REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION
****

SM_RESIDENCES CORP., Petitioner,	**CTA Case No. 9395**
- versus -	***Members:***
	DEL ROSARIO, P.J., Chairperson, **UY,** and **MINDARO-GRULLA,** JJ.
THE COMMISSIONER OF INTERNAL REVENUE, Respondent.	***Promulgated:*** APR 10 2019 1:32 pm

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DECISION

UY, J.:

Before this Court is a *Petition for Review* filed on July 27, 2016 by SM_Residences Corporation against the Commissioner of Internal Revenue, assailing the latter's Final Decision on Disputed Assessment (FDDA), holding petitioner liable for deficiency taxes in the aggregate of ₱49,552,927.83 for the taxable year (TY) 2009.

THE FACTS

Petitioner SM_Residences Corp. is a corporation duly organized and existing under the laws of the Republic of the Philippines, with principal business address at 10/F One E-com Center, Harbor Drive, Mall of Asia Complex, Pasay City.[1] Its primary purpose is stated as follows:

> "To acquire by purchase, exchange, assigns, gift or otherwise, and to sell, assign, transfer, exchange, lease let, develop, mortgage, pledge, traffic, deal in and with and otherwise operate, enjoy and dispose of, and all properties of every kind and description and wherever

[1] Exhibits "P-1" and "P-2", Docket – Vol. II, pp. 931 to 940.

> situated and as to the extent permitted by law, including but not limited to real estate, whether improved or unimproved, and any interest or right therein, as well as buildings, tenements, warehouses, factories, edifices and structures and other improvements, and bonds, debentures, promissory notes, shares of capital stock, or other securities or obligations, created, negotiated or issued by any corp., association or other entity foreign or domestic, and while the owner, holder or possessor thereof, to exercise all rights, powers and privileges of ownership or any other interest therein, including the right to receive, collect and dispose of, any and all rentals, dividends, interest and income derived therefrom, and the right to vote on any propriety or other interest on any shares of the capital stock, and upon any bonds, debentures, or other securities, having voting power so owned or held; provided that the corporation shall not engage in the business of an open-end investments company as defined in the Investment Company Act (R.A. 2629), without first complying with applicable provisions of the said Act, provided it shall not act as broker or dealer of securities."[2]

Petitioner is registered with the Bureau of Internal Revenue (BIR) as a VAT taxpayer under Taxpayer Identification Number (TIN) 007-105-036-000.[3]

On the other hand, respondent Commissioner of Internal Revenue (CIR) is the head of the BIR, the government agency tasked to, among others, collect all national internal revenue taxes. As CIR, respondent has the power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto or other matters arising under the Tax Code or other laws or portions thereof administered by the BIR. Respondent's office is at the 5th Floor, Bureau of Internal Revenue Building, Agham Road, Diliman, Quezon City.[4]

On November 14, 2008, petitioner and SM_Development Corporation (SMDC) entered into a *Memorandum of Agreement*,[5] whereby the said parties agreed to develop petitioner's property, a

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[2] Exhibit "P-2-A", Docket – Vol. II, p. 933.
[3] Exhibit "P-3", Docket – Vol. II, p. 942.
[4] Par. A.1, Joint Stipulation of Facts and Issues (JSFI), Docket – Vol. I, p. 503.
[5] Exhibit "P-31", Docket – Vol. II, at pp. 1033 to1039.

parcel of land located at SM Mall of Asia Complex, CBP 1-A, Pasay City, Metro Manila, into a commercial/ residential condominium development project, to be registered and known as the "Sea Residences". The said parties agreed that each shall be entitled to the following percentage shares based on the proceeds of the sale of condominium units: (1) 15% for petitioner, and (2) 85% for SMDC.

Petitioner filed its *Annual Income Tax Return* (ITR) for TY 2009 on April 14, 2010.[6] It likewise separately filed its *Quarterly VAT Returns* for the same year on the following dates: (1) April 27, 2009, for the first quarter of 2009;[7] and (2) February 19, 2010, for the second,[8] third,[9] and fourth,[10] quarters of 2009.

Pursuant to Letter of Authority No. LOA-125-2010-00000119 dated May 14, 2010,[11] the BIR conducted a tax examination/audit of the books of accounts and other accounting records of the petitioner for TY 2009.[12]

On April 26, 2012, petitioner, through Cecilia R. Patricio, executed a *Waiver of the Statute of Limitation under the National Internal Revenue Code* (1st Waiver),[13] which extended the BIR's period to assess until December 31, 2012.[14]

Thereafter, on August 22, 2012, petitioner, through Patricio, executed another *Waiver of the Statute of Limitation under the National Internal Revenue Code* (2nd Waiver),[15] which extended the BIR's period to assess until March 31, 2013.[16]

On January 19, 2013, petitioner again executed a *Waiver of Defense of Prescription under the Statute of Limitations of the National Internal Revenue Code* (3rd Waiver)[17] which extended the BIR's period to assess until December 31, 2013.[18]

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[6] Exhibit "P-8", Docket – Vol. II, pp. 949 to 950.
[7] Exhibit "P-17", Docket – Vol. II, p. 962.
[8] Exhibit "P-18", Docket - Vol. II, pp. 963 to 964.
[9] Exhibit "P-19", Docket – Vol. II, pp. 965 to 966.
[10] Exhibit "P-20", Docket – Vol. II, pp. 967 to 968.
[11] Exhibit "P-21", Docket – Vol. II, pp. 969 to 971; and Exhibit "R-1", BIR Records, p. 4.
[12] Par. B.1, JSFI, Docket – Vol. I, p. 504.
[13] Exhibit "P-22", Docket – Vol. II, p. 972; and Exhibit "R-2", BIR Records, p. 173.
[14] Par. B.2, JSFI, Docket – Vol. I, p. 504.
[15] Exhibit "P-23", Docket – Vol. II, p. 973; and Exhibit "R-3", BIR Records, p. 174.
[16] Par. B.3, JSFI, Docket – Vol. I, p. 504.
[17] Exhibit "P-24", Docket – Vol. II, p. 974; and Exhibit "R-4", BIR Records, p. 174-A.
[18] Par. B.4, JSFI, Docket – Vol. I, p. 504.

Subsequently, on May 3, 2013, petitioner received from the BIR a copy of the *Preliminary Assessment Notice* (PAN),[19] covering various assessments for deficiency income tax, value-added tax (VAT), and documentary stamp tax (DST), for TY 2009 in the total amount of ₱35,603,354.91, inclusive of surcharge and interest.[20]

On July 25, 2013, petitioner and SMDC entered into an *Amendment to the Memorandum of Agreement*,[21] amending their previous *Memorandum of Agreement* to the effect that the property subject of the Sea Residences Project shall be purchased by SMDC upon full payment of the agreed purchase price via the execution of a *Deed of Absolute Sale*.

Petitioner again executed, on August 29, 2013, a *Waiver of Defense of Prescription under the Statute of Limitations of the National Internal Revenue Code* (4th Waiver),[22] which extended the BIR's period to assess until April 30, 2014.[23]

A *Waiver of Defense of Prescription under the Statute of Limitations of the National Internal Revenue Code* (5th Waiver)[24] was likewise executed by petitioner on January 27, 2014, further extending the BIR's period to assess until September 30, 2014.

Petitioner then received from the BIR, on February 27, 2014, the *Formal Letter of Demand* (FLD) dated February 26, 2014,[25] together with the *Detail of Discrepancies/Assessments* for deficiency income tax, VAT and DST, in the aggregate amount of ₱39,345,258.25, inclusive of surcharge, interest and compromise penalty for TY 2009.[26]

On March 31, 2014, petitioner filed with respondent its protest letter,[27] requesting for the cancellation of the subject assessments for lack of factual and/or legal bases. In the same letter, petitioner

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[19] Exhibit "P-27", Docket – Vol. II, pp. 977 to 980; and Exhibit "R-8", BIR Records, pp. 241 to 244.
[20] Par. B.5, JSFI, Docket – Vol. I, p. 504.
[21] Exhibit "P-31-A", Docket – Vol. II, at pp. 1040 to1042.
[22] Exhibit "P-25", Docket – Vol. II, p. 975; and Exhibit "R-5", BIR Records, p. 246.
[23] Par. B.6, JSFI, Docket – Vol. I, p. 504.
[24] Exhibit "P-26", Docket – Vol. II, p. 976.
[25] Exhibit "P-28", Docket – Vol. II, pp. 981 to 987; and Exhibit "R-9", BIR Records, pp. 274 to 277.
[26] Par. B.7, JSFI, Docket – Vol. I, p. 504.
[27] Exhibit "P-29", Docket – Vol. II, pp. 988 to 1025.

requested that other available remedies be afforded it, including the submission of supplemental protest letter and additional supporting documents, for the immediate resolution of the disputed issues.

