REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

Third Division

UPS-DELBROS TRANSPORT, INC.,
Petitioner,

CTA Case No. 9063

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

Promulgated:

MAY 2 2 2018 2:20 p.m.

X---X

DECISION

RINGPIS-LIBAN, *J.*:

This Petition for Review filed by UPS-Delbros Transport, Inc. against the Commissioner of Internal Revenue prays that judgement be rendered ordering the withdrawal and cancellation of the deficiency income tax, value-added tax (VAT) and expanded withholding tax (EWT) assessments in the aggregate amount of ₱87,229,227.61, inclusive of interest and surcharges, for calendar year (CY) 2005.[1]

THE FACTS

Petitioner UPS-Delbros Transport, Inc. is a corporation duly organized and existing under the laws of the Republic of the Philippines, with principal place of business at 888 Delbros Ave., Pascor Drive, Barangay Sto. Niño,

[1] Docket, vol. 2, p. 841, Pre-Trial Order, Summary of the Case.

Parañaque City.[2] It is registered as a taxpayer with the Bureau of Internal Revenue (BIR), as evidenced by its Certificate of Registration dated January 3, 1994 and Taxpayer Identification No. 002-743-457-000.[3]

On the other hand, respondent is the duly appointed Commissioner of the Bureau of Internal Revenue 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) or other laws or portions thereof administered by the BIR. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On September 4, 2006, petitioner received Letter of Authority (LOA) No. 2001-00028936 authorizing Revenue Officer Gilquin Tolentino and Group Supervisor Crispo Y. Macarabe to examine petitioner's books of accounts and other accounting records for CY 2005.[4]

On December 8, 2008, petitioner received a copy of the Preliminary Assessment Notice (PAN) with attached Details of Discrepancies dated December 5, 2008, informing petitioner of the proposed assessment of the alleged deficiency income tax, VAT and EWT for CY 2005 in the amounts of ₱42,398,361.16, ₱13,041,298.87, and ₱1,026,627.83, respectively.[5]

Petitioner filed its reply to the PAN on December 23, 2008, contesting the preliminary finding that it is liable for deficiency income tax, VAT, and EWT for CY 2005 amounting to ₱56,466,287.86.[6]

Meanwhile, on different dates, petitioner executed several Waivers of the Defense of Prescription under the Statutes of Limitation of the National Internal Revenue Code ("Waivers" for brevity).[7]

On June 29, 2010, petitioner received the Final Assessment Notice (FAN) with attached Details of Discrepancies, both dated June 28, 2010. In the said FAN, respondent requested petitioner to pay its alleged deficiency income tax, VAT, and EWT for CY 2005 in the amounts of ₱49,082,932.28, ₱14,781,353.13, and ₱1,209,388.34 respectively.[8]

---

[2] *Id.* at p. 789, Stipulated Facts, Joint Stipulation of Facts and Issues (JSFI), par 1.
[3] *Id.* at par. 2.
[4] *Id.* at p. 790, par. 4.
[5] *Id.* at par. 5.
[6] *Id.* at par. 6.
[7] *Id.* at Note 1, vol. 3, pp. 1161-1164, Exhibits "P-18", "P-19", and "P-20".
[8] *Id.* at Note 4, par. 7.

On July 26, 2010, petitioner filed a protest letter against the FAN, requesting the cancellation and withdrawal of deficiency income tax, VAT and EWT assessments for CY 2005. On the same date, petitioner submitted several documents in support of its request for the cancellation of the deficiency tax assessments.[9]

On May 8, 2015, petitioner received the Final Decision on Disputed Assessment (FDDA) with attached Details of Discrepancies dated May 5, 2015. In the said FDDA, respondent ordered petitioner to pay the alleged deficiency income tax, VAT, and EWT for CY 2005 in the total amount of ₱87,229,227.61, inclusive of interest.[10]

Thereafter, petitioner filed the instant Petition for Review[11] before this Court on June 5, 2015.

In the Answer[12] filed through registered mail on August 12, 2015 and received by this Court on August 28, 2015, respondent interposed special and affirmative defenses. Respondent argued that during the administrative investigation of the instant case by the BIR, petitioner allegedly failed to substantiate or submit supporting evidence against the BIR findings, more specifically shown under the Details of Discrepancies attached to the PAN, the FAN, and the FDDA. Respondent added that the assessment was made within the prescriptive period under Section 222(b) of the NIRC of 1997, in view of the Waiver of the Defense of Prescription under the Statute of Limitations of the NIRC allegedly duly executed by petitioner.

The Pre-Trial Conference was scheduled on October 20, 2015.[13] Respondent submitted his Pre-Trial Brief[14] on October 16, 2015; while petitioner filed its Pre-Trial Brief[15] on October 15, 2015.

The parties submitted their Joint Stipulation of Facts and Issues[16] on October 30, 2015. Subsequently, the Court issued a Pre-Trial Order[17] on January 5, 2016 and terminated the pre-trial.

---

[9] *Id.* at par. 8.
[10] *Id.* at pars. 9 and 10.
[11] *Id.*, vol. 1, pp. 12-44.
[12] *Id.* at pp. 133-138.
[13] *Id.* at pp. 141-142.
[14] *Id.* at pp. 149-154.
[15] *Id.* at pp. 157-170.
[16] *Id.* at Note 1, pp. 789-803.
[17] *Id.* at pp. 841-850.

During the trial, petitioner presented Ms. Florinda P. Casilag – Finance and Accounting Manager of UPS International General Services Co., Ms. Maurice Gohoc – Director of UPS Delbros International Express Ltd., Inc., and Ms. Maria Myla S. Maralit – the Court-commissioned Independent Certified Public Accountant (ICPA), as its witnesses to corroborate petitioner's material allegations in the Petition for Review.

Afterwards, petitioner formally offered its testimonial and documentary evidence, consisting of Exhibits "P-1" to "P-75" and "P-80 to "P-101-a", inclusive of sub markings; which the Court admitted in Resolutions dated June 14, 2016[18] and September 16, 2016[19].

On the other hand, respondent presented Revenue Officer (RO) Roland S. Dela Torre as his witness. Thereafter, respondent filed his Formal Offer of Evidence, consisting of Exhibits "R-1" to "R-9-a", inclusive of sub markings; which the Court admitted via Resolution[20] dated April 17, 2017.

Petitioner filed its Memorandum[21] on June 19, 2017; while respondent filed a Manifestation by mail on June 16, 2017 which the Court received on June 29, 2017, manifesting that he is adopting all his pleadings filed in the present case in lieu of submitting a memorandum. Hence, the Court declared the case submitted for decision on June 23, 2017.[22]

THE ISSUES

The parties stipulated that the issues to be resolved in this case are the following:[23]

I. <u>Prescription</u>

> (i) Whether or not respondent's right to assess petitioner alleged deficiency income, VAT and EWT for CY 2005 had already prescribed in view of the lapse of the three-year prescriptive period provided under Section 203, Tax Code.

---

[18] Docket, vol. 4, pp. 1645-1646.
[19] *Id.* at pp. 1703-1704.
[20] *Id.* at pp. 1729-1730.
[21] *Id.* at pp. 1742-1788.
[22] *Id.* at p. 1791.
[23] *Id.* at Note 1, pp. 791-793.

(ii) Whether or not the Waivers of Defense of Prescription under the Statute of Limitations (The "Waivers") in this case are null and void for failure to comply with the requirements of the law.

(iii) Whether or not the ten (10) year prescriptive period provided under Section 222, Tax Code, will apply in this case.

II. Deficiency Income Tax Assessment (₱65,169,801.96)

(i) Whether or not petitioner had alleged undeclared income amounting to ₱4,799,050.19 that should be subject to income tax for CY 2005.

(ii) Whether or not petitioner understated its income in the amount of ₱55,415,430.00 as respondent determined based on petitioner's claimed creditable withholding tax in its ITR for CY 2005.

(iii) Whether or not respondent erred in disallowing the net operating loss carry-over (NOLCO) of petitioner for CY 2005 amounting to ₱3,758,684.00.

(iv) Whether or not respondent erred in disallowing the minimum corporate income tax (MCIT) of petitioner for CY 2005 amounting to ₱642,487.00.

(v) Whether or not respondent erred in disallowing the excess quarterly income tax credits of petitioner for CY 2005 amounting to ₱4,412,998.00.

III. Deficiency VAT for CY 2005 (₱20,316,192.48)

(i) Whether or not respondent erred in assessing deficiency VAT amounting to ₱6,021,445.60 on sole ground that petitioner understated its income for CY 2005 in the amount of ₱60,214,480.19.

IV. Deficiency EWT (₱1,743,233.17)

(i) Whether or not there is legal or factual basis for respondent to assess petitioner deficiency EWT in the amount of ₱605,404.48 for CY 2005.

V. Fifty Percent (50%) Surcharge

(i) Whether or not there is legal or factual basis for respondent to impose 50% surcharge on petitioner's alleged deficiency Income Tax and VAT for CY 2005 pursuant to section 222(B), Tax Code.

Petitioner's Arguments

Petitioner anchors its claim on Section 203 of the NIRC of 1997, as amended, which grants the government a period of three (3) years from the time the tax return is filed within which to assess deficiency taxes. Petitioner alleges that the subject assessment for CY 2005 is null and void for having been issued beyond the three (3)-year prescriptive period.

A. *Deficiency Income Tax Assessment*

Petitioner avers that, since it filed its Annual Income Tax Return[24] (ITR) for CY 2005 on April 17, 2006, respondent may validly issue the deficiency income tax assessment until April 17, 2009 only pursuant to Section 203 in relation to Section 77(B) of the NIRC of 1997, as amended and considering that the FAN[25] was only issued on June 28, 2010, respondent's right to assess had allegedly prescribed.

B. *Deficiency VAT Assessment*

Petitioner filed Quarterly VAT Returns for CY 2005 showing the following pertinent dates:

TAXABLE QUARTER	DUE DATE FOR FILING QUARTERLY VAT RETURNS	DATE OF FILING OF VAT RETURNS	END OF 3-YEAR PRESCRIPTIVE PERIOD
First	April 25, 2005	April 20, 2005[26]	April 25, 2008

[24] *Id.* at Note 7, pp. 999-1001, Exhibit "P-1".
[25] *Id.* at p. 1184, Exhibit "P-24".
[26] *Id.* at pp. 1003-1005, Exhibit "P-2".

Second	July 25, 2005	July 21, 2005[27]	July 25, 2008
Third	October 25, 2005	October 20, 2005[28]	October 25, 2008
Fourth	January 25, 2005	January 20, 2006[29]	January 25, 2009

Petitioner maintains that considering that the FAN was only issued on June 28, 2010, respondent's right to assess already lapsed for each of the taxable quarters as shown above.

C. *Deficiency EWT Assessment*

Petitioner filed Monthly Remittance Returns of Creditable Income Taxes Withheld (Expanded) for January to December 2005 on the following dates:

MONTH	DUE DATE FOR FILING	DATE OF FILING	END OF 3-YEAR PRESCRIPTIVE PERIOD
January	February 10, 2005	February 10, 2005[30]	February 10, 2008
February	March 10, 2005	March 10, 2005[31]	March 10, 2008
March	April 10, 2005	April 11, 2005[32]	April 11, 2008
April	May 10, 2005	May 10, 2005[33]	May 10, 2008
May	June 10, 2005	June 10, 2005[34]	June 10, 2008
June	July 10, 2005	July 11, 2005[35]	July 11, 2008
July	August 10, 2005	August 10, 2005[36]	August 10, 2008
August	September 10, 2005	September 12, 2005[37]	September 12, 2008
September	October 10, 2005	October 10, 2005[38]	October 10, 2008
October	November 10, 2005	November 10, 2005[39]	November 10, 2008
November	December 10, 2005	December 9, 2005[40]	December 10, 2008
December	January 15, 2006	January 14, 2006[41]	January 15, 2009

Petitioner submits that since the FAN was only issued on June 28, 2010, respondent's right to assess had prescribed for each of the twelve (12) months of CY 2005 as shown above.

[27] *Id.* at pp. 1006-1008, Exhibit "P-3".
[28] *Id.* at pp. 1009-1010, Exhibit "P-4".
[29] *Id.* at pp. 1011-1012, Exhibit "P-5".
[30] *Id.* at pp. 1013-1017, Exhibit "P-6".
[31] *Id.* at pp. 1027-1030, Exhibit "P-7".
[32] *Id.* at pp. 1040-1043, Exhibit "P-8".
[33] *Id.* at pp. 1054-1057, Exhibit "P-9".
[34] *Id.* at pp. 1068-1070, Exhibit "P-10".
[35] *Id.* at pp. 1094-1096, Exhibit "P-11".
[36] *Id.* at pp. 1081-1084, Exhibit "P-12".
[37] *Id.* at pp. 1097-1100, Exhibit "P-13".
[38] *Id.* at pp. 1109-1114, Exhibit "P-14".
[39] *Id.* at pp. 1125-1128, Exhibit "P-15".
[40] *Id.* at pp. 1137-1140, Exhibit "P-16".
[41] *Id.* at pp. 1149-1152, Exhibit "P-17".

More so, petitioner avers that the Waivers dated January 6, 2009[42], May 18, 2009[43], and August 17, 2009[44] purportedly executed by and between petitioner and the BIR are null and void for failure to strictly comply with the requirements under Section 222(b) of the NIRC of 1997, as amended, and Revenue Memorandum Order (RMO) No. 20-97 in relation to Revenue Delegation Authority Order (RDAO) No. 05-01; hence, they did not extend the periods given to respondent within which to issue the deficiency tax assessments against petitioner for CY 2005.

Petitioner summarized the alleged fatal defects of the subject Waivers:

WAIVER	DATE OF EXECUTION	DEADLINE OF EXTENDED PERIOD	FATAL DEFECTS OF THE WAIVERS
1st	January 6, 2009	June 30, 2009	• Failed to specify the kind and amount of taxes covered • Significant deviation from contents of a valid waiver
2nd	May 18, 2009	December 31, 2009	• Failed to specify the kind and amount of taxes covered • Petitioner was not furnished with a copy of the accepted waiver • Significant deviation from contents of a valid waiver
3rd	August 17, 2009	June 30, 2010	• Failed to specify the kind and amount of taxes covered • Petitioner was not furnished with a copy of the accepted waiver • Waiver does not state the date of the acceptance by the respondent • Significant deviation from contents of a valid waiver

42 *Id.* at p. 1161, Exhibit "P-18".
43 *Id.* at p. 1163, Exhibit "P-19".
44 *Id.* at p. 1164, Exhibit "P-20".

Petitioner submits that the ten-year prescriptive period provided under Section 222 of the NIRC of 1997, as amended, does not apply in this case since it did not fail to file a return or file a fraudulent return with intent to evade tax. Petitioner avers that respondent failed to identify the specific circumstances that would indicate fraudulent intent on the part of petitioner to evade tax.

Lastly, petitioner contends that assuming the assessment has not prescribed, the deficiency income tax, VAT, and EWT assessments should be cancelled for lack of factual and legal bases.

Respondent's Counter-Arguments

Respondent in his Answer asserts that petitioner failed to substantiate or submit supporting evidence against the BIR findings, and that the assessment was made within the prescriptive period under Section 222(b) of the NIRC of 1997, as amended, in view of the Waiver of the Defense of Prescription under the Statute of Limitations of the NIRC allegedly duly executed by petitioner.

Respondent also avers that although petitioner filed its monthly return as mandated by law, it allegedly failed to declare thereto the income subject to tax under the belief that the income supposedly subject to withholding tax is not an income but a deductible expense. Respondent argues that the return filed by petitioner can be considered as false return because it deviated from the truth when no income was declared, when in truth there was an income subject to tax. Being considered as false return, it is immaterial if petitioner intentionally omitted to declare its income subject to final withholding tax or not.

Respondent further contends that the falsities arising from petitioner's returns provide ample basis for the application of the ten-year prescriptive period under Section 222 of the NIRC of 1997, as amended.

Respondent maintains that the assessments issued against petitioner for alleged deficiency income tax, VAT, and EWT for CY 2005 were made in accordance with law and regulations and are *prima facie* presumed correct and made in good faith.

THE RULING OF THE COURT

The Court shall determine first whether the right of respondent to issue an assessment already prescribed.

Section 222 of the NIRC of 1997, as amended, is not applicable

Section 203 of the NIRC of 1997, as amended, provides:

> "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." *(Emphasis supplied)*

In the case of *Commissioner of Internal Revenue vs. FMF Development Corporation*[45], the Supreme Court held that the government must assess internal revenue taxes on time so as not to extend indefinitely the period of assessment and deprive the taxpayer of the assurance that it will no longer be subjected to further investigation for taxes after the expiration of reasonable period of time, to wit:

> "Under Section 203 of the NIRC, internal revenue taxes must be assessed within three years counted from the period fixed by law for the filing of the tax return or the actual date of filing, whichever is later. This mandate governs the question of prescription of the government's right to assess internal revenue taxes primarily to safeguard the interests of taxpayers from unreasonable investigation. Accordingly, the government must assess internal revenue taxes on time so as not to extend indefinitely the period of assessment and deprive the taxpayer of the assurance that it will no longer be subjected to further investigation for taxes after the expiration of reasonable period of time."

Thus, the BIR only has three years, counted from the date of actual filing of the return or from the last day prescribed by law for the filing of such return, whichever comes later, to assess a national internal revenue tax or to begin a court proceeding for the collection thereof without an assessment.

[45] G.R. No. 167765, June 30, 2008.

However, this rule is subject to the exceptions provided under Section 222 of the NIRC of 1997, as amended, which 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.
>
> (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." *(Emphasis supplied)*

It has been consistently held by this Court that allegations of falsity or fraud in the filing of tax returns must be proven to exist by clear and convincing evidence and cannot be justified by mere speculation. The fraud or falsity contemplated by law is actual and not constructive in nature. Therefore, it must be intentional with willful and deliberate act of deception and with the sole objective of avoiding tax.

Respondent's allegation that the returns filed by petitioner can be considered as false return because they deviated from the truth when no income was declared despite the fact that there was an income subject to tax, is not sufficient to conclude that petitioner intended to evade the payment of taxes.

While the filing of a fraudulent return necessarily implies that the act of the taxpayer was intentional and done with intent to evade the taxes due, the filing of a false return can be intentional or due to honest mistake. And the entry of wrong information due to mistake, carelessness, or ignorance, without intent to evade tax, does not constitute a false return.[46]

---

[46] *Commissioner of Internal Revenue vs. B.F. Goodrich Phils, Inc. (now Sime Darby International Tire Co., Inc.) and the Court of Appeals*, G.R. No. 104171, February 24, 1999.

Further, in *Commissioner of Internal Revenue vs. Javier, Jr., et al.*[47], the Supreme Court ruled that fraud is never imputed. The mere understatement of a tax is not itself proof of fraud for the purpose of tax evasion, to wit:

> "The fraud contemplated by law is actual and not constructive. It must be intentional fraud, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some legal right. Negligence, whether slight or gross, is not equivalent to fraud with intent to evade the tax contemplated by law. It must amount to intentional wrong-doing with the sole object of avoiding the tax. xxx"

The burden of proof in establishing whether the taxpayer is guilty of filing false or fraudulent returns with intent to evade tax is with the Commissioner of Internal Revenue or his duly authorized representative. Negligence *per se* on the part of the taxpayer, whether slight or gross, is not equivalent to filing of false or fraudulent returns under the law.

Based on the foregoing, respondent failed to convince this Court that petitioner filed a false tax return; thus, the exception as to period of limitation to assess petitioner for deficiency tax is inapplicable to the instant case.

The Waivers are valid and extended the three-year prescriptive period

Section 222(b) of the NIRC of 1997, as amended, authorizes the extension of the original three-year prescriptive period by the execution of a valid waiver, where the taxpayer and the BIR agrees in writing that the period to issue an assessment and collect the taxes due is extended to an agreed upon date.

A valid waiver of the statute of limitations under the NIRC of 1997, as amended, must be: (1) in writing; (2) agreed to by both the BIR Commissioner and the taxpayer; (3) before the expiration of the ordinary prescriptive periods for assessment and collection; and (4) for a definite period beyond the ordinary prescriptive periods for assessment and collection. The period agreed upon can still be extended by subsequent written agreement, provided that it is executed prior to the expiration of the first period agreed upon.

[47] G.R. No. 78953, July 31, 1991, citing *Aznar vs. Court of Tax Appeals*, G.R. No. L-20569, August 23, 1974.

In *Commissioner of Internal Revenue vs. Kudos Metal Corporation*[48], the Supreme Court discussed in detail Section 222(b) of the NIRC of 1997, as amended, which provides that the period to assess and collect taxes may only be extended upon a written agreement between the BIR Commissioner and the taxpayer executed before the expiration of the three-year period. Revenue Memorandum Order No. 20-90 issued on April 4, 1990 and Revenue Delegation Authority Order No. 05-01 issued on August 2, 2001 laid down 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 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

---

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

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 the present case, the following are the waivers executed by the parties:

Requisites of a Valid Waiver	First Waiver[49]	Second Waiver[50]	Third Waiver[51]
Date of Execution	January 6, 2009	May 18, 2009	August 17, 2009
Period of Limitation	June 30, 2009	December 31, 2009	June 30, 2010
BIR Signatory	OIC Regional Director – Ma. Nieva A. Guerrero	RDO Wilfredo Z. Narnola	
Taxpayer Signatory	Maria Rita B. Corvera		
Notarized Written Authority	Yes		
Date of Acceptance by BIR	January 7, 2009	May 18, 2009	August 17, 2009
Date of Receipt by Petitioner	January 8, 2009	May 20, 2009	August 18, 2009
Duly Notarized	Yes	Yes	Yes

Contrary to the allegations of petitioner that the subject waivers are defective, it can be perused from the above table that the waivers executed by and between petitioner and respondent complied with the requirements of a valid waiver pursuant to RMO No. 20-90.

Based on the foregoing, the waivers executed by the parties validly extended the three-year prescriptive period.

The Court shall now proceed to determine whether petitioner is liable to pay the assessed deficiency taxes.

The assessed deficiency income tax, VAT, and EWT for CY 2005 in the aggregate amount of ₱87,229,227.61, inclusive of interest and surcharges, is computed as follows:

Tax Type	Basic	Surcharge	Interest	Total
Income Tax	₱ 19,569,706.06	₱ 9,784,853.03	₱ 35,815,242.87	₱ 65,169,801.96
VAT	6,021,445.60	3,010,722.80	11,284,024.08	20,316,192.48
EWT	605,404.48		1,137,828.69	1,743,233.17
Total	**₱ 26,196,556.14**	**₱ 12,795,575.83**	**₱ 48,237,095.64**	**₱ 87,229,227.61**

[49] BIR Records, p. 169, Exhibit "R-3".
[50] *Id.* at p. 295, Exhibit "R-5".
[51] *Id.* at p. 311, Exhibit "R-7".

I. Deficiency Income Tax

Respondent assessed petitioner of deficiency income tax for taxable year 2005 in the amount of ₱65,169,801.96, detailed as follows:[52]

Taxable Income (Loss) per Return			(₱ 3,578,684.00)
Add: Disallowances/Adjustments			
Undeclared Income (Schedule 1)		₱ 4,799,050.19	
Undeclared Income		55,415,430.00	60,214,480.19
Total			₱ 56,635,796.19
Add: Net Operating Loss Carry-Over			3,578,684.00
Adjusted Taxable Income			₱ 60,214,480.19
Tax Due (32% and 35%)			₱ 19,569,706.06
Less: Tax Credits/Payments			
Prior year's excess credits	₱ 2,838,868.00		
Creditable Withholding Tax	2,216,617.00	₱ 5,055,485.00	
Less: MCIT paid per return	₱ 642,487.00		
Amount forwarded to succeeding period	4,412,998.00	5,055,485.00	-
Deficiency Income Tax			₱ 19,569,706.06
Add: Surcharge (50%)			9,784,853.03
Interest (04/16/06 to 06/08/15)			35,815,242.87
Total Amount Due			**₱ 65,169,801.96**

Based on this computation, petitioner disputes the following assessment items:

A. Undeclared Income	₱60,214,480.19
B. Net Operating Loss Carry-Over	3,578,684.00
C. Minimum Corporate Income Tax Paid	642,487.00
D. Amount forwarded to succeeding period	₱ 4,412,998.00

A. Undeclared Income – ₱60,214,480.19

Below are the details of the alleged undeclared income of ₱60,214,480.19:

A.1. Undeclared income from discrepancy in Salaries and Wages	₱ 4,799,050.19
A.2. Undeclared income	55,415,430.00
Total	**₱60,214,480.19**

[52] *Id.* at Note 7, pp. 1199-1203, FDDA, Exhibit "P-27".

A.1. Undeclared income from discrepancy in Salaries and Wages – ₱4,799,050.19

Respondent's comparison of petitioner's income payments, particularly, income payment for salaries and wages, disclosed a total discrepancy of ₱4,799,050.19; the amount subjected to withholding tax was much higher than the amount declared in petitioner's tax return. The aforesaid discrepancy was properly subjected to tax as shown in the Alphalist/BIR Form No. 1601F but was not part of the expenses declared per Financial Statements (FS). Thus, such amount was treated as undeclared income. As a result, the above amount has been assessed pursuant to Section 32 of the NIRC of 1997, as amended:[53]

Particulars	Income Payment per AFS	Income Payment per Alphalist	Undeclared Income
Salaries and Wages-Direct Cost	₱ 13,623,499.00		
Salaries and Wages-Operations	10,415,224.00		
Total	**₱ 24,038,723.00**	**₱ 28,837,773.19**	**₱ 4,799,050.19**

Respondent's assertion is misplaced.

It is worthy to note that the imputation of undeclared income is based on a mere presumption that since there were alleged undeclared salaries and wages in its FS, there was likewise undeclared income corresponding to it. Even if these alleged undeclared salaries and wages are to be considered as income, the same will be offset by recording the equivalent payment as expense. In other words, no taxable income will result from the said transaction.

Furthermore, it must be emphasized that, for income tax purposes, a taxpayer is free to deduct from its gross income a lesser amount or not claim any deduction at all. What is prohibited by the income tax law is to claim a deduction beyond the amount authorized therein.[54] Hence, even granting that there is an undeclared expense, the same is not prohibited by law. Bearing in mind that an undeclared expense is not prohibited by law, it goes without saying that petitioner can exercise its discretion on whether it will declare a lesser amount of deduction or none at all.[55]

While axiomatic is the fact that all presumptions are in favor of the correctness of tax assessments, the assessment itself should not be based on presumptions no matter how logical the presumption might be. In order to stand

[53] *Id.* at pp. 1199-1203, FDDA, Details of Discrepancy, Exhibit "P-27".

[54] *Commissioner of Internal Revenue vs. Phoenix Assurance Co. Ltd.*, G.R. No. L-19727, May 20, 1965.

[55] *Modern Imaging Solutions. Inc. vs. Commissioner of Internal Revenue*, CTA Case No. 8987, March 21, 2017.

the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption.

For lack of factual basis, the deficiency income tax assessment corresponding to the alleged undeclared income from discrepancy in salaries and wages amounting to ₱4,799,050.19 should be cancelled.

A.2. Undeclared income – ₱55,415,430.00

The BIR's verification disclosed that UPS Delbros International Express, Ltd., Inc. (UDE) made two (2) income payments of ₱55,415,420.00 to petitioner that were subjected to withholding tax by UDE in the amount of ₱1,108,308.40 on each transaction. The said withholding taxes in the aggregate amount of ₱2,216,616.80 were claimed by petitioner as creditable withholding taxes in its Income Tax Return (ITR) but only one income payment in the amount of ₱55,415,430.00 had been declared as sales/revenue. Thus, the other income payment of ₱55,415,430.00 was not subjected to income tax in violation of Section 32 of NIRC of 1997, as amended.[56]

Petitioner denies the alleged undeclared sales receipt amounting to ₱55,415,430.00. Petitioner claims that the relatively higher creditable withholding taxes arose as a result of double withholding made by UDE. Petitioner avers that the incident happened after the BIR sent a Letter[57] to UDE advising the latter that it is part of the Top 10,000 corporations, and as such is required to withhold tax at one percent (1%) and two percent (2%) on its purchases of goods and services, respectively. Thus, UDE believing that it was required to withhold an additional 2% on top of the 2% withholding tax it previously withheld on the same transaction with petitioner, withheld an additional 2% tax from its income payment to petitioner.[58]

This claim was affirmed by UDE through its Director, Mr. Maurice Gohoc, in his Amended Sworn Statement, to wit:[59]

> "Q17: I noticed that UDE's income payments to [p]etitioner appeared twice in each Schedule of Withholding Tax *(Exhibits "P-62-1" to "P-73-1")* and in the Alphalist of Payees

---

[56] *Id.* at Note 53, p. 1202, Exhibit "P-27".
[57] *Id.* at Note 7, p. 1325, Exhibit "P-54".
[58] *Id.* at Note 18, pp. 1769-1770, Petitioner's Memorandum, pars. 82-83.
[59] *Id.* at Note 1, pp. 863-864, Exhibit "P-60", Q17 to Q21 of the Amended Sworn Statement of Mr. Maurice Gohoc to Questions propounded by Atty. Alexis Joseph R. Noble.

subject to EWT *(Exhibit "P-74-1")*. Can you please explain this?

A: UDE twice subjected to two percent (2%) EWT its income payments to [p]etitioner in CY 2005. The double withholding of 2% EWT on income payments to [p]etitioner was an error on the part of UDE. I prepared a schedule showing the double withholding of 2% EWT in UDE's payments to [p]etitioner in CY 2005.

Q18: Why did UDE twice subjected to two percent (2%) EWT its income payments to [p]etitioner in CY 2005?

A: UDE has been subjecting its income payments to supplier of services to 2% EWT. However, when UDE was informed by the BIR that it was classified as one of the Top 10,000 corporations which was required to withhold 2% EWT from its income payments to suppliers of service, UDE erroneously assumed that it was required to withhold additional 2% EWT on top of the 2% EWT which it has been withholding in the past. Hence, although UDE's income payments to [p]etitioner in CY 2005 (net of VAT) amounted only to Php55,415,420.00, this amount was twice subjected to 2% EWT.

xxx xxx xxx

Q21: How was UDE informed that it was classified as one of the Top 10,000 corporations?

A: UDE received a letter signed by Mr. Guillermo L. Parayno, Jr., Commissioner of Internal Revenue, dated August 29, 2003 informing us that UDE is one of the Top 10,000 corporations."

In fact, UDE sent a Confirmation Certificate[60] to BIR attesting that the former has income payments on purchase of services from petitioner during CY 2005 amounting to ₱55,415,420.00 with corresponding EWT of ₱2,216,616.81.

[60] *Id.* at Note 39, p. 192.

Clearly, petitioner was able to prove that there was no undeclared income from UDE. Thus, respondent's assessment on the above item must be cancelled.

B. Net Operating Loss Carry-Over (NOLCO) – ₱3,578,684.00

Respondent's verification disclosed that petitioner's operations for the year 2005 resulted in a net operating loss of ₱3,578,684.00, as reflected in petitioner's ITR for CY 2005[61]; considering that the tax benefit of which has already been forwarded to succeeding periods as provided under Section 34(D)(3) of the NIRC of 1997, as amended, the same has been disallowed.

Petitioner opposes respondent's action of adding back the net operating loss carry-over (NOLCO) of ₱3,578,684.00 in petitioner's gross taxable income. Petitioner claims that it was in a net loss position in taxable year 2005; thus, there is no factual basis for respondent's assumption that petitioner may have obtained a benefit from the carry-over of its NOLCO in taxable year 2005 to the succeeding periods.[62]

Petitioner explains that assuming that the NOLCO was utilized in the succeeding taxable years, the erroneous application of NOLCO may only be the subject of assessment in the year when the deduction was made (*e.g.*, 2006, 2007 and/or 2008) and not in taxable year 2005 because it is beyond the scope of the revenue examiner's authority.[63] Petitioner anchors its argument in the case of *Symmetry Philippines, Inc. vs. Commissioner of Internal Revenue*[64], wherein the Court held that:

> "Granting, for the sake of argument, that petitioner actually deducted its 2004 net loss as NOLCO in the succeeding years 2005 to 2007 and the said deduction was not proper as petitioner did not incur net loss, the same could only be the subject of assessment if it was claimed as deduction in the years 2005 to 2007 and not in the year 2004, for such is beyond the scope of the present assessment. Hence, adding back the net loss amount of ₱2,888,813.00 to petitioner's taxable income for the year 2004 is erroneous."

The Court agrees with petitioner.

---

[61] *Id.* at Note 1, pp. 999-1001, Exhibit "P-1".
[62] *Id.* at Note 18, p. 1772, Petitioner's Memorandum, par. 92.
[63] *Id.* at pp. 1772-1773, par. 93.
[64] CTA Case No. 8324, June 10, 2014.

Applying the afore-quoted ruling to the instant case, the NOLCO that was incurred in CY 2005 should be carried over as such for the next three consecutive taxable years of 2006, 2007 and 2008, as clearly allowed under Section 34(D)(3) of the NIRC of 1997, as amended. Only by then can petitioner enjoy the benefit of NOLCO. Nevertheless, whether petitioner benefited from NOLCO when it applied it in the succeeding years is of no moment since the said succeeding years are beyond the scope of the present assessment. Thus, the assessment on the disallowed NOLCO in the amount of ₱3,578,684.00 should also be cancelled.

C. Minimum Corporate Income Tax (MCIT) – ₱642,487.00

Respondent disallowed the MCIT paid as tax credit against the computed deficiency income tax, considering that the said amount shall be carried over and credited against the normal income tax for the three (3) immediately succeeding taxable years, following the provisions of Section 27(E)(1) and (2) of the NIRC of 1997, as amended.

The Court finds respondent's contention untenable.

Section 27(E)(1) and (2) of the NIRC of 1997, as amended, provides:

> "SEC. 27. *Rates of Income Tax on Domestic Corporations.* –
>
> xxx xxx xxx
>
> (E) *Minimum Corporate Income Tax on Domestic Corporations.* –
>
> (1) *Imposition of Tax.* – A minimum corporate income tax of two percent (2%) of the gross income as of the end of the taxable year, as defined herein, is hereby imposed on a corporation taxable under this Title, beginning on the fourth taxable year immediately following the year in which such corporation commenced its business operations, when the minimum income tax is greater than the tax computed under Subsection (A) of this Section for the taxable year.
>
> (2) *Carry Forward of Excess Minimum Tax.* – Any excess of the minimum corporate income tax over the normal income tax as computed under Subsection (A) of this Section shall be carried forward and credited against the normal income tax for the three (3) immediately succeeding taxable years."

Implementing the above provision is Section 2.27(E) of RR No. 09-98, as amended by RR No. 12-07, which states:

> "Sec. 2.27(E) MINIMUM CORPORATE INCOME TAX (MCIT) ON DOMESTIC CORPORATIONS. –
>
> (1) *Imposition of the Tax.* – A minimum corporate income tax (MCIT) of two percent (2%) of the gross income as of the end of the taxable year (whether calendar or fiscal year, depending on the accounting period employed) is hereby imposed upon any domestic corporation beginning on the fourth (4th) taxable year immediately following the taxable year in which such corporation commenced its business operations. The MCIT shall be imposed whenever such corporation has zero or negative taxable income or whenever the amount of minimum corporate income tax is greater than the normal income tax due from such corporation.
>
> xxx xxx xxx
>
> The taxpayer shall pay the MCIT whenever it is greater than the regular or normal corporate income tax which is imposed under Sec. 27 (A) and Sec. 28 (A) (1) of the Code. The final comparison between the normal income tax payable by the corporation and the MCIT shall be made at the end of the taxable year and the payable or excess payment in the Annual Income Tax Return shall be computed taking into consideration corporate income tax payment made at the time of filing of quarterly corporate income tax returns whether this be MCIT or normal income tax."

It is clear from the foregoing provisions that the 2% MCIT on gross income shall be imposed whenever the taxpayer-corporation has zero or negative taxable income or whenever the amount of MCIT is greater than the normal or regular income tax due from such taxpayer-corporation. In other words, it is imposed in lieu of the normal or regular corporate income tax of 35%.

In its Annual ITR for CY 2005[65], petitioner declared a net loss of ₱3,578,684.00.[66] Consequently, petitioner reported and paid an MCIT in the amount of ₱642,487.00[67] on the gross income of ₱32,124,344.00.[68]

---

[65] *Id.* at Note 7, p. 999, Exhibit "P-1".
[66] *Id.* at Line 21B.
[67] *Id.* at Line 26C.
[68] *Id.* at Line 17C.

Since the deficiency assessments made by respondent, as discussed above, are unfounded, the Court will sustain the findings that petitioner had net loss from its operation, warranting the application of MCIT. Considering further that the MCIT will be credited against the normal income tax for the three (3) immediately succeeding taxable years, pursuant to Section 27(E)(2) of the NIRC of 1997, as amended, its benefit will redound to the succeeding years. Thus, it is inappropriate to disallow the same for such is beyond the scope of the present assessment.

D. Amount carried over to succeeding period – ₱4,412,998.00

Respondent disallowed the amount carried over to the succeeding period amounting to ₱4,412,998.00[69] on the basis that the said amount has already been forwarded to the succeeding period under Section 76 of the NIRC of 1997, as amended.

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

In view of the foregoing, the Court rules for the cancellation of the deficiency income tax assessment for lack of factual and legal bases.

II. Deficiency Value-added Tax – ₱20,316,192.48

Respondent assessed petitioner of deficiency VAT amounting to ₱20,316,192.48, inclusive of surcharge and interest, as computed below:[70]

Taxable Sales per VAT Returns (Schedule 3)	₱	52,989,080.00
Add: Undeclared Income (Schedule 3)		60,214,470.69
Adjusted Taxable Sales	₱	113,203,550.69
Output Tax	₱	11,320,355.07
Less: Input Tax per VAT returns		1,952,775.54
VAT Payable	₱	9,367,579.53
VAT Payments		3,346,133.93
Basic Tax Due	₱	6,021,445.60
Add: Surcharge (50%)		3,010,722.80
Interest (01/26/06 to 06/08/15)		11,284,024.08
Total Amount Due	**₱**	**20,316,192.48**

[69] *Id.* at Note 18, p. 1576, Exhibit "P-82-9".
[70] *Id.* at Note 7, p. 1199, FDDA, Exhibit "P-27".

Per attached Details of Discrepancy to the FDDA, the undeclared income is computed as follows:

	Per FAN	Adjustment	After Payment
Total Sales	₱ 110,830,840.50		
Less: Taxable Sales per VAT Returns	52,989,080.00		
Undeclared Sales	57,841,760.50		₱ 57,841,760.50
Add: Undeclared Income (Schedule 1)	4,799,050.19	₱ 2,426,340.00	2,372,710.19
Total Undeclared Sales/Income	**₱ 62,640,810.69**		**₱ 60,214,470.69**

Basically, the deficiency VAT of ₱60,214,470.69 is anchored on the findings of respondent that petitioner had undeclared sales of ₱55,415,420.50 and undeclared income of ₱4,799,050.19.

As previously discussed, petitioner has no undeclared sales and undeclared income. Therefore, the imposition of VAT thereon is improper. Accordingly, the deficiency VAT assessment made by respondent against petitioner shall be cancelled.

III. Deficiency expanded withholding tax assessment – ₱1,743,233.17

Respondent assessed petitioner of deficiency EWT amounting to ₱1,743,233.17, inclusive of interest, computed as follows:[71]

Basic Tax Due (Schedule 4)	₱ 605,404.48
Add: Interest (01/16/06 to 06/08/15)	1,137,828.69
Total Amount Due	**₱1,743,233.17**

The basic tax due arose from alleged non-withholding of income payments pursuant to Section 58 of the NIRC of 1997, as amended, as implemented by Revenue Regulations No. 2-98, computed as follows:[72]

Schedule 4	**Per FAN**	**Per FDDA**
Basic Tax Due from Non-Withholding of Expenses (Schedule 2)	44,517.11	-
Add: Non-Withholding of Payments Charged to Accounts Payable per Audit (Schedule 5)	605,404.48	605,404.48
Total Amount Due	**649,921.59**	**605,404.48**

[71] *Id.* at p. 1200.
[72] *Id.* at Note 49, pp. 403-405.

Schedule 5	
Income Payments with Withholding Tax-Charged under Accounts Payable (A/P)	
October	₱ 2,400,774.84
November	3,080,261.17
December	2,086,519.96
Total	₱ 7,567,555.97
Divided by	3 months
Monthly Average	**₱ 2,522,518.66**
Tax Rate (EWT)	2%
Average Monthly Tax Due-Income payments charged under A/P	**₱ 50,450.37**
Multiplied by	12 months
Tax Due on Income payments charged under A/P	**₱ 605,404.48**

The details of the foregoing are as follows:[73]

Particulars	December	November	October	
AR-Employees	₱ 38,765.69	₱ 138,526.96	₱ 89,435.80	
AR-Employees Monthly	51,515.84	7,427.50	39,913.59	
AR-Others Chevron	153,650.84	147,150.56	146,726.05	
Revenue Equipment-Toyota Manila Bay	990,542.43	2,013,778.46	1,281,641.07	
Clark Aviation Services-Fuji Xerox	13,608.00	-	15,000.00	
Clark Aviation Services	4,939.00	-	-	
Automotive body parts avia. car zone etc	74,728.00	-	44,765.00	
Small auto parts	68,288.20	52,279.25	50,982.28	
Starting & lighting batteries	5,383.93	10,550.00	9,223.22	
Outside repairs local	33,617.86	29,880.00	34,400.00	
Painting materials	10,267.86	-	29,800.00	
Gasoline	75,066.38	44,023.78	72,062.91	
Diesel	421,911.51	399,514.88	385,531.05	
Motor Oil	1,256.70	868.75	679.90	
Tire	10,831.25	32,244.64	28,919.64	
Ownership Licenses	9,552.60	30,554.69	36,323.42	
Automotive maintenance power units	17,100.00	17,050.00	15,250.00	
Housekeeping-cancer manpower	4,589.28	4,172.07	8,705.19	
Light and power-charges on rentals (No OR)	18,294.57	3,445.18	17,971.52	
Water-charges on rentals	4,261.61	6,896.05	2,871.25	
Light and power-charges on rentals	25,758.99	23,761.74	38,842.26	

[73] *Id.* at p. 50.

Computer maintenance service agreement	5,223.21	-	-	
Office Supplies (more than 10k)	18,281.01	21,770.23	9.64	
Auto liability insurance-Toyota Manila Bay	29,085.00	58,170.00	51,721.05	
Driver uniforms-Cejogua Sports Corp	-	38,196.43	-	
Driver uniforms-Cejogua Sports Corp	-	32,035.71	-	
	₱ 2,086,519.76	₱ 3,080,261.17	₱ 2,400,774.84	₱ 2,522,518.59
			(x12 mo/11)	*2,751,838.46*
@2% EWT	41,730.40	61,605.22	48,015.50	50,450.37
				12
			12,503.00	**₱ 605,404.46**

The amounts of income payments for the months of October, November and December were derived by the BIR from the Accounts Payable (A/P) register of petitioner. According to respondent, in consultation with Ms. Dina B. Corvera, Finance Controller of petitioner, he analyzed the entries in the A/P Register for a three-month period since petitioner's system is unavailable for verification, and multiplied the findings by 12 (months) to arrive at the preliminary findings. Allegedly, these are entries where no withholding tax had been set-up.[74]

Petitioner claims that it properly withheld the taxes due on its income payments in CY 2005. Petitioner avers that the manner of respondent in computing the deficiency EWT based on the last three (3) months balance of accounts indicates that the assessment was based on mere conjecture and speculation.[75] Petitioner in its reply to the FAN[76] emphasized that the BIR has used only the last 3 months of CY 2005 as the basis of arriving at the monthly average accounts payable and thereafter multiplied the monthly average by 12 to arrive at the accounts payable for the year 2005. Petitioner posits that it is not a valid basis since the accounts payable for each month would naturally vary from month to month, and the variance for each month could be substantial. Hence, the monthly average based on the last 3 months is not a reasonable basis.

Petitioner likewise points out that for expenses incurred and charged to the profit and loss accounts, the corresponding credit entry to the balance sheet is either to cash or accounts payable. Therefore, for each expense (charged to profit and loss accounts) which petitioner had accordingly deducted and withheld tax on, to withhold tax again based on the accounts payable amount would result

[74] *Id.* at p. 52.
[75] *Id.* at Note 18,p. 1784.
[76] *Id.* at Note 7, p. 1196, Exhibit "P-25".

in a double-counting of the EWT. To expound further, if the expenses are incurred and payment is made to the vendor in the same month, the EWT is accordingly paid/settled to the BIR in the same month. If the expenses are incurred and payment to the vendor is made in the subsequent months, the expenses are recorded as accounts payable, with the EWT recorded as accruals and these accounts payable and accruals are reversed in the month of actual payment of the expenses and EWT. Therefore, there could be a timing difference between when the expenses are first incurred (*i.e.*, charged to the profit and loss accounts) and when actual payment of the expenses and EWT is made.

Given the well-entrenched principle in taxation that tax assessments by tax examiners are presumed correct and made in good faith; that the taxpayer has the duty to prove otherwise; that 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; and finally that all presumptions are in favor of the correctness of tax assessments,[77] the assessment should be upheld as petitioner was not able to overturn these presumptions.

In the case of *Marcos II vs. Court of Appeals, et al.*[78], the Supreme Court ruled:

> "It is not the Department of Justice which is the government agency tasked to determine the amount of taxes due upon the subject estate, but the Bureau of Internal Revenue, whose determinations and assessments are presumed correct and made in good faith. The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed. Even an assessment based on estimates is *prima facie* valid and lawful where it does not appear to have been arrived at arbitrarily or capriciously. The burden of proof is upon the complaining party to show clearly that the assessment is erroneous. Failure to present proof of error in the assessment will justify the judicial affirmance of said assessment. In this instance, petitioner has not pointed out one single provision in the Memorandum of the Special Audit Team which gave rise to the questioned assessment, which bears a trace of falsity. Indeed, the petitioner's attack on the assessment bears mainly on the alleged improbable and unconscionable amount of the taxes charged. But mere rhetoric cannot supply the basis for the charge of impropriety of the assessments made."

---

[77] *Commissioner of Internal Revenue vs. Wyeth Suaco Laboratories, Inc. and the Court of Tax Appeals*, G.R. No. 76281, September 30, 1991.
[78] G.R. No. 120880, June 5, 1997.

Here, petitioner failed to prove its contentions and to effectively contradict the findings of respondent by solely basing its defense on the nature of the assessment being an estimate or average of the accounts payable amounts of the last three months of CY 2005. Even in the proceedings of this case, petitioner was not able to fully substantiate its claim. Petitioner was also unsuccessful in proving proper withholding and remittance of the withholding taxes of every item listed and considered in the tax deficiency computation. There was no evidence presented to support that petitioner indeed withheld and paid the BIR the corresponding withholding taxes due on all its income payments. As such, petitioner failed to show the fact upon which it based its claim.

While it appears that the basis of respondent is not strong, petitioner, nevertheless, should not rely on the weakness of such evidence but on the strength of its own documents. The facts essential for the proper disposition of the said controversy were available to petitioner. Petitioner should have endeavored to make the facts clear to this Court. However, it failed to satisfactorily dispute the same with clear and convincing proof.[79]

It must be emphasized that 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 in favor of the correctness of tax assessment stands.[80] In the present case, petitioner miserably failed to discharge this duty.

Finding no reversible error, the Court upholds the deficiency expanded withholding tax assessment to the extent of ₱605,404.48.

The 25% surcharge is imposable under Section 248(A)(3) of the NIRC of 1997, as amended

Since there is no legal or factual basis for respondent to impose fifty percent (50%) surcharge on petitioner's alleged deficiency income tax and VAT, the same shall be also cancelled. However, a twenty-five percent (25%) surcharge shall be imposed on petitioner's deficiency expanded withholding tax under Section 248(A)(3) of the NIRC of 1997, as amended, for failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment.

---

[79] *H. Tambunting Pawnshop, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 173373, July 29, 2013.
[80] *Sy Po vs. Hon. Court of Tax Appeals*, et al., G.R. No. 81446, August 18, 1988.

WHEREFORE, premises considered, the assessments issued by respondent against petitioner for taxable year 2005 covering deficiency income tax and value-added tax are **CANCELLED** for lack of merit, while the deficiency expanded withholding tax assessment is **AFFIRMED**. Accordingly, petitioner is hereby **ORDERED TO PAY** respondent the amount of **SEVEN HUNDRED FIFTY-SIX THOUSAND SEVEN HUNDRED FIFTY-FIVE PESOS AND 60/100 (₱756,755.60)** representing basic deficiency expanded withholding tax and the 25% surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended:

Basic Tax Due	₱ 605,404.48
Add: 25% Surcharge	151,351.12
Total Amount Due	**₱756,755.60**

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

(a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic expanded withholding tax computed from January 11, 2006, **until December 31, 2017** pursuant to Section 249(B) of the NIRC of 1997, as amended; and

(b) Delinquency interest at the rate of 20% per annum on the total amount of ₱756,755.60 and on the deficiency interest which have accrued as afore-stated in (a) computed from June 5, 2015 **until December 31, 2017** pursuant to Section 249(C) of the NIRC of 1997, as amended; and

(c) **Delinquency interest at the rate of 12% on the unpaid amount (basic tax plus surcharge plus interests computed in (a) and (b) above) from January 1, 2018 until the amount is fully paid pursuant to the relevant provision of the Republic Act No. 10963[81] or more commonly known as the TRAIN Law, which took effect on January 1, 2018."[82]**

---

[81] Section 249. Interest. -

(A) In General. There shall be assessed and collected on any unpaid amount of legal inter at the rate of **DOUBLE THE LEGAL INTEREST RATE FOR LOANS OR FORBEARANCE OF ANY MONE IN THE ABSENCE OF ANY EXPRESS STIPULATION AS BY THE BANGKO SENTRAL NG PILIPINAS,** from the date prescribed for payment until the amount is fully paid, **PROVIDED THAT IN NO CASE SHALL THE DEFICIENCY AND DELINQUENCY INTEREST PRESCRIBED UNDER SUBSECTION (B) AND (C) HEREOF, BE IMPOSED SIMULTANEOUSLY.**'

(B) Deficiency Interest - Any deficiency in the tax due as the term is defined in this Code, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof, **OR UPON ISSUANCE OF A NOTICE AND DEMAND BY THE COMMISSIONER OF INTERNAL REVENUE, WHICHEVER COMES EARLIER.** (with emphasis supplied on the amended provisions)

[82] *Moog Controls Corporation-Philippine Branch vs. Commissioner of Internal Revenue*, CTA Case no. 9077, February 22, 2018.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

LOVELL R. BAUTISTA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

ATTESTATION

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

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13 of Article VIII 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's Division.

ROMAN G. DEL ROSARIO
Presiding Justice