Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SECOND DIVISION

FSM CINEMAS, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 8551

Members:
CASTAÑEDA, JR., *Chairperson*
CASANOVA, *and*
COTANGCO-MANALASTAS, *JJ.*

Promulgated:
OCT 02 2015
4:30 p.m.

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DECISION

CASANOVA, *J.*:

The Petition for Review[1] filed on October 1, 2012, by petitioner FSM Cinemas, Inc. against respondent Commissioner of Internal Revenue prays for the cancellation and setting aside of the Final Decision on Disputed Assessment (FDDA) for the alleged deficiency income tax, value-added tax (VAT) and expanded withholding tax (EWT) and withholding tax on compensation (WTC) of petitioner in the total amount of Thirteen Million Four Hundred Thirty Eight Thousand One Hundred Eighty Three and 55/100 Pesos (₱13,438,183.55) for taxable year 2008.

Petitioner is a domestic corporation organized and existing under the laws of the Philippines with principal office address at Festival Supermall, Filinvest Corporate City, Alabang, Muntinlupa City.[2]

Respondent is the duly appointed Commissioner of Internal Revenue empowered to perform the duties of said office including, among others, the power to assess and collect all national internal

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[1] Docket, pp. 6-24.
[2] Par. 1, Stipulation of Facts, Joint Stipulation of Facts and Issues (JSFI), Docket, p. 189.

revenue taxes, fees, and charges, and to enforce all forfeitures, penalties, and fines connected therewith.[3]

Petitioner filed its Annual Income Tax Return for taxable year 2008 with attachments on April 15, 2009.[4]

Respondent issued the Letter of Authority LOA 2008 00026891[5] on July 7, 2009, authorizing revenue officer to examine petitioner's books of accounts and other accounting records for all internal revenue taxes for the period from January 1, 2008 to December 31, 2008, which petitioner received on July 13, 2009.[6]

Consequently, Audit Reports on Income Tax[7], VAT[8], Compensation Withholding Tax[9], Expanded Withholding Tax[10] and Final Tax[11] were released by the revenue officers who examined petitioner's books of accounts. On April 30, 2010, the said revenue officers recommended to the Regional Director that a Preliminary Assessment Notice be issued against petitioner.[12]

Accordingly, respondent issued a Preliminary Assessment Notice[13] with Details of Discrepancies[14] on May 3, 2011, which petitioner received on May 11, 2011[15].

Petitioner requested for an extension of fifteen (15) days with respondent to file a written reply and supporting documents on May 24, 2011.[16]

Subsequently, petitioner received a Formal Assessment Notice (FAN)[17] with Details of Discrepancies[18] and Assessment Notices[19] on

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[3] Par. 2, JSFI, Docket, p. 189.
[4] Exhibits "P-25" to "P-25-d".
[5] Exhibit "P-1"; Exhibit "R-1".
[6] Par. 3, JSFI, Docket, p. 190.
[7] Exhibit "R-2".
[8] Exhibit "R-3".
[9] Exhibit "R-4".
[10] Exhibit "R-5".
[11] Exhibit "R-6".
[12] Exhibits "R-7", "R-7-a", "R-7-b" and "R-7-c".
[13] Exhibit "R-8".
[14] Exhibit "R-9".
[15] Exhibit "R-8-b".
[16] Exhibit "R-10".
[17] Exhibits "P-6" and "P-6-a"; Exhibit "R-13".
[18] Exhibits "P-7" to "P-7-b"; Exhibit "R-14".

June 27, 2011, assessing petitioner of the following alleged deficiency taxes:[20]

Assessment No.	Tax Type	Amount
IT-LA26891-08-11-0518	Income Tax	10,511,941.84
VT-LA26891-08-11-0518	Value-Added Tax	85,416.76
WE-LA26891-08-11-0518	Withholding Tax-Expanded	892,680.69
WC-LA26891-08-11-0518	Withholding Tax-Compensation	93,558.44

On July 27, 2011, petitioner filed its written protest[21] against the aforementioned assessments.[22] Respondent then informed petitioner, on August 8, 2011, that the entire docket of petitioner's tax case would be forwarded to RDO No. 53B – Muntinlupa City.[23]

On September 1, 2012, petitioner received the Final Decision on Disputed Assessment (FDDA)[24] with Details of Discrepancies[25], dated August 29, 2012, stating that petitioner is still liable to pay deficiency income tax, value-added tax, expanded withholding tax and withholding tax on compensation for taxable year 2008 as shown below, to wit:[26]

I. *Income Tax (Assessment Notice No. Nos. IT-LA26891-08-11-0518)*

Taxable Income (Loss) per ITR		(6,002,022.00)
Add: Adjustments/Disallowance		
Disallowed expenses due to non-withholding	18,455,238.82	
Undeclared Income	1,279,578.15	
Salaries not subjected to withholding tax	627,898.47	
Disallowed penalties	251,150.00	20,613,865.44
Taxable Income per investigation		14,611,843.44
Add: NOLCO		6,002,022.00
Adjusted Taxable Income		20,613,865.44
Income Tax due		7,214,852.90
Less: Tax Payments/credits		
Prior year's excess credit	12,712.00	
Payments	-	
total	12,712.00	

[19] Exhibits "P-2" to "P-5"; Exhibits "R-15" to "R-18".
[20] Par. 4, JSFI, Docket, p. 190.
[21] Exhibits "P-8" to "P-8-f"; Exhibit "R-19".
[22] Par. 5, JSFI, Docket, p. 190.
[23] Exhibit "R-20".
[24] Exhibits "P-9" and "P-9-a"; Exhibit "R-22".
[25] Exhibit "P-10"; Exhibit "R-23".
[26] Par. 6, JSFI, Docket, pp. 190 to 191.

Less: MCIT Carry-over		
Excess MCIT carry-over	(12,712.00)	
Basic Tax Due		7,214,852.90
Add: Interest (04.16.09 to 09.28.12)		4,985,166.86
Total Amount Due		**12,200,019.76**

II. *Value-added Tax (Assessment Notice No. VT-LA26891-08-11-0518)*

Sales per VAT Returns	12,210,089.33
Add: Sales not subjected to VAT	474,308.48
VATable Sales	12,684,397.81
Output Tax (12%)	1,522,127.74
Less Input Tax During the year	(960,946.54)
VAT Payable	561,181.20
Less: Payments per returns	(504,267.88)
Deficiency VAT	56,913.32
Add: Interest (01.26.09 to 09.28.12)	41,819.59
Total Amount Due	**98,732.91**

III. *Expanded Withholding Tax (Assessment Notice No. WE-LA26891-08-11-0518)*

Basic Tax Due	592,630.87
Add: Interest (01.16.09 to 09.28.12)	438,709.21
Total Amount Due	**1,031,340.08**

IV. *Withholding Tax on Compensation (Assessment Notice No. WC-LA26891-08-11-0518)*

Basic Tax Due	62,111.37
Add: Interest (01.16.09 to 09.29.12)	45,979.43
Total	**108,090.80**

Thus, petitioner filed the instant Petition for Review on October 1, 2012.

In the Answer[27] filed on December 5, 2012, respondent interposed the following special and affirmative defenses, to wit:

> "7. Petitioner's claim for the cancellation of assessment against it in the instant Petition for Review has no basis in fact and in law and being mere opinions, for the following reasons:

[27] Docket, pp. 71-81.