On June 27, 2016, petitioner received a copy of the FDDA,[28] which denied petitioner's protest letter by reiterating the payment of the aggregate amount of ₱49,552,927.83, inclusive of increments for the deficiency income tax, VAT and DST, for TY 2009,[29] computed as follows:

I. INCOME TAX		
Taxable Income		₱ -
Add: Adjustments / Disallowances		
Undeclared Income	₱ 36,130,552.57	
Disallowed NOLCO	1,344,416.00	37,474,968.57
Adjusted Taxable Income		₱ 37,474,968.57
Tax rate		30%
Basic Tax Due		₱ 11,242,490.57
Add: Interest 4/16/2010 – 6/30/2016	₱ 13,971,489.65	
Compromise penalty	50,000.00	14,021,489.65
TOTAL AMOUNT DUE		**₱ 25,263,980.22**
II. VAT		
Taxable sales per audit		₱136,380,284.64
Tax rate		12%
Output Tax Due		₱ 16,365,634.16
Less: Input Tax Credit		5,613,985.01
Output Tax Payable		₱ 10,751,649.15
Less: Payment per return		171,406.43
Deficiency VAT		₱ 10,580,242.72
Add: Interest 1/26/2010 – 6/30/2016	₱ 13,612,279.40	
Compromise penalty	50,000.00	13,662,279.40
TOTAL AMOUNT DUE		**₱ 24,242,522.12**
III. DST		
Advances to related parties		₱ 3,330,710.00
Rate		1/200
DST due thereon		₱ 16,653.55
Add: Surcharge	₱ 4,163.39	
Interest 1/16/2010 – 6/30/2016	21,608.55	
Compromise penalty	4,000.00	29,771.94
TOTAL AMOUNT DUE		**₱ 46,425.49**
GRAND TOTAL		**₱ 49,552,927.83**

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[28] Exhibit "P-30", Docket – Vol. II, pp. 1026 to 1032; and Exhibit "R-10", BIR Records, pp. 329 to 332.
[29] Par. B.8, JSFI, Docket – Vol. I, p. 504.

On July 22, 2016, petitioner paid, through eFPS, the deficiency DST for TY 2009, in the total amount of ₱46,626.25.[30]

Subsequently, on July 27, 2016, petitioner filed the instant *Petition for Review*, praying that this Court: (a) reverse and set aside respondent's FDDA holding petitioner liable for alleged deficiency taxes in the aggregate amount of ₱49,552,927.83; (b) declare as null and void the disputed deficiency assessments for income tax, VAT and DST for the TY 2009; and (c) declare petitioner not liable for any deficiency income tax, VAT and DST for TY 2009.

On October 25, 2015, respondent filed his *Answer*,[31] interposing certain special and affirmative defenses, to wit: (1) the assessments have not prescribed, since valid waivers were executed by and between petitioner and respondent; (2) respondent observed both procedural and substantial due process in issuing the assessment; (3) the assessment issued against petitioner is valid and lawful; and (4) the assessment issued against petitioner has factual and legal bases.

The Pre-Trial Conference, initially set on February 16, 2017[32], was reset to May 4, 2017[33] pursuant to *a Motion to Reset Pre-Trial Conference*[34] filed on February 7, 2017 by petitioner; and a *Motion to Defer Pre-Trial Conference*,[35] filed by respondent on February 10, 2017. On said date, the parties' counsels agreed to file their Joint Stipulations of Facts and Issues not later than May 24, 2017.

On May 19, 2017, petitioner filed a *Motion to Commission (An Independent Certified Public Accountant)*[36] and the same was granted. Thus, Atty. Adan T. Delamide was commissioned as the *Independent Certified Public Accountant* (ICPA) for this case, in the Order dated May 25, 2017.[37]

On May 24, 2017, the parties filed their *Joint Stipulation of Facts and Issues*,[38] which was approved by the Court in its

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[30] Exhibits "P-35" and "P-35-A", Docket – Vol. II, pp. 1127 to 1128.
[31] Docket – Vol. I, pp. 179 to 190.
[32] Docket – Vol. I, pp. 192 to 193.
[33] Order dated February 8, 2017, Docket – Vol. 1, p. 206.
[34] Docket – Vol. I, pp. 201 to 204.
[35] Docket – Vol. I, pp. 210 to 212.
[36] Docket – Vol. I, pp. 493 to 496.
[37] Docket – Vol. I, pp. 523 to 524.
[38] Docket – Vol. 1, pp. 503 to 518.

Resolution dated June 6, 2017.[39] The Court then issued the Pre-trial Order on July 17, 2017.[40]

During trial, petitioner presented the following witnesses: (1) Cecilia R. Patricio,[41] (2) Gemma L. Mangaliman,[42] and the court commissioned ICPA, Atty. Adan T. Delamide.[43]

Upon conclusion of its presentation of evidence, petitioner filed its *Formal Offer of Evidence* on September 4, 2017.[44] On September 18, 2017, respondent filed his *Comment (Re: Petitioner's Formal Offer of Evidence)*,[45] stating, among others, that he objects to the purpose for which most exhibits are being offered, and for being self-serving, immaterial and irrelevant. Moreover, respondent objects to the admission of the testimony of the ICPA, Atty. Adan Delamide, due to conflict of interest.

In the Resolution dated October 24, 2017,[46] this Court resolved to admit petitioner's Exhibits, subject to its final evaluation and/or appreciation of their purposes, materiality, relevancy, and probative value to the issues involved in this case; **except Exhibit "P-9"**, for not being found in the records.

For his part, respondent presented a lone witness, Manuel T. Tasarra.[47] Thereafter, respondent filed its *Formal Offer of Evidence* on December 8, 2017.[48] Petitioner filed its *Comment (Respondent's Formal Offer of Evidence)* on December 21, 2017,[49] alleging that

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[39] Docket – Vol. I, p. 541.
[40] Docket – Vol. I, pp. 565 to 575.
[41] Exhibit "P-38", Docket – Vol. I, pp. 260 to 266; and Order dated August 15, 2017, Docket – Vol. II, pp. 908 to 909.
[42] Exhibit "P-37", Docket – Vol. I, pp. 276 to 291; Minutes of the hearing held on, and Order dated, July 18, 2017, Docket – Vol. I, pp. 578 to 581
[43] Exhibit "P-36", Docket – Vol. I, pp. 484 to 488; Exhibit "P-12398", Docket – Vol. II, pp. 591 to 610, respectively; Minutes of the hearing held on May 25, 2017, Docket – Vol. I, pp. 519 to 521; and Order dated August 15, 2017, Docket – Vol. II, pp. 908 to 909.
[44] Docket – Vol. II, pp. 911 to 929.
[45] Docket – Vol. II, pp. 1200 to 1202.
[46] Docket – Vol. II, pp. 1217 to 1218.
[47] Exhibit "R-13", Docket – Vol. I, pp. 223 to 226; Order dated November 28, 2017, Docket – Vol. II, pp. 1220 to 1221; and Transcript of Stenographic Notes on the hearing held on November 28, 2017.
[48] Docket – Vol. II, pp. 1223 to 1228.
[49] Docket – Vol. II, pp. 1230 to 1231.

petitioner has no objection to the admission of respondent's exhibits, except for Exhibit "R-11" for being self-serving.

In the Resolution dated January 24, 2018,[50] this Court admitted respondent's Exhibits, likewise subject to its final evaluation and/or appreciation of their purposes, materiality, relevancy, and probative value to the issues involved in this case. In the same Resolution, the Court directed both parties to file their respective memorandum within thirty (30) days from receipt hereof.

Respondent's *Memorandum* was filed on February 28, 2018;[51] while the *Memorandum for the Petitioner* was filed on March 27, 2018.[52] Hence, this case was considered submitted for decision on April 11, 2018.[53]

Hence, this Decision.

THE ISSUES

The parties submitted the following issues[54] for this Court's resolution, to wit:

> "1. WHETHER PETITIONER IS LIABLE TO PAY DEFICIENCY INCOME TAX, VALUE-ADDED TAX, AND DOCUMENTARY STAMP TAX IN THE TOTAL AMOUNT OF P49,552,927.83 INCLUDING INTEREST AND PENALTIES FOR TAXABLE YEAR 2009
>
> 2. WHETHER THE PETITONER IS ESTOPPED FROM QUESTIONING THE VALIDITY OF THE WAIVERS IT EXECUTED".

Petitioner's arguments:

Petitioner argues that the waivers that it executed are defective and invalid for the following reasons:

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[50] Docket – Vol. II, pp. 1238 to 1239.
[51] Docket – Vol. II, pp. 1244 to 1252.
[52] Docket – Vol. II, pp. 1256 to 1284.
[53] Resolution dated April 11, 2018, Docket – Vol. II, p. 1287.
[54] Docket – Vol. I, JSFI, pp. 504 to 505.

a.) The date of receipt by the petitioner of the duly signed waivers specifically the 2nd waiver and 4th waiver is not indicated therein. The 2nd, 3rd, 4th and 5th waivers do not show the date when the respondent received the same; and

b.) The acknowledgement in the 4th and 5th waivers indicates that Cecilia R. Patricio was acting as the authorized representative of Supplies Station, Inc. and not the petitioner.

According to petitioner, the waiver did not extend the original three (3)-year prescriptive period for the respondent to issue the FAN. But granting without conceding that the assessment has not prescribed, petitioner maintains that the deficiency tax assessment is void due to lack of factual and legal bases.

Petitioner disagrees with the findings of the respondent that there is undeclared taxable income in the amount of ₱36,130,552.57 due to the difference in its collection schedule as against its declared sales per financial statements. Allegedly, it reflected the correct amount of revenue in its ITR.

Moreover, petitioner claims that the NOLCO amounting to ₱1,344,416.00 that was applied as deduction against taxable income in 2009 was part of the sustained net operating loss of the petitioner in 2008 amounting to ₱3,323,704.00; and thus, the deficiency income tax assessment should be cancelled and set aside.

Allegedly, petitioner is not liable for any deficiency VAT on account of its failure to subject its sales to VAT. Pursuant to MOA between the petitioner and SMDC, the latter, as the exclusive Marketing and Sales Group for the Project, has issued sales documents to the buyers, accepted the payments, and correspondingly, remitted the VAT upon the sale of vatable units. Thus, the sale of these units has already been subjected to VAT at the time of sale. Invoking BIR Ruling No. DA-086-07, petitioner argues that to impose the VAT on petitioner is tantamount to direct duplicate taxation.

