REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

****

EVA AIRWAYS,
Petitioner,

C.T.A. CASE NO. 6708

Members:

- versus -

ACOSTA, *Chairman*
BAUTISTA, and
CASANOVA, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

AUG 2 4 2005

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DECISION

BAUTISTA, L. J.:

This is a judicial appeal seeking the cancellation and withdrawal of the assessments issued by the respondent against petitioner for deficiency taxes for the taxable year 1999, namely: income tax, expanded withholding tax, percentage tax and compromise penalty liable, in the aggregate amount of P99,919,321.39.

The antecedent facts of the case as jointly stipulated by the parties are as follows:

Petitioner is a foreign corporation duly organized and existing under and by virtue of the laws of Taiwan but duly licensed to transact business in the Philippines pursuant to the Certification issued by the Securities and Exchange Commission dated February 6, 1997 *(Exhibit "A")*. It is principally engaged in the business of air carriage or transportation, with principal office address at 5438 Don Tim Building, South Superhighway, Makati City *(Paragraph 1.01, Petition For Review)*.

On September 19, 2000, the then Commissioner of Internal Revenue, Dakila B. Fonacier, issued Letter of Authority (LOA) No. 00002173 *(Exhibit "B")* authorizing the Large Taxpayers Assessment Division of the Bureau of Internal Revenue (BIR) to examine for all internal revenue taxes the books of accounts and other accounting records of petitioner for the period January 1, 1999 to December 31, 1999.

On August 1, 2001, in the course of the examination of the books of petitioner then being conducted pursuant to the LOA aforementioned, the Secretary of Finance issued Revenue Regulations (RR) No. 8-2001 *(Exhibit "C")* establishing the Voluntary Assessment Program (VAP) granting taxpayers the privilege of last priority in the audit and investigation of all internal revenue taxes for taxable year ending December 31, 2000 and all prior years.

Subsequently, RR No. 8-2001 was amended by RR No. 10-2001 dated September 3, 2001 *(Exhibit "D")*, where it was provided under Section 2 thereof that-

> "Audit of taxpayers shall automatically be suspended upon availment of the VAP. <u>Letters of Authority (Las)/Audit Notices (ANs), Taxpayer Verification Orders (TVNs) or Mission Order (MOs) shall thereafter be cancelled and withdrawn upon issuance of the Certificate of Qualification, or if no such Certificate has been issued, then within thirty (30) days after the taxpayer has compiled with all the conditions and requirements for the availment of the VAP.</u> The suspension of the authority to audit/investigate, however, shall be on a per tax type or only on the kind of tax subject of the VAP availment." *(stress supplied)*

Under Section 6 of the said RR No. 8-2001, the validity of the VAP would expire on September 30, 2001. However, amendments were made extending the deadline for the availment of the VAP to December 15, 2001 under RR No. 16-2001 dated October 25, 2001, and up to December 28, 2001 under RR No. 21-2001 dated December 18, 2001.

Taking advantage of the privilege granted under the VAP, petitioner filed on December 18, 2001 with the Land Bank of the Philippines the duly accomplished VAP availment forms for income, percentage, expanded and compensation withholding and documentary stamp taxes for taxable years 1999 and 2000, and paid on the same day the corresponding VAP amount totaling P6,750,759.06. Availment of the VAP and the payment of the corresponding VAP amount are evidenced by the following documents:

FOR TAXABLE YEAR 1999

EXHIBIT	DESCRIPTION	VAP AMOUNT PAID
"G"	VAP Availment Form for Documentary Stamp Tax (DST) stamped received by Land Bank on December 18, 2001	P 60,912.00
"G-1"	Land Bank Official Receipt No. 10352387 dated December 18, 2001 for P60,912.00 for the DST payment	
"G-2"	Validated VAP Payment Form No. 0607 for the DST payment stamped received by Land Bank on December 18, 2001	
"G-3"	Documentary Stamp Tax Declaration/Return for taxable year 1999 stamped received by Land Bank on December 18, 2001	
"H"	VAP Availment Form for Withholding Tax-Compensation stamped received by Land Bank on December 18, 2001	P 353,657.13
"H-1"	Land Bank Official Receipt No. 10352385 dated December 18, 2001 for P353,657.13	
"H-2"	Validated VAP Payment Form No. 0607 for the withholding tax-compensation payment stamped received by Land Bank on December 18, 2001	
"H-3"	Quarterly Remittance Return of Final Income Taxes Withheld for taxable year 1999	
"I"	VAP Availment Form for Percentage Tax stamped received by Land Bank on December 18, 2001	P 2,527,983.95

"I-1"	Land Bank Official Receipt No. 10352386 dated December 18, 2001 for P2,527,983.95	
"I-2"	Validated VAP Payment Form No. 0607 for the percentage tax stamped received by Land Bank on December 18, 2001	
"1-3"	Quarterly Percentage Tax Return for the 4th quarter of taxable year 1999 duly stamped received by Land Bank on December 18, 2001 with Land Bank Official Receipt No. 3928200 for P18,067.76	
"I-4"	Quarterly Percentage Tax Return for the 3rd quarter of taxable year 1999 duly stamped received by Land Bank on December 18, 2001 with Land Bank's "Local Clearing Checks" slip acknowledging receipt of Bank of America Check for P7,765,415.28 as payment for the percentage tax for the 3rd quarter of taxable year 1999	
"I-5"	Quarterly Percentage Tax Return for the 2nd quarter of taxable year 1999 duly stamped received by Land Bank on December 18, 2001 with Land Bank's "Local Clearing Checks" slip acknowledging receipt of Bank of America Check for P8,818,195.62 as payment for the percentage tax for the 2nd quarter of taxable year 1999	
"I-6"	Quarterly Percentage Tax Return for the 1st quarter of taxable year 1999 duly stamped received by Land Bank on December 18, 2001 with a machine validation at the lower right portion acknowledging receipt of P8,678,184.80 as payment for the percentage tax for the 1st quarter of taxable year 1999	
"J"	VAP Availment Form For Income Tax stamped received by Land Bank on December 18, 2001	P 2,201,418.41
"J-1"	Land Bank Official Receipt No. 10352388 dated December 18, 2001 for P2,201,418.41	
"J-1-A"	Validated VAP Payment Form No. 0607 for the income tax payment stamped received by Land Bank on December 18, 2001	
"J-2" to "J-3"	Annual Income Tax Return for taxable year 1999 duly stamped received by Land Bank on December 18, 2001	
"J-4"	Land Bank Official Receipt No. 6479328 dated April 10, 2000 stamped received by Land Bank on December 18, 2001 for P123,324.47 as payment for the income tax for the 4th quarter of 1999	
"J-5"	Quarterly Income Tax Return for the 3rd quarter of taxable year 1999 duly stamped received by Land Bank on December 18, 2001	
"J-6"	Land Bank's "Local Clearing Checks" slip dated November 23, 1999 acknowledging receipt of Bank of America check for P6,497,918.14 as payment for the income tax for the 3rd quarter of taxable year 1999	
"J-7"	Quarterly Income Tax Return for the second quarter of taxable year 1999 duly stamped received by Land Bank on December 18, 2001	
"J-8"	Land Bank's "Local Clearing Checks" slip dated August 17, 1999 acknowledging	

	receipt of Bank of America check for P8,318,821.87 as payment for income tax for the 2nd quarter of taxable year 1999	
"J-9"	Quarterly Income Tax Return for the 1st quarter of taxable year 1999 duly stamped received by Land Bank on December 18, 2001	
"J-10"	Land Bank's "Local Clearing Checks" slip dated May 18, 1999 acknowledging receipt of Bank of America check for P7,674,119.62 as payment for income tax for the 1st quarter of taxable year 1999	
"J-11"	VAP Availment Form For Expanded Withholding Tax stamped received by Land Bank on December 18, 2001	P 77,159.44
"J-12"	Land Bank Official Receipt No. 10352393 dated December 18, 2001 for P77,159.44	

