REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION
****

PHILIPPINE SECURITIES SETTLEMENT CORP., Petitioner,	**CTA Case No. 9058**
	Members:
- versus -	**DEL ROSARIO,** *P.J., Chairperson,* **UY,** and **MINDARO-GRULLA,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	***Promulgated:*** AUG 22 2019 10:18 a.m.

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AMENDED DECISION

UY, J.:

For resolution is petitioner's **"MOTION FOR PARTIAL RECONSIDERATION *(with Motion for Leave to Re-Open Case for Presentation of Additional Evidence)*"** filed on September 4, 2018, with respondent' **"COMMENT/OPPOSITION (To Petitioner's Motion for Partial Reconsideration to Re-Open Case for Presentation of Additional Evidence)"** filed on October 5, 2018 and petitioner's **"REPLY (to the Comment/Opposition dated 4 October 2018)"** filed on October 26, 2018, praying for the reconsideration of this Court's Decision dated August 15, 2018, the dispositive portion of which reads:

> "**WHEREFORE**, in light of the foregoing considerations, the instant *Petition for Review* is **PARTIALLY GRANTED**.
>
> The compromise penalties in the amount of ₱32,000.00 for petitioner's alleged deficiency FWT and FWVAT are **CANCELLED** and **SET ASIDE**.

The assessments issued by respondent against petitioner for taxable year 2010 covering deficiency EWT, WTC, FWT, FWVAT and income tax are hereby **PARTIALLY UPHELD**. Accordingly, petitioner is hereby **ORDERED TO PAY** respondent the reduced amount of **₱3,895,016.71**, inclusive of the 25% surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended, computed as follows:

Tax	Basic	25% Surcharge	Total
EWT	118,663.23	29,665.81	148,329.04
WTC	225,346.24	56,336.56	281,682.80
FWT	468,376.01	117,094.00	585,470.01
FWVAT	187,350.41	46,837.60	234,188.01
Income Tax	2,116,277.48	529,069.37	2,645,346.85
Total	**₱3,116,013.37**	**₱779,003.34**	**₱3,895,016.71**

In addition, petitioner is **ORDERED TO PAY** following deficiency and delinquency interest, computed in accordance with the provisions of Section 249 of the NIRC of 1997, in its original text and as amended by RA No. 10963 (TRAIN law), *viz.:*

1) Deficiency interest at the rate of twenty percent (20%) *per annum* on the basic deficiency EWT, WTC, FWT, FWVAT, and income tax, computed from the dates indicated below until full payment thereof **until December 31, 2017**:

Tax	Basic	Commencement dates
EWT	₱ 118,663.23	January 15, 2011
WTC	225,346.24	January 15, 2011
FWT	468,376.01	January 15, 2011
FWVAT	187,350.41	January 15, 2011
Income Tax	₱2,116,277.48	April 15, 2011

2) Delinquency interest at the rate of 20% *per annum* on the total amount of ₱3,895,016.71 and on the 20% deficiency interest which have accrued as afore-stated in (a), computed from October 24, 2012 **until December 31, 2017**;

3) Delinquency interest at the rate of 12% on the total unpaid amount [basic taxes, surcharges,

<u>and interests computed on (a) and (b) above] from January 1, 2018 until the same is fully paid.</u>

SO ORDERED."

In addition, in the said *Motion for Partial Reconsideration*, petitioner prays for the re-opening of the case and allow it to present and offer in evidence, including a supplemental/consolidated Independent Certified Public Accountant (ICPA) Report.

In the Resolution dated January 23, 2019, this Court ordered petitioner to file a *Manifestation* identifying therein the additional documentary and testimonial evidence it intends to present, and the purpose therefor, within ten (10) days from notice thereof. Thus, on February 15, 2019, petitioner submitted its *Compliance*, submitting its list of additional documentary exhibits it intends to present in support of its *Motion for Leave to Re-Open Case for Presentation of Additional Evidence*.

Hence, this resolution.

THE COURT'S RULING

Petitioner's *Motion for Leave to Re-Open Case for Presentation of Additional Evidence* is untenable, while the instant *Motion for Partial Reconsideration* has partial merit.

Petitioner has not shown valid justification as to why its* Motion to Leave to Re-Open Case for Presentation of Additional Evidence *should be granted.

Petitioner avers that due to the findings of this Court that it failed to properly substantiate its claim through the proper documentation, petitioner moves, with leave of court and in the interest of substantial justice, for the reopening of the case for the submission of additional supporting documents, such as but not limited to the official receipts/invoices, acknowledgement receipts, check/accounts payable vouchers, and all other relevant accounting documents not previously submitted covering taxable years 2010 and 2009 of petitioner and the other member of the PDS Group.

Furthermore, according to petitioner, given the voluminous nature of the additional supporting documents to be submitted, petitioner likewise moves, with leave of court, for the submission of a supplemental/consolidated ICPA Report.

In support of its *Motion for Leave to Re-Open Case for Presentation of Additional Evidence*, petitioner contends that this Court shall not be bound by strict rules of procedure, and as such, this Court has allowed the reopening of cases in a number of cases pending before it.

We are not persuaded.

In *Republic of the Philippines vs. Sandiganbayan (Fourth Division), et al.*,[1] the Supreme Court said:

> "The basis for a motion to reopen a case to introduce further evidence is Section 5, Rule 30 of the Rules of Court, which reads:
>
> > Sec. 5. Order of trial. – Subject to the provisions of section 2 of Rule 31, and unless the court for special reasons otherwise directs, the trial shall be limited to the issues stated in the pre-trial order and shall proceed as follows:
> >
> > x x x x
> >
> > (f) The parties may then respectively adduce rebutting evidence only, **unless** the court, for **good reasons and in the furtherance of justice**, permits them to **adduce evidence upon their original case** [.] [emphases ours]
>
> **<u>Under this rule, a party who has the burden of proof must introduce, at the first instance, all the evidence he relies upon and such evidence cannot be given piecemeal</u>. The obvious rationale of the requirement is to avoid injurious surprises to the other party and the consequent delay in the administration of justice.**

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[1] G.R. No. 152375, December 13, 2011.

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> **A party's declaration of the completion of the presentation of his evidence prevents him from introducing further evidence; but where the evidence is *rebuttal* in character, whose necessity, for instance, arose from the shifting of the burden of evidence from one party to the other; or where the evidence sought to be presented is in the nature of *newly discovered* evidence, the party's right to introduce further evidence must be recognized.** Otherwise, the aggrieved party may avail of the remedy of *certiorari.*" *(Emphases and underscoring supplied*

Based on the foregoing jurisprudential pronouncement, when a party declares the completion of the presentation of his evidence, he is prevented from introducing further evidence, except in instances where the evidence is rebuttal in nature, or newly discovered evidence. The Court may thus allow a party-litigant to present rebuttal evidence or newly discovered evidence, even after the completion of the presentation of the party's evidence.

Relative thereto, in *Cabarles vs. Maceda, et al.*,[2] the Supreme Court clarified that the filing of a motion to reopen a case, even after promulgation but before finality of judgment, may be made, subject to certain conditions, to wit:

> "A motion to reopen a case to receive further proofs was not in the old rules but it was nonetheless a recognized procedural recourse, deriving validity and acceptance from long, established usage. xxx.
>
> xxx xxx xxx
>
> Generally, after the parties have produced their respective direct proofs, they are allowed to offer rebutting evidence only. However, **the court, for good reasons, in the furtherance of justice, may allow new evidence upon their original case, and its ruling will not be disturbed in the appellate court where no abuse of discretion appears. A motion to reopen may thus properly be presented** only after either or both parties had formally offered and closed their evidence, but before judgment is rendered, and **even after promulgation but before finality of judgment and the only controlling guideline governing a motion to reopen is the paramount interest of justice.** This

[2] G.R. No. 161330, February 20, 2007.

remedy of reopening a case was meant to prevent a miscarriage of justice." *(Emphases and underscoring supplied)*

Clearly from the foregoing, a party's right to introduce further evidence must be recognized: (1) when the evidence is *rebuttal* in character or is a *newly discovered* evidence; (2) for good reasons; and (3) in the paramount interest of justice.

In this case, petitioner alleges that it filed the instant *Motion for Leave to Re-Open Case for Presentation of Additional Evidence* based on the findings of this Court in the assailed Decision, that it failed to properly substantiate its claim through proper documentation. Thus, the evidence sought to be presented is not rebuttal in nature, nor newly discovered evidence, but allegedly, additional evidence to substantiate its claim through documentation.

As mentioned earlier, evidence is rebuttal in character when the necessity of introducing the same, for instance, arose from the shifting of the burden of evidence from one party to the other. In this case, petitioner's failure to properly substantiate its claim through proper documentation does not fall under the purview of rebuttal evidence.

As regards the term *"newly discovered evidence",* the same has a specific definition under the law. Under the Rules of Court, the requisites for newly discovered evidence are: (a) the evidence was discovered after trial; (b) such evidence could not have been discovered and produced at the trial with reasonable diligence; and (c) it is material, not merely cumulative, corroborative or impeaching, and is of such weight that, if admitted, will probably change the judgment.[3]

In its *Compliance* filed on February 11, 2019, petitioner listed the additional evidence it intends to present. However, there is no indication that these were discovered after trial; and that such evidence could not have been discovered and produced at the trial with reasonable diligence. In fact, a cursory examination of the list of documents to be presented by petitioner shows that these were already capable of being produced during trial. There is also no showing that the evidence to be presented are material and not merely cumulative or corroborative. Without doubt, the evidence presented cannot be considered as newly discovered evidence.

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[3] *Heirs of Paciencia Racaza, et al. vs. Spouses Florencio Abay-abay, et al.*, G.R. No. 198402, June 13, 2012.

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Moreover, petitioner likewise failed to establish any good reason why a decree reopening the case should be granted by this Court.

It is must be remembered that cases filed before this Court are litigated *de novo* and party-litigants must prove <u>every minute aspect</u> of their case.[4] Thus, petitioner is supposed to have established every minute aspect of its case during trial. Surely, petitioner's failure to properly substantiate its claim through proper documentation cannot be considered as a good reason to allow the re-opening of this case. Additionally, petitioner also failed to show that the paramount interest of justice would be served in granting its motion to reopen the case.

We must stress that the bare invocation of "the interest of substantial justice" is not a magic wand that will automatically compel this Court to suspend procedural rules. Procedural rules are not to be belittled or dismissed simply because their non-observance may have resulted in prejudice to a party's substantive rights. Like all rules, they are required to be followed except only for the most persuasive of reasons when they may be relaxed to relieve a litigant of an injustice not commensurate with the decree of his thoughtlessness in not complying with the procedure prescribed.[5]

It is noteworthy that during trial, petitioner was accorded full opportunity to present its testimonial and documentary evidence, after which, petitioner filed its *Formal Offer of Evidence*[6] on June 2, 2016. Thereafter, this Court ruled on the admissibility and inadmissibility of the said evidence in its Resolution dated August 12, 2016.[7] Thus, petitioner cannot claim any injustice committed during the trial of the instant case. Consequently, petitioner's *Motion for Leave to Re-Open Case for Presentation of Additional Evidence* must be denied for lack of merit.

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[4] *Edison (Bataan) Cogeneration Corporation vs. Commissioner of Internal Revenue, etseq.*, G.R. Nos. 201665 and 201668, August 30, 2017; *Commissioner of Internal Revenue vs. Philippine National Bank*, G.R. No. 180290, September 29, 2014; *Commissioner of Internal Revenue vs. United Salvage and Towage (Phils.), Inc.*, G.R. No. 197515, July 2, 2014; *Dizon vs. Court of Tax Appeals, et al.,* G.R. No. 140944, April 30, 2008; *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue,* G.R. No. 145526, March 16, 2007; and *Commissioner of Internal Revenue vs. Manila Mining Corporation,* G.R. No. 153204, August 31, 2005.

[5] *Lazaro, et al., vs. Court of Appeals, et al.*, G.R. No. 137761, April 6, 2000.

[6] Docket—Vol. III, pp. 1219 to 1261.

[7] Docket—Vol. III, pp. 1536 to 1539.

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***Petitioner's* Motion for Partial Reconsideration is partly meritorious.**

Petitioner submits that this Court erred in sustaining the foregoing deficiency tax assessments, and in imposing surcharge, as well as deficiency and delinquency interests thereon. Thus, it moves for the partial reconsideration of the assailed Decision as shall be discussed hereafter.

After a second hard look at this Court's findings and ruling in the assailed Decision, We find partial merit in the instant *Motion for Partial Reconsideration*, to wit:

A. DEFICIENCY EXPANDED WITHHOLDING TAX

I. ON RENTALS

a. Rent - Office Space – Northgate

It can be recalled that in the assailed Decision, the Court held that petitioner is liable for deficiency Expanded Withholding Tax (EWT) on its payments representing Rent – Office Space in the amount of ₱166,700.46, broken down below, for being made prior to the date of registration of Cyberzone Properties, Inc. ("Cyberzone") with the Philippine Economic Zone Authority ("PEZA"):

Exhibit No.	Invoice Amount	VAT	Amount Paid	OR No.	OR Date
P-1707 to P-1710	₱ 83,350.23	₱ 10,002.03	₱ 93,352.26	436V	20-Jan-10
P-1690 to P-1694	83,350.23	10,002.03	93,352.26	436V	20-Jan-10
Total	**₱166,700.46**	**₱20,004.06**	**₱186,704.52**		

Disagreeing with the Court, petitioner points out that Cyberzone's PEZA Certificate of Registration No. 00-05-F[8] will show that Cyberzone was registered with the PEZA beginning June 6, 2000, which was expressly recognized by the Court in the Decision when it stated:

> "Based on the Certification[9] issued by the PEZA, Cyberzone, located at the Northgate Cyberzone – SEZ, is a PEZA-registered Ecozone Facilities Enterprise with Registration Certificate No. 00-05-F dated 06 June 2000. Accordingly, income payments to Cyberzone effective June 6, 2000 shall not be subject to the EWT prescribed under RR No. 02-98, as amended."

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[8] Exhibit P-13.
[9] Exhibit P-6048.

After reviewing the documents submitted by petitioner, the Court finds that Cyberzone's PEZA registration on June 6, 2000 was still valid and effective during the entire year of 2010, hence, all rental payments made by petitioner to Cyberzone in 2010 are exempt from EWT. Accordingly, the Court finds basis to reconsider its Decision and to cancel the deficiency EWT assessment on the rental payment of ₱166,700.46.

b. Rent - Parking Space

In the assailed Decision, the Court upheld the deficiency EWT assessment on Rent-Parking Space (Exempt from EWT) in the amount of ₱2,725.20, Rent-Parking Space (Accrual) in the amount of ₱12,164.84 and Rent-Parking Space (Amortization of Prepaid Expense) in the amount of ₱12,293.10.

With regard to the Rent-Parking Space (Exempt from EWT) in the amount of ₱2,725.20, which pertains to the rentals paid by petitioner to Cyberzone on January 20, 2010 and April 5, 2010, the Court reconsiders its Decision and cancels the deficiency EWT assessment thereon because Cyberzone was PEZA registered in the year 2010, as stated earlier.

With reference to the Rent-Parking Space (Accrual) in the amount of ₱12,164.84, other than a general statement that the same was subjected to the proper application of withholding tax, petitioner failed to identify documents presented to prove its assertion. Thus, this part of the assessment shall remain.

As to the Rent-Parking Space (Amortization of Prepaid Expense) in the amount of ₱12,293.10, petitioner submits that Annex "F" of the Report[10] of the Court-commissioned ICPA, Atty. Adan T. Delamide, clearly shows that the prepaid Rent-Parking Space expense refers to petitioner's payments for quarterly parking covering the period January to March 2010, which were paid in taxable year (TY) 2009 to SPI Parking Services, Inc. (SPI).

Claiming that it properly withheld EWT on its prepaid rent in TY 2009, petitioner directs the attention of the Court on sequence nos. 133 and 134 of its Alphalist of Payees Subject to EWT as of 31 December 2009 attached to its BIR Form No. 1604E,[11] which allegedly show that petitioner withheld 5% EWT on its payments to SPI, including the prepaid Rent-Parking Space expense, to wit:

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[10] Exhibit P-45.
[11] Exhibit P-25.

BIR FORM 1604E – SCHEDULE 4
ALPHALIST OF PAYEES SUBJECT TO EXPANDED WITHHOLDING TAX
AS OF DECEMBER 31, 2009

TIN: 230447029-0000
WITHHOLDING AGENT'S NAME: PHILIPPINE SECURITIES SETTLEMENT CORP.

SEQ NO.	TIN	REGISTERED NAME	ATC CODE	AMOUNT OF INCOME PAYMENT	RATE OF TAX	AMOUNT OF TAX WITHHELD
133	214-617-904-0000	SPI Parking	WC100	18,765.20	5.00	938.26
134	214-617-904-0000	SPI Parking	WC100	37,670.39	5.00	1,883.52

The Court is not convinced.

Based solely on the aforesaid document, it cannot be ascertained whether the assessed amount of ₱12,293.10 actually formed part of the rental payments of ₱18,765.20 and ₱37,670.39 subject to 5% EWT as indicated in the Alphalist. In the absence of corroborating documents, the deficiency EWT assessment on the Rent-Parking Space (Amortization of Prepaid Expense) of ₱12,293.10 shall not be disturbed.

It must be noted that while in the assailed Decision, respondent's deficiency EWT assessment on the Rent-Parking Space (Accrual) in the amount of ₱12,164.84 and Rent-Parking Space (Amortization of Prepaid Expense) in the amount of ₱12,293.10 were upheld, the same were inadvertently omitted in the Court's final computation of petitioner's deficiency EWT on rental payments. Thus, these amounts totaling ₱24,457.94 shall be added in the computation of petitioner's adjusted deficiency EWT on rental payments.

c. <u>Rent - Computer Equipment</u>

In the assailed Decision, the Court held that petitioner is liable for deficiency EWT on the amount of ₱557,838.64, representing payments for Rent – Computer Equipment for petitioner's failure to establish its actual reimbursement to Philippine Depository & Trust Corporation ("PDTC") representing its share in the expense paid to IBM Philippines, Inc. ("IBM").

However, petitioner contends that the issue of proof of actual payment of an expense has no relation to the EWT liability of a taxpayer. Petitioner posits that the issue of proof of payment merely affects whether or not such expense may be claimed as an allowable deduction for income tax purposes. Moreover, the issue of proof of reimbursement of the Rent-Computer Equipment was never raised by respondent nor does it form part of respondent's reasons for disallowing the expense.

Indeed, the primary issue to be resolved by the Court is whether or not the income payment is subject to withholding tax or not. Contrary to petitioner's assertion, in the determination of the EWT liability of a taxpayer, the presentation of proof of payment/incurrence of the expense such as invoices and official receipts is necessary in order for the Court to ascertain the actual nature of the income payment and be able to rule on the taxability of the same.

Although We have held that mere reimbursements of actual costs/expenses, without any mark-up, profit or additional charges, are not subject to EWT, petitioner must prove, in the instant case, the actual cost/expense reimbursement to PDTC in order that the subject Rent-Computer Equipment in the amount of ₱557,838.64 may be exempted from EWT.

Petitioner likewise argues that if it were in fact true that it failed to actually reimburse PDTC on its Rent-Computer Equipment expense, the same would have been reflected in its Audited Financial Statements (AFS) for TY 2010. According to petitioner, an examination of Note 17 (Related Party Transactions) of its AFS for TY 2010 will show that the only amount "Due to Related Parties" is with respect to interest expense due to PDSHC in the amount of ₱30,324.00 and that the absence of any other entry in Note 17 indicates that it actually reimbursed PDTC for the Rent-Computer Equipment in the amount of ₱557,838.64.

Again, the Court disagrees.

A perusal of petitioner's Audited Balance Sheet[12] as of December 31, 2010 shows that the amount of ₱30,324.00 was reflected as "Due to Parent Company". As indicated in Note 1[13] of petitioner's 2010 AFS, petitioner's parent company is Philippine Dealing System Holdings Corporation (PDSHC). Thus, the account "Due to Parent Company" can only refer to petitioner's transactions with PDSHC and not to petitioner's affiliate, PDTC, to which the assessed rental of ₱557,838.64 was allegedly paid/reimbursed. And

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[12] Exhibit P-19.
[13] Exhibit P-19, Notes to Financial Statements, p. 1.

as stated in Note 17[14] of petitioner's 2010 AFS, the amount of ₱30,324.00 refers to petitioner's interest expense payable to PDSHC.

For petitioner's failure to discharge its burden of proof, the deficiency EWT assessment on the amount of ₱557,838.64 representing Rent-Computer Equipment still stands.

d. Car Lease and Rent-Transportation Equipment

Petitioner submits that the Court erred in upholding the assessment on its payments for Car Lease and Rent-Transportation Equipment in the amounts of ₱436,800.09 and ₱53,009.34, respectively. Petitioner avers that there is no basis to impose EWT on rental payments made to finance leasing companies as provided for under Section 2.57.2(C)(2) of Revenue Regulations (RR) No. 02-98, as amended, which states:

> "Sec. 2.57.2. *Income payments subject to creditable withholding tax and rates prescribed thereon.* — Except as herein otherwise provided, there shall be withheld a creditable income tax at the rates herein specified for each class of payee from the following items of income payments to persons residing in the Philippines:
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> xxx xxx xxx
>
> (C) *Rentals*
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> xxx xxx xxx
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> (2) *Personal properties.* — On gross rental or lease in excess of Ten Thousand Pesos (P10,000.00) annually for the continued use or possession of personal property used in business which the payor or obligor has not taken or is not taking title, or in which he has no equity, *except those under financial lease arrangements with leasing and finance companies authorized to operate under Republic Act No. 8556 (Financing Company Act of 1998)*. — Five percent (5%)" *(Underscoring supplied)*

Likewise, petitioner argues that assuming that the rental payments to financial leasing companies are subject to EWT, these expenses shall be only subject to 2% EWT pursuant to Section 2.57.4(E)(4) of RR No. 02-98, as amended, *viz*:

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[14] Exhibit P-19, Notes to Financial Statements, p. 23.

> "(E) *Income payments to certain contractors* — On gross payments to the following contractors, whether individual or corporate — Two percent (2%)
>
> xxx xxx xxx
>
> (4) Other Contractors -
>
> xxx xxx xxx
>
> (e) Transportation contractors which include common carriers for the carriage of goods and merchandise of whatever kind by land, air or water, where the gross payments by the payor to the same payee amounts to at least two thousand pesos (P2,000) per month, regardless of the number of shipments."

Moreover, petitioner invokes BIR Ruling No. 086-99, wherein the BIR held that payments for lease of motor vehicles are subject to EWT rate of one percent (1%) which has now been amended to two percent (2%) pursuant to Section 2.57.2(E)(4)(e) of RR No. 2-98. In addition, petitioner cites the case of *Nesic Philippines, Inc. vs Commissioner of Internal Revenue,*[15] wherein this Court *En Banc* ruled that payments for car rentals for the carriage of goods/merchandise and passengers fall within the purview of payments to transportation contractors which shall be subject to 2% EWT.

The Court is not persuaded.

Petitioner failed to present its financial lease agreements to enable the Court to verify whether the subject income payments are indeed in the nature of financial leases. Neither did petitioner submit proof that the payees to which the income payments were made, fall within the term "Transportation contractors" as contemplated under Section 2.57.2(E)(4)(e) of RR No. 2-98. Thus, for petitioner's failure to properly refute the discrepancies found by the BIR, this part of the assessment shall remain.

In sum, petitioner is liable for the adjusted deficiency 5% EWT of ₱16,578.61 on rental payments of ₱331,572.10, computed as follows:

Particulars	Amount
Rent - Office Space -Enterprise	₱ (433,102.50)
Rent - Parking Space —	24,457.94

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[15] CTA EB Case No. 524, 06 May 2010.

Rent - Computer Equipment	557,838.64
Car Lease	436,800.09
Rent - Transportation Equipment	53,009.34
Printing and Reproduction	(46,791.46)
Telecommunications - DID/Leased Lines Periodic	(5,155.48)
Telecommunications - Telephone	(255,484.47)
TOTAL	**₱ 331,572.10**
Withholding Tax Rate	5%
Deficiency EWT	**₱ 16,578.61**

II. ON PROFESSIONAL FEES

In the assailed Decision, the Court upheld the assessment for deficiency EWT on professional fees paid by petitioner due to the latter's failure to provide valid supporting documents to prove that such payments are exempt from EWT.

Petitioner submits that the assessed amount of ₱80,948.61 represents payments to professional recruitment agencies, such as Jobstreet.com Philippines, Inc. Allegedly, an examination of Annex "N" of the ICPA report will show that petitioner's indirect cost on the hiring fees substantially matches the above-mentioned amount:

Summary of Professional Fees	**Direct Costs 63.60%**	**Indirect Costs 36.40%**	**Total 100%**	**Tax Withheld**
Legal Fees – Retainer	₱ 302,732.82	₱ 173,262.18	₱ 475,995.00	-
Legal Fees – Regular	2,322.11	1,329.00	3,651.11	-
Legal Fees - Notarial Fees	512.89	293.54	806.43	-
Audit Fees – External	100,107.92	57,294.47	157,402.39	-
Hiring Fees (60/40)	**121,030.19**	**80,686.79**	**201,716.98**	**₱ 4,918.01**
Management and Professional Fees – Others	(6,987.02)	(3,998.86)	(10,985.88)	4,184.82
Total	**₱ 519,718.90**	**₱ 308,867.13**	**₱ 828,586.03**	**₱ 9,102.83**

Since the 2% EWT on the hiring fees of ₱80,686.79 was allegedly withheld and remitted to the BIR pursuant to Section 2.57.2(E)(4)(K) of RR No. 02-98, petitioner asserts that it is not liable for deficiency EWT on its professional fees.

The Court is not swayed.

It must be emphasized that the assessed amount of ₱80,948.61 was arrived at by respondent after a comparison of the professional fees reflected in petitioner's AFS/ITR (₱308,262.00) with those found in its alphalist (₱227,313.39). If We are to follow petitioner's argument that the assessed amount pertains to the hiring fees, then the resulting amount should have been ₱80,686.79 and not ₱80,948.61. Since petitioner failed to explain/account for such discrepancy, the Court cannot consider the assessed amount of ₱80,948.61 and the hiring fees of ₱80,686.79 as pertaining to the same transactions.

Moreover, the hiring fees of ₱80,686.79 (representing 20% of the total hiring fees of ₱201,716.98) were already considered and excluded by the Court in the determination of petitioner's deficiency EWT on professional fees. Below is the relevant portion of the Decision, viz:

"As regards the Hiring Fees amounting to ₱201,716.98, the same pertain to the following items:

Exhibit No.	Supplier	Nature of Payment	Invoice Amount
P-2269 to P-2274	Jobstreet.Com Philippines Inc.	Payment for Job Postings	₱ 3,435.75
P-2275 to P-2280	QUAERITO QUALITAS INC.	Payment for search and selection services.	19,240.20
P-2281 to P-2286	JOBSTREET SELECT, INC.	Payment for search and selection services.	17,316.18
P-2287 to P-2292	QUAERITO QUALITAS INC.	Payment for search and selection services.	22,680.00
P-2293 to P-2298	George Garrett Guilford & Associates	Payment for professional fee for hiring.	108,000.00
P-2299 to P-2305	Jobs DB Philippines, Inc.	Payment for Job Postings	780.00
P-2306 to P-2311	QUAERITO QUALITAS INC.	Payment for search and selection services.	7,311.28
P-2312 to P-2317	Jobstreet.Com Philippines Inc.	Payment for Job Postings	936.00
P-2318 to P-2323	JOBSTREET SELECT, INC.	Payment for search and selection services.	8,747.39
P-2324 to P-2329	JOBSTREET SELECT, INC.	Payment for search and selection services.	4,200.00
P-2330 to P-2337	-	Prepaid Amortization	9,070.18
			₱ 201,716.98

A comparison of the alphalist attached to the petitioner's BIR Form No. 1604E for the year 2010[16] and the schedule of professional fees[17] shows that petitioner properly withheld and remitted 2% EWT on the income payments listed above, except for the prepaid amortization of ₱9,070.18, pursuant to Section 2.57.2(E)(3)(k) of RR No. 02-98, as amended by RR No. 17-03,

[16] Exhibit P-85.
[17] Exhibit "P-45", Annex N, Docket, Vol. II, pp. 1068 to 1070.

which provides as follows:

> 'Sec. 2.57.2. *Income payments subject to creditable withholding tax and rates prescribed thereon.* — Except as herein otherwise provided, there shall be withheld a creditable income tax at the rates herein specified for each class of payee from the following items of income payments to persons residing in the Philippines:
>
> xxx xxx xxx
>
> (E) *Income payments to certain contractors* — On gross payments to the following contractors, whether individual or corporate — Two percent (2%)
>
> xxx xxx xxx
>
> (3) *Other contractors*
>
> xxx xxx xxx
>
> (k) Labor recruiting agencies and/or 'labor-only' contractors. For this purpose, any person who undertakes to supply workers to an employer shall be deemed to be engaged in 'labor-only' contracting where such person does not have substantial capital or investment in the form of tools, equipment, machineries, work premises and other materials and the workers recruited and placed by such person are performing activities which are directly related to the principal business or operations of the employer which the workers are habitually employed;
>
> xxx xxx xxx'

In sum, petitioner failed to withhold and remit 15% EWT in the amount of ₱34,736.11 on professional fees of ₱231,574.06, computed as follows:

	Direct Costs	**Indirect Costs**	**Total**
Legal Fees – Retainer	₱ 302,732.82	₱ 173,262.18	₱ 475,995.00
Legal Fees – Regular	2,322.11	1,329.00	3,651.11
Legal Fees - Notarial Fees	512.89	293.54	806.43
Audit Fees – External	100,107.92	57,294.47	157,402.39
Total Professional Fees	₱ 405,675.74	**₱231,574.06**	₱ 637,854.93
15% EWT		**₱34,736.11**	

However, the Court is constrained to limit its findings based on respondent's assessment. Accordingly, petitioner is liable only to the extent of that EWT assessed by respondent in the amount of ₱12,142.29."

Clearly, from the foregoing, the deficiency EWT on professional fees that is being assessed against petitioner does not include the hiring fees of ₱80,686.79.

III. ON DIRECTOR'S FEE

Petitioner maintains that the assessed amount of ₱23,000.00 was properly subjected to withholding tax; hence the Court's ruling is erroneous.

We disagree.

Petitioner's claim has no standing. Petitioner was amiss in its duty to prove its contentions and contradict the findings of respondent on the difference of ₱23,000.00 pertaining to its payment for director's fee not subjected to withholding tax. Thus, this part of the assessment shall likewise remain.

IV. ON THE PAYMENT TO CONTRACTORS/ SUBCONTRACTORS

a. *Outside Services - ₱112,677.07*
b. *Other Outside Services – ₱14,266.31*

Petitioner maintains that it paid and remitted the proper EWT on its payment for Outside Services amounting to ₱112,677.07 as can be gleaned from page 1 of Annex "BB" of the ICPA report, shown as follows:

	Invoice Amount	Direct Cost	Indirect Cost	Tax Withheld
Outsource Accrual	₱112,677.07	₱90,141.66	₱22,535.41	₱2,253.54

Petitioner's contention is devoid of merit.

In the same Annex BB of the ICPA report, the schedule detailing the breakdown of the ₱112,677.07 income payment for Outside Services shows that no EWT was withheld therefrom. Even granting that there was withholding of the amount of ₱2,253.54, petitioner failed to prove remittance thereof to the BIR.

With regard to the Other Outside Services in the amount of ₱14,266.31, petitioner alleges that this represents reimbursements made to its contractors for its share on various expenses (*e.g.*, share in parking fees and share in payment for services rendered). Thus, petitioner claims that being in the nature of reimbursement; it is not subject to EWT.

However, there being no proof that the said expenses were mere reimbursements, the Court sustains the deficiency EWT assessment on the Other Outside Services of ₱14,266.31.

c. *Advertising – ₱43,717.83*

In the assailed Decision, the Court upheld respondent's deficiency EWT assessment on the advertising expense of ₱43,717.83, broken down as follows:

Particulars	20%	100%
Advertising not subject to EWT	₱ 10,921.53	₱ 54,607.74
Advertising (Accrual)	12,556.65	62,783.27
Advertising considered nondeductible	20,000.00	100,000.00
Unaccounted difference in Advertising reflected per FS and as found by ICPA	239.65	
Total Advertising Expenses	**₱43,717.83**	

Petitioner, in its *Motion for Partial Reconsideration*, does not dispute the assessment on the Advertising (Accrual) of ₱12,556.6 and Unaccounted difference in Advertising of ₱239.65. Hence, there would be no reason to disturb the Court's ruling on these particular assessments.

As to the amount of ₱10,921.53 referred to by the ICPA as Advertising expense not subject to EWT, petitioner submits that the same represents the following accounts: (a) payment for awards night validation; (b) payments to supplier of goods; (c) various reimbursements; and (d) estimates not subject to EWT.

Relative thereto, petitioner contends as follows:

a) alleged payment for awards night validation: it was allegedly paid to Isla Lipana & Co. – a general professional partnership. Hence, pursuant to Section 2.57.5 of RR No. 02-98, income payments to GPPs are not subject to EWT.

b) payments to suppliers of goods : these were not included within the scope of Section 2.57.2 of RR No. 02-98 and as such, payments thereto are not subject to EWT following the rule *"Expressio unius est exclusion alterius"*. Moreover, petitioner alleges that it cannot be held liable for EWT on the said payments in view of the fact that it is not classified as a Top 20,000 taxpayer by the respondent.

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c) various reimbursements : being reimbursements, these are not subject to EWT.

The Court finds petitioner's contentions partially meritorious.

Based on the ICPA Report, the assessed advertising expense of ₱10,921.53 represents 20% of the following transactions amounting to ₱54,607.64, to wit:

Exhibit No.	Supplier	Nature of Payment	Invoice Amount
P-3674 to P-3679	Isla Lipana &Co.	Payment to General Professional Partnership	₱ 24,255.00
P-3680 to P-3684	Best World Beverage Brands, Inc.	Payment for Purchase of Goods	2,328.75
P-3685 to P-3689	Best World Beverage Brands, Inc.	Payment for Purchase of Goods	168.75
P-3690 to P-3695	Best World Beverage Brands, Inc.	Payment for Purchase of Goods	3,571.43
P-3696 to P-3699	Office Warehouse, inc.	Reimbursement & Liquidations	220.00
P-3700 to P-3703	C.R. Sytian Enterprises	Reimbursement & Liquidations	1,593.75
P-3704 to P-3708	National Bookstore	Reimbursement & Liquidations	417.86
P-3709 to P-3712	Kenny Rogers Roasters	Reimbursement & Liquidations	388.39
P-3709 to P-3712	National Bookstore	Reimbursement & Liquidations	441.96
P-3713 to P-3714	-	Reimbursement & Liquidations	15,000.00
P-3715 to P-3719	Paramint Enterprises	Payment for Other Advertising Expenses	1,200.00
P-3720 to P-3721	Paramint Enterprises	Payment for Other Advertising Expenses	3,428.00
P-3722 to P-3726	Jets Trophy, Inc.	Payment for Other Advertising Expenses	543.75
P-3727 to P-3732	Ian Santillan Photography	Payment for Other Advertising Expenses	1,050.00
Total			**₱54,607.64**

As to the alleged payment to Isla Lipana & Co. in the amount of ₱24,255.00, the Court cannot give credence to the supporting billing statement[18] and official receipt[19] submitted by petitioner as these were issued under the name of PDTC and not petitioner. Absent a valid proof of payment/incurrence of the amount of ₱24,255.00, the same shall be considered as transaction subject to the 2% EWT imposed under Section 2.57.2(E)(4)(h) of RR No. 02-98, as amended, which states:

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[18] Exhibit P-3675.
[19] Exhibit P-3674.

"SECTION 2.57.2. *Income Payment Subject to Creditable Withholding Tax and Rates Prescribed Thereon.* — Except as herein otherwise provided, there shall be withheld a creditable income tax at the rates herein specified for each class of payee from the following items of income payments to persons residing in the Philippines:

xxx xxx xxx

(E) *Income payments to certain contractors* — On gross payments to the following contractors, whether individual or corporate — One [sic] percent (2%).

xxx xxx xxx

(4) *Other contractors* —

xxx xxx xxx

(h) Advertising agencies, exclusive of gross payments to media;"

The same holds true with the following income payments amounting to ₱18,428.00 for which no supporting invoices or official receipts were presented by petitioner:

Exhibit No.	Supplier	Nature of Payment	Invoice Amount
P-3713 to P-3714	-	Reimbursement & Liquidations	₱ 15,000.00
P-3720 to P-3721	Paramint Enterprises	Payment for Other Advertising Expenses	3,428.00
			₱ 18,428.00

However, as to the following payments for purchases of goods and services, the Court reconsiders its Decision and cancels the deficiency EWT assessment thereon:

Exhibit No.	Supplier	Nature of Payment	Invoice Amount
P-3680 to P-3684	Best World Beverage Brands, Inc.	Payment for Purchase of Goods (bottles of wine)	2,328.75
P-3685 to P-3689	Best World Beverage Brands, Inc.	Payment for Purchase of Goods (bottles of wine)	168.75
P-3690 to P-3695	Best World Beverage Brands, Inc.	Payment for Purchase of Goods (bottles of wine)	3,571.43
P-3696 to P-3699	Office Warehouse, Inc.	Reimbursement & Liquidations (envelopes)	220.00
P-3700 to P-3703	C.R. Sytian Enterprises	Reimbursement & Liquidations (audio & lights equipment rental)	1,593.75
P-3704 to P-3708	National Bookstore	Reimbursement & Liquidations (tape, tissue)	417.86

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P-3709 to P-3712	Kenny Rogers Roasters	Reimbursement & Liquidations (meals)	388.39
P-3709 to P-3712	National Bookstore	Reimbursement & Liquidations (envelopes)	441.96
P-3715 to P-3719	Paramint Enterprises	Payment for Other Advertising Expenses (tarp for stage backdrop)	1,200.00
P-3722 to P-3726	Jets Trophy, Inc.	Payment for Other Advertising Expenses (trophy etching and wooden box)	543.75
P-3727 to P-3732	Ian Santillan Photography	Payment for Other Advertising Expenses (photo coverage)	1,050.00
Total			**11,924.64**

The aforesaid income payments are not within the scope of the 2% EWT imposed under Section 2.57.2(E)(4)(h) of RR No. 02-98, as amended, quoted earlier. Neither can these income payments be subjected to the 1% and 2% EWT on purchases of goods and services, respectively, by the top 10,000 / 20,000 corporations under Section 2.57.2(M) of RR No. 02-98, as amended by RR No. 14-08,[20] because petitioner was not among those notified and qualified by the BIR as top 10,000 corporation.[21]

With regard to the advertising expense of ₱20,000.00, petitioner submits that it is not subject to EWT in view of the fact that it did not claim the said amount as expense for income tax purposes.

We find merit in petitioner's argument.

Section 2.57.4 of RR No. 2-98, as amended by RR No. 12-01, provides when the obligation to withhold arises, to wit:

> "Sec. 2.57.4. *Time of withholding.* — The obligation of the payor to deduct and withhold the tax under Section 2.57 of these

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[20] Sec. 2.57.2. *Income Payment subject to creditable withholding tax and rates prescribed thereon.* — Except as herein otherwise provided, there shall be withheld a creditable income tax at the rates herein specified for each class of payee from the following items of income payments to persons residing in the Philippines: x x x

M) Income payments made by the top twenty thousand (20,000) private corporations to their local/resident supplier of goods and local/resident supplier of services other than those covered by other rates of withholding tax. — Income payments made by any of the top twenty thousand (20,000) private corporations, as determined by the Commissioner, to their local/resident supplier of goods and local/resident supplier of services, including non-resident alien engaged in trade or business in the Philippines:

Supplier of goods — One percent (1%)
Supplier of services — Two percent (2%)
xxx xxx xxx

[21] BIR Records, p. 696.

> Regulations arises at the time an income payment is paid or payable, *or the income payment is accrued or recorded as an expense or asset, whichever is applicable, in the payor's books*, whichever comes first. The term "payable" refers to the date the obligation becomes due, demandable or legally enforceable.
>
> *Provided, however, that where income is not yet paid or payable but the same has been recorded as an expense or asset, whichever is applicable, in the payor's books, the obligation to withhold shall arise in the last month of the return period in which the same is claimed as an expense or amortized for tax purposes*."

In the Reconciliation of Net Income per Books Against Taxable Income per petitioner's Annual Income Tax Return (ITR) for TY 2010[22], the amount of ₱1,798,474.00,[23] representing other expenses was added back to petitioner's net income per books, which means that these were recorded as expenses per petitioner's books, but were not claimed as deductible expenses in its 2010 ITR. Included in the amount of ₱1,798,474.00 is the advertising expense of ₱100,000.00, twenty percent (20%) of which pertains to the assessed amount of ₱20,000.00.

Undisputedly, petitioner recorded in its books the advertising expense of ₱20,000.00. However, it bears stressing that the recording of the amount of ₱20,000.00 as expense, although it was not yet paid or payable, is not enough to justify the application of the rule enunciated in the second paragraph of Section 2.57.4 of RR No. 2-98, as amended. There is an additional requirement to be complied with, *i.e.*, that the amount of ₱20,000.00 should have been claimed as expense or amortized for tax purposes. Since the amount of ₱20,000.00 was not claimed as expense deduction in petitioner's 2010 ITR, the Court reconsiders its Decision and cancels the deficiency EWT assessment thereon.

To recapitulate, petitioner is liable for deficiency EWT on the adjusted advertising expense of ₱21,332.90, computed as follows:

Particulars	20%	100%
Advertising not subject to EWT	₱ 8,536.60	42,683.00
Advertising (Accrual)	12,556.65	62,783.27
Unaccounted difference in Advertising reflected per FS and as found by ICPA	239.65	
Total Advertising Expenses	**₱ 21,332.90**	

d. <u>Insurance – ₱46,852.98</u>

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[22] Exhibit P-51.
[23] Exhibit P-3741.

In the assailed Decision, the Court found petitioner liable for deficiency EWT on the amount of ₱46,852.98, representing 20% of insurance expense amounting to ₱234,264.89, broken down as follows:

Particulars	20%	100%
Payments to Paul Robert Murga	₱ 343.78	₱ 1,718.91
Amortized Portion of Insurance Expense	44,538.05	222,690.25
Accrual of Insurance Expense	1,971.15	9,855.73
Total Insurance Expense	**₱46,852.98**	**₱234,264.89**

Petitioner argues that the payments to Paul Robert Murga represent reimbursements for costs incurred and as such, are not subject to EWT. With regard to the amortized portion of insurance expense in the amount of ₱44,538.05, petitioner alleges that the same represents payments which were incurred in prior years with the withholding of the applicable EWT already made in full at the time that the same was accrued, as can be seen through an examination of BIR Form No. 1604E for taxable year 2009 and as confirmed by Rosemarie Marchadesch in her *Judicial Affidavit,*[24] to wit:

> "Q82: Why didn't PSSC Withhold on its payments in the total amount of ₱39,546.91?
>
> A: PSSC did not withhold taxes on these payments because PSSC has already withheld the proper amounts in full in the year when such insurance plans were acquired. Since the income payments were already withheld in full, PSSC was no longer required to withhold on any WT on its subsequent payments.
>
> Q83: What document do you have, if any, which will indicate that PSSC withheld the proper amounts at the time such payments were made?
>
> A: An examination of the Alphalist attached to our BIR Form No. 1604E for TY 2009 will indicate that the income payments for PSSC's insurance plans were properly withheld at a rate of 2%."

As to the accrual of insurance expense in the amount of ₱1,971.15, petitioner submits that the EWT on this amount was already withheld.

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[24] Exhibit P-42.

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Correspondingly the Court reconsiders its Decision and cancels the deficiency EWT assessment on this item.

Records show that the assessed amount of ₱46,852.98 pertains to insurance premiums paid/incurred by petitioner for TY 2010, which are not among those enumerated "Income payments to certain contractors" subject to 2% EWT under Section 2.57.2(E) of RR No. 02-98, as amended. Neither can these be subjected to 2% EWT on purchases of services made by top 10,000/20,000 corporations because petitioner was not among those notified and qualified by the BIR as top 10,000 corporation, as stated earlier.

e. <u>*Communication, Light and Water – ₱11,525.74*</u>

Petitioner submits that the payment to contractors and sub-contractors in the amount of ₱11,525.74 represents reimbursements to the PDS Group under the Cost Sharing Agreement, listed as follows:

Exhibit No.	Supplier	Amount Paid	OR No.	Remarks
P-4576 to P-4581	The Enterprise Center CC	₱ 157.16	24241	CSR from 15.14% to 15.31%. The OR is not named to PSSC.
P-4582 to P-4594	The Enterprise Center CC	81,680.25	25416	Allocated to PSSC for 15.14%. The PSSC's share in 150k deduction is not yet deducted from ₱81,680.25. The OR is not named to PSSC.
P-4595 to P-4603	The Enterprise Center CC	113.43	25705	Allocated to PSSC for 15.14%. The EWT form is for power, aircon only. The OR is not named to PSSC.

Petitioner maintains that these reimbursements, in their nature, are not subject to EWT.

The Court finds petitioner's argument unmeritorious.

The supporting official receipts submitted by petitioner were not under its name, thus, the Court cannot give credence to these documents. Absent any valid documentary proof, the subject expenses shall be considered as *"Income payments to certain contractors"* subject to 2% EWT under Section 2.57.2(E) of RR No. 02-98, as amended, in line with the rule that tax assessments by tax examiners are presumed correct and made in good faith, with the taxpayer having the burden of proving otherwise. Failure to present

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proof of error in the assessment will justify the judicial affirmance of said assessment.[25] Thus, this part of the assessment shall remain.

f. Miscellaneous – ₱10,247.19

Petitioner submits that this amount represents accrual and amortization of prepaid expenses which were subjected to proper withholding tax. However, other than this bare statement, petitioner failed to point out documents presented to prove its allegation. It is a basic rule of evidence that bare allegations, unsubstantiated by evidence, are not equivalent to proof.[26]

g. Others – ₱3,722,910.43

In the assailed decision, the Court found petitioner liable for deficiency EWT on its payments to contractors/sub-contractors lodged under the account "Others" in the total amount of ₱3,722,910.43 for failure to submit documents to substantiate the same. The assessed amount is broken down as follows:

Particulars	Amount
Unaccounted Difference	(₱ 42,281.89)
Amortization Not Subjected to EWT	248,528.87
Reimbursements from Affiliates	2,947,756.33
Accruals Not Subjected to EWT	496,872.37
Income Payments Not Subjected to EWT	1,413.69
Reimbursements Not Subjected to EWT	70,621.06
Total	**₱3,722,910.43**

Petitioner insists that the issue of proof of actual payment of an expense has no relation to the EWT liability of a taxpayer but merely affects whether or not such expense may be claimed as an allowable deduction for income tax purposes. Petitioner further alleges that it was able to present various accounting documents to substantiate the transactions recorded under "Others" including official receipts, acknowledgement receipts, invoices, journal entries, etc., which allowed this Court to breakdown the said amount. The amortization of expenses, accruals of expenses and income payments purportedly not subject to EWT in the amounts of ₱248,528.87, ₱496,872.37 and ₱1,413.69[27] were already subjected to proper withholding taxes. Moreover, payments pertaining to reimbursements in the amounts of ₱2,947,756.33 and ₱70,621.06 are allegedly exempt from

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[25] *Marcos II vs. Court of Appeals, et al.*, G.R. No. 120880, June 5, 1997.
[26] *Cagatin vs. Magsaysay Maritime Corporation, et al.*, G.R. No. 175795, June 22, 2015.
[27] Exhibit P-5550 to P-5553.

withholding tax, being in the nature of reimbursements.

The Court disagrees.

To reiterate, the presentation of proof of payment/incurrence of an expense such as an invoice or official receipt is necessary in order for the Court to determine the actual nature of the transaction and its corresponding tax implication. Contrary to petitioner's claim, the assessed amount of ₱3,722,910.43 was merely supported by screenshots of journal entries and that the breakdown of the said amount was based by the Court only on the schedules provided by the ICPA.

Considering the foregoing, petitioner is liable for the adjusted deficiency EWT of ₱77,859.19 on payments to contractors/ subcontractors of ₱3,892,959.64, computed as follows:

Particulars	**Amount**
Other Outside Services	₱ 25,388.68
Outside Services	101,554.70
Advertising	21,332.90
Insurance	0.00
Communication, Light and Water	11,525.74
Miscellaneous	10,247.19
Others	3,722,910.43
TOTAL	**₱3,892,959.64**
Withholding Tax Rate	**2%**
Deficiency EWT on Payment to Contractors/Subcontractors	**₱ 77,859.19**

Correspondingly, petitioner's adjusted basic deficiency EWT due for the taxable year 2010 amounted to ₱110,030.09, computed as follows:

Expense/Income Payments	**Amount**	**EWT Rate**	**EWT Due**
Rental	₱ 331,572.10	5%	₱ 16,578.61
Professional Fees	80,948.61	15%	12,142.29
Director's Fee	23,000.00	15%	3,450.00
Payment to Contractor/Subcontractors	3,892,959.64	2%	77,859.19
Total	**₱4,328,480.35**		**₱110,030.09**

B. DEFICIENCY WITHHOLDING TAX ON COMPENSATION (WTC)

In the assailed Decision, the Court found petitioner liable for deficiency WTC on Salaries and Wages expense in the total amount of ₱853,907.70 for failure to prove the fact of actual reimbursement, shown as follows:

Allocation of Salaries and benefits from affiliates	₱ 12,830,102.43
Allocation of Salaries and benefits to affiliates	(11,976,194.73)
Salaries and Benefits subject to WTC	**₱ 853,907.70**
WTC Rate	26.39%
Deficiency WTC	**₱ 225,346.24**

Petitioner submits that the tax base used by the Court in determining petitioner's deficiency WTC liability is erroneous. Petitioner states that there is no factual and/or legal basis for comparing the amounts of "Allocation of Salaries and benefits from affiliates" with that of "Allocation of Salaries and benefits to affiliates" as they are unrelated accounts, and as such, cannot and should not be compared against each other. Petitioner explains that the "Allocation of Salaries and benefits from Affiliates" account refers to the amount it paid as reimbursements to its affiliates for its share in the salaries and benefits of the employees of its affiliates which rendered services for the entire PDS Group. On the other hand, the "Allocation of Salaries and benefits to Affiliates" account refers to the amount received by petitioner as reimbursements from its affiliates for the latter's share in the salaries and benefits of petitioner's employees which rendered services to the PDS Group, including petitioner. Thus, petitioner avers that Allocations to and from affiliates refers to different accounts and discrepancy between the two accounts is inevitable. Under the Cost Sharing Agreement, the withholding on the salaries and wages is made by the entity in control of the payment on the entity receiving the allocation.

We find no reason to modify our Decision on this assessment.

Based on the ICPA's reconciliation of the salaries and benefits reflected per petitioner's FS (₱17,803,967.06) and total compensation shown per petitioner's BIR Form No. 1601C (₱14,479,118.56), the difference of ₱3,324,848.50 pertains to the following items:

Salaries and benefits per FS		₱ 17,803,967.06
Total Compensation per BIR Form No. 1601C		14,479,118.56
Difference		₱ 3,324,848.50
Accounted for as follows:		
Allocation of salaries and benefits from affiliates:		
From PDSHC	₱ 7,589,433.57	
From PDEX	653,411.41	
From PDTC	4,587,257.45	12,830,102.43
Allocation of salaries and benefits to affiliates		(11,976,194.73)

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Accrued vacation leave not claimed as deduction		70,918.00
Retirement benefits expense not claimed as deduction		542,127.00
Fringe benefits tax		166,596.00
Non-taxable compensation (per BIR Form 1601C)		723,003.20
Accrual of bonus		975,328.64
Total		3,331,880.54
Unaccounted difference		**(₱ 7,032.04)**

We have ruled that the reconciling items, namely, accrued vacation leave of ₱70,918.00, retirement benefits of ₱542,127.00, fringe benefits tax of ₱166,596.00, non-taxable compensation of ₱723,003.20, and accrued bonus of ₱975,328.64 totalling to ₱2,477,972.84, are not subject to WTC. Thus, the only remaining reconciling items are those pertaining to the allocation of salaries and benefits from affiliates amounting to ₱12,830,102.43, allocation of salaries and benefits to affiliates amounting to ₱(11,976,194.73) which when totaled yields to a net amount of ₱853,907.70. Clearly, the tax base of ₱853,907.70 used by the Court in arriving at the deficiency WTC was a result of the ICPA's reconciliation of the salaries and benefits as reflected in petitioner's FS and in petitioner's BIR Form No. 1601C. Contrary to petitioner's claim, the amount of ₱853,907.70 was not based on the Court's comparison of the allocation of salaries and benefits from and to affiliates.

C. DEFICIENCY FINAL WITHHOLDING TAX (FWT)
D. DEFICIENCY FINAL WITHHOLDING OF VAT (FWVAT)

In the assailed Decision, the Court found petitioner liable for deficiency FWT and FWVAT in the amounts of ₱468,376.01 and ₱187,350.41, respectively, on its claimed expense pertaining to payments purportedly made by PDTC, petitioner's affiliate, to Tata Consulting Services, Ltd. ("Tata"), a non-resident foreign corporation ("NRFC") based in India, for failure to prove actual reimbursement to PDTC and the latter's withholding and remittance of the corresponding FWT and FWVAT.

Petitioner submits that it did not have any form of direct payments to Tata that required it to withhold any FWT and FWVAT on payments to non-residents. Rather, any and all payments made by petitioner in relation to the Tata account were mere reimbursements for amounts paid by PDTC. Thus, petitioner posits that the proper party subject of the deficiency FWT and FWVAT, if any, should be PDTC, being the statutory taxpayer, and not petitioner.

Moreover, petitioner argues that PDTC is not required to withhold FWT and FWVAT on its payment to Tata. Payments to Tata are allegedly subject to the provisions of the tax treaty between the Government of the Republic of the Philippines and the Government of India (RP-India Tax Treaty). Petitioner avers that pursuant to Article 7 of the RP-India Tax Treaty, payments for services rendered by the non-resident company onshore are considered "Business Profits", exempt from Philippine Income Tax, provided they are not attributable to a "permanent establishment" maintained by the NRFC in the Philippines. In view thereof, PDTC allegedly filed a Tax Treaty Relief Application ("TTRA")[28] with respondent on 9 July 2009 seeking for confirmation that its income payments to Tata are exempt from FWT. Petitioner further contends that based on the case of *Deutsche Bank AG Manila Branch vs. Commissioner of Internal Revenue*,[29] PDTC is not required to wait for the favorable ruling of respondent on its TTRA.

The Court finds no reason to disturb its findings on these assessments.

The documents submitted by petitioner (check vouchers, application for fund transfer, invoices, payment advice, letter correspondences) do not prove that the subject income payments were mere reimbursements to PDTC.

As to the allegation that PDTC's payments to Tata are tax-exempt pursuant to the provisions of the RP-India Tax Treaty, it is worthy to note that during the trial, petitioner did not present any testimonial or documentary evidence to support the said claim. Moreover, this is the first time that petitioner is raising the said issue.

As a rule, a party who deliberately adopts a certain theory upon which the case is tried and decided by the lower Court, will not be permitted to change theory on appeal. Points of law, theories, issues and arguments not brought to the attention of the lower court need not be, and ordinarily will not be, considered by a reviewing court, as these cannot be raised for the first time at such late stage. It would be unfair to the adverse party who would have no opportunity to present further evidence material to the new theory, which it could have done had it been aware of it at the time of the hearing before the trial court.[30]

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[28] Attached as Annex "A" to petitioner's Motion for Partial Reconsideration.
[29] G.R. No. 188550, 19 August 2013.
[30] *Maxicare PCIB Cigna Healthcare (now Maxicare Healthcare Corporation) et al. v. Marian Brigitte A. Contreras*, MD., G.R. No. 194352, January 30, 2013.

This rule must be applied in this case. Accordingly, petitioner is barred from raising the foregoing issue when it failed to set up the same at any time during trial, especially after the respondent rested his case.

E. DEFICIENCY INCOME TAX

I. Disallowed Prior period expenses

In the assailed decision, the Court upheld respondent's disallowance of petitioner's claimed prior period expenses in the amount of ₱116,411.53, broken down as follows:

Particulars	Amount
a. The Enterprise Center CC	₱ 58,682.76
b. The Enterprise Center CC	45,892.00
c. City Service Corp.	11,836.77
Total	**₱ 116,411.53**

Petitioner submits that the Court erred in disallowing the said expenses as it adopts the accrual method of accounting. Citing the case of *Commissioner of Internal Revenue vs. Isabela Cultural Corporation* ("*Isabela* case"),[31] petitioner explains that under such method, a taxpayer makes an estimate of the average monthly billings from its various suppliers and claims the same as an expense within the relevant TY. However, being mere estimates, the final billing may be greater or less than the initial assessment.

In the instant case, petitioner avers that the disallowed amount of ₱116,411.53 represents the difference between the initial estimate claimed as a deduction in TY 2009 and the actual cost of the services rendered, the billings of which were received by petitioner in TY 2010. Based on the billings received by petitioner, the expense accrued in TY 2009 was less than the actual expense based on the billings. As such, petitioner claimed the difference between the two amounts in TY 2010 – the year when it received such billings.

Petitioner's contention is flawed.

Section 34(A)(1)(a) of the NIRC of 1997 states that, "(t)*here shall be allowed as deduction from gross income all the ordinary & necessary expenses paid or incurred during the taxable year in*

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[31] G.R. No. 172231, February 12, 2007.

carrying on or which are directly attributable to the development, management, operation and/or conduct of the trade, business or exercise of a profession."

As held by the Supreme Court in the *Isabela* case, the requisite that it must have been paid or incurred during the taxable year is further qualified by Section 45 of the NIRC of 1997 which states that: *"(t)he deductions provided for in this Title shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred', dependent upon the method of accounting upon the basis of which the net income is computed . . ."*

Thus, if the taxpayer is on cash basis, the expense is deductible in the year it was paid, regardless of the year it was incurred. If he is on the accrual method, he can deduct the expense upon accrual thereof. An item that is reasonably ascertained as to amount and acknowledged to be due has "accrued"; actual payment is not essential to constitute "expense".

Stated otherwise, an expense is accrued and deducted for tax purposes when (1) the obligation to pay is already fixed; (2) the amount can be determined with reasonable accuracy; and (3) it is already knowable or the taxpayer can reasonably be expected to have known at the closing of its books for the taxable year.[32]

Petitioner admits that it uses the accrual method in accounting for its income and expenses and that the assessed amount of ₱116,411.53 pertains to prior year's expenses. Thus, pursuant to Section 34(A)(1)(a) of the NIRC of 1997, the amount of ₱116,411.53 is deductible as expense in the year when it was incurred, *i.e.*, 2009 and not when petitioner received the billings in the year 2010.

Moreover, Revenue Audit Memorandum Order No. 1-2000, provides that under the accrual method of accounting, expenses not being claimed as deductions by a taxpayer in the current year when they are incurred cannot be claimed as deduction from income for the succeeding year. Thus, a taxpayer who is authorized to deduct certain expenses and other allowable deductions for the current year but failed to do so cannot deduct the same for the next year.

While the amount of ₱116,411.53 represents the excess of the amounts billed in 2010 over the estimated amounts claimed by

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[32] *Ing Bank N.V., engaged in banking operations in the Philippines as Ing Bank N.V Manila Branch* vs. *Commissioner of Internal Revenue*, G.R. No. 167679. July 22, 2015.

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petitioner as expenses in 2009, such excess cannot be claimed as deduction in 2010. Petitioner should have not relied merely on estimates in claiming the subject expenses as deductions in 2009. Petitioner should have exercised due diligence and inquired from its suppliers the exact amount it owed the latter at the closing of its books for taxable year 2009.

II. Disallowed expenses due to non-withholding of EWT and FWT

Based on the discussion under the deficiency EWT and FWT assessments, the amount of petitioner's disallowed expenses due to non-withholding of EWT and FWT is reduced from ₱6,083,939.36 to ₱5,889,733.73, broken down as follows:

Disallowed Expenses due to non-withholding of EWT	₱ 4,328,480.35
Disallowed Expenses due to non-withholding of FWT	1,561,253.38
Total Disallowed expenses due to non-withholding of EWT and FWT	**₱5,889,733.73**

III. Disallowed Salaries and Wages due to non-withholding of WTC

The amount of petitioner's disallowed salaries and benefits not subjected to WTC still remains at ₱853,907.70, as this Court cannot find a valid justification to reverse such disallowance.

In fine, petitioner would be liable to basic deficiency income tax for TY 2010 in the reduced amount of ₱2,058,015.79, as computed below:

Taxable Income per return		₱ 3,949,033.00
Add: *Adjustments/Disallowances*		
Disallowed Expenses due to non-withholding-EWT and FWT	₱5,889,733.73	
Disallowed Salaries and Wages due to non-withholding	853,907.70	
Disallowed Prior Period Expenses	116,411.53	6,860,052.96
Adjusted Taxable Income		**₱ 10,809,085.96**
Basic Income Tax Due		**₱ 3,242,725.79**
Less: Tax Credits/Payments		
Unexpired excess of prior year's MCIT over NT	₱ 171,830.00	
Prior year's excess credits	4,063,029.00	

Creditable income tax withheld	671,404.00	
Total	₱ 4,906,263.00	
Less: Excess tax credits carried over to succeeding year	3,721,553.00	1,184,710.00
Basic Deficiency Income Tax		**₱ 2,058,015.79**

F. 25% SURCHARGE
G. DEFICIENCY AND DELINQUENCY INTERESTS

Petitioner argues that the Court erred in requiring petitioner to pay 25% surcharge on the alleged deficiency EWT, WTC and Income Tax based on the fact that the respondent did not include the surcharge in his assessment against the petitioner as indicated in the *Final Assessment Notice* (FAN) and the *Final Decision on Disputed Assessment* (FDDA) issued by the respondent. Petitioner posits that the Court in Division cannot rule on this liability considering that the imposition of 25% surcharge under Section 248(A)(3) of the NIRC of 1997, as amended, is within the power of respondent and not the Court. Since the respondent did not impose such surcharge, the Court in Division allegedly cannot as well impose it.

Petitioner also claims that the deficiency interest under Section 249(B) of the NIRC of 1997, as amended, applies only whenever there are deficiency income tax, deficiency estate tax, and/or deficiency donor's tax.

Petitioner is utterly mistaken.

Section 247 (a) of the NIRC of 1997, as amended, provides:

> "SEC. 247. *General Provisions.* —
>
> (a) The additions to the tax or deficiency tax prescribed in this Chapter shall apply to all taxes, fees and charges imposed in this Code. The amount so added to the tax shall be collected at the same time, in the same manner and as part of the tax."

In relation thereto are Sections 248 (A) (3) and 249 (C) of the NIRC of 1997, as amended, which state:

> "SEC. 248. *Civil Penalties.* — (A) There shall be imposed, in addition to the tax required to be paid, a penalty equivalent to twenty-five percent (25%) of this amount due, in the following cases:
>
> xxx xxx xxx

> (3) Failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment; or"
>
> "SEC. 249. *Interest.* —
>
> xxx xxx xxx
>
> (C) *Delinquency Interest.* — In case of failure to pay:
>
> (1) The amount of the tax due on any return required to be filed, or
>
> (2) The amount of the tax due for which no return is required, or
>
> (3) A deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner, there shall be assessed and collected on the unpaid amount, interest at the rate prescribed in Subsection (A) hereof until the amount is fully paid, which interest shall form part of the tax."

The Court further emphasizes that the surcharge, deficiency interest, and delinquency interest as quoted above are provided in the NIRC of 1997, as amended, under Title X, Statutory Offenses and Penalties.

Based on the foregoing, the delinquency interest and surcharge were imposed as penalty for petitioner's failure to pay the amount assessed in the FAN/FDDA within the period prescribed therein. Being a penalty, the same is necessarily imposed after the issuance of the FAN/FDDA in case of non-payment of the amount assessed. Therefore, it is impossible for respondent to indicate in the FAN/FDDA the delinquency interest and surcharge imposed in the assailed Decision.

Thus, the Court rules that the imposition of the 25% surcharge, 20% deficiency interest, and 20% delinquency interest is proper.

However, as we have stated in the assailed Decision, Republic Act (RA) No. 10963, otherwise known as the "Tax Reform for Acceleration and Inclusion" (TRAIN Law), which took effect on January 1, 2018, amended Section 249 of the NIRC of 1997 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

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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 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 the full payment thereof, or upon issuance of a notice and demand by the Commissioner of Internal Revenue, whichever comes earlier.

(C) *Delinquency Interest.* xxx."

To implement the same, RR No. 21-2018[33] was issued on September 14, 2018. The relevant portions thereof provide as follows:

"SECTION 2. RATE OF INTEREST. – There shall be assessed and collected on any unpaid amount of tax, interest at the rate of double the effective 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 (BSP) from the date prescribed for payment until the amount is fully paid.

The rate of interest per BSP Memorandum No. 799 series of 2013 for loans or forbearance of any money in the absence of an express stipulation is six percent (6%). Thus, the rate of legal interest imposable under Section 249 of the Tax Code, as amended, shall be twelve percent (12%). xxx.

xxx xxx xxx

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 tax liability	Deficiency and/or delinquency interest at 12%

xxx xxx xxx"

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[33] SUBJECT: Regulations Implementing Section 249 (Interest) of the National Internal Revenue Code (NIRC) of 1997, as amended under Section 75 of the Republic Act (RA) No. 10963 or the "Tax Reform for Acceleration and Inclusion (TRAIN Law)".

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To reiterate, one of the amendments introduced by the TRAIN Law is that the rate of interest for deficiency and/or delinquency was reduced to twelve percent (12%). However, it is clear from the transitory provision of the same law that, in cases where the deficiency taxes became due before the effectivity of the TRAIN Law on January 1, 2018 and the full payment thereof will only be accomplished after the said effectivity date, the interest rate of 20% shall be applied for the period up to December 31, 2017, while the interest rate of 12% shall be applied for the period beginning January 1, 2018 until full payment thereof.

Considering that the deficiency EWT, WTC, FWT, FWVAT and income tax assessments for TY 2010 became due on April 28, 2015 per the subject FDDA,[34] which was prior to the effectivity of the TRAIN Law, the applicable interest rates shall be: (a) 20% deficiency interest rate from the date prescribed for payment of the deficiency taxes until December 31, 2017; (b) 20% delinquency interest from April 28, 2015 until December 31, 2017; and (c) 12% delinquency interest from January 1, 2018 until full payment thereof.

WHEREFORE, in light of the foregoing considerations, petitioner's *Motion for Leave to Re-Open Case for Presentation of Additional Evidence* is **DENIED** for lack of merit.

On the other hand, petitioner's *Motion for Partial Reconsideration* is **PARTIALLY GRANTED**. Accordingly, the Court's Decision dated August 15, 2018, is hereby amended to read as follows:

> "**WHEREFORE**, in light of the foregoing considerations, the instant Petition for Review is **PARTIALLY GRANTED**.
>
> The assessments issued by respondent against petitioner for taxable year 2010 covering deficiency income tax in the amount of ₱4,989,902.97 and compromise penalties in the amount of ₱32,000.00 for petitioner's alleged deficiency FWT and FWVAT are **CANCELLED** and **SET ASIDE**.
>
> However, the assessments for deficiency EWT, WTC, FWT and FWVAT are hereby **UPHELD WITH MODIFICATIONS**. Accordingly, petitioner is hereby

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[34] Exhibit "P-7", Docket—Vol. III, pp. 1386 to 1390.

ORDERED TO PAY respondent the amount of **₱11,346,155.00,** inclusive of the 25% surcharge, 20% deficiency interest and 20% delinquency interest imposed under Sections 248(A)(3), 249(B) and (C) of the NIRC of 1997, as amended, respectively, computed until December 31, 2017 as follows:

	IT	EWT	WTC	FWT	WVAT	Total
Basic Tax	₱2,058,015.79	₱110,030.09	₱225,346.24	₱468,376.01	₱187,350.41	₱3,049,118.54
Add:25% Surcharge	514,503.95	27,507.52	56,336.56	117,094.00	46,837.60	762,279.63
20% Deficiency Interest from April 15, 2011 to April 28, 2015 (₱2,058,015.79 x 20% x 1,474/365 days)	1,662,200.15					1,662,200.15
20% Deficiency Interest from January 15, 2011 to April 28, 2015 [₱110,030.09 x 20% x 1,564/365 days]		94,294.27				94,294.27
[₱225,346.24 x 20% x 1,564/365 days]			193,118.64			193,118.64
(₱468,376.01 x 20% x 1,564 / 365 days)				401,391.82		401,391.82
20% Deficiency Interest from January 10, 2011 to April 28, 2015 [₱187,350.41 x 20% x 1,569/365 days]					161,070.02	161,070.02
Total Amount Due as of April 28, 2015	**₱4,234,719.89**	**₱231,831.88**	**₱474,801.44**	**₱986,861.83**	**₱395,258.03**	**₱6,323,473.07**
20% Deficiency Interest from April 29, 2015 to December 31, 2017 (₱2,058,015.79 x 20% x 978/365 days)	1,102,870.93					1,102,870.93
[₱110,030.09 x 20% x 978/365 days]		58,964.07				58,964.07
[₱225,346.24 x 20% x 978/365 days]			120,760.88			120,760.88
[₱438,376.01 x 20% x 978/365 days]				250,998.21		250,998.21
[₱187,350.41 x 20% x 978/365 days]					100,399.28	100,399.28
20% Delinquency Interest from April 29, 2015 to December 31, 2017 (₱4,234,719.89 x 20% x 978/365 days)	2,269,345.78					2,269,345.78
[₱231,831.88 x 20% x 978/365 days]		124,236.48				124,236.48
[₱474,801.44 x 20% x 978/365 days]			254,441.53			254,441.53

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[₱986,861.83 x 20% x 978/365 days]				528,849.79		528,849.79
[₱395,258.03 x 20% x 978/365 days]					211,814.98	211,814.98
Total Amount Due as of December 31, 2017	**₱7,606,936.60**	**₱415,032.43**	**₱850,003.85**	**₱1,766,709.83**	**₱707,472.29**	**₱11,346,155.00**

In addition, petitioner is **ORDERED TO PAY** respondent delinquency interest at the rate of twelve percent (12%) on the total amount due of **₱6,323,473.07** as of April 28, 2015, 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 the Train Law, as implemented by RR No. 21-2018.

SO ORDERED."

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Amended 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
Chairperson
Presiding Justice