<u>On the question of the assessment of Deficiency Income Tax</u>

a. **First, as to Disallowed Expenses due to Non-Withholding resulting to tax liability in the amount of ₱18,455,238.82**. Verification per audit disclosed that the subject taxpayer failed to subject to expanded withholding tax to the income payments enumerated in the Final Decision on Disputed Assessment. For such failure, petitioner's deductions against its gross income were disallowed, following Section 2.58.5 of Revenue Regulations No. 2-98, as amended ('RR 2-98') in relation to Section 34(K) of the National Internal Revenue Code of 1997, as amended ('Tax Code');

b. Petitioner, to make a case for its self, points to the case of *Hantex Trading Co., Inc. v. CIR* to make it appear that the assessment cannot stand judicial scrutiny. Well, to that, we say that petitioner is utterly mistaken, for the simple fact that the cited case requires that there must be '<u>**proof**</u> that an assessment is utterly without foundation, meaning it is arbitrary and capricious.' We ask of petitioner: *Was there any proof presented by petitioner before the Bureau of Internal Revenue ('BIR') or even before the Honorable Court?* **We daresay there is none! All that petitioner is presenting are mere arguments without showing how the assessments can be said to be arbitrary and capricious**.

c. It is worthy to note that replete in the *Annex* 'D' of the Petition are the statements that petitioner will submit reconciliation statements to the BIR to justify its protest, which we reproduce below:

- **Page 2, line 29 to 31, *Annex* 'D'**: *'<u>[w]e shall prepare for submission to your office</u> a reconciliation of the account groupings used in the AFS and in the Alphalist.'*

- **Page 3, line 34 to 35, and Page 4, line 1 to 3, *Annex* 'D'**: *'<u>[w]e shall submit a reconciliation statement</u> that will account for the income payments made by FCI that are properly subject to EWT, as well as those which are exempt from withholding tax (including the reasons therefor) in accordance with the provisions of the Withholding Tax Regulations.'*
- **Page 4, line 11 to 15, *Annex* 'D'**: *'<u>[FCI] undertakes to provide the BIR with the details of the Personnel Expenses account reported in the ITR/FS and the pertinent reconciliation statement</u> in order to establish that FCI properly withheld and remitted the WTC for 2008 in compliance with the provisions of the Withholding Tax Regulations.'*
- **Page 4, line 17 to 19, *Annex* 'D'**: *'<u>FCI shall submit the documents that support the valid claim by FCI of Taxes and Licenses for the year 2008, including the aforementioned amount</u>, in order to establish that such claim is consistent with applicable tax rules and regulations.'*
- **Page 5, line 14 to 15, *Annex* 'D'**: *'<u>[W]e shall provide you with a breakdown/schedule of the said sale items</u>, including the basis why no output tax is due thereon, shortly.'*
- **Page 6, line 1 to 4, *Annex* 'D'**: *'[ECI] is currently preparing the submission of pertinent reconciliation statement and documents that will establish that FCI properly withheld and remitted the WTC due on salaries and compensation paid to employees for the taxable year 2008.'*

However, despite petitioner's assurances to submit documents to justify its grounds for the protest, it failed to do so. As a matter of fact, the attached *Annex* 'E' of the same Petition even speaks of such failure, which we quote:

> **'In reply thereto, please be informed that your request for reinvestigation has been given favorable action. <u>However, it was disclosed that you failed to submit documents, that are relevant and warrant cancellation of the abovementioned assessment</u>.** Relative thereto, please be informed that Section 228 of the National Internal Revenue Code (NIRC) provides that '<u>Within sixty (60) days from the filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.</u> Hence, this Final Decision on Disputed Assessment has been issued.' (***Emphases and underlining all provided***)

We need no longer belabor the fact that petitioner failed to substantiate its claims in its protest, much more with the instant Petition. Thus, the disallowance was properly made, and is not susceptible of any question;

d. **Second, as to petitioner's undeclared income amounting to ₱1,279,578.15**. Verification also disclosed that the various accounts under payments of services reported per Alphalist is overstated as compared with the amounts reflected per FS and ITR as presented in the FDDA. Such treatment as undeclared income of those unaccounted expenses was held to be correct, following the case of *Perez v. CTA and CIR* that unreflected sources of funds not accounted for in the taxpayer's tax returns led to the inference that part of his income had not been reported, and will be subject to income tax pursuant to Sec. 27 in relation to Sec. 32 of the Tax Code;

e. **Third, as to the Minimum Corporate Income Tax in the amount of ₱10,246.00**. The Minimum Corporate Income Tax was also not allowed as tax credit against petitioner's computed deficiency income tax, considering that the said amount shall be carried over and credited against the normal income tax for the three (3) immediately succeeding taxable year, following the provisions of Sec. 27(E)(1)(2) of the Tax Code;

f. **Fourth, as to Excess Minimum Corporate Income Tax in the amount of ₱2,466.00**. Verification again disclosed that excess tax credit carried over to succeeding period per income tax return cannot be considered in the computation of income tax deficiency, for such excess tax credit has been credited already against the petitioner's estimated quarterly income tax liabilities for the taxable quarter(s) of the succeeding years as mandated by Sec. 76 of the Tax Code;

g. Petitioner assails such finding by the BIR, for there is allegedly no factual and legal basis for it. Again, we have to digress, for the findings contained in the FDDA is clear and even lays down the factual and legal basis. *Are the aforementioned provisions of the Tax Code and **jurisprudence not** legal bases?* ***Of course it is!*** *Is the comparative audit of petitioner's books of Income Tax Returns and its Alphalist into sufficient factual basis?* **Yes, it is!** Once more, we have to point out that it is petitioner that was remiss in its proving its position by failing to submit supporting documents despite its undertaking in its alleged protest. Thus, it cannot be allowed to question anymore the same assessment;

On the question of the assessment of Deficiency Valued-Added Tax

h. **Petitioner's sales were not subjected to Value-Added Taxes in the amount of ₱474,308.48**. Verification also disclosed that petitioner's receipts in the amount of P474,308.48 as computed in the FDDA were not subjected to Value-Added Taxes ('VAT'), despite the requirement of Sec. 105 in relation to Secs. 106 and 108 of the

Tax Code. And due to petitioner's failure to submit for its proof the breakdown/schedule of its sale items, it cannot now be allowed to assail the said VAT deficiency assessment;

<u>As to the assessment of Deficiency Expanded Withholding Tax</u>

i. **Petitioner is liable for a basic tax due in the amount of ₱41,995.80**. Verification disclosed that petitioner failed to pay the corresponding expanded withholding tax on its income payments pursuant to Sec. 2.57.2 of RR 2-98 paying the appropriate withholding tax on compensation due on a portion of its payment of salaries and wages were payment of salaries and wages in accordance with Sec. 79(A) of the Tax Code as implemented by Sec. 2.78 of RR 2-98.

<u>On the assessment of Deficiency Withholding Tax on Compensation</u>

j. **First, as to basic tax due to its non-withholding in the amount of ₱41,995.80**. Verification disclosed that petitioner did not pay the appropriate withholding tax on compensation due on a portion of its payment of salaries and wages as mandated by Sec. 79(A) of the Tax Code, as implemented by Sec. 2.78 of RR 2-98. Hence, the said salaries and wages were subjected to withholding tax on compensation;

k. **Second, as to basic tax due to under-withholding in the amount of ₱20,115.57**. Investigation of petitioner's alphabetical list of compensation subjected to withholding tax and the tax dues paid per the BIR's Integrated Tax System disclosed that it failed to remit in full the amount of ₱20,115.57 as shown in the computation contained in the copy of the FDDA. Thus, it was assessed deficiency withholding tax pursuant to Sec. 2.78 of RR 2-98;

8. Petitioner interposes prescription so as to exculpate it from its tax liabilities. To that, suffice it to state that **allegations of prescription must be clearly shown**. Since prescription is one of the affirmative defenses of the taxpayer, 'it is incumbent upon [it] to **<u>positively establish</u>** when the prescriptive period started to run and when the same ended.'

9. **Petitioner's burden to show its entitlement to its claim**. In a catena of cases, the Honorable Supreme Court has laid down the rule that in tax cases, **<u>all presumptions are in favor of the correctness of tax assessments</u>. <u>The good faith of tax assessors and the validity of their actions are presumed. They will be presumed to have taken into consideration all the facts to which their attention was called.</u> No presumption can be indulged that all of the public officials who have to do with the assessment of property for taxation will knowingly violate the duties imposed upon them by law.** As a logical outgrowth of the presumption in favor of the validity of assessments, **<u>when such assessments are assailed, the burden of proof is upon the taxpayer to clearly show that the assessment is erroneous, in order to relieve himself from it</u>**;

10. Considering that the claims by petitioner were found to be not in accordance with the requirements of the law, and following the pronouncements above, then such disallowances made in the assailed assessments is proper and valid. Hence, petitioner's prayer that the assessment notices should be cancelled and set aside has no merit and cannot be given even the scantest of consideration;

11. No evidence was submitted by the petitioner to disprove such findings by the Public Respondent. Thus, the assailed assessments are to be presumed correct. As held by the Honorable Supreme Court in one case:

> 'The Commissioner of Internal Revenue, sustained by the Tax Court, found for a fact that the expenses in the amount of P206,870.00 are fictitious.

> **Tan Guan presented no evidence to disprove such finding. In appeals to the Court of Tax Appeals, the determination of the Commissioner of Internal Revenue is presumed correct and it behooves the taxpayers to rebut such presumption** (*Perez vs. Court of Tax Appeals, et., L-10507, May 30, 1958*). **Tan Guan failed to overcome his burden. Hence, the finding that the expenses are fictitious must be sustained. And being fictitious, the expenses cannot be claimed as deduction from gross income.**' (*Emphases and underlining all provided*)

12. Indeed, mere allegations will never suffice to overthrow the presumption in favor of taxation. Only evidence presented to substantiate errors in assessment will be given merit as held by the Honorable Supreme Court in one case:

> '**Since no evidence was presented to substantiate the errors that are claimed to have been committed by the Collector in making the assessment** for the years 1948, 1949 and 1950, **the trial court had no other alternative than to resort to the legal truism that "all presumptions are in favor of the correctness of tax assessments". The burden of proof is on the taxpayer to show the contrary**. This the company failed to do. This action finds support in the following authorities:
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>> '**All presumptions are in favor of the correctness of tax assessments. The good faith of tax assessors and the validity of their actions are presumed**. They will be presumed to have taken into consideration all the facts to which their attention was called. No presumption can be indulged that all of the public officials of the state in the various counties who have to do with the assessment of property for taxation will knowingly violate the duties imposed upon them by law.
>>
>>> '**As a logical outgrowth of the presumption in favor of the validity of assessments, when such assessments are assailed, the burden of proof is upon the complaining party. It is incumbent upon the property owner clearly to**

show that the assessment was erroneous, in order to relieve himself from it. (51 *Am. Jur. pages 620-621)' (Interprovincial Autobus Co., Inc. vs. Collector of Internal Revenue,* 98 Phil., 290; 52 Off. Gaz., [2] 791.)

'When an importer challenges by legal steps the correctness of the assessment of a duty by the Collector of Customs, **the question to the decided is not whether the Collector was wrong but whether the importer was right, the burden being on the latter to establish the correctness of his own contention**.' (*Behn, Meyer & Co. vs. Collector of Customs,* 26 Phil., 647)

'**That the determination of the tax deficiency by the Government has *prima facie* validity and the burden rests upon the taxpayer to overcome this presumption and to show to the satisfaction of the Tax Court that the determination was not correct**.' (*Perez vs. Court of Tax Appeals, et al.,* G.R. No. L-10507, May 30, 1958).' (**Emphases and underlining all provided**)

13. Petitioner cannot question the assessments made against it for all presumptions are **in favor of tax assessments** (***Interprovincial Autobus Co., Inc. v. Collector*** **[98 Phil. 290];** ***Cecilia Teodoro Dayrit v. Hon. Fernando Cruz and Commissioner*** **[L-39910, Sept. 26, 1988]; and** ***Bonifacia Sy Po v. CTA & Commissioner,*** **[G.R. No. 81446, Aug. 18, 1988]**);

14. Thus, applying the pertinent provisions of the law, rules, and jurisprudence in the matter at hand, it is crystal clear that the instant petition for review lacks basis and merit, and should be dismissed outright by this Honorable Court. Consequently, petitioner should already be made to pay the deficient taxes."

Pre-Trial Brief (For the Public Respondent) and petitioner's Pre-Trial Brief were both submitted in Court on January 14, 2013[28].

On April 4, 2013, the parties presented their Joint Stipulation of Facts and Issues[29], which the Court approved on April 16, 2013.[30] The Court, likewise, terminated the Pre-Trial on the same date.

To prove its claim, petitioner presented its sole witness Ms. Elisa M. Oregano.

On the other hand, Ms. Nora Y. Tadiwan and Mr. Renato G. Balmores took the witness stand as respondent's witnesses.

Thereafter, parties formally offered their respective documentary evidence as well as testimonial evidence.

On October 31, 2014, the Court deemed the instant case submitted for decision considering petitioner's Memorandum filed on May 28, 2014[31], and the Report dated October 28, 2014 of the Records Division that no memorandum has been filed by the respondent.[32]

However, Memorandum for Respondent was filed through registered mail on October 23, 2014 and received by the Court on November 5, 2014[33]. As such, the Court admitted the said memorandum on November 6, 2014.[34]

Then, petitioner submitted its Reply (To Memorandum for Respondent) on November 14, 2014.

The parties presented the following issues[35] for the Court's resolution:

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[28] Docket, pp. 84-88 and pp. 89-95, respectively.
[29] Docket, pp. 189-192.
[30] Resolution, Docket, p. 194.
[31] Docket, pp. 450-465.
[32] Resolution, Docket, p. 485.
[33] Docket, pp. 489-496.
[34] Order, Docket.
[35] Stipulation of Issues, JSFI, Docket, p. 192.

1. Whether petitioner is liable for deficiency income tax;

2. Whether petitioner is liable for deficiency value-added tax;

3. Whether petitioner is liable for deficiency expanded withholding tax; and

4. Whether petitioner is liable for withholding tax on compensation.

The foregoing issues may be summarized into the main issue of whether petitioner is liable for deficiency income tax, VAT, EWT, withholding tax on compensation.

Before going to the main case, the Court shall first determine if it has jurisdiction over the instant petition.

Section 228 of the National Internal Revenue Code (NIRC) of 1997, as amended, provides:

> "SEC. 228. *Protesting Assessment.* – When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however*, That a preassessment notice shall not be required in the following cases:
>
> xxx xxx xxx
>
> The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.
>
> Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.

> Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.
>
> If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable."

Petitioner received the Final Decision on Disputed Assessment (FDDA) with Details of Discrepancies on September 1, 2012[36].

Applying the foregoing provision in the instant case, petitioner had thirty (30) days from September 1, 2012 or until October 1, 2012 within which to appeal respondent's denial.

Since petitioner filed the instant Petition for Review on October 1, 2012, this Petition for Review was timely filed.

Proceeding to the main issues, respondent assessed petitioner for alleged deficiency income tax, value-added tax (VAT) and expanded withholding tax (EWT) and withholding tax on compensation (WTC) in the total amount of Thirteen Million Four Hundred Thirty Eight Thousand One Hundred Eighty Three and 55/100 (₱13,438,183.55), inclusive of interest for taxable calendar year 2008, broken down as follows[37]:

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[36] Par. 6, JSFI, Docket, pp. 190-191.
[37] Final Decision on Disputed Assessment, Exhibit "P-9".

Deficiency Tax	Basic	Interest	Total
Income Tax	₱ 7,214,852.90	₱ 4,985,166.86	₱ 12,200,019.76
Value-Added Tax	56,913.32	41,819.59	98,732.91
Expanded Withholding Tax	592,630.87	438,709.21	1,031,340.08
Withholding Tax on Compensation	62,111.37	45,979.43	108,090.80
	₱ 7,926,508.46	**₱ 5,511,675.09**	**₱ 13,438,183.55**

I. Deficiency Income Tax (₱12,200,019.76)

Based on the FDDA[38], respondent computed the deficiency income tax assessment in the amount of ₱12,200,019.76, inclusive of interest, as follows:

Income Tax (Assessment Notice No. IT-LA26891-08-11-0518)			
Taxable Income (Loss) per ITR			₱ (6,002,022.00)
Add: Adjustments/Disallowance			
Disallowed expenses due to non-withholding (Schedule 1)		₱ 18,455,238.82	
Undeclared income (Schedule 2)		1,279,578.15	
Salaries not subjected to withholding tax (Schedule 3)		627,898.47	
Disallowed penalties		251,150.00	20,613,865.44
Taxable Income per Investigation			₱ 14,611,843.44
Add: Net Operating Loss Carry-Over			6,002,022.00
Adjusted Taxable Income			₱ 20,613,865.44
Income Tax Due (35%)			₱ 7,214,852.90
Less: Tax payments/credits			
Prior Year's Excess Credits		₱ 12,712.00	
Payments		-	
Total		12,712.00	
Less: Minimum Corporate Income Tax Carry-Over	₱ 10,246.00		
Excess Minimum Corporate Income Tax Carry-Over	2,466.00	12,712.00	-
Basic Tax Due			₱ 7,214,852.90
Add: Interest (4.16.09 to 09.28.12)			4,985,166.86
TOTAL AMOUNT DUE			**₱12,200,019.76**

The Court shall carefully scrutinize the merits of each of the components of the deficiency income tax assessment:

A. Disallowed Expenses due to non-withholding - (₱18,455,238.82)

[38] Final Decision on Disputed Assessment, Exhibit "P-9"; Exhibit "R-22".

In the Details of Discrepancies[39], respondent disallowed the expenses mentioned below as deduction from petitioner's gross income for its failure to subject the same to expanded withholding taxes, pursuant to Section 34 (K) of the National Internal Revenue Code (NIRC) of 1997, as amended, in relation to Section 2.58.5 of Revenue Regulations (RR) No. 2-98:

	Per FS/ITR/Audit	Per Alphalist	Amount not subjected to withholding tax	Tax rate	Tax due
Payment of goods					
Additions to PPE	₱ 6,886,027.00				
Purchases	4,367,089.00				
Materials	3,900.00				
R&M (Materials)	550,854.94				
Office Supplies	42,362.76				
Miscellaneous					
Snackbar supplies	23,644.15				
Xerox, Mimeograph	7,779.67				
Printed forms	1,100.00				
Others	7,067.25				
CUSA & Aircon cost	13,058,672.02				
	24,948,496.79	₱ 4,934,575.00	₱ 20,013,921.79	1%	₱ 200,139.22
Rental					
Leases & Rent	20,073,003.97				
Film Rentals	48,215,737.98				
AD Rentals	31,600.00				
	68,320,341.95	64,254,242.40	4,066,099.55	5%	203,304.98
Professional Fees					
Audit & Legal Fees	1,598,906.00				
Mgt. & Consultancy	981,363.24				
Booking Fees	321,428.57				
	2,901,697.81	1,640,453.33	1,261,244.48	15%	189,186.67
TOTAL	**₱109,846,239.10**	**₱ 85,784,551.43**	**₱ 25,341,265.82**		**₱592,630.87**
Less: Additions to PPE			6,886,027.00		
Disallowed expenses due to non-withholding			**₱ 18,455,238.82**		

Under Section 34(K) of the NIRC of 1997, as amended, expenses may be allowed as deduction from taxable income only if the corresponding withholding tax has been imposed and remitted to the BIR, to wit:

> "SEC. 34. **Deductions from Gross Income.** — Except for taxpayers earning compensation income arising from personal services rendered under an employer-employee relationship where no deductions shall be allowed under this Section other than under Subsection (M) hereof, in computing taxable income

[39] Details of Discrepancies, Exhibit "P-10"; Exhibit "R-23".

subject to income tax under Sections 24(A); 25(A); 26; 27(A), (B) and (C); and 28(A)(1), there shall be allowed the following deductions from gross income:

xxx xxx xxx

(K) *Additional Requirements for Deductibility of Certain Payments.* — Any amount paid or payable which is otherwise deductible from, or taken into account in computing gross income or for which depreciation or amortization may be allowed under this Section, shall be allowed as a deduction only if it is shown that the tax required to be deducted and withheld therefrom has been paid to the Bureau of Internal Revenue in accordance with this Section, Sections 58 and 81 of this Code."

The Court finds the disallowance of the abovementioned expenses due to non-withholding proper.

First, petitioner failed to substantiate its claim that the corresponding withholding tax on income payments was properly deducted and remitted to the BIR.

Petitioner contends that there is no logical basis for respondent to claim that all payments appearing in the accounting records and income tax returns of petitioner as expenses are subject to EWT. Petitioner further claims that the *prima facie* correctness of a tax assessment does not apply upon proof that the said assessment is utterly without foundation, meaning it is arbitrary and capricious, as enunciated by the Supreme Court in the case of *Commissioner of Internal Revenue vs. Hantex Trading Co. Inc.*[40]

On the other hand, respondent posits that petitioner failed to show that the assessment was arbitrary and capricious.[41]

Respondent points out that in the Protest Letter dated July 27, 2011, petitioner repeatedly promised to submit supporting documents, such as: a) reconciliation of the account groupings used

[40] G.R. No. 136975, dated March 31, 2005 citing United States v. Janis, 49 L. Ed. 2d 1046 (1976); 428 US 433 (1976).
[41] Answer, Docket, p. 73.

in the AFS and in the Alphalist; b) reconciliation statement and documents that will establish the proper withholding and remittance of EWT by FCI; c) details of personnel expenses account reported in the ITR/FS and the pertinent reconciliation statement; d) valid support for the deduction of penalties under Taxes and Licenses; and e) reconciliation statement that will establish that petitioner properly withheld and remitted the withholding tax due on compensation paid to employees during 2008.

A careful perusal of the records shows that none of the aforementioned supporting documents was submitted to prove that there was proper withholding of tax on income payments.

Second, petitioner failed to establish that the CUSA and airconditioning charges it paid to Filinvest Land Incorporated (FLI) were reimbursements of actual expenses.

Petitioner insists that respondent failed to consider the Common Usage Service Area (CUSA) and airconditioning charges petitioner paid to FLI as reimbursement for common charges incurred, incidental to the leasing out of office spaces.

It is alleged by petitioner that respondent had consistently ruled in the past that reimbursements are not income but a return of capital not subject to withholding tax. Petitioner has cited several BIR Rulings to support its argument, such as BIR Ruling No. DA-005-07 dated January 5, 2007, citing BIR Ruling No. DA-511-06, to wit:

> "... monies received by TPI from its tenants as payments for direct utilities and services are not subject to VAT and EWT.
>
> Reimbursement of expenses, by its very nature, is not income but merely a return of capital. As a return of capital, it is not income payment per se. Such being the case, it is not subject to income tax.
>
> In the case at bar, the expenses directly and indirectly attributable to TPI's tenants are billed to its various tenants depending on their levels of consumption. These amounts are actually payments for such direct and

indirect expenses. As such, they are not income payments subject to income and withholding tax."

In order for the expenses not to be subject to withholding tax, it must first be established that they are reimbursements of actual expenses. In a reimbursement-at-cost transaction, it is inferred that the expenses are incurred by the advancing party for the benefit and account of the party accommodated.

Based on the foregoing, petitioner failed to established that there were actual expenses (Common Usage Service Area (CUSA) and airconditioning charges) that were paid in advance by FLI.

Other than the billing statements purportedly issued by FLI, no other supporting documents, such as the sales/billing invoices and official receipts from the utilities providers, were presented by petitioner that would sufficiently show that what was actually paid by petitioner is exactly the same amount that was advanced by FLI,. Simply put, it was not clearly proven, based on the billing statements presented, that the expenses paid by petitioner to FLI were without any mark-up or profit element.

Tax assessments by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of any proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments.[42]

Considering the foregoing, the disallowed expenses due to non-withholding in the amount of ₱18,455,238.82 shall be upheld.

B. Undeclared Income - (₱ 1,279,578.15)

Respondent's verification revealed that the various accounts under payments of services reported per Alphalist is overstated as compared with the amounts reflected per FS and ITR. These unaccounted expenses were considered by respondent as undeclared income, following the ruling in the case of *Perez vs. Court of Tax* a

[42] *Commissioner of Internal Revenue v. Traders Royal Bank*, G.R. No. 167134, March 18, 2015, citing the case of *Sy Po v. Court of Tax Appeals*, G.R. No. 81446, August 18, 1988.

Appeals and Commissioner of Internal Revenue[43], wherein it was held that unreflected sources of funds not accounted for in the taxpayer's returns led to the inference that part of his income had not been reported and subjected to income tax, pursuant to Section 27 of 1997 NIRC, as amended, in relation to Section 32 of the same Code.

The alleged undeclared income was computed as follows[44]:

Outside Services	₱ 9,181,438.82
R&M (labor)	776,736.53
Insurance	178,471.80
Transportation & Travel	62,701.75
Communications, etc.	69,861.52
Light & Power	3,210,977.54
Water	195,514.59
Payment of Services per FS/ITR	13,675,702.55
Less: Payment of Services per Alphalist	14,955,280.70
Undeclared Income	**₱ (1,279,578.15)**

Petitioner assails the foregoing computation arguing that it was merely a result of the adjustment to the income that can be reconciled, so the undeclared income has no factual basis.

The Court agrees with petitioner.

In the case of *Toyota Manila Bay Corporation vs. Commissioner of Internal Revenue,*[45] the CTA First Division had the occasion to rule against respondent in this wise:

> "As can be gleaned from the subject deficiency income tax assessment, the factual basis therefor is that there is an *"undeclared disbursement"* in the amount of ₱206,260,123.85.
>
> The Court disagrees with respondent.

[43] G.R. No. L-10507, 30 May 1958.
[44] Details of Discrepancies, Exhibit "P-10".
[45] CTA Case No. 8227, September 3, 2014 citing the cases of Commissioner of Internal Revenue vs. Court of Appeals, et al., G.R. No. 108576, January 20, 1999 and Commissioner of Internal Revenue vs. Phoenix Assurance Co. Ltd., G.R. No. L-19727, May 20, 1965.

> The three (3) elements on the imposition of income tax are: (1) there must be gain or profit, (2) that the gain or profit is realized or received, actually or constructively, and (3) it is not exempted by law or treaty from income tax. Income tax is assessed on income received from any property, activity or service. Such being the case, in the imposition or assessment of income tax, it is not when there is an undeclared disbursement, but only when there was an income, and such income was received or realized by the taxpayer.
>
> In this case, said elements are not present. The BIR merely imposed income tax on petitioner simply because there was an *"undeclared disbursement"*, nothing more.
>
> Furthermore, it must be emphasized that for income tax purposes, a taxpayer is free to deduct from its gross income a lesser amount, or not claim any deduction at all. What is prohibited by the income tax law is to claim a deduction beyond the amount authorized therein. Hence, even granting that there is an undeclared disbursement, the same is not prohibited by law.
>
> Thus, in simply relying on the fact that there is an undeclared disbursement, respondent's imposition or assessment of the subject income tax does not hold water. xxx"

It is worthy to note that the imputation of alleged undeclared income is based on a mere presumption since there were unaccounted expenses and there were unaccounted incomes which correspond to it. That being the case, the undeclared income would be effectively offset by recording the equivalent payments as expenses. Consequently, no taxable income will result from the said transactions.

In the case of *Collector of Internal Revenue vs. Benipayo*[46], the Court ruled that the assessment must be based on actual facts.

[46] G.R. No. L-13656, January 31, 1962 citing *Commissionerof Internal Revenue v. Hantex Trading Co., Inc.*, G.R. No. 136975, March 31, 2005.

Accordingly, in the absence of any factual basis, the Court finds that the assessment on deficiency income tax pertaining to the alleged undeclared income in the amount of ₱1,279,578.15 should be cancelled and withdrawn.

C. Salaries not subjected to withholding tax (₱ 627,898.47)

Pursuant to Sections 78 and 79 of the NIRC of 1997, as amended, respondent asserts that petitioner was required to withhold and remit the withholding tax on compensation in the amount of ₱627,898.47, but the latter failed to do so. Hence, the expenses were disallowed, as shown below[47]:

Per FS/ITR				
Personnel Expenses				₱1,486,573.00
Per Alphalist				
Terminated before Dec. 31				
Non-taxable				
13th month pay & other benefits	₱ 4,856.36			
SSS, GSIS, PHIC & PAG-IBIG Contributions	3,891.70	₱ 8,748.06		
Taxable				
Salaries and other forms of compensation		77,932.27	₱ 86,680.33	
With no previous employer				
Non-taxable				
13th month pay & other benefits	23,518.12			
SSS, GSIS, PHIC & PAG-IBIG Contributions	14,849.60	38,367.72		
Taxable				
Salaries and other forms of compensation		258,956.14	297,323.86	
Minimum Wage Earners				
Non-taxable				
13th month pay & other benefits	39,854.84			
SSS, GSIS, PHIC & PAG-IBIG Contributions	25,183.20			
Salaries and other forms of compensation	209,744.84	274,782.88		
Taxable				
Salaries and other forms of compensation		199,887.46	474,670.34	858,674.53
Salaries not subjected to withholding tax				**627,898.47**
Multiply by: composite tax rate*				6.69%
Tax Due				**₱ 41,995.80**

**where composite rate was computed by dividing the tax withheld of ₱35,901.23 over the taxable compensation of ₱536,775.87 per 1604-CF schedule[48]*

[47] Details of Discrepancies, Exhibit "P-10".
[48] BIR Records, pp. 145-159.

Petitioner avers that respondent erroneously assumed that the entire amount reported as Personnel Expenses in the Audited Financial Statement (AFS) is subject to withholding tax on compensation. Petitioner claims that some of the items lodged in the aforesaid account were non-taxable compensation income.

Based on petitioner's Annual ITR,[49] the total Personnel Expenses amounting to ₱1,486,573.00 consist of Salaries and Allowances in the amount of ₱1,396,948.87[50], and Retirement Plan in the amount of ₱89,624.00[51].

Considering that the retirement expense amounting to ₱89,624.00 was not claimed by petitioner as deduction from its taxable income, the same should not form part of the assessment.

As to the Salaries and Allowances in the amount of ₱1,396,948.87, petitioner did not adduce any supporting document to prove that the portion of the same was non-taxable compensation income. As a consequence, the salaries not subjected to withholding tax in the amount of ₱538,274.34 shall be disallowed as deductible expense from petitioner's gross income, determined as follows:

Salaries and Allowances per ITR	₱ 1,396,948.87
Less: Salaries per Alphalist	858,674.53
Salaries not subjected to withholding tax	**₱ 538,274.34**

D. Disallowed Penalties (₱ 251,150.00)

Respondent disallowed as deductible expense from petitioner's gross income the amount of ₱251,150.00 representing payment for Taxes and Licenses for petitioner's failure to provide any supporting documents or evidence to support the claimed deductions, in violation of Sections 34(A)(1)(b) of the 1997 NIRC, as amended, which reads as follows:

> "SEC. 34. *Deductions from Gross Income.* - Except for taxpayers earning compensation income arising from personal services rendered under an employer-employee relationship where no deductions shall be allowed under

[49] Exhibit "P-25".
[50] Section D, Exhibit "P-25".
[51] Section E, Exhibit "P-25".

this Section other than under subsection (M) hereof, in computing taxable income subject to income tax under Sections 24(A); 25(A); 26; 27(A), (B) and (C); and 28(A)(1), there shall be allowed the following deductions from gross income:

(A) *Expenses.—*

(1) *Ordinary and Necessary Trade, Business or Professional Expenses.—*

xxx xxx xxx

(b) *Substantiation Requirements.—* No deduction from gross income shall be allowed under Subsection (A) hereof unless the taxpayer shall substantiate with sufficient evidence, such as official receipts or other adequate records: (i) the amount of the expense being deducted, and (ii) the direct connection or relation of the expense being deducted to the development, management, operation and/or conduct of the trade, business or profession of the taxpayer."

The rule that tax deductions, being in the nature of tax exemptions, are to be construed in strictissimi juris against the taxpayer is well settled. Corollary to this rule is the principle that when a taxpayer claims a deduction, he must point to some specific provision of the statute in which that deduction is authorized and must be able to prove that he is entitled to the deduction which the law allows. An item of expenditure, therefore, must fall squarely within the language of the law in order to be deductible.[52]

The requisites for the deductibility of ordinary and necessary trade, business, or professional expenses are: (a) the expense must be ordinary and necessary; (b) it must have been paid or incurred during the taxable year; (c) it must have been paid or incurred in carrying on the trade or business of the taxpayer; and (d) **it must be supported by receipts, records or other pertinent papers**.[53] (*Emphasis supplied.*)

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[52] *H. Tambunting Pawnshop, Inc. v. CIR*, G.R. No. 173373, July 29, 2013.
[53] *Commissioner of Internal Revenue v. Isabela Cultural Corporation*, G.R. No. 172231, February 12, 2007.

According to petitioner, the Taxes & Licenses account is properly supported by sufficient evidence such as official receipts or other adequate records.

Notwithstanding, records reveal that there was no sufficient evidence presented by petitioner to substantiate the afore-stated expense as deductible. Petitioner submitted to this Court only the Schedule of Taxes and Licenses[54] which is considered self-serving, unless corroborated by other supporting documents. Considering the same, there is no way for the Court to determine petitioner's compliance with the substantiation requirement of the Tax Code. Thus, the Court finds that the disallowance of penalties in the amount of ₱251,150.00 is in order.

E. Disallowed Net Operating Loss Carry-Over (NOLCO) for the taxable year 2008 (₱6,002,022.00)

Respondent's verification disclosed that petitioner's operations for the year 2008 resulted to a net loss in the amount of ₱6,002,022.00[55], the tax benefit of which has been forwarded to succeeding periods as provided under Section 34(D)(3) of the 1997 NIRC, as amended, which reads as follows:

> "SEC. 34. Deductions from Gross Income.—
>
> xxx xxx xxx
>
> (D) *Losses.—*
>
> xxx xxx xxx
>
> (3) *Net Operating Loss Carryover.—* The net operating loss of the business or enterprise for any taxable year immediately preceding the current taxable year, which had not been previously offset as deduction from gross income shall be carried over as a deduction from gross income for the next three (3) consecutive

[54] Exhibit "P-25-d".
[55] Line 23B, Annual Income Tax Return, Exhibit "P-25".

taxable years immediately following the year of such loss: *Provided, however*, That any net loss incurred in a taxable year during which the taxpayer was exempt from income tax shall not be allowed as a deduction under this Subsection: *Provided, further*, That a net operating loss carry-over shall be allowed only if there has been no substantial change in the ownership of the business or enterprise in that -

(i) Not less than seventy-five percent (75%) in nominal value of outstanding issued shares., if the business is in the name of a corporation, is held by or on behalf of the same persons; or

(ii) Not less than seventy-five percent (75%) of the paid up capital of the corporation, if the business is in the name of a corporation, is held by or on behalf of the same persons.

For purposes of this subsection, the term *'net operating loss'* shall mean the excess of allowable deduction over gross income of the business in a taxable year."

Petitioner opposes respondent's action of adding back the net operating loss carry-over (NOLCO) of ₱6,002,022.00 in petitioner's gross taxable income. Petitioner explains that NOLCO should not be added in 2008, but should be disallowed on the succeeding years when it was claimed as deduction from gross income. Petitioner anchors its argument in the case of *Moneyline Telerate vs Commissioner of Internal Revenue*[56], wherein this Honorable Court held that:

"xxx. Granting, for the sake of argument, that petitioner actually deducted its 2002 net loss as NOLCO in the succeeding year 2003 and the said deduction was not proper as petitioner did not incur net loss, **the same can only be the subject of assessment when it was claimed as deduction in the year 2003 and not in the year 2002, for such is beyond the scope of the present assessment. Therefore, adding back the**

[56] CTA Case No. 7658, February 4, 2011.

> **net loss of ₱68,433.00 to petitioner's taxable income for the year 2002 is erroneous.**" *(Emphasis supplied.)*

The Court agrees with petitioner.

Applying the afore-quoted ruling to the instant case, the NOLCO that was incurred in taxable year 2008, if not offset as deduction from petitioner's gross income, should be carried over as such for the next three consecutive taxable years of 2009, 2010 and 2011. Records show that petitioner did not offset the NOLCO as deduction from petitioner's gross income for taxable year 2008. Thus, the assessment on the disallowed NOLCO in the amount of ₱6,002,022.00 shall be cancelled.

F. Disallowed MCIT and Excess MCIT Carry-Over - ₱10,246.00 and ₱2,466.00, respectively

In arriving at the assessed amount of basic deficiency income tax of ₱7,214,852.90, respondent disallowed the minimum corporate income tax (MCIT) of ₱10,246.00 and the excess MCIT carry-over of ₱2,466.00.

As stated in the Details of Discrepancies attached to the FDDA, respondent disallowed the minimum corporate income tax (MCIT) of ₱10,246.00 considering that the said amount was carried over and credited against the normal income tax for the three (3) immediately succeeding taxable year in compliance with the provision imposed under Section 27(E)(1)(2) of the NIRC of 1997, as amended. On the other hand, the excess MCIT carry-over of ₱2,466.00 cannot be considered in the computation of income tax deficiency because this had been credited against the estimated quarterly income tax liabilities for the taxable quarter/s of the succeeding years pursuant to Section 76 of the same Code.

The Court finds respondent's arguments unmeritorious.

In any case, it was improper for the respondent to disallow the said MCIT and the excess MCIT carry-over because any tax benefit derived by petitioner from the carry-over of the said amounts redounds to the succeeding year. Since the tax benefit will be in the succeeding year, at most, petitioner may only be assessed in the said succeeding year.

In fine, petitioner shall be held liable for basic deficiency income tax of ₱4,622,212.41, computed as follows:

Taxable Income (Loss) per ITR		₱ (6,002,022.00)
Add: Adjustments/Disallowance		
Disallowed expenses due to non-withholding	₱ 18,455,238.82	
Salaries not subjected to withholding tax	538,274.34	
Disallowed penalties	251,150.00	19,244,663.16
Taxable Income per Investigation		**₱13,242,641.16**
Income Tax Due (35%)		₱ 4,634,924.41
Less: Tax payments/credits		
Prior Year's Excess Tax Credits		12,712.00
Basic Income Tax Due		**₱ 4,622,212.41**

II. Deficiency VAT (₱98,732.91)

Respondent assessed petitioner for deficiency Value-Added Tax (VAT), inclusive of interest, in the amount of ₱98,732.91, broken down as follows:

Sales per VAT returns	₱ 12,210,089.33
Add: Sales not subject to VAT	474,308.48
Vatable Sales	**₱ 12,684,397.81**
Output Tax (12%)	₱ 1,522,127.74
Less: Input Tax during the year	960,946.54
VAT payable	**₱ 561,181.20**
Less: Payment per returns	504,267.88
Deficiency Value-Added Tax	**₱ 56,913.32**
Add: Interest (1.26.09 to 9.28.12)	41,819.59
Total Amount Due	**₱ 98,732.91**

In accordance with Sections 105, 106 and 108 of the 1997 NIRC, as amended, the alleged receipts of ₱474,308.48 was not subjected to VAT, as shown hereunder:

Snackbar supplies		₱ 11,371,042.37
Other Income		
Advertising	₱ 987,527.89	

Cinema Rental	278,929.00	
Miscellaneous	46,898.55	1,313,355.44
Amount subject to VAT		₱ 12,684,397.81
Less: Amount subjected to VAT		12,210,089.33
Amount not subjected to VAT		**₱ 474,308.48**

It is claimed by petitioner that the discrepancy noted by respondent consists of sales items which were either VAT-exempt or not subject to VAT.

Notwithstanding, petitioner did not present any evidence to prove that the sales items were indeed VAT-exempt. Without any evidence to support its claim, the Court cannot accept petitioner's bare allegations.

It is basic in the rule of evidence that bare allegations, unsubstantiated by evidence, are not equivalent to proof. In short, mere allegations are not evidence.[57]

Basic and well-established is the rule that the party alleging has the burden of substantiating his allegation by preponderance of evidence. Any declaration or assertion not so substantiated is, at best, a self-serving statement or declaration which is inadmissible in evidence for being hearsay.[58]

In sum, the amount of ₱474,308.48 representing sales items which are allegedly VAT-exempt cannot be sustained for lack of evidence to prove the same. Consequently, petitioner should be held liable for basic deficiency VAT in the amount of ₱56,913.32.

III. Expanded Withholding Tax (₱1,031,340.08)

Upon verification, respondent found that petitioner failed to pay the corresponding EWT on its income payments in the amount of ₱592,630.87, pursuant to Section 2.57.2 of Revenue Regulations No. 2-98, as amended. Thus, petitioner was assessed for deficiency expanded withholding tax (EWT) in the amount of ₱1,031,340.08, inclusive of interest, detailed as follows:

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[57] *Virginia Real v. Sisenando Belo*, G.R. No. 146224, January 26, 2007.
[58] *Victory Liner, Inc. vs. Court of Appeals*, G.R. No. 125034, July 30, 1998.

	Per FS/ITR/Audit	Per Alphalist	Amount not Subjected to Withholding tax	Tax Rate	Tax Due
Payment of Goods	₱ 24,948,496.79	₱ 4,934,575.00	₱ 20,013,921.79	1%	₱ 200,139.22
Rental	68,320,341.95	64,254,242.40	4,066,099.55	5%	203,304.98
Professional Fees	2,901,697.81	1,640,453.33	1,261,244.48	15%	189,186.67
Basic deficiency expanded withholding tax					**₱ 592,630.87**
Add: Interest (1.26.09 to 9.28.12)					438,709.21
Total amount due					**₱1,031,340.08**

The aforementioned basic deficiency tax due arose from the discrepancy between certain expenses claimed per FS/ITR and the income payments reported per Alphalist, as previously discussed under the assessment for deficiency income tax.

In its Memorandum[59], petitioner avers that respondent's right to assess petitioner is limited to three (3) years from actual filing of its EWT returns or date required by law for said filing, whichever is later, pursuant to Section 203[60] of the NIRC of 1997, as amended.

As such, respondent had until the following dates within which to assess petitioner of the subject deficiency EWT for taxable year 2008:

Period Covered (CY 2008)	Date Filed[61]	Last Day to File Return[62]	Last Day to Issue Assessment
January	2/11/2008	2/11/2008	2/11/2011
February	3/09/2008	3/11/2008	3/11/2011
March	4/09/2008	4/11/2008	4/11/2011
April	5/09/2008	5/11/2008	5/11/2011
May	6/09/2008	6/11/2008	6/11/2011
June	7/10/2008	7/11/2008	7/11/2011
July	8/10/2008	8/11/2008	8/11/2011

[59] Par. 4.8, Memorandum, Docket, pp. 461-462

[60] "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."

[61] BIR Records, pp. 160-272.

[62] Based on RR No. 26-05: *Amending Further Revenue Regulations No. 9-2001, as Amended by Revenue Regulations No. 2-2002 and Revenue Regulations No. 9-2002, Providing for the Staggered Filing of Returns of Taxpayers Enrolled in the Electronic Filing and Payment System (EFPS) Based on Industry Classification.*

August	9/09/2008	9/11/2008	9/11/2011
September	10/09/2008	10/11/2008	10/11/2011
October	11/09/2008	11/11/2008	11/11/2011
November	12/10/2008	12/11/2008	12/11/2011
December	1/09/2009	1/11/2009	1/11/2012

Records show that the Formal Assessment Notice for 2008 deficiency EWT was received by petitioner on June 27, 2011. Clearly, the assessment pertaining to the months of January, February, March, April and May of CY 2008 has already prescribed. However, since petitioner was not able to show which portion of the income payments subject of the deficiency EWT assessment for the entire taxable year 2008 pertained to the prescribed months of January to May 2008, all of the subject income payments should be considered as referring to the unprescribed months of June to December 2008.

As earlier stated, petitioner failed to prove that the corresponding withholding tax on income payments were deducted and paid to the BIR. Petitioner likewise failed to prove that the CUSA and airconditioning charges were paid to FLI were reimbursement of actual expenses. Accordingly, petitioner shall be held liable for basic deficiency EWT of ₱592,630.87.

IV. Withholding Tax on Compensation (₱ 108,090.80)

Based on the Details of Discrepancies, respondent computed the deficiency withholding tax on compensation as follows:

Salaries not subjected to withholding tax		₱ 627,898.47
Multiply by: composite tax rate		6.69%
Basic tax due to non-withholding		₱ 41,995.80
Add: Basic Tax due to under withholding		
Tax due per Alphalist	₱ 35,901.23	
Less: Tax withheld per ITS	15,785.66	20,115.57
Basic Withholding Tax on Compensation Due		₱ 62,111.37
Add: Interest (1.16.09 to 9.28.12)		45,979.43
Total Amount Due		**₱ 108,090.80**

After verification, respondent found that petitioner allegedly did not pay the appropriate withholding tax on compensation due on a portion of its payment of salaries and wages in the amount of ₱41,995.80, pursuant to Section 79(A) of the Tax Code, as implemented by Section 2.78 of RR No. 2-98, as amended, hence subjected to withholding tax on compensation.

Petitioner points out that respondent's right to assess petitioner is limited to three (3) years from actual filing of its WTC returns or date required by law for said filing, whichever is later, pursuant to Section 203 of the NIRC of 1997, as amended.[63]

Clearly, respondent had until the following dates within which to assess petitioner of the subject deficiency WTC for taxable year 2008:

Period Covered (CY 2008)	**Date Filed[64]**	**Last Day to File Return**	**Last Day to Issue Assessment**
January	2/11/2008	2/11/2008	2/11/2011
February	3/9/2008	3/11/2008	3/11/2011
March	4/9/2008	4/11/2008	4/11/2011
April	5/9/2008	5/11/2008	5/11/2011
May	6/9/2008	6/11/2008	6/11/2011
June	7/10/2008	7/11/2008	7/11/2011
July	8/10/2008	8/11/2008	8/11/2011
August	9/9/2008	9/11/2008	9/11/2011
September	10/9/2008	10/11/2008	10/11/2011
October	11/10/2008	11/11/2008	11/11/2011
November	12/10/2008	12/11/2008	12/11/2011
December	1/9/2009	1/11/2009	1/11/2011

The Court reiterates its ruling in the assessment for deficiency EWT (Section III) that the assessment pertaining to the months of January, February, March, April and May of CY 2008 has already prescribed. Nevertheless, since petitioner was not able to show which portion of the salaries and wages subject of the deficiency WTC assessment for the entire taxable year 2008 pertains to the prescribed months of January to May 2008, all of the subject salaries and wages should be considered as referring to the unprescribed months of June to December 2008.

As earlier discussed, the salaries and wages of ₱538,274.34 shall be subject to withholding tax on compensation for petitioner's failure to prove that the same is non-taxable compensation income.

[63] Par. 4.8, Memorandum, Docket, pp. 461-462
[64] BIR Records, pp. 66-128.

In addition, respondent found that upon investigation of petitioner's alphalist of compensation subjected to withholding tax and tax due per Integrated Tax System, petitioner allegedly failed to remit in full the amount of ₱20,112.57, hence, assessed of deficiency withholding tax pursuant to Section 2.78 of RR No. 2-98.

On the other hand, petitioner claims that it has correctly paid the withholding tax due on compensation as reflected in the year 2008 alphalist of employees.

A perusal of the records shows that the alleged tax under withheld by petitioner was computed by respondent as follows:

Tax due per Alphalist	₱ 35,901.23
Less: Tax withheld per ITS	15,785.66
Tax due to under withholding	**₱ 20,115.57**

The tax due of ₱35,901.23 used by respondent was based on the alphalist of employees attached to the Annual Information Return of Income Taxes Withheld on Compensation and Final Withholding Taxes (BIR Form 1604-CF)[65] originally filed by petitioner on March 31, 2009. However, in April 2009, petitioner filed an amended Annual Information Return of Income Taxes Withheld on Compensation and Final Withholding Taxes (BIR Form 1604-CF) with attached alphalist of employees[66] wherein the tax due amounts to ₱24,733.12. Hence, it appears that the tax due to under withholding amounts to ₱8,947.46, as computed below:

Tax due per Alphalist	₱ 24,733.12
Less: Tax withheld per ITS	15,785.66
Tax due to under withholding	**₱ 8,947.46**

Further examination of the records reveals that petitioner withheld only the amount of ₱15,785.66 because it had an over remittance of withholding tax on compensation for December 2007[67] in the amount of ₱8,947.46 which was credited to the tax due in 2008.

[65] BIR Records, pp. 145-159.
[66] BIR Records, pp. 129-144.
[67] BIR Records, pp. 68-69.

Verily, the amount of ₱8,947.46 does not pertain to under withholding of tax on compensation, as this amount actually pertains to tax adjustment for January 2008 due to over remittance of withholding of tax on compensation for December 2007. Hence, the assessment of the respondent that there was under withholding of tax on compensation is without basis.

Considering the foregoing, petitioner should be held liable for basic deficiency withholding tax on compensation in the amount of ₱24,814.45, computed as follows:

Salaries not subjected to withholding tax	₱ 538,274.34
Multiply by: composite tax rate*	4.61%
Basic Withholding Tax on Compensation Due	**₱ 24,814.45**

**where composite rate was computed by dividing the tax withheld of ₱24,733.12 over the taxable compensation of ₱536,775.81 per amended 1604-CF schedule*

WHEREFORE, premises considered, the Petition for Review is **PARTIALLY GRANTED**. The assessments issued by respondent against petitioner for taxable year 2008 covering deficiency income tax, Value-Added Tax, Expanded Withholding Tax and deficiency Withholding Tax on Compensation are hereby **AFFIRMED** but with **MODIFICATIONS**. Accordingly, petitioner FSM Cinemas, Inc., is ordered to pay the amount of ₱6,620,713.81, inclusive of the 25% surcharge imposed under Section 248(3) of the 1997 NIRC, as amended, computed as follows:

Tax Type	Basic Tax due	25% Surcharge	Total
Deficiency Income Tax	₱ 4,622,212.41	₱ 1,155,553.10	₱ 5,777,765.51
Deficiency VAT	56,913.32	14,228.33	71,141.65
Deficiency EWT	592,630.87	148,157.72	740,788.59
Deficiency WTC	24,814.45	6,203.61	31,018.06
Total	**₱ 5,296,571.05**	**₱ 1,324,142.76**	**₱ 6,620,713.81**

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

a) Deficiency interest at the rate of 20% per annum on the basic deficiency Income Tax, VAT, EWT and WTC computed from the dates indicated below until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended:

Tax Type	Basic Tax	Deficiency interest computed from
Deficiency Income Tax	₱4,622,212.41	15-Apr-09
Deficiency VAT	56,913.32	25-Jan-09
Deficiency EWT	592,630.87	11-Jan-09
Deficiency WTC	24,814.45	11-Jan-09

b) Delinquency interest at the rate of 20% per annum on the total amount of ₱6,620,713.81 and on the 20% deficiency interest which have accrued as aforestated in (a) computed from September 28, 2012 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

ATTESTATION

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

JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson, Second Division

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice