REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

**THIRD DIVISION**

**REPUBLIC CEMENT CORPORATION (as surviving corporation in a merger involving FR CEMENT CORPORATION),**
Petitioner,

-versus-

**COMMISSIONER OF INTERNAL REVENUE,**
Respondent.

**CTA CASE NO. 7114**

Members:

**BAUTISTA,** *Chairperson*
**PALANCA-ENRIQUEZ,** and
**COTANGCO-MANALASTAS,** *JJ.*

Promulgated:
AUG 2 2011
1:15 p.m.

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**AMENDED DECISION**

**COTANGCO-MANALASTAS, *J.*:**

For resolution are the following:

1. petitioner's "**Motion for Partial Reconsideration [of Decision dated March 17, 2011]**" filed on April 5, 2011, without respondent's comment despite notice; and
2. respondent's "**Motion for Partial Reconsideration (Re: Decision promulgated 17 March 2011)**" filed on April 7, 2011, with petitioner's "**Opposition [To Respondent's Motion for Partial Reconsideration dated April 7, 2011]**" filed on May 6, 2011.

Both motions seek reconsideration of this Court's Decision promulgated on March 17, 2011, the dispositive portion of which reads:

> "**WHEREFORE**, the instant Petition for Review is hereby **PARTIALLY GRANTED.** Accordingly, the assessment of deficiency creditable withholding VAT for taxable year 1999 is hereby **AFFIRMED** with some **MODIFICATIONS**. Accordingly, petitioner is hereby **ORDERED TO PAY** respondent the amount P10,044,824.64 inclusive of the twenty-five percent (25%) surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended, computed as follows:

| | | | |
|---|---|---|---|
| Taxable basis per return | | | P 40,958,527.00 |
| Add: | Royalty payments to Non Resident Foreign Corporation - Sec 114(C) NIRC | | |
| | Retention and Service of Elex Engineers | P12,663,679.57 | |
| | Krupp Polysius Service Contract | 47,452,006.64 | |
| | BMH Claudius Engineers | 8,424,547.88 | |
| | Retention and Service Fee of Mr.Jadgmann | 6,840,442.64 | |
| | BMH Claudius Engineers | 4,977,920.38 | 80,358,597.11 |
| Taxable basis per Investigation | | | P121,317,124.11 |
| Tax Due per Investigation | | | P12,131,712.41 |
| Less: | Payments per Return | | 4,095,852.70 |
| Deficiency Creditable Withholding VAT | | | P 8,035,859.71 |
| Add: | 25% Surcharge | | 2,008,964.93 |
| **Total Deficiency Creditable Withholding VAT** | | | **P10,044,824.64** |

> Likewise, petitioner is hereby **ORDERED TO PAY** (a) deficiency interest at the rate of twenty percent (20%) *per annum* on the basic deficiency creditable withholding VAT of P8,035,859.71 computed from January 25, 2000, until full payment thereof pursuant to Section 249(B) of the NIRC of 1997; and (b) delinquency interest at the rate of twenty percent (20%) *per annum* on the total deficiency taxes of P10,044,824.64 and on the 20% deficiency interest which have accrued as afore-stated in (a), computed from December 22, 2004 until full payment thereof, pursuant to Section 249(C) of the NIRC of 1997.
>
> **SO ORDERED**."

***Petitioner's Motion for Partial Reconsideration***

The *Motion for Partial Reconsideration* of the petitioner is based on the following grounds:

> "I.
> CONTRARY TO THE FINDINGS OF THIS HONORABLE COURT, THE RIGHT OF THE GOVERNMENT TO ASSESS DEFICIENCY WITHHOLDING VAT FOR TAXABLE YEAR 1999 IS ALREADY BARRED BY THE STATUTE OF LIMITATIONS. HENCE, THE SUBJECT ASSESSMENT NOTICE SHOULD BE CANCELLED AND WITHDRAWN ON THE GROUND OF PRESCRIPTION.
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> II.
> ASSUMING *ARGUENDO* THAT THE DEFICIENCY WITHHOLDING VAT ASSESSMENT IS VALID, THIS HONORABLE COURT SHOULD FURTHER REDUCE, IF NOT TOTALLY CANCEL AND WITHDRAW, THE DEFICIENCY WITHHOLDING VAT FOR TAXABLE YEAR 1999."

In support of the first ground, petitioner claims that it duly filed proper returns for remittance of withholding VAT on payments for services rendered to non-residents, hence, the three-year prescriptive period applies.

Petitioner asserts that respondent has until January 25, 2003 to assess the deficiency withholding VAT for taxable year 1999, which is three years from the date of filing of the VAT return on January 25, 2000; and that respondent's Assessment Notice for the said deficiency tax dated February 18, 2004, which it received on March 3, 2004, is beyond the three-year prescriptive period for the assessment and collection of taxes.

Petitioner further avers that the six (6) waivers it had executed were invalid as the same did not comply with Revenue Memorandum Order (RMO) No. 20-90, and Revenue Delegation Authority Order No. (RDAO) 3-2003; hence, the said waivers did not have the effect of extending the three-year prescriptive period and the right of the government to assess the deficiency withholding VAT for taxable year 1999 is already barred by the statute of limitations.

In support of the second ground, petitioner alleges that: (a) certain payments to non-residents, such as *Elex Engineers*, *BMH Claudius Engineers*, *Mr. Jadgmann* and *Krupp Polysius* were made prior to 1999, hence, said transactions should not have been included in the subject deficiency withholding VAT assessment for taxable year 1999; (b) certain payments made to non-residents in 1999, such as *Krupp Polysius*, were established to have been made to domestic corporations and/or resident individuals, and/or payments for purchase of materials and not services, hence, not subject to deficiency withholding VAT for taxable year 1999; (c) the findings of this Court that journal vouchers, which were presented by petitioner, are self-serving is erroneous because, in the first place, it was respondent who assessed petitioner based solely on the same journal vouchers without verifying or examining any other pertinent evidence; and (d) as the assessments were based solely on the journal vouchers, which had no indication that the entries therein were payments made to non-residents or payments made in 1999, and which were not corroborated by any other evidence, therefore, the assessment is invalid for it has no factual and legal bases.

Finally, petitioner avers that the imposition of 25% surcharge has no legal basis since petitioner is not subject to deficiency withholding VAT; and that the deficiency interest should be computed from the time the tax is required to be paid, which is January 25, 2000, until the time provided for its payment under the Final Demand and Assessment Notice, which is January 31, 2005 (not until full payment), while the delinquency interest should be computed from the day after the due date appearing in the Final Demand and Assessment Notice, which is February 1, 2005 until the amount is fully paid because the imposition of the deficiency interest at the same time that the delinquency interest is imposed amounts to double imposition of interest penalty.

***Respondent's Motion for Partial Reconsideration***

On the other hand, in respondent's *Motion for Partial Reconsideration,* she insisted that petitioner is liable for the amount of P30,429,409.29 and P6,137.82, respectively, representing deficiency creditable withholding on VAT and withholding tax on compensation.

Respondent argues that the investigation conducted by its revenue officers disclosed that certain payments of services to non-resident foreign corporations were not subjected to Creditable Withholding on VAT and that petitioner failed to submit proof, hence, the assessment was sustained pursuant to Section 114(C) of the NIRC of 1997 and Section 4.102 of Revenue Regulations No. 7-95; that a comparison of withholding tax due per Alphalist against the remittance per tax Returns resulted to a discrepancy of P2,564.68, hence, the assessed deficiency withholding tax on compensation of P6,137.82 must be sustained; and that failure of petitioner to file a return for the taxes assessed merits the sanction of a Compromise Penalty in lieu of instituting a criminal action pursuant to Revenue Memorandum Order No. 1-90 in relation to RMO No. 26-86.

In its *Opposition [To Respondent's Motion For Partial Reconsideration dated April 7, 2011]*, petitioner counter-argues that: a) respondent's Motion for Partial Reconsideration is merely *pro forma*, containing mere rehash of arguments and reference to basic issues in this case which have already been passed upon in the assailed Decision; b) the right of the government to assess the disputed deficiency withholding VAT is already barred by the statute of limitations, hence, it is not subject to the said deficiency tax; c) it adequately proved that the alleged payments to non-residents are not subject to deficiency withholding VAT; and d) compromise penalty was properly cancelled as there was no mutual agreement between the taxpayer and respondent.

The Court will first resolve petitioner's Motion for Partial Reconsideration.

After a careful evaluation of the arguments raised by the petitioner, this Court hereby resolves to partially grant its Motion.

Anent the allegation of the petitioner that the three-year prescriptive period applies to its case since it duly filed the tax returns for the remittance of withholding VAT on payments for services rendered to non-residents, the same has no factual basis.

A perusal of the Quarterly Value Added Tax Return[1], which is referred to by petitioner as proof of filing of the Withholding VAT return on January 25, 2000, shows that it pertains to transaction entered into by petitioner with *Lafarge,* a non-resident corporation, during the taxable year 1999. It bears stressing that the present assessment speaks of petitioner's failure to withhold ten percent (10%) VAT on its payments to non-resident foreign corporations, namely, *Elex Engineers*, *Krupp Polysius*, *BMH Claudius Engineers*, and *Mr. Jadgmann*. While petitioner presented as evidence the abovementioned Quarterly VAT Return, the same does not prove that petitioner paid its withholding VAT due on the payment of services to the concerned non-resident foreign corporations, which are the subject of the assessment. Lacking any evidence to conclude that petitioner filed the return and correspondingly paid the creditable withholding VAT for, or on behalf of, the said non-resident foreign corporations, respondent has ten (10) years from the discovery of the omission, as provided in Section 222(a) of the NIRC of 1997, to assess petitioner. Therefore, the present case has not yet prescribed when respondent issued the Formal Letter of Demand[2] and Assessment Notice[3] on March 3, 2004.

Petitioner's allegations that payment to *Elex Engineers*, *BMH Claudius Engineers*, *Mr. Jadgmann* and *Krupp Polysius* were made prior to 1999 and therefore, should not be subject to withholding VAT is without merit.

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[1] Exhibit "LL".
[2] Exhibit "B".
[3] Exhibit "B-2".

Petitioner failed to support its allegation that payments to the concerned non-resident corporations were made prior to 1999. No evidence were adduced establishing the fact that the subject payments were indeed made in the years prior to 1999, except for those already considered in the assailed Decision as not subject to withholding of VAT under the accounts of *Krupp Polysius* and *BMH Claudius Engineers*. The Court cannot ascertain, based alone on the journal vouchers presented, the truth of petitioner's allegation. Considering that petitioner was able to partially present some documents in support of the journal vouchers covering the accounts of *Krupp Polysius* and *BMH Claudius Engineers,* this Court does not find any reason why petitioner cannot also do the same with the journal vouchers of other accounts to completely support its allegation that such payments were already made prior to 1999.

Petitioner, therefore, failed to overcome the presumption of the correctness of the assessment. Well-settled is the rule that tax assessments are presumed to be correct unless the contrary is shown, and the burden of proof rests upon the taxpayer to overcome this presumption.[4] While the determination of a deficiency tax by the Government is only *prima facie* correct, the duty to prove otherwise is on the taxpayer. Unfortunately, petitioner utterly failed to discharge this burden. Consequently, the assessed deficiency withholding VAT, as modified, should be sustained.

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[4] H. Tambunting Pawnshop, Inc. vs. Commissioner of Internal Revenue, CTA E.B. No. 68 (CTA Case No. 6238), April 24, 2006, *citing Gutierrez vs. Collector of Internal Revenue, L-19537, May 20, 1967; Tan Guan vs. Court of Tax Appeals, L-23676, April 27, 1967; Republic vs. Philippine Rabbit Bus Lines, Inc., L-26862, March 30, 1970.*

Concerning petitioner's argument that the imposition of 25% surcharge has no legal basis since it is not subject to deficiency withholding VAT, the same must fail.

As previously stated, petitioner failed to overcome the presumption of the correctness of the assessment; therefore, it is liable to pay the disputed deficiency tax. In view of this, the imposition of 25% surcharge is proper in accordance with Section 248(A) of the NIRC of 1997, which provides:

> "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
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> (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."

The law is very clear. The imposition of surcharge is mandatory. This is justified because the intention of the law is precisely to discourage delay in the payment of taxes due to the State.[5] The delay in the payment of the deficiency tax within the time prescribed for its payment in the notice of

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[5] Tambunting Pawnshop, Inc. vs. Commissioner of Internal Revenue, CTA EB No. 245, May 24, 2007.

assessment justifies the imposition of a 25% surcharge, pursuant to Section 248(A)(3) of the Tax Code.[6] Even the alleged good faith of the taxpayer in failing to pay the tax upon advice of counsel is not sufficient justification for seeking exemption from the payment of surcharge.[7]

It is basic principle that "surcharge" is an overcharge or exaction imposed by law as an addition to the main tax required to be paid. It is not really a penalty as used in criminal law but a civil administrative sanction provided primarily as a safeguard for the protection of the State revenue and to reimburse the government for the expenses in investigating and the loss resulting from the taxpayer's fraud. In other words, the imposition of a surcharge is not penal but compensatory in nature – they are compensation to the State for the delay in payment, or for the concomitant use of the funds by the taxpayer beyond the date he is supposed to have paid them to the State.[8]

As regards petitioner's assertion that the imposition of the deficiency interest at the time that the delinquency interest is also imposed amounts to double imposition of interest penalty, the same does not hold water.

The imposition of **deficiency interest** is sanctioned by Section 249(B), in relation to Section 249(A) of the NIRC of 1997, which provide:

> "SEC. 249**. Interest. -**
>
> (A) *In General.* - There shall be assessed and collected on any unpaid amount of tax, **interest at the rate of twenty**

[6] Dr. Felisa L. Vda. De San Agustin vs. Commissioner of Internal Revenue, G.R. No. 138485, September 10, 2001 (364 SCRA 802, 810).
[7] Commissioner of Internal Revenue vs. Royal Interocean Lines and The Court of Tax Appeals, No. L-26806, July 30, 1970 (34 SCRA 9).
[8] Note 5, *supra*.

> **percent (20%) per annum**, or such higher rate as may be prescribed by rules and regulations, **from the date prescribed for payment until the amount is fully paid**.
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> **(B)** ***Deficiency Interest***. - Any deficiency in the tax due, as the term is defined in this Code, **shall be subject to the interest prescribed in Subsection (A) hereof**, which interest shall be assessed and collected **from the date prescribed for its payment until the full payment thereof**." (*Emphasis supplied*)

On the other hand, the imposition of **delinquency interest** on failure to pay a deficiency tax is allowed under Section 249(C)(3) of the NIRC, which provides:

> "SEC. 249**. Interest.** - xxx
>
> **(C)** ***Delinquency Interest***. - **In case of failure to pay**:
>
> xxx
>
> (3) A deficiency tax, or any surcharge or interest thereon **on the due date appearing in the notice and demand of the Commissioner**, there shall be assessed and collected on the unpaid amount, **interest at the rate prescribed in Subsection (A) hereof until the amount is fully paid, which interest shall form part of the tax.**" (*Emphasis supplied*)

A comparison of Section 249(B) and 249(C)(3) of the NIRC reveals that the **deficiency interest** on any deficiency tax is assessed *"from the date prescribed for its payment* ***until the full payment thereof"*** while the **delinquency interest,** which is imposed for failure to pay a deficiency tax, is assessed starting *"on the due date appearing in the notice and demand of the Commissioner* ***until the amount is fully paid"***. Clearly, the law itself allows the imposition of these two kinds of interests simultaneously, and therefore, there is no double imposition of interest penalty. Hence, petitioner's assertion that the 20% deficiency interest should be computed from January 25, 2000 until January 31, 2005 and not until full payment is contrary to the very language of the NIRC.

With respect to delinquency interest, this Court, in the dispositive portion of the assailed Decision held as follows:

> "Likewise, petitioner is hereby **ORDERED TO PAY** (a) deficiency interest at the rate of twenty percent (20%) *per annum* on the basic deficiency creditable withholding VAT of P8,035,859.71 computed from January 25, 2000, until full payment thereof pursuant to Section 249(B) of the NIRC of 1997; and (b) delinquency interest at the rate of twenty percent (20%) *per annum* on the total deficiency taxes of P10,044,824.64 and on the 20% deficiency interest which have accrued as afore-stated in (a), computed from December 22, 2004 until full payment thereof, pursuant to Section 249(C) of the NIRC of 1997." (underscoring supplied)

Apparently, the delinquency interest is counted from December 22, 2004 until full payment thereof. Petitioner, however, suggested that it should be reckoned from February 1, 2005 until full payment.

We reconsider the assailed Decision with respect to the reckoning date of the delinquency interest.

After re-examination of the records of the case, the Court observed that the Assessment Notice No. WFVAT-99-00044[9] dated December 16, 2004 which was received by petitioner on December 22, 2004, specifically demanded that the due date for the payment of the deficiency tax on "Final Withholding VAT" is January 31, 2005, in contrast to the demand stated in the

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[9] Exhibit "E-2".

Final Decision on Disputed Assessment[10] dated December 16, 2004, which is to be paid immediately. Considering that the delinquency interest, which is imposed for failure to pay a deficiency tax, shall be assessed *"on the due date appearing in the notice and demand of the Commissioner"*, this Court deems it proper to consider the due date appearing in the December 16, 2004 Assessment Notice, which is January 31, 2005 as the reckoning point of the questioned delinquency interest, until full payment pursuant to Section 249(C) of the NIRC.

As regards respondent's *Motion for Partial Reconsideration*, this Court finds the same to be devoid of merit.

Respondent's allegation that the failure of the petitioner to file a return for the taxes assessed merits the sanction of a Compromise Penalty in lieu of instituting a criminal action pursuant to Revenue Memorandum Order (RMO) No. 1-90 is not correct.

Pertinent portion of the said RMO 1-90 provides:

"III. Guidelines and Instructions

> xxx xxx xxx
>
> 5. Since **compromise penalties** are only amounts **suggested in settlement of criminal liability**, **and may not therefore be imposed or exacted on the taxpayer in the event that a taxpayer refuses to pay the suggested compromise penalty**, the violation shall be referred for criminal action as heretofore mentioned." (Emphasis supplied)

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[10] Exhibit "E".

It is clear from the quoted portion of the RMO that the compromise penalties are only amounts suggested in settlement of criminal liability and it may not be imposed or exacted on the taxpayer in the event that a taxpayer refuses to pay the same.

The Court *En Banc* ruled that compromise penalties imply mutual agreement between the taxpayer, on one hand, and the Commissioner of Internal Revenue, on the other.[11] Absent any showing that the taxpayer has consented to the compromise penalty, its imposition should not be allowed.[12]

In the instant case, there is no showing that both parties reached a compromise agreement nor the taxpayer has consented to the compromise penalty. Hence, the compromise penalty of P25,000.00 charged by respondent against petitioner cannot be sustained and must be cancelled.

As to respondent's claim that petitioner should be held liable for withholding tax on compensation in the amount of P6,137.82, suffice it to say that petitioner, in its petition, did not pray for the cancellation of the assessed deficiency withholding tax on compensation. Consequently, respondent is not precluded by the assailed Decision to collect the said assessed amount of deficiency withholding tax on compensation.

The rest of the arguments raised by respondent in her Motion for Partial Reconsideration are mere reiteration of her arguments stated in her Memorandum filed on March 19, 2010, which had been duly considered and

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[11] Commissioner of Internal Revenue vs. Philippine Airlines, Inc., CTA EB No. 648 (CTA Case No. 6819) dated Dec. 15, 2010.

[12] Perpetual Succour Hospital, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 7304 dated December 1, 2010.

passed upon in the assailed Decision. We, therefore, find no cogent reason or overriding justification to disturb the assailed Decision.

**WHEREFORE**, premises considered, petitioner's ***Motion For Partial Reconsideration*** *[of the Decision dated March 17, 2011]* is hereby **PARTLY GRANTED.** Accordingly, the reckoning date of the delinquency interest is from January 31, 2005 until full payment pursuant to Section 249(C) of the NIRC.

On the other hand, respondent's ***Motion for Partial Reconsideration*** *(Re: Decision promulgated 17 March 2011)* is hereby **DENIED** for lack of merit.

**SO ORDERED.**

**AMELIA COTANGCO-MANALASTAS**
Associate Justice

WE CONCUR:

(on leave)
**LOVELL R. BAUTISTA**
Associate Justice

**OLGA PALANCA-ENRIQUEZ**
Associate Justice

**ATTESTATION**

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

**OLGA PALANCA-ENRIQUEZ**
Associate Justice
Acting Chairperson

## CERTIFICATION

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

Juanito C. Castaneda, Jr.
**JUANITO C. CASTANEDA, JR.**
Acting Presiding Justice