Furthermore, petitioner avers that it already paid the deficiency DST including interest and penalties; and thus, this item of assessment should be cancelled.

Finally, petitioner stresses that the ICPA recommended for the cancellation of the assessments.

Respondent's counter-arguments:

Respondent believes that petitioner is liable for the deficiency income tax, VAT and DST for TY 2009.

Relative to the deficiency income tax assessment, the adjusted taxable income in the amount of ₱36,130,552.64 allegedly pertains to the difference between real estate sales per petitioner's collection schedule of ₱136,380,284.64 as against its declared sales per financial statement of ₱100,249,732.00. According to respondent, said discrepancy was assessed pursuant to Section 32(A) of the National Internal Revenue Code (NIRC) in relation to Sec. 49(B) of the same Code as amended.

As for the disallowed NOLCO, verification disclosed that petitioner's claimed NOLCO were unsupported, as evidenced by its 2008 ITR, pursuant to Section 34(D)(3) of the NIRC.

With regard to the deficiency VAT assessment, the said sales amounting to ₱136,380,284.64 was allegedly subjected to VAT, pursuant to Revenue Regulation (RR) No. 16-2005, as amended by RR No. 4-2007.

Anent the deficiency DST assessment, the Advances to related parties amounting to ₱3,330,710.00 were subject to DST at the rate of ₱1.00 per ₱200.00, pursuant to Section 179 of the NIRC of 1997.

Finally, respondent claims that the right to assess petitioner has not yet prescribed. Respondent insists that petitioner is estopped from assailing the validity of the waivers it executed. Allegedly, when petitioner executed the waivers, it misled him as petitioner made respondent believe that it needs more time to submit documents.

THE COURT'S RULING

The instant *Petition for Review* is partly meritorious.

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The subject tax assessments have not prescribed.

Section 203 of the NIRC of 1997 states the period of limitation upon the assessment taxes, to wit:

> "SEC. 203. *Period of Limitation Upon Assessment and Collection.* — <u>Except as provided in Section 222</u>, **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**." *(Emphases and underscoring supplied)*

Based on the foregoing, the BIR is mandated 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. Accordingly, an assessment notice issued after the said three-year prescriptive period is no longer valid and effective.

However, there are certain instances where the BIR may assess pertinent taxes against taxpayers beyond the said three-year prescriptive period. One of which is provided under Section 222(b) of the NIRC of 1997, which reads:

> "SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* —
>
> xxx xxx xxx
>
> (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

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> written agreement made before the expiration of the period previously agreed upon.
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> xxx xxx xxx." (*Emphasis supplied.*)

Based on the foregoing, under Section 222(b) the three-year prescriptive period may be extended, if before the expiration of the time prescribed in Section 203 for the assessment of the tax, both petitioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon.

In *Commissioner of Internal Revenue vs. Kudos Metal Corporation* (hereinafter referred to as the "*Kudos Metal* case"),[55] 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:
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> 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.
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> 3. The waiver should be duly notarized.
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> 4. The CIR or the revenue official authorized by him must sign the waiver indicating that the BIR has accepted and agreed to the waiver. The date of such acceptance by the BIR should be indicated. However,

[55] G.R. No. 178087, May 5, 2010.

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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 by him must make sure that the waiver is in the prescribed form, duly notarized, and executed by the taxpayer or his duly the 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.**" *(Emphases supplied)*

In this case, while petitioner admits that it executed five (5) waivers,[56] it assails the validity thereof. Specifically, in arguing on the invalidity of the said waivers, petitioner states in its *Memorandum* the following:

"4.1. The Waivers of the Statute of Limitations executed by Petitioner, through Ms. Cecilia R. Patricio which purport to extend the prescriptive period are invalid and ineffective for the following reasons:

a. The date of receipt by the Petitioner of the duly signed waivers specifically 2nd Waiver, and 4th Waiver is not indicated therein. The 2nd Waiver, 3rd Waiver, 4th Waiver, and 5th Waiver do not show the date when the Respondent received such waivers;

b. The Acknowledgment in the 4th and 5th waivers

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[56] Pars. B.2, B.3, B.4, and B.6, JSFI, Docket – Vol. I, p. 504; and Exhibits "P-22" to "P-26", Docket – Vol. II, pp. 972 to 976.

> indicates that Cecilia R. Patricio was acting as the authorized representative of Supplies Station, Inc. and not of SM_Residences Corp."[57]

We disagree with petitioner.

Petitioner stresses that as shown in its copy of the waivers, the date of receipt by petitioner of the signed waivers, specifically the 2nd Waiver and 4th Waiver, is not indicated therein.

The above-stated procedure, as enunciated in the *Kudos Metal* case, particularly item No. 6, was misread by petitioner.

For easy reference, quoted anew is the said procedure:

> "6. The waiver must be executed in three copies, **the original copy to be attached to the docket of the case**, **the <u>second copy for the taxpayer</u>** 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 <u>in the original copy</u>** to show that the taxpayer was notified of the acceptance of the BIR and the perfection of the agreement." *(Emphases supplied)*

Based on the foregoing provision, the Waiver must be executed in three (3) copies: (1) the "original copy", which must be attached to the docket of the case; (2) the "second copy", for the taxpayer; and (3) the "third copy" for the BIR Office accepting the Waiver. But of the said three (3) copies, the fact of receipt by the taxpayer is required to be indicated only on the "original copy". This would explain why the "second copy" of the 2nd Waiver and 4th Waiver, which are in the possession of petitioner, have no indication of its date of receipt.

In the same vein, petitioner cannot invoke as a ground for invalidity that the 2nd Waiver, 3rd Waiver, 4th Waiver, and 5th Waiver, do not show the date when respondent received such waivers. This is so because the date of receipt by respondent of the Waivers is not a requirement for the validity thereof.

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[57] Docket – Vol. II, p. 1262.

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Furthermore, the indication on the *Acknowledgment* portion of the 4th and 5th Waivers that Cecilia R. Patricio was acting as the authorized representative of Supplies Station, Inc. and not of petitioner, is of no consequence. Obviously, such indication was an error made by either petitioner or the notary public, since the Waivers were clearly executed by Patricio for and on behalf of petitioner, and no other entity.

The authority of Cecilia R. Patricio, as petitioner's duly authorized representative, to execute the Waivers cannot be doubted in this case. In the Secretary's Certificate of Atty. Epitacio B. Borcelis, Jr., the duly elected Corporate Secretary of petitioner, certified under oath the following statements, to wit:

> "That at a special meeting of the Board of Directors of the Corporation held at the principal office on November 07, 2012, at which meeting a quorum was present, the following resolution was unanimously approved and adopted:
>
> > '**RESOLVED**, That the Corporation is authorized to transact with any and all government agencies and regulatory bodies in the regular course of business. In connection therewith, it is authorized and empowered to transact business with the **BUREAU OF INTERNAL REVENUE (BIR)** in connection with the conglomerate tax audit examination of the **BIR** covering taxable year 2009;
> >
> > **RESOLVED, FUTHER**, That **Ms. CECILIA R. PATRICIO**, be, as she is hereby appointed as the authorized representative of the Corporation in handling tax cases in connection with the said conglomerate tax audit examination of the **BIR** and <u>she is hereby authorized to sign, execute and deliver waiver</u> and other pertinent documents which may be necessary under the premises, <u>for and in behalf of the Corporation to effect the above purpose</u>."[58] *(Underscoring supplied)*

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[58] BIR Records (Exhibit "R-12), p. 175.

Thus, Cecilia R. Patricio is clearly the duly authorized representative of petitioner to execute the subject Waivers.

In any event, the said error on the said *Acknowledgment* does not, in any way, invalidate the said Waivers, because such an error is not a ground which can render the same as invalid. But even granting that the subject Waivers are indeed invalid, petitioner is already estopped from assailing the same.

In *Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue*,[59] the Supreme Court held:

> **"Under Article 1431 of the Civil Code, the doctrine of estoppel is anchored on the rule that '<u>an admission or representation is rendered conclusive upon the person making it, and cannot be denied or disproved as against the person relying thereon</u>.' 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.**
>
> **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.**" *(Emphases and underscoring supplied)*

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[59] G.R. No. 170257, September 7, 2011.

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Clearly from the foregoing jurisprudential pronouncement, 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 thereon. Such doctrine is applicable where a taxpayer executed waivers of the statute of limitation, and within the period agreed upon therein by the same taxpayer and the BIR, deficiency tax assessments were issued; and despite any supposed defect in the said waivers, the taxpayer still paid part of such tax assessments.

In the instant case, records show that on July 22, 2016, petitioner paid, through eFPS, part of the subject tax assessments, *i.e.*, the deficiency DST for TY 2009, in the total amount of ₱46,626.25.[60] If petitioner was really convinced that the subject Waivers were invalid or ineffective and thus, the said tax assessments were issued beyond the three (3)-year prescriptive period to assess, then it should not have paid the deficiency DST for TY 2009. Such payment of petitioner belies its stance that the same Waivers are invalid. Correspondingly, petitioner is now in estoppel from questioning the validity of the subject Waivers.

Hence, the subject tax assessments have not prescribed.

Petitioner is partly liable for the assessed deficiency income tax.

Respondent assessed petitioner in the total amount of ₱25,263,980.22, representing the subject deficiency income tax for TY 2009, computed as follows:

Taxable Income		₱ -
Add: Adjustments / Disallowances		
Undeclared Income	₱ 36,130,552.57	
Disallowed NOLCO	1,344,416.00	37,474,968.57
Adjusted Taxable Income		₱ 37,474,968.57
Tax rate		30%
Basic Tax Due		₱ 11,242,490.57
Add: Interest 4/16/2010 – 6/30/2016	₱ 13,971,489.65	
Compromise penalty	50,000.00	14,021,489.65
TOTAL AMOUNT DUE		**₱ 25,263,980.22**

[60] Exhibits "P-35" and "P-35-A", Docket – Vol. II, pp. 1127 to 1128.

NO

On whether there was undeclared income on the part of petitioner.

As can be seen from the foregoing income tax assessment, one of the reasons the same came about is because of respondent's finding that there was *Undeclared Income* in the amount of ₱36,130,552.57,[61] computed as follows:

Taxable sales of Sea Residences Project per audit	₱ 909,201,897.62
Sharing percentage per Joint Venture Agreement	15%
Taxable sales of SM Residences per audit	₱ 136,380,264.64
Real estate sales per audit	₱ 136,380,264.64
Cost of development	52,038,137.07
Sales per audit (Gross profit)	₱ 84,342,147.57
Sales per return (Gross profit)	48,211,595.00
Adjusted Taxable Income	₱ 36,130,552.57

From this computation, it is not hard to discern that the amount of ₱36,130,552.57 was derived from the supposed *Taxable sales of Sea Residences Project per audit* in the amount of ₱909,201,897.62.

While it is a general rule that tax assessments by tax examiners are presumed correct and made in good faith, the presumption does not apply upon proof that the assessment is utterly without foundation, meaning it is arbitrary and capricious. It is clear that in order to stand judicial scrutiny, the assessment must be based on actual facts.[62]

Upon a careful examination of the BIR Records,[63] the amount of ₱909,201,897.62 can only be traced to the *Schedule of collections*.[64] However, the source of the entries made therein and as to who prepared the said *Schedule*, was not disclosed by respondent; neither did respondent present any evidence to substantiate the said *Schedule*, and explain as to how the same came about.

As a corollary, petitioner presented the *Schedule of Collections for 2009* as certified by the Tax Manager, Kristine Marie Sy, and

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[61] Exhibit "R-10", BIR Records, at p. 330.
[62] Commissioner of Internal Revenue vs. Hantex Trading Co., Inc.,G.R. No. 136975, March 31, 2005 citing Collector (now Commissioner) of Internal Revenue v. Benipayo, G.R. No. L-13656, January 31, 1962
[63] Exhibit "R-13".
[64] BIR Records (Exhibit "R-13"), at pp. 119 to 160.

AVP-Controller, Gemma Mangaliman, one of petitioner's witnesses.[65] According to Mangaliman, the revenue of ₱100,249,732.00, which was reported by petitioner in its ITR, is exactly 15% of the total collection of ₱668,331,549.34 as shown in the *Schedule of Collection* which was certified by SMDC.[66] Furthermore, the following is the report of the ICPA relative to the said amount of ₱668,331,549.34, to wit:

"*<u>Undeclared income</u>*

xxx xxx xxx

9. We are not able to ascertain how the BIR arrived at the taxable sales per audit Php909,201,897.62. The FAN and FDDA provide that the said amount was taken from the 'schedule of collection'. However, no such schedule was attached to the FAN and FDDA. Moreover, a perusal of the schedule of collection of petitioner (Exhibit 'P-33') showed that the total collection in the said schedule is only Php668,331,549.34. We were unable to determine if this schedule of collection is the same as the 'schedule of collection' referred to by the BIR in its assessment.

10. Based on the documents we have examined, below are our additional findings and observations:

xxx xxx xxx

f. We have verified the documents supporting SMDC's collections of the sales proceeds of the units sold under the Project to ascertain the correct based of Petitioner's 15% share. Our verification disclosed that the total collections were as follows:

	Collections	15% Share
Total collections per taxpayer	₱668,331,549.34	₱100,249,732.40
Total collections per ICPA audit	669,522,100.54	100,428,315.08
Total	**₱ (1,190,551.20)**	**₱ (178,582.68)**

xxx xxx xxx

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[65] Exhibit "P-33", Docket – Vol. II, pp. 1063 to 1080.
[66] Refer to Q&A Nos. 37 and 38, Exhibit "P-37", Docket – Vol. I, pp. 285 to 286.

> 11. From the foregoing findings, we believe that while all the revenues recorded in the books were all reported in the ITR, SMDC's ORs and CM/DM showed that SMDC's total collection is higher by Php1,190,551.20 than what was reported to Petitioner. This resulted in an understatement in Petitioner's gross income of Php178,582.68."[67]

It must be noted that the admission of the said *Schedule of Collections for 2009* as Exhibit "P-33", *inter alia*, was objected to by respondent for the purpose it was offered.[68] However, this Court admitted the same in the Resolution dated October 24, 2017,[69] as respondent provided no valid ground against the admissibility thereof. Respondent did not question the ruling of the Court, either through a motion for reconsideration of this Court's admission, or by presenting counter evidence. Thus, as between the unsubstantiated *Schedule of collections* of respondent and the verified *Schedule of Collections for 2009* of petitioner, the latter must prevail.

Correspondingly, respondent's finding of *Undeclared Income* in the amount of ₱36,130,552.57 was not fully shown to be with foundation. As a consequence, the computation of the *Adjusted Taxable Income*, as found by respondent, is reduced to ₱178,583.01, computed as follows:

Collections per ICPA audit	₱ 669,522,100.54
Sharing percentage per Joint Venture Agreement	15%
Share of petitioner per ICPA audit	₱ 100,428,315.08
Cost of development	52,038,137.07
Sales per audit (Gross profit)	₱ 48,390,178.01
Sales per return (Gross profit)	48,211,595.00
Adjusted Taxable Income	₱ 178,583.01

Such being the case, a pertinent portion of the income tax assessment is justified to be cancelled.

Respondent properly disallowed petitioner's Net Operating Loss Carry Over (NOLCO) for TY 2009.

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[67] Exhibit "P-12,397", at pp. 4 to 6, and 8 to 11.
[68] Respondent's *Comment (Re: Petitioner's Formal Offer of Evidence)* filed on September 18, 2017, Docket – Vol. II, pp. 1200 to 1202.
[69] Docket – Vol. II, pp. 1217 to 1218.

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Respondent disallowed petitioner's Net Operating Loss Carry Over (NOLCO) for TY 2009 for being "unsupported", as follows:

> "**Disallowed NOLCO P1,344,416.00** – Verification disclosed that your claimed NOLCO were unsupported as evidenced by your 2008 ITR pursuant to Section 34(D)(3) of the Code"[70]

For its part, petitioner claims that the NOLCO amounting to ₱1,344,416.00 that was applied as deduction against the taxable income in 2009 was part of the sustained net operating loss of the petitioner in 2008 amounting to ₱3,323,704.00; and thus, the deficiency income tax assessment should be cancelled and set aside.

In response to such disallowance by respondent, the ICPA, Atty. Adan T. Delamide, through his Report,[71] made the following observations and recommendations, to wit:

> "*Disallowed NOLCO*
>
> 12. The NOLCO of Php1,344,416 was disallowed by the BIR for being unsupported by the Petitioner's 2008 ITR.
>
> 13. Our verification of Petitioner's 2008 ITR showed that Schedules 5A and 5B, which are the portions of the ITR where NOLCO is shown, showed a "NIL". This confirms that no NOLCO was presented in the ITR. A copy of the 2008 ITR is presented as **Exhibit 'P-12386'.**
>
> 14. Petitioner's 2008 Audited FS however reported, in its Note 7, that a NOLCO of Php3.3 million was available for carry over as deduction. A copy of the 2008 AFS is presented as **Exhibit 'P-12387'.**
>
> 15. Schedule 5B of Petitioner's 2010 ITR showed that the NOLCO from 2008 amounted to Php3,330,710, of which Php1,34,416 was applied in 2009. A copy of the 2010 ITR is presented as **Exhibit 'P-12389'.**
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> xxx xxx xxx
>
> **CONCLUSION AND RECOMMENDATION**

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[70] Exhibit "R-10", BIR Records, at p. 330.
[71] Exhibit "P-12,397", at pp. 9 and 15.

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27. Based on the foregoing, we believe that the assessments for income tax and VAT should be cancelled, based on the following:

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c. The NOLCO may be allowed as deduction in 2009 even though the BIR correctly mentioned that no NOLCO is shown in the 2008 ITR. It is our view that the disclosure of NOLCO in the 2008 AFS is substantial compliance to allow the NOLCO deduction. Moreover, the presentation of the 2008 NOLCO, as partially applied in 2009 in the amount of Php1,344,416, in the 2010 ITR further supports the view that this information was sufficiently disclosed to the BIR to allow it to effectively conduct an audit. We leave it to the Court to consider the effect of the fact that the 2008 AFS was only approved and authorized for issuance by the Board of Directors on April 12, 2012."

We, however, affirm respondent's finding of disallowance of the NOLCO in the amount of ₱1,344,416.00.

Section 34(D)(3) of the NIRC of 1997 provides 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 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**:

xxx xxx xxx

(D) ***Losses.*** –

xxx xxx xxx

(3) ***Net Operating Loss Carry-over.*** – The net operating loss of the business or enterprise for any taxable year immediately preceding the current taxable

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> 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 taxable years immediately following the year of such loss:** *Provided, however,* That any net loss incurred in 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:**
>
> xxx xxx xxx." *(Emphases supplied)*

Based on the foregoing provision, a NOLCO is a deduction claimed by a taxpayer for the current taxable year, arising from its net operating loss from the immediately preceding taxable year, subject to certain qualifications or limitations.

Furthermore, Section 1 of RR No. 21-2002[72] states, among others, the reportorial requirements in case a taxpayer claims a NOLCO. Said provision reads:

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[72] SUBJECT: Implementing the Provisions of Section 6(H) of the Tax Code of 1997, Authorizing the Commissioner of Internal Revenue to Prescribe Additional Procedural and/or Documentary Requirements in Connection with the Preparation and Submission of Financial Statements Accompanying the Tax Returns.

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"SECTION 1. CONTENTS AND FORMAT OF FINANCIAL STATEMENTS TO BE ATTACHED TO THE ANNUAL INCOME TAX RETURN OR INFORMATION RETURN. — The Financial Statements with accompanying Auditor's Certificate attached to the Annual Income Tax Return, or Annual Information Return for the Tax exempt persons, as the case may be, to be filed with the Bureau of Internal Revenue, thru its collection agents including Accredited Agent Banks, shall present/state the accounts therein in a very descriptive fashion such that the nature of the specific transactions entered in the accounts are known to the reader. xxx.

xxx xxx xxx

The Profit and Loss Statement/Income Statement shall show separately by segment (there should be proper labeling), with breakdown of the specific accounts, the following:

1. Cost of Goods Sold (for seller of goods)/Cost of Services (for seller of services);
II. Selling and Administrative Expenses;
III. Financial Expenses, if any;
IV. Special Deductions (e.g.. Net Operating Loss Carry-Over (NOLCO)), if any;
V. Deductions under Special Laws, if any.

(Note: Deductions III, **IV** and V **should be fully explained in the Notes to the Financial Statements).**" *(Emphases supplied)*

It clear from the foregoing that in case a NOLCO is being claimed as a deduction from gross income by a taxpayer, the same must be separately shown, with proper labeling and breakdown of the specific accounts, in the Profit and Loss Statement/Income Statement for the year in which such NOLCO is claimed; and such deduction must be fully explained in the Notes to the Financial Statements.

Furthermore, considering that the NOLCO is a tax deduction, which is a matter of legislative grace,[73] the doctrinal pronouncements

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[73] *Chamber of Real Estate and Builders Associations, Inc. vs.The Hon. Executive Secretary Alberto Romulo, et al.*, G.R. No. 160756, March 9, 2010.

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by the Supreme Court in *H. Tambunting Pawnshop, Inc. vs. Commissioner of Internal Revenue*,[74] ought to be considered, to wit:

> "**To be entitled to claim a tax deduction, the taxpayer must competently establish the factual and documentary bases of its claim.**
>
> xxx xxx xxx
>
> **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. A mere averment that the taxpayer has incurred a loss does not automatically warrant a deduction from its gross income.**
>
> xxx xxx xxx
>
> xxx. To reiterate, **deductions for income tax purposes partake the nature of tax exemptions and are strictly construed against the taxpayer, who must prove by convincing evidence that he is entitled to the deduction claimed.** Tambunting did not discharge its burden of substantiating its claim for deductions due to the inadequacy of its documentary support of its claim. xxx." *(Emphases supplied)*

Based on the foregoing doctrinal pronouncements, it is well settled that deductions from gross income must be strictly construed against the taxpayer, and the latter must competently establish the factual and documentary bases of such deductions. Relative thereto, it must also be stressed that in cases filed before this Court, which are litigated *de novo*, party-litigants must prove <u>every minute aspect</u> of their case.[75]

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[74] G.R. No. 173373, July 29, 2013.

[75] *Edison (Bataan) Cogeneration Corporation vs. Commissioner of Internal Revenue, etseq.*, G.R. Nos. 201665 and 201668, August 30, 2017.

Correspondingly, on the basis of law and jurisprudence, for a NOLCO to be validly deducted from the gross income, the following facts must be clearly established by the taxpayer-claimant, to wit:

1) The net operating loss was not previously offset as a deduction from gross income;
2) The said net operating loss has not been carried over for more than three (3) consecutive taxable years;
3) There was no substantial change in the ownership of the business or enterprise in that not less than 75% in nominal value of outstanding issued shares or not less than 75% of the paid up capital of the corporation, if the business is in the name of the corporation, is held by or on behalf of the same persons;
4) The net operating loss from the preceding year(s) which was carried over is substantiated by documentary evidence, showing the items of gross income and allowable deductions from the said preceding year(s), on the basis of which, such net operating loss was computed;
5) The NOLCO, as a special deduction, must have been shown as a separate item, with proper labeling and breakdown of the specific accounts, in the Profit and Loss Statement/Income Statement for the year in which such NOLCO is claimed; and
6) The NOLCO, as a special deduction, must be fully explained in the Notes to the Financial Statements.

In this case, petitioner failed to establish some of the foregoing legal requirements.

In its 2009 Notes to Financial Statements, regarding the subject NOLCO, petitioner's external auditor reported as follows:

"8. **Income Tax**

The Company's deferred tax asset amounting to ₱0.6 million as of December 31, 2009 represents the tax effect of NOLCO in 2008 amounting to ₱3.3 million. Unrecognized deferred tax asset amounting to ₱1.0 million as of December 31, 2008 also pertains in the tax effect of NOLCO for that year.

Portion of unrecognized NOLCO incurred in 2008 amounting to ₱1.3 million was applied as deduction against taxable income in 2009. As of December 31, 2009, the balance of carryforward benefits of NOLCO

> **that can be claimed as deduction against future taxable income amounted to ₱2.0 million which will expire in 2011.**
>
> xxx xxx xxx."[76] *(Emphasis supplied)*

Thus, it can be said that petitioner has shown substantial compliance with the requirement that the NOLCO, as a special deduction, must be fully explained in the Notes to the Financial Statements. There is likewise no indication that the net operating loss for 2008 was previously offset as deduction from gross income; nor that the same net operating loss was carried over for more than three (3) consecutive taxable years.

However, petitioner failed to show that there was no substantial change in the ownership thereof in that not less than 75% in nominal value of its outstanding issued shares or not less than 75% of the paid up capital of petitioner is held by or on behalf of the same persons. Petitioner failed to present or offer any evidence to this effect.

Furthermore, petitioner likewise failed to substantiate by documentary evidence, the items of gross income and allowable deductions for TY 2008, on the basis of which, the net operating loss from the said year was computed and carried over to TY 2009.

In addition, the NOLCO, was not shown in petitioner's *Statements of Comprehensive Income for the year ended December 31, 2009,*[77] as a special deduction and as a separate item.

Thus, We affirm respondent's disallowance of the NOLCO claimed by petitioner in the amount of ₱1,344,416.00 for TY 2009, for being unsupported.

In sum, petitioner's income tax due for TY 2009 is in the total amount of ₱456,899.70, determined as follows:

Taxable Income		₱ -
Add: Adjustments / Disallowances		
Undeclared Income	₱ 178,583.01	
Disallowed NOLCO	1,344,416.00	1,522,999.01
Adjusted Taxable Income		₱ 1,522,999.01
Tax rate		30%
Basic Income Tax Due		**₱ 456,899.70**

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[76] Exhibit "P-32-B", Docket – Vol. II, p. 1060.
[77] Exhibit "P-32", Docket – Vol. II, at p. 1046.

Petitioner is liable for the deficiency VAT.

As for the deficiency VAT for TY 2009, respondent arrived at the total amount due of ₱24,242,522.12, determined as follows:

Taxable sales per audit		₱136,380,284.64
Tax rate		12%
Output Tax Due		₱ 16,365,634.16
Less: Input Tax Credit		5,613,985.01
Output Tax Payable		₱ 10,751,649.15
Less: Payment per return		171,406.43
Deficiency VAT		₱ 10,580,242.72
Add: Interest 1/26/2010 – 6/30/2016	₱ 13,612,279.40	
Compromise penalty	50,000.00	13,662,279.40
TOTAL AMOUNT DUE		**₱ 24,242,522.12**

As already shown, the amount of ₱136,380,264.64 was computed by respondent in the following manner, to wit:

Taxable sales of Sea Residences Project per audit	₱ 909,201,897.62
Sharing percentage per Joint Venture Agreement	15%
Taxable sales of SM Residences per audit	₱ 136,380,264.64

However, similar to Our ruling on the supposed undeclared income by petitioner, the said amount of ₱909,201,897.62 cannot be used as basis to sustain respondent's finding as regards the deficiency VAT assessment, since the basis thereof was not clearly established.

Nevertheless, by petitioner's own evidence, We find that part of the subject deficiency VAT assessment may be sustained.

Sections 105 and 106 of the NIRC of 1997, as amended by Republic Act (RA) No. 9337,[78] provides, in part, as follows:

> "SEC. 105. *Persons Liable.* – **Any person, who, in the course of trade or business, <u>sells</u>**, barters, exchanges, leases **goods or properties**, renders services, and any person who imports goods **shall be**

[78] AN ACT AMENDING SECTIONS 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 AND 288 OF THE NATIONAL INTERNAL REVENUE CODE OF 1997, AS AMENDED, AND FOR OTHER PURPOSES.

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> **subject to the value-added tax (VAT) imposed in Sections 106 to 108.**
>
> xxx xxx xxx."
>
> "SEC. 106. *Value-added Tax on Sale of Goods or Properties.* –
>
> (A) *Rate and Base of Tax.* – **There shall be levied, assessed and collected on every sale**, barter or exchange of goods or properties, **a value-added tax equivalent to ten percent (10%)**[79] of the gross selling price or gross value in money of the **goods or properties sold**, bartered or exchanged, **such tax to be paid by the seller or transferor**: xxx
>
> (1) **The term 'goods or properties'** shall mean all tangible and intangible objects which are capable of pecuniary estimation and **shall include**:
>
> (a) **Real properties held primarily for sale to customers** or held for lease **in the ordinary course of trade or business**;
>
> xxx xxx xxx." *(Emphases and underscoring supplied)*

Based on the foregoing provisions, any person who, in the course of trade or business, sells, *inter alia*, goods or properties, which include real properties held primarily for sale to customers, shall be subject VAT. In other words, **the sale** of real properties held primarily for sale to customers is one of the transactions subject to VAT.

Relative thereto, it must be remembered that a contract of sale, in general, necessitates that the vendor or seller has the right to transfer ownership of the thing sold, pursuant to the following provisions of the Civil Code of the Philippines[80], to wit:

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[79] The VAT rate of 10% was increased to 12%. Refer to the Memorandum dated January 31, 2006 from then Executive Secretary Eduardo R. Ermita, as circularized in Revenue Memorandum Circular No. 7-2006 dated January 31, 2006.
[80] RA No. 386.

> "Article 1458. **By the contract of sale one of the contracting parties obligates himself <u>to transfer the ownership</u> and to deliver a determinate thing**, and the other to pay therefor a price certain in money or its equivalent.
>
> A contract of sale may be absolute or conditional." *(Emphasis and underscoring supplied)*
>
> "Article 1459. The thing must be licit and **the vendor must have a <u>right to transfer the ownership</u> thereof at the time it is delivered**." *(Emphasis and underscoring supplied)*
>
> "Article 1477. **<u>The ownership of the thing sold shall be transferred to the vendee</u> upon the actual or constructive delivery thereof**." *(Emphasis and underscoring supplied)*
>
> "Article 1495. **The vendor is <u>bound to transfer the ownership</u> of** and deliver, as well as warrant **the thing which is the object of the sale**." *(Emphasis and underscoring supplied)*

In other words, there can be no valid contract of sale, unless the vendor or seller has the right to transfer ownership, at least, at the time the thing to be sold is delivered. Thus, under the law, the imposition of VAT on the seller or the person who sells, presupposes that such seller or person has the right to transfer ownership of the thing sold.

In this case, it was shown that it is not only SMDC which has the right to transfer ownership of the units sold, but also petitioner. This is clear in the said parties' *Memorandum of Agreement* dated November 14, 2008,[81] which has the following provisions:

> "WHEREAS, the LANDOWNER[82] is the owner of a parcel of land with an area of EIGHTEEN THOUSAND FOUR HUNDRED EIGHTY square meter (18,480 sq. m.), more or less, located at Lot 4 Road Lot 11 corner Road Lot 23, SM Mall of Asia Complex, CBP 1-A, Pasay City, Metro Manila and presently covered by Transfer

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[81] Exhibit "P-31", Docket – Vol. II, at pp. 1033 to1039.
[82] Referring to petitioner.

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Certificate of Title No, 149281 of the Register of Deeds for Pasay City (PROPERTY)...

WHEREAS, the DEVELOPER is a corporation engaged in the development of real estate properties;

xxx xxx xxx

I. DEVELOPMENT

xxx xxx xxx

2. The DEVELOPER shall develop the PROPERTY into a commercial/residential condominium development project (Project) whose design shall be in accordance with government regulations. The Project shall be registered and known as "Sea Residences."

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II. OBLIGATIONS OF THE LANDOWNER

xxx xxx xxx

4. xxx. In addition, the LANDOWNER shall, through a Board Resolution, designate the DEVELOPER as the signatory to the reservation agreements, contracts to sell, deeds of absolute sale and other relevant documents for the sale of the individual condominium units at the Sea Residences to the buyers thereof.

xxx xxx xxx

V. SHARING STRUCTURE

xxx xxx xxx

2. The LANDOWNER and DEVELOPER agree that the each shall be entitled to the following percentage shares based on the proceeds of the sale of the units:

LANDOWNER	Fifteen Percent (15%)
DEVELOPER	Eighty-five Percent (85%)
Total:	One Hundred Percent (100%)

xxx xxx xxx

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VI. MARKETING AND SELLING OF UNITS

1. The DEVELOPER is hereby designated as the exclusive Marketing and Sales Group for the Project. The Sales Administration shall be exclusively undertaken by the DEVELOPER.

2. The DEVELOPER shall be entitled to a Marketing Fee of Twelve percent (12%) based on the Total Contract Price as stated in the contract to sell or other similar document executed with the buyer of a unit.

3. The selling price and payment terms for the condominium units shall be subject to the mutual agreement of the LANDOWNER and DEVELOPER. The selling price and payment terms may be revised or modified upon mutual agreement of the LANDOWNER and DEVELOPER.

xxx xxx xxx

XI. MORTGAGE AND OTHER DISPOSITION

1. It is further agreed that neither party shall mortgage, transfer, encumber or otherwise dispose the PROPERTY or any portion thereof, or any of their respective rights and interests in the PROPERTY or the Project to any person, entity, bank or financial institution. However, both the LANDOWNER and DEVELOPER shall have the right to assign, in whole or in part, any of its rights, interests and obligations granted under this MOA to any of the corporations within its group of companies, subject to the prior written consent of the LANDOWNER or the DEVELOPER, as the case may be.

xxx xxx xxx."

Based on the foregoing provisions, while petitioner is the owner of the subject parcel of land, and SMDC is the developer thereof, both of them are the owners of the Project. This holds specially true to petitioner because there is no indication that the latter transferred its ownership over the said parcel of land in TY 2009—the year under consideration; and because the selling price and payment terms for the condominium units were still subject to the mutual agreement of

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petitioner and SMDC, not only of the latter. Further, it is noted that, as agreed upon, the selling price and payment terms may be revised or modified upon mutual agreement of the landowner and developer.

Correspondingly, for each sale of the units under the Sea Residences Project, both SMDC and petitioner are considered the sellers thereof. As such, each of them must separately file their Quarterly VAT Returns, for their respective share in the Sea Residences Project, pursuant to Section 114 of the NIRC of 1997, as amended by RA No. 9337, which provides as follows:

> "SEC. 114. *Return and Payment of Value-added Tax.* —
>
> (A) *In General.* – **<u>Every person</u> liable to pay the value-added tax imposed under this Title shall file a quarterly return of the amount of his gross sales or receipts within twenty-five (25) days following the close of each taxable quarter prescribed for each taxpayer**: *Provided, however*, That VAT-registered persons shall pay the value-added tax on a monthly basis.
>
> xxx xxx xxx
>
> (B) *Where to File the Return and Pay the Tax.* – Except as the Commissioner otherwise permits, **<u>the return shall be filed with and the tax paid</u> to an authorized agent bank, Revenue Collection Officer or duly authorized city or municipal Treasurer in the Philippines located within the revenue district where the taxpayer is registered or required to register.**"

Clearly from the foregoing provisions, **every person** subject to VAT under the aforequoted Sections 105 and 106 of the NIRC of 1997, as amended by RA No. 9337, is liable to file the corresponding VAT return and pay the said tax. Thus, on the basis thereof, SMDC must include in its VAT Returns only the amount which corresponds to its 85% share in the sale of the condominium units in the Sea Residences Project, and pay the corresponding VAT thereof. For its part, petitioner must report in its VAT Returns its corresponding 15% share in the same sale of the condominium units in the Sea Residences Project, and pay also the corresponding VAT thereof.

Apropos, it is a cardinal principle of justice that fees, taxes or imposts should not be exacted except from those really liable to pay them.[83]

We do not subscribe to petitioner's contention that considering that the subject transactions have been subjected to VAT upon sale, this should not be subject to VAT anymore, since to do so would be tantamount to double taxation in its prohibited sense or direct duplicate taxation, as it violates the equal protection clause of the Constitution.

Considering that the imposition of the VAT would refer only to the said parties' corresponding share in the sale of condominium units, there is no direct duplicate taxation in this case.

Double taxation means taxing the same property twice when it should be taxed only once; that is, **taxing <u>the same person</u> twice** by the same jurisdiction for the same thing. It obnoxious when the taxpayer is taxed twice, when it should be but once.[84]

To emphasize, what is being taxed herein is merely the portion of petitioner's 15% share relative to the sale of condominium units under the Sea Residences Project. The supposed payments of the SMDC of the corresponding VAT regarding the 15% share of petitioner in the said sale of condominium units are, at best, may be considered only as a erroneously or illegally collected tax that may be refunded upon proof thereof; but is not tantamount to double taxation.

Moreover, petitioner cannot rely on BIR Ruling No. DA-086-07, wherein it was held that "[t]*he share in the net proceeds distributed to the respective joint venture partners is not subject to VAT anymore*", simply because the ruling therein is an erroneous interpretation of the law, as shown above. In this connection, it must be emphasized that although it is widely accepted that the interpretation placed upon a statute by the executive officers, whose duty is to enforce it, is entitled to great respect by the courts, this interpretation is not conclusive and will have to be ignored if judicially found to be erroneous and clearly absurd or improper. An administrative issuance that overrides the law it merely seeks to interpret, instead of remaining consistent and in harmony with it, will not be countenanced by this Court.[85]

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[83] *Iloilo vs. Pinzon*, G.R. No. L-7552, May 31, 1955.
[84] *The City of Manila, et al. vs. Coca-cola Bottlers Philippines, Inc.*, G.R. No. 181845, August 4, 2009.
[85] *Commissioner of Internal Revenue vs. American Express International, Inc.*, G.R. No. 152609, June 29, 2005.

Hence, We partly agree with the findings of the ICPA, specifically, that petitioner's VAT liability should be computed based only on its share of SMDC's vatable sales, and taking into account the VAT rules and regulations on deferred sales and installment sales. Said the ICPA Report[86], to wit:

"**b) Value Added Tax**

xxx xxx xxx

26. Assuming that Petitioner is required to pay VAT on its 15% share in the units sold, we believe its VAT liability should be computed based only on its shares of SMDC's vatable sales, and taking into account the VAT rules and regulations on deferred sales and installment sales. Based on this view, the tax base per our audit would be as follows:

Vatable Sales	**Selling Price**	**Collection**	**Tax Base**
Deferred	₱223,052,493.51	₱107,599,647.98	₱223,052,493.51
Installment	518,136,958.92	49,336,030.07	49,336,030.07
Total	₱741,189,452.43	₱156,935,678.05	₱272,388,523.58
SMDC Vatable Sales per BSL (Annex 'E')			276,326,676.00
Under (Over) Declaration in the Tax Base			**₱(3,938,152.42)**

Note: Deferred-with initial payments for the year exceeding 25% of the selling price. Tax base would be the total selling price. Installment-with initial payments for the year not exceeding 25% of the selling price. Tax base would be the amount of collections.

Based on the above computation, Petitioner's 15% share on the vatable sales would only amount to Php40,858,278.54 (Php272,388,523.58 x 15%). This amount is still lower than the amount of vatable sales reported in the 2009 VAT return of Php48,211,595.33. We therefore conclude that for TY 2009, there is an over-declaration of sales instead of under-declaration as stated in the FAN and FDDA. The VAT refundable to Petitioner can be computed as follows:

	Per VAT Return	**Per ICPA Audit**
Taxable Sales	₱48,211,595.33	₱40,858,278.54
VAT Rate	12%	12%
Output Tax Due	₱ 5,785,391.44	₱ 4,902,993.42
Input Tax Credits allowed by BIR	5,613,985.01	5,613,985.01
VAT Payable	₱ 171,406.43	₱ (710,991.59)
VAT Paid	171,406.43	171,406.43
VAT Still Due (Refundable)	**₱ -**	**₱ (171,406.43)**

[86] Exhibit "P-12,397", at pp. 13 to 14.

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Relative thereto, Section 4.106-3 of Revenue Regulations (RR) No. 16-2005,[87] as amended by RR No. 4-2007, provides, in part, as follows:

> "SEC. 4.106-3. *Sale of Real Properties.* – **Sale of real properties held primarily for sale to customers or held for lease in the ordinary course of trade of business of the seller shall be subject to VAT.**
>
> xxx xxx xxx
>
> **In case of installment sale, the seller shall be subject to output VAT on the installment payments received, including interests and penalties for late payment, actually and/or constructively received, subject to the provisions of Sec.4.106-4 hereof.** Correspondingly, the buyer of the property can claim the input tax in the same period as the seller recognized the output tax.
>
> Installment payments, including interests and penalties, actually and/or constructively received starting February 1, 2006 shall be subject to twelve percent (12%) output VAT.
>
> xxx xxx xxx
>
> **In the case of sale of real properties on a deferred-payment basis not on the installment plan, the transaction shall be treated as cash sale which makes the entire selling price taxable in the month of sale. Output tax shall be recognized by the seller** and input tax shall accrue to the buyer at the time of the execution of the instrument of sale." *(Emphases and underscoring supplied)*

Based on the foregoing provisions, in case of installment sales, the seller shall be subject to output VAT on the installment payments received, including interests and penalties for late payment, actually and/or constructively received; and in case of sale on a deferred-payment basis not on the installment plan, the transaction shall be treated as cash sale which makes the entire selling price subject to VAT in the month of sale. Thus, per the ICPA's finding, the amount of ₱49,336,030.07, representing installment sales of condominium

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[87] SUBJECT: Consolidated Value-Added Tax Regulations of 2005.

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units under the Sea Residences Project, and the amount of ₱223,052,493.51, representing the deferred sales of the same units, or the total amount of ₱272,388,523.58, are subject to VAT. The 15% of which or the total amount of ₱40,858,278.54 should have been reported by petitioner as its vatable sales for TY 2009.

However, We do not agree with the ICPA's finding that the said amount of ₱40,858,278.54 is still lower than the amount of vatable sales reported in the 2009 VAT Return of ₱48,211,595.33 and hence, *"there is an over-declaration of sales instead of under-declaration as stated in the FAN and FDDA."* This is so because: *first*, the breakdown of the said amount of ₱48,211,595.33 was not proven by petitioner; and *more importantly*, to assume that the said share of ₱40,858,278.54 is already included in the said amount ₱48,211,595.33, would run counter to petitioner's stance that *"it was SMDC that issued the sales documents to buyers, accepted payments and remitted the VAT on the sale of units."*[88] Anent the said stance, petitioner could not have included the said amount of ₱40,858,278.54 in its VAT Returns for TY 2009, if it was fully convinced that SMDC has remitted the VAT on the sale of the said condominium units.

Thus, petitioner's liability for the deficiency VAT for 2009 is reduced to ₱4,902,993.42, computed as follows:

Taxable sales (₱48,211,595.33 + ₱40,858,278.54)	₱89,069,873.87
Tax rate	12%
Output Tax Due	₱ 10,688,384.86
Less: Input Tax Credit	5,613,985.01
Output Tax Payable	₱ 5,074,399.85
Less: Payment per return	171,406.43
Deficiency VAT	**₱ 4,902,993.42**

Petitioner is liable for the deficiency DST.

With regard to deficiency DST for TY 2009, respondent computed the same in the total amount of ₱46,425.49, as follows:

Advances to related parties	₱ 3,330,710.00
Rate	1/200
DST due thereon	₱ 16,653.55

[88] Exhibit "P-29", Docket – Vol. II, at p. 990. Refer also to Par. 4.50 of the instant *Petition for Review*, Docket – Vol. I, at p. 29, and Par. 4.38 of petitioner's *Memorandum*, Docket – Vol. II, at p. 1275.

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Add: Surcharge	₱	4,163.39	
Interest 1/16/2010 – 6/30/2016		21,608.55	
Compromise penalty		4,000.00	29,771.94
TOTAL AMOUNT DUE			**₱ 46,425.49**

As already stated earlier, on July 22, 2016, petitioner paid, through eFPS, the deficiency DST for TY 2009, in the total amount of ₱46,626.25.[89] Thus, this item of assessment should already be cancelled.

Computation of deficiency and delinquency interests to conform with the provisions of RA No. 10963, and implemented by RR No. 21-2018.

It must also be noted that the Secretary of Finance issued RR No. 21-2018 on September 21, 2018, implementing Section 249 of the NIRC of 1997, as amended by RA No. 10963. Section 6 of the said RR provides as follows:

> "**SECTION 6. TRANSITORY PROVISION.** - In cases where the tax liability/ies or deficiency tax/es became due before the effectivity of the TRAIN Law on January 1, 2018, and where the full payment thereof will only be accomplished after the said effectivity date, the interest rates shall be applied as follows:
>
> | *Period* | *Applicable Interest Type and Rate* |
> |---|---|
> | For the period up to December 31, 2017 | Deficiency and/or delinquency interest at 20% |
> | For the period January 1, 2018 until full payment of the tax liability | Deficiency and/or delinquency interest at 12% |
>
> The double imposition of both deficiency and delinquency interest under Section 249 prior to its amendment will still apply insofar as the period between the date prescribed for payment until December 31, 2017.
>
> ***Illustration 2***: A Company has been assessed deficiency income tax of ₱1,000,000.00, exclusive of

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[89] Exhibits "P-35" and "P-35-A", Docket – Vol. II, pp. 1127 to 1128.

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interest and surcharge, for taxable year 2015. The tax liability has remained unpaid despite the lapse of June 30, 2017, the deadline for payment stated in the notice and demand issued by the Commissioner. Payment was made by the taxpayer only on February 10, 2018. The civil penalties for late payment shall be computed as follows:

Basic Tax Due - Income Tax			₱1,000,000.00
Add:	25% Surcharge for late payment	₱250,000.00	
	20% Deficiency Interest from April 16, 2016 to June 30, 2017 (441 days)	241,643.84	491,643.84
Total Amount Due, June 30, 2017			**₱1,491,643.84**
Add:	20% Deficiency Interest from July 1, 2017 to December 31 , 2017 (184 days; based on basic tax of P1,000.000.00)	₱100,821.92	
	20% Delinquency interest from July 1, 2017 December 31 , 2017 (184 days; based on total amount due of P1,491,643. 84 as of June 30, 2017)	150,390.39	
	12% Delinquency Interest from January 1, 2018 to February 10. 2018 (41 days; based on total amount due of P1,491,643.84 as of June 30, 2017)	20,106.54	271,318.85
Total Amount Due, February 10, 2018			**₱1,762,962.69"**

The foregoing provision clarifies and illustrates the computation of delinquency and deficiency interests in case where the tax liability became due before the effectivity of the TRAIN Law on January 1, 2018, and where the full payment thereof will only be accomplished after the said effectivity date.

WHEREFORE, in light of the foregoing considerations, the *Petition for Review* is **PARTIALLY GRANTED.** The deficiency DST, including increments, for TY 2009, in the total amount of ₱46,626.25, is **CANCELLED** and **SET ASIDE**.

Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of **₱19,271,999.00**, representing the reduced deficiency income tax and VAT, for TY 2009, inclusive of the twenty-five percent (25%) surcharge, and twenty percent (20%) deficiency interest and delinquency interest imposed under Sections 248(A) and 249(B) and (C), of the NIRC of 1997, as amended, respectively, computed until December 31, 2017, as follows:

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	Income Tax	VAT	TOTAL
Basic Tax Due	₱ 456,899.70	₱4,902,993.42	₱5,359,893.12
Add: 25% Surcharge	114,224.93	1,225,748.36	1,339,937.29
Add: 20% Deficiency Interest from:			
April 16, 2010 to June 30, 2016 *[₱456,899.70 x 20% x 2,268 days /365]*	567,807.41		567,807.41
January 26, 2010 to June 30, 2016 *[₱4,902,993.42 x 20% x 2,348 days /365]*		6,308,070.44	6,308,070.44
Total Amount Due, June 30, 2016[90]	**₱1,138,932.04**	**₱12,436,812.22**	**₱13,575,744.26**
Add: 20% Deficiency Interest from July 1, 2016 to December 31, 2017			
[₱456,899.70 x 20% x 549 days /365]	137,445.44		137,445.44
[₱4,902,993.42 x 20% x 549 days /365]		1,474,927.88	1,474,927.88
Add: 20% Delinquency Interest from July 1, 2016 to December 31, 2017			
[₱1,138,932.04 x 20% x 549 days /365]	342,615.72		342,615.72
[₱12,436,812.22 x 20% x 549 days /365]		3,741,265.70	3,741,265.70
Total Amount Due, December 31, 2017	**₱1,618,993.20**	**₱17,653,005.80**	**₱19,271,999.00**

In addition, petitioner is **ORDERED TO PAY** delinquency interest at the rate of twelve percent (12%), on the total unpaid amount as of June 30, 2016 in the amount of **₱13,575,744.26**, as determined above, computed from January 1, 2018 until full payment thereof, pursuant to Section 249(C) of the NIRC of 1997, as amended by RA No. 10963, and as implemented by RR No. 21-2018.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

(See Concurring and Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

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

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[90] Exhibit "P-30", Docket – Vol. II, at pp. 1028 to1029.

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice
Chairperson, Special 1st Division

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SPECIAL FIRST DIVISION

SM_RESIDENCES CORP.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 9395

Present:

DEL ROSARIO, *P.J., Chairperson,*
UY, and
MINDARO-GRULLA, *JJ.*

Promulgated:
APR 1 3 2019 ; 1:32 pm

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CONCURRING & DISSENTING OPINION

DEL ROSARIO, P.J.:

I concur with the conclusion of the *ponencia* in: (i) partially granting the Petition for Review; (ii) cancelling and setting aside the deficiency Documentary Stamp Tax, including increments, for taxable year (TY) 2009, in the amount of ₱46,626.25; and, (iii) ordering petitioner to pay respondent the amount of ₱19,271,999.00, representing the reduced deficiency income tax and value-added tax (VAT), for TY 2009, inclusive of the 25% surcharge, and 20% deficiency interest and delinquency interest imposed under Sections 248(A) and 249(B) and (C) of the National Internal Revenue Code (NIRC) of 1997, as amended, respectively, computed until December 31, 2017.

I concur with the *ponencia* that there are two separate computations of deficiency interest in line with Revenue Regulations No. 21-2018: (1) the **deficiency interest** computed from the date following the last day prescribed for the payment of the tax until the due date indicated in **the notice and demand**; and (2) **deficiency interest** from the day following the due date indicated in the notice and demand until December 31, 2017.

With due respect, I could not, however, subscribe to the manner by which the *ponencia* computed petitioner's tax liabilities. The due date June 30, 2016 from whence the *ponencia* computed respondent's deficiency and delinquency interest is found in the Final Decision on Disputed Assessment[1]. To my mind, the date **February 28, 2014**, appearing in the **Assessment Notices dated February 26, 2014** as the due date for payment, should be used for purposes of computing the deficiency interest.

I submit that the deficiency interest imposable on the deficiency income tax should be computed **from April 16, 2010 until February 28, 2014**, and the deficiency interest imposable on the deficiency VAT should be computed **from January 26, 2010 until February 28, 2014**, or the **due date appearing on the Assessment Notices attached to the FAN** with Nos. IT-125-LA00000119-09-14-0030 and VT-125-LA-00000119-14-0031, and from March 1, 2014 up to December 31, 2017 pursuant to Section 249 (A) and (B) of the NIRC of 1997, as amended by Section 75 of Republic Act (RA) No. 10963,[2] and Sections 3[3] and 6[4] of Revenue Regulations (RR) No. 21-2018.

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[1] Exhibit "R-10", BIR Records, pp. 329 to 332.

[2] SEC. 75. Section 249 of the NIRC, as amended, is hereby further amended to read as follows:

> "SEC. 249. *Interest.* –
>
> "(A) *In General.* – There shall be assessed and collected on any unpaid amount of tax, interest at the rate of double the legal interest rate for loans or forbearance of any money in the absence of an express stipulation as set by the Bangko Sentral ng Pilipinas from **the date prescribed for payment until the amount is fully paid**: *Provided*, That in no case shall the deficiency and the delinquency interest prescribed under Subsections (B) and (C) hereof, be imposed simultaneously
>
> "(B) *Deficiency Interest.* – Any deficiency in the tax due, as the term is defined in this Code, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected **from the date prescribed for its payment until full payment thereof, or upon issuance of a notice and demand by the Commissioner of Internal Revenue, whichever comes earlier.**"

[3] "**SECTION 3. DEFICIENCY INTEREST**. - Interest imposed on any deficiency tax due, which **interest shall be assessed and collected from the date prescribed for its payment** until: (a) full payment thereof, or (2) upon issuance of a notice and demand by the Commissioner or his authorized representative, whichever comes first."

[4] **SECTION 6. TRANSITORY PROVISION**. - In cases where the tax liability/ies or deficiency tax/es became due before the effectivity of the TRAIN Law on January 1, 2018, and where the full payment thereof will only be accomplished after the said effectivity date, the interest rates shall be applied as follows:

Period	Applicable Interest Type and Rate
For the period up to December 31, 2017	Deficiency and/or delinquency interest at 20%
For the period January 1, 2018 until full payment of the tax liability	Deficiency and/or delinquency interest at 12%

The double imposition of both deficiency and delinquency interest under Section 249 prior to its amendment will still apply in so far as the period between the date prescribed for payment until December 31, 2017.

Illustration 2: A Company has been assessed deficiency income tax of ₱1,000,000.00, exclusive of interest and surcharge, for taxable year 2015. The tax liability has remained unpaid despite the lapse of June 30, 2017, the deadline for payment stated in the notice and demand issued by the

The delinquency interest imposable in this case, on the other hand, should be **computed from March 1, 2014, the day following the due date indicated in the notice and demand** consistent with Section 6 of RR No. 21-2018.

All told, I **VOTE** to:

(i) **PARTIALLY GRANT** the Petition for Review filed on July 27, 2016;

(ii) **CANCEL** and **SET ASIDE** the deficiency Documentary Stamp Tax, including increments for TY 2009; and,

(iii) **AFFIRM** with **MODIFICATION** the deficiency Income Tax and VAT, and **ORDER** petitioner SM_Residences, Inc. to **PAY** the **Bureau of Internal Revenue** the following amount:

		IT	VAT	Total
Basic Deficiency Tax	₱	456,899.70	4,902,993.42	5,359,893.12
Add: 25% Surcharge		114,224.93	1,225,748.36	1,339,973.28
Deficiency Interest from April 16, 2010 to February 28, 2014[5] (₱456,899.70 x 20% x 1,415/365 days)		354,253.74		354,253.74
Deficiency Interest from January 26, 2010 to February 28, 2014[6] (₱4,902,993.42 x 20% x 2,608/365 days)			4,016,424.75	4,016,424.75
Total Amount Due, February 28, 2014	₱	925,378.37	10,145,166.52	11,070,544.89
Deficiency Interest From March 1, 2014 to December 31, 2017 (₱456,899.70 x 20% for 1,402/365 days)	₱	350,999.11		350,999.11

Commissioner. Payment was made by the taxpayer only on February 10, 2018. The civil penalties for late payment shall be computed as follows:

Basic Tax Due		₱1,000,000.00
Add: 25% Surcharge for late payment	₱250,000.00	
20% Deficiency Interest from April 16, 2016 to June 30, 2017 (441 days)	241,643.84	491,643.84
Total Amount Due, June 30 2017		**₱1,491,643.84**
Add:		
20% Deficiency Interest from July 1, 2017 to December 31, 2017 (184 days; based on basic tax of P1,000,000.00)	₱100,821.92	
20% Delinquency Interest from July 1, 2017 to December 31, 2017 (184 days; based on total amount due of P1,491,643.84 as of June 30, 2017	150,390.39	
12% Delinquency Interest from January 1, 2018 to February 10, 2018 (41 days; based on total amount due of ₱1,491,643.84 as of June 30, 2017	20,106.54	271,318.85
Total Amount Due, February 10, 2018		**₱1,762,962.69**

[5] Due date appearing on Assessment Notice No. IT-125-LA00000119-09-14-0030 attached to the Formal Letter of Demand dated February 26, 2014, BIR Records, p. 271.

[6] Due date appearing on Assessment Notice No. VT-125-LA-00000119-14-0031 attached to the Formal Letter of Demand dated February 26, 2014, BIR Records, p. 273.

(₱4,902,993.42 x 20% for 1,402/365 days)		3,766,573.58	3,766,573.58
Delinquency Interest			
From March 1, 2014 to December 31, 2017			
(₱925,378.37 x 20% x 1,402/365 days)	₱ 710,893.41		710,893.41
(₱10,145,466.52 x 20% x 1,402/365 days)		7,793,711.49	7,793,711.49
Total Amount Due, December 31, 2017	₱ 1,987,270.88	21,705,451.58	23,692,722.47

In addition, petitioner is ordered to pay the delinquency interest at the rate of twelve percent (12%) on the total unpaid amount as of February 28, 2014 in the amount of ₱11,070,544.89 as determined above, computed from January 1, 2018 until full payment thereof pursuant to Section 249 (C) of the NIRC of 1997, as amended by RA No. 10963 and as implemented by RR No. 21-2018.

ROMAN G. DEL ROSARIO
Presiding Justice