REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

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WESTERN MINDANAO POWER CORPORATION, Petitioner,	**CTA Case No. 9248**
	Members:
- versus -	**UY,** *Chairperson,* **RINGPIS-LIBAN,** *and* **MODESTO-SAN PEDRO,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	***Promulgated:*** JUN 29 2020 1:18 p.m.

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DECISION

UY, *J*.:

Before this Court is a *Petition for Review* filed by Western Mindanao Power Corporation, petitioner, on January 22, 2016, against the Commissioner of Internal Revenue, respondent, praying that judgment be rendered cancelling and withdrawing the assessment for the alleged deficiency income tax, value-added tax, withholding tax on compensation, expanded withholding tax, final tax, documentary stamp tax and compromise penalties for the calendar year 2012 in the aggregate amount of ₱50,968,525.45.

THE FACTS

Petitioner Western Mindanao Power Corporation is a corporation duly organized and existing under the laws of the Republic of the Philippines, with principal place of business at the 4th Floor, Alphaland Southgate Tower, 2258 Chino Roces Avenue corner

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EDSA, Makati City.[1] It is a registered taxpayer of the Bureau of Internal Revenue ("BIR"), Large Taxpayers Service ("LTS"), as shown by its Certificate of Registration dated January 17, 2000, with Taxpayer's Identification No. 004-661-556-000.[2]

On the other hand, respondent is the duly appointed Commissioner of Internal Revenue (CIR) vested under appropriate laws with the authority to carry out the functions, duties, and responsibilities of said office, including *inter alia*, the power to decide disputed assessments and to cancel and abate tax liabilities, pursuant to the pertinent provisions of the National Internal Revenue Code of 1997 and other tax laws, rules and regulations.[3]

On May 8, 2014, the BIR Large Taxpayers Service Excise, LT Excise Audit Division 1, issued a *Letter of Authority* authorizing RO Ma. Cleofas Magat, Lilian Yvette Marie Aspiras, Julius Rex Bungabong, Roque Gildo Ganaden and Group Supervisor Teresita Villamor to examine petitioner's books of accounts and other accounting records for all internal revenue taxes including documentary stamp tax and other taxes for the period January 1, 2012 to December 31, 2012.[4]

Thereafter, petitioner executed two waivers, as follows: the first *Waiver of the Statute of Limitation Under the National Internal Revenue Code* executed on January 8, 2015, extending the period to assess until June 30, 2015[5] ; and the second *Waiver of the Statute of Limitation Under the National Internal Revenue Code* executed on May 18, 2015, extending the period to assess until December 31, 2015.[6]

On July 31, 2015, petitioner received a copy of respondent's *Preliminary Assessment Notice (PAN)* alleging that petitioner is liable for alleged deficiency Income Tax, Value-Added Tax (VAT), Withholding Tax on Compensation (WTC), Expanded Withholding Tax (EWT), Final Tax, Documentary Stamp Tax (DST), and administrative penalties for the Calendar Year (CY) 2012 in the

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[1] Par. 1, Stipulated Facts, *Joint Stipulation of Facts and Issues* (JSFI), Docket – Vol. 3, p. 1276.
[2] Par. 2, Stipulated Facts, JSFI, Docket – Vol. 3, p. 1276.
[3] Par. 3, Stipulated Facts, JSFI, Docket – Vol. 3, pp. 1276 to 1277.
[4] Exhibit "R-1", BIR Records, Folder 1, p. 3.
[5] Exhibit "R-2", BIR Records, Folder 1, p. 436.
[6] Exhibit "R-3", BIR Records, Folder 1, p. 438.

aggregate amount of ₱124,064,343.74 (inclusive of interest until July 31, 2015).

On August 14, 2015, petitioner filed a *Reply* to respondent's PAN stating that the PAN has no basis both in law and in fact and requesting its withdrawal and cancellation.[7]

On September 18, 2015, petitioner received a copy of respondent's *Formal Letter of Demand (FLD)*[8] with its corresponding *Final Assessment Notices (FAN)*[9] demanding payment of alleged deficiency Income Tax, VAT, WTC, EWT, Final Tax, DST and administrative penalties for the CY 2012 in the total amount of ₱77,352,390.68.

On October 16, 2015, petitioner filed with the BIR Large Taxpayers Service (LTS) a *Request for Reinvestigation* requesting that the FLD issued against petitioner for alleged deficiency taxes for CY 2012 be voided, cancelled and withdrawn for lack of factual and legal bases.[10] Petitioner allegedly submitted on December 15, 2015 the supporting documents relating to its *Request for Reinvestigation.*

Thereafter, petitioner received a *Final Decision on Disputed Assessment (FDDA)* on December 23, 2015 demanding payment on the alleged Income Tax, VAT, WTC, EWT, Final Tax, DST and administrative penalties for the CY in the total amount of ₱50,968,525.45, broken down as follows[11]:

	Basic Tax	Surcharge	Interest	Compromise	Total Increments	Total
Income Tax	10,230,861.15		5,454,590.63		5,454,590.63	15,685,451.78
VAT	20,798,877.52		12,000,667.41		12,000,667.41	32,799,544.93
Compensation	91,062.49		53,040.78		53,040.78	144,103.27
EWT	855,136.71		498,087.85		498,087.85	1,353,224.56
Final Tax				30,548.66	30,548.66	30,548.66
DST	438,344.00	109,586.00	257,722.25		367,308.25	805,652.25
Compromise				150,000.00	150,000.00	150,000.00
Total	**32,414,281.87**	**109,586.00**	**18,264,108.92**	**180,548.66**	**18,554,243.58**	**50,968,525.45**

