CTA Form No. 8

20-000271-0080

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

CTA CASE NO. 10343

FORT BONIFACIO DEVELOPMENT CORPORATION,
Petitioner,

- versus -

NOTICE OF DECISION

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

To:

OFFICE OF THE SOLICITOR GENERAL
134 Amorsolo Street, Legazpi Village
Makati City

ATTY. MARVEEN B. DE LA PAZ
Bureau of Internal Revenue
Room 703, Litigation Division, BIR National Office Building
Sen. Miriam P. Defensor-Santiago Avenue
Diliman, Quezon City

SALVADOR LLANILLO & BERNARDO
Units 1706-1711, 17th Floor, Tower One & Exchange Plaza
Ayala Triangle, Ayala Avenue
1226 Makati City

GREETINGS:

You are hereby notified by these presents that on **August 22, 2024,** a Decision was rendered in the above-entitled case, copy of which is attached hereto.

Quezon City, Philippines, **August 27, 2024.**

Atty. Maria Johoanna F. Chan-Te
Executive Clerk of Court II

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

FORT BONIFACIO DEVELOPMENT CORPORATION, Petitioner,	**CTA CASE NO. 10343**
	Members:
- versus -	**DEL ROSARIO,** *P.J., Chairperson,* **BACORRO-VILLENA,** *and* **CUI-DAVID,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: AUG 2 2 2024; 1:00 PM

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DECISION

BACORRO-VILLENA, J.:

At bar is a Petition for Review[1] filed by petitioner Fort Bonifacio Development Corporation (**petitioner**) against respondent Commissioner of Internal Revenue (**respondent/CIR**) pursuant to Section 3(a)[2], Rule 8 in relation to Section 3(a)(1)[3], Rule 4 of the Revised

[1] Filed on 09 September 2020, Division Docket, Volume I, pp. 6-41.

[2] **SEC. 3.** *Who may appeal; period to file petition.* —
(a) A party adversely affected by a decision, ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claims for refund of internal revenue taxes, or by a decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry, the Secretary of Agriculture, or a Regional Trial Court in the exercise of its original jurisdiction may appeal to the Court by petition for review filed within thirty days after receipt of a copy of such decision or ruling, or expiration of the period fixed by law for the Commissioner of Internal Revenue to act on the disputed assessments. In case of inaction of the Commissioner of Internal Revenue on claims for refund of internal revenue taxes erroneously or illegally collected, the taxpayer must file a petition for review within the two-year period prescribed by law from payment or collection of the taxes.

[3] **SEC. 3.** *Cases within the jurisdiction of the Court in Division.* – The Court in Division shall exercise:
(a) Exclusive original over or appellate jurisdiction to review by appeal the following:

Rules of the Court of Tax Appeals[4] (**RRCTA**). It prays that judgment be rendered ordering the cancellation and withdrawal of respondent's deficiency income tax (**IT**), value-added tax (**VAT**), expanded withholding tax (**EWT**), withholding tax on compensation (**WTC**), documentary stamp tax (**DST**) assessments against petitioner in the total amount of ₱256,080,410.41 (inclusive of interest, surcharges, and compromise penalties) for calendar year (**CY**) 2012.[5]

PARTIES TO THE CASE

Petitioner is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines.[6] It is registered with the Bureau of Internal Revenue (**BIR**) with Tax Identification Number (**TIN**) 004-707-554-000.[7] It holds its principal office at 2/F Bonifacio Technology Center, 31st Street corner 2nd Avenue, Bonifacio Global City, Taguig City.[8] It primarily deals with housing projects, commercial, industrial, urban, and other kinds of real property.[9]

Respondent, on the other hand, is the CIR who is charged with, among others, the duty of assessing and collecting internal revenue taxes, fees or other charges, penalties imposed under the National Internal Revenue Code (**NIRC**) of 1997, as amended, or other laws or portions thereof, administered by the BIR. He or she holds office at the BIR, National Office Building, BIR Road, Diliman, Quezon City.[10]

FACTS OF THE CASE

On 29 August 2014, petitioner received a Letter of Authority (**LOA**) dated 18 August 2014 with Reference No. LOA-126-2014-

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(1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue[.]

4 A.M. No. 05-11-07-CTA.

5 Prayer, Petition for Review, Division Docket, Volume I, p. 38. *Aggregate tax due per Final Decision on Disputed Assessment (FDDA) is ₱256,080,410.14.*

6 Exhibit "P-1", id., Volume II, p. 801.

7 Exhibit "P-2", id., p. 869.

8 Id.

9 Exhibit "P-14", id., p. 985.

10 Paragraph 2, I. Stipulation of Facts, Joint Stipulation of Facts and Issues (JSFI), id., Volume I, p. 390.

00000017[11] (SN: eLA201100060500). The said LOA was issued by the BIR's Large Taxpayers Service (**LTS**) - Regular Audit Division 3 (**LTRAD** 3) through then Officer-in-Charge (**OIC**) Assistant Commissioner of the LTS, Nestor S. Valeroso (**Valeroso**). It authorized Revenue Officers Maureen Gay Oligane (**Oligane**), Roderick Abad (**Abad**), Michael Aldrin Bumanglag (**Bumanglag**), and Ofelia Gratuito (**Gratuito**), as well as Group Supervisor Guia Bobis (**GS Bobis**), to examine petitioner's books of accounts and other accounting records for all internal revenue taxes for the period 01 January 2012 to 31 December 2012.

On 09 September 2014, in response to the LOA, petitioner submitted supporting documentation (as requested by the BIR's investigating team), accompanied by a Transmittal Letter dated 05 September 2014.[12]

On 05 January 2016, petitioner received a Preliminary Assessment Notice[13] (**PAN**) with Details of Discrepancies (issued by the BIR on the same date), informing it of its alleged IT, VAT, WTC, EWT, and DST deficiencies amounting to ₱201,037,102.56, inclusive of penalties.

Thereafter, on 21 January 2016, petitioner received a Formal Letter of Demand with Details of Discrepancies and Assessment Notices[14] (**FLD/FAN**), all issued by the BIR on even date. The FLD/FAN demanded payment of the same deficiencies as stated in the PAN, this time amounting to ₱203,080,335.31 (as adjusted for incremental interest). In response thereto, on 22 February 2016 (the next working day after the original deadline of 20 February 2016, which fell on a Saturday), petitioner filed its Protest Letter, requesting for a reinvestigation of the FLD/FAN.[15]

On 05 January 2018, petitioner received a Letter dated 11 December 2017[16] from BIR's LTRAD 3, informing it that a new team would be continuing the investigation of its case. Accordingly, RO Cristina C. Lati (**Lati**) and GS Asela E. Sese (**Sese**) began the reinvestigation of petitioner's case, in view of its administrative protest, pursuant to

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11 Exhibit "P-4", id., Volume II, p. 871.
12 Exhibit "P-5", id., p. 872, and BIR Records, p. 5.
13 Exhibit "P-6", id., pp. 873-881.
14 Exhibit "P-7", id., pp. 882-894.
15 Exhibit "P-8", id., pp. 895-903 and BIR Records, pp. 408-416.
16 BIR Records, p. 419.

Memorandum of Assignment (**MOA**) No. 126-REIN-2017-00006 dated 07 December 2017.[17]

On 27 July 2020, petitioner received a Final Decision on Disputed Assessment[18] (**FDDA**) with attached Assessment Notices (**ANs**), issued on the same day by then CIR Caesar R. Dulay (**Dulay**), directing petitioner to pay by 26 August 2020 its alleged deficiency taxes in the aggregate amount of ₱256,080,410.14, including surcharges, interest, and compromise penalties, broken down as follows:

Tax Type	Basic Tax Due	Interest	Surcharge	Total Amount Due
IT	₱92,185,125.80	₱99,701,370.58	-	₱191,886,496.38
VAT	17,779,519.36	20,008,535.27	₱8,889,759.68	46,677,814.31
EWT	6,338,149.45	7,245,524.15	3,169,074.72	16,752,748.32
WTC	269,520.44	304,787.01	134,760.22	709,067.67
DST	1,795.00	2,039.71	448.75	4,283.46
Compromise	50,000.00	-	-	50,000.00
Total	**₱116,624,110.05**	**₱127,262,256.72**	**₱12,194,043.37**	**₱256,080,410.14**

Aggrieved, petitioner filed the present petition on 09 September 2020.[19] The case was raffled to this Court's First Division.

PROCEEDINGS BEFORE THIS COURT

On 23 September 2020, the Court served Summons[20] on respondent.

On 23 November 2020, following a 30-day extension period that the First Division granted[21], respondent filed his or her Answer.[22] In the Answer, respondent interposed that petitioner cannot question the authority of the BIR's investigating team for the first time on appeal, when it did not make any mention of such alleged lapse during the

17 Id., p. 417.
18 Exhibits "P-9" and "R-8", BIR Records, pp. 573-584.
19 Supra at note 1. Petitioner's filing follows the reopening of the Courts (pursuant to Supreme Court Administrative Circular No. 43A-2020) after the imposition of a Modified Enhanced Community Quarantine (**MECQ**) throughout the National Capital Region (**NCR**).
20 Division Docket, Volume I, p. 250.
21 See Order dated 04 November 2020, id., p. 259.
22 Id., pp. 260-282.

administrative proceedings. Respondent likewise maintained that the audit investigation and the resulting assessment were compliant with the pertinent laws and rules and were thus valid. As to the FLD/FAN, respondent insisted that it contained a categorical demand for payment with a definite amount of tax liability. Therefore, for respondent, petitioner should be liable for the assessed tax deficiencies.[23]

Later, pursuant to Parts I.1.A[24] and II[25] of A.M. No. 11-1-5-SC-PHILJA or the Interim Guidelines for Implementing Mediation in the Court of Tax Appeals, the First Division referred the case to the Philippine Mediation Center – Court of Tax Appeals (**PMC-CTA**) and ordered the parties to appear before it on 26 January 2021.[26] However, the parties decided not to have their case mediated by the PMC-CTA.[27] In its Resolution dated 22 February 2021[28], the First Division set the case for Pre-Trial Conference on 15 April 2021.

Ahead of the scheduled Pre-Trial Conference, on 22 April 2021, petitioner filed its Pre-Trial Brief[29] through electronic mail. In the *interim*, the Court issued an Order dated 03 June 2021[30], resetting the Pre-Trial Conference to 08 July 2021 in consideration of the physical closure of all courts in the National Capital Region (**NCR**) until 30 April 2021.[31]

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23 Id.

24 I. *Coverage*
I.1. The following cases may be referred to mediation:
A. *Cases within the jurisdiction of the Divisions*
1. Decisions of the Commissioner of Internal Revenue (CIR) in cases involving disputed assessments, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code (NIRC), or other laws administered by the Bureau of Internal Revenue (BIR);
2. Inaction by the CIR in cases involving disputed assessments, fees or other charges, penalties in relation thereto, or other matters arising under the NIRC or other laws administered by the BIR, where the NIRC provides a specific period for action, in which case the inaction shall be deemed a denial upon the lapse of said period[.]

25 II. *Referral to Mediation*
The referral to mediation shall be made after the filing of the Comment in cases pending with the Court *En Banc* and, before or during the pre-trial for cases pending with the Court in Division.
A Resolution (FORM NO. 1) shall be issued by the Court *En Banc* or in Division, referring the covered civil case to mediation and requiring the parties to appear before the Philippine Mediation Center – Court of Tax Appeals (PMC-CTA) at a specified date and time. Said Resolution shall suspend the proceedings for the duration of the period of mediation stated in Section VIII below.

26 See Resolution dated 09 December 2020, Division Docket, Volume I, p. 286.

27 See No Agreement to Mediate dated 09 February 2021, id., p. 287.

28 Id., p. 290.

29 Id., pp. 297-310.

30 Id., p. 329.

31 See Supreme Court (SC) Administrative Circular No. 22-2021 dated 14 April 2021.

Meanwhile, on 06 July 2021, the Court received respondent's Pre-Trial Brief[32] filed *via* an accredited courier.

On 07 July 2021, respondent transmitted the entire BIR Records for the present case, consisting of one (1) docket with 593 pages.[33] The First Division later noted the same in its Minute Resolution dated 27 July 2021.[34]

On 08 July 2021, the Pre-Trial Conference proceeded as scheduled.[35]

On 27 July 2021, petitioner filed a "Motion to Commission an Independent Certified Public Accountant"[36] (**ICPA**). Thereafter, on 28 July 2021, the parties timely submitted their Joint Stipulation of Facts and Issues[37] (**JSFI**), as they were ordered during the Pre-Trial Conference.

Originally set on 09 September 2021, the First Division reset the hearing for petitioner's Motion to Commission an ICPA to 26 October 2021, in view of the re-imposition of the Modified Enhanced Community Quarantine (**MECQ**) in the NCR.[38]

In a Resolution dated 20 October 2021[39], the First Division noted petitioner's Motion to Commission an ICPA and approved the parties' JSFI. It likewise deemed the Pre-Trial terminated.

On 26 October 2021[40], a hearing was held *via* video conferencing. Therein, the First Division granted petitioner's Motion to Commission an ICPA. The proposed ICPA, Lee Celso R. Vivas (**Vivas**), then took his oath[41] and was given forty (40) days (or until 06 December 2021, since

32 Division Docket, Volume I, pp. 333-336.
33 See Compliance dated 01 July 2021, id., p. 350-351.
34 Id., p. 372.
35 See Minutes of the Hearing and Order, both dated 08 July 2021, id., pp. 353-355 and 356-358, respectively.
36 Id., pp. 376-378.
37 Id., pp. 390-399.
38 See Notice of Resetting dated 13 September 2021, id., p. 401.
39 Id., p. 403.
40 See Order dated 26 October 2021, id., pp. 409-411.
41 Oath of Commission (For a CPA Firm) of Lee Celso R. Vivas dated 26 October 2021, id., p. 416.

05 December 2021 fell on a Sunday) to furnish his ICPA Report. He was set to testify on the said Report on 18 January 2022.

In the same hearing[42], petitioner presented his witness, Bryan S. Marin (**Marin**), who was to testify through his Judicial Affidavit dated 07 September 2020.[43]

On the witness stand, Marin, petitioner's Regulatory Compliance and Legal Manager and also its Assistant Corporate Secretary, identified the several exhibits he had referred to in his Judicial Affidavit.[44] These exhibits mainly dealt with the documents and issuances that the BIR issued to petitioner over the course of its examination of the latter's books, from the LOA to the FDDA, then the corresponding documents submitted and actions taken by petitioner. He also testified as to the events that transpired prior to the filing of petitioner's claim before this Court and his understanding of the latter's positions and arguments against the bases laid out by the BIR in its assessment. According to Marin, the subject assessment lacked legal and factual basis, and for most of the taxes involved, the right to assess against petitioner had already prescribed at the time the FLD/FAN was issued. To establish prescription, he outlined the particulars of the returns petitioner had filed during the subject CY, their corresponding deadlines, and petitioner's actual filing dates.

During his cross-examination, Marin clarified that petitioner's stance regarding the absence of a definite amount of tax liability is attributed to the period between the end date of the computation of interest *per* the FLD/FAN and the actual deadline for payment supposedly set. Nonetheless, he acknowledged that absent any prior coordination with the BIR, the latter would not know if and when exactly petitioner would settle its deficiency tax liability (which would be essential to a precise and fixed computation of interest). Meanwhile, on the question of prescription of the right to assess petitioner for CY 2012, he confirmed that petitioner had not executed any waivers in connection with the audit examination.[45] No redirect examination followed.[46]

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42 Supra at note 40.
43 Exhibit "P-17", id., pp. 44-61.
44 Id.
45 TSN dated 26 October 2021, pp. 23-27.
46 Supra at note 40.

On 07 December 2021, ICPA Vivas filed his Report[47] through registered mail.

Meanwhile, on 16 December 2021, the First Division issued an order confirming the termination of the Pre-Trial.[48]

On 12 January 2022, the Supreme Court (**SC**) issued SC Memorandum Order No. 10-2022 ordering the physical closure of all courts in the NCR until 31 January 2022, recognizing the rising number of COVID-19 cases in the region. Accordingly, in an Order dated 02 February 2022[49], the First Division noted the submission by ICPA Vivas of his Report and rescheduled the hearing originally set for him (to testify on the same) to 05 April 2022. The same Order likewise cancelled the hearing for the presentation of respondent's evidence until further notice, which was originally scheduled on the new date for ICPA Vivas' testimony.

Later, on 11 January 2022 and 31 March 2022, respectively, petitioner filed ICPA Vivas' initial[50] and supplemental[51] Judicial Affidavits. On 05 April 2022[52], the latter testified, as scheduled. During the hearing, the First Division admitted ICPA Vivas' supplemental Judicial Affidavit over the objection of respondent's counsel, but penalized petitioner with a ₱3,000.00 fine.

When ICPA Vivas took the witness stand, he declared that he conducted an examination of petitioner's supporting documents in connection with the instant petition. He identified his Report and some of the corresponding exhibits he had referred to in his Judicial Affidavit.[53] In his supplemental Judicial Affidavit, he identified further voluminous supporting documentation that petitioner proffered to support the latter's claims. He exhaustively enumerated the collection of exhibits he had pre-marked over the course of investigation.[54] Likewise, ICPA Vivas outlined the scope of his examination and the procedures he performed.

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47 Exhibit "P-16", id., pp. 432-464.
48 Id., pp. 468-478.
49 Id., p. 479.
50 Exhibit "P-18", id., pp. 518-541.
51 Exhibit "P-19", id., pp. 761-770.
52 See Minutes of the Hearing and Order, both dated 05 April 2022, id., pp. 775-778 and 779-780, respectively.
53 Supra at note 50.
54 Supra at note 51.

In verifying each item of the deficiency assessment, he analyzed how respondent recomputed the alleged deficiency taxes by looking into the breakdown and details thereof. He then reviewed petitioner's defenses against each item, as stated in its administrative protest and in the present petition.[55]

During the cross-examination, respondent's counsel inquired about the discrepancy between the supporting documents that petitioner presented in the administrative proceedings and those presented to the Court (highlighting that select items did not appear to have been presented to the BIR). To this, ICPA Vivas pointed out that he was unaware of what had occurred during the administrative proceedings as he was not a participant therein.[56] No redirect examination followed.[57]

With ICPA Vivas being petitioner's last witness, its turn to present evidence had thus ended. The First Division then gave petitioner fifteen (15) days, or until 20 April 2022, to file its Formal Offer of Evidence (**FOE**). Correspondingly, respondent was given ten (10) days from receiving a copy of the FOE to file a Comment thereon.[58]

On 20 April 2022, petitioner filed its FOE.[59] Respondent was served a copy thereof on the same date[60] and, thus, had until 30 April 2022 to file a Comment thereto. Unfortunately, respondent failed to timely file the same, as the records showed that the Court had not received such by the lapse of the granted 10-day period and even beyond, until 05 May 2022.[61] It was later discovered that respondent filed a "Comment (On Petitioner's Formal Offer of Evidence)" dated 05 May 2022[62] *via* registered mail on 06 May 2022, which the Court received on 18 May 2022. Nevertheless, the same had been filed to and received by the Court out of time.

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55 Supra at note 50.
56 TSN dated 05 April 2022, pp. 16-18.
57 Supra at note 52.
58 Supra at note 52.
59 Id., Volume II, pp. 788-799.
60 Id., p. 799.
61 See Records Verification dated 05 May 2022, id., p. 1046.
62 Id., pp. 1049-1050.

As such, in its Resolution dated 24 May 2022[63], the First Division acted upon petitioner's FOE *sans* respondent's Comment and admitted all but two (2) of petitioner's offered exhibits. In particular, the offered sub-marked Exhibits "**P-15-1.2-200002**"[64] and "**P-15-1.2-300465**"[65] were denied admission as petitioner failed to present the document's original or certified true copy for comparison. In another Resolution dated 03 June 2022[66], the First Division considered respondent's Comment moot, in consideration of its earlier FOE Resolution.

On 23 June 2022, in an attempt to remedy the denial, petitioner filed a "Motion for Partial Reconsideration (Re: Resolution dated May 24, 2022)"[67] (**MPR**). Respondent, once again, failed to comment.[68] However, in the Resolution dated 18 August 2022[69], the First Division denied the MPR for lack of merit, stating that the previously denied exhibits were inadmissible photocopies and lacked a certification from the ICPA that they were faithful reproductions of their original counterparts.

Unsatisfied, on 14 September 2022, petitioner asked for a Commissioner's Hearing for the comparison of its aforementioned denied exhibits with the corresponding originals.[70] In a Resolution dated 03 October 2022[71], the Court, in the interest of justice, allowed the same and set a Commissioner's Hearing on 13 October 2022. However, petitioner apparently belatedly received a copy of said Resolution (on the same day as the scheduled Commissioner's Hearing) and was thus unable to prepare the exhibits nor had them marked.

Accordingly, on 18 October 2022[72], petitioner moved to reset the Commissioner's Hearing and defer the filing of its amended FOE. On 27 October 2022, the Court granted the same and set a Commissioner's Hearing anew on 03 November 2022 and granted petitioner ten (10) days

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63 Id., pp. 1055-1056.
64 Official Receipt (OR) No. 5024 issued by Aglipay Security & Maintenance Inc. dated 27 January 2012, in the amount of ₱265,794.19.
65 OR No. 08202 issued by Bonifacio Security Services, Inc. dated 17 July 2012, in the amount of ₱1,191,346.22.
66 Id., p. 1058.
67 Id., pp. 1059-1063.
68 See Records Verification dated 19 July 2022, id., pp. 1067.
69 Id., pp. 1071-1073.
70 See Petitioner's Motion with Leave of Court to Set a Commissioner's Hearing dated 14 September 2022, id., pp. 1076-1078.
71 Id., p. 1080.
72 See Petitioner's Omnibus Motion with Leave of Court (i) To Defer the Filing of the Formal Offer of Evidence; and (ii) To Set Commissioner's Hearing, id., pp. 1084-1086.

therefrom to file another FOE. It also gave respondent 10 days from receipt of the FOE to file his or her Comment thereon.

Later, the Commissioner's Hearing proceeded as scheduled and petitioner's previously denied exhibits were duly marked.[73] On 14 November 2022, petitioner filed its Amended FOE.[74] Once again, respondent did not comment.[75]

In a Resolution dated on 06 January 2023[76], the Court pointed out that, as opposed to petitioner's initial FOE that offered "Exhibits P-15, inclusive of sub-markings", the amended FOE only offered "Exhibit P-15" (without an indication of the inclusion of the sub-marked exhibits). In line with this, it noted Exhibit **"P-15"** and petitioner's other offered exhibits (stating that these were already previously admitted when it acted upon petitioner's first FOE and pointing out that the previously denied sub-marked exhibits **"P-15-1.2-200002"**[77] and **"P-15-1.2-300465"**[78]) were not part of the amended FOE.

On 22 February 2023, petitioner filed its motion for reconsideration[79] (**MR**) praying that the Court take into account the tenor of its prayer in its FOE that asked for the admission of all of its offered exhibits "inclusive of sub-markings." Over respondent's objection[80], the Court granted the MR and admitted (the previously denied) Exhibits **"P-15-1.2-200002"** and **"P-15-1.2-300465"** in its Resolution dated 18 April 2023.[81]

Meanwhile, on 02 March 2023, RO Bumanglag took the witness stand as respondent's sole witness.[82]

On the witness stand, RO Bumanglag testified, by way of his Judicial Affidavit[83], on what transpired during petitioner's audit and

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[73] Id., pp. 1093-1094.
[74] Id., pp. 1095-1105.
[75] See Records Verification dated 28 November 2022, id., p. 1110.
[76] Id., pp. 1114-1115.
[77] Supra at note 64.
[78] Supra at note 65.
[79] Petitioner's Motion for Reconsideration (Re: Resolution dated January 10, 2023), id., p. 1118-1122.
[80] Respondent's Comment/Opposition dated 06 March 2023, id., pp. 1141-1142.
[81] Id., pp. 1162-1164.
[82] See Order dated 02 March 2023, id., pp. 1138-1139.
[83] Exhibit "R-10", id., Volume I, pp. 342-348.

assessment, and identified the relevant documents the BIR issued during the conduct thereof. He declared as well that he prepared a Memorandum Report dated 18 December 2015[84], recommending the issuance of a PAN against petitioner. He stated that, following the eventual issuance of the PAN, petitioner filed a protest in response to the said PAN. He further declared while the investigation team evaluated petitioner's arguments in the protest to the PAN, petitioner was still found liable for the deficiency taxes. As a result, Memorandum Report dated 18 January 2016[85] was issued, recommending the issuance of an FLD/FAN against it. RO Bumanglag narrated further that petitioner also eventually filed a protest to the FLD/FAN, triggering thus another round of examination that later resulted in the issuance of the final Memorandum Report dated 07 January 2019[86] (recommending the issuance of an FDDA).

On cross-examination, replying to an inquiry about his participation in the reinvestigation of petitioner's protest to the FLD/FAN, RO Bumanglag explained that he was not involved since his transfer to a different BIR office in Bacolod. Nevertheless, he confirmed that the case was transferred to the group of GS Sese for reinvestigation. As regards the LOA for GS Sese, he stated that he was not aware of a new LOA issued to GS Sese's team for the reinvestigation.[87] No redirect examination followed.[88]

On 27 March 2023, respondent filed his or her FOE comprised of Exhibits "**R-1**" through "**R-10-A**"[89], with petitioner filing its comment thereto on 31 March 2023.[90] In the Resolution dated 23 May 2023[91], the First Division admitted all of respondent's offered exhibits.

The same Resolution ordered the parties to file their respective memoranda within thirty (30) days. On 30 June 2023, Petitioner filed its Memorandum.[92] Respondent, however, failed to comply with the First

84 Exhibit "R-3", BIR Records, pp. 377-380.
85 Exhibit "R-5", id., pp. 390-394.
86 Exhibit "R-7", id., pp. 562-568.
87 TSN dated 02 March 2023, pp. 12-15.
88 Supra at note 82.
89 Division Docket, Volume II, pp. 1148-1152.
90 Petitioner's Comment (Re: Respondent's Formal Offer of Evidence dated March 27, 2023), id., pp. 1154-1159.
91 Id., pp. 1168-1169.
92 Id., pp. 1170-1222.

Division's directive.[93] With the filing of petitioner's memorandum and the lapse of the period allotted for respondent to file the same, the case was submitted for decision on 28 July 2023.[94]

ISSUES

Based on the arguments exchanged by the parties, the issues ripe for this Court's determination may be summarized as follows —

I.
WHETHER THE COURT OF TAX APPEALS (CTA) HAS JURISDICTION OVER THE PRESENT PETITION FOR REVIEW;

II.
WHETHER THE FORMAL LETTER OF DEMAND (FLD) ISSUED TO PETITIONER FORT BONIFACIO DEVELOPMENT CORPORATION IS VOID AS THE OFFICERS THAT EVALUATED ITS REQUEST FOR REINVESTIGATION WERE NOT ISSUED A VALID LETTER OF AUTHORITY (LOA);

III.
WHETHER THE FORMAL LETTER OF DEMAND (FLD) ISSUED TO PETITIONER FORT BONIFACIO DEVELOPMENT CORPORATION IS VOID FOR ITS FAILURE TO INDICATE (A) A DEMAND TO PAY TAX LIABILITIES, AND (B) THE TOTAL AMOUNT OF TAX LIABILITY; AND,

IV.
WHETHER PETITIONER FORT BONIFACIO DEVELOPMENT CORPORATION IS LIABLE TO PAY THE ASSESSED DEFICIENCY INCOME TAX (IT), VALUE-ADDED TAX (VAT), EXPANDED WITHHOLDING TAX (EWT), WITHHOLDING TAX ON COMPENSATION (WTC), AND DOCUMENTARY STAMP TAX (DST) FOR CALENDAR YEAR (CY) 2012.

ARGUMENTS

In support of its petition, petitioner argues that respondent violated its due process rights in conducting the audit investigation and issuing the assessment for CY 2012. Specifically, petitioner contends that the present assessment is void on the following grounds: (1) the RO who

93 See Records Verification dated 25 July 2023, id., p. 1223.
94 See Minute Resolution dated 28 July 2023, id., p. 1224.

was assigned to evaluate its Request for Reinvestigation was not authorized through a valid LOA; and, (2) the FLD and FDDA did not contain a demand for payment and petitioner's alleged tax liability remains indefinite.

Petitioner also points out that the right to assess a number of items included in the deficiency tax assessment had already prescribed. According to petitioner, the three (3)-year prescriptive period for the BIR to assess under the NIRC of 1997, as amended, had lapsed by the time it had received the FLD.

Furthermore, petitioner avers that respondent failed to establish a willful and deliberate attempt (on its part) to mislead or deceive the government. Petitioner explains that this is necessary to justify the imposition of the 50% surcharge (instead of the regular 25%) and the application of the extended ten (10)-year prescriptive period (counted from the discovery of the taxpayer's falsity, fraud or omission).

Finally, petitioner insists that the assessment issued against it lacked factual and legal bases. Thus, for petitioner, even if the procedural defects were set aside, it could not be held liable for any deficiency IT, VAT, EWT, WTC, nor DST.

Meanwhile, respondent argues that petitioner can no longer question the authority of the investigating team for the first time on appeal, when it neglected to do so during the administrative proceedings. Respondent likewise denounces other petitioner's contention over the validity of the FLD, insisting that the FLD/FAN already indicates a demand for payment with a definite amount of tax liability.

Then, contrary to petitioner's claim, respondent believes that the items in the deficiency assessment were all duly supported in fact and in law.

Finally, respondent argues that in the absence of any irregularities in their performance of duties, the investigating ROs' findings shall stand. Respondent points out that assessments enjoy the presumption of correctness and regularity in the absence of any showing of arbitrariness or capriciousness. The burden to overturn such presumption falls on petitioner, who has failed to do so.

RULING OF THE COURT

Before delving into the merits of the case, We find it propitious to first discuss whether this Court has jurisdiction over the instant petition.

THE COURT OF TAX APPEALS HAS JURISDICTION OVER THE TIMELY-FILED PRESENT PETITION FOR REVIEW.

The Court of Tax Appeals (**CTA**), being a court of special jurisdiction, can only take cognizance of matters that are clearly within its jurisdiction.[95]

Section 11 of the Republic Act (**RA**) No. 1125, as amended by RA 9282, in relation to Section 3(a), Rule 8 of the RRCTA, provides for the proper period during which petitioner may invoke the CTA's jurisdiction in order to question respondent's decision, to wit:

> ...
>
> SEC. 11. *Who May Appeal; Mode of Appeal; Effect of Appeal.* — **Any party adversely affected by a decision, ruling** or inaction **of the Commissioner of Internal Revenue**, the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry or the Secretary of Agriculture or the Central Board of Assessment Appeals or the Regional Trial Courts **may file an appeal with the CTA <u>within thirty (30) days</u> after the receipt of such decision or ruling or after the expiration of the period fixed by law for action as referred to in Section 7(a)(2) herein.**
>
> ...
>
> SEC. 3. *Who may appeal; period to file petition.* —
>
> (a) **A party adversely affected by a decision, ruling** or the inaction **of the Commissioner of Internal Revenue on disputed assessments** or claims for refund of internal revenue taxes, or by a

95 *Commissioner of Internal Revenue v. Silicon Philippines, Inc. (formerly Intel Philippines Manufacturing, Inc.)*, G.R. No. 169778, 12 March 2014.

> decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry, the Secretary of Agriculture, or a Regional Trial Court in the exercise of its original jurisdiction **may appeal to the Court by petition for review filed <u>within thirty days</u> after receipt of a copy of such decision or ruling**, or expiration of the period fixed by law for the Commissioner of Internal Revenue to act on the disputed assessments. In case of inaction of the Commissioner of Internal Revenue on claims for refund of internal revenue taxes erroneously or illegally collected, the taxpayer must file a petition for review within the two-year period prescribed by law from payment or collection of the taxes.[96]
>
> ...

Accordingly, in case of the CIR's adverse decision or ruling, the taxpayer is given 30 days to file a petition for review with the CTA.

However, within the period allowed by law for petitioner to file its Petition for Review, the Supreme Court (**SC**) issued SC Administrative Circular (**AC**) No. 43A-2020 dated 03 August 2020, in view of the imposition of the MECQ due to the surge of cases of COVID-19 in the country, which ordered courts in Metro Manila (among others) to be physically closed. The said AC suspended the reglementary period for the filing of pleadings and other court submissions from 04 to 18 August 2020 (resuming on 19 August 2020).

Here, it is undisputed that petitioner received the CIR's Final Decision on <u>27 July 2020</u>[97] (in the form of an FDDA signed by then CIR Dulay), which is the adverse decision appealable to this Court. After considering the suspension of the 30-day reglementary period for filing an appeal pursuant to AC No. 43A-2020 dated 03 August 2020, petitioner had until <u>10 September 2020</u>[98], to file a petition for review with the CTA. Clearly, petitioner timely filed the instant Petition for Review on <u>09 September 2020</u>[99]. That said, this Court has jurisdiction over the case.

We then proceed with a discussion of the merits of the case.

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96 Emphasis and underscoring supplied.

97 Respondent admitted the allegations in Par. 12 of the Petition for Review. See Par. 1 of respondent's Answer, Division Docket Volume I, p. 260.

98 The end of the original 30-day period to file fell on 26 August 2020. By 04 August 2020, eight (8) days had expired therefrom. Counting from the resumption of court operations on 19 August 2020, the remaining twenty-two (22) days from the 30-day period ended on 10 September 2020.

99 Supra at note 1.

After an assiduous review of the case records and the parties' arguments, this Court finds the present petition partly meritorious.

A LETTER OF AUTHORITY (LOA) IS NO LONGER NECESSARY TO AUTHORIZE REVENUE OFFICER (RO) LATI AND GROUP SUPERVISOR (GS) SESE TO REINVESTIGATE PETITIONER'S DEFICIENCY TAX ASSESSMENTS.

Petitioner contends that its constitutional rights to due process (in the conduct of its audit leading to the issuance of the assessment) were violated as the RO who conducted the **reinvestigation** was not authorized by a valid LOA.

We disagree.

The NIRC of 1997, as amended, does require that an investigating officer be duly clothed with authority from the CIR (or from his duly authorized representatives) before an audit examination takes place. Section 6 thereof thus provides:

> ...
> SEC. 6. *Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.* —
>
> (A) *Examination of Returns and Determination of Tax Due.* — After a return has been filed as required under the provisions of this Code, the **Commissioner or his duly authorized representative may authorize the examination of any taxpayer and the assessment of the correct amount of tax**: *Provided, however*; That failure to file a return shall not prevent the Commissioner from authorizing the examination of any taxpayer.[100]
>
> ...

Relatedly, Section 13 of the NIRC of 1997, as amended, states:

> ...
> SEC. 13. *Authority of a Revenue Officer.* — Subject to the rules and regulations to be prescribed by the Secretary of Finance, upon

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[100] Emphasis supplied and italics in the original text.

recommendation of the Commissioner, a Revenue Officer assigned to perform assessment functions in any district may, **pursuant to a Letter of Authority issued by the Revenue Regional Director**, examine taxpayers within the jurisdiction of the district in order to collect the correct amount of tax, or to recommend the assessment of any deficiency tax due in the same manner that the said acts could have been performed by the Revenue Regional Director himself.[101]

...

However, while the law explicitly requires a valid LOA to be addressed to an RO before an examination of a taxpayer's books (and subsequently recommend the issuance of an assessment), the law does not specifically require the same for purposes of issuing a recommendation towards the FDDA.

Evidently, the above-discussed LOA requirement pertains to the stage of the administrative proceedings where the RO and GS would conduct an audit of the books of accounts and other accounting records of the taxpayer after the filing of the latter's tax returns, and ultimately recommend the issuance of a PAN and a FAN.

Alternatively stated, a valid LOA is necessary for all the stages of the administrative proceedings until the issuance of the FAN. It does not envision a situation where a **reinvestigation** will have to be conducted to arrive at a final decision upon an administrative protest to the FAN (to be set forth in an FDDA).

Moreover, even assuming that an LOA is required to conduct the reinvestigation, its absence would only invalidate the resulting *decision*, such as the FDDA. The Supreme Court elucidated the relevant distinctions in the case of *Commissioner of Internal Revenue v. Liquigaz Philippines Corporation*[102] (**Liquigaz**) where it held:

...

A void FDDA does not ipso facto render the assessment void.

...

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101 Emphasis supplied and italics in the original text.

102 G.R. Nos. 215534 and 215557, 18 April 2016; Citations omitted, emphasis supplied and italics in the original text.

In resolving the issue on the effects of a void FDDA, it is necessary to **differentiate an 'assessment' from a "decision."** In *St. Stephen's Association v. Collector of Internal Revenue*, the Court has long recognized that a "decision" — differs from an "assessment," to wit:

> In the first place, we believe the respondent court erred in holding that the assessment in question is the respondent Collector's decision or ruling appealable to it, and that consequently, the period of thirty days prescribed by Section II of Republic Act No. 1125 within which petitioner should have appealed to the respondent court must be counted from its receipt of said assessment. Where a taxpayer questions an assessment and asks the Collector to reconsider or cancel the same because he (the taxpayer) believes he is not liable therefor, the assessment becomes a "disputed assessment" that the Collector must decide, and the taxpayer can appeal to the Court of Tax Appeals only upon receipt of the decision of the Collector on the disputed assessment, in accordance with paragraph (1) of Section 7, Republic Act No. 1125, conferring appellate jurisdiction upon the Court of Tax Appeals to review "*decisions* of the Collector of Internal Revenue in cases involving *disputed assessment...*"

The difference is likewise readily apparent in Section 7 of R.A. 1125, as amended, where the CTA is conferred with appellate jurisdiction over the decision of the CIR in cases involving disputed assessments, as well as inaction of the CIR in disputed assessments. **From the foregoing, it is clear that what is appealable to the CTA is the "decision" of the CIR on disputed assessment and not the assessment itself.**

An assessment becomes a disputed assessment after a taxpayer has filed its protest to the assessment in the administrative level. Thereafter, the CIR either issues a decision on the disputed assessment or fails to act on it and is, therefore, considered denied. The taxpayer may then appeal the decision on the disputed assessment or the inaction of the CIR. **As such, the FDDA is not the only means that the final tax liability of a taxpayer is fixed, which may then be appealed by the taxpayer.** Under the law, inaction on the part of the CIR may likewise result in the finality of a taxpayer's tax liability as it is deemed a denial of the protest filed by the latter, which may also be appealed before the CTA.

Clearly, a decision of the CIR on a disputed assessment differs from the assessment itself. Hence, the invalidity of one does not necessarily result to the invalidity of the other— unless the law or regulations otherwise provide.

...

> The Court, however, finds that the CTA erred in concluding that the assessment on EWT and FBT deficiency was void because the FDDA covering the same was void. **The assessment remains valid notwithstanding the nullity of the FDDA because as discussed above, the assessment itself differs from a decision on the disputed assessment.**
>
> As established, an FDDA that does not inform the taxpayer in writing of the facts and law on which it is based renders the decision void. Therefore, it is as if there was no decision rendered by the CIR. It is tantamount to a denial by inaction by the CIR, which may still be appealed before the CTA and the assessment evaluated on the basis of the available evidence and documents. The merits of the EWT and FBT assessment should have been discussed and not merely brushed aside on account of the void FDDA.
>
> ...
>
> To recapitulate, **a "decision" differs from an "assessment" and failure of the FDDA to state the facts and law on which it is based renders the decision void—but not necessarily the assessment.** Tax laws may not be extended by implication beyond the clear import of their language, nor their operation enlarged so as to embrace matters not specifically provided.
>
> ...

Clearly, a decision on a disputed assessment is distinct from the assessment that preceded it. Hence, in consideration of the foregoing, the invalidity of one would not necessarily result in the invalidity of the other.

In the instant case, it is undisputed that RO Oligane examined petitioner's books of accounts and other accounting records and recommended the issuance of the PAN and the FANs under a validly issued LOA.[103] Such fact is also supported by the memoranda recommending the issuance of the PAN[104] and the FAN[105], respectively, found in the BIR Records for this case. Nonetheless, at the onset, petitioner had only questioned the authority of the team assigned to evaluate its protest.

As the records bear, petitioner protested the FLD/FAN on 22 February 2016, by filing a Request for Reinvestigation.[106] **Pursuant**

103 Supra at note 11.
104 BIR Records, p. 377.
105 Id., p. 390.
106 Supra at note 15.

to Revenue Memorandum Order (RMO) No. 69-2010 dated 11 August 2010[107], an MOA shall be issued for protested cases or cases for reinvestigation. Furthermore, RMO No. 08-06 dated 01 February 2006[108] provides that protested cases under reinvestigation shall not be assigned to the same RO who handled the original investigation. Accordingly, the reinvestigation of petitioner's protest letter was properly referred to a different RO, specifically RO Lati, under the team of GS Sese.

Indeed, Greg M. Buhain, then Chief of LTRAD 3, who issued the MOA[109] authorizing RO Lati to conduct the reinvestigation, is not among the authorized representatives (as contemplated under Section 6[110] of the NIRC of 1997, as amended, and supplemented[111] by RMO No. 43-90[112] and RMO No. 29-2007[113]) who may authorize the examination of any taxpayer and the assessment of the correct amount of tax. The said MOA, thus, does not carry the same power as a duly-issued LOA.

However, the same should not invalidate the FLD/FAN **previously issued** against petitioner. To be clear, the FDDA, which was issued upon the recommendation of RO Lati, is **not** for an assessment but for a decision on a disputed assessment. In any case, applying the precepts in the *Liquigaz* case, a void FDDA would not *ipso facto* render the assessment void.

Notably, as part of its arguments, petitioner erroneously relies on the discussions in the case of *Commissioner of Internal Revenue v. Sony Philippines, Inc.*[114] (**Sony Philippines**), where the Supreme Court

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107 Guidelines on the Issuance of Electronic Letters of Authority, Tax Verification Notices, and Memoranda of Assignment.

108 Prescribing Guidelines and Procedures in the Implementation of the Letter of Authority Monitoring System (LAMS).

109 Supra at note 17.

110 SEC. 6. *Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.*
(A) *Examination of Returns and Determination of Tax Due.* After a return has been filed as required under the provisions of this Code, the Commissioner or his duly authorized representative may authorize the examination of any taxpayer and the assessment of the correct amount of tax[.]

111 Section D(4) of RMO No. 43-9010 provides that deputy commissioners (DCIRs), and other BIR officials authorized by the CIR himself are permitted to issue an LOA. Among the BIR officials expressly authorized by the CIR (under RMO No. 29-2007) to issue an LOA are the Assistant Commissioners (ACIRs) and Head Revenue Executive Assistants (HREAs).

112 Amendment of Revenue Memorandum Order No. 37-90 Prescribing Revised Policy Guidelines for Examination of Returns and Issuance of Letters of Authority to Audit.

113 Prescribing the Audit Policies, Guidelines and Standards at the Large Taxpayers Service.

114 G.R. No. 178697, 17 November 2010.

discussed the significance of a valid LOA in audits carried out by the BIR. However, in addition to Our discussions further above, the said case involved an LOA, which covered more than one taxable year. There, the LOA was to cover "the period 1997 and unverified prior years" but the BIR based its assessment on records for the periods of January to March 1998. Clearly, the BIR's action was repugnant to Section C(3) of RMO No. 43-90[115], prohibiting the practice of issuing an LOA covering audit of "unverified prior years." Its factual backdrop renders it inapplicable to the instant case.

Petitioner likewise anchors its position on the Supreme Court's pronouncements in *Commissioner of Internal Revenue v. McDonald's Philippines Realty Corp.*[116], which explored the purpose of the LOA:

> ...
>
> **To comply with due process in the audit or investigation by the BIR, the taxpayer needs to be informed that the revenue officer knocking at his or her door has the proper authority to examine his books of accounts.** The only way for the taxpayer to verify the existence of that authority is when, upon reading the LOA, there is a link between the said LOA and the revenue officer who will conduct the examination and assessment; and the only way to make that link is by looking at the names of the revenue officers who are authorized in the said LOA. **If any revenue officer other than those named in the LOA conducted the <u>examination and assessment</u>, taxpayers would be in a situation where they cannot verify the existence of the authority of the revenue officer to conduct the examination and assessment.** Due process requires that **taxpayers must have the right to know that the revenue officers are duly authorized to conduct the <u>examination and assessment</u>**, and this requires that the LOAs must contain the names of the authorized revenue officers. In other words, identifying the authorized revenue officers in the LOA is a jurisdictional requirement of a valid audit or investigation by the BIR, and therefore of a valid assessment.
>
> ...

Petitioner's reliance on the above ruling is misplaced.

As previously established, **the reinvestigation is conducted in connection with a taxpayer's protest against the FAN.** As exemplified by the very fact that there is already a FAN, the said

[115] Supra at note 112.
[116] G.R. No. 242670, 10 May 2021; Emphasis supplied.

reinvestigation procedures occur subsequent to the issuance of the assessment.

As a point of further contrast, in a reinvestigation, no ROs will be "knocking at a taxpayer's door." Inversely, it is the taxpayer (aggrieved from the results of the examination of its records, as laid out in the issued assessment) who proceeds to the pertinent offices of the BIR to dispute (or protest) the assessment.

Moreover, in *Sony Philippines*, it is emphasized that ROs duly authorized *via* LOA must not go beyond the authority given to them.[117] As an incident of the taxpayer's remedy of seeking reinvestigation, it is the taxpayer that determines the extent of the evidence that the BIR will be able to review or peruse. This is in accordance with the latter's responsibility to submit all relevant supporting documents (in connection with the request for reinvestigation) within sixty (60) days from the filing of the protest.[118]

The Court *En Banc* had likewise aired this view in its recent case of *Commissioner of Internal Revenue v. RCL Feeders Phils., Inc.*[119], where it proclaimed that after the issuance of the FAN, an LOA is not necessary to authorize the new RO to reinvestigate the CIR's deficiency tax assessments.

It echoed the same ruling in *Commissioner of Internal Revenue v. Titanium Corporation*[120], where the Court *En Banc* took effort to clarify that the subject FDDA therein was void not because the RO who conducted the reinvestigation of therein respondent's tax liabilities was not duly authorized through a validly issued LOA, but as a consequence of a void assessment. It thus enunciated that "while the law requires explicitly an LOA to be given to the appropriate [RO] before an examination of a taxpayer and the assessment of the correct amount of tax may be had, the law does not explicitly require the same before reinvestigation and for the purpose of recommending the issuance of [an] FDDA".[121]

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117 Supra at note 114.
118 See Par. 4, Section 228(e), NIRC of 1997, as amended.
119 CTA EB Case No. 2772, 29 April 2024.
120 CTA EB Case No. 2502, 13 February 2023.
121 Id.

All told, the absence of a valid LOA for the team assigned to evaluate petitioner's protest is not fatal to the FDDA.

THE FORMAL LETTER OF DEMAND WITH ASSESSMENT NOTICES (FLD/FAN) CONTAINED A SUFFICIENT DEMAND FOR THE PAYMENT OF A DEFINITE AMOUNT OF TAX LIABILITY.

Petitioner, citing *Commissioner of Internal Revenue v. Fitness By Design, Inc.*[122] (**Fitness By Design**), contends that the FLD/FAN is void for failing to (**a**) demand the payment of tax liability and, (**b**) fix the total amount of the said tax liability (when it was unable to fix the total amount of interest due).

We disagree.

In *Fitness By Design*, the Supreme Court noted that the amount in the FAN remained indefinite as the same was subject to modification, depending on the date of the taxpayer's payment. The pertinent wording in the FAN therein is quoted, as follows:

> ...
> The complete details covering the aforementioned discrepancies established during the investigation of this case are shown in the accompanying Annex 1 of this Notice. The 50% surcharge and 20% interest have been imposed pursuant to Sections 248 and 249(B) of the [National Internal Revenue Code], as amended. **Please note, however, that the interest and the total amount due will have to be adjusted <u>if paid prior or beyond April 15, 2004</u>.**[123]
> ...

The Supreme Court also emphasized in *Fitness By Design* that the FAN therein **did not contain due dates**, thus, it held:

> ...
> Second, there are no due dates in the Final Assessment Notice. This negates petitioner's demand for payment. Petitioner's contention that April 15, 2004 should be regarded as the actual due date cannot

[122] G.R. No. 215957, 09 November 2016.
[123] Supra; Emphasis and underscoring in the original text.

be accepted. The last paragraph of the Final Assessment Notice states that the due dates for payment were supposedly reflected in the attached assessment:

> In view thereof, you are *requested to pay* your aforesaid deficiency internal revenue tax liabilities through the duly authorized agent bank in which you are enrolled *within the time shown in the enclosed assessment notice.*

However, based on the findings of the Court of Tax Appeals First Division, **the enclosed assessment pertained to remain unaccomplished**.[124]

...

Following the principles laid down by the Supreme Court in *Fitness By Design*, the vital element determining the validity of the assessment is the **definiteness of the amount indicated in the FLD and the deadline for payment (shown in the assessment notices attached to the FLD)**. If the FLD substantially satisfies both requirements, then the FLD could not be said to be wanting of material details nor should the assessment be voided based on such premise.

Here, the mere use of the phrase "you are **requested** to pay your aforesaid deficiency..." cannot invalidate the subject FLD/FAN. In fact, the same phraseology is used in the *pro-forma* FLD in Annex B of Revenue Regulations (**RR**) No. 12-99[125], as amended by RR No. 18-2013.[126]

Regarding the due date, the present case differs from *Fitness by Design* in that the FLD[127] here clearly identifies the due date of the assessment, *i.e.*, **20 February 2016**, or 30 days from petitioner's receipt of the FLD on 21 January 2016. For clarity, its accompanying ANs[128] indicate the due date therein as "30 days from date of receipt thereof".

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124 Supra at note 122; Citations omitted, italics in the original text, emphasis and underscoring supplied.

125 Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extra-Judicial Settlement of a Taxpayer's Criminal Violation of the Code Through Payment of a Suggested Compromise Penalty. Issued on 06 September 1999.

126 Amending Certain Sections of Revenue Regulations No. 12-99 Relative to the Due Process Requirement in the Issuance of a Deficiency Tax Assessment. Issued on 28 November 2013.

127 Exhibit "P-7", supra at note 14,

128 Division Docket, Volume II, pp. 889-894.

on the face of each page. This becomes undisputed after petitioner had also acknowledged receipt on each page.[129]

We also do not subscribe to petitioner's argument that the gap period of twenty (20) days between the due date of the FLD/FAN and the computation of the interest renders the amount indefinite, as the same has no leg to stand on. What is proscribed is an indefinite amount of total tax due or liability, <u>not</u> the amount of interest.

Assuming *arguendo* that the amount of interest should also be definite and computed as of the due date, the same is still **determinable**. The FLD/FAN in the instant case clearly indicates the <u>dates when the interest commences to run and end</u> on the face of the FAN and the attached Details of Discrepancies[130], with a notation that the interest is subject to adjustment when the deficiency taxes are paid beyond the dates indicated. *Au contraire*, in *Fitness By Design*, none is provided, leaving the total tax due **undeterminable**.

In addition, the indefiniteness of the amount of interest is but only logical given the wording of Section 249[131] of the NIRC of 1997, as amended, *i.e.,* "interest shall be assessed and collected from the date prescribed for its payment **until the full payment thereof**" and "interest at the rate prescribed in Subsection (A) hereof until **the amount is fully paid**". Truth be told, **<u>the BIR could not reasonably be expected to know when the taxpayer would actually settle the assessment at the time it sends the FLD/FAN.</u>**

THE PERIOD TO ASSESS SELECT TAXES
FOR THE CALENDAR YEAR (CY) 2012
HAD ALREADY PRESCRIBED.

Pertinently, Sections 203 and 222(a) of the NIRC of 1997, as amended, provide:

> ...
>
> SEC. 203. *Period of Limitation Upon Assessment and Collection.* — **Except as provided in Section 222, internal revenue taxes shall**

---

[129] Par. 5, I. Stipulation of Facts, JSFI, id., Volume I, p. 391.
[130] Exhibit "P-7", id., Volume II, pp. 882-888.
[131] SEC. 249. *Interest.*

> **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-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.[132]
>
> ...
>
> 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.[133]
>
> ...

Furthermore, Section 248(B) of the NIRC of 1997, as amended, states what constitutes *prima facie* evidence of a false or fraudulent return:

> ...
> SEC. 248. *Civil Penalties.* -
> ...
>
> (B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud: *Provided*, That **a substantial under-declaration of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, shall constitute *prima facie* evidence of a false or fraudulent return: *Provided, further*,**

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132 Emphasis supplied and italics in the original text.
133 Emphasis supplied and italics in the original text.

> **That failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding thirty percent (30%) of actual deductions shall render the taxpayer liable for substantial under-declaration of sales, receipts or income or for overstatement of deductions, as mentioned herein**.[134]
>
> ...

Based on the foregoing provision, *prima facie* evidence of a false or fraudulent return is either a substantial *underdeclaration* of sales, receipts or income, or a substantial *overstatement* of deductions. A substantial underdeclaration of sales, receipts or income occurs when there is a failure to report sales, receipts or income exceeding 30% of that declared *per* return. Conversely, a substantial overstatement of deductions happens when the total amount of claimed deductions exceeds 30% of the actual deductions.

In the instant case, *there is neither substantial underdeclaration of sales, receipts or income, nor a substantial overstatement of deductions, based on the respective 30%-threshold established by law* or otherwise. This can be gleaned from the nature of the itemized findings (for VAT, EWT, and WTC) in the Details of Discrepancies each attending the PAN and the FLD/FAN.

Further, it is worth noting that, in the case at bar, respondent neither imputed nor established actual fraud, nor imposed the application of the 10-year prescriptive period. None amongst the PAN, the FLD/FAN, the FDDA, nor any of the corresponding memoranda submitted by the investigating teams (for purposes of positively recommending the aforementioned issuances) included any discussion regarding the filing of a false or fraudulent return, or any invocation of the 10-year prescriptive period.

While the breakdown of the tax due under the present assessment includes respondent's imposition of the 50% surcharge (under Section 248[135] of the NIRC of 1997, as amended) for VAT, WTC, and EWT (thereby insinuating the filing of a false return), this, by itself and in line with the preceding disquisitions, can hardly be considered sufficient to

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[134] Italics in the original text, emphasis and underscoring supplied.
[135] Supra at pp. 27-28.

warrant the application of the 10-year prescriptive period. Considering the requisites of the *prima facie* presumption of filing a false or fraudulent return under Section 248 of the NIRC of 1997, as amended, bare allegations of filing a false return (which were, at most, what can be found in respondent's issuances and Answer) would not have been sufficient.

Moreover, while petitioner vehemently defended its position on the application of the three (3)-year period to assess, respondent only lamely countered with blanket denial and failed to forward strong legal grounds to support the application of the 10-year assessment period.

The recent Supreme Court case of *McDonald's Philippines Realty Corp. v. Commissioner of Internal Revenue*[136] presents an exemplification of what supports a valid invocation of the extraordinary prescriptive period:

> ...
>
> *F.* *Summary: Conditions for a Valid Extension of Assessment Period in Case of a False Return*
>
> i. *Requisites under Section 222(a) of the 1997 Tax Code*
>
> • *General Rule — Proof of False or Fraudulent*
>
> Pursuant to Section 222(a) of the 1997 Tax Code, the extraordinary 10-year assessment period may apply in case the taxpayer: (1) filed a false return, (2) filed a fraudulent return, or (3) failed to file a return.
>
> A fraudulent return "implies intentional or deceitful entry with intent to evade the taxes due," while a false return simply "implies deviation from the truth, whether intentional or not."
>
> It must be stressed, however, that a false return within the meaning of Section 222(a) does not refer to false returns in general. To be sure, the extraordinary 10-year assessment period applies to a *false return* when:

136 G.R. No. 247737, 08 August 2023; Citation omitted, emphasis and italics in the original text, and underscoring supplied.

(1) the return contains an error or misstatement, and
(2) such error or misstatement was *deliberate or willful.*

Consequently, the Court's ruling in *Aznar* which applied the extraordinary 10-year assessment period under Section 222 (a) to false returns in general, *i.e.*, regardless of whether the deviation is intentional or not, is abandoned.

It shall be the CIR's burden to establish the existence of the above-enumerated statutory requisites with clear and convincing evidence.

- *Exception — Prima Facie Evidence of a False or Fraudulent Return (30% Threshold)*

The CIR may be relieved from the above-mentioned burden of proof when there is *prima facie evidence of falsity or fraud*, as defined under Section 248 (B) of the 1997 Tax Code.

(1) The CIR ascertains that there is a *statement/ misdeclaration* in the return, in particular,

(a) an *understatement/underdeclaration* of sales, receipts, or income or
(b) an *overstatement/overdeclaration* of expenses or other deductions, and

(2) The misstatement is *substantial*, such that exceeds the corresponding amount declared in the return by 30%.

30% threshold satisfied. There is *prima facie* evidence of falsity or fraud and the burden of proof shifts to the taxpayer. If the taxpayer fails to overcome the presumption, the *prima facie* evidence shall be sufficient to justify the application of the 10-year period.

Taxpayer refutes presumption. If the taxpayer is successful in overturning the presumption (*e.g.*, demonstrating that the misstatement as ascertained by the CIR had been inadvertent or attributable to a mistake or was not deliberate or willful on the part of the taxpayer), the CIR cannot rely on the presumption in proving the taxpayer's intent to evade.

ii. Due Process Requirements

(1) **First Due Process Requirement**. The *assessment notice* issued to the taxpayer must clearly state the following:

(a) that extraordinary prescriptive period (not the basic three-year period) is being applied, and

(b) the bases of allegations of falsity or fraud, *e.g.*, if the CIR seeks to rely on the *presumption of falsity or fraud* particularly, the formal notice to the taxpayer *must set out the computation by which it ascertained that the misdeclaration in the return surpassed the 30% threshold.*

(2) **Second Due Process Requirement**. The tax authorities have not acted in a manner that is inconsistent with the invocation of the extraordinary prescriptive period or have otherwise misled the taxpayer that the basic period will be applied.

...

In summary, notwithstanding the absence of any circumstances that could be construed as petitioner's act of filing a false or fraudulent return, to begin with, the BIR and respondent never invoked the application of the extraordinary 10-year period throughout the administrative proceedings and in the present judicial proceedings. Nowhere in the allegations of the parties, nor in the BIR Records, were there any indications that the parties executed any waivers of prescription over the course of the administrative proceedings.

Collectively considering the foregoing, **the applicable period of prescription should be three (3) years counted after the last day prescribed by law (for the filing of the return, pursuant to Section 203[137] of the NIRC of 1997, as amended).**

Correspondingly, anent the subject deficiency IT, respondent's right to assess the same was to end on 15 April 2016, or the end of the three (3)-year period to assess from the last day to file the Annual Income Tax Return **(ITR)** for CY 2012 on 15 April 2013 (considering petitioner's earlier filing of its Annual ITR on 11 April 2013).[138]

Meanwhile, regarding petitioner's alleged deficiency DST, both parties point to the other's lack of information. For the part of respondent, petitioner did not present the lease contracts or equivalent supporting documents to refute the alleged deficiency. For petitioner,

137 Supra at pp. 26-27.
138 Exhibit "P-13", Division Docket, Volume II, pp. 959-976.

respondent failed to clearly specify which transactions in CY 2012 were flagged for deficiency DST. As no new evidence was presented to this Court, the only information available is that the transactions covered by the present assessment (to be determined whether they are subject to DST) are those within CY 2012, the scope of the instant investigation.

Section 200(B)[139] of the NIRC of 1997, as amended, sets the deadline to file the necessary tax return "within ten (10) days after the close of the month when the taxable document was made, signed, issued, accepted, or transferred, and the tax thereon shall be paid at the same time the aforesaid return is filed."

Assuming *arguendo* and in keeping with the presumption of regularity of an issued assessment, that all of the subject transactions occurred at the end of the taxable period, that is, on 31 December 2012, the return would have fallen due (at the latest) on 10 January 2013. This fact, and petitioner's position that the subject transactions were not subject to DST and the absence of the pertinent DST returns lend credence to the idea that no such DST returns were filed. Following this assumption, in line with Section 203[140] of the NIRC of 1997, as amended, the end of respondent's right to assess the same would have fallen on 10 January 2016.

As for the deficiency VAT, EWT and WTC, the period of limitation on respondent's right to assess is outlined below:

Period Covered	Date of Actual Filing	Last Day Prescribed by law to File the Return	Last Day to Assess under Section 203 of the NIRC of 1997, as amended
VAT[141][142]			
First Quarter of 2012	23 April 2012	25 April 2012	25 April 2015
Second Quarter of 2012	23 July 2012	25 July 2012	25 July 2015
Third Quarter of 2012	25 October 2012	25 October 2012	25 October 2015
Fourth Quarter of 2012	25 January 2013	25 January 2013	**25 January 2016**

139 SEC. 200. *Payment of Documentary Stamp Tax.* —
(B) Time for Filing and Payment of the Tax.
140 Supra at pp. 26-27.
141 Exhibits "P-10-a" to "P-10-d", Division Docket, Volume II, pp. 904-911.
142 Section 114(A), NIRC of 1997, as amended.

Period Covered	Date of Actual Filing	Last Day Prescribed by law to File the Return	Last Day to Assess under Section 203 of the NIRC of 1997, as amended
EWT[143][144]			
January 2012	13 February 2012	13 February 2012	13 February 2015
February 2012	13 March 2012	13 March 2012	13 March 2015
March 2012	13 April 2012	13 April 2012	13 April 2015
April 2012	11 May 2012	14 May 2012*	14 May 2015
May 2012	13 June 2012	13 June 2012	13 June 2015
June 2012	12 July 2012	13 July 2012	13 July 2015
July 2012	13 August 2012	13 August 2012	13 August 2015
August 2012	13 September 2012	13 September 2012	13 September 2015
September 2012	10 October 2012	15 October 2012*	15 October 2015
October 2012	12 November 2012	13 November 2012	13 November 2015
November 2012	13 December 2012	13 December 2012	13 December 2015
December 2012	14 January 2013	14 January 2013*	14 January 2016
WTC[145][146]			
January 2012	13 February 2012	13 February 2012	13 February 2015
February 2012	13 March 2012	13 March 2012	13 March 2015
March 2012	13 April 2012	13 April 2012	13 April 2015
April 2012	11 May 2012	14 May 2012*	14 May 2015
May 2012	13 June 2012	13 June 2012	13 June 2015
June 2012	12 July 2012	13 July 2012	13 July 2015
July 2012	13 August 2012	13 August 2012	13 August 2015
August 2012	13 September 2012	13 September 2012	13 September 2015
September 2012	12 October 2012	15 October 2012*	15 October 2015
October 2012	13 November 2012	13 November 2012	13 November 2015
November 2012	13 December 2012	13 December 2012	13 December 2015
December 2012	14 January 2013	14 January 2013*	14 January 2016
* Deadline fell on a weekend or holiday.			

Clearly from the foregoing, when the FAN[147] was issued on **21 January 2016**, <u>respondent's right to assess petitioner for deficiency</u>

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143 Exhibits "P-11-a" to "P-11-l", Division Docket, Volume II, pp. 912-934.

144 Section 58(A), NIRC of 1997, as amended; Cf.: Section 7, RR No. 9-2001 (Electronic Filing of Tax Returns and Payment of Taxes), as amended by RR No. 26-02 dated 05 December 2002 [Amending Further Revenue Regulations No. 9-2001, as Amended by Revenue Regulations No. 2-2002 and Revenue Regulations No. 9-2002, Providing for the Staggered Filing of Returns of Taxpayers Enrolled in the Electronic Filing and Payment System (eFPS) Based on Industry Classification]. Being engaged in Real Estate Activities, petitioner belongs to Group C of eFPS filers. Due date for filing monthly withholding tax returns except withholding of Value-Added Tax (VAT) is thirteen (13) days following the end of each month for eFPS filers under Group C.

145 Exhibits "P-12-a" to "P-12-l", Division Docket, Volume II, pp. 935-958.

146 Section 81, NIRC of 1997, as amended; Cf.: Section 7, RR No. 9-2001 as amended by RR No. 26-02 dated 05 December 2002. Being engaged in Real Estate Activities, petitioner belongs to Group C of eFPS filers. Due date for filing monthly withholding tax returns except withholding of VAT is thirteen (13) days following the end of each month for eFPS filers under Group C.

147 Supra at note 14.

VAT for the 1st to 3rd quarters of CY 2012, and deficiency EWT, WTC, and DST, all for the entirety of CY 2012, *had already prescribed*.

Consequently, as established above, respondent's right to assess petitioner for deficiency IT, as well as VAT, for the 4th quarter of CY 2012, *had not yet prescribed* when the FLD/FAN was issued (within the three [3]-year prescriptive period allowed by law).

It bears to note, however, that while the Court finds respondent's right to assess petitioner for deficiency VAT (for the 1st to 3rd quarters of CY 2012) had prescribed, a further examination of the evidence would be necessary to **clearly distinguish the portion of said alleged deficiency taxes that pertains to the periods that prescribed from those that have not**. Consequently, in the absence of proof to the contrary, the Court would be constrained to impute the entire alleged deficiency for the tax in scrutiny (in this case, VAT) to the portion of CY 2012 that had *not* yet prescribed.

RESPONDENT'S PERIOD TO COLLECT
HAS NOT YET PRESCRIBED.

As for the right to collect taxes, Section 203 of the NIRC of 1997, as amended, provides the reckoning date by which respondent's power to collect commences. The provision reads:

> ...
>
> 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.[148]
>
> ...

In *Commissioner of Internal Revenue v. United Salvage and Towage (Phils.), Inc.*[149], the Supreme Court clarified that, when the BIR issues the

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148 Emphasis supplied and italics in the original text.

149 G.R. No. 197515, 02 July 2014.

assessment within the three(3)-year prescriptive period, it has another three (3) years, counted from the date the assessment notice is released, mailed or sent to the taxpayer, within which to collect the tax due by distraint, levy or court proceeding as follows:

> ...
> [P]etitioner has three (3) years from the date of actual filing of the tax return to assess a national internal revenue tax or to commence court proceedings for the collection thereof without an assessment. However, **when it validly issues an assessment within the three (3)-year period, it has another three (3) years within which to collect the tax due by distraint, levy, or court proceeding. The assessment of the tax is deemed made and the three (3)-year period for collection of the assessed tax begins to run on the date the assessment notice had been released, mailed or sent to the taxpayer.**[150]
> ...

Relative to the running of the said three (3)-year prescriptive period, Section 223 of the NIRC of 1997, as amended, categorically provides that when the CIR grants a taxpayer's request for reinvestigation, the running of the period to collect is *tolled*:

> ...
> SEC. 223. *Suspension of Running of Statute of Limitations.* – The running of the Statute of Limitations provided in Sections 203 and 222 on the making of assessment and the beginning of distraint or levy or a proceeding in court for collection, in respect of any deficiency, shall be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or levy or a proceeding in court and for sixty (60) days thereafter; **when the taxpayer requests for a reinvestigation which is granted by the Commissioner**; when the taxpayer cannot be located in the address given by him in the return filed upon which a tax is being assessed or collected: *Provided*, That, if the taxpayer informs the Commissioner of any change in address, the running of the Statute of Limitations will not be suspended; when the warrant of distraint or levy is duly served upon the taxpayer, his authorized representative, or a member of his household with sufficient discretion, and no property could be located; and when the taxpayer is out of the Philippines.[151]
> ...

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150 Emphasis supplied.
151 Emphasis supplied and italics in the original text.

A thorough reading of the FDDA[152] shows that respondent considered specific pieces of evidence that petitioner submitted in support of its request for reinvestigation, each leading to a reduction of the pertinent deficiency tax liability. Overall, a comparison of the deficiency amounts *per* the FLD/FAN[153] and *per* the FDDA[154] also confirms that respondent actually conducted a reinvestigation of petitioner's tax liabilities, resulting in amendments that *reduced* most items of the deficiency tax assessment:

Tax Type	**Basic Tax Due *per* FLD**	**Basic Tax Due *per* FDDA**	**Reduction**
	(a)	(b)	(c) = (a) – (b)
IT	₱93,907,258.88	**₱92,185,125.80**	₱1,722,133.08
VAT	38,340,858.91	**17,779,519.36**	20,561,339.55
EWT	13,443,713.37	**6,338,149.45**	7,105,563.92
WTC	3,150,962.22	**269,520.44**	2,881,441.78
DST	1,599,476.96	**1,795.00**	1,597,681.96
Compromise	50,000.00	50,000.00	–

Undeniably, with respondent's reinvestigation of petitioner's tax liabilities based on the latter's Protest Letter, the running of the statute of limitations to collect the assessed deficiency taxes was suspended from **05 January 2018**[155], when petitioner learned of the grant of its request for reinvestigation, to **27 July 2020**, when petitioner received the FDDA.[156] Irrespective of any further suspensions, the three (3)-year period to collect the deficiency assessments, as extended, was set to end on **11 August 2021**.[157] By the time the Answer was filed on **23 November 2020**[158], respondent's right to collect petitioner's deficiency IT for CY 2012 and VAT for the 4th quarter of the same year had clearly not yet prescribed.

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152 Supra at note 18.
153 Supra at note 14.
154 Supra at note 18.
155 Supra at note 16.
156 Supra at note 18.
157

Petitioner's receipt of the FLD/FAN	21 January 2016
Petitioner's receipt of respondent's acceptance of request for reinvestigation	05 January 2018
Period lapsed (out of the three [3]-year period to collect or 1,095 days)	715 days
Petitioner's receipt of the FDDA	27 July 2020
End of extended three [3]-year period to collect (remaining 380 days) [365 days/year x three (3) years, less 715 days]	11 August 2021

158 Supra at note 22.

IMPROPER IMPOSITION OF THE 50% SURCHARGE

Recapitulating the above discussions, respondent failed to establish that petitioner filed a false or fraudulent return. Neither was there sufficient basis for the *prima facie* presumption of evidence of a false or fraudulent return under Section 248(B)[159] of the NIRC of 1997, as amended. Furthermore, neither his or her Answer to the Petition for Review nor the prior administrative issuances to petitioner (*i.e.*, PAN, FLD/FAN, FDDA, and the corresponding Details of Discrepancies) bear any imputations to this effect.

For its specific basis, the 'Details of Discrepancies' (attached to the PAN or FLD/FAN) cites the ruling in *Holiday Inns (Phils.), Inc. v. Commissioner of Internal Revenue*[160], the pertinent discussion therein is quoted as follows:

> ...
>
> It faults the CTA for applying the ten-year period of limitation under Section 222, contending that there was not even an allegation on the part of the CIR that it filed a false or fraudulent return, as in fact it did not even impose the 50% surcharge. Furthermore, HIPI points out that it did not declare the amount of P269,967.02 which corresponds to its management fee, because it believed in good faith that it was not subject to the VAT. As such, there was really no deliberate attempt or malicious intent to evade payment of the tax. Besides, the return cannot be considered as false or fraudulent because the amount of P269,967.02 which was not declared in the VAT return is not even 5% of its total sales subject to VAT and is way below the 30% underdeclaration threshold under Section 248(B) of the Tax Code.
>
> That the **50% surcharge** was not imposed does not mean that the return filed by HIPI was correct. In fact, the 30% threshold on substantial underdeclaration under Section 248(B) of the Tax Code is but a mere *prima facie* presumption of the filing of a false or fraudulent return. Thus, the fact that HIPI underdeclared 5% only of its total sales does not mean that it did not file a false return.
>
> ...

[159] Supra at pp. 27-28.

[160] CA-G.R. SP No. 78828, 09 September 2004; Emphasis supplied.

The above is the sole portion of the ruling that references the surcharge. It is apparent in the discussions therein, however, that the Court had been able to clearly establish the fact of therein taxpayer's filing of a false or fraudulent return. On the flipside, the same discussions do not explain **why** the 50% surcharge must be imposed in the present assessment.

In the absence of valid legal basis, Section 228[161] of the NIRC of 1997, as amended, dictates that We must **cancel the imposition of the 50% surcharge** upon the remaining deficiency IT assessment.

Even if We were to set aside the procedural requirements in issuing the assessment, **there is no sufficient evidence of willful neglect to file the return within the period prescribed, or a false or fraudulent return is willfully made**, as is necessary to support the imposition of the 50% surcharge in accordance with Section 248(B)[162] of the NIRC of 1997, as amended. Respondent had failed to establish or adduce evidence to support the same. Therefore, the lower **25% surcharge** (for failure to pay deficiency tax) under the preceding Section 248(A)(3)[163] shall apply instead, in the event that there is still a deficiency tax due.

Having disposed of the issues of prescription and the validity of the assessment (in relation to the authority of the RO to conduct the reinvestigation and the tenor of the FLD), the Court shall now discuss the validity of the remaining items in the assessment, that is, IT and VAT, in *seriatim* and *per* item.

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161 SEC. 228. *Protesting of Assessment.* —

...

The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.

162 Supra at pp. 27-28.

163 SEC. 248. *Civil Penalties.* —

(A) There shall be imposed, in addition to the tax required to be paid, a penalty equivalent to twenty-five percent (25%) of the amount due, in the following cases:

(1) Failure to file any return and pay the tax due thereon as required under the provisions of this Code or rules and regulations on the date prescribed; or

(2) Unless otherwise authorized by the Commissioner, filing a return with an internal revenue officer other than those with whom the return is required to be filed; or

(3) Failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment; or

(4) Failure to pay the full or part of the amount of tax shown on any return required to be filed under the provisions of this Code or rules and regulations, or the full amount of tax due for which no return is required to be filed, on or before the date prescribed for its payment. (Emphasis supplied)

DEFICIENCY INCOME TAX (IT) FOR CALENDAR YEAR (CY) 2012

In assessing petitioner for the alleged deficiency IT, respondent calculated the total deficiency IT payable in the FDDA in this wise:

Taxable income *per* ITR	₱	1,483,996,154.00
Add: Adjustments		
Disallowed expenses due to under-withholding of EWT		**305,333,178.94**
Disallowed expenses due to under-withholding of WTC		**1,062,752.06**
Adjusted taxable income		1,790,392,085.00
Income tax due		
Special rate (₱142,922,634 x 5%)		7,146,131.70
Regular rate (₱1,647,469,451 x 30%)		494,240,835.30
Less: Payments / tax credits		
Prior years excess credits other than MCIT		(144,051,092.00)
Tax payments		(87,352,260.70)
Creditable withholding taxes (CWTs) claimed		(178,064,835.00)
Add back: Disallowed CWTs		**266,346.44**
Add: Unaccounted rounding difference		0.06
Basic deficiency income tax due	₱	**92,185,125.80**
Add: Penalties		
Interest at 20% from 16 April 2013 to 31 December 2017		86,881,324.04
Interest at 12% from 01 January 2018 to 28 Feb 2019		12,820,046.54
Total amount due *per* FDDA	₱	**191,886,496.38**

The items of respondent's assessment can then be summed up as follows:

Particulars	Tax Base	Basic Tax Due
30% deficiency IT resulting from disallowed expenses due to under-withholding of EWT	₱305,333,178.94	₱91,599,953.68
30% deficiency IT resulting from disallowed expenses due to under-withholding of WTC	1,062,752.06	318,825.62
Disallowed CWTs		266,346.44
Total		**₱92,185,125.74**

We shall thus verify petitioner's defenses and representations for each item of the deficiency IT assessment.

(i) DISALLOWED EXPENSES DUE TO NON-WITHHOLDING OF EXPANDED WITHHOLDING TAXES (EWT) - ₱305,333,178.94

Respondent compared petitioner's income payments (subjected to EWT) in the previously filed returns against its expenses that are expected to be subject to EWT (as can gleaned from its AFS and ITR). In the process of reconciling the two (2), respondent attributed the variances to deductions improperly claimed without first withholding the requisite EWT.

Per the FDDA, such practice of claiming deductions from gross income for expenses not subjected to withholding violates Section 34(K)[164] of the NIRC of 1997, as amended, which provides that deductions from gross income shall only be allowed as a deduction after showing that the tax required to be deducted and withheld therefrom has been paid to the BIR. Sections 57[165] and 58[166] of the NIRC of 1997, as amended, on the other hand, prescribes the manner of withholding.

Relative to this finding, the ICPA pointed out a footing error in the breakdown of the observed discrepancy, resulting in a reduced total in the aforementioned item of the deficiency IT assessment.

Before proceeding to analyze petitioner's defenses and position relative to each component of this deficiency IT assessment item, We note the discrepancy amounting to ₱368,939.02 in the total tax base (or total deductions subject to withholding), outlined as follows:

Applicable EWT Rate	Tax Base	Deficiency EWT
1%	₱1,820,286.33	₱18,202.86
2%	301,837,645.45	6,036,752.91

164 CHAPTER VII. ALLOWABLE DEDUCTIONS
SEC. 34. Deductions from Gross Income.
...
(K) Additional Requirements for Deductibility of Certain Payments. — Any amount paid or payable which is otherwise deductible from, or taken into account in computing gross income or for which depreciation or amortization may be allowed under this Section, shall be allowed as a deduction only if it is shown that the tax required to be deducted and withheld therefrom has been paid to the Bureau of Internal Revenue in accordance with this Section, Sections 58 and 81 of this Code.

165 **SEC. 57**. *Withholding of Tax at Source.*

166 **SEC. 58**. *Returns and Payment of Taxes Withheld at Source.*

Applicable EWT Rate	Tax Base	Deficiency EWT
5%	837,623.68	41,881.18
20%	1,206,562.50	241,312.50
Total subject to EWT	₱305,702,117.96	
Add: Total subject to WTC	1,062,752.06	
Total deductions subject to withholding **(a)**	₱306,764,870.02	
Assessment item *per* FDDA **(b)**	306,395,931.00	
Difference (c) = (a) - (b)	**₱368,939.02**	

Notably, in compliance with Section 228[167] of the NIRC of 1997, as amended, petitioner is still sufficiently informed of the amounts of each piece of this assessment item, as each tax base is clearly determinable even though the total amount reflected in the FDDA is understated. It is worth noting, however, that "Schedule 2" of the Details of Discrepancies accompanying the PAN and the equivalent Details of Discrepancies for the FLD/FAN both show the correct total for the same tax bases. The correct breakdown is shown below:

EWT Rate [A]	**Total expenses *per* books** [B]	**Income payments subjected to EWT *per* BIR Form No. 1604-E** [C]	**Deductions claimed with no EWT withheld** [D = B - C]	**Basic deficiency EWT** [E = D x A]
1%	₱25,222,150.44	₱23,401,864.11	₱1,820,286.33	₱18,202.86
2%	1,617,305,108.70	1,315,467,463.25	301,837,645.45	6,036,752.91
5%	1,793,801.27	956,177.59	837,623.68	41,881.18
20%	1,206,562.50	-	1,206,562.50	241,312.50
Total	**₱1,645,527,622.91**	**₱1,339,825,504.95**	**₱305,702,117.96**	**₱6,338,149.46**

Taking the foregoing into account, the proper total amount of Disallowed Expenses for Non-Withholding of EWT is ₱305,702,117.96. Hence, the above-mentioned difference of ₱368,939.02 shall be added back into the total amount of this assessment item to ensure that the deficiency assessment is accurately depicted.

We will now evaluate the portions of this deficiency IT assessment item that petitioner disputes:

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167 Supra at note 161.

Timing differences for withholding EWT in payments to contractors with recoupment of advance billings and retention amounts	₱264,513,902.93
Payments to security agencies not subject to EWT	32,224,934.15
Typographical error in EWT rate applied	1,206,562.50
Unrefuted/unsupported balance	7,387,779.36
Unaccounted discrepancy	368,939.02
Total deductions disallowed due to non-withholding of EWT	**₱305,702,117.96**

(a) TIMING DIFFERENCES IN WITHHOLDING OF EXPANDED WITHHOLDING TAXES (EWTs) IN RELATION TO PAYMENTS TO CONTRACTORS - ₱264,513,902.93

Petitioner attributes a substantial portion of the assessed difference (between expenses *per* books and income payments *per* EWT returns) to timing differences arising from its payments to contractors.

The crux of petitioner's position is outlined in its Protest Letter[168], and the discussion therein was later reiterated in its Petition for Review[169], *viz*:

> ...
>
> With all due respect, we submit that the aforesaid findings are without factual and legal bases and therefore should be cancelled and withdrawn.
>
> Upon verification of the audit findings of the examiner, we noted that the discrepancies in the income payments and the EWT alphalist resulting into the erroneous conclusion that FBDC failed to withhold the corresponding EWT are due to the following:
>
> 1. There is <u>**timing difference in the withholding of EWT due** on the downpayment attributed to the **retention amounts** which were recouped by FBDC upon each progress billings at certain percentage and/or on each payment of progress billings paid to contractors subjected to retention amounts</u>. This was previously discussed with the examiners during the audit.
>
> Retention amount is the amount at certain percentage of the amount billed by contractors usually in construction contracts that is

[168] Supra at note 15.
[169] Supra at note 1.

> deducted from the amount due to contractors and is retained by the client. The purpose of retention is to ensure that the contractor properly completes the activities required of them under the contract.
>
> The retention amount is only released partly upon substantial completion of the project and/or lapse of the defects liability period or warranty under the contract and compliance of certain conditions.
>
> **Upon processing of downpayment and/or progress billings** from contractors, **FBDC subjected the payment to the corresponding EWT including the retention amount** notwithstanding that the said retention amount is not released to the contractor until lapse of certain period and compliance with certain conditions or documents as mentioned above. Considering that construction projects and contracts may cover more than a year, the **proper withholding and remittance of EWT on these payments were done in previous year(s)** and therefore were **no longer reflected in the 2012 EWT alphalist.** We noted that the possible difference resulting from this item amounted to more or less Php301 million. Having subjected the same to the proper EWT albeit in different periods, the audit findings have therefore no basis.
>
> ...

Petitioner mainly argues that the pertinent EWTs were already **withheld in prior CYs**. Section 2.57.4 of RR No. 2-98[170], as amended by RR No. 12-2001[171], sets forth the proper point in time to withhold EWT:

> ...
>
> 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.[172]
>
> ...

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170 Implementing Republic Act No. 8424, "An Act Amending The National Internal Revenue Code, as Amended" Relative to the Withholding on Income Subject to the Expanded Withholding Tax and Final Withholding Tax, Withholding of Income Tax on Compensation, Withholding of Creditable Value-Added Tax and Other Percentage Taxes. Issued on 17 April 1998.

171 Amendment to the Pertinent Provisions of Revenue Regulations No. 1-98, as Amended, Revenue Regulations No. 2-98, as Amended, and Revenue Regulations No. 6-2001, Relative to the Revision of Withholding Tax Rates on Certain Income Payments Subject to Withholding Tax, the Deferment of the New Deadline Dates For Filing Selected Tax Returns, the Reporting Requirements for Recipients of Talent Fees, and for Other Purposes. Issued on 07 September 2001.

172 Emphasis and underscoring supplied; italics in the original text.

From the foregoing, based on petitioner's representations, it should have been deducting and withholding the appropriate EWT *upon payment* of its downpayments or Progress Billings. The EWT shall be based on the full amount regardless of any Retention deducted from the actual payment made, as this portion from the payment would otherwise be recorded in petitioner's books, triggering the requirement to deduct and withhold EWT either way.

It thus follows that, for successive payments wherein Retention payments are finally released to the contractor (either through a distinct payment by itself or aggregating the same with a subsequent payment on Progress Billings), EWT will no longer be deducted from the amount paid, as the pertinent EWT was already deducted and withheld when it was previously recorded.

According to petitioner, the BIR's investigating team considered the full project cost as income payments and correlated the same with EWT payments within the same period.[173]

For purposes of examining this item of the assessment, the ICPA inspected the particulars of the **Progress Billings** that petitioner had included in its EWT reconciliation schedule. This was done to confirm whether the accounts involved (in recording the said transactions) comprised its reported costs or expenses, which it eventually claimed as deductions in its Annual ITR for CY 2012. He likewise cross-referenced the components of Progress Billings with petitioner's Monthly Alphalist of Payees (**MAP**) for EWT in CY 2012 to determine if the said billings formed part of the alphalists supporting petitioner's EWT returns (which would confirm that the subject EWT was indeed remitted in CY 2012). This procedure aids the ICPA in confirming that the transactions it is evaluating are for the proper taxable period.

The ICPA then identified Progress Billings from CY 2012 that included deductions (from the gross amount payable to the contractor) based on **Advance Payments made in prior years** by inspecting the (1) SIs and ORs issued to petitioner (for the CY 2012 payments), (2) interim payment certificates (issued by petitioner in CY 2012 to its contractors to certify the latter's completion of a certain portion of the

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173 Par. 66, Petition for Review, supra at note 1.

contracted work, as well as monitor the project's progress to date), and (3) petitioner's own monitoring of its progress billings and summary of payments.[174] The ICPA also reviewed **Retentions deducted from prior CYs' Progress Billings** to confirm whether these were indeed subjected to EWT during the period they were *retained*, as petitioner claimed.

Finally, the ICPA tested the **components of Progress Billings in CY 2012 that were not subjected to EWT** (*i.e.*, recoupment of prior periods' Advance Payments and release of Retentions deducted from prior periods). He then traced the originating transactions from previous CYs (to the extent feasible) to check whether EWT was indeed already withheld from the said items, specifically:

> ...
>
> 1. For retention payables released not subject to EWT during 2012, we also traced these back to the corresponding progress billings [from prior periods] to determine if these are previously subjected to withholding tax.
>
> 2. For prior years advanced payments supposedly already subjected to EWT in prior years, we checked the contractors' OR and billing statements and traced these transactions back to the Alphalist of Payees subjected to EWT for the corresponding [prior] period to determine whether or not EWT was indeed previously remitted for such advanced payments.
>
> 3. For retention payables released but not subject to EWT during 2012, we understand that the EWT was withheld on the gross amount of the [prior period] progress billings. Hence, to the extent feasible, we traced these back to the corresponding progress billings in prior years to determine if these were previously subjected to withholding tax.[175]
>
> ...

The ICPA then outlined his findings and proffered recommendations[176] based on: (1) the release of Retention payables during CY 2012 that were already subjected to EWT in prior CYs; (2) the recoupment of Advance Payments that were already subjected to EWT in prior CYs, integrated into CY 2012 Progress Billings payments; and,

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[174] Exhibit "P15-1.1", ICPA USB.
[175] Part II.4.i., ICPA Report, "P-16", Division Docket, Volume I, p. 442.
[176] Id., pp. 456-457.

(3) the Progress Billings payments not recorded as costs but debited to asset accounts in the balance sheet.

The Court, however, is unable to verify the results of the Court-commissioned ICPA's examination. As a crucial procedure in support of petitioner's contentions, the ICPA had checked Progress Billings components that were not subjected to EWT in CY 2012, to confirm that the appropriate taxes were instead withheld in prior CYs. Notably, essential pieces of evidence in relation thereto that the ICPA had allegedly inspected cannot be found in the records of this case nor did they form part of the exhibits pre-marked and offered by the ICPA.

In particular, the evidence available on record lacks documentation to ascertain the withholding and payment of EWT in prior periods, such as, but not limited to: (1) receipts or invoices for prior CYs; (2) CWTs issued during prior CYs' payments; (3) prior CYs' EWT returns and the corresponding MAPs; and, (4) general ledgers (**GLs**) for the current CY and relevant prior CYs.

While the Court can reasonably ascertain that petitioner's deductions *per* ITR tie up with its costs and expenses *per* AFS, the absence of a GL or equivalent document prevents Us from verifying whether the transactions represented by petitioner are duly reflected in its books. Journal entries and reconciliation schedules, by themselves, do not convincingly support the narrative behind a transaction without first being tied to the AFS and ITR, which purportedly represent the whole range of petitioner's transactions for each CY or taxable period.

Section 3 of Rule 13[177] of the RRCTA[178], as amended, clarifies that the parties may challenge the ICPA's findings and conclusions. As for the Court, the same are not conclusive upon it but it may, in whole or in part, adopt such findings and conclusion subject to its own verification. Put differently, this Court is not bound by the findings of the ICPA and is not compelled to take such findings at face value. The merit or probative value of the contents of such report is still subject to the Court's scrutiny, and it is free to adopt or disregard, completely or partially, the findings of the ICPA.

177 Trial by Commissioner.
178 Supra at note 4.

Accordingly, in light of insufficient evidence, We cannot subscribe to petitioner's arguments. Bare allegations, unsubstantiated by evidence, are not equivalent to proof.[179] While the relevant source documents allow verification of its CY 2012 Progress Billings payments, We are unable to validate the other half of its contention that the corresponding EWTs were already withheld.

In view of the foregoing, petitioner's arguments herein lack sufficient merit to warrant a reduction of the instant deficiency IT assessment item.

(b) PAYMENTS TO SECURITY AGENCIES NOT SUBJECTED TO EXPANDED WITHHOLDING TAXES (EWT) - ₱32,224,934.15

Petitioner argues that in payments to certain agencies and independent job contractors, specifically security agencies, only the portion pertaining to agency fees are subject to EWT, *i.e.*, security guards' salaries covered in the same billing statement (for security services) with the corresponding agency fees are *not* subject to EWT.

As confirmed by the ICPA and later verified by this Court, petitioner would either withhold EWT upon the agency fee portion of the security services it availed, or on both the agency fees and security guards' salaries. This practice varied depending on the security agency with which it was transacting.[180]

Sections IV and V of Revenue Memorandum Circular (**RMC**) No. 39-07 dated 22 January 2007 set forth the tax treatment of the salaries of security guards, to wit:

> ...
> SUBJECT: *Clarifying the Income Tax and VAT Treatment of Agency Fees/Gross Receipts of Security Agencies Including the Withholding of Taxes Due thereon.*
> ...

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179 See *Mirasol Castillo v. Republic of the Philippines and Felipe Impas*, G.R. No. 214064, 06 February 2017.

180 See Part III.D.3.i., ICPA Report, "P-16", Division Docket, Volume I, p. 454.

> IV. MANNER OF ISSUING RECEIPT FOR THE ENTIRE CONTRACT PRICE. —
>
> ...
>
> With respect to the security guards' salaries which are mandated by law to be paid by the Client through the Security Agency, **the amount so paid representing salaries must be covered by a Non-VAT Acknowledgement Receipt. This document, coupled with the notarized certification of the expanded withholding taxes prescribed in Paragraph V hereunder, shall be a sufficient <u>substantiation for the expense that will be claimed as a deduction from gross income</u>** by the Client.
>
> V. WITHHOLDING TAX COMPLIANCE. —
>
> ...
>
> **<u>Insofar as the Agency Fee is concerned, the Client is constituted as the withholding agent of the EWT</u>** following the rule above-mentioned. However, with respect to the portion of the Contract Price representing the amount segregated and earmarked as salaries of the security guards, the Security Agency shall be the one responsible for the withholding of the tax on compensation income. This is so because while it is the Client who claims the payment as an expense, it is the Security Agency who physically controls the payment to the salaries of the Security Guards. However, **<u>in order to comply with the requirement for deductibility under Section 34 (K), in relation to Sections 58 and 81, all of the National Internal Revenue Code, as amended, the Security Agency must furnish its Client, on or before January 31 of the year following the year of withholding, a *Notarized Certification* (see Annex 'A') indicating the names of the guards employed by the Client, their respective TINs, the amount of their salaries and the amount of tax withheld from each</u>. This certification together with the covering Non-VAT Acknowledgment Receipt must be kept on file by the Client as <u>substantiation for the claim of the expense</u>.**[181]
>
> ...

Pursuant to the foregoing provisions of RMC No. 39-07, petitioner is mandated to withhold and remit EWT only on the agency fee, and not on the salaries paid to the security guards. At this juncture, We must make a distinction between the documentation requirements:

1. Non-VAT Acknowledgment Receipt for the amount paid representing the security guards' salaries; and,

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[181] Italics in the original text, emphasis and underscoring supplied.

2. Notarized Certification with the guards' pertinent details, and the amount of their salaries and amount of taxes withheld from each, if any, furnished on or before 31 January of the year following the year of withholding.

Pursuant to the above RMC, both requirements are necessary for **substantiating an expense claim**. However, for purposes of meeting the requirements of Section 58[182] of the NIRC of 1997, as amended, the notarized certification is sufficient.

Notably, the present assessment item being scrutinized only deals with the fact of withholding, and not necessarily the substantiation of the expense. Indeed, the components of the IT assessment do not include any disallowances for unsubstantiated deductions claimed.

In any case, petitioner was unable to support its claim with the necessary proof. The ICPA confirmed that petitioner failed to provide the needed notarized certifications.

On further inspection, petitioner submitted a batch notarized certifications pertaining to *Bonifacio Security Agency*, representing ₱32,620,222.59 of its claim. However, the ICPA noted that these certifications were issued on 15 October 2021, falling short of the requirement. To recap, RMC No. 39-07 requires that the notarized certification be furnished **on or before 31 January of the year following the year of withholding**. Considering the present CY 2012 assessment, the certifications should have been issued by 31 January 2013.

In light of the foregoing, We cannot appreciate petitioner's claim based on the information and documentation it provided. Petitioner's above allegations, in the absence of sufficient proof, cannot justify a reduction in the total amount of this deficiency IT assessment item.

(c) PETITIONER'S ERROR IN INPUTTING THE APPLICABLE EXPANDED WITHHOLDING TAX (EWT) RATE - ₱1,206,562.50

182 Supra at note 166.

Regarding the unaccounted difference of ₱1,206,562.50, which the BIR observed and subjected to 20% EWT, petitioner attributes the same to a clerical error in the preparation of its EWT return.

The pertinent details, as gathered by the ICPA, are summarized as follows:

Payment to Columbus Holdings, Inc.

	***Per* OR/CWT**	***Per* Return**
Tax base or gross amount [A]	₱1,206,562.50	₱1,608,750.00
Alphanumeric tax code (**ATC**)	-	WI091
EWT rate applied [B]	20%	15%
EWT withheld [C = A x B]	241,312.50	241,312.50
Actual payment (*per* OR) [D = A - C]	965,250.00	-

According to petitioner, it inadvertently used the wrong ATC in preparing the return, but nevertheless accurately reported the amount of EWT withheld at ₱241,312.50. This error resulted in an inflation of the tax base, obtained by dividing the tax withheld by the applied EWT rate.

Furthermore, the CWT Certificate issued by petitioner for the transaction[183] confirms the amount of EWT actually remitted (or ₱241,312.50) and reflects the supposedly incorrect ATC, aligning with petitioner's contention. In addition, while the ATC and the corresponding rate are for a type of income payment subject to 15% EWT, the tax base indicated on the face of the CWT Certificate is ₱1,206,562.50, which implies that a 20% EWT rate had been utilized to arrive at the tax withheld amounting to ₱241,312.50.[184] Incidentally, the pertinent assessment item[185] imputes failure to withhold 20% EWT on deductions claimed amounting to exactly ₱1,206,562.50 (equivalent to the instant singular transaction).

Section 34(K)[186] of the NIRC of 1997, as amended, allows a deduction "only if it is shown that the **tax required to be deducted and withheld therefrom has been paid to the** [**BIR**]." Owing to the foregoing facts, plus the absence of any showing that petitioner

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183 Exhibit "P15-1.3", ICPA USB.
184 ₱241,312.50 / ₱1,206,562.50 = 20%
185 Breakdown of the item of assessment; supra at page 41.
186 Supra at note 164.

attempted to escape its tax liability, and coupled with the fact that there is no resultant loss to the government, We deem petitioner's substantial compliance (with the requirements of the aforementioned provision) sufficient to warrant the reduction of the assessment item by ₱1,206,562.50.

(d) UNREFUTED PORTION OF DEDUCTIONS NOT SUBJECTED TO EXPANDED WITHHOLDING TAX (EWT) - ₱7,387,779.36

Apart from its defenses mentioned above, petitioner has not refuted the remainder of this deficiency IT assessment item, to the extent of ₱7,387,779.36.

None among its arguments in the instant petition, memorandum, documentary evidence, testimonies of its witnesses, information and documentation forwarded to the ICPA, and submissions in the administrative proceedings with the BIR directly address such remainder. As such, this unrefuted portion of the deficiency IT assessment is upheld.

Effectively, the previously noted discrepancy amounting to ₱368,939.02 (revealed by re-computing the breakdown of the FDDA total) is similarly situated and shall remain part of the deficiency IT assessment item.

All told, this item of the deficiency IT assessment is upheld to the extent that it was not successfully disproved by petitioner. After accounting for all of the foregoing, this assessment item is reduced to ₱304,495,555.46, calculated as follows:

Total deductions disallowed due to non-withholding of EWT	₱305,702,117.96
Less: Income payment aptly subjected to 20% EWT but issued CWT and filed MAP with an incorrect ATC (item c)	1,206,562.50
Adjusted deductions disallowed due to non-withholding of EWT	**₱304,495,555.46**

(ii) DISALLOWED EXPENSES DUE TO NON-WITHHOLDING OF COMPENSATION TAXES - ₱1,062,752.06

Similar to the preceding finding, expenses disallowed due to failure to withhold and remit WTC find basis in Section 34(K)[187] of the NIRC of 1997, as amended. Respondent imputes upon petitioner the failure to withhold WTC on expenses incurred by the latter for employee compensation, amounting to ₱1,062,752.06. The present rules for filing and withholding compensation taxes can be found in Section 81[188] of the NIRC of 1997, as amended.

Prior to the issuance of the present FDDA, petitioner had presented copies of its employee alphalist and WTC returns to the BIR's investigating team, to be compared with its recorded personnel costs. The latter would later on reconcile the balances therein, revise the computation reflected in the assessment, and reduce the unaccounted balance (from a starting point of ₱6,694,534.52 in the FLD/FAN) to that which was reflected in the FDDA finding. The present computation is shown below:

Estimated net taxable compensation *per* books	₱41,780,298.87
Less: Taxable compensation *per* WTC returns	40,717,541.81
Unaccounted difference	**₱1,062,752.06**

Petitioner insinuates that respondent's calculation is inaccurate as it includes deductions claimed that were not subject to WTC to begin with. Particularly, petitioner attributes the variance to the following:

Employee Benefits (Others) Car plan amortization shouldered by petitioner as the employer	₱960,751.56
Employee Benefits (Uniforms) Advance payments for uniforms	106,517.8681
Unaccounted excess	(4,517.36)
Total	**₱1,062,752.06**

[187] Supra at note 164.

[188] SEC. **81**. *Filing of Return and Payment of Taxes Withheld.*

According to petitioner, as gathered by the ICPA, petitioner's management represented that the car plan amortizations are properly being subjected to Fringe Benefits Tax (**FBT**) (instead of WTC), while the cost of uniforms is a non-payroll item (though We understand this relates to personnel costs). Petitioner was also unable to accurately reconcile the balance in full, leading to a minor overage when it attempted to re-construct the amount assessed.

Relevantly, with respect to both the computation and the evidentiary support for petitioner's supposed deductions not subject to WTC, there is no sufficient proof available in the case records nor were there any supporting documents submitted to the ICPA for examination. As such, the presumption in favor of the correctness of the tax assessment prevails, given that petitioner had failed to debunk the same.

We thus uphold this item of the deficiency IT assessment in its full amount.

(iii) DISALLOWED CREDITABLE WITHHOLDING TAXES (CWTs) - ₱266,346.44

Respondent disallowed part of the CWTs claimed by petitioner during CY 2012, alleging "double take-ups" for a few items, while one item is outright unsupported by a valid CWT Certificate (BIR Form No. 2307):

Registered Name	Period	Nature	CWT Amount	Findings
Bases Convention Development Authority	03/31/2012	Rentals	₱117,066.39	Double take-up
Coffee Centrale The Bean Co Inc.	02/29/2012	Rentals	8,158.88	Double take-up
Global City Autosales Inc.	03/31/2012	Rentals	23,958.00	Double take-up
Global City Autosales Inc.	03/31/2012	Rentals	873.54	Double take-up
Global City Innovative College Incorporated	03/31/2012	Rentals	49,355.32	Double take-up
Monolith Construction and Development Corp.	02/01/2012	Rentals	357.14	Double take-up
Coffee Centrale The Bean Co Inc.	07/31/2012	Rentals	10,247.13	Unsupported
Intelligent Beauty Skin Solutions Inc.	10/31/2012	Rentals	8,636.93	Double take-up
Pecolotum Foods Inc.	10/31/2012	Rentals	14,793.21	Double take-up
Pecolotum Foods Inc.	11/30/2012	Rentals	14,738.27	Double take-up
Pecolotum Foods Inc.	12/31/2012	Rentals	14,807.63	Double take-up
Pecolotum Foods Inc.	10/31/2012	Rentals	2,251.00	Double take-up

Registered Name	Period	Nature	CWT Amount	Findings
Pecolotum Foods Inc.	11/30/2012	Rentals	551.50	Double take-up
Pecolotum Foods Inc.	12/31/2012	Rentals	551.50	Double take-up
Total			₱266,346.44	

In its defense, petitioner insists that any double take-ups were ultimately reversed. According to petitioner, its claim should be supported by the contents of its Summary Alphalists of Withholding Taxes (**SAWTs**), CWT Certificates, reconciliation schedules, and reversal entries found in its GL. However, petitioner has not offered any supporting documentation nor submitted them to the Court-commissioned ICPA for his examination.

This item of the deficiency IT assessment was made pursuant to Section 2.58.3 of RR No. 2-98[189], as amended:

> ...
> SECTION 2.58.3. Claim for Tax Credit or Refund. —
> ...
>
> (B) Claims for tax credit or refund of any creditable income tax which was deducted and withheld on income payments shall be given due course only when it is shown that the **income payment has been declared as part of the gross income** <u>and</u> the **fact of withholding is established by a copy of the withholding tax statement duly issued by the payor to the payee showing the amount paid and the amount of tax withheld therefrom**.
>
> ...

Echoing the foregoing, claims for tax credit or refund of any creditable income tax, which was deducted and withheld on income payments, shall be given due course only when it is shown that: (1) the income payment has been declared as part of the gross income; and, (2) the fact of withholding is established by a copy of the withholding tax statement duly issued by the payor or withholding agent to the payee or recipient (through a Certificate of Creditable Tax Withheld at Source or BIR Form No. 2307), showing the amount paid and the amount of tax withheld therefrom.

189 Supra at note 170; Emphasis and underscoring supplied.

For this item of the deficiency IT assessment, and considering the nature thereof, petitioner must also proffer proof that it either did not claim the same CWT more than once *or* show that the items flagged above are supported by its own, distinct certificate. Unfortunately, without sufficient evidence for this Court to examine, We are unable to appraise whether petitioner's argument indeed holds water. Petitioner's bare allegations, unsubstantiated by evidence, are not equivalent to proof.[190] As such, this item of the deficiency IT assessment is upheld, and the full amount thereof shall be retained.

To summarize thus far, petitioner is liable to pay the updated basic deficiency IT in the amount of ₱91,933,838.70, computed as follows:

Taxable income *per* ITR	₱	1,483,996,154.00
Add: Adjustments		
Disallowed expenses due to under-withholding of EWT		**304,495,555.46**
Disallowed expenses due to under-withholding of WTC		**1,062,752.06**
Adjusted taxable income		1,789,554,461.52
Income tax due		
Special rate (₱142,922,634.00 x 5%)		7,146,131.70
Regular rate (₱1,646,631,827.52 x 30%)		493,989,548.26
Less: Payments / tax credits		
Prior years excess credits other than MCIT		(144,051,092.00)
Tax payments		(87,352,260.70)
Creditable withholding taxes (CWTs) claimed		(178,064,835.00)
Add back: Disallowed CWTs		**266,346.44**
Adjusted Basic Deficiency Income Tax Due	**₱**	**91,933,838.70**

DEFICIENCY VALUE-ADDED TAX (VAT) FOR THE CALENDAR YEAR (CY) 2012

Per the FDDA, petitioner's alleged deficiency VAT *vis-à-vis* the comprising items for adjustment and disallowance, are computed as follows:

[190] *Spouses Eliseo R. Bautista, et al. v. Spouses Mila Jalandoni, et al.*, G.R. Nos. 171464 and 199341, 27 November 2013.

VATable sales	₱	3,443,002,596.33
Sales to government		14,210,883.50
Total VATable sales before adjustments		3,457,213,479.83
Add: Adjustment/s		
Common area charges, not subjected to VAT		**147,833,356.40**
Unsupported disposals of PPE		**213,000.00**
Total VATable sales after adjustments		3,605,259,836.23
Multiply by: Output tax rate		x 12%
Output tax due		432,631,180.35
Less: Total allowable input tax		
Input tax deferred from previous quarters		37,998,758.65
Transitional input tax		164,374.08
Input tax claimed for the year		215,803,263.11
Less: Input tax carried over to next period		(85,051.95)
Net VAT payable per returns		178,749,836.46
Less: Payment per returns		217,666,299.29
Less: VAT withheld on sales to government		663,624.26
VAT payable/(excess)		(39,580,087.09)
Add: Excess credits carried over to succeeding period		57,345,649.87
Net VAT payable/(excess)		17,765,562.78
Add: Disallowed input taxes		**13,956.58**
Deficiency VAT	**₱**	**17,779,519.36**
Add: Penalties		
Surcharge at 50%		8,889,759.68
Interest at 20% from 26 Jan 2013 to 31 Dec 2017		17,535,964.31
Interest at 12% from 01 Jan 2018 to 28 Feb 2019		2,472,570.97
Total Amount Due *per* FDDA	**₱**	**46,677,814.31**

Respondent assessed petitioner of deficiency VAT based essentially on these items, to wit:

Particulars	Amount
Common area charges not subjected to VAT	₱ 147,833,356.40
Unsupported equipment disposals not subjected to VAT	213,000.00
Disallowed input taxes claimed	13,956.58

We now go through each of respondent's findings in *seriatim*.

(i) COMMON AREA CHARGES NOT SUBJECTED TO VALUE-ADDED TAX (VAT) - ₱147,833,356.40

As the records so yield, respondent treated petitioner's supposed **Common Area Charges** as part of petitioner's gross receipts subject to 12% VAT, pursuant to Sections 105[191] and 108[192] of the NIRC of 1997, as amended. This item of the assessment, representing ₱147,833,356.40 of the alleged deficiency VAT, originates from a schedule[193] of Common Area Charges for CY 2012.

Petitioner represents that the said charges do not form part of its income but are merely collected (and held in trust) to cover upkeep and maintenance expenses for the common areas in its leased premises.[194]

Relevantly, the Supreme Court's pronouncements in the case of *In The Matter of Declaratory Relief on the Validity of BIR Revenue Memorandum Circular No. 65-2012 "Clarifying The Taxability of Association Dues, Membership Fees and Other Assessments/Charges Collected by Condominium Corporations"*[195] enlightens Us on the taxability of the subject fees:

> ...
> Association dues, membership fees, and other assessments/charges do not arise from transactions involving the sale, barter, or exchange of goods or property. Nor are they generated by the performance of services. As such, they are not subject to value-added tax per Section 105 of RA 8424, *viz.*:
>
> > Section 105. Persons Liable. — Any person who, in the course of trade or business, sells, barters, exchanges, leases goods or properties, renders services, and any person who imports goods shall be subject to the value-added tax (VAT) imposed in Sections 106 to 108 of this Code.
> >
> > The value-added tax is an indirect tax and the amount of tax may be shifted or passed on to the buyer, transferee or lessee of the goods, properties or services. This rule shall

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191 **SEC. 105**. *Persons Liable.*

192 **SEC. 108**. *Value-added Tax on Sale of Services and Use or Lease of Properties.*

193 BIR Records, pp. 436-464.

194 Par. 110, Petitioner's Memorandum, Division Docket, Volume II, p. 1213.

195 G.R. Nos. 215801 and 218924, 15 January 2020; Citations omitted, underscoring supplied, emphasis and italics in the original text.

> likewise apply to existing contracts of sale or lease of goods, properties or services at the time of the effectivity of Republic Act No. 7716.
>
> **The phrase "in the course of trade or business" means the regular conduct or pursuit of a commercial or an economic activity including transactions incidental thereto, by any person regardless of whether or not the person engaged therein is a non-stock, non-profit private organization (irrespective of the disposition of its net income and whether or not it sells exclusively to members or their guests), or government entity.**
>
> The rule of regularity, to the contrary notwithstanding, services as defined in this Code rendered in the Philippines by nonresident foreign persons shall be considered as being course of trade or business.

The value-added tax is a burden on transactions imposed at every stage of the distribution process on the sale, barter, exchange of goods or property, and on the performance of services, even in the absence of profit attributable thereto, so much so that even a non-stock, non-profit organization or government entity, is liable to pay value-added tax on the sale of goods or services.

Section 106 of RA 8424 imposes value-added tax on the sale of goods and properties. The term 'goods' or 'properties' shall mean all tangible and intangible objects which are capable of pecuniary estimation. These 'goods' or 'properties' include real property, intellectual property, equipment, and rights over motion picture films. Section 106 of RA 8424 likewise imposes value-added tax on transactions such as transfer of goods, properties, profits, or inventories.

Section 108 of RA 8424 further imposes value-added tax on sale of services and use or lease of properties. It defines "sale or exchange of services," as follows:

> The phrase '**sale or exchange of services**' means the performance of all kinds of services in the Philippines for others for a fee, remuneration or consideration, including those performed or rendered by construction and service contractors; stock, real estate, commercial, customs and immigration brokers; lessors of property, whether personal or real; warehousing services; lessors or distributors of cinematographic films; persons engaged in milling, processing, manufacturing or repacking goods for others; proprietors, operators or keepers of hotels, motels, rest-houses, pension houses, inns, resorts; proprietors or operators of restaurants, refreshment parlors, cafes and other eating places, including clubs and caterers; dealers in securities;

> lending investors; transportation contractors on their transport of goods or cargoes, including persons who transport goods or cargoes for hire and other domestic common carriers by land relative to their transport of goods or cargoes; common carriers by air and sea relative to their transport of passengers, goods or cargoes from one place in the Philippines to another place in the Philippines; sales of electricity by generation companies, transmission, and distribution companies; services of franchise grantees of electric utilities, telephone and telegraph, radio and television broadcasting and all other franchise grantees except those under Section 119 of this Code and non-life insurance companies (except their crop insurances), including surety, fidelity, indemnity and bonding companies; and similar services regardless of whether or not the performance thereof calls for the exercise or use of the physical or mental faculties. x x x
>
> The phrase 'sale or exchange of services' shall include the use of intellectual property, use of certain types of equipment, supplying certain types of knowledge or information, lease of motion picture films, and use of transmission or air time.
>
> <u>Both under RA 8424 (Sections 106, 107, and 108) and the TRAIN Law, there, too, is no mention of association dues, membership fees, and other assessments/charges collected by condominium corporations being subject to VAT. And rightly so. For when a condominium corporation manages, maintains, and preserves the common areas in the building, it does so only for the benefit of the condominium owners. It cannot be said to be engaged in trade or business, thus, the collection of association dues, membership fees, and other assessments/charges is not a result of the regular conduct or pursuit of a commercial or an economic activity, or any transactions incidental thereto.</u>
>
> Neither can it be said that a condominium corporation is rendering services to the unit owners for a fee, remuneration or consideration. <u>Association dues, membership fees, and other assessments/charges form part of a pool from which a condominium corporation must draw funds in order to bear the costs for maintenance, repair, improvement, reconstruction expenses and other administrative expenses.</u>
>
> Indisputably, the nature and purpose of a condominium corporation negates the *carte blanche* application of our value-added tax provisions on its transactions and activities. ***CIR v. Magsaysay Lines, Inc.***, stated:
>
> > Yet VAT is not a singular-minded tax on every transactional level. Its assessment bears direct relevance to

> the taxpayer's role or link in the production chain. Hence, as affirmed by Section 99 of the Tax Code and its subsequent incarnations, **the tax is levied only on the sale, barter or exchange of goods or services by persons who engage in such activities, in the course of trade or business.** **These transactions outside the course of trade or business may invariably contribute to the production chain, but they do so only as a matter of accident or incident.** **As the sales of goods or services do not occur within the course of trade or business, the providers of such goods or services would hardly, if at all, have the opportunity to appropriately credit any VAT liability as against their own accumulated VAT collections since the accumulation of output VAT arises in the first place only through the ordinary course of trade or business.**

Too, ***ANPC*** held that membership fees, assessment dues, and the like collected by recreational clubs are not subject to value-added tax "*because in collecting such fees, the club is not selling its service to the members. Conversely, the members are not buying services from the club when dues are paid; hence, there is no economic or commercial activity to speak of as these dues are devoted for the operations/ maintenance of the facilities of the organization. As such, there could be no 'sale, barter or exchange of goods or properties, or sale of a service' to speak of, which would then be subject to VAT under the 1997 NIRC.*" This principle equally applies to condominium corporations which are similarly situated with recreational clubs insofar as membership fees, assessment dues, and other fees of similar nature collected from condominium owners are devoted to the operations and maintenance of the facilities of the condominium. In sum, RMC No. 65-2012 illegally imposes value-added tax on association dues, membership fees, and other assessments/charges collected and received by condominium corporations.

...

From the foregoing, it is clear that the subject Common Area Charges are **not** subject to VAT, as they are *outside* the scope of taxability of Sections 105[196] and 108[197] of the NIRC of 1997, as amended.

In petitioner's case, the ICPA traced its collections of Common Area Charges to the Official Receipts (**ORs**) it had previously issued. Upon examination, the said charges would variably appear in ORs by itself (as "Common Area Charges mm/dd/yyyy – mm/dd/yyyy") or accompanied by other charges to a single tenant. However, in all cases, as

[196] Supra at note 191.
[197] Supra at note 192.

later verified by this Court, this line item is distinct (and easily separable) from any other items charged in the same OR.

While petitioner issued VAT ORs for the purpose (instead of a document that is outright unusable for the claim of input taxes, *i.e.* a non-VAT collection or acknowledgment receipt[198]), each pertinent OR clearly tagged the said Common Area Charges as VAT-exempt sales. This prevented any output taxes from being passed on to tenants and thereby preventing them from utilizing any input taxes on the said charges. Accordingly, petitioner's invoicing practice successfully prevented any resulting loss to the government. We thus cannot completely fault petitioner for such, especially in the context of this specific finding of "common area charges not subjected to VAT", where the subject charges were aptly not subject to VAT to begin with.

Thus, in cancelling this item of the deficiency VAT assessment, this Court must first be convinced that the subject charges are adequately supported by source documents, in accord with petitioner's representation. For this, the ICPA confirmed that petitioner was able partially substantiate the same, summarized as follows:

Collections traced to ORs issued in Q4 of 2012	₱	43,983,253.65
Collections traced to ORs issued in Q3 of 2012 and prior		87,679,643.41
Collections not supported by ORs		16,170,459.34
Total amount *per* schedule and FDDA finding	**₱**	**147,833,356.40**

Based on the foregoing, the amounts duly supported, totaling ₱131,662,897.06, shall be removed from the deficiency VAT assessment, for lack of factual and legal basis. Additionally, the portions thereof that pertain to transactions paid prior to the 4th quarter of CY 2012 are likewise removable on account of prescription.

In consideration of the discussions on the issue of prescription further above, given that the right to assess deficiency VAT for the first three (3) quarters of CY 2012 had already prescribed, it would have been proper to cancel the portions of the assessment pertaining to

198 See Revenue Memorandum Circular (RMC) No. 09-2006 dated 25 January 2006.

transactions dated earlier than the close of the 3rd quarter of CY 2012, or 30 September 2012.

It is observed that the transactions in petitioner's schedule each bear a posting date, document date, entry date, as well as a covered period for the charges, generally for one (1) month at a time. For the substantiated transactions, the ICPA tabulated the OR dates. Upon closer inspection, it is understood that the CY 2012 schedule was prepared based on the posting dates, as these fall within 2012 for all the transactions therein (as opposed to the entry date, document date, and periods, all of which include 2011 transactions).

It can likewise be gleaned from the schedule that the interval between the other dates and the actual dates of payments (for the supported portion) can widely vary by multiple months. As such, We cannot rely on any of the available dates in the schedule to reckon which of the unsupported portions pertain to transactions for which the right to assess deficiency VAT has already prescribed.

In sum, with the evidence available, it cannot be reliably established whether the collections representing the supposed Common Area Charges were properly accounted for as such, and that petitioner had not shifted output VAT or enabled tenants to utilize input VAT, as a consequence of its aforesaid invoicing practice.

As for the issue on prescription, the evidence on record is insufficient to establish the date of receipt for each collection, and consequently segregate the prescribed portions of this item of the deficiency assessment. We are thus constrained to uphold the deficiency VAT assessment in the unsupported remainder of ₱16,170,459.34, intact.

(ii) UNSUPPORTED EQUIPMENT DISPOSALS NOT SUBJECTED TO VALUE-ADDED TAX (VAT) - ₱213,000.00

In relation to the two (2) batches of equipment, respondent imputes a VAT deficiency upon the asset disposal, invoking Section 105 of the NIRC of 1997, as amended. According to respondent, petitioner's disposals are subject to VAT based on paragraph 3 thereof, which reads:

> ...
>
> SEC. 105. ***Persons Liable.*** — Any person who, in the course of trade or business, sells, barters, exchanges, leases goods or properties, renders services, and any person who imports goods shall be subject to the value-added tax (VAT) imposed in Sections 106 to 108 of this Code.
>
> ...
>
> The phrase 'in the course of trade or business' means the **regular conduct or pursuit of a commercial or an economic activity, including transactions incidental thereto**, by any person regardless of whether or not the person engaged therein is a nonstock, nonprofit private organization (irrespective of the disposition of its net income and whether or not it sells exclusively to members or their guests), or government entity.[199]
>
> ...

Petitioner insists on the alternative, that the disposals of equipment are not in connection with its regular course of trade or business and should therefore not be subject to VAT. In support of its position, petitioner points out that such transactions are not within its primary purpose, as stated in its Articles of Incorporation (**AOI**).[200]

We find for respondent.

This finding is traceable to petitioner's Audited Financial Statements (**AFS**), where Note 10 thereof shows a lapsing schedule for petitioner's recorded Property, Plant, and Equipment (**PPE**). A total of ₱213,000.00 worth of asset disposals was reported for CY 2012.

In implementing Section 109[201] of the NIRC of 1997, as amended, RR No. 16-05[202], as amended by RR No. 04-07[203] specifies:

199 Italics in the original text, emphasis and underscoring supplied.
200 Exhibit "P-1", Division Docket, Volume II, p. 804.
201 Exempt Transactions.
202 Consolidated Value-Added Tax Regulations of 2005. Issued on 01 September 2005.
203 Amending Certain Provisions of Revenue Regulations No. 16-2005, As Amended, Otherwise Known as the Consolidated Value-Added Tax Regulations of 2005. Issued on 07 February 2007.

...

SEC. 4.109-1. VAT-Exempt Transactions. —

...

(B) Exempt transactions. — Subject to the provisions of Sec. 4.109-2 hereof, the following transactions shall be exempt from VAT:

...

(p) The following sales of real properties are exempt from VAT, namely:

...

(1) Sale of real properties not primarily held for sale to customers or held for lease in the ordinary course of trade or business.

However, even if the real property is **not primarily held for sale** to customers or held for lease in the ordinary course of trade or business but the same is **used in the trade or business of the seller**, the sale thereof shall be subject to VAT being a **transaction incidental to the taxpayer's main business**.

...

Taken together with Section 105 further above, the disposal of assets through sale, by a taxpayer engaged in business, is considered a transaction incidental to its main business, and is therefore subject to VAT.

The Court-commissioned ICPA noted the specifics of petitioner's supposed asset disposals[204], as follows:

Journal Entry Date	Particulars	Amount
20 December 2012	Retirement of damaged BHS Camera	₱9,290.00
21 December 2012	Intercompany transfer (to BESC and BGC) of DELL LAN Switch and RUCKUS Wi-Fi Access Point	203,967.34
	Total	**₱213,257.34**

Upon checking the specifics of each transaction, the following details were observed:

I. Retirement of damaged BHS Camera

204 Exhibit "P15-2.3", USB.

(i) The asset was retired from use during the year, with both the asset account and the corresponding balance of its corresponding Accumulated Depreciation account being closed and removed from the books; and,

(ii) Petitioner initially charged the remaining book value of the asset against Loss on Sale of Equipment, then subsequently transferred a portion thereof to Miscellaneous Gains/ Losses.

II. *Intercompany transfer of DELL LAN Switch and RUCKUS Wi-Fi Access Point*

(i) Both the asset account and the corresponding balance of its corresponding Accumulated Depreciation account being closed and removed from the books;

(ii) Petitioner initially charged the remaining book value of the asset against Loss on Sale of Equipment; and,

(iii) Petitioner subsequently recognized intercompany receivables and an equal amount of Gain from Sale of Equipment.

For the second asset disposal (*i.e.*, the intercompany transfer of equipment), the equipment's sale was evident from the recognition of receivables after their reported transfer to the third parties. As for the first asset disposal (*i.e.*, the damaged camera), while it appears that the asset was recorded as retired from use, the movement of the balances through the 'Gain/Loss on Sale of Equipment' account is not fully explained. It is also worth noting that petitioner's Statement of Cash Flows[205] (within its AFS) reports a cash inflow from operating activities tagged as "loss on disposal of property and equipment."

In the recent case of *Lapanday Foods Corporation v. Commissioner of Internal Revenue*[206] (**Lapanday**), citing *Mindanao II Geothermal Partnership v. Commissioner of Internal Revenue*[207], the Supreme Court

[205] Exhibit "P-14", Division Docket, Volume II, pp. 982-983.
[206] G.R. No. 186155, 17 January 2023; Citations omitted, emphasis and underscoring supplied, italics in the original text.
[207] G.R. Nos. 193301 and 194637, 11 March 2013.

explained the implications of transactions incidental to a business' principal transactions:

> ...
>
> In this regard, We cannot support Lapanday's submission that for VAT to apply, the particular activity or transaction must always be pursued with regularity or habituality, or put in another way, the VAT is unavailing when such activity or transaction is merely occasional or isolated. The reason is significantly discernible from the text of Sec. 105 that defines the phrase "in the course of trade or business" to include a transaction "incidental" to the main business activity. **The term "incidental" means depending upon or appertaining to something else primary; something necessary appertaining to, or depending upon another, which is termed the principal; something incidental to the main purpose.** That the primary or main activity is characterized by regularity or habituality cannot be in doubt, and that which is merely incidental to it may indeed be conducted only occasionally.
>
> Yet, although merely occasional or isolated, **a transaction may** still **be embraced in the definition of the phrase "in the course of the trade or business" — thus, subject to VAT — so long as it may be established that such transaction is incidental to the seller's or service provider's main business activity. Thus, We have once held that an isolated transaction can be considered an incidental transaction for purposes of VAT liability.** In *Mindanao II Geothermal v. Commissioner of Internal Revenue (Mindanao)*, We considered as taxable the sale of a Nissan Patrol by one who was not primarily engaged in the business of selling motor vehicles. We ratiocinated:
>
> > Mindanao II's sale of the Nissan Patrol is said to be an isolated transaction. However, it does not follow that an isolated transaction cannot be an incidental transaction for purposes of VAT liability. Indeed a reading of Section 105 of the 1997 Tax Code would show that **a transaction "in the course of trade or business" includes "transactions incidental thereto."** <u>Mindanao II's business is to convert the steam supplied to it by PNOC-EDC into electricity and to deliver the electricity to NPC. In the course of its business, Mindanao II bought and eventually sold a Nissan Patrol. Prior to the sale, the Nissan Patrol was part of Mindanao II's property, plant, and equipment. Therefore, the sale of the Nissan Patrol is an incidental transaction made in the course of Mindanao II's business which should be liable for VAT.</u>
>
> *Mindanao* must be differentiated from the 2006 case of *Magsaysay* that was cited by Lapanday. In *Magsaysay*, the sale by National Development Company (NDC) of its vessels to Magsaysay

> Lines, Inc. was also isolated, but the Court ruled that it was not subject to VAT. Ruling that the sale was not in the course of trade or business, the Court explained that it was made pursuant to the government's privatization program, and that the transaction could no longer be repeated or carried on with regularity. **It must be noted too that *Magsaysay* was decided under the 1986 NIRC when the phrase "in the course of trade or business" had not yet been defined to include incidental transactions, unlike the present NIRC.**
>
> ...
>
> ...[T]he loan transactions entered into by Lapanday can be held taxable as incidental transactions of its regular line of business, *regardless of the fact that these were entered into on an isolated basis only*. It is imperative, however, that in order for a transaction to be considered incidental to the main line of business, there must be shown some intimate connection between the transaction in question and the main business activity. Otherwise, it makes no sense to hold a transaction incidental to a primary business activity where no causal link or tie could even be traced. In *Mindanao*, such connection is shown by the fact that the Nissan patrol was previously acquired for use in the seller's business. Prior to the sale, the Nissan patrol formed part of Mindanao's "Property, Plant and Equipment" account.
>
> ...

Given the Court's limited visibility into petitioner's transactions, and absent any attempts from petitioner to further support the same, We are unable to reliably establish the circumstances surrounding the said asset disposals and any arising VAT payments or adjustments (and particularly, whether any VAT liability should arise). However, petitioner's representations and the ICPA's observations concur that petitioner did not charge VAT during the sales or transfers.

In any case, it is apparent from the records that the subject pieces of equipment previously formed part of petitioner's PPE and were used in its business, as understood from the fact that petitioner depreciated them over taxable periods. Here, the pieces of hardware were acquired for use with the business and subsequently disposed. In parallel with *Lapanday*, these disposals are clearly incidental to petitioner's main business, and are thus subject to VAT.

Notably, while the actual total cost of assets disposed covered in the deficiency VAT assessment is ₱213,257.34, the deficiency *per* FDDA, as assessed by respondent, in the amount of ₱213,000.00, shall be maintained.

(iii) DISALLOWED INPUT TAXES - ₱13,956.58

Per the FDDA, petitioner's input tax claims for CY 2012 included the following items:

Particulars		Amount	Findings
ALLAN S EARNHART JR	₱	2,723.17	Supported with a non-VAT receipt/invoice[208]
BEATRIZ ESTELA M TIANGCO		3,294.12	No document presented
K G PUA ACOUSTIC DESIGN AND CONSULTANCY		5,357.14	Supported with a non-VAT receipt/invoice [209]
NAVI ENTERPRISE		1,339.29	Supported with a non-VAT receipt/invoice[210]
TOWN AND COUNTRY CAR RENTAL AGENCY		1,242.86	No document presented
	₱	**13,956.58**	

Respondent disallowed the above input taxes after verifying that petitioner claimed the same from suppliers who were not VAT-registered. Disallowance followed after the input tax claims were shown to be supported by invoices or receipts that were noncompliant with the prescribed invoicing requirements (or not supported at all), pursuant to Section 113[211] in relation to Section 110[212] of the NIRC of 1997, as amended.

Petitioner avers that it relied in good faith that its suppliers' ORs and Sales Invoices (**SIs**) were issued in compliance with tax laws, rules, and regulations. It points out that it should not be faulted for the alleged failure of its suppliers to follow the proper invoicing requirements, if its suppliers were indeed not properly VAT-registered taxpayers.

Upon verification in the BIR Records, some of the above transactions were supported by non-VAT documents. Over petitioner's contention, the said inspection is irrespective of whether the supplier is

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208 BIR Records, p. 560.
209 Id., p. 551.
210 Id., p. 557.
211 **SEC. 113**. *Invoicing and Accounting Requirements for VAT-registered Persons.*
212 **SEC. 110**. *Tax Credits.*

VAT-registered, as it remains evident that the documents presented were not valid for claiming input taxes.

As for the remaining items, no supporting documents were presented to this Court to disprove the allegations in the FDDA. Neither were there any prior documents presented in the administrative proceedings, as gleaned from the BIR Records.

With this, the Court finds that petitioner invalidly claimed the items detailed above as part of its input taxes. Hence, this item of the deficiency VAT assessment must also be upheld in its entirety.

Having addressed all the VAT findings in the FDDA, petitioner's deficiency VAT liability shall be updated. Petitioner should be held liable for basic deficiency VAT in the amount of ₱1,979,971.71, computed as follows:

VATable sales	₱ 3,443,002,596.33
Sales to government	14,210,883.50
Total VATable sales before adjustments	3,457,213,479.83
Add: Adjustment/s	
Common area charges, not subjected to VAT	16,170,459.34
Unsupported disposals of PPE	213,000.00
Total VATable sales after adjustments	3,473,596,939.17
Multiply by: Output tax rate	12%
Output tax due	416,831,632.70
Less: Total allowable input tax	
Input tax deferred from previous quarters	37,998,758.65
Transitional input tax	164,374.08
Input tax claimed for the year	215,803,263.11
Less: Input tax carried over to next period	(85,051.95)
Net VAT payable per returns	162,950,288.81
Less: Payment *per* returns	217,666,299.29
Less: VAT withheld on sales to government	663,624.26
VAT payable/(excess)	(55,379,634.74)
Add: Excess credits carried over to succeeding period	57,345,649.87
Net VAT payable/(excess)	1,966,015.13
Add: Disallowed input taxes	13,956.58
Basic Deficiency VAT	**₱ 1,979,971.71**

INVALID COMPROMISE PENALTIES
FOR THE CALENDAR YEAR (CY) 2012

In the FDDA, respondent retained a compromise penalty amounting to ₱50,000.00, for petitioner's alleged failure to pay the correct amount of IT. The FDDA states that said penalty is sourced from Annex A of RMO No. 07-2015[213], in relation to Section 255[214] of the NIRC of 1997, as amended.

The nature of a compromise penalty is explained in the case of *Commissioner of Internal Revenue v. Armando L. Abad, et al.*[215]:

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

Clearly, there can be no compromise if there is no agreement between the parties. A compromise penalty *cannot* be imposed or collected without the agreement or conformity of the taxpayer.[216] A compromise, after all, by its nature, is *mutual* in essence.[217] It cannot be imposed in the absence of a preceding agreement. Thus, the fact that the taxpayer protested the assessment only signifies that there was no agreement to speak of.[218]

WHEREFORE, premises considered, the Petition for Review filed by petitioner Fort Bonifacio Development Corporation is hereby **PARTIALLY GRANTED**. As a result, the assessments for deficiency

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213 The Revised Consolidated Schedule of Compromise Penalties for Violations of the National Internal Revenue Code.

214 **SEC. 255**. *Failure to File Return, Supply Correct and Accurate Information, Pay Tax Withhold and Remit Tax and Refund Excess Taxes Withheld on Compensation.*

215 G.R. No. L-19627, 27 June 1968; Citations omitted and emphasis supplied.

216 See *Wonder Mechanical Engineering Corporation v. The Hon. Court of Tax Appeals, et al.*, G.R. No. L-22805 & L-27858, 30 June 1975.

217 See *Dr. Felisa L. Vda. De San Agustin, et al. v. Commissioner of Internal Revenue*, G.R. No. 138485, 10 September 2001.

218 See *Manila Bankers' Life Insurance Corporation v. Commissioner of Internal Revenue*, G.R. Nos. 199729-30 and 199732-33, 27 February 2019.

income tax and value-added tax shall be **ADJUSTED**. Meanwhile, the assessments for deficiency expanded withholding tax, withholding tax on compensation, documentary stamp tax, and the compromise penalties shall be **CANCELLED** and **WITHDRAWN**.

Accordingly, petitioner Fort Bonifacio Development Corporation is **ORDERED TO PAY** respondent Commissioner of Internal Revenue the amounts of **₱230,900,021.79** and **₱5,059,668.54**, representing deficiency income tax and value-added tax, respectively, inclusive of the 25% surcharge, 20% deficiency interest imposed thereon under Section 249(B) of the NIRC of 1997, as amended by Republic Act No. 10963, also known as Tax Reform for Acceleration and Inclusion (**TRAIN Law**) and as implemented by Revenue Regulations No. 21-2018[219], respectively, computed until 26 August 2020, as determined below:

	IT	VAT	Total
Basic tax due	₱91,933,838.70	₱1,979,971.71	₱93,913,810.41
Surcharge (25%)	22,983,459.68	494,992.93	23,478,452.61
Deficiency Interest (20%) until 31 December 2017			
IT - 16 April 2013 to 31 December 2017 (Basic IT due x 20% x 1,721 days / 365 days)	86,694,869.26		86,694,869.26
VAT - 26 January 2013 to 31 December 2017 (Basic VAT due x 20% x 1,801 days / 365 days)		1,953,933.73	1,953,933.73
Deficiency Interest (12%) from 01 January 2018[220] to 26 August 2020[221]			
IT – 01 January 2018 to 26 August 2020 (Basic IT due x 12% x 969 days / 365 days)	29,287,854.15		29,287,854.15
VAT – 01 January 2018 to 26 August 2020 (Basic VAT due x 12% x 969 days / 365 days)		630,770.17	630,770.17
Total Amount Due as of 26 August 2020	**₱230,900,021.79**	**₱5,059,668.54**	**₱235,959,690.33**

In addition, petitioner is **ORDERED TO PAY** delinquency interest at the rate of 12%[222], computed from 27 August 2020 until full payment thereof, pursuant to Section 249(C) of the NIRC of 1997, as amended by the TRAIN Law, on said deficiency taxes based the following principal amounts:

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

220 Id.

221 Deadline for payment stated in the Assessment Notices attached to the FDDA, Exhibits "P-9" and "R-8", BIR Records, pp. 573-579.

222 Supra at note 219.

Income Tax	₱230,900,021.79
Value-Added Tax	₱5,059,668.54

SO ORDERED.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

LANEE S. CUI-DAVID
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, 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