REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

SYMMETRY PHILIPPINES, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8324

Members:

BAUTISTA, *Chairperson*
FABON-VICTORINO, *and*
RINGPIS-LIBAN, *JJ.*

Promulgated:

JUN 10 2014
10:30 a.m.

x- -x

DECISION

***Fabon-Victorino, J.*:**

In this Petition for Review dated August 23, 2011, petitioner Symmetry Philippines, Inc. seeks to reverse and set aside the Final Decision on Disputed Assessment (FDDA) dated June 22, 2011, issued against it by respondent Commissioner of Internal Revenue (CIR) for deficiency income tax (IT), value-added tax (VAT), expanded withholding tax (EWT), and final withholding tax (FWT), all for taxable year 2004.

Petitioner Symmetry Philippines, Inc., is a Philippine corporation with office address at Ground Floor, SEDDCO I Building, cor. Rada and Legaspi Streets, Legaspi Village, Makati City.[1]

On the other hand, respondent Commissioner of Internal Revenue is the head of the Bureau of Internal

[1] Par. 1, Summary of Admitted Facts, Joint Stipulation of Facts (JSF), docket, p. 203.

Revenue (BIR), with office address at BIR National Office Building, Agham Road, Diliman, Quezon City.

In June of 2006, petitioner received a Letter of Authority (LOA) No. 00096189 dated June 5, 2006, in relation to its internal revenue taxes for taxable year 2004.[2]

Sometime in 2008, petitioner received from respondent Items for Reconciliation for taxable year 2004 to which it submitted Replies on May 30, 2008.[3]

On September 4, 2008, petitioner received the results of the investigation conducted on its internal revenue taxes for taxable year 2004 via a letter dated July 18, 2008.[4]

On September 24, 2008 and October 3, 2008,[5] petitioner submitted to respondent documents explaining the discrepancies indicated in the letter of July 18, 2008.

In 2009, petitioner received Assessment Notices dated April 21, 2009, with a Formal Letter of Demand (FLD) for deficiency IT, VAT, EWT, FWT, and compromise penalty in the total amount of P47,021,249.69.[6]

On June 26, 2009, petitioner sent to respondent a protest letter dated June 25, 2009.[7]

More than two (2) years thereafter, or on July 25, 2011, petitioner received the assailed FDDA dated June 22, 2011.[8]

On August 24, 2011, petitioner filed the instant Petition for Review with the Court.

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[2] Par. 4, Summary of Admitted Facts, JSF, docket, p. 204.
[3] Pars. 5 and 6, Summary of Admitted Facts, JSF, docket, p. 204.
[4] Par. 7, Summary of Admitted Facts, JSF, docket, p. 204.
[5] Pars. 8 and 9, Summary of Admitted Facts, JSF, docket, p. 204.
[6] Par. 10, Summary of Admitted Facts, JSF, docket, p. 204.
[7] Par. 11, Summary of Admitted Facts, JSF, docket, p. 204.
[8] Par. 12, Summary of Admitted Facts, JSF, docket, p. 204; Exhibit "A".

In her Answer [9] filed on November 14, 2011, respondent raised the following special and affirmative defenses:

> 7. The assessments in question were made and issued in accordance with law, rules and regulations;
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> 8. Royalty payments per BIR Form 1601F (Other payments to NRFCs) total P6,372,165.79. Note 12 of the FS states: 'In consideration thereof, Symmetry Philippines, Inc. shall pay **five (5%) of the monthly Philippine net sales of the product**.' The above amount was grossed up and resulted in the amount of P127,443,316.00, which represents net sales, the basis of royalty payments. The difference between the derived amount was compared against Symmetry's Income Tax Return, resulting in undeclared sales of P49,167,727.00. The fact that only 3.9M was claimed as Royalty Expense in the ITR is of no consequence since payments per 1601F reflect P6.3M. The inclusion of the tax base of the 6.3M remittance as part of Royalty Payments finds basis also in the agreement where it is stated that 5% of net sales is the basis of royalty payments. There is no mention of additional compensation for Symmetry USA in the form of commissions anywhere in the documents submitted to refute the assessment.
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> 9. Respondent disallowed petitioner's part of commission expense, professional fees, purchases of goods and services in the total amount of P3,711,336.56 for failure of the petitioner to withhold the corresponding withholding tax thereon and remit the same to the BIR.

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[9] Docket, pp. 149-151.

> 10. Importations in the BOC importation data from the Audit Information Tax Exemption and Incentives Division were not included in the petitioner's schedule of importation, thus, resulting to under declaration of sales amounting to P1,650,134.00.
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> 11. Petitioner failed to submit a breakdown or schedule of its various expenses in the amount of P3,364,471.73, hence, were disallowed.
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> 12. Input tax claimed per return includes purchases of capital goods amounting to P580,237.40. However, the cash flow statement as well as Note 7 of petitioner's Notes to Financial Statements show an acquisition of only P136,778.00 or a difference of P443,459.40. The input tax for this unsupported capital expenditure is P44,345.94. (sic) Which was disallowed for failure to substantiate.
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> 13. Input tax claimed amounting to P429,779.16 was disallowed inasmuch as the same were (sic) came from non-VAT suppliers.
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> 14. All presumptions are in favor of the correctness of the tax assessment **(Interprovincial Autobus vs. Collector of Internal Revenue, 98 Phil. 290)**.

Trial ensued after the Pre-Trial Order was issued on May 21, 2012.

Petitioner first presented its current General Manager **Elizabeth Añana.** She testified that petitioner entered into a License Agreement with Symmetry Corporation in the U.S. under which the latter agreed to provide its marketing and distribution plan in return for a royalty fee equivalent to 5% net of petitioner's sales.

Añana explained that under the multi-level marketing plan, petitioner sells its products only to distributors and not directly to the consumers or end users. The distributors either sell to the end-users, or recruit other individuals as distributors under them, the latter termed as downlines. A distributor recruited by another distributor is part of the recruiter distributor's network. In this marketing scheme, a distributor earns income, not only from his sales to the consumers, but also from the sales of the distributors he recruited up to the 7th level.

Since all Philippine distributors have been recruited by distributors from Symmetry Corporation in the U.S., these distributors from the U.S. earn commissions from their distributors in the Philippines. Thus, Symmetry Corporation in the U.S. bills petitioner which in turn remits the commissions to the U.S. distributors.

Further, Añana differentiated royalty fees from commissions based on tax rates. According to her, petitioner withheld ten percent (10%) from the royalty fees it paid to Symmetry Corporation in the U.S. and thirty-two percent (32%) from the commissions it remitted to the distributors in the U.S. through Symmetry Corporation.

On this regard, petitioner's Chief Accountant for the past 15 years **Elito Uy Chan** explained further that the royalties to Symmetry Corporation and commissions paid to the distributors in the U.S. were separately recognized by petitioner for reporting and recording purposes. Contrary to the FDDA, petitioner already subjected the royalty payments to Symmetry Corporation to withholding VAT. The FDDA also erroneously indicated as royalties the commissions paid to the distributors in the U.S which were not subjected by petitioner to withholding VAT but to final tax of 32%. Symmetry Corporation bills petitioner and pays the commissions of the U.S. distributors. On the other hand, petitioner directly pays the commissions of the Philippine distributors.

Finally, Independent Certified Public Accountant (ICPA) **Michael L. Aguirre,** who audited petitioner's supporting documents, submitted to the Court an ICPA Report with the following results:

1. Petitioner had no undeclared sales, in the amount of P49,167,727.00 arising from grossed-up amount on alleged "royalty payments" because such amount were commissions and should not be used as basis for computing petitioner's revenue. Petitioner thus cannot be held liable for deficiency income tax and VAT relative to such grossed-up amount.

2. Petitioner had no undeclared sales from "Assumed Undeclared Importation" in the amount of P1,650,134.00 based on the audit conducted. Further, the BIR failed to provide petitioner the factual and legal bases of such assessment which is then deemed void pursuant to Section 228 of the NIRC.

3. The disallowed commission expense in the amount of P410,336.00 claimed by the BIR to be a discrepancy was due to an error in identifying the expense. Instead of recording some of the discrepancies as Commission Expense, it was mistakenly recorded as Sales Discount. The remaining difference was attributable to timing difference as petitioner is following the "Accrual Accounting" method in preparing its Financial Statements.

4. As to the disallowed P60,000.00 Professional Fees, the same should be allowed as appropriate withholding was done by petitioner. Those not subjected to withholding tax were for payments to General Professional Partnerships.

5. Other income payments were erroneously disallowed by the BIR.

6. The disallowance of Unsupported Various Expenses in the amount of P3,364,471.73 is without legal and factual basis.

7. Petitioner is not liable for Deficiency Income tax for disallowed NOLCO.

8. However, petitioner is liable for Deficiency VAT in the amount of P95,730.15, exclusive of penalties and

interest, as well as for unpaid withholding VAT for Commission payments in the amount of P637,216.58, exclusive of penalties and interest.

After petitioner rested, respondent, though counsel, manifested that she would not present any evidence.[10]

The lone issue submitted by the parties for resolution is as follows:

> 1. Whether or not Petitioner is liable for deficiency income tax, deficiency Value-Added Tax, deficiency Withholding Tax-Expanded, and deficiency Withholding Tax-Final, in the total amount of Fifty Seven Million Three Hundred Thirty Nine Thousand Five Hundred Fifty Nine and 49/100 Pesos (P57,339,559.49).

DISCUSSION/RULING

First, the Court must determine if the instant Petition for Review was seasonably filed. Section 228 of the National Internal Revenue Code (NIRC), as amended, pertinently provides, thus:

> SEC. 228. *Protesting of Assessment.* – When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: x x x
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> The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.
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> Within a period to be prescribed by implementing rules and regulations, the

[10] Docket, p. 481.

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

Per the parties' stipulation, petitioner received Assessment Notices dated April 21, 2009, including the Formal Letter of Demand (FLD) in 2009.[11] The said Assessment Notices and the FLD were not offered in evidence, while the FLD with Details of Discrepancy, and Assessment Notices[12] attached to the Petition for Review dated August 23, 2011, do not indicate date of receipt by petitioner. Thus, the Court cannot determine with certainty if the protest was timely filed by petitioner on June 26, 2009.[13]

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[11] Par. 10, Summary Of Admitted Facts, JSF, docket p. 205.
[12] Annexes K, L, M, N, O, P, Q, and R, docket pp. 94-103.
[13] Par. 11, Summary Of Admitted Facts, JSF, docket p. 205.

Jurisprudence has it that a protest or "a request for reconsideration must be made within thirty (30) days from the taxpayer's receipt of the tax deficiency assessment, otherwise it becomes final, unappealable and demandable. A tax assessment that has become final, executory and enforceable for failure of the taxpayer to assail the same on time as provided in Section 228 can no longer be contested x x x."[14]

In the case at bar, respondent acted on the protest through the FDDA dated June 22, 2011,[15] albeit adverse to petitioner. This fact demonstrates that the protest was timely filed.

Further, Section 228 of the NIRC provides that in case the CIR failed to act on the disputed assessment within the 180-day period from date of submission of documents, a taxpayer can either: 1) file a petition for review with the Court of Tax Appeals (CTA) within 30 days after the expiration of the 180-day period; or 2) await the final decision of the Commissioner on the disputed assessments then appeal such final decision to the CTA within 30 days from notice. However, these options are mutually exclusive, and resort to one bars the application of the other.[16]

Conspicuously, petitioner opted to await the decision of respondent on the protest which was rendered through the FDDA issued on June 22, 2011 or almost two years after the filing of the protest.

