CTA Form No. 8

22-000031-0050

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

CTA CASE NO. 10741

DMCI HOLDINGS, INC.,
Petitioner,

- versus -

NOTICE OF DECISION

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

To:

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

ATTY. SYLVIA R. ALMA JOSE
ATTY. AYESHA HANIA B. GUILING-MATANOG
ATTY. LARA NICOLE T. GONZALES
Bureau of Internal Revenue
Room 703, Litigation Division, BIR National Office Building
Sen. Miriam P. Defensor-Santiago Avenue
Diliman, Quezon City

CASTILLO LAMAN TAN PANTALEON & SAN JOSE
2nd to 5th and 9th Floors, The Valero Tower
122 Valero Street, Salcedo Village, Makati City

GREETINGS:

You are hereby notified by these presents that on **September 20, 2024,** a Decision was rendered in the above-entitled case, copy of which is attached hereto.

Quezon City, Philippines, **September 23, 2024.**

Atty. Margarette Y. Guzman
Executive Clerk of Court III

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

DMCI HOLDINGS, INC., Petitioner,	**CTA CASE NO. 10741**
	Members:
- versus -	**DEL ROSARIO,** *P.J., Chairperson,* **BACORRO-VILLENA,** *and* **CUI-DAVID,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: SEP 20 2024 1:25PM

x - x

DECISION

BACORRO-VILLENA, J.:

At bar is a Petition for Review[1] filed by petitioner DMCI Holdings, Inc. (**petitioner**) against respondent Commissioner of Internal Revenue (**respondent/CIR**) pursuant to Section 3(a)[2], Rule 8 in relation to

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[1] Filed on 02 February 2022, Division Docket, Volume I, pp. 8-30.

[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.

Section 3(a)(1)[3], Rule 4 of the Revised Rules of the Court of Tax Appeals[4] (**RRCTA**). It prays for the nullification and cancellation of respondent's Final Decision on Disputed Assessment[5] (**FDDA**) assessing petitioner with deficiency income tax (**IT**) in the total amount of ₱103,681,385.81, inclusive of penalties, for calendar year (**CY**) 2014.

PARTIES TO THE CASE

Petitioner is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines, with principal office address at 3rd Floor, Dacon Building, 2281 Don Chino Roces Avenue, Makati City.[6] It is primarily engaged to invest in, purchase, or otherwise acquire and own, hold, use, sell, assign, transfer, mortgage, pledge, exchange, or otherwise dispose of real and personal property of every kind and description, including shares of stock, bonds, debentures, notes, evidences of indebtedness and other securities, contracts or obligations of any corporation or corporations, association or associations, domestic or foreign, for whatever lawful purpose or purposes the same may have been organized and to pay thereon in whole or in part, in cash or by exchanging therefor, stocks bonds, or other evidences of indebtedness or securities of this or any other corporation, and while the owner or holder of any such real or personal property, stocks, bonds, debentures, notes, evidences of indebtedness, or other securities, contracts or obligations, to receive, collect, and dispose of the interest, dividends, and income arising from such property and to possess and exercise in respect, thereof all the rights, powers of any stock so owned, without however engaging in dealership in securities or in stock brokerage business. In addition, petitioner aids, either by loans or by guaranty of securities or in any other manner, any domestic or foreign corporation, or any share of stock or any bond, debenture, evidence of indebtedness or other security where a corporation holds interest. It also

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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:
(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 Exhibit "P-1", Division Docket, Volume I, pp. 48-53/Exhibit "R-21", BIR Records, pp. 1271-1275.

6 See third part in the Amended Articles of Incorporation of DMCI Holdings, Inc., Exhibit "P-3", Division Docket, Volume II, p. 759.

provides services that are intended to protect, preserve, improve or enhance the value of a corporation's property.[7]

Respondent, on the other hand, is the head of the Bureau of Internal Revenue (**BIR**) who is charged with, among others, the duty of assessing and collecting internal revenue taxes, fees or other charges, and 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.[8]

FACTS OF THE CASE

On 04 September 2015, petitioner received a Letter of Authority (**LOA**) dated 25 August 2015 with reference No. AUDR05/004181/2015 (eLA201200041912).[9] The BIR's Large Taxpayers Service (**LTS**) issued the said LOA through its then Officer-in-Charge (**OIC**) Assistant Commissioner of the LTS, Nestor S. Valeroso (**Valeroso**). The LOA authorized Revenue Officer (**RO**) Rayan James Dizon (**Dizon**) and Group Supervisor (**GS**) Ma. Amable Tan (**Tan**) to conduct an audit or examination of petitioner's books of account and other accounting records for all internal revenue taxes for the period 01 January 2014 to 31 December 2014, or CY 2014.

On 31 January 2017, petitioner, through its authorized representative Brian T. Lim (**Lim**), executed a Waiver of Defense of Prescription[10] (**waiver**) wherein the parties agreed that the period to assess shall be extended until 31 December 2017. Respondent, through OIC Assistant Commissioner Teresita M. Angeles (**OIC Angeles**), signed and accepted the waiver on 02 February 2017. After a few days or on 10 February 2017, petitioner received a copy of the accepted waiver.

Simultaneous with the acceptance of waiver, petitioner also received the First Notice for the Presentation of Books of Accounts and other Accounting Records dated 31 January 2017.[11] Subsequently,

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7 See Primary Purpose in the Amended Articles of Incorporation of DMCI Holdings, Inc., id., p. 757.
8 Paragraph II, Summary of Admitted Facts, Respondent's Pre-Trial Brief, id., p. 574.
9 Exhibit "R-4", BIR Records, p. 3.
10 Exhibit "R-8", id., p. 412.
11 Exhibit "R-6", id., pp. 6-7.

petitioner received the Second and Final Notice for the Presentation of Books of Accounts and other Accounting Records.[12]

On 31 July 2017, petitioner (through Lim) executed a second (2nd) waiver which extended the period to assess until 31 December 2018.[13] OIC Angeles accepted the said waiver on 04 August 2017. Petitioner received the copy of the 2nd accepted waiver on 31 August 2017.

On 30 May 2018, petitioner received a second LOA with Reference No. AUDR01/019674/2018 (eLA201600030687), dated 22 May 2018, which authorized ROs Hapsah Baunto (**Baunto**), Sean Ruthie Villanueva (**Villanueva**) and GS Joseph Christian Santos (**Santos**) of Revenue District Office (**RDO**) No. 125 – Regular LT Division II, to examine petitioner's books and accounting records for all internal revenue taxes for CY 2014.[14] The second LOA effectively replaced the first LOA (or LOA No. AUDR05/004181/2015) issued to petitioner.

On 27 September 2018, petitioner (through Lim) executed the third (3rd) waiver which extended the period of assessment until 31 December 2019.[15] On even date, GS Santos accepted the waiver and petitioner received a copy thereof.

Later, on 05 December 2018, respondent issued the Notice for Informal Conference[16] (**NIC**) which initially assessed petitioner for deficiency taxes of ₱156,209,551.52, inclusive of interests and surcharges, which also included income tax (**IT**), value-added tax (**VAT**), withholding tax on compensation (**WTC**), expanded withholding tax (**EWT**), final withholding tax (**FWT**), documentary stamp tax (**DST**), fringe benefit tax (**FBT**), and compromise penalty.

On 23 May 2019, petitioner received the Preliminary Assessment Notice[17] (**PAN**) with Details of Discrepancies[18] (issued by the BIR on the same date), informing it of its increased alleged tax liabilities from ₱156,209,551.52 to ₱159,176,510.13, inclusive of penalties. In response to

12 Exhibit "R-7", id., pp. 10-11.
13 Exhibit "R-9", id., p. 447.
14 Exhibit "R-1", id., p. 4.
15 Exhibit "R-10", id., pp. 454-455.
16 Exhibit "R-11", id., pp. 718-721.
17 Exhibit "R-13", id., pp. 800-803.
18 Exhibit "R-13-1", id., pp. 790-799.

the PAN, petitioner filed a Reply[19] on 06 June 2019 to contest the assessments.

On 16 December 2019, petitioner (through Lim) also executed the fourth (4th) waiver that extended the period to assess until 31 March 2020.[20] GS Santos also accepted the waiver. On 27 December 2019, petitioner received the copy of the 4th accepted waiver.

On 16 March 2020, petitioner (through Lim) executed the fifth (5th) waiver which extended the period of assessment until 30 June 2020.[21] GS Santos also accepted the waiver. However, unlike the other waivers, no proof was shown that petitioner received a copy of the 5th accepted waiver.

On 01 July 2020, petitioner (through Lim) executed the sixth (6th) waiver which extended the period of assessment until 31 December 2020.[22] Again, GS Santos accepted the waiver. On 17 July 2020, petitioner received the copy of the 6th accepted waiver.

Thereafter, on 02 October 2020, petitioner received the Formal Letter of Demand[23] (**FLD**) with Details of Discrepancies[24] and the Assessment Notices[25] (**ANs**), all dated 01 September 2020, where respondent had lowered its deficiency tax assessments to ₱103,797,877.66 (still for IT, VAT, WTC, EWT, DST, FBT and compromise penalty). Dissatisfied, petitioner filed its Protest Letter requesting for a reinvestigation of the FLD on 30 October 2020.[26] To comply with its request for reinvestigation, petitioner transmitted to the BIR several documents in support of the arguments in its Protest Letter on 17 December 2020.[27]

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19 Exhibit "P-8", Division Docket, Volume I, pp. 95-100.
20 Exhibit "R-14", BIR Records, pp. 938-939.
21 Exhibit "R-15", id., pp. 939.1-939.2.
22 Exhibit "R-16", id., pp. 941.1-941.2.
23 Exhibits "P-9"/"R-18", id., pp. 1059-1061.
24 Exhibit "R-18-1", id., pp. 1052-1058.
25 Exhibits "R-19" to "R-19-6", id., pp. 1039-1045.
26 Exhibit "P-10", id., pp. 1168-1176.
27 Exhibit "P-11", id., pp. 1203-1205.

Based on the Memorandum dated 26 July 2021[28], respondent removed the assessments for VAT, WTC, EWT, DST, FBT and compromise penalty as petitioner paid the said deficiency taxes.[29] However, the IT deficiency assessment against petitioner was retained after its arguments in its Protest Letter failed to convince respondent.

Consequently, on 29 December 2021, petitioner received the FDDA[30] dated 27 December 2021 with attached ANs[31], (issued by then CIR Caesar R. Dulay [**Dulay**]), directing petitioner to pay by 29 October 2021[32] its alleged deficiency IT liability in the aggregate amount of ₱103,681,385.81, including penalties, broken down as follows:

Taxable Income *per* Income Tax Return (ITR)			₱ -
Add: Adjustments *per* investigation			
Disallowed prior period expenses		₱ 1,279,664.60	
Non-deductible donation		50,000.00	
Disallowed depreciation expense		700,908.34	
Non-deductible expenses due to improper allocation		76,553,432.32	
Disallowed stock issuance costs		92,922,746.00	171,506,751.26
Adjusted Taxable Income			₱ 171,506,751.26
Income Tax Due (30%)			₱ 51,452,025.38
Add: Tax Credits and Payments *per* ITR/ITS			
Prior year's excess tax credits		₱ 7,512,171.00	
Creditable tax withheld		955,333.00	
Total		₱ 8,467,504.00	
Less: Unsupported creditable withholding tax	₱ 320,583.00		
Excess tax credits forward to succeeding period	8,467,504.00	8,788,087.00	320,583.00
Deficiency Income Tax			₱ 51,772,608.38
Add: Interest at 20% p.a. (04/16/2015 to 12/31/2017)		₱ 28,113,235.56	
Interest at 12% p.a. (01/01/2018 to 10/29/2021)		23,795,541.87	51,908,777.43
TOTAL AMOUNT DUE			**₱ 103,681,385.81**

28 Exhibit "R-20", id., pp. 1247-1256.

29 See BIR-Collections and Bank Reconciliation System Payment Information, id., pp. 1223-1228.

30 Supra at note 5.

31 Exhibits "R-22", BIR Records, pp. 1269-1270.

32 See due date in the Assessment Notice No. IT-125-019674-14-21-538, id.

Aggrieved, petitioner filed the present Petition for Review on 02 February 2022.[33] The case was raffled to this Court's Second Division.[34]

PROCEEDINGS BEFORE THIS COURT

On 07 February 2022, the Court served Summons[35] on respondent. On 19 April 2022, following a thirty (30)-day extension period that the Second Division granted[36], respondent filed his or her Answer.[37]

In the Answer, respondent countered that tax assessments enjoy a presumption of correctness, thus, a taxpayer may only contest the findings therein through the presentation of competent evidence. In this case, respondent argued that petitioner failed to refute the deficiency IT assessment based on the following grounds, to wit: (1) contrary to petitioner's insistence that the reckoning point of the audit is the net loss, it is correct to reflect the Taxable Income *per* Income Tax Return (**ITR**) in the amount of zero (0) since the net loss had already become part of the Net Operating Loss Carry Over (**NOLCO**) and may be claimed as a deduction in petitioner's ITR for the next three (3) succeeding years and not from CY 2014 where it emanated; (2) instead of presenting invoices and official receipts (**ORs**) to prove that the disallowed claimed expenses were related to the revenues earned for CY 2014, petitioner merely presented acknowledgment receipts (**ARs**) in violation of Revenue Regulations (**RR**) No. 18-2012[38] and Revenue Memorandum Circular (**RMC**) No. 44-2013[39]; and, (3) the stock issuance cost of ₱92,922,746.00 that petitioner claimed as expense based solely on the BIR Ruling DA-(C-061) 212-08[40] must be disallowed since the latter issuance is merely effective between the real parties therein and not to any taxpayer such as petitioner.

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33 Supra at note 1.

34 The Second Division was then composed of Associate Justice Juanito C. Castañeda (ret.) as Chairperson, Associate Justice Jean Marie A. Bacorro-Villena and Associate Justice Lanee S. Cui-David, as members.

35 Division Docket, Volume II, p. 549.

36 See Motion for Extension of Time to File Answer, id., pp. 551-554; Order dated 16 March 2022, id., p. 556.

37 Id., pp. 557-569.

38 Regulations in the Processing of Authority to Print (ATP) Official Receipts, Sales Invoices, and Other Commercial Invoices Using the On-line ATP System and Providing for the Additional Requirements in the Printing Thereof.

39 Extending the Validity of Unused/Unissued Principal and Supplementary Receipts/Invoices Printed Prior to January 18, 2013 and other Matters.

40 Pepsi-Cola Products Philippines, Inc., 12 September 2008.

In further support of respondent's first ground, he or she explained that the nature of NOLCO is akin to the nature of Creditable Withholding Taxes (**CWT**) under Section 76[41] of the NIRC of 1997, as amended, where the option to refund or carry-over is irrevocable. Thus, in this case, since petitioner opted to carry-over the NOLCO, it cannot claim the net loss as deduction for CY 2014. As for the second ground, on the other hand, respondent maintained that the BIR correctly disallowed the amount of ₱1,279,664.60. Moreover, respondent asserted that this Court should not appreciate evidence which were not previously submitted during respondent's audit and/or investigation of petitioner's books. According to respondent, the Court's jurisdiction to resolve the instant petition is strictly appellate in nature.

Prior to the Pre-Trial Conference[42], on 26 August 2022, both petitioner and respondent filed their respective Pre-Trial Briefs.[43] During the Pre-Trial proper, the Second Division[44] ordered the parties to file their Joint Stipulation of Facts and Issues (**JSFI**) on or before 30 September 2022.[45] Moreover, after the parties signified their willingness to undergo mediation, they were ordered to appear before the Philippine Mediation Center – Court of Tax Appeals (**PMC-CTA**) on 21 September 2022.[46]

Prior to the mediation proceedings before the PMC-CTA, or on 06 September 2022, respondent transmitted the BIR Records (consisting of two [2] folders) before this Court.[47] On the date of mediation, both parties attended but opted to forego negotiations or any possibility of settlement.[48]

Subsequently, petitioner filed a motion to commission Mr. Emmanuel Y. Mendoza (**Mendoza**) as the Independent Certified Public Accountant (**ICPA**)[49] and the same was set for a hearing. Later, or

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41 **SEC. 76.** *Final Adjustment Return.*

42 See Notice of Pre-Trial Conference dated 21 April 2022, Division Docket, Volume II, pp. 571-572; Notice of Resetting dated 09 June 2022, id., p. 573.

43 See Respondent's Pre-Trial Brief, id., pp. 574-580; Petitioner's Pre-Trial Brief, id., pp. 602-613.

44 After retirement of Associate Justice Juanito C. Castañeda, Jr., the Second Division was then composed of Associate Justice Erlina P. Uy (Ret.) as chairperson, Associate Justice Jean Marie A. Bacorro-Villena and Associate Justice Lanee S. Cui-David, as members.

45 See Order dated 31 August 2022, Division Docket, Volume II, pp. 616-617.

46 Id.

47 See Compliance dated 02 September 2022, id., pp. 618-620.

48 See No Agreement to Mediate dated 21 September 2022, id., p. 623.

49 See Motion to Commission Independent Certified Public Accountant, id., pp. 626-629.

on 30 September 2022, the parties filed their JSFI.[50] After approving the JSFI that the parties submitted, the Second Division issued the Pre-Trial Order on 25 October 2022.[51]

During the hearing on 26 October 2022, the Second Division granted petitioner's motion to commission Mendoza as the Court-commissioned ICPA. He was given a period of 30 days to file the ICPA Report.[52] Accordingly, Mendoza filed the ICPA Report on 24 November 2022.[53]

Later in the proceedings, petitioner presented the following witnesses, namely: (1) April A. Arriola (**Arriola**), its' Accounting and Administrative Officer; and, (2) Mendoza, the Court-commissioned ICPA.

On the witness stand, Arriola testified, through her Judicial Affidavit[54], that: (1) petitioner is a publicly-listed holding company and has the obligation to file reports before the Philippine Stock Exchange (**PSE**) and Securities and Exchange Commission (**SEC**); (2) petitioner was subjected to an audit and/or investigation pursuant to LOA No. AUDR01/019674/2018 for all internal revenue taxes for CY 2014; (3) after petitioner received the PAN on 23 May 2019, it filed its Reply thereto; (4) in response to the Reply, petitioner received the FLD which adjusted the deficiency taxes for the recomputed interests; (5) petitioner filed its Protest (by way of a request for reinvestigation) to dispute the assessments; (6) petitioner transmitted documents to the BIR in support of its Protest Letter; and, (7) after petitioner paid some of the assessed tax liabilities, respondent issued the FDDA which only retained the IT deficiency assessment.

No cross-examination was conducted.[55]

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50 See Joint Stipulation od Facts and Issues, id., pp. 648-659.
51 Id., pp. 664-670.
52 See Order dated 26 October 2022, id., pp. 673-674.
53 Id., p. 675.
54 Exhibit "P-18", Judicial Affidavit of April A. Arriola, id., Volume I, pp. 34-47.
55 TSN dated 18 January 2023, p. 5.

Mendoza assumed the witness stand next. Based on his Judicial Affidavit[56], which was adopted as his direct testimony, he testified that: (1) he reviewed and examined petitioner's documentary evidence in support of its Petition for Review *vis-à-vis* respondent's assessment as reflected in the FDDA; (2) the audit procedures performed and his findings were summarized in his ICPA Report (with a soft copy and also the soft copies of the documents examined were stored in a USB flash drive[57]) submitted to the Court on 24 November 2022; (3) his audit examination yielded two (2) recommendations based on different assumptions. Under the first assumption, petitioner may have incurred a tax loss position of ₱53,180,259.64 if it had a net loss of ₱159,048,709.00 and there had been valid deductions of: (*i*) ordinary and necessary expenses of ₱1,034,50704; (*ii*) non-deductible expenses of ₱76,553,432.32 that were disallowed due to improper allocation; and, (*iii*) disallowed stock issuance costs of ₱28,280,510.00. On the other hand, under the second assumption that the whole amount of disallowed stock issuance costs of ₱92,922,746.00 is a non-deductible expense, petitioner would have a taxable income of ₱11,461,976.42 which will result in the income tax due of ₱3,438,592.93.[58]

In Mendoza's cross-examination[59], the same centered on the extent of his audit of petitioner's books for CY 2014 where he explained that it was limited to the expenses that were the subject of the disallowances in respondent's FDDA. No redirect examination was conducted.[60]

Prior to the formal offer of petitioner's evidence, on 13 February 2023, the parties filed a Joint Manifestation[61] informing the Second Division that respondent stipulated on the genuineness and authenticity of the previously provisionally marked Exhibits "**P-3**", "**P-14**" and "**P-16**".[62]

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56 Exhibit "P-31", Division Docket, Volume II, pp. 694-708.
57 Exhibit "P-30-2".
58 Supra at note 53, p. 24 of the ICPA Report.
59 TSN dated 01 February 2023, p.5.
60 Id.
61 Division Docket, Volume II, pp. 750-752.
62

Exhibit	Description
"P-3"	DMCI's Amended Articles of Incorporation.
"P-14"	DMCI's Annual Report (SEC Form 17-A) for the year ending December 31, 2013.
"P-16"	SEC Form 17-C (Current Report Under Section 17 of the SRC and SRC Rule 17.2(c) thereunder) dated September 24, 2014.

In addition, petitioner attached the certified true copies of the said exhibits in the Joint Manifestation.[63]

Thereafter, petitioner filed its "Offer of Documentary Evidence"[64] or Formal Offer of Evidence (**FOE**) on 21 February 2023 comprised of Exhibits "**P-1**" to "**P-30**"[65], inclusive of sub-markings. Without much objection from respondent[66], the Second Division admitted the exhibits except for Exhibit "**P-4**" for failure to locate the marked document; and

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63 Division Docket, Volume II, pp. 754-1151.

64 Id., pp. 1154-1161.

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Exhibit	Description
"P-1"	Final Decision on Disputed Assessment dated December 27, 2021.
"P-2"	DMCI's Company Information and Stock Data pages on the website of the Philippine Stock Exchange.
"P-3"	DMCI's Amended Articles of Incorporation.
"P-4"	DMCI's Certificate of Permit to Offer Securities for Sale dated February 13, 1997.
"P-5"	Letter of Authority No. AUDR01/019674/2018 dated May 22, 2018.
"P-6"	Letter of Authority No. AUDR05/004181/2015 dated August 25, 2015 with Checklist of Requirements dated September 2, 2015.
"P-7"	Preliminary Assessment Notice with Details of Discrepancies dated May 23, 2019.
"P-8"	Reply to Preliminary Assessment Notice dated June 6, 2019.
"P-9"	Final Assessment Notice/Formal Letter of Demand with Details of Discrepancies dated September 1, 2020.
"P-10"	Protest/Request for Reinvestigation dated October 27, 2020.
"P-11"	Transmittal Letter dated December 15, 2020.
"P-12"	Annual Income Tax Return for Taxable Year 2014.
"P-13"	Audited Financial Statements for the year ending December 31, 2014.
"P-14"	DMCI's Annual Report (SEC Form 17-A) for the year ending December 31, 2013.
"P-15-1" to "P-16-65"	Various source documents to support prior-period expenses in the total amount of ₱1,279,664.60.
"P-16"	SEC Form 17-C (Current Report Under Section 17 of the SRC and SRC Rule 17.2(c) thereunder) dated September 24, 2014
"P-17-1" to "P-17-5"	Various source documents to support the transaction costs in the total amount of ₱92,922,746.00
"P-19"	Annual Income Tax Return for taxable year 2013.
"P-20"	Annual Income Tax Return for taxable year 2015.
"P-21"	Annual Income Tax Return for taxable year 2016.
"P-22"	Annual Income Tax Return for taxable year 2017.
"P-23"	Audited Financial Statements for taxable year 2013.
"P-24"	Audited Financial Statements for taxable year 2015.
"P-25"	Audited Financial Statements for taxable year 2016.
"P-26"	Audited Financial Statements for taxable year 2017.
"P-27" to "P-27-i"	Various general ledgers.
"P-28"	Director's Certificate on Increase of Authorized Capital Stock dated August 14, 2014.
"P-29"	SEC Certificate Approval of Increase of Capital Stock.
"P-30" to "P-30-1"	ICPA Report dated November 24, 2022 with Mr. Emmanuel Y. Mendoza's signature on page 26.
"P-30-2"	USB drive containing exhibits Mr. Mendoza referred to in ICPA Report.

66 See Comment Re: Petitioner's Formal Offer of Evidence, Division Docket, Volume II, pp. 1163-1165.

Exhibits "**P-15-30**", "**P-15-33**", "**P-15-36**" and "**P-15-39**"[67] due to the unreadable contents of the documents. Petitioner later moved for partial reconsideration for the admission of Exhibits "**P-4**" and "**P-15-39**".[68] Over respondent's opposition[69], the Second Division only admitted Exhibit "**P-4**".[70]

As for respondent, he or she presented GS Santos as the lone witness. Based on his Judicial Affidavit[71], GS Santos testified that: (1) he was one of the assigned BIR officers who audited petitioner's books for CY 2014; (2) despite several notices, petitioner failed to submit all supporting documents that respondent requested; (3) in the conduct of the audit, petitioner executed several waivers (which respondent accepted) to extend the period of assessment until 31 December 2020; (4) within the extended periods to assess, respondent issued the NIC, PAN and FLD which assessed petitioner with deficiency taxes for IT, VAT, WTC, EWT, FWT, FBT and compromise penalty; and, (5) after petitioner filed its Protest Letter to the FLD and paid some of the assessed tax liabilities, respondent issued the FDDA that retained the IT deficiency assessment as he or she found petitioner's arguments (in the Protest Letter) to be unmeritorious.

On cross-examination[72], when asked of the documents that petitioner failed to submit, GS Santos referred to the worksheets which would have served as guide in the preparation of the financial statements. According to GS Santos, there were items that were grouped into accounts for ITR declaration purposes, thus he requested the worksheet to see the breakdown of the said line-item accounts. Moreover, he declared that out the several books requested (like general ledger, journal book, sales book, purchase book, summary list of sales, etc.), petitioner only submitted its general ledger.

67

Exhibit	Description
"P-4"	DMCI's Certificate of Permit to Offer Securities for Sale dated February 13, 1997.
"P-15-30"	Official Receipt from Shell
"P-15-33"	Divas Kaffe Official Receipt
"P-15-36"	7-Eleven Official Receipt
"P-15-39"	Official Receipt from Shell

68 See Motion for Partial Reconsideration, Division Docket, Volume II, pp. 1175-1177.
69 See Opposition Re: Petitioner's Motion for Partial Reconsideration, id., pp. 1200-1203.
70 See Resolution dated 02 August 2023, id., pp. 1208-1210.
71 Exhibit "R-24", BIR Records, pp. 588-601.
72 TSN dated 19 April 2023, pp. 10-11.

No redirect examination was conducted.[73]

On 03 May 2023, respondent filed his or her FOE[74] comprised of Exhibits "**R-1**" to "**R-23**"[75], inclusive of sub-markings. Petitioner filed its comment[76] to the said FOE wherein it interposed its objections to the purposes for which the exhibits were then being offered.

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73 Id.

74 See Respondent's Formal Offer of Evidence, Division Docket, Volume II, pp. 1181-1189.

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Exhibit	Description
"R-1"	Letter of Authority SN: eLA201600030687/AUDR01/019674/2018 dated 22 May 2018.
"R-2"	Memorandum of Assignment dated 6 April 2017.
"R-3"	Memorandum of Assignment dated 26 June 2017.
"R-4"	Letter of Authority SN: eLA2012200041912/AUDR05/004181/2015 dated 25 August 2015.
"R-5"	Checklist of Requirements dated 2 September 2015.
"R-6"	First Notice for the Presentation of Books of Accounts and Other Accounting Records dated 31 January 2017.
"R-7"	Second and Final Notice for the Presentation of Books of Accounts and Other Accounting Records.
"R-8"	Waiver of Defense of Prescription executed on 31 January 2017.
"R-9"	Waiver of Defense of Prescription executed on 31 July 2017.
"R-10"	Waiver of Defense of Prescription executed on 27 September 2018.
"R-11"	Notice of Informal Conference dated 05 December 2018.
"R-12"	Memorandum addressed to Arnel SD. Guballa.
"R-13"	Preliminary Assessment Notice (PAN) dated 23 May 2019.
"R-13-1"	Details of Discrepancy attached to PAN.
"R-14"	Waiver of the Defense of Prescription executed on 16 December 2019.
"R-15"	Waiver of the Defense of Prescription executed on 16 March 2020.
"R-16"	Waiver of the Defense of Prescription executed on 1 July 2020.
"R-17"	Case Briefer DMCI Holdings, Inc. Taxable Year ending December 31, 2014.
"R-18"	Formal Letter of Demand (FLD) dated 7 September 2020.
"R-18-1"	Details of Discrepancies dated 7 September 2020 attached to FLD.
"R-19"	Audit Result/Assessment Notice (BIR Form 0401) No. IT-125-019674-14-20-194 dated 1 September 2020 for Income Tax.
"R-19-1"	Audit Result/Assessment Notice (BIR Form 0401) No. VT-125-019674-14-20-194 dated 01 September 2020 for Value-Added Tax.
R-19-2"	Audit Result/Assessment Notice (BIR Form 0401) No. WC-125-019674-14-20-194 dated 01 September 2020 for Withholding Tax on Compensation.
"R-19-3"	Audit Result/Assessment Notice (BIR Form 0401) No. WE-125-019674-14-20-194 dated 01 September 2020 for Expanded Withholding Tax.
"R-19-4"	Audit Result/Assessment Notice (BIR Form 0401) No. DS-125-019674-14-20-194 dated 01 September 2020 for Documentary Stamp Tax.
"R-19-5"	Audit Result/Assessment Notice (BIR Form 0401) No. WR-125-019674-14-20-194 dated 01 September 2020 for Fringe Benefit Tax.
"R-19-6"	Audit Result/Assessment Notice (BIR Form 0401) No. MC-125-019674-14-20-194 dated 01 September 2020 for Compromise Penalty.
"R-20"	Memorandum dated 26 July 2021.
"R-21"	Final Decision on Disputed Assessment dated 27 December 2021.
"R-22"	Audit Result/Assessment Notice (BIR Form 0401) dated 27 December 2021.
"R-23"	Entire BIR Investigation Records.

76 See Comment (on respondent's Formal Offer of Evidence dated May 3, 2023), Division Docket, Volume II, pp. 1193-1198.

In the *interim*, the case was transferred to the First Division pursuant to the Resolution dated 29 May 2023.[77] Thereafter, in the Resolution[78] of 02 August 2023, the First Division admitted all of respondent's offered exhibits. Moreover, with the termination of the presentation of evidence, the parties were ordered to file their respective memoranda within 30 days from notice.[79]

On 07 September 2023, respondent filed his or her Memorandum[80] while petitioner filed its Memorandum[81] on 15 September 2023. With the filing of the memoranda, the case was then submitted for decision.[82]

ISSUE

Based on the Pre-Trial Order, the sole issue for this Court's determination is —

> WHETHER PETITIONER DMCI HOLDINGS, INC. IS LIABLE FOR THE DEFICIENCY INCOME TAX (IT) ASSESSMENT AMOUNTING TO ₱103,681,385.81, INCLUSIVE OF INTERESTS, FOR THE CALENDAR YEAR (CY) ENDED ON 31 DECEMBER 2014.

ARGUMENTS

In support of its petition, petitioner argues that respondent's deficiency IT assessment against it has no factual and legal bases. According to it, respondent erred in using the amount of zero (0) as Taxable Income *per* ITR when clearly, based on the records, the Annual ITR for CY 2014[83] reflected a net loss of ₱159,048,709.[84] Petitioner adds that the BIR's manner of computation resulted in double disallowance, an iniquitous practice that is plainly contrary to law and jurisprudence.

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77 Id., p. 1205.
78 Supra at note 70.
79 Id.
80 Division Docket, Volume II, pp. 1211-1223.
81 Id., pp. 1225-1251.
82 Id., p. 1253.
83 Exhibit "P-12", id., Volume I, pp. 170-178.
84 See Line 40, id., p. 172.

As regards respondent's observation that NOLCO is similar to CWT, petitioner counters that unlike CWT (which has two (2) options of whether to refund or carry-over), NOLCO is only limited to the option of carry-over. Thus, the danger that is sought to be prevented under Section 76 of the NIRC of 1997, as amended, is not present in its case.

On the disallowed expenses of ₱1,279,664.60, petitioner contends that the amount was a payment for services rendered to it in 2014 in relation to the preparation of its Annual Report for the year ended 31 December 2013 (that was subsequently filed before SEC). It also emphasizes that it had substantially complied and submitted supporting documents such as ORs and ARs to show that these were incurred and paid in 2014.

Furthermore, petitioner insists that the stock issuance cost of ₱92,922,746.00 can be claimed as deductible expenses under Section 34(A)(1)(a)[85] of the NIRC of 1997, as amended. In BIR Ruling DA-(C-061) 212-08 dated 12 September 2008, BIR ruled that transaction costs (consisting of PSE listing fees, SEC registration fees, underwriter's fees, commissions, and professional fees) qualify as the issuer's ordinary and necessary expenses that are deductible for income tax purposes.

Finally, as to the disallowed amount of ₱76,553,432.32 due to improper allocation in violation of RR No. 04-2011[86], petitioner cites the case of *Department of Finance (DOF), et al. v. Asia United Bank, et al.*[87] (**DOF v. AUB**), where the Supreme Court declared the said issuance as void since it modifies, limits, and qualifies the permissible deductions under Section 34(A)(1) of the NIRC of 1997, as amended.

On the other hand, respondent reiterates the arguments in his or her previously filed Answer. He or she argues that it is correct to use zero (0) as the starting taxable base for the following reasons: (1) the net loss that became part of the NOLCO may not be claimed as a deduction from the year where it originated; (2) the nature of the

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85 **SEC. 34**. *Deductions from Gross Income*. – ...
(A) *Expenses*. –
(1) *Ordinary and Necessary Trade, Business or Professional Expenses*. –
(a) *In General*. – ...

86 Proper Allocation of Costs and Expenses Amongst Income Earnings of Banks and other Financial Institutions for Income Tax Reporting Purposes.

87 G.R. Nos. 240163 & 240168-69, 01 December 2021.

NOLCO is akin to the irrevocability nature of CWT, hence when petitioner opted to carry-over the NOLCO to the succeeding years, it ought to be barred from using the same for CY 2014 to prevent double benefit to the taxpayer; and, (3) citing the case of *Bureau of Internal Revenue v. Court of Appeals, et al.*[88], the Supreme Court permitted the government in using the expenditure method (like in the instant case) in the conduct of its audit.

Respondent likewise claims that the disallowed prior period expenses of ₱1,279,664.60 should be maintained since petitioner failed to provide the necessary invoices and ORs to prove that these expenses were incurred in relation to the revenues earned in CY 2014. He or she adds the ARs are not sufficient to refute the said disallowance.

Relative thereto, respondent also avers that petitioner should not be permitted to submit documents (in support of its judicial appeal) which were not even introduced at the administrative level. Similarly, respondent opines that this Court should confine itself to whether respondent's findings are consistent with the law or not.

Lastly, on the disallowed stock issuance costs of ₱92,922,746.00, respondent maintains that petitioner is not allowed to use BIR Ruling DA-(C-061) 212-08 as its basis to deduct the same as part of its ordinary and necessary costs. The BIR Rulings are effective only as between the parties to the said issuance and not to third persons such as petitioner pursuant to Revenue Memorandum Order (**RMO**) No. 09-2014.[89]

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.

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[88] G.R. No. 197590, 24 November 2014.

[89] Requests for Rulings with the Law and Legislative Division.

THE COURT OF TAX APPEALS (CTA) 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.[90]

Section 11 of the Republic Act (**RA**) No. 1125[91], as amended by RA 9282[92], 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 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 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

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

91 AN ACT CREATING THE COURT OF TAX APPEALS.

92 AN ACT EXPANDING THE JURISDICTION OF THE COURT OF TAX APPEALS (CTA), ELEVATING ITS RANK TO THE LEVEL OF A COLLEGIATE COURT WITH SPECIAL JURISDICTION AND ENLARGING ITS MEMBERSHIP, AMENDING FOR THE PURPOSE CERTAIN SECTIONS OR REPUBLIC ACT NO. 1125, AS AMENDED, OTHERWISE KNOWN AS THE LAW CREATING THE COURT OF TAX APPEALS, AND FOR OTHER PURPOSES.

> 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.[93]
>
> ...

Accordingly, in case of the CIR's adverse decision or ruling, the taxpayer has 30 days to file a Petition for Review with the CTA. Here, petitioner received the FDDA on 29 December 2021. Counting 30 days therefrom, petitioner had until <u>28 January 2022</u> to file its judicial appeal.

However, within the period allowed by law for petitioner to file its Petition for Review, the Supreme Court issued Administrative Circular No. 01-2022[94] and Memorandum Order No. 10-2022[95] wherein the filing periods of any and all pleadings and other court submissions falling due in the month of January 2022 in all courts were extended until **01 February** 2022. Even so, as 01 February 2022 was declared a special non-working holiday in celebration of Chinese New Year[96], pursuant to Section 1[97], Rule 22 of the Rules of Civil Procedure, as amended[98], the last day to file shall not run until the next working day, or in this case, **<u>02 February</u>** <u>2022</u>. Clearly, petitioner timely filed the instant Petition for Review on <u>02 February 2022.</u>[99]

RESPONDENT'S RIGHT TO ASSESS PETITIONER'S BOOKS FOR CALENDAR YEAR (CY) 2014 HAS NOT YET PRESCRIBED.

Admittedly, while the matter of prescription was not raised as an issue, the Court also deems it relevant in its determination of whether it could properly exercise jurisdiction over the present case.

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93 Italics in the original text, emphasis and underscoring supplied.

94 EXTENSION OF THE DEADLINES FOR THE FILING OF ANY AND ALL PLEADINGS AND OTHER COURT SUBMISSIONS FALLING DUE IN THE MONTH OF JANUARY 2022 IN ALL COURTS.

95 RISING CASES OF COVID 19 INFECTION/PHYSICAL CLOSURE OF COURTS IN SELECT AREAS.

96 See Proclamation No. 1236, 29 October 2021.

97 Section 1. *How to compute time.* – In computing any period of time prescribed or allowed by these Rules, or by order of the court, or by any applicable statute, the day of the act or event from which the designated period of time begins to run is to be excluded and the date of performance included. If the last day of the period, as thus computed, falls on a Saturday, a Sunday, or a legal holiday in the place where the court sits, the time shall not run until the next working day.

98 A.M. No. 19-10-20-SC.

99 Supra at note 1.

Section 203 of the NIRC of 1997, as amended, provides that the BIR's period to assess is limited to three (3) years after the last day prescribed by law for the filing of the return or the day the return was filed –

> ...
>
> **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.
>
> ...

Relative thereto, Section 222(b) of the NIRC of 1997, as amended, states that the period of assessment may be extended when, prior to the expiration of the period, an agreement in writing is executed by the parties –

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

Applying the foregoing provisions in the case at bar, the period of the subject assessment is for 01 January 2014 to 31 December 2014, or CY 2014. Considering that the remaining assessment is only for IT, the Annual ITR for CY 2014 was filed on 16 April 2015.[100] Counting three (3) years therefrom, BIR had until 16 April 2018 to issue the resulting

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100 Division Docket, Volume I, p. 170.

assessment. However, prior to the expiration period, the parties executed several waivers as summarized in the table below:

Waiver	Date of Execution	Date of Expiration (of assessment)
1st Waiver[101]	31 January 2017	31 December 2017
2nd Waiver[102]	31 July 2017	31 December 2018
3rd Waiver[103]	27 September 2018	31 December 2019
4th Waiver[104]	16 December 2019	31 March 2020
5th Waiver[105]	**16 March 2020**	**30 June 2020**
6th Waiver[106]	**01 July 2020**	**31 December 2020**

Out the six (6) executed waivers, a scrutiny of the 5th and 6th waivers is crucial. It is observed that there is no proof of petitioner's receipt of the copy of the 5th accepted waiver. Further, the 6th waiver was executed a day *after* the expiration of the 5th waiver, specifically on **01 July 2020**, which is in violation of Section 222(b) of the NIRC of 1997, as amended. Under normal circumstances, the period of assessment is not validly extended, thus assessments issued after the said date are considered prescribed.

However, it is noteworthy to consider that during the period mentioned above, the BIR issued several COVID 19 issuances to address the suspension of the running of the period of limitations that were directly affected during the pandemic. RR Nos. 7-2020[107], 10-2020[108], 11-2020[109] and RMC No. 34-2020[110] were thus issued and therein declared that the running of the statute of limitations under Section 203 of the

101 Supra at note 10.
102 Supra at note 13.
103 Supra at note 15.
104 Supra at note 20.
105 Supra at note 21.
106 Supra at note 22.
107 Implementing Section 4 [z] of Republic Act No. 11469, Otherwise Known as "Bayanihan to Heal as One Act," Particularly on the Extension of Statutory Deadlines and Timelines for the Filing and Submission of Any Document and the Payment of Taxes.
108 Amends Section 2 of Revenue Regulations No. 7-2020 Relative to the Extension of Statutory Deadlines and Timelines for the Filing and Submission of Any Document and the Payment of Taxes Pursuant to Section 4 (z) of Republic Act No. 11469, Otherwise Known as "Bayanihan to Heal as One Act".
109 Amends Section 2 of Revenue Regulations No. 10-2020 Relative to the Extension of Statutory Deadlines and Timelines for the Filing and Submission of any Document and the Payment of Taxes Pursuant to Section 4 (z) of Republic Act No. 11469, Otherwise Known as "Bayanihan to Heal as One Act".
110 Suspending the Running of the Statute of Limitations in the Assessment and Collection of Taxes Pursuant to Section 223 of the National Internal Revenue Code of 1997, as Amended, Due to the Declaration of a National Emergency from the Corona Virus Disease 2019 (COVID-19) Situation.

NIRC of 1997, as amended, was suspended starting 16 March 2020 until the lifting of the state of national emergency and for sixty (60) days thereafter. To further clarify the new prescriptive period, the BIR issued RMC No. 136-2020[111] which explained that a total of 137 days shall be excluded in the counting of the period to assess.

From the foregoing issuances, from the prescriptive period of 31 March 2020 (which the 4th waiver had validly extended), excluding 137 days therefrom, the new prescriptive period to assess fell on 15 August 2020.[112] Hence, even with a defective 5th waiver (due to lack of proof of petitioner's receipt of the accepted copy), the 6th waiver is deemed to have been executed and received (on 01 July 2020 and 17 July 2020, respectively) or prior to the expiration of the adjusted period to assess (15 August 2020). Therefore, in turn, the period of assessment was validly extended until 31 December 2020. Accordingly, the FLD issued on 07 September 2020, which petitioner received on 02 October 2020, was issued within the prescriptive period.

We then proceed to the other issues material to the full disposition of the case.

To summarize petitioner's issues, the following items of the subject assessment are being contested: (1) the taxable income *per* ITR (as starting point of the audit); (2) the disallowed prior period expenses of ₱1,279,664.60; (3) the non-deductible expenses due to improper allocation of ₱76,553,432.32; and, (4) the disallowed stock issuance costs of ₱92,922,746.00.

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

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111 Clarification on the Suspension of the Statute of Limitation Provided Under Revenue Regulations (RR) No. 11-2020.

112

Month	April	May	June	July	August	Total number of excluded days
31 March 2020	30	31	30	31	15	137

I. TAXABLE INCOME *PER* INCOME TAX RETURN (ITR)

Central in the parties' arguments is the supposed taxable income *per* ITR that should be the reckoning amount of the audit. Petitioner claims that it should be the net loss of ₱159,048,709.00 (as reflected in its Annual ITR for CY 2014) as opposed to respondent's insistence that it should be zero (0) considering that the NOLCO's nature, being akin to a CWT, petitioner is already barred from using the net loss as deduction for CY 2014 as it opted to carry-over the same to the succeeding years.

Respondent's arguments are untenable.

First, there is no factual basis for respondent to determine and set petitioner's taxable income *per* ITR as zero (0) when the records indicate clearly that petitioner suffered a net loss of ₱159,048,709.00.

Second, respondent's action is bereft of any legal mooring. Section 76 of the NIRC of 1997, as amended, outlines the option of carry-over or refund of excess CWT but, unfortunately, it is inapplicable to the instant case (since there really is no option to refund the present net loss).

Third, as petitioner argued correctly, the BIR's method of computation will result in double disallowance. To illustrate, based on the ICPA Report[113], petitioner arrived at a net loss of ₱159,048,709.00 in this wise –

Particulars	Amount	
Revenues:		
Dividend Income	4,869,458,060.00	
Finance Income	108,877,740.00	
Management Fee	4,200,000.00	
Gain on sale of property and equipment	692,880.00	
Pension income	298,268.00	₱4,983,526,948.00
Less: Expenses		
Salaries, wages and employee benefits	17,526,472.00	
Professional fees	15,516,847.00	
Transportation and travel	8,760,081.00	

[113] ICPA Report, pp. 9-15.

Entertainment, amusement and recreation	5,354,662.00	
Taxes and licenses	4,546,528.00	
Advertising and promotions	4,398,057.00	
Rent	2,809,337.00	
Repairs and Maintenance	2,483,193.00	
Contribution and donation	2,013,000.00	
Depreciation	2,001,576.00	
Supplies	1,235,461.00	
Communication, light and water	1,150,100.00	
Contracted expenses	782,041.00	
Fuel and oil	777,900.00	
Miscellaneous	1,812,105.00	
Finance cost	5,263.00	
Foreign exchange loss-net	11,321,631.00	₱82,494,254.00
Income before income tax		₱4,901,032,694.00
Add: Non-deductible expenses		
Entertainment, amusement or recreation	5,312,662.00	
Others	5,864,481.00	11,177,143.00
Total Income		₱4,912,209,837.00
Less: Non-taxable income and income subjected to final withholding tax		
Dividend Income	4,869,458,060.00	
Interest Income	108,877,740.00	4,978,335,800.00
Net Loss		**(₱66,125,963.00)**
Less: Stock Issuance Costs		92,922,746.00
Net Operating Loss Carry Over (NOLCO)		**(₱159,048,709.00)**

From the foregoing, petitioner claimed the stock issuance costs of ₱92,922,746.00 as part of its other deductions, thus arriving at the net loss of ₱159,048,709.00.

Assuming We uphold the disallowance of the stock issuance costs using the actual net loss as the taxable income *per* ITR, the disallowed stock issuance costs would only decrease petitioner's claimed expenses, thus, reducing the amount of net loss to ₱66,125,963.00.[114] Nonetheless, it will not result into any taxable income that will be assessed for IT deficiency. On the contrary, using respondent's method, the same shall derive a taxable income equivalent to the amount of the stock issuance costs of ₱92,922,746.00 and will result in a deficiency IT liability of

114 See Net Loss at the table above, supra at p. 23.

₱27,876,823.80.[115] This tax liability is expectedly arrived at since respondent used zero (0) as the tax base, and again deduct the same expense based on the finding of his or her disallowance. However, in this method, respondent had seemingly disallowed all the expenses that petitioner had claimed as deductions for CY 2014 without any evidence to support its action. Simply put, this transgresses petitioner's right to due process.

In the case of *Spouses Emmanuel D. Pacquiao and Jinkee J. Pacquiao v. The Court of Tax Appeals-First Division, et al.*[116], the Supreme Court ruled emphatically that a taxpayer should be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment is void. Nothing is more settled but that an assessment, in order to stand judicial scrutiny, must be based on facts. **The presumption of the correctness of an assessment, being a mere presumption, cannot be made to rest on another presumption.** Here, based on the records, respondent has no factual evidence to prove or at least bolster the disallowances of the previously claimed deductions for CY 2014.

In view of the above circumstances, We could not uphold respondent's starting or reckoning point for the assessment. Instead, We use the net loss *per* Annual ITR for CY 2014 of ₱159,048,709.00.

II. DISALLOWED PRIOR PERIOD EXPENSES OF ₱1,279,664.60

A careful examination of the ICPA Report and petitioner's supporting documents shows that the disallowance of expenses amounting to ₱1,034,597.04 must be upheld since petitioner's documents do not satisfy the invoicing requirements. As summarized in the ICPA Report[117] –

115

Taxable Income *per* ITR	₱0
Less: Disallowed Stock Issuance Costs	92,922,746.00
Assessed Taxable Income	₱92,922,746.00
Multiply by Tax Rate (30%)	30%
Assessed IT deficiency	₱27,876,823.80

116 G.R. No. 213394, 06 April 2016.

117 ICPA Report, p. 17.

Particulars	Reference[118]	Total
Properly Substantiated		
Expenses supported by ORs and invoices	Annex A-2	₱ 245,067.56
Total Expenses that are properly substantiated		**₱ 245,067.56**
Not Properly Substantiated		
Expenses supported by photocopied ORs	Annex A-3	90.00
Expenses supported by unreadable ORs and invoices	Annex A-4	8,901.82
Expenses supported by ORs, but year not indicated in the OR	Annex A-5	2,516.49
Expenses supported by ORs but OR not in the name of the Petitioner	Annex A-6	104.00
Expenses supported by ORs and invoices but no VAT and EWT breakdown	Annex A-7	409,372.11
Expenses supported by ORs and invoices with corrections on the documents not countersigned	Annex A-8	302,112.52
Expenses recognized as deductible but was reversed in the books as supported by credit memo	Annex A-9	310,000.00
Expenses supported by documents other than ORs and invoices	Annex A-10	244.00
Expenses with no supporting documents	Annex A-11	1,256.10
Total Expenses that are not properly substantiated		**₱ 1,034,597.04**

III. NON-DEDUCTIBLE EXPENSES DUE TO IMPROPER ALLOCATION OF ₱76,553,432.32

Based on the Details of Discrepancies[119] (of the FLD), respondent disallowed expenses (amounting to ₱63,760,055.47) which failed to directly relate to a particular revenue account. He or she asserts that under RR No. 04-2011, all costs and expenses that cannot be specifically identified for a particular unit shall be allocated based on the percentage share of gross income earnings of a unit to the total gross income earnings subject to regular IT and final tax including exempt from IT (otherwise the said expenses shall not be allowed as deduction from the taxpayer's taxable income).

Petitioner accepted the disallowance as reflected in its Protest Letter.[120] Thus, in the FDDA, respondent reiterated the said findings and increased the amount to ₱76,553,432.32.[121]

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118 Exhibit "P-30-2", USB.
119 Supra at note 24, p. 1056.
120 Supra at note 26, p. 1170.
121 Supra at note 5, p. 51.

Notwithstanding petitioner's acceptance, We are constrained to disregard the said assessment since the legal basis for its disallowance is no longer valid. In *DOF v. AUB*[122], the Supreme Court explained that RR No. 04-2011 unduly expanded and modified the requirement for deductibility under Section 34 of the NIRC of 1997, as amended, thus making it an *ultra vires* act of the Secretary of Finance (**SOF**) –

> ...
> *RR 4-2011 is invalid*
>
> ...
>
> We rule that RR 4-2011 is void. We now expound.
>
> It is settled that administrative issuances must not override, supplant, or modify the law; they must remain consistent with the law they intend to carry out. When the application of an administrative issuance modifies existing laws or exceeds the intended scope, the issuance becomes void, not only for being *ultra vires*, but also for being unreasonable. Surely, courts will not countenance such administrative issuances that override, instead of remaining consistent and in harmony with the law they seek to apply and implement.
>
> We underline that the power of administrative officials to promulgate rules in the implementation of a statute is necessarily limited to what is provided for in the legislative enactment. The implementing rules and regulations of a law cannot extend the law or expand its coverage, as the power to amend or repeal a statute is vested in the legislature. It bears stressing, however, that administrative bodies are allowed under their power of subordinate legislation to implement the broad policies laid down in a statute by "filling in" the details. All that is required is that the regulation be germane to the objectives and purposes of the law; that the regulation does not contradict but conforms with the standards prescribed by law.
>
> ...
>
> Indeed, administrative issuances, such as revenue regulations, cannot simply amend the law it seeks to implement. In *Commissioner of Internal Revenue v. Seagate Technology (Philippines)*, We held that a mere administrative issuance, like a BIR regulation, cannot amend the law; the former cannot purport to do any more than implement the latter. To reiterate, the courts will not countenance an administrative regulation that overrides the statute it seeks to implement.

122 Supra at note 87.

Ultimately, this Court once again clarifies that the function of promulgating rules and regulations may be legitimately exercised only for the purpose of carrying out the provisions of the law into effect. Hence, administrative regulations cannot extend the law or amend a legislative enactment, for settled is the rule that administrative regulations must be in harmony with the provisions of the law. It cannot be stressed enough that administrative issuances must not override, but must remain consistent with the law they seek to apply and implement. They are intended to carry out, not to supplant nor to modify, the law. To underscore, it is only the Congress which has the power to repeal or amend the law.

To be sure, RR 4-2011 is anchored on Section 244 of the Tax Code which empowers the SOF, upon recommendation of the CIR, to promulgate rules and regulations for the effective enforcement of the provisions of the Tax Code. As discussed by Associate Justice Japar B. Dimaampao, since RRs are mandated by the Tax Code itself, they are in the nature of a subordinate legislation that is as of the Tax Code it implements. Being products of a delegated power to create new and additional legal provisions that have the effect of law, RRs should be within the scope of the statutory authority granted by the legislature to the administrative agency. It is required that the regulation be germane to the objects and purposes of the law, and that *it be not in contravention to, but in conformity with, the standards prescribed by law.*

Here, the BIR expanded or modified the law when it curtailed the income tax deductions of respondents and when it sanctioned the method of accounting the respondents should use, without any basis found in the Tax Code. In fact, in its petition, the DOF and BIR did not even pinpoint the exact provisions of the Tax Code which they seek to apply and implement.

Without a doubt, the RR did not simply provide details for the enforcement of the provisions in the Tax Code. Neither did it interpret the provisions of the Tax Code. Instead, RR 4-2011 modified what was explicitly provided therein. This amounts to tax legislation which is a matter within the authority of the legislative department only.

First, **RR 4-2011 contravenes Section 43 of the Tax Code**. This provision provides the general rule for taxpayer's accounting periods and methods of accounting. It unequivocally states that taxpayers are allowed to self-determine the most applicable accounting method. The CIR may only prescribe an accounting method *if* any of the following conditions exist: (a) no accounting method has been employed by the taxpayer; or (b) while an accounting method has been employed, it does not clearly reflect the income of the taxpayer. Accounting methods for tax purposes "comprise a set of rules for determining when and how to report income and deductions."

...

Any of the foregoing methods may be employed by any taxpayer so long as it reflects its income and expenses properly. The peculiarities of the business or occupation engaged in by a taxpayer would largely determine how it would report income and expenses in its accounting books or records. The Tax Code does not prescribe a uniform, or even a specific method of accounting. Nevertheless, other methods approved by the CIR, even when not expressly mentioned in the Tax Code, may be adopted if such method would enable the taxpayer to properly reflect its income.

In this case, the conditions under Section 43 of the Tax Code are not present. There is no showing that banks and financial institutions have not employed an accounting method, or that the accounting method employed do not reflect said banks and financial institutions' true income. Clearly, therefore, the allocation rules under RR 4-2011 are arbitrary and indiscriminate imposition of a uniform accounting method as it dictate the amount that banks may reflect as deductions and taxable income. We thus agree with respondents that by imposing the allocation method under the RR, petitioners negated respondents' right to adopt its own accounting method.

Without any finding that the accounting method employed by said taxpayers do not reflect their actual income, there is no basis for petitioners to impose an accounting method for allocating the expenses of respondents. The CIR cannot simply substitute its own judgment and impose an accounting method on the taxpayer without any reasonable ground, in contravention of the taxpayer's right to use any accounting method of its choice. To be sure, the CIR may only challenge the propriety of the accounting method employed after the taxpayer has filed a tax return through an audit investigation or assessment of a particular taxpayer when the CIR can properly make a finding on the existence of a distortion, that is, on whether the accounting method used did not clearly reflect income.

Second, **RR 4-2011 unduly expands Section 50 of the Tax Code.** Under the said provision, the CIR is authorized to distribute, apportion, or allocate gross income or deductions <u>if</u> they determine that such distribution, apportionment, or allocation: (a) is necessary in order to prevent evasion of taxes; or (b) clearly to reflect the income of organizations, trades, or businesses.

Applying the foregoing, We find that these conditions are not met or supported by evidence in this case. The records are bereft of any indication that the allocation under RR 4-2011 is necessary to prevent evasion of taxes, or to reflect their true income. Thus, the exercise of CIR's authority under Section 50, through the issuance of RR 4-2011, is misplaced.

...

By prescribing a method for allocating and reporting expenses, the CIR effectively derogated the right of taxpayer banks and other financial institutions to adopt its own accounting method. Moreover, a difference in tax treatment of income flowing to a single taxpayer—as in the case of respondents—does not automatically merit a taxpayer's classification as controlled taxpayer to warrant the allocation of income and deductions. To reiterate, Section 50 of the Tax Code authorizes such allocation if the CIR *determines that such allocation is necessary in order to prevent evasion of taxes or clearly reflect the income of any such organization, trade, or business.* There is no showing that RR 4-2011 was issued to prevent evasion of taxes nor to clearly reflect the income of controlled taxpayer's organization, trade, or business.

Third, following the CIR's arbitrary imposition of allocation rules, **RR 4-2011 inevitably impairs the taxpayers' right to claim deductions under Section 34 of the Tax Code. In issuing said RR, which requires the aforesaid allocation of costs and expenses of banks with respect to its RBU and FCDU/EFCDU or OBU operations and as to its "tax paid income" and "tax exempt income" activities, petitioners effectively imposed an additional requirement for deductibility of expenses which is not provided under the Tax Code. RR 4-2011, therefore, effectively qualified the deduction bestowed by the Tax Code, thereby modifying the law.**

Under Section 34(A)(1) of the Tax Code, the taxpayer has the right to claim as deductions from its gross income all the ordinary and necessary expenses paid or incurred in carrying on, or which are directly attributable to the development, management, operation and/or conduct of its trade or business, to arrive at the correct amount of taxable income.

We agree with respondents that common expenses should be deductible in full against its income subject to regular tax. As currently worded, all expenses are deducted directly and in full without any allocation or attribution between the different income streams. There is no requirement to allocate the common expenses to its income subject to Final Withholding Tax or exempt income. There is no distinction for common expenses among income streams, as these are, after all, common expenses. Thus, there can be no allocation of expenses between different income in the same trade or business unit.

We are aware of the matching principle of accounting, which provides that expenses should be matched to their corresponding revenues. However, said principle should be applied *viz-a-viz* the CIR's authority to interpret the Tax Code. RR 4-2011 requires that "common expenses or expenses that cannot be specifically identified for a particular unit shall be allocated based on percentage share of gross income earnings of a unit to the total gross income earnings subject to regular income tax and final tax including those exempt from income tax." The amount that will be allocated to RBU and FCDU/EFCDU or OBU are mere estimates based on a ratio which finds no statutory basis under the Tax Code. As discussed, this is beyond the contemplation of Section 50.

Verily, the permissible deductions under Section 34 (A) (1) of the Tax Code were effectively modified, limited and qualified by RR 4-2011 since the same are being deducted or allocated to tax exempt or final tax paid income, in violation of the law and prevailing jurisprudence. To be sure, revenue regulations cannot unduly curtail, and essentially amend, the tax reliefs unequivocally provided by the Tax Code to taxpayers.

...

Given the foregoing, there is no need for this Court to discuss the constitutional aspect of due process clause as RR 4-2011 itself clearly demonstrates how it has unduly expanded the provisions of the Tax Code, making its issuance an *ultra vires* act on the part of the SOF.

...

In fine, the CIR is empowered to interpret our tax laws but not expand or alter them. In the case of RR 4-2011, however, the CIR went beyond, if not, gravely abused such authority. Consequently, given the above substantive and procedural irregularities in its issuance, **RR 4-2011 is null and void.**[123]

...

IV. DISALLOWED STOCK ISSUANCE COSTS OF ₱92,922,746.00

Based on the Annual ITR for CY 2014, petitioner considered the stock issuance costs of ₱92,922,746.00 as other deduction[124] (included in the total ordinary allowable itemized deduction) or special deduction[125] which decreased the net income *per* books, thus arriving at the net loss of ₱159,048,709.00.

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[123] Citations omitted, italics, underscoring and emphasis in the original text and supplied.

[124] Line 38, Schedule 4, supra at note 83, p. 175.

[125] Line 7, Schedule 9, id., p. 176.

However, a thorough examination of its Audited Financial Statement (**AFS**) for CY 2014[126] reveals that petitioner treated the said stock issuance costs as a deduction from its equity. In Note 12 of the AFS, the relevant part states –

> ...
> The stock transaction cost paid in 2014 amounted to ₱92,922.75 million which **is netted against the 'Additional Paid-in Capital'** [**APIC**] in the consolidated statements of financial position.[127]
> ...

Corollarily, as reflected in the Statement of Changes in Equity[128], the stock issuance costs of ₱92,922,746.00 was debited against the Additional Paid-In Capital (**APIC**), thus decreasing the APIC from ₱4,765,316,671.00 to ₱4,672,393,925.00.

Paragraph 37 of Philippine Accounting Standard (**PAS**) 32, *Financial Instruments: Presentation*, requires that transaction costs that are directly attributable to issuing new shares be deducted from equity, net of any related income tax benefit.[129] Further, the amount of transaction costs accounted as a deduction from equity in the period is disclosed separately in the statement of changes in equity, under International Accounting Standard (**IAS**) 1 *Presentation of Financial Statements*.[130]

The evidence on records shows that petitioner followed the abovementioned standards and treated the stock issuance costs of ₱92,922,746.00 as a reduction against its equity instead of claiming it is as an expense (in its AFS for CY 2014). Hence, following petitioner's accounting treatment, We maintain the disallowance of ₱92,922,746.00 as a deductible expense.

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126 Exhibit "P-13", Division Docket, Volume I, pp. 179-254.
127 Id., p. 221; Emphasis supplied.
128 Id., p. 184.
129 <https://www.pfsrsc.org/wp-content/themes/financialreportca453/pdf/PIC-Q&A-No-2018-13.pdf> last accessed 28 August 2024.
130 Nenita S. Robles and Patricia M. Empleo, *The Intermediate Accounting Series, Volume 2, Based on the IFRS including the IFRS effective 2019*, 2017 edition, Mandaluyong City, Philippines, Millenium Books, Inc., 2017, p. 189.

Lastly, for the non-deductible donation of ₱50,000; disallowed depreciation expense of ₱700,908.34 and unsupported CWT of ₱320,583.00, considering that petitioner accepted the said assessments (based on its Protest Letter[131]), it did not then proffer any evidence to contest or refute them. Thus, We uphold these assessments.

En totale, the adjusted IT assessment is presented in this manner:

Particulars	Amount	
Net taxable income (loss) *per* ITR for CY 2014		(₱159,048,709.00)[132]
Add:		
Disallowed prior period expenses[133]	1,034,597.04	
Non-deductible donation[134]	50,000.00	
Disallowed depreciation expense[135]	700,908.34	
Disallowed stock issuance cost[136]	92,922,746.00	94,708,251.38
Adjusted Taxable Income (Loss) for CY 2014		**(₱64,340,457.62)**
Income Tax Due (30%)		-

As shown, the total disallowance of ₱94,708,251.38 (previously deducted as expenses) is added back to the net loss, resulting thus in a decreased net loss of ₱64,340,457.62 for CY 2014. In any case, as it appears from petitioner's AFS for CY 2017[137] that it did not utilize the NOLCO arising from CY 2014[138], no tax benefit has accrued to it or may accrue to it with the reduction of its net loss in CY 2014.

131 Supra at note 26, pp. 1169-1170.
132 Supra at pp. 22-24.
133 Supra at pp. 24-25.
134 Based on the Petition for Review, petitioner did not contest the said assessment, supra at note 1, p. 25.
135 Based on the Petition for Review, petitioner did not contest the said assessment, id.
136 Supra at pp. 30-31.
137 Exhibit "P-26", USB.
138 See Note 15, id., p. 32.

Year Incurred	Amount	Applied/Expired	Balance	Year of Expiry
NOLCO:				
2017	₱1,617,162	₱-	₱1,617,162	2020
2016	51,720,118	-	51,720,118	2019
2015	48,432,539	-	48,432,539	2018
2014	159,048,709	159,048,709	-	2017
	₱260,818,528		₱101,769,819	

WHEREFORE, premises considered, the instant Petition for Review filed by petitioner DMCI Holdings, Inc. on 02 February 2022 is hereby **GRANTED.** Finding that petitioner has no more deficiency income tax liability for calendar year 2014, the Formal Letter of Demand dated 01 September 2020 and the Final Decision on Disputed Assessment dated 27 December 2021 are **CANCELLED** and **SET ASIDE.**

Accordingly, respondent Commissioner of Internal Revenue or any person duly acting on his or her behalf is **ENJOINED** and **PROHIBITED** from collecting the tax deficiency amount against petitioner.

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