurisdiction, it shall proceed to determine whether the Waivers executed by petitioner validly extended the government's right to assess the subject deficiency withholding tax on compensation.

Exception to the rule that when a waiver does not comply with the requisites for its validity, it is invalid and ineffective.

[43] Docket – Vol. I, pp. 29 to 30.
[44] Exhibits "K", Docket – Vol. II, p. 661.
[45] Par. 3, Summary of Admitted Facts, JSFI, Docket – Vol. I, pp. 313 to 314.
[46] Exhibits "S" and "T", Docket – Vol. II, pp. 756 to 763.

Sections 203 and 222 of the NIRC of 1997 state the periods of limitation of the assessment and collection of taxes, to wit:

> "SEC. 203. *Period of Limitation Upon Assessment and Collection.* — Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day."
>
> "SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collections of Taxes.*—
>
> (a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: *Provided*, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.
>
> (b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.
>
> xxx xxx xxx."

Section 203 of the NIRC of 1997 mandates the government to assess internal revenue taxes within three (3) years from the last day prescribed by law for the filing of the tax return or the actual date of filing of such return, whichever comes later. Hence, an assessment notice issued after the three-year prescriptive period is no longer valid and effective.

Respondent, however, contends that Section 203 of the NIRC of 1997 is not applicable to withholding tax assessments.

We do not agree.

The law does distinguish whether it should apply only to a particular type of assessment. When the law does not distinguish, neither should We.[47] Furthermore, in a number of cases,[48] the Supreme Court has already applied Section 203 of the NIRC of 1997 involving withholding tax assessments. Thus, there can be no merit to respondent's contention.

Be that as it may, as already stated, exceptions are provided under Section 222 of the NIRC of 1997,[49] to the period of limitation stated in Section 203 thereof, to wit: (1) in the case of a false or fraudulent return with intent to evade tax or of failure to file a return, and (2) when the three-year period is extended upon a valid written agreement between the Commissioner of Internal Revenue and the taxpayer executed before the expiration thereof.

The *"valid written agreement"* referred to in the second exception is commonly known as a *"waiver of the statute of limitations"*, which is defined as *"an agreement between the taxpayer and the BIR that the period to issue an assessment and collect the taxes due is extended to a date certain."*[50]

In this case, petitioner executed eight (8) waivers of the statute of limitations on the following dates: November 20, 2003;[51] September 8, 2004;[52] March 3, 2005;[53] November 10, 2005;[54] March

[47] *Soloil, Inc. vs. Philippine Coconut Authority*, G.R. No. 174806, August 11, 2010.

[48] *Philippine Journalist, Inc. vs. Commissioner of Internal Revenue,* G.R. No. 162852, December 16, 2004; *Commissioner of Internal Revenue vs. FMF Development Corporation,* G.R. No. 167765, June 30, 2008; *Commissioner of Internal Revenue vs. Kudos Metal Corporation,* G.R. No. 178087, May 5, 2010.

[49] *Commissioner of Internal Revenue vs. Kudos Metal Corporation,* supra.

[50] *Philippine Journalist, Inc. vs. Commissioner of Internal Revenue*, supra.

[51] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibit "19", BIR Records, p. 1564; and Exhibit "U", Docket – Vol. II, p. 764.

[52] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibit "18", BIR Records, p. 1566; and Exhibit "V", Docket – Vol. II, p. 765.

[53] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibit "17", BIR Records, p. 1569; and Exhibit "W", Docket – Vol. II, p. 766.

[54] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibit

21, 2006;[55] November 16, 2006;[56] April 18, 2007;[57] and October 25, 2007.[58] However, petitioner argues that the subject waivers do not bind petitioner, since the person who executed the same was never authorized to do so; and that the said waivers are void since these were never validly notarized.

We disagree.

In *Commissioner of Internal Revenue vs. Kudos Metal Corporation*,[59] the Supreme Court said:

> "Section 222(b) of the NIRC provides that the period to assess and collect taxes may only be extended upon a written agreement between the CIR and the taxpayer executed before the expiration of the three-year period. RMO 20-90 issued on April 4, 1990 and RDAO 05-01 issued on August 2, 2001 lay down the procedure for the proper execution of the waiver, to wit:
>
> 1. The waiver must be in the proper form prescribed by RMO 20-90. The phrase 'but not after ______ 19____', which indicates the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription, should be filled up.
>
> 2. The waiver must be signed by the taxpayer himself or his duly authorized representative. In the case of a corporation, the waiver must be signed by any of its responsible officials. In case the authority is delegated by the taxpayer to a representative, such delegation should be in writing and duly notarized.
>
> 3. The waiver should be duly notarized.
>
> 4. The CIR or the revenue official authorized by him must sign the waiver indicating that the BIR has accepted

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"16", BIR Records, p. 1571; and Exhibit "X", Docket – Vol. II, p. 767.
[55] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibit "15", BIR Records, p. 1577; and Exhibit "Y", Docket – Vol. II, p. 768.
[56] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibits "19" and "Z", BIR Records, p. 1939.
[57] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibits "13" and "OO", BIR Records, p. 2033.
[58] Par. 10, Summary of Admitted Facts, JSFI, Docket – Vol. I, p. 315, vis-a-vis Exhibits "12" and "PP", BIR Records, p. 2038.
[59] Supra.

and agreed to the waiver. The date of such acceptance by the BIR should be indicated. However, before signing the waiver, the CIR or the revenue official authorized by him must make sure that the waiver is in the prescribed form duly notarized, and executed by the taxpayer or his duly authorized representative.

5. Both the date of execution by the taxpayer and date of acceptance by the Bureau should be before the expiration of the period of prescription or before the lapse of the period agreed upon in case a subsequent agreement is executed.

6. The waiver must be executed in three copies, the original copy to be attached to the docket of the case, the second copy for the taxpayer and the third copy for the Office accepting the waiver. The fact of receipt by the taxpayer of his/her file copy must be indicated in the original copy to show that the taxpayer was notified of the acceptance of the BIR and the perfection of the agreement."

It is mandated that the foregoing procedures should be **strictly** followed;[60] otherwise, the waiver shall be rendered defective and shall not extend the period to assess the tax. Nevertheless, there is an exception to this rule, as enunciated in the recent case of *Commissioner of Internal Revenue vs. Next Mobile, Inc.*[61] In the said case, the Supreme Court held:

"To be sure, both parties in this case are at fault.

Here, respondent, through *Sarmiento*, executed five Waivers in favor of petitioner. However, her authority to sign these Waivers was not presented upon their submission to the BIR. In fact, later on, her authority to sign was questioned by respondent itself, the very same entity that caused her to sign such in the first place. Thus, it is clear that respondent violated RMO 20-90 which states that in case of a corporate taxpayer, the waiver must be signed by its responsible officials and RDAO 01-05 which requires the presentation of a written and notarized authority to the BIR.

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[60] *Philippine Journalists, Inc. vs. Commissioner of Internal Revenue*, supra; Revenue Memorandum Order No. 20-90.
[61] G.R. No. 212825, December 7, 2015.

Similarly, the BIR violated its own rules and was careless in performing its functions with respect to these Waivers. It is very clear that under RDAO 05-01 it is the duty of the authorized revenue official **to ensure that the waiver is duly accomplished and signed by the taxpayer or his authorized representative** before affixing his signature to signify acceptance of the same. It also instructs that **in case the authority is delegated by the taxpayer to a representative, the concerned revenue official shall see to it that such delegation is in writing and duly notarized**. Furthermore, it mandates that **the waiver should not be accepted by the concerned BIR office and official unless duly notarized**.

Vis-à-vis the five Waivers it received from respondent, the BIR has failed, for five times, to perform its duties in relation thereto: to verify Ms. Sarmiento's authority to execute them, demand the presentation of a notarized document evidencing the same, refuse acceptance of the Waivers when no such document was presented, affix the dates of its acceptance on each waiver, and indicate on the Second Waiver the date of respondent's receipt thereof.

Both parties knew the infirmities of the Waivers yet they continued dealing with each other on the strength of these documents without bothering to rectify these infirmities. In fact, in its Letter Protest to the BIR, respondent did not even question the validity of the Waivers or call attention to their alleged defects.

In this case, respondent, after deliberately executing defective waivers, raised the very same deficiencies it caused to avoid the tax liability determined by the BIR during the extended assessment period. It must be remembered that by virtue of these Waivers, respondent was given the opportunity to gather and submit documents to substantiate its claims before the CIR during investigation. It was able to postpone the payment of taxes, as well as contest and negotiate the assessment against it. Yet, after enjoying these benefits, respondent challenged the validity of the Waivers when the consequences thereof were not in its favor. In other words, respondent's act of impugning these Waivers after benefiting therefrom and allowing petitioner to rely on the same is an act of bad faith.

On the other hand, the stringent requirements in RMO 20-90 and RDAO 05-01 are in place precisely because the BIR put them there. Yet, instead of strictly enforcing its provisions, the BIR defied the mandates of its very own issuances. Verily, if the BIR was truly determined to validly assess and collect taxes from respondent after the prescriptive period, it should have been prudent enough to make sure that all the requirements for the effectivity of the Waivers were followed not only by its revenue officers but also by respondent. The BIR stood to lose millions of pesos in case the Waivers were declared void, as they eventually were by the CTA, but it appears that it was too negligent to even comply with its most basic requirements.

The BIR's negligence in this case is so gross that it amounts to malice and bad faith. Without doubt, the BIR knew that waivers should conform strictly to RMO 20-90 and RDAO 05-01 in order to be valid. In fact, the mandatory nature of the requirements, as ruled by this Court, has been recognized by the BIR itself in its issuances such as Revenue Memorandum Circular No. 6-2005, among others. Nevertheless, the BIR allowed respondent to submit, and it duly received, five defective Waivers when it was its duty to exact compliance with RMO 20-90 and RDAO 05-01 and follow the procedure dictated therein. It even openly admitted that it did not require respondent to present any notarized authority to sign the questioned Waivers. The BIR failed to demand respondent to follow the requirements for the validity of the Waivers when it had the duty to do so, most especially because it had the highest interest at stake. If it was serious in collecting taxes, the BIR should have meticulously complied with the foregoing orders, leaving no stone unturned.

<u>The general rule is that when a waiver does not comply with the requisites for its validity specified under RMO No. 20-90 and RDAO 01-05, it is invalid and ineffective to extend the prescriptive period to assess taxes. However, due to its peculiar circumstances, We shall treat this case as an exception to this rule and find the Waivers valid for the reasons discussed below.</u>

First, the parties in this are in pari delicto or 'in equal fault.' *In pari delicto* connotes that the two parties to a controversy are equally culpable or guilty and they shall have no action against each other. However, although the parties are *in pari delicto*, the Court may interfere and grant relief at the suit of one of them, where public policy requires its intervention, even though the result may be that a benefit will be derived by one party who is in equal guilt with the other.

Here, to uphold the validity of the Waivers would be consistent with the public policy embodied in the principle that taxes are the lifeblood of the government, and their prompt and certain availability is an imperious need. Taxes are the nation's lifeblood through which government agencies continue to operate and which the State discharges its functions for the welfare of its constituents. As between the parties, it would be more equitable if petitioner's lapses were allowed to pass and consequently uphold the Waivers in order to support this principle and public policy.

Second, the Court has repeatedly pronounced that parties must come to court with clean hands. Parties who do not come to court with clean hands cannot be allowed to benefit from their own wrongdoing. Following the foregoing principle, respondent should not be allowed to benefit from the flaws in its own Waivers and successfully insist on their invalidity in order to evade its responsibility to pay taxes.

Third, respondent is estopped from questioning the validity of its Waivers. While it is true that the Court has repeatedly held that the doctrine of estoppel must be sparingly applied as an exception to the statute of limitations for assessment of taxes, the Court finds that the application of the doctrine is justified in this case. Verily, the application of estoppel in this case would promote the administration of the law, prevent injustice and avert the accomplishment of a wrong and undue advantage. Respondent executed *five* Waivers and delivered them to petitioner, one after the other. It allowed petitioner to rely on them and did not raise any objection against their validity until petitioner assessed taxes and penalties against it. Moreover, the application of estoppel is necessary to prevent the undue injury that the government would suffer because of the cancellation of petitioner's assessment of respondent's tax liabilities.

> *Finally*, the Court cannot tolerate this highly suspicious situation. In this case, the taxpayer, on the one hand, after voluntarily executing waivers, insisted on their invalidity by raising the very same defects it caused. On the other hand, the BIR miserably failed to exact from respondent compliance with its rules. The BIR's negligence in the performance of its duties was so gross that it amounted to malice and bad faith. Moreover, the BIR was so lax such that it seemed that it consented to the mistakes in the Waivers. Such a situation is dangerous and open to abuse by unscrupulous taxpayers who intend to escape their responsibility to pay taxes by mere expedient of hiding behind technicalities.
>
> It is true that petitioner was also at fault here because it was careless in complying with the requirements of RMO No. 20-90 and RDAO 01-05. Nevertheless, petitioner's negligence may be addressed by enforcing the provisions imposing administrative liabilities upon the officers responsible for these errors. The BIR's right to assess and collect taxes should not be jeopardized merely because of the mistakes and lapses of its officers, especially in cases like this where the taxpayer is obviously in bad faith." *(Underscoring supplied)*

The foregoing case is on all-fours with, and thus, must be applied to, the instant case.

On one hand, petitioner denies ever having authorized Mr. Roderick M. Tan to sign the subject Waivers. It even points out that the said Waivers were **not** notarized. Upon the other hand, it is apparent that respondent failed to ensure that the said Waivers were duly accomplished and signed by petitioner's duly authorized representative. Neither did she make certain that the same Waivers were duly notarized.

Just as in the above-quoted *Next Mobile* case, the parties are likewise *in pari delicto*, and have not come to this Court with clean hands. Furthermore, petitioner is estopped from questioning the validity of the subject waivers since it is the same entity which caused the invalidity thereof. Finally, taking this Court's bearing from the High Court's ruling, this highly suspicious situation should not be tolerated.

Thus, this Court finds that the subject waivers are valid, and have extended the right of the government to assess petitioner of the subject withholding tax on compensation. Correspondingly, the Court shall proceed to determine whether petitioner is liable therefor.

Petitioner's withholding tax liability.

In respondent's Decision dated July 1, 2011,[62] the deficiency withholding tax on compensation amounting to ₱17,775,818.59 as per the FDDA was sustained by respondent, showing the following details[63]:

Basic Tax	₱ 7,669,421.27
Surcharge	-
Interest	10,056,397.32
Compromise	50,000.00
Total	**₱17,775,818.59**

The above deficiency arose from the ₱23,966,941.48 discrepancy found by respondent upon comparison of the compensation reflected per petitioner's audited financial statements (FS) and per alphalist. Respondent treated the discrepancy as unaccounted salaries and allowances and assessed the corresponding deficiency withholding tax on compensation pursuant to Sections 79 and 80 of the NIRC of 1997. Below is the detailed computation of the discrepancy and the deficiency withholding tax on compensation, to wit:[64]

Per audited FS/ITR		
Direct labor		₱ 34,625,756.00
Salaries, wages and bonuses		153,205,583.00[65]
Salaries and allowances		43,393,814.00[66]
		₱231,225,153.00[67]
Less: Per alphalist		
Non-taxable	₱32,163,409.32	
Taxable	175,094,802.20	207,258,211.52
Discrepancy		**₱23,966,941.48**

[62] Exhibit "T", Docket – Vol. II, pp. 756 to 763.
[63] Exhibit "J", Docket – Vol. II, p. 657.
[64] Formal Letter of Demand (FLD), Exhibit "E", Docket – Vol. II, pp. 612 to 620.
[65] ₱34,625,756.00 + ₱153,205,583.00 = ₱187,831,339.00, Note 11 of AFS, Exhibit "LL-1".
[66] Line 77, Section E, AITR, BIR Folder I, p. 1964.
[67] Exhibit "32", BIR Folder I, p. 1860.

Tax rate		32%
Basic deficiency compensation withholding tax due		**₱ 7,669,421.27**

Petitioner refutes said assessment averring that out of the amount of ₱238,506,562.86 which represents its total salary and wage expense account as reflected in its audited FS for the year 2001, ₱31,248,351.27 of which represents non-compensation items not subject to withholding taxes under the NIRC, hence, were not included in the alphalist. As such, no discrepancy allegedly exists.

According to petitioner, the BIR examiners grievously erred in failing to compare the amounts reflected in petitioner's alphalist to that portion of salary and wage expense account which forms part of the compensation expenses subject to withholding tax.[68]

Further, petitioner posits that respondent's examiners failed to include in their analysis termination pay made during the year which was classified under Employees' Benefits in the audited FS in the aggregate amount of ₱7,281,409.79.[69]

The Court-commissioned Independent Certified Public Accountant (ICPA), Mr. Joseph Peter Anthony Ayson, noted that the total non-taxable compensation amounting to ₱31,248,351.27, as claimed by petitioner, is higher than the discrepancy assessed amounting to ₱23,966,941.48 by ₱7,281,409.79. The difference ties up with the termination pay as indicated in the preceding paragraph, but was assumed not to be included in respondent's assessment.[70]

However, for purposes of his examination, the ICPA substantiated the whole amount of ₱31,248,351.27, broken down as follows:[71]

Accounts	Amount
Hospitalization Company Contribution	₱3,565,810.25
Group Insurance	376,157.69
SSS Contribution	3,642,154.30
Medicare Contribution	593,881.25
Employee Compensation Insurance	62,840.00
Pag-ibig Contribution	645,680.00

[68] Pars. 60 and 61, Petitioner's Memorandum, Docket -- Vol. II, p .1162.
[69] Supplemental Protest to the FLD, Exhibit "H", Docket – Vol. II, p. 647.
[70] Q&A No. 11, Judicial Affidavit of Mr. Joseph Peter Anthony Ayson, Exhibit "MM", Docket – Vol. II, p. 774.
[71] Q&A No. 9(iii), *Id.* at p. 773.

Rice	3,098,891.74
Employee Uniform	1,156,534.39
Retirement Plan Contribution	17,459,628.63
Canteen Allowance	301,977.38
Maintenance Expense	156,660.42
Tools Expense	188,135.22
TOTAL	**₱31,248,351.27**

The nature of the above items, as found by the ICPA,[72] are summarized as follows:

Accounts	**Nature**
Hospitalization Company Contribution	Employer's share on the monthly membership premium under petitioner's health care program
Group Insurance	Employer's share on the monthly membership premium under petitioner's group insurance plan
SSS Contribution	Employer's share in mandatory monthly SSS contribution
Medicare Contribution	Employer's share in mandatory monthly Philhealth contribution
Employee Compensation Insurance	Employer's share in mandatory monthly SSS contribution
Pag-ibig Contribution	Employer's share in mandatory Pag-ibig contribution
Rice	9 sacks per year per covered employee under the CBA for Non-Supervisory Labor Union as well as all other regular managerial and supervisory employees and other staff not covered in the CBAs 10 sacks per year per covered employee under the CBA for Bisig Asian Transmission Labor Union
Employee Uniform	Uniform items or sets per year per covered employee under the CBA for Non-Supervisory Labor Union and CBA for Bisig Asian Transmission Labor Union and all other regular managerial and supervisory employees and other staff not covered in the CBAs
Retirement Plan Contribution	Petitioner's contribution to its Retirement Plan
Canteen Allowance	Daily meal allowance of P35.00 per day on all regular managerial employees
Maintenance Expense	none
Tools Expense	none

The supporting documents to substantiate the above items are the following:[73]

Description	**Exhibits (inclusive of sub-markings)**
Statements of account, official receipts, vouchers and other supporting documents for Hospitalization Company Contribution	AA-1 to 11
Official receipts, vouchers and other supporting documents for Group Insurance	BB-1 to 16
SSS special bank receipts, contribution payment return (R-5), check vouchers and other supporting documents for SSS Contribution and Employee Compensation Insurance	CC-1 to 12
Contribution payment return (ME-5), vouchers and other supporting documents for Medicare Contribution	DD-1 to 12

[72] ICPA Report, Exhibit "NN", Docket – Vol. II, pp. 782 to 785.
[73] *Id.* at pp. 779 to 780.

Official receipts, vouchers and other supporting documents for Pag-ibig Contribution	EE-1 to 12
Invoices, official receipts, check vouchers and other supporting documents for Rice	FF-1 to 23
Invoices, official receipts, check vouchers and other supporting documents for Employee Uniform	GG-1 to 18
Acknowledgment receipts, check vouchers and other supporting documents for Retirement Plan Contribution	HH-1 to 5
Vouchers, petty cash vouchers and other supporting documents for Canteen Allowance	II-1 to 12
Collective Bargaining Agreement (CBA) for Non-Supervisory Labor Unit	KK-1
CBA for Bisig ng Asian Transmission Labor Unit	KK-2

Based on the submitted supporting documents, the ICPA found that petitioner is liable for deficiency withholding tax on compensation in the amount of ₱337,673.89 on the unsubstantiated amount of ₱1,055,230.90[74]:

Accounts	Contested Amount	Verified Amount	Difference	WT Rate	WT Due
Hospitalization Company Contribution	₱3,565,810.25	₱3,345,258.50	₱220,551.75	32%	₱70,576.56
Group Insurance	376,157.69	335,035.28	41,122.41	32%	13,159.17
SSS Contribution	3,642,154.30	3,621,197.10	20,957.20	32%	6,706.30
Medicare Contribution	593,881.25	584,431.25	9,450.00	32%	3,024.00
Employee Compensation Insurance	62,840.00	62,840.00	-	32%	-
Pag-ibig Contribution	645,680.00	639,164.00	6,516.00	32%	2,085.12
Rice	3,098,891.74	2,962,900.00	135,991.74	32%	43,517.36
Employee Uniform	1,156,534.39	1,244,314.55	-	32%	-
Retirement Plan Contribution	17,459,628.63	17,392,689.85	66,938.78	32%	21,420.41
Canteen Allowance	301,977.38	93,070.00	208,907.38	32%	66,850.36
Maintenance Expense	156,660.42	-	156,660.42	32%	50,131.33
Tools Expense	188,135.22	-	188,135.22	32%	60,203.27
TOTAL	**₱31,248,351.27**	**₱30,280,900.53**[75]	**₱1,055,230.90**		**₱337,673.89**

This Court, however, does not totally agree with the foregoing findings.

Section 2.78.1 of Revenue Regulations (RR) No. 02-98, as amended by RR Nos. 08-00 and 10-00, states the following:

> "SECTION 2.78.1. *Withholding of Income Tax on Compensation Income.* — **The withholding of tax on**

[74] Page 9, ICPA Report, Exhibit "NN", Docket – Vol. II, p. 786.

[75] Pertains to correct footing of the amounts. Total per ICPA Report only amounted to ₱30,263,135.61 due to wrong footing.

compensation income is a method of collecting the income at source **upon receipt of the income**. It applies to all employed individuals whether citizens or aliens, deriving income from compensation for services rendered in the Philippines. The employer is constituted as the withholding agent.

(A) *Compensation Income Defined.* — In general, the term 'compensation' means all remuneration for services performed by an employee for his employer under an employer-employee relationship, unless specifically excluded by the Code.

xxx xxx xxx

(2) Living quarters or meals. — If a person receives a salary as remuneration for services rendered, and in addition thereto, living quarters or meals are provided, the value to such person of the quarters and meals so furnished shall be added to the remuneration paid for the purpose of determining the amount of compensation subject to withholding. However, **if living quarters or meals are furnished to an employee for the convenience of the employer, the value thereof need not be included as part of compensation income.**

(3) *Facilities and privileges of relatively small value.* — Ordinarily, facilities and privileges (such as entertainment, medical services, or so-called "courtesy discounts" on purchases), otherwise known as "de minimis benefits," furnished or offered by an employer to his employees, are not considered as compensation subject to income tax and consequently to withholding tax, if such facilities are offered or furnished by the employer merely as means of promoting the health, goodwill, contentment, or efficiency of his employees.

The following shall be considered as **'de minimis' benefits not subject to withholding tax on compensation** income of both managerial and rank and file employees: x x x

(c) **Rice subsidy** of P1,000.00 or one (1) sack of 50-kg. rice per month amounting to not more than P1,000.00.

(d) **Uniforms and clothing allowance** not exceeding P3,000.00 per annum; x x x

(j) **Daily meal allowance** for overtime work **not exceeding twenty five percent (25%) of the basic minimum wage.**

xxx xxx xxx

(B) ***Exemptions from withholding tax on compensation.*** — The following income payments are exempted from the requirement of withholding tax on compensation:

xxx xxx xxx

> (12) **GSIS, SSS, Medicare and other contributions. — GSIS, SSS, Medicare and Pag-Ibig contributions, and union dues of individual employees.**" (*Emphases and underscoring supplied*)

Based on the foregoing provisions, it is clear that the withholding tax on compensation income is a method of collecting the income at source *"upon receipt of the income"*. Income, in turn, is defined, and the elements for the imposition of income tax thereon is stated, in *Commissioner of Internal Revenue vs. Court of Appeals, et al.*,[76] as follows:

> "xxx. **Income in tax law is an amount of money <u>coming to a person</u> within a specified time**, whether as payment for services, interest, or profit from investment. It means cash or its equivalent. It is gain derived and severed from capital, from labor or from both combined xxx.
>
> xxx xxx xxx
>
> The three (3) elements in the imposition of income tax are: (1) there must be gain or profit, (2) **<u>that the gain or profit is realized or received, actually or constructively</u>**, and (3) it is not exempted by law or treaty from income tax. xxx."

Thus, unless specifically exempted from withholding tax on compensation, for a compensation income to be subjected thereto, the said income must *"come to the person"* or must be realized or received by the same person, *"actually or constructively"*. In this connection, there is constructive receipt, when the consideration for the articles sold, exchanged or leased, or the services rendered has already been placed under the control of the person who sold the goods or rendered the services without any restriction by the payor.[77]

In applying the foregoing rules, the burden of proof rests on petitioner. In appeals to this Court, the determination of respondent is presumed correct and it behooves the taxpayers to rebut such presumption.[78]

In this case, considering that *SSS, Medicare, Pag-ibig Contributions and Employee Compensation Insurance* are income

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[76] G.R. No. 108576, January 20, 1999.

[77] *Ericsson Telecommunications, Inc. vs. City of Pasig, et al.*, G.R. No. 176667, November 22, 2007.

[78] *Tan Guan vs. Court of Tax Appeals, et al.*, G.R. No. L-23676, April 27, 1967.

payments specifically exempted by the above-quoted Section 2.78.1(B)(12) of RR No. 2-98, the Court finds that the same should not be subjected to withholding tax on compensation, detailed as follows:

Accounts	Verified Amount
SSS Contribution	₱3,621,197.10
Medicare Contribution	584,431.25
Employee Compensation Insurance	62,840.00
Pag-ibig Contribution	639,164.00
Total exempted contributions	**₱4,907,632.35**

Anent the other contributions, *i.e.*, *Hospitalization Company Contribution*, *Group Insurance*, and *Retirement Plan Contribution*, since the same are not specifically exempted from withholding tax on compensation, it must have been shown by petitioner that such contributions are not subject to the requirement of withholding tax on compensation. Specifically, petitioner should have established by clear and convincing evidence that said contributions were not realized or received, actually or constructively, by its employees. However, it failed to do so, and thus, the withholding tax assessment thereon must be sustained.

As cases filed before this Court are litigated *de novo*, party-litigants should prove **every minute aspect** of their cases.[79]

As for the *Rice Allowance*, petitioner's documents substantiating the same in the amount of ₱2,962,900.00 sufficiently established the fact of purchase of rice and the corresponding list of employees which were entitled for such benefit. Accordingly, the rice allowance given to each of petitioner's employees amounted to either ₱890 or ₱900 per month during 2001, well-within the threshold set forth in Section 2.78.1(A)(3)(c) of RR No. 02-98 as *de minimis* benefits. Thus, the *Rice Allowance* in the verified amount of ₱2,962,900.00 is exempt from withholding tax on compensation.

However, this Court cannot extend the same ruling on *Employee Uniforms*, since the documents presented by petitioner failed to prove the number/listing of employees which were given with

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[79] *Dizon vs. Court of Tax Appeals, et al.*, G.R. No. 140944, April 30, 2008; *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue,* G.R. No. 145526, March 16, 2007; and *Commissioner of Internal Revenue vs. Manila Mining Corporation,* G.R. No. 153204, August 31, 2005.

the uniforms, hence, the Court cannot verify whether said allowance was within the threshold per employee as set forth in the earlier quoted Section 2.78.1(A)(3)(d) of RR No. 2-98. We are then constrained to rule that the assessment on the deficiency withholding tax on compensation arising from the alleged *Employee Uniforms* must be upheld.

With regard to the *Canteen Allowance*, the same should likewise be subjected to withholding tax on compensation. This must be so because petitioner failed to prove that the *"meals"* were furnished *"for the convenience of the employer"*, as required by the above-quoted Section 2.78.1(A)(2) of RR No. 2-98, for the value thereof to be not included as part of compensation income. Moreover, there is no showing that the said amount represents *"daily meal allowance for overtime work"* considered as *de minimis* benefits under Section 2.78.1(A)(3)(j) of RR No. 2-98

As regards the *Maintenance and Tool Expenses* in the amounts of ₱156,660.42 and ₱188,135.22, respectively, petitioner neither presented any supporting documents, nor explained the nature of these expenses. Hence, the assessments thereto must no longer be disturbed.

In sum, the deficiency withholding tax on compensation assessed against petitioner is determined anew as follows:

Discrepancy as found by respondent		₱23,966,941.48
Less: *Items not subject to withholding tax on compensation:*		
SSS Contribution	₱3,621,197.10	
Medicare Contribution	584,431.25	
Employee Compensation Insurance	62,840.00	
Pag-ibig Contribution	639,164.00	
Rice	2,962,900.00	7,870,532.35
Amount subject to withholding tax on compensation		**₱16,096,409.13**

The above unaccounted compensation of ₱16,096,409.13 should be subjected to withholding tax on compensation based on the graduated tax rates of 5% to 32%. We note, however, that the BIR used the highest tax rate of 32%, in computing the deficiency withholding tax on compensation. Since the employees to whom the compensation pertained to were not individually identified, the appropriate tax rate to be used should be the effective rate computed based on the total withholding tax on compensation paid divided by the total amount of taxable gross compensation reported during the taxable year 2001, as shown below:

Total Withholding Tax on Compensation	₱ 34,803,195.66[80]
Total Taxable Gross Compensation	÷ ₱175,094,802.20
Effective Tax Rate	**19.88%**

In fine, petitioner is liable to pay basic deficiency withholding tax on compensation for taxable year 2001 in the amount of ₱3,199,966.14, computed as follows:

Amount subject to withholding tax on compensation	₱16,096,409.13
Multiply by Effective tax rate	19.88%
Basic deficiency withholding tax on compensation	**₱ 3,199,966.14**

Lastly, the compromise penalty imposed by respondent for the deficiency withholding tax on compensation in the amount of ₱50,000.00 must be cancelled. Pursuant to RMO No. 01-90, compromise penalties are only amounts suggested in settlement of criminal liability, and may not be imposed or exacted on the taxpayer in the event that a taxpayer refuses to pay the same. It is well-settled that the Court has no jurisdiction to compel a taxpayer to pay the compromise penalty because by its very nature, it implies a mutual agreement between the parties in respect to the thing or subject matter that is so compromised, and the choice of paying or not paying it distinctly belongs to the taxpayer.[81] Absent a showing that herein petitioner consented to the compromise penalty, its imposition should be deleted. The imposition of the same without the conformity of the taxpayer is illegal and unauthorized.[82]

WHEREFORE, in light of the foregoing considerations, the instant Petition for Review is **PARTIALLY GRANTED**. Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of ₱3,999,957.67, representing basic deficiency withholding tax on compensation and the 25% surcharge imposed under Section 248(3) of the NIRC of 1997, broken down as follows:

Basic Deficiency Withholding Tax on Compensation	₱ 3,199,966.14
25% Surcharge	799,991.53
Total	**₱ 3,999,957.67**

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[80] BIR Records, p. 1514.

[81] *The Philippines International Fair, Inc. vs. The Collector of Internal Revenue, et. al.*, G.R. Nos. L-12928 and L-12932, March 31, 1962.

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

In addition, petitioner is **ORDERED TO PAY** delinquency interest at the rate of twenty percent (20%) per annum on the said total amount of ₱3,999,957.67, computed from July 31, 2011 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

Cielito N. Mindaro-Grulla
(With Separate Concurring Opinion)
CIELITO N. MINDARO-GRULLA
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Chairperson
Presiding Justice

Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

FIRST DIVISION

ASIAN TRANSMISSION CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8366

Members:
DEL ROSARIO, PJ, *Chairperson*
UY, and
MINDARO-GRULLA, JJ.

Promulgated:
MAR 16 2016 , 1:13 p.m.

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SEPARATE CONCURRING OPINION

With all due respect, I concur with the disquisition of the ponencia in partially granting the Petition for Review.

However, it is my opinion that deficiency interest must likewise be imposed on the deficiency withholding tax on compensation pursuant to Section 249(B) of the NIRC of 1997, as amended, and maintain my position that the imposition of deficiency interest under Section 249(B) of the NIRC of 1997, as amended, clearly applies to all internal revenue taxes imposed by the present Tax Code in accordance with the Court En Banc's Decision dated September 4, 2012 in the case of Takenaka Corporation Philippine Branch vs. Commissioner of Internal Revenue, CTA EB Case No. 745.

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