Also under the same provision, petitioner had 30 days to appeal respondent's denial of its protest to the CTA.[17] It has been admitted that petitioner received the FDDA dated June 22, 2011 on July 25, 2011.[18] Hence, the instant Petition for Review was timely filed on August 24, 2011.

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[14] Oceanic Wireless vs. Commissioner of Internal Revenue, G.R. NO. 148380, December 09, 2005.
[15] Exhibit A, docket p. 28.
[16] RCBC vs. CIR, G.R. No. 168498, April 24, 2007.
[17] Fishwealth Canning Corporation vs. CIR, G.R. No. 179343, January 21, 2010.
[18] Par. 12, Summary of Admitted Facts, JSF, docket p. 205.

Proceeding to the merits of the case, it must be emphasized that tax assessments by tax examiners are presumed correct and made in good faith. All presumptions are in favor of the correctness of a tax assessment. Be that as it may, such assessment must be supported by sufficient evidence. The Supreme Court explained the rationale of the foregoing legal principle, in this wise:

> xxx Upon the introduction of the assessment in evidence, a *prima facie* case of liability on the part of the taxpayer is made. If a taxpayer files a petition for review in the CTA and assails the assessment, the *prima facie* presumption is that the assessment made by the BIR is correct, and that in preparing the same, the BIR personnel regularly performed their duties. This rule for tax initiated suits is premised on several factors other than the normal evidentiary rule imposing proof obligation on the petitioner-taxpayer: the presumption of administrative regularity; the likelihood that the taxpayer will have access to the relevant information; and the desirability of bolstering the record-keeping requirements of the NIRC.
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> However, the *prima facie* correctness of a tax assessment does not apply upon proof that an assessment is utterly without foundation, meaning it is arbitrary and capricious. Where the BIR has come out with a 'naked assessment,' *i.e.*, without any foundation character, the determination of the tax due is without rational basis. In such a situation, the U.S. Court of Appeals ruled that the determination of the Commissioner contained in a deficiency notice disappears. *Hence, the determination by the CTA must rest on all the evidence introduced and its ultimate determination must find support in credible evidence.*"[19]

[19] Commission of Internal Revenue vs. Hantex Trading Co. Inc., G.R. No. 136975, March 31, 2005.

In connection with the foregoing, petitioner availed of the services of an Independent Certified Public Accountant (ICPA) pursuant to Rule 13 of the Revised Rules of the Court of Tax Appeals as the case involved voluminous documents.[20] However, it must be pointed out that the Court cannot just adopt the ICPA's findings *sans* verification of the documents from which they were based.

Significantly, the Court of Tax Appeals Circular No. 1-95 provides in part:

> 1. The party who desires to introduce as evidence such voluminous documents must present: (a) Summary containing the total amount/s of the tax account or tax paid for the period involved and a chronological or numerical list of the numbers, dates and amounts covered by the invoices or receipts; xxx
>
> 2. The method of individual presentation of each and every receipt or invoice or other documents for marking, identification and comparison with the originals thereof need not be done before the Court or the Commissioner anymore after the introduction of the summary and CPA certification. It is enough that the receipts, invoices and other documents covering the said accounts or payments must be pre-marked by the party concerned and submitted to the Court in order to be made accessible to the adverse party whenever he/she desires to check and verify the correctness of the summary and CPA certification. xxx

The circular was promulgated to avoid the time-consuming procedure of presenting, identifying and marking of voluminous documents before the Court. It does not relieve the taxpayer of its imperative task of premarking

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[20] Docket, pp. 219-221.

photocopies of sales receipts and invoices and **submitting them all to the Court after the ICPA shall have examined and compared them with the originals. Without presenting these pre-marked documents as evidence – from which the summary and schedules were based, the Court cannot verify the authenticity and veracity of the Independent Auditor's conclusions.**[21]

Further, Section 3 of Rule 13 of the Revised Rules of the Court of Tax Appeals provides:

> SEC. 3. *Findings of independent CPA.* – The submission by the independent CPA of pre-marked documentary exhibits shall be subject to verification and comparison with the original documents, the availability of which shall be the primary responsibility of the party possessing such documents and, secondarily, by the independent CPA. **The findings and conclusions of the independent CPA may be challenged by the parties and shall not be conclusive upon the Court, which may, in whole or in part, adopt such findings and conclusions subject to verification.** *(Emphasis supplied)*

Bearing in mind the cited tenet, the Court shall determine whether petitioner was able to overturn the presumption of correctness of the assessment based not only on the findings of the ICPA, but on the evidence presented before the Court as well.

The FDDA [22] dated June 22, 2011 sustained the following deficiency tax assessments issued against petitioner, inclusive of interest until June 30, 2009, for

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[21] *Philippine Long Distance Telephone Company vs. Commissioner of Internal Revenue*, G.R. No. 157264, January 31, 2008, citing *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.

[22] Exhibit "A".

taxable year ending December 31, 2004, pursuant to the Letter of Authority No. 00096189 dated June 5, 2006:

TAX	AMOUNT
Income Tax	P 34,185,465.97
Value-added Tax	10,668,847.24
Withholding Tax-Expanded	200,678.41
Withholding Tax-Expanded	16,489.54
Withholding Tax-Final	1,948,768.53
Compromise Penalty	1,000.00
TOTAL	**P47,021,249.69**

I. INCOME TAX - P34,185,465.97

The deficiency income tax of P34,185,465.97 arose from the following items:

1. Undeclared Sales		
a. Arising from royalties of P6,372,165.79 paid by petitioner to Symmetry Corporation	P49,167,727.00	
b. Arising from petitioner's alleged undeclared importations	1,650,134.00	P50,817,861.00
2. Disallowed Expenses not subjected to EWT		3,711,336.56
3. Unsupported various expenses		3,364,471.73
4. Net Operating Loss Carry Over (NOLCO)		2,888,813.00

1. Undeclared Sales – P50,817,861.00

A. Undeclared sales arising from the alleged royalties paid by petitioner during the year amounting to P6,372,165.79

The FDDA indicates that royalty payments per BIR Form No. 1601F (Other payments to NRFCs) amount to P6,372,165.79. The FDDA cites Note 12 of the Financial Statements (FS) which states: "In consideration thereof, Symmetry Philippines, Inc., shall pay five (5%) per cent of the monthly Philippine net sales of the product". The above amount was grossed up by respondent and resulted in the amount of P127,443,316.00 net sales, the basis of royalty payments. The difference between the derived amount was compared by respondent against petitioner's ITR, resulting in undeclared sales of P49,167,727.00.[23]

Respondent held that the fact that only P3,900,000.00 was claimed as royalty expense in the ITR was of no moment since the payments per BIR Form No. 1601F reflected the amount of P6,300,000.00. Respondent added that the inclusion of the tax base of the P6,300,000.00 remittance as part of royalty payments was likewise backed-up by the provision in the agreement that 5% of net sales would be the basis of royalty payments. There was also no mention of additional compensation for Symmetry Corporation, in the form of commissions, in any documents submitted to refute the assessment. Hence, the conclusion that it was proper to consider the same as royalty payments, in the absence of any proof to the contrary.[24]

On this matter, petitioner adopted the report of the ICPA stating that it withheld ten percent (10%) from the royalty payments to Symmetry Corporation, and thirty-two percent (32%) from the commissions paid to the latter.[25]

Petitioner and the ICPA also shared the view that the amount of P6,372,165.79, indicated in BIR Form No. 1601F as other payments to NRFCs, actually pertained to commissions billed by Symmetry Corporation in the U.S. for the sales made by Philippine downlines or distributors and not to undeclared sales.

According to petitioner, respondent mistakenly **grossed up** the said amount, assuming that it was five percent (5%) of the net sales as agreed upon in the License Agreement.

Petitioner explained that the commissions were not indicated in the License Agreement and the rates were not

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[23] Exhibit "A-1".
[24] *Ibid.*
[25] Exhibit "Q-2".

fixed since the distributors earned by multi-levels. The commissions were tracked by the accounting system of Symmetry Corporation. Any commission then earned by the uplines or distributors in the US are billed by Symmetry Corporation.

Petitioner also gave premium on the ICPA's conclusion that it had no undeclared sales arising from the grossed-up amount on alleged 'royalty payments' because such amount were commissions and should not be used as basis for computing the Company's revenue. In fine, petitioner should not be made liable for deficiency income tax and VAT.[26]

Section 3.2 of Article III of the License Agreement between petitioner and Symmetry Corporation[27] provides that any commission due to non-resident Filipinos on sales generated in the Philippines as well as all expenses incurred in connection with the training and assistance provided for by Symmetry Corporation, shall be for the account of petitioner in addition to the consideration referred to in Section 3.1 of the License Agreement. Section 3.1 of the License Agreement pertains to the royalty fee to be paid by petitioner to Symmetry Corporation for the use of the product plan and rights and privileges granted by virtue of the License Agreement, the sum equivalent to 5% of the monthly Philippine net sales of the product.

However, beyond the License Agreement and the self-serving testimonies of Elizabeth Añana and Elito Uy Chan, no other evidence was adduced to show that there were indeed commissions due and paid to non-resident Filipinos under the marketing and distribution plan described by witness Elizabeth Añana. In other words, no evidence, documentary or otherwise, was presented to show that commissions were paid to the distributors in the U.S.

Moreover, the Court could not verify the ICPA's findings in favor of petitioner as the credit memo, invoices, and Symmetry Corporation's Commission Scheme from which

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[26] Exhibit "Q-2", docket, p. 303.
[27] Exhibit "B-2-b".

they were derived were not formally offered and submitted to the Court. The Court is therefore constrained to adopt the income tax assessment on the undeclared sales arising from payment of royalties for failure of petitioner to overcome the presumption of correctness of the assessment issued by respondent.

B. Undeclared sales arising from importations in the amount of P1,650,134.00

In the assailed FDDA, respondent also placed much weight on the Importer's Detailed Report obtained from the Audit Information Tax Exemption and Incentive Division (AITEID) of the BIR showing that the above-stated importations were not included in petitioner's Importation Listing. Besides, the assessment for deficiency income tax resulting from the discrepancy was already included in the proposed deficiency taxes as early as the informal conference stage negating petitioner's allegation in its protest that it had no knowledge of such deficiency assessment.

On this regard, petitioner argued that it requested for a copy of the alleged Importer's Detailed Report during the conference stage to be able to reconcile it with their records. However, they were not handed any. Had its request been granted, it could have retrieved the appropriate documents to clarify matters. As a result, petitioner submitted documents which it deemed material to its cause.

Finding comfort, petitioner highlighted the following findings of the ICPA:

> Based on my audit, I noted that the BIR failed to furnish the Company of the said BOC Importation data. Details of the alleged discrepancy were not made

> available to the latter for further examination and possible clarification. Section 228 of the NIRC states that *'the taxpayers shall be informed in writing of the law and the facts on which the assessment is made: otherwise, the assessment shall be void.*[28]

The Court agrees.

The law requires that the taxpayer should be informed of the legal and factual bases of the assessment. Section 228 of the National Internal Revenue Code (NIRC) of 1997, as amended, provides in part:

> SEC. 228. *Protesting of Assessment.* - When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however*, That a pre-assessment notice shall not be required in the following cases:
>
> xxx xxx xxx
>
> **The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void**. *(Emphasis supplied)*

Evident from the record that respondent did not present any evidence during the trial of the case. In effect, she failed to refute petitioner's claim that despite request it was not furnished with the Importation Data which could have shown the nature of the importations that were not allegedly declared in the ITR. Even the FDDA failed to indicate the nature of the alleged undeclared importation.

[28] Exhibit "Q-2", docket, p. 304.

In view of respondent's failure to establish the kind of importation which petitioner purportedly failed to declare in its ITR, she has no basis to assume that the alleged undeclared importations automatically translated into undeclared sales.

Further, income tax is assessed on income received from any property, activity or service. The three elements on the imposition of income tax are: (1) that there must be gain or profit, (2) that the gain or profit is realized or received, actually or constructively, and (3) that it is not exempted by law or treaty from income tax.[29]

In this case, even assuming that petitioner had under-declared importations, standing alone, that fact would not result in undeclared sales from which deficiency income tax could be assessed. There was no clear indication that an income was derived or resulted from the alleged undeclared importation of petitioner.

As correctly argued by petitioner, the absence of verifiable facts anent the allegation of respondent made the assessment regarding the alleged undeclared sales void, pursuant to Section 228 of the NIRC.

2. Disallowed expenses allegedly not subjected to withholding tax

The disallowed expenses as reflected in the Details of Discrepancy attached to the FLD, which the parties stipulated in their Joint Stipulation of Facts dated March 4, 2012, are as follows:

Commission	P 410,336.00
Professional fees	60,000.00
Purchases of services	2,200,847.00

[29] *Commissioner of Internal Revenue vs. The Court of Appeals, et al.*, G.R. No. 108576, January 20, 1999.

Purchases of goods	1,040,153.00
TOTAL	P3,711,337.00

After audit of petitioner's evidence, the ICPA reached the following conclusions regarding the Commission Expense of P410,336.00:

> The discrepancy per returns and AFS arose due to error of Symmetry Philippines, Inc. in its recording. Instead of recording Commission expense, the Company recorded sales discount instead. The amount of the sales discount was P2,169.00 million. Besides, the reduction to Commission expense and Intercompany accounts in the amount of P2.355 million were made to reflect commission payments by Symmetry Corporation USA to its Philippine-based agents. The latter instructed Symmetry Philippines, Inc. to settle this on their behalf. The remaining discrepancy will be attributed to timing difference, since the Company is preparing its Financial Statements under 'Accrual Accounting'. For instance, the Company booked its commission expense for the month of December 2003 on same month, but reflected in January 2004 withholding tax return. Likewise, the commission expense for the month of December 2004 was reflected in January 2005 withholding tax return.[30]

Petitioner claimed that the difference of P60,000.00 disallowed as Professional Fees also represents timing difference of booking and actual remittance of withholding tax. On this matter, the ICPA reported, thus:

> Based on my review on the audited financial statements and alphalist of suppliers in 2004, I

[30] Exhibit "Q-2", docket, p. 305.

verified that professional fees in the amount of P298,100 *(including the disallowed amount of P60,000)* should be allowed by the BIR as an expense on the ground that taxes were appropriately withheld. The income payments made to General Professional Partnership (GPP) of P180,000 were not subjected to withholding in pursuant to Sec. 26 of the NIRC which states:

> *'Section 26. Tax Liability of Members of General Professional Partnerships. – A general professional partnership as such shall not be subject to income tax imposed under this Chapter. Persons engaging in business as partners in a general professional partnership shall be liable for income tax only in their separate and individual capacities.*

In addition, the P35,000 income payment to a General Professional Partnership was mistakenly withheld and remitted by the SPI in the year 2004.[31]

As found by the ICPA, petitioner even made a mistake in withholding taxes for an income payment amounting to P35,000.00 to a General Professional Partnership.

Anent the disallowed income payments for Purchases of Goods and Services, the ICPA had following findings:

> C. Security Services
>
> Based on my examination, the difference of P5,454.51 was due to timing difference and was properly withheld and remitted by SPI on 2005. ***Please refer to Annex C – ICPA for EWT Compliance Review and Exhibit N.1.1 to N.9.1 – ICPA for the schedule of security services.***

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[31] Exhibit "Q-2", docket, p. 305.

D. Janitorial Services

Based on my examination, the difference between the book and Alphalist is due to timing difference and was properly withheld and remitted by SPI amounting to P857.16. ***Please refer to Annex C – ICPA for EWT Compliance Review and Exhibit O.1.1 to O.34.1 – ICPA for Schedule of Janitorial Expenses.***

E. Repairs and Maintenance

Based on my examination, non-withholding on income payments were justified because purchase transactions were made to non-regular suppliers, including single purchase not exceeding P10,000. Also, these expenses were reimbursable to the Company's employees. ***For your convenience, excerpt from Revenue Regulation 17-2003 is provided below:***

'The term 'local/resident supplier of goods' pertains to a supplier from whom any top ten thousand (10,000) private corporations, as determined by the Commissioner, regularly makes its purchases of goods, that is, purchases made from non-regular suppliers and oftentimes involving single purchases. ***However, a single purchase which involves ten thousand pesos (P10,000) or more shall be subject to a withholding tax. The term 'regular suppliers' refer to suppliers who are engaged in business or exercise of profession/calling with whom the taxpayer-buyer has transacted at least six (6) transactions, regardless of amount per transaction either in previous year or current year.*** *The same rules apply to local/resident supplier of services other than those covered by separate rates of withholding tax.'*

Please refer to Annex C – ICPA for EWT Compliance Review and Exhibit P.1.1 to P.25.1 – ICPA for schedule of repairs and maintenance.

<u>F. Utilities</u>

Based on my examination, the amount of P922,791.47 was treated as reimbursements of the lessor, SEDCCO, to the Company. The former billed and collected this amount based on the sub-meter readings. It is lessor however who pays MERALCO & Maynilad and applies the related withholding tax to the Utility Companies. ***Please refer to Annex C – ICPA for EWT Compliance Review and Exhibit S.1.1 to S.23.1 – ICPA for schedule of utilities expense.***

<u>G. Telephone Expense</u>

Based on my examination, the amount of P66,600.19 should not be disallowed because purchases were made to non-regular suppliers. ***Please refer to Annex C – ICPA for EWT Compliance Review and Exhibit T.1.1 to T.130.1 – ICPA for schedule of telephone expense.***

<u>H. Literature Inventory</u>

Based on my examination, proper withholding taxes were made and remitted to the tax authority in the amount P129,498.62. In fact, comparison of amounts reflected in returns (1604E) and AFS disclosed an over-withholding of P32,077.01. ***Please refer to Annex C – ICPA for EWT Compliance Review and Exhibit U.1.1 to U.33.1 – ICPA for schedule of literature inventory.***

<u>I. Office Supplies</u>

Based on my examination, majority of the purchases amounting to P92,980.12

> were made to non-regular suppliers. Also income payments in the amount of P178,628.52 were properly withheld and remitted to the BIR. ***Please refer to Annex C – ICPA for EWT Compliance Review and Exhibit CC.1.1 to CC.114.1 – ICPA for schedule of office supplies.***[32]

Per the ICPA Report, the following documents were examined: the schedule of expenses, BIR Form Nos. 1601-E and 1601-F, journal entries, Audited Financial Statement of petitioner, alphalist of suppliers in 2004, official receipts and statement of account/invoices, which allegedly supported the above-mentioned findings regarding the disallowed expenses. But other than the Audited Financial Statement, no other documents from which the said findings were based were offered and submitted to the Court.

3. Disallowed various expenses amounting to P3,364,471.73

In the FDDA,[33] respondent mentioned that petitioner failed to present and submit a breakdown or schedule of the above deduction despite requests for its production and its inclusion in the Preliminary Assessment Notice dated November 11, 2008.

On the other hand, petitioner adopted the report of the ICPA in relation to the subject "various expenses", to wit:

> The BIR assessed SPI for deficiency income tax arising from disallowance of alleged unsupported various expenses in the abovementioned amount.

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[32] Exhibit "Q-2". docket, pp. 306-307.
[33] Exhibit "A".

> Detailed review of BIR Form 1601F, ***marked as Exhibit C.1 to C.13-ICPA***, reveals that this amount was taken from the tax base of 'Royalties Expense'. The Company inadvertently used a different tax rate from 10% to 32% for the months of January, November and December 2004 thus resulting to the alleged unsupported various expense of P3.364M. Should SPI use the proper rate of 10%, the resulting amount would be P3.992M which matched the amount reflected as royalty expense in the AFS in 2004. ***Please refer to Exhibit G.2 – ICPA for the details.***
>
> The tax authority's request for detailed breakdown of this amount was not possible because the Company's various expense reflected in the Financial Statements amounted to P11.708M instead. ***Please refer to Exhibit GG - ICPA for the schedule of various expense.***
>
> **I therefore conclude in this instance that the disallowance made by the BIR is without legal and factual basis.**[34]

On the basis of this finding, petitioner concluded that there was error on the part of respondent in disallowing the "various expenses" in the amount of P3,364,471.73.

To repeat, except for its Audited Financial Statement, petitioner failed to offer and submit to the Court the documents from which the above ICPA conclusions were based. Consequently, the Court has no means to check the veracity of the above assertions. Besides, petitioner failed to overcome by sufficient evidence the presumption of correctness of the income tax assessment issued by respondent relating to the disallowed expenses.

[34] Exhibit "Q-2", docket, pp. 307-308.

4. Net Operating Loss Carry Over (NOLCO) - P2,888,813.00

In the FDDA,[35] respondent alleged that the NOLCO cannot be included as part of taxable income for taxable year 2004. Allegedly, the amount disallowed was the net loss in the ITR for 2004 and it was only included in the assessment to prevent offsetting of the loss for taxable year 2004 against the assessment and because the same would be included in petitioner's NOLCO (carried forward) in the next taxable year.

Petitioner however countered that respondent erred in disallowing the NOLCO citing the findings in the ICPA Report, the pertinent portions of which read as follows:

> Net operating loss sustained by the Company for the year 2004 was disallowed by the BIR under Section 24(D)(3) of the Tax Code.
>
> Based on my examination, the BIR seemed to have mistaken Net Operating Loss for the year 2004 as a reduction of 2004 income, which was added back the amount in its computation to arrive at a new taxable income figure. This loss relates only to the excess of itemized deductions over gross income for the current year 2004 which can be used as a deduction from taxable income for the succeeding three (3) years. It was pointed out that the Company **did not use** this 'Loss' as a deduction from its 2004 gross income and in the succeeding taxable years to arrive at taxable income. The Company could not use Net Operating Loss in the succeeding years as they incurred Net Loss from these years as evidenced by Audited Financial Statements of the Company in 2005 to 2007 ***(Please see J.1.1 to J.1.3-ICPA)***.

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[35] Exhibit "A".

> **I therefore conclude that the Company should not be made liable for Deficiency Income Tax resulting from disallowed NOLCO.**[36]

Per the ICPA, petitioner could not use Net Operating Loss in the succeeding years as it incurred net loss from these years as evidenced by the Audited Financial Statements of petitioner in 2005 to 2007. However, the said Audited Financial Statements for 2005 to 2007 were not offered and submitted as evidence to the Court. Hence, the veracity of such conclusion could not be checked.

Granting, for the sake of argument, that petitioner actually deducted its 2004 net loss as NOLCO in the succeeding years 2005 to 2007 and the said deduction was not proper as petitioner did not incur net loss, the same could only be the subject of assessment if it was claimed as deduction in the years 2005 to 2007 and not in the year 2004, for such is beyond the scope of the present assessment. Hence, adding back the net loss amount of P2,888,813.00 to petitioner's taxable income for the year 2004 is erroneous.

In view thereof, petitioner is liable to pay basic deficiency income tax for taxable year 2004 in the amount of P14,255,877.13, computed as follows:

Net Loss per ITR			P (2,888,813.00)
Add:	Disallowances/Adjustment		
	Undeclared Sales	P49,167,727.00	
	Expenses not subjected to EWT		
	Commission Expense	410,336.10	
	Professional Fees	60,000.00	
	Purchase of Services	2,200,847.46	
	Purchase of Goods	1,040,153.00	
	Various Expenses		56,243,535.29

[36] Exhibit "Q-2", docket, p. 308.

		3,364,471.73	
Net Taxable Income per Audit			**P53,354,722.29**
Income Tax Due (at 32%)			P 17,073,511.13
Less:	Tax Credits		
	Prior Year's Excess Credits	P 2,520, 548.00	
	Creditable Tax Withheld for the Fourth Quarter	297,086.00	2,817,634.00
Deficiency Income Tax			**P14,255,877.13**

II. VALUE-ADDED TAX – P10,568,847.24

The deficiency VAT assessment was based on the following items:

1. Undeclared Sales		
A. Arising from royalties of P6,372,165.79 paid by petitioner to Symmetry Corporation	P49,167,727.00	
B. Arising from petitioner's alleged undeclared importations	1,650,134.00	P50,817,861.00
2. Disallowed Input VAT		
A. Excess Input Tax Claimed on Capital Goods	44,345.94	
B. Input Tax from Non-VAT Suppliers	429,779.16	474,125.10
3. Discrepancy between Input VAT on Importation per Return and Input VAT per Summary of Importation		780.07

1. Undeclared sales - P50,817,861.00

A. Undeclared sales arising from payment of royalties - P49,167,727.00

Earlier, the Court sustained the assessment on the amount of undeclared sales arising out of royalty payments as mentioned in the Court's discussion on petitioner's income tax liability.[37] Accordingly, the deficiency VAT assessed on the alleged undeclared sales shall likewise be sustained.

B. Undeclared sales arising from undeclared importation - P1,650,134.00

The VAT assessment on the purported undeclared sales from undeclared importation is hereby cancelled considering that the Court did not sustain respondent's findings that there are undeclared sales arising from undeclared importations.[38]

2. Disallowed Input Tax from Purchase of Capital Goods in the amount of P44,345.94 and Disallowed Input Tax from alleged Non-VAT suppliers in the amount of P429,779.16

The BIR assessed petitioner of deficiency VAT arising from disallowed input tax from purchases of capital goods due to discrepancy per VAT Returns and Statement of Cash Flows. Petitioner was likewise assessed by the BIR of deficiency VAT due to alleged input tax claimed from suppliers not registered in the ITS database.

According to the ICPA, petitioner's schedule of input tax, the VAT invoices and the VAT official receipts and revealed that the discrepancy was merely the result of erroneous filling-out of the VAT Return, but still the input taxes claimed were duly supported. However, the same documents show that petitioner is liable for deficiency VAT in the amount of P95,730.15.[39]

[37] See discussion in item I.1.A.
[38] See discussion in item I.1.B.
[39] Exhibit "Q-2".

Perusal of the record shows that, aside from the VAT Returns which were admitted in evidence for petitioner, the other documents examined by the ICPA were not offered and/or submitted before this Court, making verification of the ICPA's findings impossible. Thus, the Court shall adopt respondent's VAT assessment pertaining to the above disallowed input tax.

3. Discrepancy between Input VAT on Importation per Return and Input VAT per Summary of Importation - P780.07

With regard to the above-mentioned discrepancy, petitioner did not dispute the factual and legal bases of the assessed amount. Hence, the Court shall sustain the assessment of deficiency VAT in the amount of P780.07.

In sum, other than the VAT assessment on the undeclared sales arising from the alleged undeclared importation which was cancelled for lack of factual and legal bases, the Court sustains the rest of respondent's VAT assessment in the amount of P5,391,677.87 for petitioner's failure to overcome the presumption of correctness of the assessment. Consequently, petitioner is found to be liable for the following deficiency VAT:

Undeclared Sales (P49,167,727.00 x 10%)	P 4,916,772.70
Disallowed Excess Input Tax Claimed on Capital Goods	44,345.94
Disallowed Input Tax from Non-VAT Suppliers	429,779.16
Discrepancy between Input VAT on Importation per Return and Input VAT per Summary of Importation	780.07
Deficiency VAT	**P5,391,677.87**

III. FINAL WITHHOLDING VAT - P1,036,419.10

The assessment resulted from respondent's imposition of final withholding VAT on royalties and commissions allegedly paid by petitioner in the respective amounts of P3,992,025.00 and P6,372,166.00 as shown below:

Payments subject to Final Withholding VAT	
a. Royalties	P 3,992,025.00
b. Commissions (Royalties)	6,372,166.00
Total	P 10,364,191.00
Withholding VAT Rate	10%
Final Withholding VAT Due	**P1,036,419.10**

According to petitioner the ICPA confirmed that the VAT on royalties has been shown to have been duly paid by petitioner, to wit:

> Final Withholding VAT on royalty expense in the amount of P399,202.52 were properly withheld and remitted to the BIR as evidenced by VAT Returns and related BTR-BIR Deposit Slip marked as **Exhibit E.1.1 to E.12.1 - ICPA**. The Company could have used BIR Form 1600 instead of 'another' VAT Returns in remitting the said withholding VAT. Nevertheless, the Company made a timely and appropriate remittance of the Final Withholding VAT due to the Tax Bureau though using a wrong tax return.

Petitioner, however, refuted the ICPA's finding that it is liable for deficiency VAT on commissions in the amount of P637,216.58, exclusive of interest and penalties. It cited Section 105 of the National Internal Revenue Code of 1997, which provides:

> SEC. 105. *Persons Liable*. – Any person who, in the course of trade or business, sells, barters, exchanges, leases goods or properties, renders services, and any person who imports goods shall be subject to the value-added tax (VAT) imposed in Sections 106 to 108 of this Code.

Petitioner explained that the commissions earned by the US uplines or distributors resulted from the sales of their downlines or their recruited distributors in the Philippines. There is no sale by the US uplines that would generate the revenue upon which the commission would be based. In effect, the US uplines merely invested in money, viz., the initial basic capital, and effort by encouraging others, the downlines, to participate in the business. Petitioner maintained that the set-up is akin to the purchase of stocks in an existing business enterprise, where the stockholder may earn dividends from the business activity of others. Dividends are not subject to VAT just as interest from deposit.

Further, VAT may be imposed only on the sale of goods and services. The commissions allegedly earned by the US uplines were not derived from direct sale of goods and services by the uplines; hence, not subject to VAT.

The record is however bereft of any evidence to substantiate the afore-mentioned allegations. Apart from its self-serving allegations, through the testimonies of its witnesses and the findings of the ICPA, there was nothing in the record that would establish how the alleged commissions were earned by the US uplines and whether the amount subjected to withholding of Final VAT actually pertained to the said commissions.

For petitioner's failure to overcome the presumption of correctness of respondent's assessment, the Court upholds the assessment for deficiency Final Withholding VAT as follows:

	Income Payment	Rate	Final Withholding VAT
Non-Resident Foreign Corporations	P 6,372,165.79	10%	P 637,216.58
Non-Resident Owners of Cinematographic Films	3,992,025.00	10%	399,202.50
Deficiency Final Withholding VAT	**P10,364,190.79**		**P1,036,419.08**

IV. EXPANDED WITHHOLDING TAX AND COMPROMISE PENALTY

1. Expanded Withholding Tax - P200,678.41

Based on the finding that petitioner failed to withhold and remit EWT on certain income payments made amounting to P3,711,336.56 in violation of Section 2.57.2 of Revenue Regulations (RR) No. 2-98, as amended by Section 3 of RR No. 17-03, discussed under the deficiency income tax assessment,[40] respondent assessed petitioner deficiency EWT in the amount of P200,678.41, inclusive of interest.

As stated earlier, petitioner failed to prove that it withheld and remitted the EWT on its income payments in the amount of P3,711,336.56; thus, petitioner should be held liable to pay the corresponding EWT in the amount of P101,452.09 computed as follows:

Expenses not subjected to EWT	Income Payment	Rate	EWT Due
Commission expenses	P 410,336.10	10%	P 41,033.61
Professional fees	60,000.00	10%	6,000.00
Purchase of services	2,200,847.46	2%	44,016.95
Purchase of goods	1,040,153.00	1%	10,401.53
Deficiency EWT	**P3,711,336.56**		**P101,452.09**

[40] See discussion in item I.2.

It must be noted that the 15% rate originally imposed by respondent on the P60,000.00 Professional Fees was reduced to 10% pursuant to Section 2.57.2(A) of Revenue Regulations No. 2-98, as amended by Section 3 of Revenue Regulations No. 30-03, which provides as follows:

> Sec. 2.57.2. *Income payments subject to creditable withholding tax and rates prescribed thereon.* –
>
> (A) *Professional fees, talent fees, etc., for services rendered by individuals.* – On the gross professional, promotional and talent fees or any other form of remuneration for the services of the following individuals – *Fifteen percent (15%), if the gross income for the current year exceeds P720,000.00; and Ten percent (10%), if otherwise;*

Considering that the Professional Fee of P60,000.00 does not exceed P720,000.00, the proper rate to be applied is 10% as reflected in the above table.

2. Expanded Withholding Tax - P16,489.54 and Compromise Penalty - P1,000.00

As to the afore-stated assessment, petitioner offered no objection. Furthermore, the parties stipulated that petitioner had already paid the assessed withholding tax-expanded in the amount of P18,843.14 [41] and the compromise penalty in the amount of P1,000.00.[42] Having already paid the said amounts, the assessment for the foregoing amounts is cancelled.

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[41] Par. 13, Summary of Admitted Facts, JSF, docket, p. 205.
[42] Par. 14, Summary of Admitted Facts, JSF, docket, p. 205.

WHEREFORE, the instant Petition for Review is **PARTIALLY GRANTED**. The assessments issued by respondent against petitioner for deficiency income tax, VAT, EWT and final withholding VAT for taxable year 2004 are hereby **AFFIRMED** with modifications.

Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of **P25,981,782.71** representing deficiency income tax, value added tax, expanded withholding tax and final withholding VAT for taxable year 2004, inclusive of the twenty-five percent (25%) surcharge imposed under Section 248(A)(3) of the NIRC of 1997, computed as follows:

TAX TYPE	BASIC TAX	25% SURCHARGE	TOTAL
Income Tax	P 14,255,877.13	P 3,563,969.28	P 17,819,846.41
VAT	5,391,677.87	1,347,919.47	6,739,597.34
EWT	101,452.09	25,363.02	126,815.11
Final Withholding VAT	1,036,419.08	259,104.77	1,295,523.85
	P20,785,426.17	**P5,196,356.54**	**P25,981,782.71**

Petitioner is likewise **ORDERED TO PAY**:

(a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency income tax, value added tax, expanded withholding tax and final withholding value added tax computed from the dates indicated below until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended;

TAX TYPE	DEFICIENCY INTEREST COMPUTED FROM
Income Tax	April 15, 2005
VAT	January 25, 2005
EWT	January 15, 2005
Final Withholding VAT	January 10, 2005

(b) Delinquency interest at the rate of 20% per annum on the total amount of P25,981,782.71 and on the 20% deficiency interest which have accrued as afore-stated in (a), computed from July 31, 2011 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

LOVELL R. BAUTISTA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
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.

LOVELL R. BAUTISTA
Chairperson

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