FOR TAXABLE YEAR 2000

EXHIBIT	DESCRIPTION	VAP AMOUNT PAID
"K"	VAP Availment Form for Documentary Stamp Tax (DST) stamped received by Land Bank on December 18, 2001	P 9,912.00
"K-1"	Land Bank Official Receipt No. 10352389 dated December 18, 2001 for P9,912.00 for the DST payment	
"K-2"	Validated VAP Payment Form No. 0607 for the DST payment stamped received by Land Bank on December 18, 2001	
"K-3"	Documentary Stamp Tax Declaration/Return for taxable year 2000 stamped received by Land Bank on December 18, 2001	
"L"	VAP Availment Form For Expanded Withholding Tax dated December 18, 2001 stamped received by Land Bank on December 18, 2001	P 49,320,00
"L-1"	Land Bank Official Receipt No. 10352391 dated December 18, 2001 for P49,320.00	
"L-2"	Validated VAP Payment Form No. 0607 dated December 18, 2001 for the expanded withholding tax payment stamped received by Land Bank on December 18, 2001	
"L-3"	Annual Information Return of Creditable Income Taxes Withheld (Expanded)/ Income Payments Exempt from Withholding Tax (BIR Form No. 1604-E) for taxable year 2000 duly stamped received by Land Bank on December 18, 2001	
"L-4" to "L-16"	Monthly Remittance Return of Creditable Income Taxes Withheld (Expanded) from January, 2000 all stamped received by Land Bank on December 18, 2001	
"M"	VAP Availment Form for Percentage Tax dated December 18, 2001 stamped received by Land bank on December 18, 2001	P 720,407.52
"M-1"	Land Bank Official Receipt No. 10352392 dated December 18, 2001 for P720,407.52 for the VAP payment for the percentage tax	

"M-2"	Validated VAP Payment Form No. 0607 for the percentage tax stamped received by Land Bank on December 18, 2001		
"M-3"	Quarterly Percentage Tax Return for the 4th quarter of taxable year 2000 duly stamped received by Land Bank on December 18, 2001		
"M-4"	Land Bank Official Receipt No. 7058760 dated January 19, 2001 for P5,111,052.00 as payment for the percentage taxes due for the 4th quarter of taxable year 2000		
"M-5"	Quarterly Percentage Tax Return for the 3rd quarter of taxable year 2000 duly stamped received by Land Bank on December 18, 2001		
"M-6"	Quarterly Percentage Tax Return for the 2nd quarter of taxable year 2000 duly stamped received by Land Bank on December 18, 2001		
"M-7"	Quarterly Percentage Tax Return for the 1st quarter of taxable year 2000 duly stamped received by Land Bank on December 18, 2001		
"M-8"	Land Bank Official Receipt No. 6479343 dated April 24, 2000 for P2,093,023.20 as payment for the percentage taxes due for the 1st quarter of taxable year 2000		
"N"	VAP Availment Form For Income Tax dated December 18, 2001 stamped received by Land Bank on December 18, 2001	P	749,988.61
"N-1"	Land Bank Official Receipt No. 10352390 dated December 18, 2001 for P2,201,418.41 for the VAP payment for income tax		
"N-2"	Validated VAP Payment Form No. 0607 for the income tax stamped received by Land Bank on December 18, 2001		
"N-3" to "N-5"	Annual Income Tax Return (consisting of 3 pages) for taxable year 2000 paid under Bank of America Check No. 808357 for P3,675,098.00 duly stamped received by Land Bank on December 18, 2001		
"N-6"	Quarterly Income Tax Return for the 3rd quarter of taxable year 2000 duly stamped received by Land Bank on December 18, 2001		
"N-7"	Quarterly Income Tax Return for the second quarter of taxable year 2000 duly stamped received by Land Bank on December 18, 2001		
"N-8"	Quarterly Income Tax Return for the 1st quarter of taxable year 2000 duly stamped received by Land Bank on December 18, 2001		
"N-9"	Land Bank Official Receipt No. 6484075 dated May 24, 2000 for P1,324,825.09 for the income tax payment for the 1st quarter of taxable year 2000		

Subsequently, the Land Bank of the Philippines forwarded petitioner's VAP application to the Large Taxpayers Document Processing and Quality Assurance Division of the BIR. The transmittal was received on December 21, 2001, evidenced by a letter to petitioner dated August 22, 2002 *(Exhibit "O")* from the Manager of LBP-Pasong Tamo Branch.

On June 21, 2002, the Large Taxpayers Service of the BIR, through Assistant Commissioner Edwin R. Abella, issued a Notice of Disqualification *(Exhibit "P")* for the VAP application of petitioner for income tax for the taxable year 1999. A week later, on June 28, 2002, Asst. Commissioner Abella also issued separate Notices of Disqualification for the VAP application of petitioner for withholding tax-expanded *(Exhibit "Q")* and percentage tax *(Exhibit "R")* for the taxable year 1999.

The notice of disqualification dated June 21, 2002 for the VAP application for income tax covering taxable year 1999, which was received by petitioner on July 18, 2002, cited as one of the grounds for the denial of the VAP application, the alleged erroneous rate used in computing the VAP due, resulting in a VAP deficiency. To elaborate, the Large Taxpayer Service contended that petitioner should have applied the rate of 20% and paid a VAP of P4,402,836.82 since the ratio of the tax due per return over the annual gross sales/receipts for the year did not exceed 2.5%, and that petitioner should not have used the rate of 10%, which was applicable only if the ratio of the tax due per return over the annual gross sales/receipts for the year exceeded 2.5%.

In a letter dated July 19, 2002 *(Exhibit "S")*, which was received by the Large Taxpayers Service of the BIR on July 22, 2002, petitioner countered that it applied the rate of 10% because the ratio of the tax due per return over the annual gross sales/receipts for the year was exactly 2.5%, and since the RR was ambiguous in that it did not prescribe any rate when the ratio of the tax due per return over the annual gross sales/receipts for the year is exactly 2.5%, following the basic rule of statutory construction, the ambiguity must be construed against the BIR. Through the same letter, petitioner submitted the required documents specified in the notice of disqualification, namely, (a) the sworn statement of a responsible officer of petitioner that petitioner had no outstanding tax liability as of the time of the VAP availment, and (b) the quarterly income tax returns with the corresponding proofs of payment.

The notices of disqualification dated June 28, 2001 for the VAP application for expanded withholding tax and percentage tax were received by petitioner on July 31, 2002. In two separate letters both dated August 1, 2002 *(Exhibits "T and U")*, which were received by the Large Taxpayers Service on August 5, 2002, petitioner seasonably answered the notices of disqualification.

Meantime, in a letter dated July 1, 2002 *(Exhibit "V")*, the Large Taxpayers Service notified petitioner of the completion of the investigation conducted pursuant to LOA No. 00002173.

By way of reply, in a letter dated July 5, 2002 *(Exhibit "W")*, petitioner informed the Large Taxpayers Service about the former having availed of the VAP, citing Section 2 of RR No. 10-2001, which provided for the automatic suspension of the LOA, inter alia, "upon issuance of the Certificate of Qualification, or if no such Certificate has been issued, then within thirty (30) days after the taxpayer has complied with all the conditions and requirements for the availment of the VAP."

However, in a letter dated July 17, 2002 *(Exhibit "W-1")*, the Large Taxpayers Service informed petitioner that the latter did not validly avail of the VAP, this time not upon the grounds cited in the notice of disqualification but upon the alleged failure of petitioner to comply with the conditions and requirements of the availment of the VAP prescribed by Revenue Memorandum Order No. 21-2001, one among which was the filing of the VAP application with the Large Taxpayers Service after the said application had been stamped "received" by the appropriate BIR collection agent.

On September 12, 2002, Asst. Commissioner Abella issued a Preliminary Assessment Notice *(Exhibit "X, X-1 to X-4")* for deficiency income tax of P22,225,511.42, expanded withholding tax of P12,770.86, and percentage tax of P77,447,330.07.

And on October 23, 2002, Atty. Abella issued a formal letter of demand *(Exhibit "Y, Y-1 to Y-8")* for deficiency income tax of P22,225,511.42, expanded withholding tax of P12,770.86, and percentage tax of P77,447,330.07.

Protesting the assessment, petitioner sought reconsideration thereof by way of a letter dated November 25, 2002 *(Exhibit "Z")*.

The request for reconsideration was received by the office of respondent on November 26, 2002. Under Section 228 of the National Internal Revenue Code, respondent has thirty (30) days within which to deny the protest which was filed in the form of a request for reconsideration, and if the protest is not acted upon within the period mentioned, the taxpayer has thirty (30) days from the lapse of one hundred eighty (180) days from submission of the documents within which to appeal to the Court of Tax Appeals. Since respondent did not act on petitioner's protest within the 30-day period, petitioner filed this appeal on June 24, 2003.

However, in a letter dated July 4, 2003, the Large Taxpayers Service issued its final decision *(Exhibit "AA, AA-1 to AA-9")* denying the protest of petitioner.

Meanwhile, on September 25, 2002, the Large Taxpayers Service issued to petitioner a Certificate of Qualification *(Exhibit "BB")* for the VAP application of the latter for percentage tax covering taxable year 2000. This Certificate of Qualification was issued by the Large Taxpayers Service without the petitioner complying with the requirements prescribed by Revenue Memorandum Order No. 21-2001 cited by the Large Taxpayers Service in its letter dated July 17, 2002 *(Exhibit "W-1")* as the principal ground for denying the VAP applications of petitioner for income, percentage and withholding taxes for taxable year 1999.

Likewise, on August 28, 2003, the Large Taxpayers Service also issued to petitioner a Certificate of Qualification *(Exhibit "CC")* for the VAP application of the latter for documentary stamp tax covering taxable years 1999 and 2000. This Certificate of Qualification was also issued by the Large Taxpayers Service without the petitioner complying with the requirements prescribed by Revenue Memorandum Order No. 21-2001 cited by the Large Taxpayers Service in its letter dated July 17, 2002 *(Exhibit "W-1")* as the principal ground for denying the VAP applications of petitioner for income, percentage and withholding taxes for taxable year 1999.

By way of an Answer dated August 11, 2003, respondent asserted the following Special and Affirmative Defenses, among others:

> a. The Letter of Authority No. 00002173 dated September 19, 2000 was not suspended nor cancelled or withdrawn when petitioner paid the computed VAP due on December 18, 2001 because it complied only with the requirement on the payment of VAP but not the application as provided under Section 3 of RR 8-2001, as amended by RR 10-2001;
>
> b. There is also a need for petitioner to file with the Technical Working Group in the Large Taxpayers Service their VAP application pursuant to Section 5 and 6.1 of RMO 21-2001 in order for the availment of VAP to be completely valid;

c. Section 6.6 of RMO 21-2001 requires for a proof of full compliance to be observed by taxpayers availing of the VAP;

d. Availment of the VAP is not without limitations and does not guarantee an automatic enjoyment of the benefits it provides (Section 6.7 of RMO 21-2001);

e. Section 2 of RR 8-2001, as amended by RR 10-2001, and Section 8 of RMO 21-2001 provides that the audit of taxpayers shall be automatically suspended upon availment of the VAP. LA/AN/TVN or MOs shall thereafter be cancelled and withdrawn upon issuance of the Certificate of Qualification, or if no such Certificate has been issued, within thirty (30) days **after the taxpayer has complied with all the conditions and requirements for the availment of the VAP**; and

f. Petitioner failed to state the facts, applicable laws, rules and regulations or jurisprudence on which its protest is based. Hence, its protest is considered void and without force and effect. Likewise, no documents to support its protest were submitted within sixty (60) days from the date of filing of letter protest pursuant to Section 3.15 of RR 12-99.

The parties submitted the following stipulation of issues of the case:

1. Whether or not petitioner had substantially complied with the conditions and requirements for the availment of the VAP for income, percentage and expanded withholding taxes for 1999, notwithstanding—

   a. The non-filing of the third copy of the VAP application forms with the Large Taxpayers Service of the BIR as prescribed by Section 6.1 of RMO No. 21-2001; and

   b. The lack of subsequent confirmation by the Large Taxpayers Service that the application is "COMPLETE AS TO DOCUMENTARY REQUIREMENTS" as prescribed by Section 6.6 of RMO No. 21-2001;

and considering further the issuance of the Certificate of Qualification for documentary stamp tax covering taxable year 1999 and 2000, and the issuance of Certificate of Qualification for percentage tax covering taxable year 2000, without the petitioner complying with the requirements mentioned in items (a) and (b) above;

2. Whether or not the Letter of Authority No. 00002173 dated September 19, 2000 was considered withdrawn and cancelled within 30 days after petitioner had substantially complied with the conditions and requirements for the availment of the VAP; and

3. If so, whether or not the deficiency assessment covered by the Preliminary Assessment Notice dated September 12, 2002, the Formal Letter of Demand dated October 23, 2002 and the "Final Decision on Disputed Assessment dated July 24, 2003 was proper.

As agreed upon by both parties, the Court issued a resolution dated September 16, 2004 and considered the case submitted for decision based solely on the "Amended Joint Stipulation of Facts and Issues" filed on September 10, 2004. Hence, after both parties have filed their respective memorandum, the Court issued a resolution dated March 15, 2005, submitting the case for decision.

We observed that the first and second issues are interrelated or intertwined, this Court finds it apropos to discuss them jointly.

Petitioner argues that it has substantially complied with the conditions and requirements for the availment of the VAP. It specifically points out the following circumstances which warrant the validity of its availment, to wit:

> "a. In the initial notice of disqualification of petitioner's VAP applications issued by the Large Taxpayer Service (LTS), the alleged lack of filing a copy of the VAP application and other forms with the Technical Working Group of the National Office of the BIR, and the lack of subsequent confirmation by the LTS that the application was complete as to documentary requirements <u>were never raised</u>;
>
> b. Respondent issued two (2) Certificates of Qualification based on the VAP applications filed, one for documentary stamp taxes covering taxable year 1999 and 2000, and another for percentage tax covering taxable year 2000, <u>without the petitioner complying with the requirements mentioned</u>." *(Underscoring Ours)*

It is the position of petitioner that considering the failure on the part of respondent to question the validity of the subject VAP applications for income tax, expanded withholding tax and percentage tax covering the taxable year 1999, on the grounds of: (a) lack of filing of VAP forms with the Technical Working Group (TWG) of the Large Taxpayer Service (LTS), and (b) lack of subsequent confirmation of completion of documentary requirements, in all the initial notices of disqualification *(Exhibits "P, Q and R")*, such failure constitutes a waiver on the part of respondent to raise the same grounds before this Court. Petitioner posits that the grounds presently raised by respondent should be considered as a mere afterthought and thus, legally insufficient to invalidate such VAP availments.

Petitioner, from the foregoing facts, therefore concludes that the TWG of the LTS appears to have already received the VAP applications of petitioner from the Large Taxpayers Document Processing and Quality Assurance Division, and as a matter of fact, after due evaluation, the LTS had effectively dispensed with or waived a mere technicality (filing copies of the VAP applications with the TWG of the LTS) and focused instead on the substantive considerations revolving around the alleged deficiency in the amount of VAP payments.

Moreover, to further bolster its claim of substantial compliance, petitioner points out that respondent even issued two (2) Certificates of Qualification (CQs), one for documentary stamp taxes covering taxable years 1999 and 2000 *(Exhibit "CC")* and another for percentage tax covering taxable year 2000 *(Exhibit "BB")*, despite the fact that no copy of the corresponding VAP application forms were previously filed with the TWG of the LTS, and without any previous confirmation that the documentary requirements were completed. These only show, as petitioner insists, that the procedural requirements of filing a copy of a VAP application and other forms with the Technical Working Group of the National Office of the BIR, and the subsequent confirmation by the LTS that the application was complete as to documentary requirements, may actually be dispensed with.

In its conclusion, petitioner explains that in the light of the validity of its VAP availment after its alleged substantial compliance with the conditions and requirements provided for by law, it shall be entitled to the benefits provided under the pertinent provisions of Section 2 of Revenue Regulation No. 8-2001 (RR 8-2001), as amended by Revenue Regulation No. 10-2001 (RR 10-2001) and Section 8 of Revenue Memorandum Order No. 21-2001 (RMO 21-2001) hereunder quoted for easy reference:

> "*SECTION 8. Benefits from VAP availment.* — A taxpayer who has availed of the VAP shall not be audited except upon authorization and approval of the CIR when there is strong evidence or finding of understatement in the payment of taxpayer's correct tax liability by more than thirty percent (30%) as supported by a written report of the appropriate office detailing the facts and the law on which such finding is based: Provided, however, that any VAP payment should be allowed as tax credit against the deficiency tax due, if any, in case the concerned taxpayer has been subjected to audit.
>
> **Audit of taxpayers shall automatically be suspended upon availment of the VAP. LAs/ANs/TVNs or MOs shall thereafter be cancelled and withdrawn upon issuance of the Certificate of Qualification, or if no such Certificate has been issued, then within thirty (30) days <u>after the taxpayer has complied with all the conditions and requirements for the availment of the VAP</u>. The suspension of audit/investigation and the cancellation of the authority to audit/investigate, however, shall be on a per tax type or only on the kind of tax subject of VAP availment.**
>
> Before any LA, AN, TVN, or MO is issued against a taxpayer covering the taxable year/s covered by this Program, it is incumbent upon the investigating office to first secure a Certification from the DCIR-Operations Group on whether such taxpayer has availed of the VAP and whether such availment has been correspondingly approved. On the other hand, reports of tax audit/investigation of taxpayers who did not avail of the VAP shall be subjected to post audit by the National Office upon request thereof by the CIR or his duly authorized representative." *(Emphasis and underscoring Ours)*

Petitioner, in support of its above-stated proposition and applying the above-quoted provisions, explained that the CQs for the VAP applications for income tax, expanded withholding tax and percentage tax covering taxable year 1999 were deemed issued thirty (30) days from the date it has substantially complied with all the conditions and requirements set thereto. Thus, petitioner in counting the thirty-(30) day period from July 22, 2002 and August 5, 2002, corresponding to the dates petitioner's reply letters *(Exhibits "S, T and U")* to the notices of disqualification *(Exhibits "P, Q and R")*, concludes that its CQs for the VAP applications for the above-enumerated taxes were deemed issued on August 21, 2002 and September 4, 2002, respectively. In effect, petitioner argues that the subject notices of disqualification were already belatedly sent considering the above-stated reasons.

Thus, it could be seen from the foregoing, that petitioner's protest of the deficiency assessment issued by respondent is based on the sole ground that by its availment of the VAP, the Letter of Authority No. 00002172 dated September, 2000 should be considered withdrawn and cancelled within thirty (30) days after it had substantially complied with the conditions and requirements for such availment. Hence, it maintains that the aforesaid assessment covered by the Preliminary Assessment Notice *(Exhibit "X", inclusive)* dated September 12, 2002, the Formal Letter of Demand dated October 23, 2002 *(Exhibit "Y", inclusive)* and the Final Decision on Disputed Assessment dated July 24, 2003 *(Exhibit "AA", inclusive)* were improper.

On the other hand, it is the contention of the respondent that petitioner is not entitled to the benefits of the VAP under the pertinent provisions of RR 8-2001, as amended by RR 10-2001 and implementing RMO 21-2001, because it has not strictly complied with all the conditions and requirements embodied therein. Furthermore, after a thorough evaluation of the VAP applications of petitioner, respondent observed serious defects and deficiencies in the actual amounts paid which are sufficient grounds to disqualify the aforesaid VAP applications. It is precisely for this reason that an assessment was issued against petitioner premised on the fact that it has not validly availed of the VAP as provided for in the applicable provisions.

The crux of the matter therefore is whether or not strict compliance with Revenue Memorandum Order No. 21-2001 is mandatory. The pertinent provisions of the aforesaid RMO are hereunder quoted for easy reference, to wit:

> "SECTION 5. *Requirements to be attached to the VAP application form.* — After the original and triplicate copies of the VAP Application Form have been duly stamped "received" and returned to the taxpayer by the concerned AAB/RCO/DMT, one copy shall be filed in accordance with Subsection 6.1 hereof for processing and approval together with the following documents: xxx
>
> SECTION 6. *Processing of VAP applications.* —
>
> 6.1 *Filing of VAP applications.* — For VAP applications on covered years where returns have been filed, <u>such applications and VAP payment forms, after having been duly stamped "received" by the appropriate BIR collection agent (AAB or RCO/DMT, whichever is applicable), together with the required attachments, shall be filed with the Technical Working Group (TWG) of the Regional Office having jurisdiction over the place where the VAP-applicant taxpayer is required to register.</u> However, if the taxpayer availing of VAP is registered in a RDO located outside the province where the Regional Office is situated, such VAP application, duly stamped, "received" by the appropriate BIR collection agent, may be filed with the said RDO for pre-processing. Within seven (7) days after the taxpayer has complied with all the requirements and conditions for availment, the same shall be transmitted to the Regional Office for final processing. If the application is approved, a Certificate of Qualification duly signed by the Regional Director shall be issued to the taxpayer, otherwise, a Notice of Disqualification shall be issued.
>
> xxx xxx xxx

> 6.6 *Proof of full compliance.* — Upon submission of all the necessary documentary requirements, the concerned member of the respective teams should indicate in the appropriate box provided in the VAP application form that such application is 'COMPLETE AS TO DOCUMENTARY REQUIREMENTS', further affixing thereto his full name and signature. The same information shall likewise be indicated on the VAP-applicant taxpayer's copy (triplicate copy) of the VAP application form for his file and reference.
>
> 6.7 *Grounds for disqualification.* — The following shall constitute grounds for disqualification of VAP applications:
>
> > 6.7.1 If the taxpayer failed to submit the documentary requirements within the reglementary period provided hereof, unless he asks for an extension in writing;
> >
> > 6.7.2 In case of defects/omissions on the face of the VAP application/VAP payment form which the taxpayer has failed to rectify within the period prescribed or agreed upon;
> >
> > 6.7.3 In case of failure to pay the previously recognized unpaid tax liability;
> >
> > 6.7.4 In case of failure to pay the VAP amount in accordance with this Order (e.g., use of TDM or excess tax credits in the payment of the VAP amount); and
> >
> > 6.7.5 In case VAP is availed on those cases not covered by the Program.
>
> 6.8 *Effect of disqualification.* — If disqualified, his payment under the VAP shall be credited against his deficiency tax liability, in case of audit. xxx" *(Underscoring ours)*

From the above-quoted provisions, it is clear that there are certain conditions which must first be complied with and requirements which must first be accomplished before availment of the VAP is considered proper and valid. Failure to comply thereto is a valid ground for the disqualification of said application. Clearly, availment of the VAP is not without limitations and does not guarantee an automatic enjoyment of the benefits it provides.

As correctly pointed out by respondent, the provisions of Section 8 of RMO 21-2001 which provides an automatic suspension to audit any taxpayer and a cancellation and withdrawal of any LAs/ANs/TVNs or MOs as a consequence of the availment of VAP, shall only take effect **after the taxpayer has complied with all the conditions and requirements** provided therein. *(Emphasis ours)*

It is worthy to mention that "the rationale behind the VAP is to give taxpayers a final opportunity to come up with a clean slate before they will be dealt with strictly for not paying their correct taxes. Therefore, it was enacted to encourage taxpayers to pay their taxes or pay the correct taxes ***(Julieta Ariete vs. CIR, et al., C.T.A. Case No. 5880, January 15, 2002)***". However, in availing the same, strict compliance with the conditions and requirements provided under the pertinent provisions of the subject RMO should be observed.

It bears stressing that pursuant to Section 6(a), in relation to Section 244, of the National Internal Revenue Code of 1997, the subject revenue regulations and memorandum order are hereby promulgated to establish the policy and procedures governing the availment by taxpayers of the privilege of last priority in the audit and investigation of all internal revenue taxes. Thus, strict observance of these regulations are mandatory because such are considered administrative rulings (in the sense of more specific and less general interpretations of tax laws) which are issued from time to time by the Commissioner of Internal Revenue to effectively implement the provisions of the 1997 NIRC. It is widely accepted that the interpretation placed upon a statute by the executive officers, whose duty is to enforce it, is entitled to great respect by the courts unless, of course, judicially found to be erroneous ***(Philippine Bank of Communications vs. Commissioner of Internal Revenue, 302 SCRA 241 [1999])***.

By analogy, the Supreme Court unequivocally ruled in one case that:

> "The NIRC, under Sections 203 and 222, provides for a statute of limitations on the assessment and collection of internal revenue taxes in order to safeguard the interest of the taxpayer against unreasonable investigation. Unreasonable investigation contemplates cases where the period of assessment extends indefinitely because this deprives the taxpayer of the assurance that it will no longer be subjected to further investigation for taxes after the expiration of a reasonable period of time. xxx
>
> xxx xxx xxx
>
> RMO No. 20-90 implements these provisions of the NIRC relating to the period of prescription for the assessment and collection of taxes. A cursory reading of the Order supports petitioner's argument that the RMO must be strictly followed, xxx ***(Philippine Journalists, Inc. vs. Commissioner of Internal Revenue, G.R. No. 162852, December 16, 2004)***." *(Underscoring Ours)*

Guided by the foregoing principles laid down by the Supreme Court, in resolving the instant case, We rule that strict compliance with the aforesaid revenue regulations and memorandum order should likewise be observed. Indubitably therefore, petitioner's stand that the 30-day period provided for under Section 8 of RMO 21-2001 shall apply in the case under consideration is devoid of merit due to failure of petitioner to strictly comply therewith. Therefore, the LOA *(Exhibit "B")* issued by respondent on September 19, 2000 is not considered withdrawn or cancelled; and thus, valid.

With respect to the arguments of petitioner that respondent has impliedly waived the technical requirements of the VAP applications: (a) by not including in his initial notices of disqualification the alleged lack of filing a copy of the VAP application and other forms with the Technical Working Group of the National Office of the BIR, and the lack of subsequent confirmation by the LTS that the application was complete as to documentary requirements as grounds thereof; and (b) by subsequently issuing two (2) CQs based on the VAP applications filed, one for documentary stamp taxes covering taxable year 1999 and 2000, and another for percentage tax covering taxable year 2000, without the petitioner complying with the requirements mentioned, the same could not hold water.

In order to put more clarity on the subject matter, We would like to emphasize that, "[i]t is a long and settled rule of law that the Government is not bound by the errors committed by its agents. In the performance of its governmental functions, the State cannot be estopped by the neglect of its agent and officers. Although the Government may generally be estopped through the affirmative acts of public officers acting within their authority, their neglect or omission of public duties as exemplified in this case will not and should not produce that effect ***(Commissioner of Internal Revenue vs. Court of Appeals, Citytrust Banking Corporation and Court of Tax Appeals, 234 SCRA 348 [1994])***."

Moreover,

> "Nowhere is the aforestated rule more true than in the field of taxation. <u>It is axiomatic that the Government cannot and must not be estopped particularly in matters involving taxes.</u> Taxes are the lifeblood of the nation through which the government agencies continue to operate and with which the State effects its functions for the welfare of its constituents. <u>The errors of certain administrative officers should never be allowed to jeopardize the Government's financial position, especially in the case at bar where the amount involves millions of pesos the collection whereof, if justified, stands to be prejudiced just because of bureaucratic lethargy</u> ***(Commissioner of Internal Revenue vs. Court of Appeals, Citytrust Banking Corporation and Court of Tax Appeals, supra)***." *(Underscoring ours)*

Accordingly, notwithstanding the fact that respondent failed to state in his initial notice of disqualification that petitioner failed to file a copy of its VAP applications and other forms with the Technical Working Group of the National Office of the BIR, and the lack of subsequent confirmation by the LTS that the application was complete as to documentary requirements, respondent could not be deprived of his right to eventually point out such defects in petitioner's VAP application and; thus, deny the said VAP availment on the grounds thereof. Furthermore, the issuance of the other CQs for the VAP applications filed, one for documentary stamp taxes covering taxable year 1999 and 2000, and another for percentage tax covering taxable year 2000, without compliance by petitioner of all the conditions and requirements provided in the subject order, are deemed defective. No other than the petitioner itself has admitted the fact that the subject CQs were issued even though it failed to comply with the same conditions and requirements. In such case, there is indeed a clear issue on the validity of aforesaid CQs, which respondent should perhaps look into.

Although petitioner protested the subject deficiency assessment as reflected in its protest letter *(Exhibit "Z")*, it miserably failed to support its arguments before this Court as no other substantial evidence were presented before Us to consider. Petitioner merely relied on the validity of its VAP availment, which is, unfortunately, found by this Court to be invalid and defective.

However, even though We have already established that there was no valid availment of VAP by the petitioner, which in effect, did not cancel or withdraw the LOA *(Exhibit "B")*, the deficiency assessment and formal letter of demand *(Exhibit "Y, Y-1 to Y-8")* issued by respondent, We still find it important to determine whether or not the aforesaid deficiency assessment was proper for a complete resolution of the case under consideration.

As reflected in the records of this case, the 1999 deficiency tax assessment was computed as follows:

DEFICIENCY INCOME TAX (*Exhibit Y-1*)

GROSS BILLINGS PER RETURN		P 880,567,364.00	P22,014,184.10
Adjustment			
1. SPCL and NRML commissions On passengers deducted from gross billings	P288,945,975.09		
2. Cargo Commissions – deducted from gross billings	30,581,261.44		
3. Unreported sales/receipts on Cargo	172,868,372.58		
4. Unreported excess baggage Revenue	6,627,910.00	499,023,519.11	12,475,587.98
Gross Billings Per Audit		P1,379,590,883.11	P34,489,772.08
Tax Paid Per Return			24,215,602.51
Basic			P10,274,169.57
Surcharge-50%			6,237,793.99
Interest- 4-15-2000/10-23-2002			5,896,967.50
TOTAL DEFICIENCY INCOME TAX			**P22,408,931.06**

DEFICIENCY EXPANDED WITHHOLDING TAX (*Exhibit Y-2 & p. 386, Folder 2, BIR Records*)

AMOUNT PER RETURN	P 5,580,368.10	P 492,893.76
Adjustment		
1. Customs & Immigration Officers	P 44,323.00	P 6,648.45
2. Janitorial	371,843.90	3,718.44
3. Security	1,141,796.62	11,417.97
4. Delivery Charges	135,760.94	1,357.61
5. Retainers Fee	24,809.50	2,480.95
6. Rental	680,963.41	34,048.17
7. Other Contractors	462,794.77	4,627.95
Total Adjustment	P 2,862,292.14	P 64,299.54
Total Per Audit	P 8,442,660.24	P 557,193.30
Tax Paid Per Return		492,893.76
Basic Deficiency Expanded Withholding Tax		P 64,299.54
Interest 1-25-2000 to 12-18-2001		**24,048.03**
Total Deficiency Expanded Withholding Tax		P 88,347.57
Less: VAP Payment		
Basic	P 64,299.53	
Interest	**12,859.91**	77,159.44
Net Deficiency Interest		P 11,188.13
Add: Interest on unpaid deficiency interest 12-19-2001 to 10-23-2002		1,872.14
TOTAL DUE & PAYABLE		**P 13,060.27**

DEFICIENCY PERCENTAGE TAX (*Exhibit Y-4*)

GROSS RECEIPTS PER RETURN	P 842,661,315.23
Adjustment	
1. Unreported sales on cargo	P 346,226,879.04
2. Passenger with final destination other than Taipei	880,889,783.41
3. Unreported excess baggage revenue	6,627,910.00
4. Unreported sales/receipts base on passenger transfer manifest per audit on types of class passenger seats Compared to their reported summary per returns	14,250,942.93
Total adjustment	P1,247,995,515.38
Gross Receipts Per Audit	P2,090,656,830.61
Tax Due Per Audit	P 62,719,704.92
Less: Tax Paid	27,807,823.41
Basic Deficiency Percentage Tax	P 34,911,881.51
Surcharge-50%	18,719,932.73
Interest up to 10-23-02	23,765,515.83
Compromise Penalty – Failed to register books of accounts prescribed under Section 232 of the NIRC and implemented by RR 6-66 and failure to preserved records such as disbursement Vouchers, airline tickets prescribed under Section 235 of the NIRC (RMO 1-90)	50,000.00
TOTAL DEFICIENCY PERCENTAGE TAX	**P 77,447,330.07**

Considering the varied tax assessments invoked in this case concerning different tax liabilities, We are constrained to clarify the above-quoted computation as follows:

I. DEFICIENCY INCOME TAX – P22,408,931.06

Respondent's computation of deficiency income tax, stemmed from four items of discrepancies, to wit:

1.	SPCL and NRML commissions on passengers deducted from gross billings	P288,945,975.09
2.	Cargo Commissions – deducted from gross billings	30,581,261.44
3.	Unreported sales/receipts on Cargo	172,868,372.58
4.	Unreported excess baggage	6,627,910.00
	Total	P499,023,519.11

With respect to the "Special & Normal Commissions on Passengers and Cargo Commissions", respondent's findings show that petitioner failed to include in its Gross Philippine Billings special and normal commissions in the amount of

P288,945,975.09, as well as cargo commissions in the sum of P30,581,261.44. Thus, pursuant to Section 28(A)(3)(a) of the 1997 NIRC, the same should be subject to 2.5% income tax on Gross Philippine Billings. The aforesaid provision of law is hereunder quoted, to wit:

> "SEC. 28. *Rates of Income Tax on Foreign Corporations.-*
>
> (A) xxx
> (1) xxx;
> (2) xxx;
> (3) *International Carrier.* – An international carrier doing business in the Philippines shall pay a tax of two and one-half percent (2 ½%) on its 'Gross Philippine Billings' as defined hereunder:
> (a) *International Air Carrier.* – *'Gross Philippine Billings'* refers to the amount of **gross revenue** derived from carriage of persons, excess baggage, cargo and mail originating from the Philippines in a continuous and uninterrupted flight, irrespective of the place of sale or issue and the place of payment the ticket or passage document: *Provided,* That tickets revalidated, exchanged and/or indorsed to another international airline form part of the Gross Philippine Billings if the passenger boards a plane in a port or point in the Philippines: *Provided, further,* That for a flight which originates from the Philippines, but transshipment of passenger takes place at any port outside the Philippines on another airline, only the aliquot portion of the cost of the ticket corresponding to the leg flown from the Philippines to the point of transshipment shall form part of Gross Philippine Billings." *(Underscoring and emphasis Ours)*

On the other hand, petitioner avers that the said commissions were not in reality commissions but discounts which, in industry-wide practice, were outrightly deducted from the gross billings. It opines that the non-inclusion of discounts from Gross Philippine Billings was proper considering that they were not revenues and the practice of excluding them from Gross Philippine Billings was actually recognized by Revenue Regulations No. 15-2002.

We find petitioner's contention on this matter without merit.

Nowhere in the above-quoted law can it be found that discounts are considered deductions from Gross Philippine Billings. On the contrary, the Gross

Philippine Billings represent the total amount of gross revenue derived from passage of persons, excess baggage, cargo and/or mail. Therefore, Gross Philippine Billings are based on the gross revenue without consideration of any deduction. Consequently, petitioner should have included the discounts as part of its Gross Philippine Billings for purposes of computing its 2.5% final income tax liability.

In a most recent decision of the Supreme Court entitled ***Commissioner of Internal Revenue vs. Bank of Commerce, G.R. No. 149636, June 08, 2005***, it categorically defined the term "gross", stressing that:

> "The word 'gross' must be used in its plain and ordinary meaning. It is defined as 'whole, entire, total, without deduction'. A common definition is 'without deduction'. 'Gross' is also defined as 'taking in the whole; having no deduction or abatement; whole, total as opposed to a sum consisting of separate and specified parts'. Gross is the antithesis of net. xxx"

It is a settled rule in statutory construction that when the language of the law is clear and unequivocal, the law must be taken to mean exactly what it say's ***(Asian Transmission Corporation vs. Court of Appeals, March 15, 2004; Marin vs. Nacianceno, 19 Phil. 238 [1911])***. Construction and interpretation come only after it has been demonstrated that application is impossible or inadequate without them ***(People vs. Mapa, 20 SCRA 1164 [1967])***.

Moreover, in ***Qantas Airways Limited vs. The Commissioner of Internal Revenue, CTA Case No. 4459, June 23, 1993***, which was affirmed by the Court of Appeals in ***CA-G.R. SP No. 32109, June 7, 1995***, this Court had the opportunity to expound on the meaning of "Gross Philippine Billings", elucidating:

> "Petitioner's contention that 'the amount actually received by the petitioner as consideration for its ticket is its revenue which should be subject to the 2-½% GPB tax and not the face value of the ticket' (see Petitioner's Memorandum, p. 7) is unacceptable. The law is explicit on imposing the 2-1/2% GPB tax on 'gross revenue realized

from uplifts of passengers . . .'. By 'gross revenue' it means 'whole, entire, total' (Appeal of Braun, 105 Pa. 415, 41'5) 'without deductions. . .' (First Trust Co. of St. Paul v. Commonwealth Co., C.C.A.S.D., 98 F. 2d 27, 31). It is synonymous with 'gross income'. The Tax Code defines 'gross income' thus:

> "Gross income' includes gains, profits, and income derived from salaries, wages or compensation for personal service of whatever kind and in whatever form paid, or from profession, vocations, trades, business, commerce, sales or dealing in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interests, rents, dividends, securities or the transactions of any business carried on for gain or profit or gains, profits, and income derived from any source whatever. . . . (Sec. 29 [3]; underscoring supplied).'

Petitioner in trying to buttress his weak stand made use of an analogy, thus:

> '[m]ere increase in the value of shares of stocks does not make the stockholder taxable thereon as no income is received by such stockholder unless a sale of the shares is made for an amount in excess of its original cost (Umali on Taxation, 1985 ed., p. 78). Similarly, the fact that a plane ticket is valued at a particular amount does not make the issuing airline subject to GPB tax on such amount unless a sale of the ticket is made based on the amount appearing on its face. If the airline sold the ticket for less, then it is only logical that its GPB tax liability should be based only on the amount actually received. (See Petitioner's Memorandum, p. 8)'

Such contention is based neither in law nor in jurisprudence. It is erroneous because GPB tax is considered a tax on gross income (Commissioner of Internal Revenue vs. British Overseas Airways Corporation, April 30, 1987, 149 SCRA 395) meaning the income based on the price of the ticket on its face value, whole, entire, total and without deductions. In the sale of shares of stocks, value by itself is verily not an income, as correctly put by the petitioner since the market sales price is beyond the control of the seller. It is erratic and unpredictable. But 'value by itself is not an income' is not absolute and was wrongfully compared with the sales of tickets since the face value of the ticket can be realized had the petitioner chosen to. But it did not. Petitioner could have sold the tickets using its own resources rather than give discounts to travel agencies. But it did not. Instead, it opted to avail of the services of travel agencies as a marketing

> strategy thereby giving them discounts. The respondent cannot question the generosity of the petitioner to these travel agencies. However, it was absolutely right for the respondent to protect the interest of the government in seeing to it that its share, by way of taxes on the given discounts, would not be given away but should be shouldered by the petitioner.
>
> The petitioner, when it gave away discounts to travel agencies, was also giving away the share of the government by way of taxes on the said discounts. If ever the petitioner would like to show magnanimity of resources to its marketing arm (i.e., the travel agencies), it should not be at the expense of the government." *(Underscoring ours)*

Petitioner's contention that Revenue Regulations No. 15-02 supports its stand on the matter is untenable. While it is true that the respondent has the power of subordinate legislation effected by its issuances of implementing rules and regulations, such as Revenue Regulations No. 15-02, said power is not without any limitation. The administrative regulation must not be in sharp conflict with the governing statute it seeks to implement ***(Nestle Philippines, Inc. vs. Court of Appeals, et al., 203 SCRA 504 [1991])***. Under Revenue Regulations No. 15-02, the term "gross revenue" was given a new meaning. For income on passengers, it was interpreted to mean as **actual amount** derived for transportation services xxx. It is computed based on the average **net fare** of all the tax coupons of plane tickets issued for the month. For income on cargoes, it is the amount appearing on the airway bill **after deducting the amount of discounts granted**. *(Emphasis and underscoring Ours)*

Therefore, when the law speaks of gross revenue, the term "gross" contemplated therein only means income based on the price of the ticket on its face value, whole, entire, total and without deductions.

With respect to the "Unreported Receipts on Cargoes & Excess Baggage", respondent points out that petitioner failed to report the receipts on cargo in the total amount of P172,868,372.58, representing the difference between the amounts reflected in petitioner's Cargo Flown Revenue Per Station and the Summary of Cargo Sales Invoices *(pp. 419 – 436, Folder 1, BIR Records)*. In addition, excess baggage revenue in the total amount of P6,627,910.00, as shown in the Excess Baggage Revenue report *(p. 418, Folder 1, BIR Records)*, was allegedly not reported as part of the Gross Philippine Billings.

Petitioner refutes the aforesaid findings by explaining that respondent failed to consider the adjustments arising from credit and debit notes accompanying the transactions in arriving at the above discrepancies. It insists that, after proper adjustments were made, its income tax return faithfully reflected the actual receipts required by respondent.

We are not convinced by petitioner's ratiocination.

Although there might be some truth in petitioner's contention, the fact remains that the credit and debit notes referred to by petitioner were never offered in evidence.

Well-settled is the rule that all presumptions are in favor of the correctness of the assessment ***(Commissioner of Internal Revenue vs. Court of Appeals, et al., G.R. Nos. 104151 & 105563, March 10, 1995; Inter-Provincial Autobus Co., Inc. vs. Commissioner of Internal Revenue, 98 Phil. 290 [1956])***, and the burden of proof is upon petitioner to prove otherwise. Since petitioner failed to present the credit and debit notes, the assessment is presumed correct.

Based on the foregoing, petitioner is therefore liable for deficiency final income tax. However, with regard to the imposition of surcharge, We rule to reduce the 50% surcharge amounting to P6,237,793.99 to 25% inasmuch as respondent failed to prove that petitioner willfully made a false or fraudulent return.

It is worthy to mention that We allow the imposition of the 25% surcharge because the same is mandatory. As consistently ruled, imposition of surcharge is justified because the intention of the law is precisely to discourage delay in the payment of taxes due to the State. The delay in the payment of the deficiency tax within the time prescribed for its payment in the notice of assessment justifies the imposition of a 25% surcharge in consonance with Section 248(A)(3) of the 1997 NIRC ***(Dr. Felisa L. Vda de San Agustin, in substitution of Jose Y. Feria, in his capacity as Executor of the Estate of San Jose Agustin vs. Commissioner of Internal Revenue, 364 SCRA 802 [2001])***.

Hence, petitioner shall be held liable in the reduced amount of P18,739,679.46 representing its deficiency income tax, computed as follows:

DEFICIENCY INCOME TAX

GROSS BILLINGS PER RETURN		P880,567,364.00	P22,014,184.10
Adjustment			
1. SPCL and NRML commissions on passengers deducted from gross billings	P288,945,975.09		
2. Cargo Commissions - deducted from gross billings	30,581,261.44		
3. Unreported sales/receipts on Cargo	172,868,372.58		
4. Unreported excess baggage Revenue	6,627,910.00	499,023,519.11	12,475,587.98
Gross Billings Per Audit			P34,489,772.08
Tax Paid Per Return			24,215,602.51
Basic Deficiency Income Tax			P10,274,169.57
Add: 25% Surcharge			2,568,542.39
20% Interest from 4/15/00 to 10/23/02			5,896,967.50
TOTAL DEFICIENCY INCOME TAX			**P18,739,679.46**

II. DEFICIENCY EXPANDED WITHHOLDING TAX – P13,060.26

As to the deficiency expanded withholding tax in the amount of P13,060.26, We have observed that the same was never disputed by petitioner.

Based on Our evaluation of the records of this case, petitioner had already paid the basic deficiency expanded withholding tax and portion of deficiency interest when it availed of the Voluntary Assessment Program (VAP). However, there still remain deficiency interest and interest on unpaid deficiency interest in the aggregate amount of P13,060.26 which petitioner has yet to pay.

III. DEFICIENCY PERCENTAGE TAX – P77,447,330.07

As regards the deficiency percentage tax in the amount of P77,447,330.07, respondent clearly explained in his formal letter of demand the basis of his assessment, as follows:

> "Verification disclosed that your company failed to report the gross receipts from other destinations as verified on the Passenger Transfer Manifest prepared by petitioner's ground-handling agent. Unreported sales/receipts were also found per summary of sales invoices on cargo, excess baggage revenue and discrepancy based on Passenger Transfer Manifest on types of class of passenger seats compared to their summary per returns. The tax base of the three percent (3%) percentage tax is the total amount of the gross receipts derived from passage of persons, excess baggage, cargo or freight including mail cargo originating from the Philippines in a continuous and uninterrupted flight, irrespective of the place of sale or issue and the place of payment of the ticket. The gross receipts shall be computed on the cost of the single one-way fare as approved by the Civil Aeronautics Board or in its absence the IATA rate, which is actually the cost reflected in the tickets. In your case only the cost of the ticket on the first leg or Manila to Taipei was reported as gross receipts on passengers and on cargo, such under-declaration was clear violation of **Section 118 A of the NIRC,** implementing Revenue Regulations **6-66** and **BIR Ruling 164-88**. Furthermore, pursuant to **Section 248 B of the NIRC of 1997** that for failure to report sales, receipts, or income in an amount exceeding thirty percent (30%) of that declared per return shall render the taxpayer liable for substantial under-declaration of sales, receipts, or income and the penalty to be

imposed shall be fifty percent (50%) of the deficiency tax. For the taxable year 1999 the under-declaration for the year 1999 was one hundred forty eight percent (148%). xxx"

From the above-quoted explanation by respondent, the deficiency percentage assessment arose from the following:

1. Unreported sales on cargo	P 346,226,879.04
2. Passenger with final destination other than Taipei	880,889,783.41
3. Unreported excess baggage revenue	6,627,910.00
4. Unreported sales/receipts base on passenger transfer manifest per audit on types of class of passenger seats compared to their reported summary per returns	14,250,942.93
Total	P1,247,995,515.38

Petitioner, on the other hand, counters that the unreported sales on cargo in the amount of P346,226,879.04 were due to the debit and credit notes which the examiner failed to consider. Likewise, with respect to the alleged unreported revenues from passengers originating from the Philippines with destination other than Taipei, petitioner believes that the figures reported by the examiner do not reflect the actual number of passengers, actual quantity of excess baggage, and the actual number of infants and adults as the same were all mere estimates.

We disagree with petitioner.

Records reveal that the assessment for deficiency percentage tax was based on petitioner's Flight Manifest *(pp. 747-866, Folder 1, BIR Records)*, Summary of Cargo Sales Invoices per month (*pp. 419 -436, Folder 1, BIR Records*) and Carrier Tax Revenue Report (*pp. 411-576, Folder 1, BIR Records*) which the BIR examiners meticulously considered and analyzed. From the aforesaid documents, the examiners prepared the Summary of Returns Filed *(Annex "E-1", p.195, Folder 2,* *BIR Records)*, Summary of Computation of Common Carrier's Tax on Passengers per Return *(Annex "E-2", pp.192-194, Folder 2, BIR Records)*, Summary of Common Carrier's Tax Returns and Adjustment on Cargo *(Annex "E-3", pp.187-188, Folder 2, BIR Records)*, Summary of Cargo Sales Invoices *(Annex "E-4", p.186, Folder 2, BIR Records)*, Computation of Discrepancy on the Numbers of Passengers Based on Flight Manifest Per Audit Compare to Common Carrier Tax Per Return *(Annex "E-6", p.184, Folder 2, BIR Records)*, Summary of Flight Manifest *(Annex "E-7", p.183, Folder 2, BIR Records)*, Summary of Adjustment to Common Carrier Tax Based on Passenger with Final Destination Other Than Taipei *(Annex "E-8", p. 182, Folder 2, BIR Records)*. Clearly, the above-enumerated summaries became the bases of respondent in determining petitioner's unreported sales.

Assuming without admitting, that the assessment was based on estimates, the same can still be considered as valid and lawful. In the case of ***Ferdinand R. Marcos II vs. Court of Appeals, The Commissioner of the Bureau of Internal Revenue and Herminia D. De Guzman, G.R. No. 120880, June 5, 1997***, the Supreme Court held that:

> "[E]ven an assessment based on estimates is prima facie valid and lawful where it does not appear to have been arrived at arbitrarily or capriciously. The burden of proof is upon the complaining party to show clearly that the assessment is erroneous. Failure to present proof of error in assessment will justify the judicial affirmance of said assessment. xxx"

Wanting in the record any proof of arbitrariness in the assailed assessments, this Court affirms the findings of discrepancies by the respondent. However, for the same reason stated earlier, the petitioner should be liable for the 25% surcharge pursuant to Section 248(A)(3) of the 1997 NIRC. The 50% surcharge is imposed only upon taxpayers who willfully neglect to file the return within the prescribed period or who willfully made a false or fraudulent return. Strengthening this position, in the case of ***Commissioner of Internal Revenue vs. Air India and The Court of Tax Appeals (157 SCRA 648 [1988])***, it was further explained that:

> "[T]he willful neglect to file the required tax return or the fraudulent intent to evade the payment of taxes, considering that the same is accompanied by legal consequences, cannot be presumed. At this point, We call attention to the pronouncement of this Court in *Aznar v. Court of Tax Appeals*, to wit—
>
>> "The lower court's conclusion regarding the existence of fraudulent intent to evade payment of taxes was based merely on a presumption and not on evidence establishing a willful filing of false and fraudulent returns as to warrant the imposition of fraud penalty. The fraud contemplated by law is actual and not constructive. It must be intentional fraud, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some legal right. Negligence, whether slight or gross, is not equivalent to the fraud with intent to give up some legal right. Negligence, whether slight or gross, is not equivalent to the fraud with intent to evade the tax contemplated by the law. It must amount to intentional wrongdoing with the sole object of avoiding the tax. xxx"

In addition, We disregard the P50,000.00 compromise penalty because there was no mutual agreement reached by the parties ***(Antam Pawnshop Corporation vs. commissioner of Internal Revenue, CTA Case No. 7069, June 21, 2005 citing Collector of Internal Revenue vs. UST, 104 Phil 1062; Atlas Consolidated Mining and Development Corporation [doing business under the name Atlas-Itochu Consortium] vs. Commissioner of Internal Revenue, CTA Case No. 5671, August 29, 2002).***

Therefore, after a re-computation of the above subject assessment, petitioner is correctly found to be liable for deficiency percentage tax in the reduced amount of P67,405,367.72, computed as follows:

DEFICIENCY PERCENTAGE TAX

GROSS RECEIPTS PER RETURN	P 842,661,315.23
Adjustment	
1. Unreported sales on cargo	P 346,226,879.04
2. Passenger with final destination other than Taipei	880,889,783.41
3. Unreported excess baggage revenue	6,627,910.00
4. Unreported sales/receipts base on passenger transfer manifest per audit on types of class passenger seats compared to their reported summary per returns	14,250,942.93
Total adjustment	P1,247,995,515.38
Gross Receipts Per Audit	P2,090,656,830.61
Tax Due Per Audit	P 62,719,704.92
Less: Tax Paid	27,807,823.41
Basic Deficiency Percentage Tax	P 34,911,881.51
Add: 25% Surcharge	8,727,970.38
20% Interest up to 10/23/00	23,765,515.83
TOTAL DEFICIENCY PERCENTAGE TAX	**P 67,405,367.72**

WHEREFORE, the instant petition is hereby **DENIED** for lack of merit. Accordingly, petitioner is hereby **ORDERED TO PAY** the amounts of P18,739,679.46, P13,060.26 and P67,405,367.72 as deficiency income tax, expanded withholding tax and percentage tax, respectively, or the total amount of P86,158,107.44 for taxable year 1999, plus 20% delinquency interest from November 28, 2002 until fully paid pursuant to Sections 249 of the 1997 Tax Code.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Division of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Chairman, First Division
Presiding Justice