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[7] Exhibit "P-5", Docket – Vol. 4, pp. 2099 to 2105; Exhibit "R-11" (Entire BIR Records), Folder 3, pp. 800 to 806.
[8] Exhibit "P-6", Docket – Vol. 4, pp. 2106 to 2113; Exhibit "R-7", BIR Records, Folder 3, pp. 840 to 847.
[9] Exhibit "P-6", Docket – Vol. 4, pp. 2114 to 2120; Exhibit "R-8", BIR Records, Folder 3, pp. 833 to 839.
[10] Exhibit "P-7", Docket – Vol. 4, pp. 2121 to 2128; Exhibit "R-11" (Entire BIR Records), Folder 3, pp. 908 to 915.
[11] Exhibit "P-9", Docket – Vol. 4, pp. 2134 to 2136; Exhibit "R-10", BIR Records, Folder 3, pp. 1008 to 1010.

On August 25, 2016, petitioner paid respondent, through the BIR's electronic Filing and Payment System (eFPS), the amount of ₱4,395,710.19, composed of: (1) ₱666,339.50 as payment for the components of the deficiency Value Added Tax (VAT) assessment such as VAT on Sale of Fixed Asset, VAT on Interest Income and VAT on other Income; and (2) ₱2,335,702.67 and ₱1,393,668.03 as payment for the deficiency EWT and DST assessments for CY 2012, inclusive of penalties and interest, respectively.[12]

Consequently, petitioner filed the instant *Petition for Review* on January 22, 2016.[13]

Respondent filed his *Answer* on May 16, 2016,[14] interposing, among others, the following *"Special and Affirmative Defenses"*, summarized as follows:

> **Petitioner's Income Tax**
>
> Upon verification from petitioner's Summary List of Purchases (SLP) vis-à-vis petitioner's suppliers or income payments per Summary List of Sales (SLS), it showed a discrepancy which resulted in unrecorded gross profit in the amount ₱34,102,870.49
>
> **Petitioner's Value-Added Tax**
>
> Per verification from petitioner's SLP vis-à-vis petitioner's SLS showed that there was a discrepancy which resulted in undeclared sales in the amount of ₱53,210,907.30; That petitioner was also found liable for VAT from the proceeds of its sale of Property Plant and Equipment amounting to ₱843,039.61; That the Input Tax in the amount of ₱94,500.00 must also be disallowed and that unsupported input tax deferred on capital goods in the amount of ₱11,758,927.74 must be disallowed pursuant to Sec. 4.110-3 of RR 16-2005; That petitioner is also liable for unreported Output Tax in the amount of ₱13,717,950.29.

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[12] Par. 15, Stipulated Facts, JSFI, Docket – Vol. 3, p. 1279. Exhibit "P-105" to Exhibit "P-107", Docket – Vol. 4, pp. 2372 to 2376, 2377 to 2378, 2382 to 2384.
[13] Docket – Vol. 1, pp. 10 to 31.
[14] Docket – Vol. 1, pp. 230 to 239.

Petitioner's Withholding Tax on Compensation

Upon verification of BIR Form 1601C against petitioner's: alphalist compensation in the amount of P5,389.49 and entries in the general ledger in the amount of P85,376.00, disclosed a discrepancy considered as under remittance, and therefore petitioner is liable for deficiency EWT amounting to ₱144,103.27, inclusive of increments.

Petitioner's Expanded Withholding Tax

Petitioner was found liable for expenses not subjected to Expanded Withholding Tax in the amount ₱51,606,408.94 imposed on income payments in said amount not subjected to EWT, or the EWT thereon was under-withheld, pursuant to Section 57(B) of the Tax Code of 1997, as amended and implemented by Revenue Regulations 2-98, as amended.

Petitioner's Final Tax

Petitioner remitted only the Final Tax on interest payment for the period from November 14, 2012 to February 14, 2013 and August 14, 2012 to February 14, 2013, were remitted only on March 13, 2013 which should have been on January 16, 2013, hence 20% interest was imposed pursuant to Sec. 2.57 of RR 2-98. A penalty in the amount of ₱30,548.66 was imposed.

Petitioner's Documentary Stamp Tax

Petitioner is liable for advances to/from related parties not subject to Documentary Stamp Tax in the amount of ₱87,668,784.12, and in its mortgage of Property, Plant and Equipment (PPE) in the amount of ₱642,344,087.00.

Petitioner's Other Tax Liability

Administrative penalty amounting to ₱150,000.00 was also imposed for failure to pay internal revenue taxes at the time or times required by law, and for failure to withhold or remit withheld taxes at the time or times required.

The Pre-Trial Conference initially set on August 4, 2016[15] was reset to September 7, 2016 in the Order dated July 19, 2016[16] in view of petitioner's *Motion to Defer Pre-Trial Conference*[17] filed on July 15, 2016.

On September 2, 2016, respondent filed his *Pre-Trial Brief*[18] and a *Motion for Extension of Time to File Judicial Affidavits and Transmit BIR Records*, praying that the Judicial Affidavit of respondent's witnesses be allowed to be submitted at least five (5) days before their scheduled hearing dates to testify and that the BIR Records be allowed to be submitted at least thirty (30) days from the date of the pre-trial, or up until October 6, 2016.[19] The said motion was granted on September 15, 2016, giving respondent until October 5, 2016 (the date set for Pre-Trial Conference), to file judicial affidavit of witnesses and until October 6, 2016 to transmit the BIR Records.[20] On the other hand, petitioner filed its *Pre-Trial Brief* on September 5, 2016.[21]

After the Pre-Trial Conference held on October 5, 2016,[22] the parties filed their *Joint Stipulation of Facts and Issues* within the extension period granted on November 9, 2016.[23] The same was approved in the Resolution dated November 29, 2016.[24] Subsequently, the Court issued its Pre-Trial Order on March 6, 2017.[25]

During trial, petitioner presented the following witnesses: 1) Amalia A. Soterio[26]; 2) Estelita M. Alcaraz[27]; and 3) Liza S. Glodoviza.[28]

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[15] Resolution dated May 26, 2016, Docket – Vol. 1, pp. 243 to 244.
[16] Docket – Vol. 1, p. 249.
[17] Docket – Vol. 1, pp. 245 to 248.
[18] Docket – Vol. 1, pp. 251 to 254.
[19] Docket – Vol. 1, pp. 256 to 259.
[20] Order dated September 15, 2016, Docket – Vol. 2, pp. 1238 to 1239.
[21] Docket – Vol. 1, pp. 397 to 408.
[22] Minutes of the hearing and Order dated October 5, 2016, Docket – Vol. 3, pp. 1241 to 1245.
[23] JSFI, Docket – Vol. 3, pp. 1276 to 1289.
[24] Docket – Vol. 3, p. 1318.
[25] Docket – Vol. 3, pp. 1380 to 1413.
[26] Exhibit "P-200", Docket – Vol. 1, pp. 270 to 283; Minutes of the hearing and Order both dated May 9, 2017, Docket – Vol. 3, pp. 1456 to 1459.
[27] Exhibit "P-201", Docket – Vol. 3, pp. 1480 to 1515; Minutes of the hearing and Order both dated July 13, 2017, Docket – Vol. 4, pp. 1904 to 1911.
[28] Docket – Vol. 4, pp. 2001 to 2004; Order dated February 15, 2018, Docket – Vol. 4, pp. 2009 to 2010.

On May 4, 2018, petitioner submitted its *Formal Offer of Evidence*[29] which were all admitted by the Court in the Resolution dated July 5, 2018.[30]

For his part, respondent presented Revenue Officer Julius Rex Bungabong.[31] Thereafter, respondent filed his *Formal Offer of Evidence* on October 30, 2018.[32] Petitioner filed a *Comment (Re: Respondent's Formal Offer of Evidence)* on November 15, 2018.[33] Subsequently, the Court admitted all of respondent's evidence in the Resolution dated January 28, 2019.[34]

On April 29, 2019, the instant case was submitted for decision[35], taking into consideration petitioner's and respondent's *Memorandum* filed on April 16, 2019[36] and March 28, 2019,[37] respectively.

Hence, this Decision.

THE ISSUE

As stipulated by the parties, the sole issue for this Court's resolution [38] is as follows:

> "Whether or not petitioner is liable in the aggregate amount of ₱50,968,525.45 representing deficiency Income Tax, VAT, WTC, Final Tax and Compromise Penalty for CY 2012."

Petitioner's arguments:

Petitioner argues that respondent's deficiency tax assessments should be cancelled for lack of legal and factual basis.

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[29] Docket – Vol. 4, pp. 2024 to 2073.
[30] Docket - Vol. 4, pp. 2554 to 2556.
[31] Minutes of the Hearing and Order dated October 9, 2018, Docket – Vol. 5, 99. 2570 to 2572.
[32] Docket – Vol. 5, pp. 2576 to 2582.
[33] Docket – Vol. 5, pp. 2584 to 2589.
[34] Docket – Vol. 5, pp. 2593 to 2594.
[35] Docket – Vol. 5, p. 2657.
[36] Docket – Vol. 5, pp. 2621 to 2654.
[37] Docket – Vol. 5, pp. 2606 to 2613.
[38] Issue, JSFI, Docket – Vol. 3, p. 1280.

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Allegedly, respondent's findings that petitioner had alleged undeclared sales and undeclared purchases for CY 2012 are devoid of factual and legal basis for being based on unverified third-party information. Both the FLD and FDDA failed to provide petitioner with specific information on the details of the alleged discrepancy between petitioner's Summary List of Purchases ("SLP") and its suppliers' Summary List of Sales ("SLS"). Thus, petitioner would have no way of knowing and understanding the legal and factual basis of respondent's findings.

As regards respondent's deficiency VAT assessment, the same should also be cancelled similarly for lack of factual and legal basis. In support of its stance, petitioner alleges the following: (1) it did not have undeclared sales amounting to ₱53,210,907.30 in CY 2012; (2) it did not have other income, amounting to ₱1,778,585.69, which was not subjected to VAT; (3) respondent's disallowance of input tax in the amount of ₱94,500.00 is erroneous and without legal basis.

Anent respondent's deficiency CWT assessment, there is allegedly no under-remittance of ₱5,689.49 and that respondent erroneously included items not subject to WTC.

Further, petitioner contends that its right to due process was violated due to the change in the basis of respondent's deficiency final tax assessment for CY 2012.

Lastly, petitioner submits that respondent's assessment for compromise penalties should be cancelled for the absence of petitioner's consent thereto.

Respondent's counter-arguments:

Respondent counter-argues that the assessments issued against the petitioner for deficiency Income Tax, Value Added Tax, Withholding Tax on Compensation, Expanded Withholding Tax, Final Tax, Documentary Stamp Tax, and other tax liabilities have bases in facts and law, and thus, are valid and lawful. The said factual and legal bases were discussed in the *Special and Affirmative Defenses* raised in respondent's Answer.

Well-settled is the rule that tax assessments are entitled to the presumption of correctness and made in good faith, while it is the taxpayer who has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments.

THE COURT'S RULING

The *Petition for Review* is partly meritorious.

In the FDDA, respondent demanded that petitioner pay the alleged deficiency Income Tax, Value-Added Tax, Withholding Tax on Compensation, Expanded Withholding Tax, Final Tax, Documentary Stamp Tax and administrative penalties for CY 2012 in the total amount of ₱50,968,525.45, broken down as follows:

	Basic Tax	**Surcharge**	**Interest**	**Compromise**	**Total**
Income Tax	10,230,861.15	-	5,454,590.63	-	15,685,451.78
VAT	20,798,877.52	-	12,000,667.41	-	32,799,544.93
WTC	91,062.49	-	53,040.78	-	144,103.27
EWT	855,136.71	-	498,087.85	-	1,353,224.56
Final Tax	-	-	-	30,548.66	30,548.66
DST	438,344.00	109,586.00	257,722.25	-	805,652.25
Compromise	-	-	-	150,000.00	150,000.00
TOTAL	**32,414,281.87**	**109,586.00**	**257,722.25**	**180,548.66**	**50,968,525.45**

The Court shall now look into the merits of each deficiency tax assessments.

Deficiency Income Tax

In the FDDA, respondent assessed petitioner of *Unrecorded gross profit from Extraction of Master Files per CAATTS pursuant to RMO No. 14-2011* amounting to ₱34,102,870.49. Respondent alleges that, by comparing the purchases reported on the Summary List of Purchases (SLP) vis-à-vis petitioner's suppliers or income payments per Summary List of Sales (SLS), petitioner had undeclared purchases amounting to ₱19,108,036.81. Respondent, by using the Cost Ratio, used the gross up value of these undeclared purchases to draw the imputed gross profit amount of ₱34,102,870.49.

Respondent's assessment for deficiency income tax is unwarranted.

The three (3) elements on the imposition of income tax are: (1) there must be gain or profit, (2) that the gain or profit is realized or received, actually or constructively, and (3) it is not exempted by law or treaty from income tax.[39] Income tax is assessed on income received from any property, activity or service.[40] Such being the case, in the imposition or assessment of income tax, it must be clear that there was an income, and such income was received by the taxpayer, not when there is underdeclaration of purchases.

Furthermore, it must be emphasized that for income tax purposes, a taxpayer is free to deduct from its gross income a lesser amount, or not claim any deduction at all. What is prohibited by the income tax law is to claim a deduction beyond the amount authorized therein.[41]

In this case, respondent's assessment arose from a presumption that the undeclared purchases automatically resulted in undeclared income subject to income tax, which is not correct. Respondent's imposition or assessment of the subject income tax does not hold water because the assessment was not based on undeclared income actually received by petitioner.

Hence, the supposed "*Unrecorded gross profit from Extraction of Master Files per CAATTS pursuant to RMO No. 14-2011*" in the computed amount of ₱34,102,840.49 must not be considered in the subject deficiency tax assessment.

Deficiency Value – Added Tax

Respondent assessed petitioner for alleged deficiency Value-Added Tax amounting to ₱32,799,544.93 including increments, computed as follows:

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[39] *Commissioner of Internal Revenue vs. The Court of Appeals, et al.*, G.R. No. 108576, January 20, 1999.
[40] Supra.
[41] *The Commissioner of Internal Revenue vs. Phoenix Assurance Co. Ltd.,etseq.*, G.R. Nos. L-19727 and L-19903, May 20, 1965.

Taxable Base per Vat Returns		Php1,361,175,835.81
Add: Adjustments		
A. Data from SLS Suppliers	Php57,358,886.99	
Data from SLP WMPC	38,250,850.18	
Undeclared Purchases	19,108,036.81	
Divided by Cost Ratio	35.91%	
Undeclared Sales		53,210,907.30
B.1 Proceeds from Sale of PPE	Php843,039.61	
B.2 Interest Income Not Subjected to VAT	115,247.00	
B.3 Other Income not Subjected to VAT	4,051,033.00	5,009,319.61
Taxable Base Per Audit		Php1,419,396,062.72
Output Tax (12%)		Php170,327,527.53
Input Tax on Capital Goods	Php27,089,643.00	
Current Input Tax	34,156,116.53	
Total Available Input Tax	Php61,245,759.53	
Add: Input Tax Closed to Expense	55,038,984.71	
Total	Php116,284,744.24	
Less: Input Tax Deferred on Cap Goods	21,002,435.65	
Total Input Tax Applied	Php95,282,308.59	
Less:		
C. Disallowed Input Tax	94,500.00	95,187,808.59
VAT Payable		75,139,718.94
Less: Creditable VAT Withheld Certificate		68,058,791.71
Total		7,080,927.23
Add:		
D. Unremitted Output VAT		13,717,950.29
Total Basic VAT Payable		20,798,877.52
Interest		12,000,667.41
Total VAT Deficiency		**Php32,799,544.93**

A. Undeclared Sales in the amount of ₱53,210,907.30 –

Respondent's verification disclosed that petitioner has undeclared sales amounting to ₱53,210,907.30 after reconciliation of the purchases data from SLP of petitioner as against the data extracted from the SLS of its various suppliers, allegedly disclosing a difference of ₱19,108,036.81, representing undeclared purchases. The said amount was computed as follows:

Data from SLS Suppliers	Php57,358,886.99	
Data from SLP WMPC	38,250,850.18	
Undeclared Purchases	19,108,036.81	
Divided by Cost Ratio	35.91%	
Undeclared Sales		53,210,907.30

The assessment on this item must be cancelled.

The amount of ₱53,210,907.30 is related to the previously discussed discrepancies under deficiency Income Tax. In line with the findings discussed earlier, no deficiency VAT assessment should arise from an undeclared purchase. As discussed, respondent is incorrect to presume that the undeclared purchases automatically resulted in undeclared income, therefore the imposition of VAT thereon is likewise incorrect. As such, the imposition of VAT assessment pertaining thereto shall be cancelled.

B. *Proceeds from Sales of PPE and VAT on Interest Income in the amount of ₱843,039.61 –*

Anent the items on the deficiency VAT assessed on the sale of its Property Plant and Equipment (PPE) amounting to ₱843,039.61 and Interest Income amounting to ₱115,247.00, records show that on August 25, 2016, petitioner partially paid respondent on its alleged deficiency VAT as evidenced by BIR Form No. 0605 thru Unionbank with reference number 291600016598566[42] amounting to ₱666,339.50, broken down as follows:

	Tax Base	Tax
VAT on Sale of Fixed Asset (PPE)	Php843,039.61	Php 101,164.75
VAT on Interest Income	115,247.00	13,829.64
VAT on Other Income	2,272,160.70	272,659.28
Total		387,653.68
Add: Penalty (20%)		278,685.82
Total Payment		Php666,339.50[43]

Thus, insofar as the deficiency VAT assessed on the sale of its PPE amounting to ₱843,039.61 and Interest Income amounting to ₱115,247.00, petitioner's payment of deficiency VAT on said items must be deducted upon the final settlement of the total deficiency VAT.

C. *Other Income Not Subjected to VAT*

Respondent's verification disclosed that petitioner has other income per Trial Balance in the amount of ₱4,051,033.00 that were allegedly not subjected to VAT.

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[42] Exhibits "P-105" and "P-105-a", refer to the CD attached to petitioner's FOE.
[43] Petitioner's Memorandum, Docket – Vol. 5, p. 2624.

In relation to the deficiency VAT payment made by petitioner as discussed above, petitioner partially paid ₱272,659.28 for deficiency VAT on other income amounting to ₱2,272,160.70. Hence, petitioner in its *Memorandum* alleges that it did not have other income amounting to ₱1,778,872.30[44] (₱4,051,033.00 less ₱2,272,160.70), which was not subjected to VAT. Petitioner avers that it is not actually income but a mere reversal of the accrued commitment fee recorded by the petitioner in CY 2012 relating to a loan executed with Union Bank of the Philippines.

In support of its dispute pertaining to the said assessment, petitioner presented Journal Voucher[45], Journal Voucher Register[46] and Page 256 of General ledger Book[47]. However, upon examination of the details of the said documents, it does not show proof that it pertains to the loan executed by the petitioner with Union Bank. Thus, respondent's assessment of other income amounting to ₱1,778,872.30 shall remain.

D. <u>Disallowed Input VAT in the amount of ₱94,500.00</u>

In the FDDA, respondent disallowed Input Tax in the amount of ₱94,500. According to respondent, petitioner has overclaimed purchases upon verification and comparison of petitioner's SLS Extract and SLP which disclosed a positive difference of ₱787,500.00 considered as overclaimed purchases. Thus, respondent assessed petitioner in the amount of ₱94,500.00 (₱787,500.00 multiplied by 12%).

Petitioner submits that the input VAT amounting to ₱94,500.00 pertains to its payment of purchase of transportation equipment, as duly supported by official receipt[48] and sales invoice[49] issued by Isuzu Automotive Dealership, Inc.

The Court finds the supporting documents presented by petitioner particularly, Sales Invoice No. 06798 dated December 21, 2012 corroborates petitioner's allegation that the input VAT of ₱94,500.00 pertains to its purchase of transportation equipment. Therefore, the assessment of this item is unwarranted.

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[44] Par. 53, Petitioner's Memorandum, Docket – Vol. 5, p. 2638.
[45] Exhibit "P-151", refer to the CD attached to petitioner's FOE.
[46] Exhibit "P-152", refer to the CD attached to petitioner's FOE.
[47] Exhibit "P-153", refer to the CD attached to petitioner's FOE.
[48] Exhibit "P-43-a", Docket – Vol. 4, p. 2300.
[49] Exhibit "P-43-b", Docket – Vol. 4, p. 2301.

E. Unremitted Output Tax in the amount of ₱13,717,950.29

Respondent argues that petitioner is liable for unreported Output Tax in the amount of ₱13,717,950.29. Respondent's verification of petitioner's Audited Financial Statement disclosed that there was Output Tax of ₱40,631,044.71 (Gross of ₱2,877,000.00 input VAT and Withholding VAT of ₱16,851,000.00), when compared to the 12% VAT accruals for October 26-November 25, 2012 (for PSA Nos. 211-214). The result is that there was a difference of ₱13,717,950.29 considered as output tax.

On the other hand, petitioner argues that it exclusively sells electricity to the National Power Corporation (NPC)/Power Sector Assets and Liabilities Management (PSALM), both government owned and controlled corporations (GOCC). That payments made to the NPC and PSALM are subject to the 5% Final withholding VAT. Considering that petitioner sells 100% of its generated power to GOCC's, petitioner submits that it does not have any unremitted output tax amounting to ₱13,717,950.29 for CY 2012.

Moreover, petitioner contends that as testified by petitioner's Accountant, Estelita Alcaraz, all receipts of petitioner from its sale of electricity to NPC/PSALM are duly subjected to 5% final VAT withholding and any discrepancy is merely due to timing difference in the reporting.

The Court finds that the assessment of respondent does not refer to the 5% Final withholding VAT but on the basis of a difference between petitioner's Audited Financial Statement and accruals for October 26 - November 25, 2012. Petitioner's allegation is unsupported by documentary proof to refute respondent's assessment. Moreover, as to the allegation of timing difference, the same is unsubstantiated. Thus, the deficiency VAT on this item should be retained.

From the foregoing, petitioner is still liable for basic deficiency VAT amounting to **₱14,319,068.64**, computed as follows:

Taxable Base per VAT Returns		1,361,175,835.81
Add: Adjustments		
Proceeds from Sale of PPE	843,039.61	
Interest Income Not Subjected to VAT	115,247.00	
Other Income Not Subjected to VAT	4,051,033.00	5,009,319.61

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Taxable Base per Audit	1,366,185,155.42
Output VAT (12%)	163,942,218.65
Less: Input VAT Applied	95,282,308.59
VAT Payable	68,659,910.06
Less: Creditable Tax Withheld	68,058,791.71
Total	601,118.35
Add: Unremitted Output VAT	13,717,950.29
Basic Deficiency VAT	**14,319,068.64**

WITHHOLDING TAX ON COMPENSATION

Respondent assessed petitioner for alleged deficiency Withholding Tax on Compensation amounting to Php₱144,103.27 including increments, computed as follows:

A. Under-remittance per Recon of BIR Form 1601C vs Alphalist	Php5,686.49
B. Discrepancy per Recon of GL Entries vs BIR Form 1601C	85,376.00
Total	91,062.49
Interest (20%)	53,040.78
Total Deficiency WTC	**Php144,103.27**

A. Under remittance per recon of BIR Form 1601C vs. Alphalist

In the FDDA, respondent finds that petitioner is liable for deficiency Withholding Tax on Compensation in the amount of ₱5,686.49 as per verification of petitioner's BIR Form 1601C vis-à-vis the Alphalist compensation.

Petitioner argues that there is no under-remittance in the amount of ₱5,689.49. Petitioner contends that respondent erroneously included, from its comparison of the Alphalist and the Audited Financial Statements, items not subject to WTC, such as non-taxable salaries of minimum wage earners, employer's share in Social Security System, Philippine Health Insurance Corporation and Home Development Mutual Fund, de minimis benefits, accrual of pension expense, actual pension pay-out in CY 2012 and fringe benefits.

We agree with petitioner.

An examination of the BIR Form 1601C,[50] BIR Form 1604-CF,[51] respondent's working paper/schedules[52] and the Alphalist[53] reveals that petitioner does not have under-remittance, as presented below:

Total Tax Withheld Per BIR Form 1601C		Php9,697,321.96
Less: Amount of Tax Withheld as Adjusted		
Schedule 7.1 – Alphalist of Employees Terminated before Dec. 31	87,013.26	
Schedule 7.2 – Alphalist of Employees whose compensation income are exempt from withholding tax but subject to income tax	-	
Schedule 7.3 – Alphalist of Employees as of December 31 with no Previous employer within the year.	9,572,110.13	
Schedule 7.4 – Missing Alphalist	-	9,659,123.39
Difference		38,198.57

Upon comparison between the total tax withheld per BIR Form 1601C versus the alphalists shows a difference of ₱38,198.57 indicating that petitioner has no under-remittance. Based on this difference, the allegation of respondent is unfounded and the assessment of this item must be cancelled.

B. <u>Discrepancy per Recon of GL Entries vs. BIR Form 1601C</u>

In the FDDA, respondent's reconciliation of BIR Form 1601C as per entries on Employees Withholding Tax account per General Ledger (GL) of petitioner disclosed a discrepancy of ₱85,376.00, considered by the respondent as under-remittance.

Petitioner argues that the discrepancy pertains mostly to taxes withheld from or refunded to contractual employees and withheld taxes refunded to regular employees covering the period October 1, 2012 to December 31, 2012.

A perusal of the documents presented by petitioner such as Payroll Summary, Debit/Credit Memo, UnionBank Deposit Slips, Accounts Payable Voucher, Revolving Fund Voucher and

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[50] Exhibit "R-11" (Entire BIR Records), pp. 165 to 188.
[51] Exhibit "R-11" (Entire BIR Records), pp. 195 to 197.
[52] Exhibit "R-11" (Entire BIR Records), pp. 638 to 639.
[53] Exhibit "R-11" (Entire BIR Records), pp. 190 to 194.

Reconciliation Schedule[54] reveal that petitioner was able to properly provide documents, explanations and reconciliation schedule to refute the assessment. Thus, this assessment will be cancelled.

In sum, the assessment of deficiency Withholding Tax on Compensation in the aggregate amount of ₱144,103.27 must be cancelled.

EXPANDED WITHHOLDING TAX

Respondent assessed petitioner for deficiency Expanded Withholding Tax including increments in the amount of ₱1,353,224.56 [₱855,136.71(Basic EWT) plus ₱498,087.85 (Interest)], which the latter acknowledged because of its payment on August 25, 2016, as evidenced by BIR Form No. 0605 thru Unionbank with reference number 291600016598611[55] amounting to ₱2,335,702.67, broken down as follows:

Basic Expanded Withholding Tax	₱1,353,224.56
Add: Penalty (20%)	982,478.11
Total Payment	**₱2,335,702.67**[56]

However, deficiency and delinquency interest must be imposed pursuant to Sections 248(A) and 249(B) and (C), of the NIRC of 1997, as amended by Republic Act No. 10963 and implemented by Revenue Regulations No. 21-2018. Thus, interest and surcharge on the basic deficiency Expanded Withholding Tax must be adjusted as follows:

	EWT
Basic Tax Due	1,353,224.56
25% Surcharge	338,306.14
Sub-Total	1,691,530.70
20% Deficiency Interest:	
16-Jan-13 to 23-Dec-15 (1,353,224.56 x 20% x1072/365)	794,880.40
Total Amount Due, Dec. 23, 2015	**2,486,411.10**

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[54] Exhibits "P-108" to "P-149-b", CD.
[55] Exhibits "P-106" and "P-106-a", CD.
[56] Petitioner's Memorandum, Docket – Vol. 5, p. 2624.

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20% Deficiency Interest:	
24-Dec-15 to 25-Aug-16[57] (1,353,224.56 x 20% x 246/365)	182,407.26
20% Delinquency Interest:	
24-Dec-15 to 25-Aug-16 (2,486,411.10 x 20% x 246/365)	335,154.59
26-Aug-16 to 31-Dec-17 (2,486,411.10 less 2,335,702.67[58] = 150,708.43 x 20% x 493/365)	40,711.92
Total Amount Due, Dec. 31, 2017	**3,044,684.87**

DOCUMENTARY STAMP TAX

Respondent assessed petitioner for deficiency Documentary Stamp Tax including increments in the amount of ₱805,652.25, broken down as follows:

Basic Documentary Stamp Tax	₱438,344.00
Surcharge	109,586.00
Interest	257,722.25
TOTAL	**₱805,652.25**

Petitioner acknowledged this assessment because of its payment on August 25, 2016, as evidenced by BIR Form No. 0605 thru Unionbank with reference number 291600016598499[59] amounting to ₱1,393,668.03, broken down as follows:

Basic Documentary Stamp Tax	₱805,652.25
Add: Penalty (20%)	588,015.78
Total Payment	**₱1,393,668.03**[60]

Anent deficiency and delinquency interest pursuant to Sections 248(A) and 249(B) and (C), of the NIRC of 1997, as amended by RA

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[57] Date of Payment: August 25, 2016, Exhibits "P-106" and "P-106-a", CD.
[58] Amount Paid on August 25, 2016.
[59] Exhibits "P-107" and "P-107-a", CD.
[60] Petitioner's Memorandum, Docket – Vol. 5, pp. 2624 to 2625.

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No. 10963 and implemented by RR No. 21-2018, the interest and surcharge on the basic deficiency DST is adjusted accordingly:

Basic Tax Due	438,344.00
25% Surcharge	109,586.00
Sub-Total	547,930.00
20% Deficiency Interest:	
06-Jan-13 to 23-Dec-15 (438,344.00 x 20% x1082/365)	259,883.95
Total Amount Due, Dec. 23, 2015	**807,813.95**
20% Deficiency Interest:	
24-Dec-15 to 25-Aug-16 (438,344.00 x 20% x 246/365)	59,086.37
20% Delinquency Interest:	
24-Dec-15 to 25-Aug-16 (807,813.95 x 20% x 246/365)	108,888.89
Total Amount Due, August 25, 2016	975,789.21
Payment on August 25, 2016	1,393,668.03
DST Due (Overpayment)	**(₱417,878.82)**

Based on the foregoing, it appears that petitioner made an overpayment in the amount of ₱417,878.82. Consequently, no DST liabilities including increments will be imposed upon the petitioner.

FINAL TAX & COMPROMISE PENALTIES

In the FDDA, respondent assessed petitioner of compromise penalties in the following amount:

	Compromise
Final Tax	30,548.66
Compromise	150,000.00
TOTAL	**180,548.66**

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Notably in the details of the FDDA, the Final Tax imposed by respondent to petitioner is labeled as "Final Tax" but what respondent is actually imposing is compromise penalty for the remittance of accrued interest.

It must be stressed that a compromise penalty is imposed to avoid prosecution for violation of the provisions of the Tax Code.[61] The nature of a compromise penalty is explained in the case of *Commissioner of Internal Revenue vs. Armando L. Abad*[62], to wit:

> "**a compromise implies agreement. One party cannot impose it upon the other**. If an offer of compromise is rejected by the taxpayer, as in this case, the Commissioner of Internal Revenue should file a criminal action if he believes that the taxpayer is criminally liable for violation of the tax law as the only way to enforce a penalty. As penalty can be imposed only on a finding of criminal liability." *(Emphasis supplied)*

In the instant case, there is no showing that petitioner consented to the compromise penalty. Hence, its imposition should be deleted. The imposition of the compromise penalty without the taxpayer's conformity is illegal and unauthorized.[63] Thus, petitioner cannot be held liable for Compromise Penalty in the amount of ₱180,548.66.

WHEREFORE, in light of the foregoing considerations, the *Petition for Review* is **PARTIALLY GRANTED**.

Accordingly, petitioner is **ORDERED TO PAY the amount of THIRTY EIGHT MILLION SIX HUNDRED FORTY SIX THOUSAND THIRTY ONE PESOS AND 44/100 (₱38,646,031.44)** representing deficiency VAT and EWT for calendar year 2012, inclusive of twenty-five percent (25%) surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended, and twenty percent (20%) deficiency interest and 20% delinquency interest imposed under Section 249(A) and (B), respectively, of the same Code, computed until December 31, 2017, which is prior to its amendment under the TRAIN Law, computed as follows:

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[61] *The Philippines International Fair, Inc. vs. The Collector of Internal Revenue, et al.*, G.R Nos. L-12928 and L-12932, March 31, 1962.
[62] G.R. No. L-19627, June 27, 1968.
[63] *Commissioner of Internal Revenue vs. Lianga Bay Logging Co., Inc., et al.*, G.R. No. L-35266, January 21, 1991.

	VAT	EWT	TOTAL
Basic Tax Due	14,319,068.64	1,353,224.56	15,672,293.20
25% Surcharge	3,579,767.16	338,306.14	3,918,073.30
Sub-Total	17,898,835.80	1,691,530.70	19,590,366.50
20% Deficiency Interest:			
26-Jan-13 to 23-Dec-15[64] (14,319,068.64 x 20% x 1062/365)	8,332,521.04		8,332,521.04
16-Jan-13 to 23-Dec-15 (1,353,224.56 x 20% x1072/365)		794,880.40	794,880.40
Total Amount Due, Dec. 23, 2015	**26,231,356.84**	**2,486,411.10**	**28,717,767.94**
20% Deficiency Interest:			
24-Dec-15 to 25-Aug-16[65] (14,319,068.64 x 20% x 246/365)	1,930,131.99		1,930,131.99
24-Dec-15 to 25-Aug-16[66] (1,353,224.56 x 20% x 246/365)		182,407.26	182,407.26
20% Delinquency Interest:			
24-Dec-15 to 25-Aug-16 (26,231,356.84 x 20% x 246/365)	3,535,843.17		3,535,843.17
26-Aug-16 to 31-Dec-17 (26,231,356.84 less 666,339.50[67] = 25,565,017.34 x 20% x 493/365)	6,906,056.74		6,906,056.74
24-Dec-15 to 25-Aug-16 (2,486,411.10 x 20% x 246/365)		335,154.59	335,154.59
26-Aug-16 to 31-Dec-17 (2,486,411.10 less 2,335,702.67[68] = 150,708.43 x 20% x 493/365)		40,711.92	40,711.92
Sub-total Amount Due, December 31, 2017	38,603,388.74	3,044,684.87	41,648,073.61
Less Payment made on August 25, 2016	666,339.50	2,335,702.67	3,002,042.17
Total Amount Due, Dec. 31, 2017	**37,937,049.24**	**708,982.20**	**38,646,031.44**

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[64] FDDA was received on Dec. 23, 2015, Exhibit "P-9", Docket – Vol. 4, pp. 2134 to 2136.
[65] Date of Payment: August 25, 2016, Exhibits "P-105" and "P-105-a", CD.
[66] Date of Payment: August 25, 2016, Exhibits "P-106" and "P-106-a", CD.
[67] Amount Paid on August 25, 2016.
[68] Amount Paid on August 25, 2016.

In addition, petitioner is **ORDERED TO PAY** delinquency interest at the rate of twelve percent (12%), on the total unpaid amount as of August 26, 2016 in the amount of **₱25,715,725.77**[69], computed from January 1, 2018 until full payment thereof pursuant to Section 249(C) of the Tax Code, as amended by RA No. 10963 and implemented by Revenue Regulations No. 21-2018.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

MA. BELEN RINGPIS-LIBAN
Associate Justice

MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

ATTESTATION

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

ERLINDA P. UY
Associate Justice
Chairperson, 3rd Division

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[69] Only the remaining VAT(Php25,565,017.34) and EWT(Php150,708.43) **DUE** as of August 26, 2016 shall be computed until full payment thereof.

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice