Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SECOND DIVISION

THUNDERBIRD PILIPINAS HOTELS AND RESORTS, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 8612

Members:
CASTAÑEDA, JR., *Chairperson,*
CASANOVA, *and*
MANAHAN, *JJ.*

Promulgated:

FEB 0 3 2017
10:30 a.m.

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DECISION

CASANOVA, J.:

This is a Petition for Review[1] filed on February 19, 2013 by petitioner Thunderbird Pilipinas Hotels and Resorts, Inc. against respondent Commissioner of Internal Revenue (CIR), seeking the cancellation of deficiency assessments on special preferential rate tax (SPRT), franchise tax (FT), expanded withholding tax (EWT), final withholding tax (FWT) and documentary stamp tax (DST) in the aggregate amount of ₱131,699,553.75, inclusive of interest, surcharges and compromise penalties, for taxable year ended December 31, 2008, allegedly for being devoid of factual and legal bases.

Petitioner is a corporation organized and existing under the laws of the Philippines, with principal office at VOA Pennsylvania Avenue, Poro Point, San Fernando City, La Union. It is engaged in the business of conducting and operating hotels, clubs, restaurants, and all other businesses appurtenant and/or related thereto.[2] It is registered with

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[1] Docket (Vol. I), pp. 6-47.
[2] Exhibit "P-1".

Bureau of Internal Revenue (BIR), Revenue Region No. 1 with Certificate of Registration (COR) No. OCN 4RC0000334281 dated November 18, 2005 and Tax Identification No. (TIN) 241-973-218-000.[3]

Petitioner is registered with Poro Point Management Corporation (PPMC) as a Poro Point Special Economic and Freeport Zone (PPSEFZ) enterprise pursuant to Republic Act (RA) No. 7227, known as the Bases Conversion and Development Act of 1992, as amended by RA No. 9400.[4] Petitioner is duly licensed by Philippine Amusement and Gaming Corporation (PAGCOR) to operate a casino complex business within PPSEFZ pursuant to Presidential Decree (PD) No. 1869.[5]

Respondent is the duly appointed Commissioner of the BIR who has the power to decide disputed assessments, refunds of internal revenue taxes, fees, or other charges, penalties imposed in relation thereto or other matters arising under the National Internal Revenue Code (NIRC) of 1997, as amended, or other laws or portions thereof administered by the BIR. He holds office at the BIR National Office Building, Agham Road, Quezon City.

For the taxable year 2008, petitioner filed its Annual Income Tax Return (ITR), Monthly Remittance Returns of Creditable Income Taxes Withheld (Expanded) and Monthly Remittance Returns of Final Income Taxes Withheld, on the following dates:

Tax Return	**Taxable Period**	**Filing Date**
Annual Income Tax Return[6]	December 2008	April 15, 2009
Franchise Tax (FT)	2008	none
Expanding Withholding Tax (EWT)[7]	January 2008	February 11, 2008
	February 2008	March 10, 2008
	March 2008	April 10, 2008
	April 2008	May 12, 2008
	May 2008	June 10, 2008
	June 2008	July 10, 2008
	July 2008	August 11, 2008
	August 2008	September 10, 2008

[3] Exhibit "P-2".
[4] Exhibit "P-3".
[5] Exhibit "P-4".
[6] Exhibit "P-6".
[7] Exhibit "P-7".

	September 2008	October 10, 2008
	October 2008	November 10, 2008
	November 2008	December 10, 2008 January 21, 2009 (amended)[8]
	December 2008	January 15, 2009
Final Withholding Tax (FWT)[9]	January 2008	March 16, 2010
	February 2008	March 10, 2008
	March 2008	March 16, 2010
	April 2008	May 12, 2008
	May 2008	June 10, 2008
	June 2008	July 10, 2008
	July 2008	August 11, 2008
	August 2008	September 10, 2008
	September 2008	October 13, 2008
	October 2008	November 7, 2008
	November 2008	December 1, 2008
	December 2008	January 9, 2009
Documentary Stamp Tax (DST)	2008	none

On July 16, 2009, petitioner received Letter of Authority (LOA) No. 2008-00036937[10] dated July 15, 2009, authorizing the conduct of examination and investigation of the books of accounts and other accounting records of petitioner for taxable year 2008.

On September 22, 2011, petitioner received Notice of Informal Conference[11] dated September 15, 2011 issued by Revenue Region No. 1 of the BIR for deficiency tax assessments for taxable year 2008.[12] On October 5, 2011, petitioner filed a protest requesting for the reconsideration and withdrawal of respondent's assessments.[13]

Petitioner executed a Waiver of the Statute of Limitations under the NIRC dated October 10, 2011 (First Waiver)[14] extending the period to assess deficiency taxes to a period not later than August 31, 2012.

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[8] BIR Records, Folder 6, pp. 234-235.
[9] Exhibit "P-7-1".
[10] Exhibit "P-8". Par. 2, Joint Stipulation of Facts and Issues (JSFI), Docket (Vol. IV), p. 1365.
[11] Exhibits "P-9".
[12] Par. 3, JSFI, Docket (Vol. IV), p. 1365.
[13] Exhibit "R-18".
[14] Exhibits "P-16".

On July 31, 2012, petitioner received the Preliminary Assessment Notice[15] (PAN) dated June 21, 2012 issued by respondent[16], assessing it for deficiency SPRT, FT, EWT, FWT, and DST in the aggregate amount of ₱129,759,083.42, inclusive of interest, surcharge, and penalties. On August 14, 2012, petitioner filed its protest[17] dated August 13, 2012 against the PAN.[18]

On August 17, 2012, petitioner received the Final Assessment Notices (FAN)[19] dated August 15, 2012 issued by respondent.[20]

On August 29, 2012, petitioner received a Letter[21] dated August 28, 2012 from Regional Director Arnel SD. Guballa[22], informing it that before its protest to the PAN and request for reconsideration can be acted upon, submission of the Waiver of Defense of the Statute of Limitations is necessary.

Petitioner executed another Waiver of the Statute of Limitations under the NIRC dated August 30, 2012 (Second Waiver)[23] extending the period to assess deficiency taxes to a period not later than March 31, 2013.

Petitioner filed its protest[24] to the FAN on September 14, 2012[25] and supplemental protest[26] on November 13, 2012. On January 21, 2013, petitioner received a Letter[27] dated January 8, 2013 issued by Regional Director Arnel SD. Guballa, informing petitioner of the denial of its protest.

Petitioner filed the present Petition for Review on February 19, 2013.

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[15] Exhibit "P-10".
[16] Par. 4, JSFI, Docket (Vol. IV), p. 1366.
[17] Exhibits "P-11" and "P-11-1".
[18] Par. 5, JSFI, Docket (Vol. IV), p. 1366.
[19] Exhibit "P-12".
[20] Par. 6, JSFI, Docket (Vol. IV), p. 1366.
[21] Exhibit "P-13".
[22] Par. 7, JSFI, Docket (Vol. IV), p. 1366.
[23] Exhibits "P-16-1" and "R-27".
[24] Exhibit "P-14".
[25] Par. 8, JSFI, Docket (Vol. IV), p. 1366.
[26] Exhibit "P-15".
[27] Exhibits "P-17". Par. 9, JSFI, Docket (Vol. IV), p. 1366.

On May 27, 2013, respondent filed his Answer[28], interposing the following Special and Affirmative Defenses:

"SPECIAL AND AFFIRMATIVE DEFENSES

xxx xxx xxx

The assessment on deficiency taxes were issued in accordance with law, rules and jurisprudence.

4. It is strongly maintained that petitioner is liable for the following deficiency taxes for the year 2008 in the aggregate amount of Php131,699,553.75 based on the Formal Letter of Demand, as shown below.

THUNDERBIRD PILIPINAS HOTELS & RESORTS, INC.
AUDIT SHEET
For the taxable year ended 2008

Special Preferential Rate (SPR) Tax – Republic Act 9400

Gross Revenues		**33,507,934.00**
Add: Undeclared Gross Revenues		
Gross Revenues per Tax Credit Certificates (Form 2307)	**124,263,552.00**	
Gross Revenues per BIR Form 1702	33,507,934.00	90,755,618.00
Adjusted Gross Revenues		124,263,552.00
Less: Allowed Deductions under Revenue Regulations 13-2005		
Salaries & Employees Benefits	20,828,219.00	
Repairs & Maintenance		
Operating Supplies	7,967,635.00	
Food, Beverage, and Others	3,969,527.00	
Outside Services		
Entertainment, Amusement, and Recreation		
Others		
Depreciation & Amortization	700,209.30	33,465,590.30
Gross Income subject to SPR Tax per Audit		90,797,961.70
Add: Other Income (Rental Income)		16,846,231.48
Total Gross Income subject to SPR Tax per Audit		107,644,193.18
Multiply by Special preferential Rate Tax		5%
Special Preferential Rate (SPR) Tax Due		5,382, 209.66
Less: Tax Credits		

[28] Docket (Vol. I), pp. 142-169.

Prior Year's Excess Tax Credits	339,315.00	
Creditable Tax Withheld – 1st to 3rd Qtr.	447,749.00	
Creditable Tax Withheld – 4th Qtr.	173,569.00	960,633.00
Tax Payable (Overpayment) per Audit		4,421,576.66
Add: **Overpayment per BIR Form 1702 Carried Over to Next Period**		960,633.00
Deficiency Special Preferential Tax		5,382,209.66
Add: Interest until August 30, 2012		3,632,991.52
Special Preferential Rate (SPR) Tax Payable*		9,015,201.18

*Special Preferential Rate (SPR) Tax Payable to the National Government under Sec. 3 of RA 9400 5,409,120.71

*Special Preferential Rate (SPR) Tax Payable to the National Government to the Municipal Treasurer's Office Sec.3 of RA 9400 3,606,080.47

Franchise Tax – Presidential Decree 1869

Gross Revenues – Gaming	867,061,768.00
Multiply by Franchise Tax Rate	5%
Franchise Tax Due	43,353,088.40
Less: Tax Paid	
Deficiency Franchise Tax	43,353,088.40
Add: Interest until August 30, 2012	29,263,334.67
Franchise Tax Payable	**72,616,423.07**

Expanded Withholding Tax

Particulars	Amount	EWT Rate	EWT Due
*Expenses Subject to 2%	29,535,724.28	2%	P 590,714.49
*Expenses Subject to 5%	45,915,923.61	5%	2,295,796.18
*Expenses Subject to 10% (Commission)	255,923.63	10%	25,592.36
*Expenses Subject to 15%	133,065,176.73	15%	19,959,776.51
Expanded Withholding Tax Due			**P 22,871,879.54**
Less: Expanded Withholding Tax Remitted			2,113,670.27
Deficiency Expanded Withholding Tax			P 20,758,209.27
Add: Interest until August 30,2012			15,049,701.72
November Return**			103,567.51
Expanded Withholding Tax Payable			**P 35,911,478.50**

**Increments for late filing of November Return:
Tax Base P320, 995.26

Surcharge	P 80,248.82
Interest	7,318.69
Compromise Penalty	16,000.00
Total Increments Payable	P 103,567.51

Final Withholding Tax

Management Fees- Regional Operating Headquarters P 79,813,348.00

Dividends		6,356,066.40
Total Taxable Disbursements	P	86,169,414.40
Multiply by Tax Rate		10%
Final Withholding Tax Due	P	8,616,941.44
Less: Tax Remitted		635,606.64
Deficiency Final Withholding Tax	P	7,981,334.80
Add: Interest until August 30, 2012	P	5,786,467.73
Final Withholding Tax Payable	**P**	**13,767,802.53**

Documentary Stamp Tax

Increase in the Equity Portion of Long-term Advances		28,794,150.00
Documentary Stamp Tax Rate on Debt Instruments (Sec. 179 NIRC)		1/200
Documentary Stamp Tax Due		143,970.75
Add: 25% Surcharge	P 35,992.69	
Interest until August 30, 2012	105,185.03	
Compromise Penalty	16,000.00	157,177.72
Documentary Stamp Tax Payable		**P 301,148.47**

Suggested Compromise Penalties in Lieu of Criminal Prosecution

Failure to File the Following:	
January – December Duly Received Monthly Alphalist of Payees	P 87,500.00
Total Compromise Penalty Payable	**P 87,500.00**

Summary of Assessments

Special Preferential Rate Tax Payable	P 9,015,201.18
Franchise Tax Payable	72,616,423.07
Expanded Withholding Tax Payable	35,911,478.50
Final Withholding Tax Payable	13,767.802.53
Documentary Stamp Tax Payable	301,148.47
Compromise Penalty Payable	87,500.00
Total Amount Payable	**P 131,699,553.74**

*****Nothing Follows*****

THUNDERBIRD PILIPINAS HOTELS & RESORTS, INC.
Details of the Expenses Subjected to Expanded Withholding Tax
For the taxable year 2008

Account Name	***Amount***	***2%***	***5%***	***15%***
Equipment Rental-Slots	₱ 9,848,959.20		9,848,959.20	
Equipment Rental-Golf	519,620.00		519,620.00	
Outside Services-Security	5,547,544.1	5,547,544.11		
Outside Services-Maintenance & Housekeeping	156,400.02	156,400.02		
Outside Services-Golf Operations	650,137.23	650,137.23		
Outside Services-Security (Hotel)	1,256,392.77	1,256,392.77		
Outside Services-Laundry (Hotel)	14,852.00	14,852.00		
Consulting Fees-Security	535,294.13			535,294.13
Advertising-Promotions (Golf)	675,603.66	675,603.66		
Advertising-Promotions (Hotel)	1,212,495.51	1,212,495.51		
Outside Services-Human Resources	386,751.27	386,751.27		

Outside Services-General Administration (Hotel)	15,000.00	15,000.00		
Professional Fees	68,575.00			68,575.00
Professional Fees-HRD	180,000.00			180,000.00
Professional Fees-Marketing	266,666.64			266,666.64
Professional Fees-General and Admin (Hotel)	517,596.31			517,596.31
Accounting Fees-General Administration	1,321,640.45			1,321,640.45
Legal-General Administration	507,713.17			507,713.17
Legal-General Administration (Hotel)	1,473,242.17			1,473,242.17
Director and Other Fees	1,769,672.86			1,769,672.86
Advertising (Promotions/Outdoor)	721,914.86	721,914.86		
Newspaper (Marketing	69,750.00	69,750.00		
Other-Marketing	155,167.34	155,167.34		
Marketing-FCC Casino	124,073.93	124,073.93		
Design-Marketing	554,726.02	554,726.02		
Give Away-Marketing	228,148.95	228,148.95		
Rent-Property Admin	27,169,749.80		27,169,749.80	
Rent-Property Admin (Straight Line Method)	8,377,594.61		8,377,594.61	
Courier/Postage-Admin	57,348.54	57,348.54		
Courier/Postage-Accounting (Hotel)	1,833.48	1,833.48		
Shipping and Freight Charges-Administrative	84,042.11	84,042.11		
Management Fee	206,238,123.84			126,424,776.00
Outside Service-Fee	17,623,542.48	17,623,542.48		
Total Taxable Amount per Audit	**₱288,330,172.46**	**₱29,535,724.28**	**₱45,915,923.61**	**₱133,065,176.73**

*****Nothing Follows*****

5. Contrary to petitioner's asseverations, the assessment issued against it has legal and factual bases. In fact per details of discrepancy, respondent established the following:

THUNDERBIRD PILIPINAS HOTELS & RESORTS, INC.
Legal & Factual Bases of Assessments
For the taxable year **2008**

Note: The final assessment notice was based on the investigation. findings of Revenue Officers Marc Denison Andrey, Geraldine Carpizo, Venus Ferrer and Anna Rose Romero.

1. **Deficiency Expanded Withholding Tax Payable**

In line with Section 2.57.2 (A) & (B) *(sic)* of Revenue Regulations No. 2-98, as amended by Revenue Regulations No. 30-2003, payments for professional services rendered by individuals and juridical persons shall be subjected to expanded withholding tax. Fifteen percent (15%), if the gross income for the current year exceed P720,000.00; Ten Percent (10%), if otherwise. Under Revenue Regulation 30-2003, every individual professional/talent/corporate directors shall periodically disclose his gross income for the current year to the BIR by submitting a notarized sworn declaration, otherwise such income payments shall be subjected to fifteen percent (15%) expanded withholding tax rate. In the absence of any showing to the contrary, the fifteen percent (15%) expanded withholding tax rate was imposed on said income payments.

Under Section 2.57.2 (C) of Revenue Regulations No. 2-98, as amended by Revenue Regulations No. 14-2002 and Revenue Regulations 17-2003, Rent expenses were subjected to five percent (5%) expanded withholding tax.

Under Section 2.57.2 (E) of Revenue Regulations No. 2-98, as amended by Revenue Regulations No. 30-2003, income payments to contractors were subjected to two percent (2%) expanded withholding tax.

Further, the total expanded withholding tax remitted, except for the amount remitted related to income payment named as "Income/distribution to Beneficiaries of Estates" for which expanded withholding tax of P80,294.13 was remitted, was considered in computing the deficiency expanded withholding tax. Since there is no clear showing that the 'Income Distribution to Beneficiaries of Estates" has been included in the expenses declared in the Income Statement for the year under audit, the related expanded withholding tax remitted thereon was not included as part of the amount deducted from the expanded withholding tax due to determine the amount of deficiency.

Moreover, increments on the late filing of November Expanded Withholding Tax Return was made part of the assessment.

2. Suggested Compromise Penalties in Lieu of Criminal prosecution/Failure to File Certain Information/Returns

The required January to December Monthly Alphalists of Payees (MAP) were not filed at the time prescribed by tax rules and regulations. Hence, compromise penalties were proposed, for non-filing of said schedules, lists, or information required under Section 255 of the said Code. The proposals are made, with the intention of imposing them in lieu of criminal prosecution. The imposed compromise penalties are based on Revenue Regulations No. 2-2006 and Revenue Memorandum Order No. 19-2007.

3. Deficiency Documentary Stamp Tax

The equity portion in Long-term Advances remains to be a legal liability of the Company at year end, the increase in the said amount was subjected to documentary stamp tax for debt instruments under Section 179 of the NIRC.

4. Deficiency Franchise Tax

The Gaming Revenues was duly subjected to Franchise Tax under Presidential Decree 1869.

5. Deficiency Special Preferential Rate Tax

The "gross income" subject to the Special Preferential Rate Tax (SPR) under Republic Act 9400 was duly adjusted based on the provisions of Revenue Regulation No. 13-2005. Furthermore, "other operating income" which pertains to the Rental Income received during the year, was made part of the "gross income" subjected to SPR.

6. Deficiency Final Withholding Tax

> Verification disclosed that disbursement for Management Fees – Regional Operating Headquarter was not subjected to final withholding tax, hence, made part of the assessment.

6. Under Revenue Regulations No. 12-99, a valid assessment is accomplished following the stages of Notice of Informal Conference, Preliminary Assessment Notice and Final Assessment Notice. The procedure prescribed under RR No. 12-99 have been complied with by respondent as can be deduced from the following narration of facts.

7. Foremost, petitioner received the Letter of Authority No. 200800036937 dated 15 July 2009 on 16 July 2009, authorizing the revenue examiners named therein to examine the books of accounts and other accounting records of petitioner for all internal revenue taxes for the period 1 January 2008 to 31 December 2008.

8. Request for presentation of records were issued and duly received by petitioner on 7 July 2009, 24 August 2009 and 1 September 2009, respectively. And in view of the failure of petitioner to comply with the requirements for tax investigation a Subpoena Duces Tecum was issued against petitioner, the subpoena was received on 19 November 2009. Still for failure to submit the required documents another Subpoena Duces Tecum was issued, the same was received by petitioner on 9 September 2010.

9. A Notice of Informal Conference was received by petitioner on 22 September 2011 informing petitioner of its findings and giving the latter the opportunity to offer its explanation, present objections and submit documentary evidence to refute the said findings.

10. The Preliminary Assessment Notice with Details of Discrepancy dated 21 June 2012 was issued to petitioner and received on 30 July 2012. Petitioner filed its protest thereto and the same was received by respondent only on 24 August 2012 or 9 days late. Hence, the Formal Letter of Demand with Assessment Notices and Details of Discrepancies dated 15 August 2012 was issued to the petitioner as well. On 8 January 2013, respondent issued the final decision on the disputed assessment.

11. There is no truth to petitioner's allegation that there was no due process when the Final Assessment Notice was issued on the last day for the filing of petitioner's protest against Preliminary Assessment Notice. It bears emphasis that at the time the Final Assessment Notice was issued, respondent had not received any protest letter to Preliminary Assessment Notice.

12. Despite that, respondent entertained the protest to both Preliminary Assessment Notice and Final Assessment Notice. Hence, there is no denying that petitioner was informed of the factual and legal bases of the deficiency assessment

13. The fact that petitioner filed protest means that it was informed of the findings of the Revenue Officer. The protest although erroneous and self-serving was accomplished with meticulous detail trying in vain to overthrow the findings of deficiency Special Preferential Rate Tax, Franchise Tax, Expanded Withholding Tax, Final Withholding Tax, Documentary Stamp Tax, Compromise Penalty.

14. Moreover, despite repeated requests by respondent to submit the documents needed to verify petitioner's claim, petitioner failed to substantiate its protest to the deficiency assessment.

15. In view of the foregoing, petitioner is liable to pay the assessed deficiency Special Preferential Rate Tax, Franchise Tax, Expanded Withholding Tax, Final Withholding Tax, Documentary Stamp Tax, and Compromise Penalty. The examiner's assessment should be given full weight and credit, in the absence of proof submitted by petitioner to the contrary. This is in line with the High Court's ruling in several cases wherein the Court said that **tax assessments by tax examiners are prima facie presumed correct and made in good faith. The taxpayer 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 case of Commissioner of Internal Revenue vs. Construction Resources of Asia, Inc., where the Court cited 51 Am. Jur. pp. 620-621, states the principle in detail, thus:

> All presumptions are in favor of the correctness of tax assessments. The good faith of tax assessors and the validity of their actions are presumed. They will be presumed to have taken into consideration all the facts to which their attention was called. No presumption can be indulged that all of the public officials of the State in the various counties who have to do with the assessment of property for taxation will knowingly violate the duties imposed upon them by law.

16. In another case decided by the Supreme Court, the Honorable Court espoused:

> We agree with the contention of the petitioner that, as a general rule, 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. It is to be presumed, however, that such assessment was based on sufficient evidence. **Upon the introduction of the assessment in evidence, *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.** The 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. (Emphasis supplied)

17. The burden of proof is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the Commissioner of Internal Revenue is wrong but the taxpayer is right. Otherwise the presumption of correctness of tax assessment stands.

18. Unfortunately, petitioner failed to overcome the presumption of correctness of respondent's assessment.

19. Petitioner has not pointed out any provision or item in the assessment notice which bears a trace of falsity. Its averments were based on conjectures, surmises and speculations. These cannot supply the basis for the charge of impropriety in the assessments made.

The Final Assessment Notices were valid and binding since the same were issued within the prescriptive period.

20. Respondent humbly submits that the deficiency tax assessments made against petitioner for taxable year 2008 were issued within the prescriptive period allowed by law. The legal provision governing the prescription of the Government's right to assess taxes in ordinary cases is found in Section 203 of the 1997 Tax Code, as amended, which reads as follows:

> "SECTION 203. Period of Limitation Upon Assessment and Collection. – Except as provided in the succeeding section, internal revenue taxes shall be assessed within three years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: Provided, That in a case where

> a return is filed beyond the period prescribed by law, the three-year period shall be counted from the day the return was filed. For the purposes of this section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day."

21. On the other hand, Section 222 of the Tax Code, as amended, provides the exceptions as to the period of limitation of assessment and collection, which reads as follows:

> "SECTION 223. Exceptions as to Period of Limitation of Assessment and Collection of Taxes.
>
> Xxx . . . xxx . . . xxx
>
> (b) **<u>If before the expiration of the time prescribed in the preceding section for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.</u>** xxx." (Emphasis and underscoring supplied)

22. Based on the provision of law cited above, one of the exceptions to the three (3) year prescriptive period for assessment occurs when both the Commissioner and the taxpayer <u>consent and agree</u> in writing that assessment may be made after the expiration of the time prescribed for the assessment of taxes which may subsequently be extended upon written agreement made before the period previously agreed upon.

23. Corollary thereto, Article 1305 of the Civil Code of the Philippines explicitly provides:

> "Art. 1305. A contract is a **meeting of minds between two persons** whereby one binds himself, with respect to the other, to give something or to render service.
>
> Art. 1306. The Contracting parties **may establish such stipulations, clauses, terms and conditions** as they may deem convenient, provided they are not contrary to law, morals, good customs, public order or public policy.
>
> Art. 1315. Contracts **are perfected by mere consent**, and from that moment the parties are **bound not only to the fulfillment of what has been expressly stipulated** but also to all the consequences which, according to their nature, may be in keeping with good faith, usage and law." (Emphasis and underscoring supplied)

24. Applying the foregoing provisions of law in the case at hand, any agreement/contract that may be entered into by the parties are considered valid and binding so long as it fully met all the essential requirements for its validity.

25. The two waivers were executed by and between the Commissioner, thru his duly authorized representative and petitioner's representative on the following dates: (a) 10 October 2011 and (b) 30 August 2012. These waivers extended the period of assessment to (a) 31 August 2012 and (b) 31 March 2013, respectively.

26. It is therefore conclusive that the Formal Letter of Demand and the corresponding Final Assessment Notices dated 15 August 2012 and received by petitioner on 17 August 2012 were valid and binding as they were issued within the prescriptive period to assess.

The Waivers of the Defense of Prescription under the Statute of Limitations of the Tax Code which was accepted and approved by Respondent and thereafter received by Petitioner are valid and binding between them.

27. Petitioner executed two (2) separate Waivers of the Statute of Limitations under the National Internal Revenue Code for taxable year 2008 on the following dates: (a) 10 October 2011 and (b) 30 August 2012. These waivers extended the period of assessment to (a) 31 August 2012 and (b) 31 March 2013, respectively. These waivers were duly accepted and approved by respondent. Nonetheless, petitioner alleges that the waivers were defective.

28. It is the contention of petitioner that the waivers were not signed by the respondent making it defective does not hold water. It is true that Revenue Memorandum Order No. 20-90 provides that for tax cases involving more than One Million Pesos, the authorized revenue official to sign the waiver is the Commissioner. Respondent humbly manifests that the Commissioner may delegate the powers vested in her under the pertinent provisions of the Tax Code, as amended, to any such subordinate officials with a rank equivalent to a division chief or higher. This was done by the issuance of Revenue Delegation Authority Order (RDAO) No. 5-2001. For easy reference, RDAO No. 5-2001 is hereby quoted:

> August 2, 2001
>
> Revenue Delegation Authority Order No. 5-2001
>
> SUBJECT: Delegation of Authority to Sign and Accept the Waiver of the Defense of Prescription Under the Statute of Limitations
>
> TO: All Internal Revenue Officers and Employees and Others Concerned

1. Revenue Officials Authorized to Sign the Waiver

The following revenue Officials are authorized to sign and accept the Waiver of the Defense of Prescription Under the Statute of Limitations (Annex A) prescribed in Sections 203, 222 and other related provisions of the National Internal Revenue Code of 1997:

A. For National Office cases

Designated Revenue Official

1. Assistant Commissioner (ACIR), Enforcement Service – For tax fraud and policy cases.

2. ACIR, Lag Taxpayers Service – For large taxpayers cases other than those cases falling under Subsection B hereof.

3. ACIR, Legal Service – For cases pending verification and awaiting resolution of certain legal issues prior to prescription and for issuance/ compliance of Subpoena Duces Tecum.

4. ACIR, Assessment Service (AS) – For cases which are pending in or subject to review or approval by the ACIR, AS

5. ACIR, Collection Service - For cases pending action in the Collection Service

B. For cases in the Large Taxpayers District Office (LTDO)

The Chief of the LTDO shall sign and accept the waiver for cases pending investigation/action in his possession.

C. **Regional cases**

Designated Revenue Official

1. Revenue District Officer – Cases pending investigation/verification/reinvestigation in the Revenue District Offices.

2. **<u>Regional Director – Cases pending in the Divisions in the Regional Office, including cases pending approval by the Regional Director.</u>**

In order to prevent undue delay in the execution and acceptance of the waiver, the assistant heads of concerned offices are likewise authorized to sign the same under meritorious circumstances in the absence of the abovementioned officials.

The authorized revenue official shall ensure that the waiver is duly accomplished and signed by the taxpayer or his authorized representative before affixing his signature to signify acceptance of the same. In case the authority is delegated by the taxpayer to a representative, the concerned revenue official shall see to it that such delegation is in writing and duly notarized The "WAIVER" should not be accepted by the concerned BIR office and official unless duly notarized. (Emphasis supplied)

II. Repealing Clause

All other issuances and/or portions thereof inconsistent herewith are hereby repealed and amended accordingly.

III. Effectivity

This revenue delegation authority order shall take effect immediately upon approval.

(sgd.)
RENE G. BANEZ
Commissioner of Internal Revenue

29. It is therefore crystal clear that the Commissioner may delegate the power to accept and approve the waivers executed. If truth be told, the two (2) waivers were signed by Atty. Arnel SD. Guballa, Regional Director of Revenue Region No. 1. The named revenue official is duly authorized to sign the waiver as provided for in the above-cited RDAO.

30. Likewise, petitioner contends that the date of acceptance by the officials of the respondent was not indicated in the waivers. On the contrary, an advance copy of the First Waiver was sent via fax on 10 October 2011 and the hard copy was stamped "Received" by the Legal Division on 13 October 2011. As to the Second

Waiver, an advance copy of the same was sent via fax and stamped "Received" by the Office of the Regional Director on 30 August 2012. The receipt and acceptance of the of the same was acknowledged by respondent in a letter dated 31 August 2012 signed by Atty. Arnel SD. Guballa, Regional Director, to wit:

> 31 August 2012
>
> THUNDERBIRD PILIPINAS HOTELS AND RESORTS, INC.
> c/o The President/General Manager
> VOA Pennsylvannia Ave., Poro Point
> San Fernando City, 2500 La Union
> TIN:241-973-218
>
> Sir/Madam:
>
> This has reference to your letter dated August 30, 2012 and accomplished waiver notarized on August 30, 2012, which was received on August 31, 2012, regarding your internal revenue tax liabilities for taxable year ending December 31, 2008 pursuant to Letter of Authority No. 00036937 dated July 15, 2009.
>
> Xxx
>
> Moreover, attached herewith is your copy of waiver of statute of limitations which was duly accepted and signed.
>
> Xxx
>
> (Signed)
> ATTY. ARNEL SD. GUBALLA
> Regional Director

31. Petitioner alleges that since the date of acceptance by the Bureau was not indicated in the waivers, such waiver becomes invalid. Respondent humbly submits that the date of acceptance was indicated therein. In the present case, the date of acceptance by the Bureau was indicated in the letter to which the waiver was attached.

32. In the case at bar, the Waivers of the Statute of Limitations under the National Internal Revenue Code was executed by and between Elmer R. Pedrezuela and witnessed by Princess Grace Diaz for the petitioner and the duly authorized signatory for the respondent, Atty.

Arnel SD. Guballa. The summary of the dates of execution, expiry, notary of the waivers, hereby follows:

Waiver	**Date of Execution of Waiver**	**Expiry Date of Waiver**	**Date of Notarization of Waiver**
1st	10 October 2011	31 August 2012	10 October 2011
2nd	30 August (2012)	31 March 2013	30 August (2012)

33. What is important is that the waivers were signed and accepted by the authorized official of the Bureau before the expiration of the period of prescription or before the lapse of the period agreed in the case of subsequent waivers executed, and such fact is proven by the letter dated 31 August 2012 signed by Atty. Arnel SD. Guballa

34. In fact in the case of Philippine Journalist, Inc. vs. Commissioner of Internal Revenue, the Supreme Court espoused:

> "The other defect noted in this case is the date of acceptance which makes it difficult to fix with certainty **if the waiver was actually agreed before the expiration of the three year prescriptive period."** (Emphasis supplied)

35. Thus, the evil which the date of acceptance address is the chance that the actual meeting of the minds took place beyond the period of limitation, therefore, in such a case, there is no more existent, valid period of assessment to extend as the period had prescribed. In the instant case it is easy to determine if the waiver was actually agreed upon before the expiration of the three-year prescriptive period.

36. The third contention of petitioner is that the waivers did not specify the kind and amount of tax due. Petitioner's contention has no leg to stand on.

37. This issue was squarely disposed of by the Honorable Court in the case of Oceanic Wireless Network,

Inc. vs. Commissioner of Internal Revenue, wherein the Court held that:

> "After meticulous scrutiny of the evidence, we rule in favor of the validity of the subject assessment notices.
>
> While it is true that the waiver executed by petitioner does not specify the kind of tax and the amount of tax due as required under Revenue Memorandum Order No. 20-90, petitioner cannot invoke the same in the present case. This is because we have noted that as of the time of the execution of the waiver on March 17, 1999, there was no preliminary assessment issued yet against petitioner wherein the kind and amount of tax due could be referred to. Hence, such details cannot be specified in the waiver because the amount and the kind of tax were still unascertainable.
>
> **The first report of preliminary assessment was issued on May 18, 1999 and this was received by petitioner on the same date. But since petitioner had already executed a waiver on March 17, 1999, it is justified that the amount and the kind of tax are not reflected therein. The waiver therefore is valid.**" (Emphasis supplied)

38. With regard to the allegation that the waivers did not conform to the requirements for proper execution as prescribed by RMO No. 20-90 and RDAO No. 5-2001, respondent would like to remind petitioner that it is the duty of the taxpayer, as the one who prepared the waiver to see to it that the waiver is in conformity with the prescribed form.

39. The subject waivers were voluntarily prepared by petitioner. Respondent did not intervene in the preparation thereof. Hence, petitioner cannot point the finger at respondent.

40. In fact, in a letter dated 30 August 2012 addressed to Atty. Arnel SD. Guballa, the counsels for petitioner attached a copy of the notarized waiver therein. Hence, the counsels have knowledge of the content and form of the waiver. If the waiver was indeed defective why did petitioner's counsels raise the issue only now? As can be gleaned from the BIR records, petitioner's counsels have been in constant communication with the revenue examiners/officers since the start of audit/investigation even during the informal conference. Petitioner as well as their counsels have every opportunity to raise the same in the administrative level, but the fact is they did not. Was it a conscious effort on their part?

41. Viewed in the light of the foregoing consideration the two waivers were valid and binding between petitioner and respondent. Respondent humbly manifests that petitioner's voluntary act of signing the waivers is tantamount to an assent or consent to extend the period of assessment. Therefore, petitioner is now estopped from claiming otherwise.

The case of Philippine Journalists, Inc. vs. Commissioner of Internal Revenue is not on all four with the present petition.

42. Lastly, any attempt to shoehorn the facts of the present case to a fit that renders applicable the Supreme Court case, Philippine Journalists, Inc. vs. Commissioner of Internal Revenue should collapse because the said case cannot be four-square applicable hereto. For this reason, stare decisis will not apply.

43. In Philippine Journalists, Inc. vs. Commissioner of Internal Revenue, the High Court ruled that the Waiver of the Statute of Limitations signed by petitioner's representative is not valid and binding for it did not specify a definite agreed date between the Bureau and petitioner within which the former may assess and collect revenue taxes. Thus, petitioner's waiver became unlimited in time,

violating Section 222 (b) of the Tax Code. Such is not the case in point in the present petition.

44. Clearly, the subject waivers specifies the definite date agreed upon between petitioner and respondent's authorized representative. This fact can be easily verified on the face of the waiver. As aforecited, the waivers were executed on (a) 10 October 2011 and (b) 30 August 2012 and these waivers extended the period of assessment to (a) 31 August 2012 and (b) 31 March 2013, respectively.

45. Second, in the abovecited case, the High Court held that the waiver was also defective from the government side because it was signed only by a revenue district officer, not the Commissioner, as mandated by the NIRC.

46. It may not be amiss to state that the said waiver therein was executed prior to the year 2001. Later or on 2 August 2001 the Commissioner issued Delegation Authority Order (RDAO) No. 5-2001 delegating the authority to sign waivers to any such subordinate officials with a rank equivalent to a division chief or higher. Hence, when the subject waivers were executed the RDAO was already issued. The authorized revenue officials who signed the waivers were duly designated to sign such as provided for in the RDAO.

47. Third, the High Court held in the same case that there was also doubt as to whether the waiver was actually agreed before the expiration of the three-year prescriptive period. In this case there was no indicia at all as to whether the waiver was actually accepted or agreed upon before the expiration of the three-year prescriptive period unlike in the instant case it can be easily verified when the acceptance was made.

48. Lastly, the High Court held in the same case that the records showed that petitioner was not furnished a copy of the waiver. Thus, the waiver document was incomplete and defective, and the three-year prescriptive period was not tolled or extended and continued to run until April 17, 1998. Consequently, the assessment issued

on December 9, 1998 was invalid because it was issued beyond the three-year period.

49. As can be gleaned from the records. The receipt and acceptance of the same was acknowledged by respondent in a letter dated 31 August 2012 signed by Atty. Arnel SD. Guballa, Regional Director. Such fact is a good indicia that petitioner received a copy of the waiver prior to the expiry of the period to assess.

50. Absent showing such error or defects as cited in the aforecited case, stare decisis cannot apply and herein waivers are conclusively valid and binding between petitioner and respondent.

By its own actions, petitioner is now estopped from assailing the subject waivers.

51. Indisputably, the execution of the waivers by both parties proved to be favorable to petitioner considering that aforesaid waivers constitute as tools for petitioner by providing it enough time to gather voluminous documents/records to substitute its position.

52. It is quite absurd and unfair that when the Formal Letter of Demand and Final Assessment Notices proved to be adverse to petitioner, the very same waivers utilized by petitioner for its own advantage will now be used by the very same petitioner to defeat the validity of the waivers it voluntarily executed.

53. A party, having performed affirmative acts upon which another person based his subsequent action, cannot thereafter refute his acts or renege on the effects of the same, to the prejudice of the latter. In *Lopez vs. Ochoa*, the Honorable Supreme Court discussed the relation between waiver and estoppel, to wit:

> "The doctrine of waiver belongs to the family of, or is based upon, estoppel. This is especially true where the waiver relied upon is constructive or implied from the conduct of a

party, when it is said that the elements of estoppel are attendant.

(2) B. *Nature of Doctrine.* – The doctrine of waiver has been characterized as technical, as of some arbitrariness. It is one of the most familiar in the law, prevalent in ancient as well as in modern times throughout every branch of law as well as of practice. It is a doctrine resting upon an equitable principle which courts of law will recognize, that a person, with full knowledge of the facts shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another, a rule of judicial policy, the legal outgrowth of judicial abhorrence so to speak, of a person's taking inconsistent positions and gaining advantages thereby through the aid of courts. *The doctrine, it has been said, belongs to the family of, is of the nature of, is based upon, estoppel. The essence of waiver, it has been stated, is estoppel, and where there is no estoppel, there is no waiver. "Waiver" and "estoppel" are frequently used as convertible.* On the other hand, it has been said that the terms are not convertible, that an estoppel in pais has connections in no wise akin to waiver, and that the doctrine of waiver does not necessarily depend on estoppel or misrepresentation; thus, a waiver does not necessarily imply that one has been misled to his prejudice or into an altered position; a waiver may be created by acts, conduct, or declaration to create a technical estoppel. However, the distinction, it has been said, is more easily preserved in dealing with express waiver, but where the waiver relied upon is constructive or merely implied from the conduct of a party, irrespective of what his actual intention may have been, it is at least questionable if there are not present some of the elements of estoppel."

54. In the Heirs of Cipriano Reyes case the Supreme Court held that a valid waiver need only consist of the following requisites: (a) existence of a right; (b) the knowledge of the existence thereof; and (c) an intention to relinquish such right. In the case at bar, petitioner knew it could waive its right under the Statute of Limitations and manifested its intention in writing.

55. Hence, by its own actions petitioner is estopped from assailing the four waivers.

Petitioner as withholding agent has the legal duty to collect the tax for the government.

56. In brushing aside the foregoing arguments, respondent humbly submits that in fact there is no need to issue assessments to collect the expanded withholding tax, final withholding tax and final tax nor should there be a need to execute waivers of the defense of prescription under the statute of limitations. What is contemplated in Sections 203 and 223 of the Tax Code is the period to assess tax liabilities of taxpayer. This does not include expanded withholding tax, final withholding tax and final tax because an assessment for expanded withholding tax, final withholding tax and final tax is in the nature of a penalty. Thereafter, it is outside the ambit of Sections 203 and 223 of the Tax Code which provides a limitation as to the assessment of taxes but not penalties.

57. In the assessment for deficiency expanded withholding tax, final withholding tax and final tax, what is being sought to be collected from petitioner are penalties for failure to withhold the tax. **The Tax Code only makes the agent personally liable for the tax arising from the breach of its legal duty to withhold as distinguished from its duty to pay tax since the government's cause of action against the withholding agent is not for the collection of income tax, but for the enforcement of the withholding provision of Section 53 of the Tax Code, compliance with which is imposed on the withholding agent and not upon the taxpayer.**

58. In *Philippine Guaranty Company, Inc. v. Commissioner of Internal Revenue*, this Court pointed out that a withholding agent is in fact the agent both of the government and of the taxpayer, and that the withholding agent is not an ordinary government agent:

> "The law sets no condition for the personal liability of the withholding agent to attach. The reason is to compel the withholding agent to withhold the tax under all circumstances. In effect, the responsibility for the collection of the tax as well as the payment thereof is concentrated upon the person over whom the Government has jurisdiction. Thus, the withholding agent is constituted the agent of both the Government and the taxpayer. With respect to the collection and/or withholding of the tax, he is the Government's agent. In regard to the filing of the necessary income tax return and the payment of the tax to the Government, he is the agent of the taxpayer. The withholding agent, therefore, is no ordinary government agent especially because under Section 53 (c) he is held personally liable for the tax he is duty bound to withhold; whereas the Commissioner and his deputies are not made liable by law."

59. Hence, petitioner as withholding agent has the legal duty to collect the tax for the government particularly the Bureau of Internal Revenue.

60. Also without merit is the contention of the petitioner that amount paid by petitioner to Thunderbird-Poro Point Ltd. and Thunderbird Resorts, Inc. as well as Bettingjobs.com as management fees and consultancy fees for services rendered by said companies allegedly outside the Philippines is considered income earned outside the Philippines and not subject to Philippine Withholding Tax.

61. Such allegation is dearth of merit. As provided in Section 28 (B) of the NIRC, as amended – a foreign

corporation not engaged in trade or business in the Philippines shall pay a tax equal to thirty-five percent (35%) of the gross income received during each taxable year from all sources within the Philippines, such as interests, dividends, rents, royalties, salaries. premiums (except reinsurance premiums), annuities, emoluments or other fixed or determinable annual, periodic or casual gains, profits and income and capital gains.

62. Correlatively, Section 42 (A) of the NIRC, as amended provides:

> Gross income from Sources Within the Philippines. – The following items of gross income shall be treated as gross income from sources within the Philippines:
>
> (1) Interests – X X X
> (2) Dividends – X X X
> (3) Services – Compensation for labor or personal services performed in the Philippines;
> (4) X X X

63. However, in a Court of Appeals case, Philam Insurance vs. CTA and CIR, CA-GR No. 31283, 25 April 1995, the Honorable Court states that **a non-resident foreign corporation is taxed on compensation derived from sources within the Philippines even if the services are performed abroad.** While it is true that a non-resident foreign corporation has no properties here in the Philippines, in entering into a management contract with a domestic corporation here in the Philippines, the non-resident foreign corporation's income from said contract is well within the ambit of Section 37(a)(7) of the 1980 Tax Code. **In our jurisprudence, the test of taxability is the "source' and the "source" of an income is that activity which produced the income.**

64. Petitioner's view that it is beyond the ambit of the authority of the Bureau of Internal Revenue to tax income considered earned outside the territorial limits of the Philippines must be set aside. What is important to consider is that there is an income earned and the necessary tax must be imposed thereon.

65. Accordingly, petitioner cannot claim that it is not liable to withhold taxes on the management and consultancy fees because it was income derived by Thunderbird-Poro Point Ltd. and Thunderbird Resorts, Inc. as well as Bettingjobs.com, non-resident foreign corporations, from sources within the Philippines.

66. Following the law, rules and jurisprudence Thunderbird-Poro Point Ltd. and Thunderbird Resorts, Inc. as well as Bettingjobs.com must pay the tax for its income earned and the petitioner must withhold the said tax as collector of the government.

67. At any rate, it is worthy to stress that the power to tax, an inherent prerogative, has to be availed of to assure the performance of vital state functions. It is the source of the bulk of public funds. To paraphrase a recent decision, a tax being the lifeblood of the government, its prompt and certain availability is of the essence. The state will be deprived of the taxes validly due it and the public will suffer if taxpayers will not be held liable for the proper taxes assessed against them.

68. Well-settled is the principle that taxes are imposed for the support of the government in return for the general advantage and protection which the government affords to taxpayers and their property. Taxes are the lifeblood of the government. It is imperative that the power to impose them to be clothed with the implied authority to devise ways and means to accomplish their collection in the most effective manner. Without this implied power the end of government may falter or fail."

xxx xxx xxx"

Thereafter, Pre-Trial Conference[29] was scheduled on June 20, 2013 but was finally reset[30] on March 27, 2014. Respondent's Pre-Trial Brief[31] was filed on July 11, 2013, while Pre-Trial Brief for Petitioner[32] was filed through registered mail on March 24, 2014.

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[29] Notice of Pre-Trial Conference, Docket (Vol. I), p. 170.
[30] Minutes of the hearing on January 30, 2014, Docket (Vol. I), p. 258.
[31] Docket (Vol. I), pp. 176-184.
[32] Docket (Vol. III), pp. 935-958.

On April 23, 2014, the parties filed their Joint Stipulation of Facts and Issues[33], which was approved by the Court in its Pre-Trial Order[34] dated May 2, 2014.

During trial, petitioner presented Atty. George F. Ventayen, Romeo A. De Jesus, Jr., Elmer R. Pedrezuela, and Angel Suciro as its witnesses, and offered Exhibits "P-1" to "P-3a" as its documentary evidence. On the other hand, respondent presented Ted Teodulo R. Paragar, Jr. and Maria Raquel V. Rosario as his witnesses, and offered Exhibits "R-1" to "R-36-A".

Petitioner's Formal Offer of Exhibits[35] was filed through registered mail on September 23, 2014 and received by the Court on October 2, 2014, offering Exhibits "P-1", "P-2", "P-3", "P-4", "P-4-1", "P-5", "P-6", "P-7", "P-7-1", "P-8", "P-9", "P-10", "P-11", "P-11-1", "P-12", "P-13", "P-14", "P-15", P-15-1", "P-16", "P-16-1", "P-17", "P-18", "P-19", "P-19-1", "P-20", "P-20-1", "P-20-2", "P-21", "P-22", "P-23", "P-24", "P-24-1", "P-25", "P-25-A", "P-26", "P-27", "P-28", "P-29", "P-29-1", "P-30", "P-30-1", "P-32-1" to "P-32-678", "P-33-1" to "P-33-1103", "P-34-1" to "P-34-6", "P-35-1" to "P-35-4195", "P-37-1" to "P-37-12", "P-38", "P-38-1", "P-39", and "P-39-1", as its documentary evidence. Respondent's filed his Comment (On Petitioner's Formal Offer of Evidence)[36] through registered mail on September 29, 2014 and received by the Court on October 8, 2014. Petitioner filed its Reply (to Respondent Comment to the Formal offer of Evidence)[37] on October 10, 2014.

In the Resolution[38] dated December 9, 2014 , the Court admitted Exhibits "P-1" to "P-4", "P-6", "P-7", "P-7-1", "P-8", "P-9", "P-10", "P-11", "P-11-1", "P-12", "P-13", "P-14", "P-15", P-15-1", "P-16", "P-16-1", "P-17", "P-18", "P-19", "P-19-1", "P-20", "P-20-1", "P-20-2", "P-21", "P-22", "P-23", "P-24", "P-24-1", "P-25", "P-25-A", "P-26", "P-27", "P-28", "P-29", "P-29-1", "P-30", "P-30-1", "P-32-1" to "P-32-678", "P-33-1" to "P-33-784", "P-33-786" to "P-33-1103", "P-34-1" to "P-34-6", "P-35-1" to "P-35-6", "P-35-10" to "P-35-4089", "P-35-4091" to "P-35-4195", "P-37-1" to "P-37-12", "P-38", "P-38-1", "P-39", and "P-39-1" but denied Exhibits "P-4-1", "P-5", "P-33-785", "P-35-7", "P-35-8", "P-35-9", and "P-35-4090".

[33] Docket (Vol. IV), pp. 1365-1368.
[34] Docket (Vol. IV), pp. 1370-1377.
[35] Docket (Vol. IV), pp. 1541-1560.
[36] Docket (Vol. IV), pp. 1568-1571.
[37] Docket (Vol. IV), pp. 1573-1579.
[38] Docket (Vol. IV), pp. 1638-1639.

Petitioner filed its Motion for Reconsideration[39], through registered mail, on January 5, 2015 and received by the Court on January 14, 2015. Respondent, however, failed[40] to file his comment on petitioner's Motion for Reconsideration. In the Resolution[41] dated June 17, 2015, the Court admitted Exhibits "P-4-1", "P-33-785", and "P-35-4090".

Respondent's Formal Offer of Documentary Evidence[42] was filed on September 3, 2015, offering Exhibits "R-1", "R-2", "R-3", "R-4", "R-5", "R-6", "R-7", "R-8", "R-9", "R-10", "R-11", "R-12", "R-13", "R-14", "R-15", "R-16", "R-17", "R-18", "R-19", "R-20", "R-21", "R-22", "R-22-A", "R-23", "R-23-A", "R-24", "R-24-A", "R-24-B", "R-25", "R-26", "R-27", "R-28", "R-29", "R-30", "R-31", "R-32", "R-33", "R-33-A", "R-34", "R-35", "R-35-A", "R-36", and "R-36-A", as his documentary evidence. On the other hand, petitioner filed its Comment/Opposition (Re: Respondent's Formal Offer of Documentary Evidence dated 25 August 2015)[43] on September 23, 2015.

In the Resolution[44] dated October 27, 2015, the Court admitted Exhibits "R-1", "R-2", "R-3", "R-4", "R-5", "R-6", "R-7", "R-8", "R-9", "R-10", "R-11", "R-12", "R-13", "R-14", "R-15", "R-16", "R-17", "R-18", "R-19", "R-20", "R-21", "R-22", "R-22-A", "R-23", "R-23-A", "R-24", "R-24-A", "R-24-B", "R-25", "R-26", "R-27", "R-28", "R-29", "R-30", "R-31", "R-32", "R-33", "R-33-A", "R-34", "R-35", "R-35-A", "R-36", and "R-36-A".

On February 5, 2016, the case was submitted[45] for decision, taking into consideration petitioner's Memorandum[46] filed on December 28, 2015 and respondent's Memorandum[47] filed on February 2, 2016.

The parties submitted the following issues[48] for the Court's resolution:

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[39] Docket (Vol. IV), pp. 1669-1674.
[40] Records Verification dated February 12, 2015, Docket (Vol. IV), p. 1694.
[41] Docket (Vol. IV), pp. 1750-1751.
[42] Docket (Vol. IV), pp. 1784-1805.
[43] Docket (Vol. V), pp. 1828-1844.
[44] Docket (Vol. V), pp. 1853-1854.
[45] Resolution dated February 5, 2016, Docket (Vol. V), p. 1967.
[46] Docket (Vol. V), pp. 1877-1937
[47] Docket (Vol. V), pp. 1939-1965
[48] JSFI, Docket (Vol. IV), p. 1366

1. Whether petitioner is liable to pay ₱131,699,553.75 as alleged deficiency Special Preferential Rate Tax, Franchise Tax, Expanded Withholding Tax, Final Withholding Tax, Documentary Stamp Tax, with interest, surcharges and penalty for the taxable year 2008; and

2. Whether the assessment against petitioner for deficiency taxes for taxable year 2008 had prescribed already.

The Court shall first resolve the issue on whether or not the period to assess petitioner for deficiency SPRT, FT, EWT, FWT and DST for taxable year 2008 had already prescribed.

Petitioner contends that respondent's assessment notices were void as the right of the government to assess deficiency taxes had already prescribed. Petitioner claims that it received the assessments for alleged deficiency SPRT, FT, EWT, FWT and DST for taxable year 2008 only on August 17, 2012, which is beyond the three (3)-year period prescribed by law for the assessment and collection of taxes. Petitioner further argues that the waivers executed are not valid for failure to comply with the requisites and formalities of a valid waiver. Hence, the waivers did not have the effect of extending the three (3)-year prescriptive period.

Section 203 of the NIRC of 1997, as amended, provides that internal revenue taxes must be assessed within three (3) years reckoned from the period fixed by law for the filing of the tax return or the actual date of filing, whichever is later, thus:

> "SEC. 203. *Period of Limitation Upon Assessment and Collection.* - Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law

> for the filing thereof shall be considered as filed on such last day."

However, in case of false or fraudulent return with intent to evade tax or of failure to file a return, a tax may be assessed and/or collected at any time within ten (10) years after the discovery of the falsity, fraud or omission. Section 222(a) of the NIRC of 1997, as amended, states:

> "SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* –
>
> (a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: *Provided*, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof."

The following are the summary of the dates of filing of petitioner's relevant returns and the corresponding dates within which respondent should assess petitioner for deficiency taxes for the taxable year 2008:

Tax Return	**Taxable Period**	**Filing Date**	**Last Day to File Return**	**Last Day to Assess**
Annual Income Tax Return[49]	2008	April 15, 2009	April 15, 2009	April 15, 2012
FT[50]	2008	none		
EWT[51]	January 2008	February 11, 2008	February 15, 2008	February 15, 2011

[49] Exhibit "P-6. Pursuant to Section 77 (B) of the NIRC of 1997, as amended, a corporate taxpayer shall file its final adjustment return (annual income tax return) on or before the fifteenth (15th) day of April.

[50] Pursuant to Revenue Regulations (RR) No. 4-02, return must be filed not later than the 20th day following the end of each month.

[51] Exhibit "P-7". Pursuant to Revenue Regulations (RR) No. 26-02, return must be filed on or before the fifteenth (15th) day of the month following the month of withholding.

	February 2008	March 10, 2008	March 17, 2008[52]	March 17, 2011
	March 2008	April 10, 2008	April 15, 2008	April 15, 2011
	April 2008	May 12, 2008	May 15, 2008	May 15, 2011
	May 2008	June 10, 2008	June 16, 2008[53]	June 16, 2011
	June 2008	July 10, 2008	July 15, 2008	July 15, 2011
	July 2008	August 11, 2008	August 15, 2008	August 15, 2011
	August 2008	September 10, 2008	September 15, 2008	September 15, 2011
	September 2008	October 10, 2008	October 15, 2008	October 15, 2011
	October 2008	November 10, 2008	November 17, 2008[54]	November 15, 2011
	November 2008	December 10, 2008 January 21, 2009 (amended)[55]	December 15, 2008	January 21, 2012
	December 2008	January 15, 2009	January 15, 2009	January 15, 2012
FWT[56]	January 2008	March 16, 2010	February 15, 2008	March 16, 2013
	February 2008	March 10, 2008	March 17, 2008[57]	March 17, 2011
	March 2008	March 16, 2010	April 15, 2008	March 16, 2013
	April 2008	May 12, 2008	May 15, 2008	May 15, 2011
	May 2008	June 10, 2008	June 16, 2008[58]	June 16, 2011
	June 2008	July 10, 2008	July 15, 2008	July 15, 2011
	July 2008	August 11, 2008	August 15, 2008	August 15, 2011
	August 2008	September 10, 2008	September 15, 2008	September 15, 2011
	September 2008	October 13, 2008	October 15, 2008	October 15, 2011
	October 2008	November 7, 2008	November 17, 2008[59]	November 17, 2011
	November 2008	December 1, 2008	December 15, 2008	December 15, 2011

[52] March 15, 2008 fell on a Saturday.
[53] June 15, 2008 fell on a Sunday.
[54] November 15, 2008 fell on a Saturday.
[55] BIR Records, Folder 6, pp. 234-235.
[56] Exhibit "P-7-1". Pursuant to Revenue Regulations (RR) No. 26-02, return must be filed on or before the fifteenth (15th) day of the month following the month of withholding.
[57] March 15, 2008 fell on a Saturday.
[58] June 15, 2008 fell on a Sunday.
[59] November 15, 2008 fell on a Saturday.

	December 2008	January 9, 2009	January 15, 2009	January 15, 2012
DST[60]	2008	none		

Section 222(b) of the NIRC of 1997, as amended, provides that the period to assess and collect deficiency taxes may be extended upon a written agreement between the CIR and the taxpayer prior to the expiration of the three (3)-year prescriptive period. The pertinent portion of the provision states that:

> "SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* –
>
> xxx xxx xxx
>
> (b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon."

In relation to the above-quoted provision, Revenue Memorandum Order (RMO) No. 20-90[61], as amended by Revenue Delegation Authority Order (RDAO) No. 05-01[62], was issued which provides the procedures that should be followed for the proper execution of the Waiver of the Statute of Limitations.

In RMO No. 20-90, respondent laid down the procedures in executing a Waiver as follows:

> "1. The waiver must be in the form identified hereof. This form may be reproduced by the Office concerned but there should be no

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[60] Pursuant to Section 200 (B) of the NIRC of 1997, as amended, the tax return shall be filed within ten (10) days after the close of the month when the taxable document was made, signed, issued, accepted, or transferred.

[61] Subject: Proper Execution of the Waiver of the Statute of Limitations Under the National Internal Revenue Code, April 4, 1990.

[62] Subject: Delegation of Authority to Sign and Accept the Waiver of the Defense of Prescription Under the Statute of Limitations, August 2, 2001.

deviation from such form. The phrase 'but not after ______ 19 ___' should be filled up. This indicates the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription. The period agreed upon shall constitute the time within which to effect the assessment/collection of the tax in addition to the ordinary prescriptive period.

2. The waiver shall be signed by the taxpayer himself or his duly authorized representative. In the case of a corporation, the waiver must be signed by any of its responsible officials.

Soon after the waiver is signed by the taxpayer, the Commissioner of Internal Revenue or the revenue official authorized by him, as hereinafter provided, shall sign the waiver indicating that the Bureau has accepted and agreed to the waiver. The date of such acceptance by the Bureau should be indicated. Both the date of execution by the taxpayer and date of acceptance by the Bureau should be before the expiration of the period of prescription or before the lapse of the period agreed upon in case a subsequent agreement is executed.

3. The following revenue officials are authorized to sign the waiver.

A. In the National Office

xxx xxx xxx

3. Commissioner – For tax cases involving more than P1M

B. In the Regional Offices

1. The Revenue District Officer with respect to tax cases still pending investigation and the period

to assess is about to prescribe regardless of amount.

2. The Regional Director, the Assistant Regional Director, the Chief, Assessment Branch or the Chief, Legal Branch with respect to cases still pending review and the period to assess/collect is about to prescribe, regardless of amount.

3. The Regional Director, the Assistant Regional Director, the Chief, Collection Branch or the Chief, Legal Branch with respect to cases still pending collection and the period to assess/collect is about to prescribe regardless of amount.

4. The waiver must be executed in three (3) copies, the original copy to be attached to the docket of the case, the second copy for the taxpayer and the third copy for the Office accepting the waiver. The fact of receipt by the taxpayer of his/her file copy shall be indicated in the original copy.

5. The foregoing procedures shall be strictly followed. Any revenue official found not to have complied with this Order resulting in prescription of the right to assess/collect shall be administratively dealt with."

Whereas in RDAO 05-01, respondent details the following authorities who may sign and accept the Waivers:

"I. Revenue Officials Authorized to Sign the Waiver

The following revenue officials are authorized to sign and accept the Waiver of the Defense of Prescription Under the Statute of Limitations (Annex A) prescribed in Sections 203, 222 and other related provisions of the National Internal Revenue Code of 1997:

For National Office cases

Designated Revenue Official

1. Assistant Commissioner (ACIR), Enforcement Service - For tax fraud and policy cases

2. ACIR, Large Taxpayers Service - For large taxpayers cases other than those cases falling under Subsection B hereof

3. ACIR, Legal Service - For cases pending verification and awaiting resolution of certain legal issues prior to prescription and for issuance/compliance of *Subpoena Duces Tecum*

4. ACIR, Assessment Service (AS) - For cases which are pending in or subject to review or approval by the ACIR, AS

5. ACIR, Collection Service -For cases pending action in the Collection Service

B. For cases in the Large Taxpayers District Office (LTDO)

The Chief of the LTDO shall sign and accept the waiver for cases pending investigation/action in his possession.

C. For Regional cases

Designated Revenue Official

1. Revenue District Officer — Cases pending investigation/ verification/reinvestigation in the Revenue District Offices

2. Regional Director — Cases pending in the Divisions in the Regional Office, including cases pending approval by the Regional Director

In order to prevent undue delay in the execution and acceptance of the waiver, the assistant heads of the concerned offices are likewise authorized to sign the same.

under meritorious circumstances in the absence of the abovementioned officials.

The authorized revenue official shall ensure that the waiver is duly accomplished and signed by the taxpayer or his authorized representative before affixing his signature to signify acceptance of the same. In case the authority is delegated by the taxpayer to a representative, the concerned revenue official shall see to it that such delegation is in writing and duly notarized. The 'WAIVER' should not be accepted by the concerned BIR office and official unless duly notarized."

In the case of *Commissioner of Internal Revenue vs. Standard Chartered Bank*[63], the Supreme Court outlined the procedure for the proper execution of a waiver, to wit:

> "1. The waiver must be in the proper form prescribed by RMO 20-90. The phrase 'but not after __ 19 _', which indicates the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription, should be filled up.
>
> 2. The waiver must be signed by the taxpayer himself or his duly authorized representative. In the case of a corporation, the waiver must be signed by any of its responsible officials. In case the authority is delegated by the taxpayer to a representative, such delegation should be in writing and duly notarized.
>
> 3. The waiver should be duly notarized.
>
> 4. The CIR or the revenue official authorized by him must sign the waiver indicating that the BIR has accepted and agreed to the waiver. The date of such acceptance by the BIR should be indicated. However, before signing the waiver, the CIR or the revenue official authorized by him must make sure that the waiver is in the

[63] G.R. No. 192173, July 29, 2015.

prescribed form, duly notarized, and executed by the taxpayer or his duly authorized representative.

5. Both the date of execution by the taxpayer and date of acceptance by the Bureau should be before the expiration of the period of prescription or before the lapse of the period agreed upon in case a subsequent agreement is executed.

6. The waiver must be executed in three copies, the original copy to be attached to the docket of the case, the second copy for the taxpayer and the third copy for the Office accepting the waiver. The fact of receipt by the taxpayer of his/her file copy must be indicated in the original copy to show that the taxpayer was notified of the acceptance of the BIR and the perfection of the agreement."

In this case, the First Waiver was issued on October 10, 2011. Apparently, even prior to the issuance of the First Waiver, the right of respondent to assess petitioner had already prescribed with respect to the following taxes: (1) deficiency EWT for the months of January to August 2008 and (2) deficiency FWT for the months of February, April to August 2008, as follows:

Tax Return	Taxable Period	Filing Date	Last Day to File Return	Last Day to Assess
EWT	January 2008	February 11, 2008	February 15, 2008	February 15, 2011
	February 2008	March 10, 2008	March 17, 2008[64]	March 17, 2011
	March 2008	April 10, 2008	April 15, 2008	April 15, 2011
	April 2008	May 12, 2008	May 15, 2008	May 15, 2011
	May 2008	June 10, 2008	June 16, 2008[65]	June 16, 2011

a

[64] March 15, 2008 fell on a Saturday.
[65] June 15, 2008 fell on a Sunday.

	June 2008	July 10, 2008	July 15, 2008	July 15, 2011
	July 2008	August 11, 2008	August 15, 2008	August 15, 2011
	August 2008	September 10, 2008	September 15, 2008	September 15, 2011
FWT	February 2008	March 10, 2008	March 17, 2008[66]	March 17, 2011
	April 2008	May 12, 2008	May 15, 2008	May 15, 2011
	May 2008	June 10, 2008	June 16, 2008[67]	June 16, 2011
	June 2008	July 10, 2008	July 15, 2008	July 15, 2011
	July 2008	August 11, 2008	August 15, 2008	August 15, 2011
	August 2008	September 10, 2008	September 15, 2008	September 15, 2011

As to the remaining assessments, petitioner alleges that the two (2) waivers contained the following defects: (1) executed without any attached notarized written authority of the signatory; (2) that they were signed only by the Regional Director of Revenue Region No. 1 – Calasiao, Pangasinan; (3) that the date of acceptance by respondent was not indicated; (4) that they failed to specify the kind and amount of tax due; (5) that the authority of petitioner's signatory to the waivers was not attached to the waivers; and (6) that the date of execution and notarization of the Second Waiver cannot be clearly established. For these reasons, petitioner claims that the waivers are void and, therefore, did not extend the prescriptive period for the assessment of alleged deficiency taxes.

Petitioner's contentions are bereft of merit.

The Supreme Court has consistently held that a Waiver of the Statute of Limitations must faithfully comply with the provisions of RMO No. 20-90 and RDAO 05-01 in order to be valid and binding. However, an exception to this rule was created in the recent case of *Commissioner of Internal Revenue vs. Next Mobile, Inc. (formerly Nextel Communications Phils., Inc.)*[68], to wit:

> "The general rule is that when a waiver does not comply with the requisites for its

[66] March 15, 2008 fell on a Saturday.
[67] June 15, 2008 fell on a Sunday.
[68] G.R. No. 212825, December 7, 2015.

validity specified under RMO No. 20-90 and RDAO 01-05, it is invalid and ineffective to extend the prescriptive period to assess taxes. However, due to its peculiar circumstances, We shall treat this case as an exception to this rule and find the Waivers valid for the reasons discussed below.

First, the parties in this case are *in pari delicto* or 'in equal fault.' *In pari delicto* connotes that the two parties to a controversy are equally culpable or guilty and they shall have no action against each other. However, although the parties are *in pari delicto*, the Court may interfere and grant relief at the suit of one of them, where public policy requires its intervention, even though the result may be that a benefit will be derived by one party who is in equal guilt with the other.

Here, to uphold the validity of the Waivers would be consistent with the public policy embodied in the principle that taxes are the lifeblood of the government, and their prompt and certain availability is an imperious need. Taxes are the nation's lifeblood through which government agencies continue to operate and which the State discharges its functions for the welfare of its constituents. As between the parties, it would be more equitable if petitioner's lapses were allowed to pass and consequently uphold the Waivers in order to support this principle and public policy.

Second, the Court has repeatedly pronounced that parties must come to court with clean hands. Parties who do not come to court with clean hands cannot be allowed to benefit from their own wrongdoing. Following the foregoing principle, respondent should not be allowed to benefit from the flaws in its own Waivers and successfully insist on their invalidity in order to evade its responsibility to pay taxes.

> *Third*, respondent is estopped from questioning the validity of its Waivers. While it is true that the Court has repeatedly held that the doctrine of estoppel must be sparingly applied as an exception to the statute of limitations for assessment of taxes, the Court finds that the application of the doctrine is justified in this case. Verily, the application of estoppel in this case would promote the administration of the law, prevent injustice and avert the accomplishment of a wrong and undue advantage. Respondent executed *five* Waivers and delivered them to petitioner, one after the other. It allowed petitioner to rely on them and did not raise any objection against their validity until petitioner assessed taxes and penalties against it. Moreover, the application of estoppel is necessary to prevent the undue injury that the government would suffer because of the cancellation of petitioner's assessment of respondent's tax liabilities.
>
> *Finally,* the Court cannot tolerate this highly suspicious situation. In this case, the taxpayer, on the one hand, after voluntarily executing waivers, insisted on their invalidity by raising the very same defects it caused. On the other hand, the BIR miserably failed to exact from respondent compliance with its rules. The BIR's negligence in the performance of its duties was so gross that it amounted to malice and bad faith. Moreover, the BIR was so lax such that it seemed that it consented to the mistakes in the Waivers. Such a situation is dangerous and open to abuse by unscrupulous taxpayers who intend to escape their responsibility to pay taxes by mere expedient of hiding behind technicalities."

The Court finds the factual circumstances of the foregoing case similar with the present case. In this case, both parties are at fault. Both parties were aware of the infirmities of the waivers but still continued their dealings with each other on the strength of these waivers. It must also be noted that petitioner did not question the validity of the waiver in its protest to the PAN filed on August 14, 2012 and in its protest and supplemental protest to the FAN filed on September 14, 2012 and November 13, 2012, respectively. It was only on February 19, 2013, when petitioner filed the present Petition for Review that it initially questioned the validity of the waivers which were already executed as early as October, 10, 2011 (First Waiver) and August 30, 2012 (Second Waiver). The BIR failed to exact from petitioner compliance with its own rules as regards the procedures in the execution of a valid waiver. In effect, respondent consented to the mistakes in the waivers. Hence, both parties are considered *in pari delicto* or 'in equal fault'.

The Court noted that, while the requirements of RMO No 20-90 and RDAO No. 05-01 must be strictly complied, the act of petitioner, in voluntarily executing waivers, without raising any objection as to their validity, means that it is already estopped from questioning their validity after the assessment had already been issued.

Considering that the waivers are valid, respondent's right to assess is validly extended from October 11, 2011 to March 31, 2013 <u>except</u> for deficiency EWT for the months of January to August 2008 and deficiency FWT for the months of February, April to August 2008, which, as aforestated, had already prescribed.

It must be stressed that, although this Court found that respondent's right to assess petitioner for deficiency taxes for deficiency EWT for the months of January to August 2008 and deficiency FWT for the months of February, April to August 2008 had already prescribed, petitioner, however, failed to specify which portion of said deficiency taxes pertain to the prescribed months. Consequently, the Court shall impute the entire deficiency tax assessments to the unprescribed portion of taxable year 2008. This is the ruling of this Court in the case of *Liquigaz Philippines Corporation vs. Commissioner of Internal Revenue*[69], as follows:

> "It must be remembered that tax assessments by tax examiners are presumed correct and made in good faith. All presumptions are in favor of the correctness of tax assessments. In other words, a

[69] CTA E.B. Case Nos. 1117 & 1119 (CTA Case No. 8149), September 21, 2015.

> the taxpayer contesting the validity or correctness of an assessment must prove not only that the CIR is wrong but the taxpayer is right, otherwise, the presumption in favor of the correctness of tax assessment stands.
>
> Correspondingly, while the Court in Division found that the CIR's right to assess LPC for deficiency VAT for the second quarter of 2006 and deficiency EWT and WTC for the months of January 2006 to September 2006 has prescribed, the burden is still upon LPC, as the taxpayer contesting the validity of the assessments issued by the CIR, to show which portion of said deficiency taxes pertain to the prescribed months. However, for its part, LPC merely alleges that *"(t)he invoices, receipts, tax returns and other voluminous records presented by the petitioner would readily show that there were numerous transactions during the quarters/period covered by the assessments which had already prescribed"*, without identifying which of the said documents specifically show that the subject portion of the deficiency taxes fall under the months that have prescribed.
>
> Mere allegations without adducing evidence are not sufficient. Allegation is not synonymous with proof. In the absence of proof, the Court in Division had no alternative but to uphold the validity and correctness of the assessment and consider the entire assessment as pertaining to the unprescribed portion of taxable year 2006.

As regards the assessment on FT and DST, the ten (10)-year prescriptive period for assessment applies considering petitioner's failure to file the required returns.

In view of the foregoing, the Court shall now determine petitioner's liabilities for deficiency SPRT, FT, EWT, FWT and DST.

Respondent assessed petitioner for deficiency SPRT, FT, EWT, FWT and DST in the aggregate amount of ₱131,699,553.75, inclusive of interest, surcharges and compromise penalties, for the taxable year ended December 31, 2008, detailed as follows:

I. Special Preferential Rate Tax (SPRT)	₱ 9,015,201.18
II. Franchise Tax (FT)	72,616,423.07
III. Expanded Withholding Tax (EWT)	35,911,478.50
IV. Final Withholding Tax (FWT)	13,767,802.53
V. Documentary Stamp Tax (DST)	301,148.47
VI. Compromise Penalties	87,500.00
TOTAL	**₱ 131,699,553.75**

I. Special Preferential Rate Tax (SPRT) - ₱9,015,201.18

The details of respondent's assessment on petitioner's deficiency SPRT, are as follow:[70]

Gross Revenues			₱ 33,507,934.00
Add:	Undeclared Gross Revenues		
	Gross Revenues per Tax Credit Certificates (2307)	₱ 124,263,552.00	
	Gross Revenues per BIR Form 1702	33,507,934.00	90,755,618.00
Adjusted Gross Revenues			₱ 124,263,552.00
Less:	Allowed Deductions under Revenue Regulations 13-2005		
	Salaries & Employee Benefits	₱ 20,828,219.00	
	Repairs & Maintenance	-	
	Operating Supplies	7,967,635.00	
	Food, Beverage & Others	3,969,527.00	
	Outside Services	-	
	Entertainment, Amusement & Recreation	-	
	Others	-	
	Depreciation & Amortization	700,209.30	33,465,590.30
Gross Income subject to SPR Tax per Audit			**₱ 90,797,961.70**
Add:	Other Income (Rental Income)		16,846,231.48
Total Gross Income subject to SPR Tax per Audit			**₱ 107,644,193.18**
Multiply by Special Preferential Rate Tax			5%
Special Preferential Rate (SPR) Tax Due			**₱ 5,382,209.66**
Less:	Tax Credits		
	Prior Year's Excess Tax Credits	₱ 339,315.00	
	Creditable Tax Withheld - 1st to 3rd Qtr	447,749.00	
	Creditable Tax Withheld - 4th Qtr	173,569.00	960,633.00
Tax Payable (Overpayment) per Audit			**₱ 4,421,576.66**

[70] Exhibit "R-24", BIR Records, Folder 7, pp. 391 to 396.

Add: Overpayment per BIR Form 1702 Carried Over to Next Period		960,633.00
Deficiency Special Preferential Rate Tax		**₱ 5,382,209.66**
Add: Interest until August 30, 2012		3,632,991.52
Special Preferential Rate (SPR) Tax Payable*		**₱ 9,015,201.18**

*Special preferential rate tax payable to the national government under Sec. 3 of RA 9400 ₱ 5,409,120.71

*Special preferential rate tax payable to the municipal treasurer's office under Sec. 3 of RA 9400 ₱ 3,606,080.47

The Court shall determine the propriety of the following items impinging the deficiency SPRT:

A. Undeclared gross revenues	₱ 90,755,618.00
B. Allowed deductions under Revenue Regulations 13-2005	33,465,590.30
C. Other income (Rental income)	16,846,231.48
D. Overpayment per BIR Form 1702 carried over to next period	960,633.00

A. Undeclared gross revenues - ₱90,755,618.00

Based on the Formal Letter of Demand[71], respondent assessed petitioner of deficiency SPRT for alleged undeclared gross revenues of ₱90,755,618.00 arising from the difference between gross revenues declared as revenues subject to special rate in petitioner's Annual ITR for taxable year 2008 of ₱33,507,934.00 and gross revenues of ₱124,263,552.00, as computed in various Certificates of Creditable Tax Withheld at Source, as follows:

Gross Revenues per Tax Credit Certificates (2307)	₱ 124,263,552.00
Gross Revenues per BIR Form 1702	33,507,934.00
Undeclared Gross Revenues	**₱ 90,755,618.00**

Petitioner claims that respondent did not provide any explanation or factual basis on how the amount of ₱124,263,552.00 was arrived at, thus, preventing it to fully determine the propriety of the assessment. By such reason, petitioner is of the considered view that such item should be cancelled for being a mere presumption or conjecture.

[71] Exhibit "R-24", BIR Records, Folder 7, pp. 391 to 402.

The Court does not agree.

In a long line of cases decided by this Court, it was consistently stressed that the requirement of the law to inform the taxpayer of the basis of the assessment should not be construed as limited to the assessment notice itself. Upon a careful study of the law, it is noteworthy to emphasize that assessment notices need not be a full narration of the facts and laws on which the assessment is based. Further, the law mandates that the notice to acquaint the taxpayer of the basis of her assessment must be in writing but it does not categorically state that the assessment itself must contain such information. It is enough that petitioner be substantially informed of the law and the facts on which the assessment for a tax liability is made in any other written document presented to the taxpayer.[72]

An examination of petitioner's protest to the FAN shows that it did not only presume but in fact knew the basis of the assailed assessment considering that it was able to compute how the amount of ₱124,263,552.00 was arrived at by respondent, i.e., by dividing the creditable withholding taxes of ₱621,317.76 claimed by petitioner in its 2008 Income Tax Return by 0.5% EWT rate. Also, petitioner was able to refute such finding by claiming that the amount of ₱621,317.76 as shown in various BIR Forms 2307 pertains to EWT withheld by Banco de Oro Unibank, Inc., a credit card company on payments it made to petitioner and that these payments do not necessarily constitute as revenues of petitioner as these are not yet considered pay-outs made to players.

Thus, petitioner's contention that respondent's assessments are without factual and legal bases has no merit.

The Court shall now determine whether petitioner is liable for any deficiency taxes on the said discrepancy between income per ITR and per CWT certificates.

As alleged by petitioner, the payments made by BDO do not necessarily constitute revenues of petitioner as these are not yet considered pay-outs made to players.

[72] *Southern Negros Development Corporation vs. Commissioner of Internal Revenue,* CTA EB Case No. 162 (CTA Case No. 7075), August 8, 2006, citing the case *Calma, et. al. vs. Court of Appeals, et. al.,* G.R. No. 122787, February 9, 1999.

The Court does not subscribe.

In his Judicial Affidavit[73], Mr. Elmer R. Pedrezuela, petitioner's Financial Controller, explained the nature of "drops" and "pay-outs" and how petitioner's gaming operations revenue are computed, as follows:

> "Q-66: Can you explain the concept of "drops"?
>
> A-66: The 'drops' are the converted or substituted form of the player's actual cash or credit (via credit card) in the form of the chips and/or gaming tickets, which will be used for bets on the slot machines and/or gaming tables. **These 'drops' do not per se form part of gross revenues of TPHRI**. In other words, **there is yet no revenue to speak of on the part of TPHRI as the 'drops' are still considered 'cash' in the hands of the players** and still remain their property at the point of conversion. These 'drops' are readily convertible back to actual cash at any time.
>
> When the player actually places a bet and wins in the form of chips and/or tickets, said winnings are considered as 'pay-outs' to the player. Each time a player wins, the casino incurs loss. Conversely, each time the player loses, the casino earns income/revenues.
>
> Subsequently, when the player cashes out the chips and/or tickets from the cashier, these are merely converted back to actual cash of the player. Thus, for tax purposes, the casino accounts for the difference between the 'drops' and the 'pay-outs', which amount shall be reported as gross revenues of the casino gaming operations.
>
> Q-67: How is the actual gaming revenue computed in relation to the 'drops' and 'pay-outs'?
>
> A-67: The difference between the amount of 'drops' and the 'pay-outs' constitutes the actual gaming revenues duly reported in its annual ITR under the column of 'Exempt'. *(Boldfacing supplied)*

On the other hand, petitioner's License[74] to operate the Casino complex of the Fiesta Casino and Resort granted by PAGCOR on October 31, 2006 defines "Casino Gross Revenues", as follows:

[73] Exhibit "P-29".
[74] Exhibit "P-4".

> **"Casino Gross Revenues"** means the total of all sums, including cheques and other negotiable instruments, whether collected or not, that is received in any month from the conduct of gaming, less the total of all sums paid out as winnings to casino players during that month in respect of gaming. For purposes of this definition:
>
> a. Any sum received for the issue of a chip or slot machine token for gaming is a sum received from the conduct of gaming, and any sum paid out to redeem a chip or slot machine token is a sum paid out as winnings;
>
> b. In cases where PAGCOR consents to the extension of credit to foreign players brought in to the Casino, the aggregate value of chips issued in any month on credit, whether by credit card transaction or otherwise, shall be deemed to be sums actually received in that month from the conduct of gaming. *(Underscoring supplied)*

Conversely, based on the foregoing, "drops" are any sum received, actually or constructively, for the issue of a chip or slot machine token for gaming; while "pay-outs" are any sum paid out as winnings. Consequently, the "drops", regardless of whether or not deposited into the gaming machines, less "pay-outs" is already considered as gaming revenue.

In this case, the payments made by BDO to petitioner are considered as "drops". However, without showing how much was the "pay-outs", the same shall be considered as the gaming revenues already earned by petitioner in this period of assessment.

The Court shall now determine whether the said gross revenues of ₱124,263,552.00 is subject to 5% SPRT.

Petitioner posits that, as an enterprise duly licensed with PAGCOR to operate a casino, its revenues from gaming operations are not subject to the SPRT of 5%, on the ground that the same is already subjected to franchise tax of 5% which petitioner remits to the PAGCOR together with the license fees of 20%. It is PAGCOR that remits to the BIR the 5% franchise tax for and on behalf of petitioner.

The Court does not agree.

In CTA EB Case No. 976 dated January 29, 2014, which involved the same parties herein, the Court *En Banc* affirmed the Court in

Division's ruling in CTA Case No. 7902 dated July 18, 2012 that petitioner is no longer exempt from income tax upon the passage of RA No. 9337 or an Act Amending the National Internal Revenue Code of 1997, as follows:

> "The issue on whether PAGCOR is still exempt from payment of income tax is not novel. The Supreme Court has already ruled in the case of *Abakada Guro Party List vs. Honourable Secretary Ermita, et al., GR No. 168056, September 1, 2005,* that the Philippine Amusement and Gaming Corporation is not exempt from income taxes anymore.
>
> More direct and firm was the pronouncement by the Supreme Court of the removal of PAGCOR's exemption in the more recent case of *Philippine Amusement and Gaming Corporation (PAGCOR) vs. The Bureau of Internal Revenue, represented herein by Hon. Jose Mario Buñag, GR No. 172087, March 15, 2011* (PAGCOR case), wherein it was emphasized that with the passage of Republic Act (RA) No. 9337, PAGCOR is no longer exempt from corporate income tax. Pertinent to quote the disquisition of the Supreme Court in the PAGCOR case, to wit:
>
> xxx xxx xxx
>
> It is very clear in the foregoing pronounced PAGCOR case that PAGCOR's exemption was already eliminated, hence, it is now subject to income tax. Thus, petitioner, as the licensee or contractee of PAGCOR, cannot rely with the exemption of PAGCOR to renege on its obligation to pay the proper income tax."

It is very clear from the foregoing that petitioner, as the licensee or contractee of PAGCOR, cannot rely on the exemption of PAGCOR to avoid its obligation to pay the proper income tax.

Basic is the rule that tax assessments by tax examiners are presumed correct and made in good faith with the taxpayer having the burden of proving otherwise. Therefore, finding the arguments of the petitioner to be unmeritorious, the Court shall affirm the assessment.

B. Allowed deductions under Revenue Regulations 13-2005 - ₱33,465,590.30

According to petitioner, in its Annual ITR for taxable year 2008, it claimed the amount of ₱101,017,262.00 as direct costs. However, the Assessment Notices, without stating the basis thereof, reduced the allowable direct costs to only ₱33,465,590.30, effectively disallowing the amount of ₱67,551,671.70.

Further, petitioner is registered with PPMC as a PPSEFZ enterprise[75] pursuant to RA No. 7227[76], as amended by RA No. 9400.[77] By virtue of petitioner's registration with PPMC, it enjoys all the rights, privileges and benefits established under RA No. 7227 and its Implementing Rules and Regulations, which include the availment of 5% SPRT based on gross income (i.e., revenue less direct costs).

For purposes of computing the 5% SPRT, specific allowable deductions are enumerated under (RR) No. 13-05 and Department of Finance Order No. (DOF Order) 3-08.

Petitioner submits that, for the taxable year 2008, the direct costs, in the aggregate amount of ₱101,017,262.00 being claimed by petitioner consist of salaries, wages and benefits, operating supplies/materials, depreciation, outside services and other expenses, which are directly related to its registered activities on hotel and allied operations and are duly recognized by RR No. 13-05 as allowable deductions in determining the gross income subject to 5% SPRT. These expenses are duly substantiated and deductible from revenues derived from petitioner's registered activities with PPMC.[78]

The Court finds against petitioner.

RR No. 13-05 dated April 25, 2005 provides for the list of costs which are allowed as deductions from gross income subject to 5% tax rate, pursuant to RA No. 7227. Specifically, for Service Enterprises like petitioner, the following deductions shall be allowable for the calculation of gross income earned (GIE):

"3. Service Enterprises:

- Direct salaries, wages or labor expense
- Service supervision salaries

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[75] PPFZ Enterprise Certificates Nos. 2007-03 and 2008-03, Exhibit P-3.
[76] THE BASES CONVERSION AND DEVELOPMENT ACT OF 1992.
[77] AN ACT AMENDING REPUBLIC ACT NO. 7227, AS AMENDED, OTHERWISE KNOWN AS THE BASES CONVERSION AND DEVELOPMENT ACT OF 1992, AND FOR OTHER PURPOSES
[78] Pars. 51-54, Petition for Review, Docket (Vol. I), pp. 27-28.

- Direct materials, supplies used
- Depreciation of machineries and equipment used in the rendition of registered services, and of that portion of the building owned or constructed that is used exclusively in the rendition of the registered service
- Rent and utility charges for buildings and capital equipment used in the rendition of registered services
- Financing charges associated with fixed assets used in the registered service business the amount of which were not previously capitalized."

On the other hand, Section 5(a)(2)(iii) of DOF Order No. 3-08, Rules and Regulations to Implement RA No. 9400, an Act Amending RA No. 7227 and creating the Poro Point Freeport Zone, issued in February 13, 2008, which is the applicable ruling being of a later date, expressly provides that **only the following costs of sales/direct costs** shall be allowed as deductions for purposes of calculating the GIE earned by the following Ecozone or Freeport enterprises/industries, as follows:

"iii. Service Enterprises —

- Direct salaries, wages, or labor expenses, inclusive of training directly related to the registered activity;
- Service supervision salaries;
- Direct materials, supplies used;
- Depreciation of machinery, equipment used in the rendition of registered services, and of that portion of the building owned or constructed by the registered enterprise that is used exclusively in the rendition of the registered service;
- Rent and utility charges for buildings and capital equipment used in the rendition of registered services;
- Financing charges associated with fixed assets used in the registered service business the amount of which were not previously capitalized."

Thus, only the above costs are allowed to be deducted from gross income.

Analysis between the Annual ITR and the FLD shows that the following direct costs, aggregating ₱67,551,671.70, were disallowed by respondent:

Direct Costs:	Declared per ITR[79]	Allowed Per FLD	Disallowed Direct Costs
Salaries & employee benefits	₱ 35,575,310.00	₱ 20,828,219.00	₱ 14,747,091.00
Materials, supplies and facilities	25,352,039.00	-	25,352,039.00
Repairs & maintenance	-	-	-
Operating supplies	-	7,967,635.00	(7,967,635.00)
Food, beverage & others	-	3,969,527.00	(3,969,527.00)
Outside services	2,441,302.00	-	2,441,302.00
Entertainment, amusement & recreation (EAR)	-	-	-
Others	8,244,069.00	-	8,244,069.00
Depreciation & amortization	29,404,542.00	700,209.30[80]	28,704,332.70
Total	**₱101,017,262.00**	**₱33,465,590.30**	**₱67,551,671.70**

It was noted that the amounts allowed by respondent as deduction from gross income subject to SPRT were all lifted from petitioner's Audited Financial Statements (AFS).[81]

In his Judicial Affidavit,[82] Mr. Elmer Pedrezuela explained that the difference between direct costs for non-gaming operations per 2008 AFS and per ITR pertains to the [Food & Beverage] F&B Sales in restaurants/bars physically located inside the casino premises. For clarification, it should be noted that, while the Direct Costs as reported in petitioner's 2008 AFS were classified into gaming and non-gaming costs, the basis of classification used therein was the physical location of its income-generating operations as follows:

a. Direct costs incurred within the casino premises/structure, which include the direct costs attributable to casino/gaming operations and F&B sales in restaurants/bars physically located inside the casino premises; and

b. Direct costs incurred within the hotel premises/structure, which include the direct costs attributable to hotel operations and F&B sales in restaurants/bars physically located in the hotel premises.

[79] Schedule of Cost of Sales, Schedule 3, BIR Form No. 1702, Exhibit P-6.
[80] Based on petitioner's General Ledger with Account Code 8600-07-09, BIR Records, Folder 6, p. 401.
[81] Note 10.2, Notes to Financial Statements, Exhibit P-18.
[82] Exhibit "P-29".

Thus, "direct costs incurred within the casino premises/structure" were reported under Direct Costs – Gaming, which included direct costs attributable to F&B sales in restaurants/bars located within the casino premises. As such F&B sales are considered non-gaming revenues, which should be properly included as part of Direct Costs – Non-gaming for income tax purposes.

Accordingly, for tax purposes, only direct costs attributable to purely gaming operations are deducted from the gaming revenues. With respect to non-gaming revenues, direct costs attributable thereto were deducted which include:

a. Direct costs attributable to F&B sales in restaurants/bars physically located inside the casino premises; and

b. Direct costs attributable to hotel operations and F&B sales in restaurants/bars physically located inside the hotel premises.

Therefore, for tax purposes, it is just proper to include the "direct costs attributable to F&B sales in restaurants/bars physically located inside the casino premises" as part of Direct Costs-Non-Gaming, which was reported as part of Direct Costs-Gaming in the AFS.[83]

To simply put Mr. Pedrezuela's explanation, for financial statements purposes, the direct cost allocation is based on the physical location where the services were performed (whether it was inside the casino or hotel premises), regardless of whether it was incurred in pursuit of gaming or non-gaming operations. However, for income tax purposes, the direct cost allocation was based on the nature of the direct cost (whether it was incurred in pursuit of the gaming or non-gaming operations), regardless of the physical location where these services were rendered.

In support of its claimed direct costs per ITR, petitioner submitted documents, such as its journal entry for transfer of salaries & wages to Hotel and Golf operations account[84] and suppliers' invoices and official receipts, check vouchers and other supporting documents[85].

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[83] Q&A No. 74, Judicial Affidavit of Mr. Elmer Pedrezuela, Exhibit "P-29".
[84] Exhibit "P-34".
[85] Exhibits "P-35-1" to "P-35-6" and "P-35-10" to "P-35-4195".

It must be emphasized that petitioner has two operations: gaming and non-gaming, which were declared under the Exempt and Special Columns, respectively, in the ITR. Both operations incurred direct costs respectively which were also declared in the ITR.

Hence, the Court deems it necessary for petitioner to show that its supporting documents actually pertain and are traceable to those direct costs which are being disallowed by respondent under its non-gaming operations. In this regard, petitioner miserably failed.

Petitioner did not bother to lay down the accounts and the corresponding amounts which comprised the direct costs being claimed as deduction from gross income and which the documents purportedly support.

As can be recalled, respondent based its allowable direct costs from those indicated in the AFS. And, to reiterate, petitioner has a different method of classification of direct costs between the AFS and the ITR. While petitioner explained this aspect, it was, however, remiss in providing a reconciliation, in specific accounts and figures, of the difference which arose from the differing classification methods.

The Court is, thus, left at a loss as to the traceability of the supporting documents to the financial balances pertaining to petitioner's non-gaming operations declared for GIT purposes.

For petitioner's failure to satisfactorily discharge its burden of proof as to the direct costs it claims to be deductible, the Court finds it proper to uphold the disallowance made by respondent.

C. Other income (Rental income) - ₱16,846,231.48

In his assessment, respondent made part of the gross income subject to SPRT, the "other operating income" which pertains to the Rental Income received by petitioner during the year.

According to petitioner, the Rental Income of ₱16,846,231.48 pertains to a sub-lease of property by petitioner to Thunderbird Poro Development Ventures, Inc., a domestic corporation registered with

PPMC as a PPFZ enterprise. The property being sub-leased is the same property that is principally being leased by petitioner from PPMC.[86]

Assuming that the rental income earned by TPHRI from the sub-lease rental is subject to SPRT, petitioner claims that it should also be entitled to a proportionate share of the 25-year lease payments to PPMC as an expense deduction in 2008, in the amount of ₱35.5 million which is reported under "general and administrative expenses" in the 2008 AFS. Consequently, since the amount of rental expense is higher than the rental income, no operating income should be subject to any SPRT.[87]

Petitioner's arguments are partially meritorious.

Section 5 of DOF Order No. 3-08, defines **"gross income earned"** as gross sales or gross revenue **derived from business activities within the subject Ecozone or Freeport,** net of sales discounts, sales returns and allowances minus cost of sales or direct costs but before any deduction for administrative, marketing, selling, and/or operating expenses or incidental losses during a given taxable year.

Likewise, RR No. 13-05 defines **"gross income earned"** as gross sales or gross revenues derived from business activity within the Zone, net of sales discounts, sales returns and allowances and minus costs of sales or direct costs but before any deduction is made for administrative, marketing, selling and/or operating expenses or incidental losses during a given taxable period.

Following the above definitions, the income from petitioner's sublease contract was derived within the Freeport zone, hence shall be considered as gross income which must be subject to SPRT.

Petitioner was, however, correct in invoking that the corresponding rent expense incurred in providing said sublease must be deducted from the rental income earned. This is provided in the previously mentioned DOF Order No. 3-08 which allows deduction for rent and utility charges for buildings and capital equipment used in the rendition of its registered services.

[86] Pas. 6.94, Petitioner's Memorandum, Docket (Vol. V), p. 1925.
[87] Q&A No. 77, Judicial Affidavit of Mr. Elmer Pedrezuela, Exhibit "P-29".

As indicated in the FS, petitioner's rental expense recognized during the year with respect to its lease of land from BCDA and PPMC amounts to ₱35,547,344.00, of which the amount of ₱8,377,594.61 is not deductible rent expense for income purposes (as discussed below under B.4 Rent Property-Admin). As such, only the amount of ₱27,169,749.39 may be considered as deductible expense. However, petitioner did not provide how the rental expense of ₱27,169,749.39 was arrived at, thus we cannot ascertain how much of the said rental expense was directly used in the rendition of its registered activity. Consequently, we are constrained to disallow the same as deductible expense from its income subject to SPRT. In view thereof, we shall uphold the assessment subjecting the entire rental income of ₱16,846,231.48 to SPRT.

D. Overpayment per BIR Form 1702 carried over to next period - ₱960,633.00

Respondent disallowed petitioner's total overpayment amounting to ₱960,633.00[88] by adding the same to the latter's tax liability after the former's audit, but did not explain the reason in doing so. The Court can only surmise that the overpayment which was carried over to the succeeding year was disallowed in order to recapture the tax benefit realized by petitioner in carrying the said amount to the succeeding year.

The Court finds it improper for respondent to disallow the said excess tax credits because any tax benefit derived by petitioner from the carry-over of the said amount redounds to the succeeding year 2009. Since the tax benefit will be in the succeeding year, at most, petitioner may only be assessed in the said succeeding year.

In fine, petitioner is found liable for basic deficiency SPRT in the amount of ₱4,421,576.66, computed as follows:

Gross Revenues			₱ 33,507,934.00
Add:	Undeclared Gross Revenues		
	Gross Revenues per Tax Credit Certificates (2307)	₱124,263,552.00	
	Gross Revenues per BIR Form 1702	33,507,934.00	90,755,618.00

[88] Line 33, Exhibit "P-6".

Other Income (Rental Income)		16,846,231.48
Adjusted Gross Revenues		₱ 141,109,783.48
Less: Allowed Deductions under DOF Order No. 03-08		
Salaries & Employee Benefits	₱ 20,828,219.00	
Operating Supplies	7,967,635.00	
Food, Beverage & Others	3,969,527.00	
Depreciation & Amortization	700,209.30	33,465,590.30
Gross Income subject to SPR Tax		**₱107,644,193.18**
Multiply by Special Preferential Tax Rate		5%
Special Preferential Rate (SPR) Tax Due		**₱ 5,382,209.66**
Less: Tax Credits		
Prior Year's Excess Tax Credits	₱ 339,315.00	
Creditable Tax Withheld - 1st to 3rd Quarter	447,749.00	
Creditable Tax Withheld - 4th Quarter	173,569.00	960,633.00
Special Preferential Rate (SPR) Tax Payable		**₱ 4,421,576.66**

It must be noted that the basic SPRT due of ₱4,421,576.66 shall be paid and remitted by petitioner as follows:

a) 3% to the National Government (₱2,652,946.00)
b) 2% to the Local Government Units through the Treasurer's Office of the Municipality or City where the petitioner is located (₱1,768,630.66)

II. Franchise Tax - ₱72,616,423.07

Respondent assessed the Gaming Revenues to be subject to Franchise Tax under Presidential Decree No. 1869, amounting to ₱72,616,423.07 with details as follow:[89]

Gross Revenues - Gaming	₱ 867,061,768.00
Multiply by Franchise Tax Rate	5%
Franchise Tax Due	₱ 43,353,088.40
Less: Tax Paid	
Deficiency Franchise Tax	₱ 43,353,088.40
Add: Interest until August 30, 2012	29,263,334.67
Franchise Tax Payable	**₱ 72,616,423.07**

Petitioner refutes said assessment averring that, being a Licensee of PAGCOR to operate a casino complex within PPSEFZ, the a

[89] Formal Letter of Demand, Exhibit "R-24", BIR Records, Folder 7, p. 393-396.

latter's exemption inures to the benefit of, and extends to, petitioner as provided under PD No. 1869.

According to petitioner, under Section 13(2)(a) of PD No. 1869, PAGCOR is exempt from income and other taxes, except 5% franchise tax on gross revenues or earnings. Moreover, Section 13(2)(b) of PD No. 1869 provides that the exemptions granted to PAGCOR for earnings derived from casino operations shall "inure to the benefit of and extend to corporation(s), association(s), agency(ies), or individual(s) with whom the Corporation (referring to PAGCOR) or operator has any contractual relationship in connection with the operations of the casino(s) authorized to be conducted under its Franchise." Such tax exemption was carried over to RA No. 9487 dated June 20, 2007, which amended the PAGCOR Charter.

Moreover, as insisted and mandated by PAGCOR, all remittances of license fees and franchise tax on gaming revenues should be made through PAGCOR. Accordingly, petitioner has been paying PAGCOR the amount equivalent to 25% of gross gaming revenues, which include 20% license fee and 5% franchise tax, which PAGCOR was obligated to remit to the BIR for and on behalf of petitioner.

Considering that the 5% tax was computed based on "gross gaming revenues", the remittance of such tax to PAGCOR already covers tax on both PAGCOR's and petitioner's shares in the earnings. Effectively, therefore, there is no deficiency FT to speak of as the 5% tax was duly remitted to PAGCOR and subsequently, to the government covering both petitioner's and PAGCOR's gaming revenues.[90]

Petitioner's contentions are bereft of merit.

The License[91] granted by PAGCOR to petitioner states:

> "**9. LICENSE FEE**. As an essential condition for this License issued by PAGCOR to THUNDERBIRD PILIPINAS to establish and operate a casino at the PPSEFZ, THUNDERBIRD PILIPINAS must remit to

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[90] Pars.6.100 to 6.102, b. Deficiency Franchise Tax, Petitioner's Memorandum, Docket (Vol. VI), pp. 1926-1927.
[91] Exhibit "P-4".

PAGCOR starting from the date the casino commences operations, the following:

> Twenty five percent 25% of the monthly aggregate gross gaming revenue of the FIESTA CASINO excluding junket/chipwashing operations plus 25% of the monthly gross gaming revenue generated from third-party chipwashing and/or junket operations;
>
> \- or -
>
> a Monthly Minimum License Fee of UNITED STATES DOLLARS: SEVENTY FIVE THOUSAND (US$75,000.00) for the first six (6) months period of operation, whichever is higher. The Monthly Minimum License Fee shall be increased to UNITED STATES DOLLARS: ONE HUNDRED TWENTY FIVE THOUSAND (US$125,000.00) for the next six (6) month period.
>
> The Monthly Minimum License Fee shall be increased by five percent (5%) per year on the start of the second year of operation and every year thereafter."

The Court does not agree with the petitioner's argument that its payment of 25% includes 20% license fee and 5% franchise tax. The 25% license fee/gross gaming revenue paid by petitioner is different and distinct from the franchise tax to which petitioner is being assessed. As clearly stated in its License, the 25% of the gross gaming revenue is being paid by virtue of the License to establish and operate a casino at the PPSEFZ. Nothing in the terms of the License show that such includes 5% franchise tax from its gaming operations.

Further, PAGCOR's Official Receipts and Daily Collection Report[92] do not show any breakdown for the 25% PAGCOR's share remitted daily by petitioner. Neither did petitioner show any proof that PAGCOR remitted the corresponding 5% franchise tax it collected from petitioner.

Since there was no substantial evidence nor argument presented by petitioner to bolster the same, the Court shall uphold the assessment of the respondent.

III. Expanded Withholding Tax (EWT) - ₱35,911,478.50

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[92] Exhibits "P-32-1" to "P-32-678".

Respondent's audit findings show that in line with Section 2.57.2 (A) & (B) of RR No. 2-98, as amended by RR No. 30-2003, payments for professional services rendered by individuals and juridical persons shall be subjected to EWT. Fifteen percent (15%), if the gross income for the current year exceed ₱720,000.00; and Ten Percent (10%), if otherwise. Under RR No. 30-2003, every individual, professional/talent/corporate directors shall periodically disclose his gross income for the current year to the BIR by submitting a notarized sworn declaration, otherwise such income payments shall be subjected to fifteen percent (15%) EWT rate. In the absence of any showing to the contrary, the fifteen percent (15%) EWT rate was imposed on said income payments.

Under Section 2.57.2 (C) of RR No. 2-98, as amended by RR No. 14-2002 and RR No. 17-2003, Rent expenses were subjected to five percent (5%) EWT.

Under Section 2.57.2 (E) of RR No. 2-98, as amended by RR No. 30-2003, income payments to contractors were subjected to two percent (2%) EWT.

Further, the total EWT remitted, except for the amount remitted related to income payment named as "Income Distribution to Beneficiaries of Estates" for which EWT of ₱80,294.13 was remitted, was considered in computing the deficiency EWT. Since there is no clear showing that the "Income Distribution to Beneficiaries of Estates" has been included in the expenses declared in the Income Statement for the year under audit, the related expanded withholding tax remitted thereon was not included as part of the amount deducted from the EWT due to determine the amount of deficiency.

Moreover, increments on the late filing of November EWT Return was made part of the assessment.[93]

Respondent's assessment for deficiency EWT was computed as follows:

[93] Formal Letter of Demand, Exhibit "R-24", BIR Records, Folder 7, pp. 391-396.

Particulars	**Amount**	**EWT Rate**	**EWT Due**
* Expenses subject to 2%	₱ 29,535,724.28	2%	₱ 590,714.49
* Expenses subject to 5%	45,915,923.61	5%	2,295,796.18
Expenses subject to 10% (commission)	255,923.63	10%	25,592.36
* Expenses subject to 15%	133,065,176.73	15%	19,959,776.51
Expanded withholding tax due			22,871,879.54
Less: Expanded withholding tax remitted			2,113,670.27
Deficiency expanded withholding tax			20,758,209.27
Add: Interest until August 30, 2012			15,049,701.72
Increments on late filing of November return**			103,567.51
Expanded withholding tax payable			**₱35,911,478.50**

**see Schedule A*

***Increments for late filing of November return:*

Tax base	₱320,995.26
Surcharge	₱ 80,248.82
Interest	7,318.69
Compromise penalty	16,000.00
Total increments payable	₱ 103,567.51

Schedule A

Account Name	*Amount*	*2%*	*5%*	*15%*
Equipment Rental-Slots	₱ 9,848,959.20		₱ 9,848,959.20	
Equipment Rental-Golf	519,620.00		519,620.00	
Outside Services-Security	5,547,544.11	₱ 5,547,544.11		
Outside Services-Maintenance & Housekeeping	156,400.02	156,400.02		
Outside Services-Golf Operations	650,137.23	650,137.23		
Outside Services-Security (Hotel)	1,256,392.77	1,256,392.77		
Outside Services-Laundry (Hotel)	14,852.00	14,852.00		
Consulting Fees-Security	535,294.13			₱ 535,294.13
Advertising-Promotions (Golf)	675,603.66	675,603.66		
Advertising-Promotions (Hotel)	1,212,495.51	1,212,495.51		
Outside Services-Human Resources	386,751.27	386,751.27		
Outside Services-General Administration (Hotel)	15,000.00	15,000.00		
Professional Fees	68,575.00			68,575.00
Professional Fees-HRD	180,000.00			180,000.00
Professional Fees-Marketing	266,666.64			266,666.64
Professional Fees-General and Admin (Hotel)	517,596.31			517,596.31
Accounting Fees-General Administration	1,321,640.45			1,321,640.45

Legal-General Administration	507,713.17			507,713.17
Legal-General Administration (Hotel)	1,473,242.17			1,473,242.17
Director and Other Fees	1,769,672.86			1,769,672.86
Advertising (Promotions/Outdoor)	721,914.86	721,914.86		
Newspaper-Marketing	69,750.00	69,750.00		
Other-Marketing	155,167.34	155,167.34		
Marketing-FCC Casino	124,073.93	124,073.93		
Design-Marketing	554,726.02	554,726.02		
Give Away-Marketing	228,148.95	228,148.95		
Rent-Property Admin	27,169,749.80		27,169,749.80	
Rent-Property Admin (Straight Line Method)	8,377,594.61		8,377,594.61	
Courier/Postage-Admin	57,348.54	57,348.54		
Courier/Postage-Accounting (Hotel)	1,833.48	1,833.48		
Shipping and Freight Charges-Administrative	84,042.11	84,042.11		
Management Fee	206,238,123.84			126,424,776.00
Outside Service-fee	17,623,542.48	17,623,542.48		
Total Taxable Amount per Audit	***₱288,330,172.46***	***₱29,535,724.28***	***₱45,915,923.61***	***₱133,065,176.73***

Based on records, the above accounts and amounts were lifted by respondent from petitioner's General Ledger of All Revenues and Expenses[94].

A. Expenses of ₱29,535,724.28 subject to 2% - ₱590,714.49

Respondent assessed 2% deficiency EWT on petitioner's income payments mostly classified as outside services, advertising and marketing expenses and service fees in the total amount of ₱29,535,724.28, detailed as follows:

Item No.	**Account Name**	**Amount**
A.1	Outside Services-Security	₱5,547,544.11
A.2	Outside Services-Maintenance & Housekeeping	156,400.02
A.3	Outside Services-Golf Operations	650,137.23
A.4	Outside Services-Security (Hotel)	1,256,392.77

[94] BIR Records, Folder 6, pp. 400-408.

A.5	Outside Services-Laundry (Hotel)	14,852.00
A.6	Advertising-Promotions (Golf)	675,603.66
A.7	Advertising-Promotions (Hotel)	1,212,495.51
A.8	Outside Services-Human Resources	386,751.27
A.9	Outside Services-General Administration (Hotel)	15,000.00
A.10	Advertising (Promotions/Outdoor)	721,914.86
A.11	Newspaper-Marketing	69,750.00
A.12	Other-Marketing	155,167.34
A.13	Marketing-FCC Casino	124,073.93
A.14	Design-Marketing	554,726.02
A.15	Give Away-Marketing	228,148.95
A.16	Courier/Postage-Admin	57,348.54
A.17	Courier/Postage-Accounting (Hotel)	1,833.48
A.18	Shipping and Freight Charges-Administrative	84,042.11
A.19	Outside Service-fee	17,623,542.48
	Total	**₱29,535,724.28**

Petitioner claims that it faithfully withholds 2% EWT on all income payments to various contractors, advertising agencies, security agencies, janitorial and housekeeping agencies and other income payments that are subject to EWT as enumerated under RR No. 2-98, as amended.

Petitioner argues that some of the items which were assessed 2% deficiency EWT are not subject to EWT, such as: (a) payment for services rendered outside the Philippines; (b) petty cash replenishments, representing reimbursement of minor business expenses to employees; (c) reimbursement of allocated expenses at cost to an affiliate; and (d) purchases of goods and not services that are not subject to EWT, on the ground that petitioner was not classified as one of the "Top 20,000 Private Corporations" in 2008.

Petitioner's arguments are untenable.

At the outset, respondent's assessment on expenses subject to 2% EWT was based on Section 2.57.2(E) of RR No. 2-98, as amended by RR No. 30-2003, stating that income payments to certain contractors, whether individual or corporate, is subject to 2% withholding tax, irrespective of whether or not it was notified as one of the top 20,000 private corporations.

Moreover, it can be observed from the Monthly Remittance Returns of Creditable Income Taxes Withheld (Expanded) (BIR Form 1601-E) for the year 2008[95] that petitioner withheld taxes on its income payments to its local/resident supplier of goods with ATC Code WC 158. This only shows that petitioner, as of the year 2008, is already classified as one of the top 10,000 corporations, albeit, it was only in 2009 that it was classified as one of the top 20,000 corporations[96].

As mentioned, petitioner withheld 2% on its payments to prime contractors/sub-contractors, with ATC Code WC 120, amounting to ₱232,249,577.94, and duly remitted the corresponding EWT amounting to ₱4,644,991.56, detailed as follows:

Month	Income Payment	EWT
January	₱20,319,016.50	₱406,380.33
February	24,483,642.00	489,672.84
March	27,045,220.00	540,904.40
April	17,976,625.44	359,532.51
May	18,069,498.00	361,389.96
June	11,922,061.00	238,441.22
July	12,555,273.00	251,105.46
August	14,896,976.50	297,939.53
September	34,584,304.50	691,686.09
October	38,225,957.50	764,519.15
November	3,569,186.00	71,383.72
December	8,601,817.50	172,036.35
Total	**₱232,249,577.94**	**₱4,644,991.56**

As can be noticed, the above amount of income payments subjected by petitioner to EWT is higher than the amount being subjected by respondent to 2% EWT by ₱202,713,853.66 (₱232,249,577.94 – ₱29,535,724.28).

However, petitioner did not offer its Alphalist of Payments subject to EWT for the year 2008, thus, we cannot ascertain whether the income payments being subjected by respondent to 2% EWT are part of the income payments already subjected by petitioner to 2% EWT. Also, petitioner failed to substantiate with documentary evidence the foregoing expenses amounting to ₱29,535,724.28. Thus, the Court could not verify the actual nature of the said expenses.

[95] Exhibit "P-7".
[96] Exhibit "P-22".

Consequently, respondent's deficiency EWT assessment pertaining thereto shall be sustained.

B. Expenses of ₱45,915,923.61 subject to 5% - ₱2,295,796.18

Respondent subjected the following rentals for deficiency EWT at 5%:

Item No.	Account Name	Amount per FLD
B.1	Equipment Rental-Slots	₱ 9,848,959.20
B.2	Equipment Rental-Golf	519,620.00
B.3	Rent-Property Admin	27,169,749.80
B.4	Rent-Property Admin (Straight Line Method)	8,377,594.61
	Total	**₱ 45,915,923.61**

Based on petitioner's BIR Forms 1601-E in 2008[97], it withheld 5% on its payments on rentals, with ATC Code WC100, amounting to ₱25,619,016.40, and remitted the corresponding EWT amounting to ₱1,280,950.82, with monthly details as follows:

Month	Income Payment	EWT
January	₱ 3,685,513.40	₱ 184,275.67
February	2,254,696.40	112,734.82
March	2,524,426.80	126,221.34
April	1,725,241.80	86,262.09
May	2,535,655.40	126,782.77
June	2,752,343.20	137,617.16
July	1,633,327.00	81,666.35
August	1,515,008.80	75,750.44
September	1,711,466.80	85,573.34
October	1,605,245.80	80,262.29
November	1,765,611.80	88,280.59
December	1,910,479.20	95,523.96
Total	**₱ 25,619,016.40**	**₱ 1,280,950.82**

However, petitioner did not offer in evidence its Alphalist of Payments subject to EWT for 2008, thus, the Court cannot ascertain whether the income payments being subjected by respondent to 5% EWT are part of the income payments already subjected by petitioner to 5% EWT.

[97] Exhibit "P-7".

Nevertheless, the Court shall determine, based on available documents, whether or not the whole amount assessed by respondent shall be subject to deficiency EWT.

B.1 Equipment Rental-Slots - ₱9,848,959.20

Petitioner's records show that rentals for slot machines amounting to ₱9,848,959.20 due to IGT Asia Ltd. were mere accruals for the year 2008.[98] It was found that these accruals were not subjected to EWT.

Petitioner asserts that these rentals pertain to payments made to IGT Asia – Macau Lda. for maintenance services of gaming software installed in slot machines. These fees are clearly payment for services and not rentals of equipment. Petitioner adds that the slot machines are actually owned by petitioner and not rented from IGT Asia.

Petitioner's argument is unmeritorious.

While petitioner argues that the fees paid to IGT Asia were for the services rendered and not for the rent of machines, the former failed to show proof of any service agreement to that effect.

Also, petitioner did not present any proof that IGT Asia is a non-resident foreign corporation for us to rule that the services are not subject to any EWT.

Thus, without sufficient documents to refute respondent's assessment, the Court shall not disturb the same.

B.2 Equipment Rental-Golf - ₱519,620.00

Petitioner did not submit the breakdown for the above expense and any supporting documents to substantiate the same. Thus, the

[98] Annex N-10 of ICPA Report, Exhibit "P-38".

findings of the examiner shall be upheld, in line with the principle that tax assessments by tax examiners are presumed correct and made in good faith, and all presumptions are in favor of the correctness of a tax assessment unless proven otherwise.[99] Failure to present proof of error in the assessment will justify the judicial affirmance of said assessment.[100]

B.3 Rent Property-Admin - ₱27,169,749.80

Petitioner alleges that the rental payments of ₱27,169,749.80 were made to the following:[101]

Laigo's Residential	₱ 756,000.00
PPMC/BCDA	16,578,139.80
PPMC/BCDA	8,679,618.00
PPMC/BCDA	685,992.00
Metrobank Corporation	470,000.00
Total	**₱ 27,169,749.80**

Petitioner claims that its rental expense of ₱25,943,749.80 pertains to lease of properties by petitioner from BCDA and PPMC, which are the governing bodies over PPFZ. Pursuant to RMC No. 27-07 dated April 16, 2007, any income of BCDA/PPMC from lease of properties is subject to preferential tax rate of 5% on gross income. Petitioner argues that the income payments made to entities located within the ecozones and entitled to preferential tax rates are not subject to EWT. Thus, rental payments made by petitioner to BCDA/PPMC are not subject to EWT.[102]

The Court agrees with petitioner.

Section 2.57.5 of Revenue Regulations No. 2-98, as amended, provides:

> "**Section 2.57.5.** ***Exemption from Withholding.*** — The withholding of creditable withholding tax prescribed in these

[99] *Commissioner of Internal Revenue vs. Hon. Raul M. Gonzales, et al.,* G.R. No. 177279, October 13, 2010.
[100] *Marcos II vs. Court of Appeals, et al.*, G.R. No. 120880, June 5, 1997.
[101] ICPA Report, Exhibit "P-38", Docket (Vol. IV), pp. 1432-1457.
[102] Par. 6.111, Petitioner's Memorandum, Docket (Vol. V), p. 1929.

> Regulations shall not apply to income payments made to the following:
>
> xxx xxx xxx
>
> (B) Persons enjoying exemption from payment of income taxes pursuant to the provisions of any law, general or special, such as but not limited to the following:
>
> xxx xxx xxx"

Based from the foregoing and pursuant to RMC No. 27-07, petitioner's rental payment to BCDA/PPMC, as a governing body of the PPFZ which is entitled with the same tax incentives enjoyed by petitioner, is exempted from withholding.

As for the rest amounting to ₱1,226,000.00 (₱756,000.00 + ₱470,000.00), no supporting documents were submitted by petitioner to substantiate the same wherein the Court can verify the nature of the said expense. As such, the assessment over them must be upheld.

B.4 Rent Property-Admin (Straight-Line Method) - ₱8,377,594.61

Petitioner submits that the amount of rent expense booked in its 2008 books of accounts includes "deferred rent expense" account in the amount of ₱8,377,595.00 which was recorded as expense in the books of petitioner purely for compliance with Philippine Accounting Standards (PAS) 17 on Leases but was not claimed as expenses for income tax purposes. In fact, the deferred rent expense appears as a reconciling item in the Annual ITR for 2008,[103] which proves that the same was not actually deducted for income tax purposes. Hence, these rental payments to BCDA/PPMC, which were not paid nor deducted as an expense in 2008, are not subject to deficiency EWT.

The Court agrees with petitioner.

Section 2.57.4 of RR No. 2-98, as amended, prescribes the time of withholding of the subject EWT as follows:

[103] Line 121, Section E, BIR Form No. 1702, Exhibit P-6.

> "Sec. 2.57.4. *Time of withholding.* - The obligation of the payor to deduct and withhold the tax under Section 2.57 of these Regulations arises at the time an income payment is paid or payable, or the income payment is accrued or recorded as an expense or asset, whichever is applicable, in the payor's books, whichever comes first. The term 'payable' refers to the date the obligation becomes due, demandable or legally enforceable.
>
> Provided, however, that where income is not yet paid or payable but the same has been recorded as an expense or asset, whichever is applicable, in the payor's books, the obligation to withhold shall arise in the last month of the return period in which the same is claimed as an expense or amortized for tax purposes.

Accordingly, petitioner is required to withhold EWT on its rental when it is either paid, becomes payable or was accrued or claimed as expense for income tax purposes, whichever comes first.

Petitioner had not yet paid this deferred rent and proved that such amount was not claimed as an expense for income tax purposes in 2008 albeit presented as an expense for financial statement purposes in compliance with PAS 17. Thus, pursuant to Section 2.57.4 of RR No. 2-98, petitioner is not mandated to withhold 5% EWT on the Deferred Rent of ₱8,377,594.61, and the same shall be deducted from the assessment.

In summary, the Court finds petitioner liable for deficiency EWT on the rentals of ₱11,594,579.20, as detailed below:

Item No.	**Account Name**	**Amount to be Assessed**
B.1	Equipment Rental-Slots	₱ 9,848,959.20
B.2	Equipment Rental-Golf	519,620.00
B.3	Rent-Property Admin	1,226,000.00
	Total	**₱ 11,594,579.20**

C. Expenses of ₱255,923.63 subject to 10% (commission) - ₱25,592.36

Based on the FAN, the alleged deficiency EWT subject to 10% withholding tax rate pertains to commission expense. Respondent, however, failed to sufficiently explain how the amount of ₱255,923.63 as basis for alleged 10% EWT was arrived at. Absent additional information, petitioner is unable to properly address, much less, refute the foregoing findings.[104]

The Court agrees with petitioner.

An examination of the BIR Records does not show any trace as to how the amount was derived by respondent nor was there any commission expense claimed in the financial statements and ITR for the year 2008.

Further, the FLD did not lay down the legal basis for assessing the said amount. As such, the Court cannot as well determine the propriety of the assessment. Hence, the assessment for deficiency EWT pertaining thereto shall be cancelled.

D. Expenses of ₱133,065,176.73 subject to 15% - ₱19,959,776.51

Respondent subjected the following amounts to deficiency EWT at 15%:

Item No.	Account Name	Amount per FLD
D.1	Consulting Fees-Security	₱ 535,294.13
D.2	Professional Fees	68,575.00
D.3	Professional Fees-HRD	180,000.00
D.4	Professional Fees-Marketing	266,666.64
D.5	Professional Fees-General and Admin (Hotel)	517,596.31
D.6	Accounting Fees-General Administration	1,321,640.45
D.7	Legal-General Administration	507,713.17
D.8	Legal-General Administration (Hotel)	1,473,242.17
D.9	Director and Other Fees	1,769,672.86
D.10	Management Fee	126,424,776.00
		₱ 133,065,176.73

BIR Forms 1601-E[105] of petitioner reveal that it withheld 10% on its payments to professionals and remitted the corresponding EWT of ₱883,877.53, with monthly details as follows:

[104] Par. 6.110, Petitioner's Memorandum, Docket (Vol. V), p. 1929.
[105] Exhibit "P-7".

Taxable Year 2008	**Professionals – ATC WI 010 - 10%**	
Month	**Income Payment**	**EWT**
January	₱ 418,812.70	₱ 41,881.27
February	116,000.00	11,600.00
March	110,243.10	11,024.31
April	1,816,137.10	181,613.71
May	391,666.70	39,166.67
June	187,000.00	18,700.00
July	1,392,647.90	139,264.79
August	10,000.00	1,000.00
September	1,708,175.30	170,817.53
October	652,804.90	65,280.49
November	747,222.30	74,722.23
December	1,288,065.30	128,806.53
Total	**₱ 8,838,775.30**	**₱ 883,877.53**

As can be noticed on its returns, petitioner only withheld 10% on its payments to professionals and its directors.

However, petitioner did not offer its Alphalist of Payments subject to EWT for 2008. Hence, the Court cannot verify whether or not the amounts specifically assessed by respondent to 15% deficiency EWT were already included in the amounts declared in the returns which were subjected to 10% EWT.

At any rate, the Court shall determine whether or not the whole amount assessed by respondent must be subject to deficiency EWT. The rate of 15% shall be imposed on professional income in the absence of proof that it submitted the June 30 annual declaration/disclosure of gross income to the BIR, and furnished petitioner the copy thereof, in accordance to Section 2.57.2(A) of RR No. 2-98, as amended.

D.1 Consulting Fees-Security - ₱535,294.13

The consultancy fees of ₱535,294.13 was allegedly paid to Roberto Ortega[106], but no documents were submitted to support the

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[106] ICPA Report, Exhibit "P-38", Docket (Vol. IV), p. 1453.

same. Hence, the Court cannot verify the proper tax implications of the said transactions. As such, the assessment over it must be upheld.

D.2 Professional Fees - ₱68,575.00

The professional fees of ₱68,575.00 was allegedly paid to EM Zalamea Actuarial Services.[107] However, no supporting documents were offered to substantiate the same. Thus, the Court upholds the assessment.

D.3 Professional Fees-HRD - ₱180,000.00

The Professional Fees-HRD of ₱180,000.00 was allegedly paid to Dr. Eva Marie M. Dayag.[108] However, no supporting documents were offered to substantiate the same. Thus, the Court upholds the assessment.

D.4 Professional Fees - Marketing - ₱266,666.64

The Professional Fees-Marketing was allegedly paid to Cosmopolitan Promotion and Casting.[109] However, no supporting documents were offered to substantiate the same. Thus, the Court upholds the assessment.

D.5 Professional Fees-General and Admin (Hotel) - ₱517,596.31

No supporting documents were offered to substantiate the above fees of ₱517,596.31. Likewise, petitioner failed to identify the person/entity to whom the same were paid. Hence, the assessment shall not be disturbed.

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[107] ICPA Report, Exhibit P-38, Docket (Vol. IV), p. 1453.
[108] ICPA Report, Exhibit P-38, Docket (Vol. IV), p. 1453.
[109] ICPA Report, Exhibit P-38, Docket (Vol. IV), p. 1453.

D.6 Accounting Fees-General Administration - ₱1,321,640.45 and Legal-General Administration - ₱507,713.17

Petitioner alleges that the Accounting Fees-General Administration of ₱1,321,640.45 and Legal-General Administration of ₱507,713.17 were made to the following, which are General Professional Partnerships (GPPs) not subject to EWT:

Accounting-Fees – General Administration	**Amount**
Punongbayan & Araullo (P&A)	₱ 952,592.95
SGV & Co.	369,047.50
Total	**₱ 1,321,640.45**

Legal – General Administration	**Amount**
Reyes Cabrera and Associates	₱ 307,873.60
Atty. Felomino Balbin	120,000.00
Fortun and Narvasa	79,839.57
Total	**₱ 507,713.17**

Section 26 of the NIRC of 1997, as amended, and Section 2.57.5 of RR No. 2-98, as amended, explicitly exempt income payments made to a general professional partnership from income tax and consequently from expanded withholding tax, to wit:

> "**SEC. 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."
>
> ***"Sec. 2.57.5. Exemption from withholding*** – The withholding of creditable withholding tax prescribed in these Regulations shall not apply to income payments made to the following:
>
> xxx xxx xxx
>
> (B) Persons enjoying exemption from payment of income taxes pursuant to the provisions of any law, general or special, such as but not limited to the following:
>
> xxx xxx xxx
>
> (4) General professional partnerships."

However, petitioner failed to provide documents to support the alleged payments made, thus, the Court cannot ascertain whether the alleged fees were indeed made to the GPPs. Consequently, the assessment shall remain.

D.7 Legal - General Administration (Hotel) - ₱1,473,242.17

No supporting documents were offered to substantiate the above fees of ₱1,473,242.17. Likewise, petitioner failed to identify the person/entity to whom the same were paid. Hence, the assessment shall not be disturbed.

D.8 Director and Other Fees - ₱1,769,672.86

The Director and Other Fees of ₱1,769,672.86 were allegedly paid to the following:[110]

Shaun Thomsen	₱ 680,636.91
Fabio Moretti	604,214.25
Rudy Van Der Veen	262,382.12
Coralyn Cullado	222,439.58
Total	**₱ 1,769,672.86**

However no supporting documents were offered to substantiate the same, thus, the Court upholds the assessment.

D.9 Management Fee - ₱126,424,776.16

Petitioner alleges that the Management Fees of ₱126,424,776.16 pertain to payments made to the following:[111]

Thunderbird Poro Point Ltd. (TPPL)	₱ 90,485,744.46
Thunderbird Resorts Inc. (TRI)	35,939,031.70

[110] ICPA Report, Exhibit "P-38", Docket (Vol. IV), p. 1453.
[111] ICPA Report, Exhibit "P-38", Docket (Vol. IV), pp. 1432-1457.

Total	**₱ 126,424,776.16**

Petitioner contends that these management fees pertain to consultancy services in connection with casino operations rendered outside the Philippines.

Allegedly, TPPL and TRI are non-resident foreign corporations not doing business in the Philippines; TPPL and TRI are both foreign corporations organized and existing under the laws of British Virgin Islands.

Further, the services performed by TPPL and TRI were all rendered abroad. Their work products, usually in the form of confidential documents were delivered electronically and/or by courier. In some instances, consultancy services were rendered through teleconference and e-mail correspondences.

Under the source rules of the Philippine taxation, the situs of income derived from the performance of services is the place where the services are performed. Thus, if the services are performed in the Philippines, income derived therefrom is treated as income from sources within the Philippines. Conversely, income derived from services rendered outside the Philippines is treated as income from sources outside the Philippines. Hence, payments to TPPL and TRI for services rendered abroad are not considered Philippine-source income and are not subject to EWT.[112]

The Court does not subscribe.

Section 23(F) of the NIRC of 1997, as amended, in relation to Section 42(A) of the same Code, states that a foreign corporation, whether engaged or not in trade or business in the Philippines, is taxable only on income derived from sources within the Philippines.

To clearly establish non-liability of the petitioner, the Court finds support in the "Source of Income" doctrine. In the case of *CIR vs. Baier-Nickel, GR No. 153793, August 29, 2006*, the "source of income" was explained by the Supreme Court, as follows:

[112] Pars. 6.104 to 6.107, Petitioner's Memorandum, Docket (Vol. V), pp. 1927-1928.

> xxx "**source of income" relates to the property, activity or service that produced the income.** With respect to rendition of labor or personal service, as in the instant case, **it is the place where the labor or service was performed that determines the source of the income.** There is therefore no merit in petitioner's interpretation which equates source of income in labor or personal service with the residence of the payor or the place of payment of the income.
>
> xxx xxx xxx
>
> **The decisive factual consideration here is not the capacity in which respondent received the income, but the sufficiency of evidence to prove that the services she rendered were performed in Germany**. Though not raised as an issue, the Court is clothed with authority to address the same because the resolution thereof will settle the vital question posed in this controversy." *(Emphasis and underscoring provided)*

Analyzing the evidence presented by petitioner,[113] the Court is not convinced that the subject services were indeed performed outside the Philippines.

For the alleged services rendered by TPPL, i.e., TPPL allegedly acts as the group services headquarters and provides financial and information technology related services to petitioner, no documentary evidence was presented to prove that the same were indeed performed outside the Philippines. Also, petitioner failed to prove that TPPL is a non-resident foreign corporation. Hence, the management fees accruing thereto shall be subject to EWT.

On the other hand, TRI allegedly provides, among others, consultancy services/advice in connection with the development, design and operation of the Fiesta Casino and Resort in Poro Point, La Union.

While TRI's office is not in the Philippines, the actual services can actually be performed here in the Philippines, considering that the

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[113] Exhibits "P-24" and "P-36-691" to "P-36-735".

subject of the service, which is the Casino, is actually located in the Philippines.

Further, admitted in the redirect examination of Mr. Angel Sueiro, Chief Operating Officer of petitioner, in the July 2, 2014 hearing, that he frequently visited Philippines in 2008 to perform certain tasks, which formed part of the Casino Consultancy Management Agreement, to wit:

ATTY. SARMIENTO:
Thank you, your Honors.

Q Mr. witness, I would like to clarify the position that you have stated in Question wherein you stated that you were the CEO of the Company since 2013, can you further clarify to this Honorable Court to **what company or entity do you belong during the year of 2008** or with the pendency of this case?

A **TRI.**

xxx xxx xxx

Q Ok, so what is your position in TRI?
A I was the Vice President of the Corporation, on the Multi National Corporation.

Q So **what is your participation with the petitioner** Thunderbird Pilipinas Hotel and Resorts, Inc. during that year?

A **At that time I was travelling often to the Philippines to assist clerical operation** basically on management functions also on several procedures, auto procedures and operation procedures and also standard and practices & manners.

xxx xxx xxx

JUSTICE CASTAÑEDA:
Clarificatory, with respect to the management and consultancy agreement here, **were the services you are providing them form part of the management and consultancy services**?

WITNESS:
At that time, yah I was traveling and part of my functions was advised to the local operations to follow up the corporate procedures that we established in different countries.

JUSTICE CASTAÑEDA:
That includes the petitioner here?

WITNESS:
Yah.[114] *(Emphasis supplied)*

Verily, these statements by petitioner's witness confirmed that the services performed by TRI were done in the Philippines.

As for the amount of payments made, it was sufficiently established in petitioner's AFS that the amounts subject of assessment were paid to TPPL and TRI, respectively.[115]

However, Section 2.57.1(I) of RR No 2-98, as amended, provides that income derived from all sources within the Philippines by nonresident foreign corporations shall be subject to final withholding tax based on the gross amount of income.

Thus, finding respondent's assessment for deficiency EWT on petitioner's payment to non-resident foreign corporation TRI misplaced, the assessment shall be cancelled. Consequently, only the management fees made to TPPL in the amount of ₱90,485,744.46 shall be subject to 15% EWT.

In view of the foregoing, petitioner shall be held liable for 15% deficiency EWT on the income payments of ₱97,126,145.03, as shown below:

Item No.	**Account Name**	**Base Amount**
D.1	Consulting Fees-Security	₱ 535,294.13
D.2	Professional Fees	68,575.00
D.3	Professional Fees-HRD	180,000.00
D.4	Professional Fees-Marketing	266,666.64
D.5	Professional Fees-General and Admin (Hotel)	517,596.31
D.6	Accounting Fees-General Administration	1,321,640.45
D.7	Legal-General Administration	507,713.17
D.8	Legal-General Administration (Hotel)	1,473,242.17
D.9	Director and Other Fees	1,769,672.86
D.10	Management Fee	90,485,744.46
	Total	**₱ 97,126,145.19**

[114] TSN of Hearing dated July 2, 2014, pp. 11-12.
[115] Note 16.1, Notes to Financial Statements, Exhibit "P-18".

E. Increments for the late filing of November Returns - ₱103,567.51

Since petitioner timely filed its original November 2008 EWT return on December 10, 2008, with the corresponding payment via BTR-BIR Deposit, made on the same day,[116] the Court finds it incorrect for respondent to pronounce petitioner liable for increments for the alleged late filing of its November 2008 EWT return, based on the filing of the amended return on January 21, 2009.[117] Thus, the same shall be cancelled.

In view of the foregoing, the Court finds petitioner liable for basic deficiency EWT in the reduced amount of ₱13,625,694.93, computed as follows:

Particulars	**Amount**	**EWT Rate**	**EWT Due**
Expenses subject 2%	₱29,535,724.28	2%	₱ 590,714.49
Expenses subject 5%	11,594,579.20	5%	579,728.96
Expenses subject 15%	97,126,145.19	15%	14,568,921.78
Total EWT			₱ 15,739,365.23
Less: Expanded withholding tax remitted			2,113,670.27
Basic Deficiency EWT			**₱13,625,694.96**

IV. Final Withholding Tax (FWT) - ₱13,767,802.53

Respondent's verification disclosed that disbursement for Management Fees – Regional Operating Headquarters was not subjected to FWT, hence, made part of the assessment.[118]

Management Fees - Regional Operating Headquarters	₱ 79,813,348.00
Dividends	6,356,066.40
Total Taxable Disbursements	86,169,414.40
Multiply by Tax Rate	10%
Final Withholding Tax Due	8,616,941.44

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[116] Exhibit "P-7".
[117] BIR Records, Folder 6, pp. 234-235.
[118] Formal Letter of Demand, Exhibit "R-24", BIR Records, Folder 7, pp. 391-396.

Less: Tax Remitted	635,606.64
Deficiency final withholding tax	7,981,334.80
Add: Interest until August 30, 2012	5,786,467.73
Final Withholding Tax Payable	**₱ 13,767,802.53**

Petitioner posits that the management fees amounting to ₱79,813,348.00[119] were paid to South American Entertainment Corporation II Ltd. - Regional Operating Headquarters ("SAEC-ROHQ").[120] Accordingly, under Section 28(A) of the NIRC of 1997, SAEC-ROHQ, as an ROHQ, is classified as a resident foreign corporation and is entitled to the 10% preferential tax on its taxable/net income. Hence, subjecting ROHQ's income to FWT, which is imposed on gross income, would negate the preferential tax rate enjoyed by ROHQs under the law. Moreover, there is no requirement for withholding taxes for income payments to ROHQs under RR No. 2-98, as amended, nor in any other law or regulation.[121]

The Court agrees with petitioner.

SAEC-ROHQ is a regional operating headquarters registered with SEC pursuant to the Omnibus Investments Code of 1987 (OIC)[122], with Company Registration No FS200617210 issued on November 3, 2006. It is engaged in general administration and planning; business planning and coordination; sourcing and procurement of raw materials and components; corporate finance advisory services; marketing control and sales promotion; training and personnel management; logistic services; research and development services and product development; technical support and maintenance; data processing and communications; and business development.[123]

Under Chapter IV, Article 64 of EO 226, as amended by RA 8756, ROHQs are subject to a tax rate of 10% of their taxable income as provided for under the NIRC. Likewise, Part IV, Rule XVII(E), Section 13 of the rules and regulations implementing RA 8756 (IRR) provides that income derived by ROHQs from performing the qualifying services shall be subject to the preferential rate of 10% on taxable income in accordance with the provisions of the NIRC, as amended.

[119] Note 16.1, Notes to Audited Financial Statements, Exhibit "P-18".
[120] Note 20.2, Notes to Audited Financial Statements, Exhibit "P-18".
[121] Pars. 119 to 120, Petition for Review, Docket (Vol I), p. 41.
[122] EO 226, as amended by RA 8756.
[123] Exhibit "P-23".

On the other hand, Section 28(A)(6)(b) of the Tax Code, as amended, provides that ROHQ as defined in Section 22(EE), as cited below, shall pay a tax of 10% of their taxable income.

> "The term '*regional operating headquarters*' shall mean a branch established in the Philippines by multinational companies which are engaged in any of the following services: general administration and planning; business planning and coordination; sourcing and procurement of raw materials and components; corporate finance advisory services; marketing control and sales promotion; training and personnel management; logistic services; research and development services and product development; technical support and maintenance; data processing and communications; and business development.

Further, the OIC of 1987, its IRR and RR No. 2-98, as amended, did not provide for any requirement in imposing FWT on income received by ROHQs.

Clearly then, petitioner cannot be held liable for FWT on its income payments to SAEC-ROHQ. Consequently, the assessment shall be cancelled.

V. Documentary Stamp Tax (DST) - ₱285,148.47

According to respondent, the equity portion of Long-term Advances remains to be a legal liability of the Company at year end, thus, the increase in the said amount was subjected to DST for debt instruments under Section 179 of the NIRC of 1997, as amended, as follows:[124]

Increase in Equity Portion of Long-term Advances		₱ 28,794,150.00
Documentary Stamp Tax Rate on Debt Instruments (Sec. 179 NIRC)		1/200
Documentary Stamp Tax Due		₱ 143,970.75
Add: 25% Surcharge	₱ 35,992.69	
Interest until August 30, 2012	105,185.03	
Compromise Penalty	16,000.00	157,177.72
Documentary Stamp Tax Payable		**₱ 301,148.47**

[124] Formal Letter of Demand, Exhibit "R-24", BIR Records, Folder 7, pp. 391-396.

Petitioner contends that no detail or explanation was provided by the Assessment Notices to allow petitioner to fully determine the propriety of the assessment. This is contrary to the requirements of the law and jurisprudence that the legal and factual bases of the assessment be stated. As such, the assessment for deficiency DST is void.

Petitioner also submits that it did not obtain any loan or advances during the taxable year 2008, thus, the alleged deficiency DST is bereft of factual and legal bases.

Further, the alleged increase in Equity Advances from 2007 to 2008 is not due to a new loan or advances obtained by petitioner in 2008. Instead, the increase of ₱23,423,399.00 pertains to unrealized foreign exchange gains, which must be reported for accounting purposes even if not yet realized. For financial accounting purposes, the Equity Advances, being foreign currency-denominated loan must be restated to reflect its current value, including the unrealized foreign exchange gains.[125]

The Court finds petitioner's contentions without merit.

Contrary to petitioner's contentions, the amount subjected to deficiency DST assessment by respondent was based on petitioner's Credits amounting to ₱28,794,150.00 in the Equity Portion of Long Term Advances account in its Historical Trial Balance Summary by Period for 2008[126]. Such credits connote increase in said account. Hence, petitioner had all the means to verify the amount subjected to deficiency DST in order to refute the same.

An examination of petitioner's Equity Portion of Long Term Advances shows the following movements during 2008:[127]

Beginning balance		**₱159,393,850.00**
Additions:		
October	₱28,278,250.00	

[125] Pars. 123 and 125, Petition for Review, Docket (Vol. I), pp. 41-42.
[126] BIR Records, Folder 7, p. 286.
[127] Id.

November	515,900.00	28,794,150.00
Deductions:		
December		(5,370,750.00)
Ending balance		**₱182,817,250.00**

Based on petitioner's general ledger for unrealized foreign exchange account[128], only ₱5,370,750.00 pertains to foreign currency adjustment for the Equity Portion of Long Term Advances account.

Petitioner was not able to explain or substantiate the total additions in the account amounting to ₱28,794,150.00.

For petitioner's failure to sufficiently refute said assessment, the same, therefore, must not be disturbed.

VI. Compromise penalties - ₱119,500.00

The compromise penalty imposed by respondent in the aggregate amount of ₱119,500.00, broken down as follows, shall be cancelled:

Expanded Withholding Tax: Increments on Late Filing of November Return	₱ 16,000.00
Documentary Stamp Tax	16,000.00
Suggested Compromise Penalties in Lieu of Criminal Prosecution	87,500.00
Total Compromise Penalties	**₱ 119,500.00**

Pursuant to RMO No. 01-90, compromise penalties are only amounts suggested in settlement of criminal liability, and may not be imposed or exacted on the taxpayer in the event that a taxpayer refuses to pay the same. It is well-settled that the Court has no jurisdiction to compel a taxpayer to pay the compromise penalty because by its very nature, it implies a mutual agreement between the parties in respect to the thing or subject matter that is so compromised, and the choice of paying or not paying it distinctly belongs to the taxpayer.[129] Absent a showing that petitioner consented to the compromise penalty, its imposition should be deleted. The

[128] Annex S of ICPA Report, Exhibit "P-38".
[129] *The Philippines International Fair, Inc. vs. The Collector of Internal Revenue, et. al.*, G.R. Nos. L-12928 and L-12932, March 31, 1962.

imposition of the same without the conformity of the taxpayer is illegal and unauthorized.[130]

WHEREFORE, premises considered, the Petition for Review filed on February 19, 2013, is **PARTIALLY GRANTED**. The deficiency FWT assessment issued by respondent against petitioner for taxable year 2008 is **CANCELLED** and **SET ASIDE**. However, the deficiency SPRT, FT, EWT and DST assessments issued by respondent against petitioner for taxable year 2008 is **AFFIRMED with MODIFICATION**. Accordingly, petitioner is **ORDERED TO PAY** the amount of **₱76,930,413.43**, inclusive of the 25% surcharge amounting to **₱15,386,082.69** imposed under Section 248(3) of the NIRC of 1997, as amended, computed as follows:

	Basic	Surcharge	Total
I. Special Preferential Rate Tax (SPRT)	₱ 4,421,576.66	₱ 1,105,394.17	₱ 5,526,970.83
II. Franchise Tax (FT)	43,353,088.40	10,838,272.10	54,191,360.50
III. Expanded Withholding Tax (EWT)	13,625,694.96	3,406,423.74	17,032,118.70
V. Documentary Stamp Tax (DST)	143,970.75	35,992.69	179,963.44
TOTAL	**₱ 61,544,330.77**	**₱ 15,386,082.70**	**₱ 76,930,413.47**

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

a) Deficiency interest at the rate of 20% per annum on the basic deficiency SPRT, FT, EWT and DST computed from the following dates until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended:

Tax Type	Basic Tax	20% deficiency interest computed from
SPRT	₱ 4,421,576.66	April 15, 2009
FT	43,353,088.40	January 20, 2009
EWT	13,625,694.96	January 15, 2009
DST	143,970.75	January 10, 2009

b) Delinquency interest at the rate of 20% per annum on the total amount of ₱76,930,413.43 and on the 20% deficiency interest which have accrued as aforestated in (a), computed

[130] *Commissioner of Internal Revenue vs. Lianga Bay Logging Co., Inc., et. al.*, G.R. No. L-35266, January 21, 1991.

from September 14, 2012 until full payment thereof pursuant to Section 249(C) of the 1997 NIRC, as amended.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

ATTESTATION

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

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

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice