**REPUBLIC OF THE PHILIPPINES**
**COURT OF TAX APPEALS**
**QUEZON CITY**

*First Division*

**OMYA CHEMICAL MERCHANTS, INC.,**
*Petitioner,*

-*versus*-

**COMMISSIONER OF INTERNAL REVENUE,**
*Respondent.*

**CTA Case No. 9047**

Members:

**DEL ROSARIO, *P.J.***, *Chairperson*
**FABON-VICTORINO**, *and*
**MANAHAN**, *JJ.*

Promulgated:
OCT 14 2019 3:10pm

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# DECISION

**MANAHAN, *J.*:**

This case involves the *Petition for Review*[1] filed by petitioner Omya Chemical Merchants, Inc. (OCMI) against respondent Commissioner of Internal Revenue's (CIR's) assessment for alleged deficiency income tax (IT), value-added tax (VAT), expanded withholding tax (EWT), final withholding tax (FWT), documentary stamp tax (DST), final withholding on VAT (FWVAT) and compromise penalty in the aggregate amount of P5,132,892.82 for the calendar year (CY) 2010.

## THE PARTIES

Petitioner OCMI is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines with principal place of business at 17/F BDO Plaza 8737, Makati City.[2]

On the other hand, respondent is the duly appointed CIR, vested with authority to decide disputed assessments of internal revenue taxes and penalties imposed against taxpayers pursuant to the provisions of the National Internal

[1] Docket, CTA Case No. 9047, Vol. I, pp. 12-37.
[2] *Id.*, Vol. IV, Joint Stipulation of Facts and Issues (JSFI), p. 1512.

Revenue Code (NIRC) of 1997, as amended. Respondent holds office at the 5th Floor, Bureau of Internal Revenue National Office Building, Agham Road, Diliman, Quezon City, where he may be served summons and other legal processes of this court.

## THE FACTS

On February 20, 2012, petitioner received a Letter of Authority (LOA) No. LOA-050-2012-00000036 [SN: eLA201000078095] dated February 16, 2012 from BIR Revenue District Office (RDO) No. 50, Makati City, authorizing Revenue Officer Ricaredo O. Balderas and Revenue Supervisor Rebecca Bailon to examine the books of accounts and other accounting records of petitioner for all internal revenue taxes for the period January 1, 2010 to December 31, 2010, pursuant to Audit Criteria for Taxable Years 2009 and 2010.[3]

On August 30, 2012, petitioner received a Notice of Informal Conference dated August 23, 2012 from BIR RDO No. 50, stating that based on the revised report of Revenue Officer Balderas under Group Supervisor Bailon, petitioner is liable for deficiency taxes in the aggregate amount of ₱10,097,397.26. Petitioner was then requested to attend the informal conference within fifteen (15) days from receipt of the said notice.[4]

On September 26, 2013, Ms. Purificacion S. Samson (Ms. Samson), petitioner's Treasurer and Head of Finance and Controlling, signed a Waiver of the Defense of Prescription under the Statute of Limitations (Waiver).[5]

On July 9, 2014, petitioner received a copy of the Preliminary Assessment Notice (PAN) issued by respondent dated July 8, 2014, with attached Details of Discrepancies. According to the PAN, petitioner was liable for deficiency taxes for CY 2010 in the total amount of ₱5,089,874.82.[6]

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[3] Docket, Vol. IV, JSFI, p. 1513.
[4] *Id.*
[5] *Id.*, Vol. IV, Sworn Statement of Ms. Purificacion S. Samson to Questions Propounded by Atty. Alexis Joseph R. Noble, p. 1536; Exhibit "P-23", p. 1730.
[6] *Id.*, Vol. IV, JSFI, p. 1513.

On July 23, 2014, petitioner filed its Reply to the PAN, requesting for re-investigation of the alleged deficiency taxes.[7]

On July 28, 2014, petitioner received a copy of respondent's Formal Assessment Notice (FAN) with attached Details of Discrepancies. In the FAN, respondent ordered petitioner to pay its alleged deficiency taxes for CY 2010 in the aggregate amount of P5,132,892.82 inclusive of compromise penalty.[8]

On August 27, 2014, petitioner filed a Request for Reinvestigation against the FAN, requesting the cancellation and withdrawal of the assessments for deficiency IT, VAT, EWT, FWT, DST, FWVAT and compromise penalty for CY 2010.[9]

On October 20, 2014, petitioner submitted to respondent the additional documents in support of its Request for Reinvestigation.[10] Pursuant to Section 228 of the NIRC, as amended, and Section 3.1.4 of Revenue Regulations No. 12-99, respondent had one hundred eighty (180) days from submission of the documents, or until April 18, 2015, to act on such request for reinvestigation. The period, however, lapsed without any decision from respondent.

Petitioner then had thirty (30) days from April 18, 2015 or until May 18, 2015, within which to file its Petition for Review before this Court. It timely filed its Petition for Review on May 15, 2015.

After service of summons, respondent filed his Answer[11] on July 10, 2015 interposing the following special and affirmative defenses:

xxx xxx xxx

> 2. The waiver dated September 26, 2016 executed by Purification S. Samson in her capacity as Treasurer of the Petitioner is valid.

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[7] Docket, Vol. IV, JSFI, p. 1513.
[8] *Id.*
[9] *Id.*, p. 1515.
[10] *Id.*, Vol. I, Petition for Review, p. 16.
[11] *Id.*, Vol. I, pp.164-166.

> 3. Assuming without admitting that the waiver is not valid, the ten (10) year prescriptive period will apply to the Final Withholding VAT assessment pursuant to Section 222 (A) of the Tax Code, which states that "In case of false or fraudulent return with the intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission."
>
> 4. Assessments are prima facie presumed correct and made in good faith. The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed. (*Aban, Law of Basic Taxation in the Philippines, 1st Edition, p. 109*);
>
> 5. Finally, Petitioner should be reminded that taxes are important because it is the lifeblood of the government and so should be collected without unnecessary hindrance *(Commissioner vs. Algue, Inc. L-28896, 17 February 1988).* Taxes are enforced proportional contribution from persons and property levied by the state, thus no one is considered entitled to recover that which he must give up to another- *Non videtur quisquam id capere quod ei necesse est alii restitutere.*

A Notice of Pre-trial Conference[12] was issued on July 27, 2015 setting the case for pre-trial on September 3, 2015. Accordingly, respondent filed his Pre-Trial Brief[13] on August 24, 2018, whereas petitioner filed its Pre-Trial Brief[14] on August 28, 2015[15].

On August 27, 2015, petitioner filed a Motion for Preliminary Hearing on the Issue on Prescription[16], which the Court granted during the scheduled pre-trial.

Pre-trial ensued. The parties thereafter filed their Joint Stipulation of Facts and Issues[17] on September 23, 2015, and the Court issued the Pre-Trial Order[18] on October 2, 2015, and the pre-trial was deemed terminated.

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[12] Docket, Vol. I., pp.168-169.
[13] *Id.*, Vol. I, pp. 170-173.
[14] *Id.*, Vol. III, pp. 926-939.
[15] *Id.*, Vol. III, pp. 1503.
[16] *Id.*, Vol. I, pp. 174-182.
[17] *Id.*, Vol. IV, pp. 1512-1524.
[18] *Id.*, Vol. IV, pp.1526-1530.

On the issue of prescription, petitioner strongly argued that the Waiver executed by Ms. Samson is null and void for failing to strictly comply with the requirements laid down in RMO No. 20-90, in relation to RDAO 5-2001. According to petitioner, Ms. Samson had no written authority to execute the said waiver for and in behalf of petitioner, and the waiver failed to comply with the required format. Moreover, it was allegedly discovered later on that the Notary Public who notarized the Waiver was not duly commissioned.

Therefore, considering that the waiver did not extend the period of assessment and the assessment for CY 2010 was only issued on July 25, 2014, beyond the regular three-year prescriptive period, the assessment for IT, VAT and EWT is void.

To prove its claim, petitioner presented its Accountant, and Head of Finance and Controlling, Ms. Crystal Mae C. Lapitan (Ms. Lapitan)[19] and Ms. Samson[20], respectively.

Petitioner filed its Formal Offer of Evidence (Re: Preliminary Hearing to Resolve Issue on Prescription)[21] on October 19, 2015. The Court resolved to admit all of petitioner's exhibits[22] in a Resolution[23] dated November 25, 2015.

Respondent, for his part, presented Revenue Officer (RO) Ricaredo O. Balderas[24] and Assistant Revenue District Officer (ARDO) Rhodora Icaranom[25]. After the presentation of the witnesses, he filed the Formal Offer of Evidence[26] on March 31, 2016. The Court admitted all of respondent's exhibits[27] except for Exhibit "R-7"[28] in a Resolution[29] dated May 18, 2016.

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[19] Docket, Vol. II, pp. 295-321.
[20] *Id.*, Vol. IV, Exhibit "P-70", Judicial Affidavit, pp.1534-1539.
[21] *Id.*, Vol. IV, pp.1641-1647.
[22] Exhibits "P-3", "P-4 to P-7", "P-8 to P-19", "P-20", "P-23", "P-23-1", "P-69", "P-69-1", "P-70" and "P-70-1".
[23] Docket, Vol. IV, pp.1769-1770.
[24] *Id.*, Vol. IV, Exhibit "R-9", Judicial Affidavit, pp.1735-1739.
[25] *Id.*, Vol. IV, Exhibit "R-14", Judicial Affidavit, pp.1779-1783.
[26] *Id.*, Vol. IV, pp.1811-1814.
[27] Exhibits "R-1", "R-2", "R-3", "R-4", "R-5", "R-6", "R-6-a", "R-8", "R-8-a", "R-9", "R-9-a", "R-10", "R-10-a", "R-10-b", "R-11", "R-12", "R-13", "R-14", "R-14-a".
[28] Denied for failure to present originals for comparison.
[29] Docket, Vol. IV, pp.1878-1879.

After extensions of time to file memorandum, petitioner filed its Memorandum (Re: Preliminary Issue on Prescription)[30] on July 15, 2016. Respondent, however, failed[31] to file his Memorandum.

Pursuant to petitioner's motion, the Court resolved first the issue on prescription with respect to IT, VAT and EWT assessments after presentation of evidence.

The Court ruled that the waiver was null and void on the ground that Ms. Samson has no written authority to execute the waiver. The waiver was likewise treated as unnotarized as the Notary Public was not duly commissioned. The Resolution was promulgated on August 30, 2016[32], the dispositive portion of which reads:

> WHEREFORE, petitioner's motion praying that the assessment for deficiency income tax, VAT and EWT for calendar year 2010 be declared void is GRANTED. Accordingly, the Formal Assessment Notice for calendar year 2010 against petitioner is declared void but only as to the alleged deficiency income tax, VAT and EWT.
>
> Let this case be set for trial on the remaining deficiency tax assessments for calendar year 2010.
>
> SO ORDERED.

Respondent moved for the reconsideration of the above resolution but was denied in a Resolution[33] dated January 12, 2017.

Respondent then sought the reversal and setting aside of the August 30, 2016 and January 12, 2017 Resolutions by filing a Petition for Review with the Court *En Banc* docketed as CTA EB No. 1593, but the same was likewise denied by the Court *En Banc* in a Resolution[34] dated June 7, 2017. Respondent's Motion for Reconsideration filed with the Court *En Banc* was also denied in a Resolution[35] dated January 11, 2018.

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[30] Docket, Vol. IV, pp. 1889-1909.
[31] *Id.*, Records Verification dated August 3, 2016, p. 1911.
[32] *Id.*, Vol. IV, pp. 1913-1920.
[33] *Id.*, Vol. IV, pp. 1954-1960.
[34] *Id.*, Vol. V, pp. 2510-2518.
[35] *Id.*, Vol. VI, pp. 2577-2581.

Aggrieved, respondent CIR filed a Petition for Review[36] with the Supreme Court assailing the June 7, 2017 and January 11, 2018 Resolutions of the Court *En Banc*, based on the following grounds:

> The Court of Tax Appeals *En Banc* gravely erred when it dismissed Respondent's Petition for Review on the ground of prematurity; and
>
> The period to assess Petitioner deficiency taxes for CY 2010 has not yet prescribed because Ms. Purificacion Samson, the person who executed the Waiver, is the duly authorized representative of Petitioner, and her lack of a notarized authority from the Petitioner to sign the waiver will not render the waiver null as she has already established her authority to act for and in behalf of the Petitioner ever since the BIR started conducting its audit.

Petitioner filed its Comment[37] to the Petition for Review before the Supreme Court. The Supreme Court denied the petition in a Resolution dated November 7, 2018.

Meanwhile, trial on the remaining issues proceeded. Petitioner presented again Ms. Lapitan[38]. Petitioner also filed its Formal Offer of Evidence on April 12, 2017. In a Resolution[39] dated May 30, 2017, the Court admitted all of petitioner's exhibits save for Exhibits "P-38-1", "P-38-2", "P-38-3", "P-39", "P-40", "P-41", "P-42", "P-43", "P-43-2", "P-44", "P-45", "P-46", "P-47", "P-48", "P-49", "P-50", "P-50-2", "P-51", "P-51-1", "P-52", "P-52-1", "P-53", "P-53-1" and "P-66".

Petitioner moved[40] for the reconsideration of the denied exhibits but the same was denied[41].

On the other hand, respondent manifested that he will no longer present additional witnesses and documentary evidence and will just adopt the evidence proffered for the issue on prescription. Accordingly, the Court ordered the parties to file their respective memoranda.[42]

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[36] Supreme Court G.R. No. 237079.
[37] Docket, Vol. VI, pp. 2598-2622.
[38] *Id.*, Vol. V, Exhibit "P-72", Supplemental Judicial Affidavit, pp. 2001-2007.
[39] *Id.*, Vol. V, pp. 2493-2495.
[40] *Id.*, Vol. V., Motion for Partial Reconsideration (Re: Resolution dated May 30, 2017, pp. 2498-2507.
[41] *Id.*, Vol. VI, Resolution dated October 18, 2017, pp. 2526-2529.
[42] *Id.*, Vol. VI, Resolution dated July 6, 2018, pp. 2587-2591.

With the filing of petitioner's Memorandum[43] on September 12, 2018 and respondent's failure to file his Memorandum within the time provided per Records Verification[44] dated September 18, 2018, the Court submitted the case for decision.

## ISSUE

The issues to be resolved in this case are as follows:

1. Whether or not respondent's right to assess petitioner of alleged deficiency IT, VAT and EWT for CY2010 had already prescribed;

2. Whether or not there is legal or factual bases for respondent's assessment of deficiency IT, VAT, EWT, FWT, DST and FWVAT in the aggregate amount of ₱5,132,892.82 for CY 2010; and

3. Whether or not petitioner is liable for deficiency income tax, VAT, EWT, FWT, DST and FWVAT in the aggregate amount of ₱5,132,892.82 for CY2010.

**Petitioner's Arguments**[45]

Petitioner argues that respondent's right to assess petitioner alleged deficiency IT, VAT, and EWT had already prescribed and that the assessment has no factual or legal basis.

Petitioner insists that it is not liable for deficiency IT, VAT, EWT, FWT, DST, and FWVAT in the aggregate amount of ₱5,132,892.82 for CY 2010.

## RULING OF THE COURT

At the outset, the Court finds no cogent reason to disturb its earlier finding that the assessment for IT, VAT and EWT has already prescribed. The Court has exhaustively passed upon the issue on prescription according to established rules,

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[43] Docket., Vol. VI, pp. 2695-2718
[44] *Id.* at 2720.
[45] *Supra.*, Note 26.

regulations and jurisprudence as gleaned on pages 1913 to 1920 of the Case Docket, Volume IV.

It shall now proceed to discuss the remaining assessment for DST, FWT, FWVAT and compromise penalty.

## I. Deficiency DST - ₱355,570.60

Finding that petitioner had unpaid DST on its Loans Payable amounting to ₱26,178,000.00 and Advances from Affiliates amounting to ₱9,760,500.00, respondent assessed petitioner of deficiency DST for CY 2010 in the amount of ₱355,570.60, broken down as follows:

| | | | |
|---|---|---|---|
| Basic Tax Due | | | ₱ 179,693.00 |
| Add: | Surcharge (25%) | ₱44,923.25 | |
| | Interest (1.6.11 to 8.28.14) | 130,954.35 | 175,877.60 |
| **TOTAL AMOUNT DUE** | | | **₱355,570.60** |

Petitioner paid the deficiency DST assessment through the BIR's electronic filing and payment system (eFPS) on October 15, 2014 in the amount of ₱376,182.93, broken down as follows:[46]

| | |
|---|---|
| Basic Tax | ₱ 179,693.00 |
| Surcharge | 44,923.25 |
| Interest | 136,566.68 |
| Compromise | 15,000.00 |
| **Total** | **₱ 376,182.93** |

However, such payment did not represent full settlement of the total amount due as of October 15, 2014. Pursuant to Sections 249(B) and (C) of the National Internal Revenue Code (NIRC) of 1997, as amended, petitioner is still liable to pay the amount of ₱5,598.67 representing balance of the 20% delinquency interest due on the aforesaid payment, as computed below:

| | | |
|---|---|---|
| Basic Deficiency DST | | ₱179,693.00 |
| 25% Surcharge | | 44,923.25 |
| 20% Deficiency Interest from January 6, 2011 to August 25, 2014 *(₱179,693.00 x 20% x 1328/365 days)* | | 130,757.43 |
| **Total Amount Due as of August 25, 2014** | | **₱355,373.68** |
| 20% Deficiency Interest from August 26, 2014 to October 15, 2014 *(₱179,693.00 x 20% x 51/365 days)* | | 1,476.93 |

[46] Docket, Vol. V, Exhibits "P-58-1" to "P-58-3", pp. 2241-2243.

| | | |
|---|---|---|
| 20% Delinquency Interest from August 26, 2014 to October 15, 2014 *(₱355,373.68 x 20% x 51/365 days)* | | 9,930.99 |
| **Total Amount Due as of October 15, 2014** | | **₱366,781.60** |
| Less: Payment made on October 15, 2014 | | |
| Basic Tax | ₱179,693.00 | |
| Surcharge | 44,923.25 | |
| Interest | 136,566.68 | 361,182.93 |
| **20% Delinquency Interest Still Due as of October 15, 2014** | | **₱ 5,598.67** |

## II. Deficiency FWT - ₱74,648.78

Invoking Section 28(B)(5)(a) of the NIRC of 1997, respondent found petitioner liable for deficiency FWT on its interest payments on foreign loan from its lender-nonresident foreign corporation, Omya (Shweiz) AG, amounting to ₱378,296.54. Under the Philippine-Switzerland Tax Treaty, the preferential tax rate of 10% is imposed on interest income paid by contracting states. The deficiency FWT was computed as follows:[47]

| | | |
|---|---|---|
| Interest on Foreign Loan | | ₱378,296.54 |
| Multiplied by FWT rate | | 10% |
| **Basic Deficiency Final Withholding Tax** | | **₱37,829.65** |
| Add: Surcharge | ₱ 9,457.41 | |
| Interest (01.16.11 to 08.28.2014) | 27,361.72 | 36,819.13 |
| **Total Amount Due** | | **₱74,648.78** |

Petitioner contends that the assessment has no factual or legal basis as it withheld the appropriate taxes on these income payments.

Based on the schedule submitted by the petitioner, the interest on foreign loans subjected to FWT was composed of the following:[48]

| Date | Amount |
|---|---|
| 3/31/2010 | US$ 233.44 |
| 4/30/2010 | 701.07 |
| 5/31/2010 | 925.66 |
| 6/30/2010 | 897.30 |
| 7/31/2010 | 1,055.24 |
| 8/31/2010 | 1,057.10 |
| 9/30/2010 | 1,024.80 |
| 10/31/2010 | 934.03 |
| 11/30/2010 | 905.10 |

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[47] Docket, Vol. IV, Exhibit "P-20", p. 1719-1723.
[48] *Id.*, Vol. II, Exhibit "P-71-5", p. 325.

| | |
|---|---|
| 12/31/2010 | 936.82 |
| **Subtotal 2010** | US$ **8,670.56** |
| 1/31/2011 | 944.88 |
| 2/28/2011 | 854.84 |
| 3/31/2011 | 2,397.57 |
| 4/30/2011 | 2,372.70 |
| 5/31/2011 | 2,455.51 |
| 6/30/2011 | 2,379.90 |
| 7/31/2011 | 2,382.97 |
| 8/31/2011 | 2,386.37 |
| 9/30/2011 | 2,458.50 |
| 10/31/2011 | 3,050.71 |
| 11/30/2011 | 2,956.80 |
| 12/31/2011 | 3,060.32 |
| **Subtotal 2011** | US$ **27,701.07** |
| 1/31/2012 | 3,407.21 |
| 2/29/2012 | 3,193.19 |
| 3/31/2012 | 3,418.99 |
| 4/30/2012 | 3,910.31 |
| 5/31/2012 | 4,517.63 |
| 6/30/2012 | 4,380.90 |
| 7/31/2012 | 4,521.35 |
| 8/31/2012 | 4,746.71 |
| 9/30/2012 | 4,983.90 |
| 10/31/2012 | 4,940.78 |
| 11/30/2012 | 4,790.70 |
| 12/31/2012 | 4,959.69 |
| **Subtotal 2012** | US$ **51,771.36** |
| 1/31/2013 | 4,854.29 |
| 2/28/2013 | 4,392.92 |
| 3/31/2013 | 4,871.96 |
| 4/30/2013 | 4,671.60 |
| 5/31/2013 | 4,836.00 |
| 6/30/2013 | 4,689.00 |
| 7/31/2013 | 4,836.31 |
| 8/31/2013 | 4,845.30 |
| 9/30/2013 | 4,697.70 |
| 10/1/2013 | 4,219.05 |
| **Subtotal 2013** | US$ **46,914.13** |
| **Total** | US$ **135,057.12** |
| US$ to PHP Exchange Rate | 43.72 |
| **Total Interest in PHP** | **₱5,904,022.00** |
| FWT Rate | 10% |
| **Tax Due in PHP** | **₱ 590,402.20** |

Petitioner claims that the assessed amount pertains to the 2010 interest expense included in the income payments already subjected to FWT. The amount of interest expenses on the foreign loan assessed for deficiency FWT are shown as follows:

| Date | Amount |
|---|---|
| 3/31/2010 | US$ 233.44 |
| 4/30/2010 | 701.07 |
| 5/31/2010 | 925.66 |
| 6/30/2010 | 897.30 |
| 7/31/2010 | 1,055.24 |
| 8/31/2010 | 1,057.10 |
| 9/30/2010 | 1,024.80 |
| 10/31/2010 | 934.03 |
| 11/30/2010 | 905.10 |
| 12/31/2010 | 936.82 |
| **Subtotal 2010** | **US$ 8,670.56** |
| US$ to PHP Exchange Rate | 43.63 |
| **Total Interest in PHP** | **₱378,296.53** |

Upon perusal of the records, the Court found that petitioner paid final withholding taxes in the amount of ₱866,688.61 on December 9, 2013 as shown in its Monthly Remittance Return of Final Income Taxes Withheld (BIR Form No. 1601F) for November 2013 which was filed with the BIR on the same date.[49] Details of the FWT remittance of ₱866,688.61 based on tax treaty rates are as follows:

| ATC | Amount | Tax Rate | FWT |
|---|---|---|---|
| WC180-Interest on Foreign Currency payable to Non-Resident Foreign Corporation | ₱5,904,021.10 | 10.00 | ₱ 590,402.11 |
| WC230-On Other Payments to NRFCs | 1,841,910.00 | 15.00 | 276,286.50 |
| **Total** | | | **₱ 866,688.61** |

Evidently, the 10% FWT remittance on December 9, 2013 of ₱590,402.11 included the assessed 10% FWT for CY 2010 of ₱37,829.65. Hence, respondent's basic deficiency FWT assessment in the amount of ₱37,829.65 is cancelled. However, pursuant to Sections 248(A)(1)[50] and 249(A)[51] of the

[49] Exhibit "P-59-3", Docket, vol. V, p. 2336-2341.

[50] 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 xxx

[51] SEC. 249. *Interest.* —

(A) *In General.* — There shall be assessed and collected on any unpaid amount of tax, interest at the rate of twenty 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.

NIRC of 1997, as amended, petitioner is liable for 25% surcharge and 20% deficiency interest for belated filing of BIR Form No. 1601F and payment of the ₱37,829.65 FWT for CY 2010.

Section 2.57.4 of Revenue Regulations (RR) No. 02-98, as amended by RR No. 12-01, provides when the obligation to withhold arises, to wit:

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

Applying the foregoing provision to this case, the duty of petitioner to withhold arises when the interest payments are paid, becomes payable, or when accrued/recorded as expense in petitioner's books, whichever comes first. The second paragraph however, states that if petitioner recorded the interest payments as expense, although they were not yet paid or payable, the obligation to withhold shall be within the last month of the return period in which the royalty payments were claimed as expenses for tax purposes.

It is observed that evidence on record is bereft of any indication as to when the subject interest payments have been accrued by petitioner during the CY 2010. It follows then that accrual of the interest cannot be used as basis in knowing when the obligation to withhold commences.

While petitioner allegedly paid the subject interest on foreign currency loan for CY 2010 only on November 29, 2013, the Credit Facility Agreement[52] entered into by petitioner with its lender-nonresident foreign corporation, Omya (Schweiz) AG, provides that the interest on its foreign currency loan was

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[52] Exhibit "P-59-1", Docket, Vol. V, pp. 2244 - 2246.

payable on a monthly basis, *i.e.*, last calendar day of every month starting March 31, 2010. Thus, the 10% FWT on the interest incurred by petitioner for CY 2010 should have been withheld every last calendar day of the month starting March 31, 2010.

On the other hand, Section 2.58(A)(2)(a) of RR 02-98, as amended by RR No. 17-2003, provides the time of filing of returns and remittance of final income taxes withheld as follows:

> **Sec. 2.58. RETURNS AND PAYMENT OF TAXES WITHHELD AT SOURCE.**
>
> ***(A) Monthly return and payment of taxes withheld at source***
>
> (1) xxx xxx xxx
>
> ***(2) WHEN TO FILE—***
>
> (a) For both large and non-large taxpayers, the withholding tax return, whether creditable or final (including final withholding taxes on interest from any currency bank deposit and yield or any other monetary benefit from deposit substitutes and from trust funds and similar arrangements) **shall be filed and payments should be made, within ten (10) days after the end of each month, except for taxes withheld for the month of December of each year, which shall be filed on or before January 15 of the following year**; *(Emphasis supplied)*

Based on the foregoing provisions, petitioner should have remitted the 10% FWT on the monthly interest it incurred on foreign currency loan for CY 2010 on April 12, 2010[53], May 10, 2010, June 10, 2010, July 12, 2010[54], August 10, 2010, September 10, 2010, October 11, 2010[55], November 10, 2010, December 10, 2010 and January 17, 2011[56].

Accordingly, petitioner is liable to pay the amount of ₱34,044.43 representing 25% surcharge in the amount of ₱9,457.40 and 20% deficiency interest in the amount of ₱24,587.03, computed as follows:

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[53] *April 10, 2010 falls on a Saturday hence the due date shall be on the next business day April 12, 2010*

[54] *July 10, 2010 falls on a Saturday hence the due date shall be on the next business day July 12, 2010*

[55] *October 10, 2010 falls on a Sunday hence the due date shall be on the next business day October 11, 2010*

[56] *January 15, 2011 falls on a Saturday hence the due date shall be on the next business day January 17, 2011.*

| | **March** | **April** | **May** | **June** | **July** | **August** |
|---|---|---|---|---|---|---|
| Basic Tax | ₱ 1,018.50 | ₱ 3,058.77 | ₱ 4,038.65 | ₱ 3,914.92 | ₱ 4,604.01 | ₱ 4,612.13 |
| | | | | | | |
| 25% Surcharge | ₱ 254.62 | ₱ 764.69 | ₱ 1,009.66 | ₱ 978.73 | ₱ 1,151.00 | ₱ 1,153.03 |
| Add: 20% Deficiency Interest from April 12, 2010 to December 9, 2013 *(₱1,018.50 x 20% x 1,337/365 days)* | 746.16 | | | | | |
| 20% Deficiency Interest from May 10, 2010 to December 9, 2013 *(₱3,058.77 x 20% x 1,309/365 days)* | | 2,193.93 | | | | |
| 20% Deficiency Interest from June 10, 2010 to December 9, 2013 *(₱4,038.65 x 20% x 1,278/365 days)* | | | 2,828.16 | | | |
| 20% Deficiency Interest from July 12, 2010 to December 9, 2013 *(₱3,914.92 x 20% x 1,246/365 days)* | | | | 2,672.87 | | |
| 20% Deficiency Interest from August 10,2010 to December 9, 2013 *(₱4,604.01 x 20% x 1,217/365 days)* | | | | | 3,070.18 | |
| 20% Deficiency Interest from September 10, 2010 to December 9, 2013 *(₱4,612.13 x 20% x 1,186/365 days)* | | | | | | 2,997.25 |
| **Total Amount Due as of Dec. 9, 2013** | **₱1,000.78** | **₱2,958.62** | **₱3,837.82** | **₱3,651.60** | **₱4,221.18** | **₱4,150.28** |

| | **September** | **October** | **November** | **December** | **Total** |
|---|---|---|---|---|---|
| Basic Tax | ₱ 4,471.20 | ₱ 4,075.17 | ₱ 3,948.95 | ₱ 4,087.35 | ₱ 37,829.65 |
| | | | | | |
| 25% Surcharge | ₱ 1,117.80 | ₱ 1,018.79 | ₱ 987.24 | ₱ 1,021.84 | **₱ 9,457.40** |
| 20% Deficiency Interest from October 11, 2010 to December 9, 2013 *(₱4,471.20 x 20% x 1,155/365 days)* | 2,829.72 | | | | |
| 20% Deficiency Interest from November 10, 2010 to December 9, 2013 *(₱4,075.17 x 20% x 1,125/365 days)* | | 2,512.09 | | | |
| 20% Deficiency Interest from December 10, 2010 to December 9, 2013 *(₱3,948.95 x 20% x 1,095/365 days)* | | | 2,369.37 | | |
| 20% Deficiency Interest from January 17, 2011 to December 9, 2013 *(₱4,087.35 x 20% x 1,057/365 days)* | | | | 2,367.30 | |
| **Total Deficiency Interest from April 12, 2010 to January 17, 2011** | | | | | **24,587.03** |
| **Total Amount Due as of December 9, 2013** | **₱3,947.52** | **₱3,530.88** | **₱3,356.61** | **₱3,389.14** | **₱34,044.43** |

## III. Final Withholding on VAT (FWVAT) - ₱1,764,354.55

Respondent's verification disclosed that petitioner had income payments to its affiliated companies for management services, marketing services, masterbrand license fees, software installation and enhancement and computer maintenance in the amount of ₱7,450,994.00 subject to 12% FWVAT. Citing Section 4.114-2(b)(3) of RR No. 16-2005, respondent assessed petitioner of the corresponding deficiency FWVAT in the amount of ₱1,764,354.55, inclusive of surcharge and interest, as shown below:[57]

| | | |
|---|---|---|
| Payments made to non-resident affiliated companies | | ₱ 7,450,994.00 |
| Multiplied by FWT rate | | 12% |
| **Basic Final Withholding on VAT Due** | | **₱ 894,119.28** |
| Add: Surcharge | ₱223,529.82 | |
| Interest (01.16.11 to 08.28.2014) | 646,705.45 | 870,235.27 |
| **Total Amount Due** | | **₱1,764,354.55** |

Petitioner submits that the place where the services are performed determines the jurisdiction to impose VAT as held by the Supreme Court in the case of *Commissioner of Internal Revenue v. American Express International, Inc. (Philippine Branch)*[58], thus:

> The law neither makes a qualification nor adds a condition in determining the tax *situs* of a zero-rated service. **Under this criterion, the place where the service is rendered determines the jurisdiction to impose the VAT.** Performed in the Philippines, such service is necessarily subject to its jurisdiction, for the State necessarily has to have "a substantial connection" to it, in order to enforce a zero rate. **The place of payment is immaterial, much less is the place where the output of the service will be further or ultimately used.**

Petitioner points out that under Section 108(A) of the NIRC of 1997, as amended, the VAT is imposed on gross receipts derived from the sale or exchange of services, and the use or lease of properties. The same provision of the NIRC of 1997, as amended, provides that the phrase 'sale or exchange of services' means the performance of all kinds of services in the Philippines for others for a fee, remuneration or

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[57] Docket, Vol. IV, Exhibit "P-20", p. 1719-1723.
[58] G.R. No. 152609, June 29, 2005.

consideration. Conversely, services performed outside the Philippines are not subject to VAT.

Petitioner avers that the assessed amount of ₱7,450,994.00 pertains to payments to its non-resident foreign affiliated companies whose services were performed or rendered outside the Philippines. Hence, petitioner is of the view that it has no obligation to withhold VAT since the services were performed outside the Philippines.

As summarized by petitioner, the assessed amount of ₱7,450,994.00 comprised the following:[59]

| Company Name | Country of Residence | Nature of Services Rendered | Amount (FC) | Rate | Amount (PHP) |
|---|---|---|---|---|---|
| Omya AG[60] | Switzerland | Masterbrand License Fee[61] | 22,270.00 | 43.89 | ₱ 977,353.62 |
| Omya International AG[62] | Switzerland | Marketing Services[63] | 4,800.00 | 50.67 | 243,229.07 |
| Omya Management AG[64] | Switzerland | Management Services[65] | 16,807.00 | 43.89 | 737,575.20 |
| Omya Korea AG[66] | Korea | IT Services[67] | 5,652.80 | 46.34 | 261,950.75 |
| Omya Australia Pty Ltd[68] | Australia | IT Network Assistance[69] | 10,143.19 | 45.50 | 461,515.15 |
| | | Management Services[70] | 64,000.00 | 43.89 | 2,808,640.00 |
| Omya Asia Pacific Sdn Bhd[71] | Malaysia | Applied Technology | 1,830.00 | 44.05 | 80,611.50 |
| | | Hyper Care for BCPS | 4,082.00 | 44.05 | 179,812.10 |
| | | Capitalized Accounting Software | 37,249.00 | 45.65 | 1,700,306.33 |
| **Total** | | | | | **₱7,450,993.72** |

Petitioner proffered the service agreements for suppliers "Omya AG", "Omya International AG", Omya Management AG", and "Omya Korea AG", together with the invoice, credit

[59] Docket, Vol. II, Exhibit "P-71-6", p. 326.
[60] Docket, Vol. V, Exhibits "P-66-5" to "P-66-6", pp. 2485-2486.
[61] *Id.*, Vol. V, Exhibits "P-60", "P-60-1" to "P-60-2", pp. 2342-2360.
[62] *Id.*, Vol. V, Exhibit "P-66-2", p. 2482.
[63] *Id.*, Vol. V, Exhibits "P-61", "P-61-1" to "P-61-2", pp. 2361-2381.
[64] *Id.*, Vol. V, Exhibit "P-66-1", p. 2481.
[65] *Id.*, Vol. V, Exhibits "P-62", "P-62-1" to "P-62-3", pp. 2382-2420.
[66] *Id.*, Vol. V, Exhibit "P-66-3", p. 2483.
[67] *Id.*, Vol. V, Exhibits P-63, P-63-1 to P-63-2, pp. 2421-2427.
[68] *Id.*, Vol. V, Exhibit P-66-4, p. 2484.
[69] *Id.*, Vol. V, Exhibits P-64-1 to P-64-2, pp. 2428-2429.
[70] *Id.*, Vol. V, Exhibits P-65, P-65-1 to P-65-15, pp. 2430-2479.
[71] *Id.*, Vol. V, Exhibit P-66-7, p. 2487.

memo and foreign/domestic telegraphic transfer application corresponding to the above-listed services.

However, petitioner failed to prove that the listed services were actually performed outside of the Philippines. The invoices and telegraphic transfers issued to these foreign companies only prove that the services were actually paid to the service provider but do not indicate where the services were rendered. In the same vein, the service agreements/contracts provisions are vague as to where and how the services are to be executed.

For petitioner's failure to refute respondent's assessment, the Court shall not disturb the same. Settled is the rule that tax assessments by tax examiners are presumed correct and made in good faith, with the taxpayer having the burden of proving otherwise. Failure to present proof of error in the assessment will justify the judicial affirmance of said assessment.[72]

Thus, petitioner's income payments to its non-resident foreign affiliated companies amounting to ₱7,450,993.72 shall be subject to deficiency FWVAT in the amount of ₱894,119.28, computed as follows:

| | |
|---|---|
| Payments made to non-resident affiliated companies | ₱ 7,450,994.00 |
| Multiplied by FWT rate | 12% |
| **DEFICIENCY FWVAT** | **₱ 894,119.28** |

## IV. Compromise penalties - ₱44,500.00

Pursuant to Section 255 of the NIRC of 1997, as amended, respondent assessed petitioner of compromise penalties amounting to ₱44,500.00, broken down as follows:[73]

| Nature of violation | Compromise Penalty |
|---|---|
| Failure to file and/or pay the Documentary Stamp tax | ₱ 16,000.00 |
| Failure to file and/or pay the Final Withholding Tax | 8,500.00 |
| Failure to file and/or pay the Final Withholding VAT | 20,000.00 |
| **Total Compromise Penalties** | **₱44,500.00** |

[72] *Marcos II vs. Court of Appeals, et al.*, G.R. No. 120880, June 5, 1997.
[73] Docket, Vol. IV, Exhibit "P-20", p. 1720.

The Court finds no basis to impose the compromise penalty of ₱16,000.00 for failure to file and/or pay DST, as petitioner paid the same on October 15, 2014.[74]

Similarly, the Court cancels the remaining compromise penalties in the amounts of ₱8,500 and ₱20,000.00 because under Revenue Memorandum Order (RMO) No. 01-90, compromise penalties are only amounts suggested in settlement of criminal liability, and may not be imposed on or exacted from the taxpayer in the event that a taxpayer refuses to pay the same. It is a well-settled rule that the Court has no jurisdiction to compel a taxpayer to pay the compromise penalty because by its very nature, it implies a mutual agreement between the parties in respect to the thing or subject matter that is so compromised, and the choice of paying or not paying it distinctly belongs to the taxpayer.[75] Absent a showing that herein petitioner consented to the compromise penalty, its imposition should be deleted. The imposition of the same without the conformity of the taxpayer is illegal and unauthorized.[76]

**WHEREFORE**, premises considered, the instant Petition for Review is **PARTIALLY GRANTED**. The assessments issued by respondent against petitioner for CY 2010 covering deficiency IT, VAT, EWT and compromise penalties are **CANCELLED** and **WITHDRAWN**. However, the assessments covering deficiency DST, FWT and FWVAT are **AFFIRMED** with **MODIFICATIONS**. Accordingly, petitioner is **ORDERED TO PAY** respondent the aggregate amount of **THREE MILLION SIX HUNDRED SIX THOUSAND FIVE HUNDRED FIFTY-FIVE PESOS AND TWO CENTAVOS (₱3,606,555.02)**, broken down below, inclusive of the the 25% surcharge, 20% deficiency interest and 20% delinquency interest imposed under Sections 248(A)(3), 249(B) and (C) of the NIRC of 1997, as amended, respectively, computed until December 31, 2017:

| | |
|---|---|
| 20% Delinquency Interest Still Due on the Deficiency DST Assessment Paid on October 15, 2014 | ₱ 5,598.67 |
| Increments for belated filing of BIR Form No. 1601F and payment of FWT on interest on foreign currency loan | 56,877.52 |
| Deficiency FWVAT | ₱ 3,544,078.83 |

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74 Docket, Vol. V, Exhibits "P-58-1" to "P-58-3", pp. 2241-2243.
75 *The Philippines International Fair, Inc. vs. The Collector of Internal Revenue, et. al.*, G.R. Nos. L-12928 and L-12932, March 31, 1962.
76 *Commissioner of Internal Revenue vs. Lianga Bay Logging Co., Inc., et. al.*, G.R. No. L-35266, January 21, 1991.

| | |
|---|---|
| **Total** | **₱3,606,555.02** |

The above amounts are computed as follows:

| ***20% Delinquency Interest Still Due on the Deficiency DST Assessment Paid on October 15, 2014*** | | |
|---|---|---|
| Basic Deficiency DST | | ₱ 179,693.00 |
| 25% Surcharge | | 44,923.25 |
| 20% Deficiency Interest from January 6, 2011 to August 25, 2014 *(₱179,693.00 x 20% x 1328/365 days)* | | 130,757.43 |
| **Total Amount Due as of August 25, 2014** | | **₱355,373.68** |
| 20% Deficiency Interest from August 26, 2014 to October 15, 2014 *(₱179,693.00 x 20% x 51/365 days)* | | 1,476.93 |
| 20% Delinquency Interest from August 26, 2014 to October 15, 2014 *(₱355,373.68 x 20% x 51/365 days)* | | 9,930.99 |
| **Total Amount Due as of October 15, 2014** | | **₱366,781.60** |
| Less: Payment made on October 15, 2014 | | |
| Basic Tax | ₱179,693.00 | |
| Surcharge | 44,923.25 | |
| Interest | 136,566.68 | 361,182.93 |
| **20% Delinquency Interest Still Due as of October 15, 2014** | | **₱ 5,598.67** |

| ***Increments for belated filing of BIR Form No. 1601F and payment of FWT on interest on foreign currency loan*** | |
|---|---|
| 25% Surcharge | ₱ 9,457.40 |
| Total Deficiency Interest as of December 9, 2013 | 24,587.03 |
| **Total Amount Due as of December 9, 2013** | **₱34,044.43** |
| Add: 20% Delinquency Interest from August 26, 2014 to December 31, 2017 *(₱34,044.43 x 20% x 1,224/365 days)* | 22,833.09 |
| **Total Amount Due as of December 31, 2017** | **₱56,877.52** |

| ***Deficiency FWVAT*** | |
|---|---|
| Basic Tax | ₱ 894,119.28 |
| 25% Surcharge | 223,529.82 |
| 20% Deficiency Interest from January 17, 2011 to August 25, 2014 *(₱894,119.28 x 20% x 1,316/365 days)* | 644,745.74 |
| **Total Amount Due as of August 25, 2014** | **₱1,762,394.84** |
| Add: 20% Deficiency Interest from August 26, 2014 to December 31, 2017 *(₱894,119.28 x 20% x 1,224/365 days)* | 599,672.33 |
| 20% Delinquency Interest from August 26, 2014 to December 31, 2017 *(₱1,762,394.84 x 20% x 1,224/365 days)* | 1,182,011.66 |
| **Total Amount Due as of December 31, 2017** | **₱3,544,078.83** |

In addition, petitioner is **ORDERED TO PAY** respondent delinquency interest at the rate of twelve percent (12%) on the **aggregate amounts due of ₱34,044.43, and ₱1,762,394.84** as of 09 December 2013 and 25 August 2014, respectively, **or in the total amount of ₱1,796,439.27,** as determined above, computed from 01 January 2018 until full payment thereof pursuant to Section 249 (C) of the NIRC of 1997, as amended by Republic Act No. 10963, also known as Tax Reform for

Acceleration and Inclusion (TRAIN), as implemented by RR No. 21-2018.

**SO ORDERED.**

**CATHERINE T. MANAHAN**
Associate Justice

**WE CONCUR:**

(See Dissenting Opinion)
**ROMAN G. DEL ROSARIO**
Presiding Justice

**ESPERANZA R. FABON-VICTORINO**
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.

**ROMAN G. DEL ROSARIO**
Presiding Justice

REPUBLIC OF THE PHILIPPINES
**Court of Tax Appeals**
QUEZON CITY

*FIRST DIVISION*

| | |
|---|---|
| **OMYA CHEMICAL MERCHANTS, INC.,** *Petitioner,* | **CTA Case No. 9047** |
| | *Members:* |
| | Del Rosario, *P.J., Chairperson*<br>Fabon-Victorino, *and*<br>Manahan, *JJ.* |
| *-versus-* | |
| **COMMISSIONER OF INTERNAL REVENUE** *Respondent.* | Promulgated: |

x- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - x

## DISSENTING OPINION

***DEL ROSARIO, PJ:***

With due respect, I submit that the Petition for Review should be granted and that the deficiency tax assessments issued against petitioner for the calendar year (CY) 2010 should be cancelled and set aside for being void, as the Revenue Officer (RO) and Group Supervisor (GS) who continued the audit and examination of petitioner's books of accounts and other accounting records for the CY 2010 were not authorized to do so pursuant to a Letter of Authority (LOA).

In LOA No. 050-2012-00000036 dated February 16, 2012,[1] signed by Regional Director Nestor S. Valeroso of Revenue Region No. 8, RO Ricaredo Balderas and GS Rebecca Bailon were authorized to examine petitioner's books of accounts and other accounting records for the CY 2010. Pursuant thereto, RO Balderas submitted his Memorandum Report dated October 11, 2012 relative to petitioner's 2010 internal revenue tax liabilities.[2] RO Balderas

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[1] Exhibit R-1, BIR Records, p. 37.
[2] Exhibit R-6, BIR Records, unpaginated.

specifically recommended the issuance of a Preliminary Assessment Notice (PAN) after making a finding that petitioner is liable for the following deficiency taxes:

| | |
|---|---|
| Income Tax | ₱5,761,201.13 |
| Value-Added Tax | ₱1,118,532.41 |
| Withholding Tax – Compensation | ₱912,135.92 |
| Withholding Tax – Expanded | ₱1,929,842.44 |
| Documentary Stamp Tax | ₱375,685.36 |

RO Balderas testified that in a Letter dated November 13, 2012, petitioner submitted its response to the foregoing audit findings and in reply thereto, a Letter dated December 11, 2012, signed by Regional Director Valeroso was sent to petitioner. RO Balderas further testified that after said December 11, 2012 Letter, **the case was re-assigned to another revenue examiner**.[3] The testimony of RO Balderas was corroborated by the testimony of Assistant Revenue District Officer (ARDO) Rhodora Icaranom who testified that **the case was re-assigned to RO Ruby S. Munion**, under the supervision of GS Bailon.[4] There was, however, nothing in her testimony which states that an LOA was issued to RO Munion for purposes of continuing the audit of petitioner's CY 2010 books of account and other accounting records.

Truth to tell, a close scrutiny of the BIR Records reveals that the re-assignment of the case to RO Munion was made pursuant to a Memorandum of Assignment dated December 17, 2012, signed by Revenue District Officer Ricardo B. Espiritu.[5] BIR Records would further show that **the RO and GS who eventually continued the audit of petitioner's CY 2010 books of account and other accounting records were RO Michael T. Felipe and GS Roderick P. Cantillana pursuant to a Memorandum of Assignment dated March 17, 2014 issued by Revenue District Officer Maridur R. Rosario**.[6] The audit and examination conducted by RO Felipe led him to propose the issuance of a PAN assessing petitioner for the following:

| | |
|---|---|
| Income Tax | ₱863,660.42 |
| Value-Added Tax | ₱37,481.10 |
| Withholding Tax – Expanded | ₱802,935.68 |

[3] Judicial Affidavit of Ricaredo O. Balderas dated October 12, 2015 marked as Exhibit R-9, Docket, p. 1735 to 1738.
[4] Judicial Affidavit of Rhodora Icaranom dated January 8, 2016, marked as Exhibit R-14, pp.1779 to 1783.
[5] BIR Records, p. 1446.
[6] BIR Records, p. 1492.

| | |
|---|---|
| Documentary Stamp Tax | ₱179,693.00 |
| Final Withholding Tax | ₱37,829.65 |
| Final Withholding VAT | ₱894,119.28[7] |

On the basis of RO Felipe's recommendation, PAN dated July 9, 2014[8] was thereafter issued.

The National Internal Revenue Code (NIRC) of 1997, as amended, is clear and categorical in requiring an authority from the **Commissioner of Internal Revenue (CIR) or from his duly authorized representatives** before an examination of a taxpayer may be made.[9] Section 6 thereof provides:

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

**A Bureau of Internal Revenue (BIR) officer cannot simply subject a taxpayer to audit without valid authority issued for that purpose.** Section 13 of the NIRC of 1997, as amended, provides:

> "SEC. 13. Authority of a Revenue Officer. - Subject to the rules and regulations to be prescribed by the Secretary of Finance, upon recommendation of the Commissioner, **a Revenue Officer assigned to perform assessment functions** in any district may, **<u>pursuant to a Letter of Authority</u>** issued by the **<u>Revenue Regional Director</u>**, examine taxpayers within the jurisdiction of the district in order **to collect the correct amount of tax, or to recommend the assessment of any deficiency tax due** in the same manner that the said acts could have been performed by the Revenue Regional Director himself." *(Boldfacing and underscoring supplied)*

Revenue Memorandum Order (RMO) No. 43-90 specifies the policy guidelines in the issuance of LOAs to audit. It likewise identifies and limits the BIR Officials who are authorized to issue LOAs, *viz.*:

> "D. Preparation and issuance of L/As.
>
> xxx

[7] BIR Records, pp. 1521 to 1526.
[8] BIR Records, pp. 1527 to 1531.
[9] *Medicard Philippines, Inc. vs. Commissioner of Internal Revenue*, G.R. No. 222743, April 5, 2017.

> 4. For the proper monitoring and coordination of the issuance of Letter of Authority, **the only BIR officials authorized to issue and sign Letters of Authority are the Regional Directors, the Deputy Commissioners and the Commissioner**. For the exigencies of the service, **other officials may be authorized to issue and sign Letters of Authority but only upon prior authorization by the Commissioner himself**." *(Boldfacing and underscoring supplied)*

RMO No. 43-90 is explicit that the continuation of audit by a revenue officer other than the officer named in a previous LOA, **requires the issuance of a new LOA**:

> "C. Other policies for issuance of L/As.
>
> 1. **All audits/investigations, whether field or office audit, should be conducted under a Letter of Authority.**
>
> xxx
>
> 5. **Any re-assignment/transfer of cases to another RO(s)**, and revalidation of L/As which have already expired, **shall require the issuance of a new L/A, with the corresponding notation thereto, including the previous L/A number and date of issue of said L/As**." *(Boldfacing supplied)*

The *"authorized representative"* contemplated under Section 6 of the NIRC of 1997, as amended, who may issue an LOA is, at the very least, no other than a **Revenue Regional Director** pursuant to Section 13 thereof.

The power to issue an LOA may not be delegated by the CIR or the Revenue Regional Director to any other officer - - much less to a Revenue District Officer. On this point, the pronouncement in *NPC Drivers and Mechanics Association, (NPC DAMA) vs. The National Power Corporation*[10] is instructive, *viz.*:

> "We agree with petitioners. In enumerating under Section 48 those who shall compose the National Power Board of Directors, the legislature has vested upon these persons the power to exercise their judgment and discretion in running the affairs of the NPC. Xxx xxx xxx. It is to be presumed that in naming the respective department heads as members of the board of directors, the legislature chose these secretaries of the various executive departments on the basis of their personal qualifications and acumen which made them eligible to occupy their present positions as department heads. **Thus, the department secretaries cannot delegate their duties as members of the NPB, much less their power to vote and approve board resolutions, because it is their personal judgment that must be exercised in the fulfillment of such responsibility.**

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[10] G.R. No. 156208, September 26, 2006.

Xxx, the rule enunciated in the case of *Binamira v. Garrucho* is relevant in the present controversy, to wit:

> **An officer to whom a discretion is entrusted cannot delegate it to another, the presumption being that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and unless the power to substitute another in his place has been given to him, he cannot delegate his duties to another.**
>
> Xxx." *(Citations omitted; Boldfacing supplied)*

In *Commissioner of Internal Revenue vs. Composite Materials, Inc.,*[11] the Supreme Court categorically held that an RO may only examine the taxpayer's books pursuant to an LOA issued by the Revenue Regional Director and emphasized that the Referral Memorandum issued by the Revenue District Officer directing another RO to continue with the examination of Composite Materials, Inc.'s (CMI) records is not equivalent to an LOA nor does it cure the RO's lack of authority, *viz.*:

> "As regards the issue on Revenue Officer Mary Anne P. Cruz's (RO Cruz) authority to examine CMI's records, **the provisions of the National Internal Revenue Code of 1997, as amended, are clear that a Revenue Officer may only examine the taxpayer's books pursuant to a Letter of Authority (LOA) issued by the Regional Director**. This was reiterated by the Court in *Medicard Philippines, Inc. v. Commissioner of Internal Revenue*, ruling that in the absence of an LOA, the assessment or examination is a nullity.
>
> x x x
>
> Moreover, the Court agrees with the CTA *en banc* that the **Referral Memorandum** issued by a Revenue District Officer **directing RO Cruz to continue with the examination of CMI's records is not equivalent to an LOA nor does it cure RO Cruz's lack of authority**. To be sure, Revenue Memorandum Order No. 43-90, which specified the guidelines in the issuance of LOAs states that **any reassignment or transfer of cases to another RO or revalidation of an expired LOA shall require the issuance of a new LOA**." *(Boldfacing and underscoring supplied)*

In the present case, while the Memorandum of Assignment cannot be treated as an LOA as precisely, any re-assignment of cases requires the issuance of a new LOA, its fatal infirmity is further highlighted by the fact that it was **signed and issued by the Revenue District Officer only** and not by the Revenue Regional Director.

[11] G.R. No. 238352, September 12, 2018.

All told, I VOTE to: (i) GRANT the Petition for Review filed by Omya Chemical Merchants, Inc.; and, (ii) CANCEL and SET ASIDE the Formal Assessment Notices (FAN) dated July 25, 2014 with attached Details of Discrepancies.

**ROMAN G. DEL ROSARIO**
Presiding Justice