REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL THIRD DIVISION

POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT (PSALM) CORPORATION, *Petitioner,*	**CTA CASE NO. 8177**
	Members: **BAUTISTA,** *Chairperson* **COTANGCO-MANALASTAS,** *JJ.*
-versus-	
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	**Promulgated:** JUL 3 2013 AFernando 2:35 p.m.

x- x

DECISION

COTANGCO-MANALASTAS, *J.*:

STATEMENT OF THE CASE

This case involves a Petition for Review filed by petitioner Power Sector Assets and Liabilities Management (PSALM) Corporation on October 8, 2010 pursuant to Section 228 of the National Internal Revenue Code of 1997 (1997 NIRC), as amended, in relation to Section 7(a)(2) of Republic Act (RA) No. 1125, as amended by RA No. 9282, and Section 3(a)(2) of Rule 4 of the Revised Rules of the Court of Tax Appeals.

Petitioner appeals the Formal Letter of Demand[1] (FLD) and Final Assessment Notice (FAN) Nos. VT-06-00031[2], CP-06-00006[3], WF-06-00039[4], WG-06-00040[5], WE-06-00061[6], and WC-06-00037[7], all dated December 14, 2009, issued by respondent, holding petitioner liable for alleged deficiency value-added tax (VAT), withholding tax on compensation

[1] Exhibit "9".
[2] Exhibit "9-a".
[3] Exhibit "9-b".
[4] Exhibit "9-c".
[5] Exhibit "9-d".
[6] Exhibit "9-e".
[7] Exhibit "9-f".

(WTC), expanded withholding tax (EWT), final withholding tax (FWT), final withholding VAT (FWV), and withholding percentage tax (WPT), in the total amount of ₱315,472,516.55, inclusive of interests and compromise penalties, for the taxable year ending December 31, 2006.

STATEMENT OF FACTS

Petitioner is a government-owned and -controlled corporation created under Section 49 of RA No. 9136, otherwise known as the Electric Power Industry Reform Act of 2001 ("EPIRA"), which "shall take ownership of all existing National Power Corporation (NPC) generation assets, liabilities, Independent Power Producer (IPP) contracts, real estate and all other disposable assets" and is mandated to manage the orderly sale, disposition, and privatization of NPC generation assets, real estate and other disposable assets, and IPP contracts with the objective of liquidating all NPC financial obligations and stranded contracts costs in an optimal manner. It has its principal office at the 7th Floor, Bankmer Building, 6756 Ayala Avenue, Makati City.[8]

Respondent is the duly appointed Commissioner of Internal Revenue, vested under the appropriate laws with the authority to carry out the functions, duties and responsibilities of said Office, including, *inter alia*, the power to decide disputed assessments, cancel, and abate tax liabilities, pursuant to the provisions of the National Internal Revenue Code (NIRC) of 1997 and other tax laws, rules and regulations. She holds office at the Bureau of Internal Revenue (BIR) National Office Building, BIR Road, Diliman, Quezon City.

On August 31, 2007, the BIR Large Taxpayers Audit & Investigation Division II (LTAID II) issued Letter of Authority (LOA) No. 2001-00040996[9], authorizing Revenue Officers Leonor P. Alcaraz, Ruby Ann B. Oradia, Ma. Theresa V. Carrillo, and Josephine A. Labarro to examine petitioner's books of accounts and other accounting records for all internal revenue taxes for the period covering January 1, 2006 to December 31, 2006.

On May 28, 2009, respondent issued a Notice of Informal Conference[10] requesting petitioner to appear at an informal conference to be held on June 15, 2009.

[8] Par. 1, The Parties, Petition for Review, docket, p. 3; Par. 5, Answer, docket, p. 139.
[9] Exhibit "1".
[10] Exhibit "5".

On October 8, 2009, respondent issued a Preliminary Assessment Notice (PAN) with Details of Discrepancies[11], assessing petitioner for deficiency VAT, WTC, EWT, FWT, FWV, and WPT for the taxable year ending December 31, 2006.

On December 15, 2009[12], petitioner received the FLD[13] and FAN Nos. VT-06-00031[14], CP-06-00006[15], WF-06-00039[16], WG-06-00040[17], WE-06-00061[18], and WC-06-00037[19], all dated December 14, 2009, issued by respondent, holding petitioner liable for alleged deficiency internal revenue taxes, in the total amount of ₱315,472,516.55, inclusive of interests and compromise penalties, for the taxable year ending December 31, 2006, consisting of:

Nature of Tax	**Basic**	**Interest**	**Compromise Penalty**	**Total**
Value-added Tax	₱92,549,080.50	₱54,224,506.26	₱ 50,000.00	₱146,823,586.76
Withholding Tax on Compensation	5,602,236.07	3,329,408.90	50,000.00	10,555,169.57
		1,482,524.60*	91,000.00**	
Expanded Withholding Tax	641,967.09	381,521.04	50,000.00	1,095,009.92
		4,021.79*	17,500.00**	
Final Withholding Tax	90,528,072.10	53,800,833.25	50,000.00	
		139,832.33*	50,000.00**	144,568,737.68
Final Withholding VAT	6,745,914.80	4,009,097.17	50,000.00	12,429,844.38
		1,562,332.41*	62,500.00	
Withholding Percentage Tax	(1,819.61)	168.24*	0.00	168.24
TOTAL				**₱315,472,516.55**

*Interest for late payments
**Compromise penalty for late payments

On January 13, 2010, petitioner filed its protest letter dated January 13, 2010 against the FLD and the FAN with BIR LTAID II.[20]

[11] Exhibit "7".
[12] Par. 1, Jurisdictional Allegations, Petition for Review, docket, p. 2; Exhibit "9".
[13] Exhibit "9".
[14] Exhibit "9-a".
[15] Exhibit "9-b".
[16] Exhibit "9-c".
[17] Exhibit "9-d".
[18] Exhibit "9-e".
[19] Exhibit "9-f".
[20] Par. 2, Joint Stipulation of Facts, Joint Stipulation of Facts and Issues, docket, p. 222.

On March 12, 2010, petitioner filed with the BIR LTAID II a supplemental protest, reiterating its substantive defenses and disagreement with the subject withholding tax assessments and submitting therewith all the relevant documents to support its position against the merit of the assessments.[21]

Since no decision was issued by respondent on petitioner's protest letter dated January 13, 2010, petitioner filed the instant Petition for Review docketed as CTA Case No. 8177 on October 8, 2010.[22]

On December 2, 2010, respondent filed her Answer[23] to the Petition for Review and raised the following special and affirmative defenses:

> "8. Respondent reiterates and re-pleads the preceding paragraphs of this Answer as part of her Special and Affirmative Defenses.
>
> 9. Petitioner Power Sector Assets and Liabilities Management (PSALM) Corporation (PSALM, *for brevity*) is liable to pay its deficiency VAT and withholding taxes for calendar year 2006 in the aggregate amount of Three Hundred Fifteen Million Four Hundred Seventy-Two Thousand Five Hundred Sixteen Pesos and 55/100 (Php315,472,516.55) including penalties, surcharges and interest for the following reasons:
>
> 8.1 The instant petition should not be given due course by this Honorable Court for lack of merit.
>
> 8.2 Respondent respectfully avers that the assessment for taxable year 2006 in the aggregate amount of Php315,472,516.55 was issued in accordance with law and regulations.
>
> 8.3 Comprehensive study of petitioner's books of accounts and pertinent accounting records disclosed that it is liable to pay the total deficiency VAT and income tax assessments. The pertinent portions of the Memorandum Report dated November 27, 2009 of the examiner who

[21] Par. 3, Joint Stipulation of Facts, Joint Stipulation of Facts and Issues, docket, p. 222.
[22] Par. 4, *id.*
[23] Docket, pp. 137 to 152.

conducted the investigation of petitioner's case are quoted hereunder: *to wit*:

RESULTS OF REINVESTIGATION:

I. VALUE-ADDED TAX

xxx xxx xxx

Our Position:

On November 1, 2005, R.A. 9337 came into law and placed the electric power industry under the VAT system. Section 24 thereof expressly repealed Section 13 of NPC's Charter (R.A. 6395) which relates to the exemption of NPC from VAT. Thus, for the main business of selling power and ***all transactions incidental thereto*** entered into by NPC and its successors-in-interest, namely; PSALM and TRANSCO starting November 1, 2005, the same are subject to 10% VAT and 12% effective February 1, 2006.

Since the legal title in the generation assets and facilities and other disposable assets still remains with the NPC although the ownership was already vested with PSALM pursuant to the provisions of the EPIRA, NPC shall report in the return the sale for VAT purposes and pay the appropriate tax therewith. Verification disclosed that NPC reported the sale of assets which materialized in 2006 for VAT purposes.

Relative to the sale of asset of NPC, forfeiture of bond in case of cancellation of the transaction due to non-performance of an obligation by the other party is a condition which is an integral part of the Deed of Sale of Asset. In view thereof, we maintained our position that the proceeds from the forfeited bond totaling to 757,720,181.07 which was declared as income by PSALM in their Annual Income Tax Return is subject to 12% VAT being an incidental income pursuant to Sec. 105 of the Tax Code, as amended and Sec. 4. 105-3 of RR No. 16-2005, as amended which states that:

Sec. 4.105-3. Meaning of 'In the Course of Trade or Business – the term 'in the course of trade or

> *business' means the regular conduct or pursuit of a commercial or economic activity,* ***including transactions incidental thereto****, by any person regardless of whether or not the person engaged therein is a non-stock non-profit private organization, or government entity.*

On the other hand, their claims that only P85,823.44 of the input tax being claimed per return has **insufficient documentation** on the VAT-registration of the supplier/contractor-payee was upheld upon scrutiny of the newly submitted documents. However, such allegations (no. 3 above) in order to rebut the disallowance of P1,121,583.66 for failure to impose the limitation set forth in Section 4.110.3 of RR No. 16-2005 could not be given due course since there were vatable revenues during the period which they failed to subject to 12% VAT. Accordingly, disallowance of input taxes aggregating to P1,220,611.92 is hereby reiterated pursuant to Sections 110 and 113 of the Tax Code, as amended and RR No. 16-2005, as amended.

In view thereof, deficiency VAT amounting to **P92,549,080.50** exclusive of penalties thereto was assessed from herein taxpayer.

II. WITHHOLDING TAX

Compliance with the withholding tax rules and regulations was verified thru reconciliation of the amount subjected to applicable withholding tax rates per various withholding tax returns duly filed with the Bureau as against the amount of income payments claimed as purchases/expense and capitalized per ITR/FS.

In order to reconcile various discrepancies found still due per PAN, various reconciliation schedules and returns submitted thereafter were carefully evaluated the result of which are as follows:

a) Withholding Tax on Compensation

xxx xxx xxx

Our position:

Various arguments and supporting documents submitted after PAN were carefully evaluated and reconciled with the findings per PAN. Per documents submitted it was verified that herein taxpayer maintained a separate alphalist for recipient of CPB. Both CPB and CIB were booked under Other Maintenance and Operating Expense. Scrutiny of the said alphalist disclosed that the P30,000.00 allowable threshold exemption was applied against the CPB of each recipient which led to lower taxable bonus/rate. Since the P30,000.00 threshold exemption was already applied against the employee benefits booked under Personal Services and reported per Alpha List of Employees, we reiterate our stand on the issue that gross amount of CPB and CIB be subjected to 32% rate. On the other hand, various payments made in 2008 (6/12/08 P111,566.83 [part of 19M] and 8/12/08 P1,821,021.11) including remittance of tax withheld from 2005 expenses for P1,801,636.39 on 4/14/08 were now considered upon scrutiny of the documents submitted to support the same.

Accordingly, deficiency basis withholding tax on compensation for **P5,602,236.07** was assessed pursuant to Sec. 79(A) of the Tax Code, as amended, and RR No. 2-98, as amended.

b) Expanded Withholding Tax (EWT):

xxx xxx xxx

Our Position:

Upon careful appraisal of the schedules and supporting documents attached to their position paper dated October 23, 2009, such claim regarding certain expenses being mere reimbursement of expenses was given due course. However, the amount of P18,061,909.00 representing PPE was still subjected to EWT since Note 8 of FS clearly shows that these were additions to PPE during the year. In view thereof, after considering payments made in the succeeding year (Feb. '07 – P112,575.96 & March '07 – P5,385.15), deficiency expanded withholding for **P641,967.09** exclusive of penalties thereto was assessed from herein taxpayer pursuant to Sec. 57

(B) of the Tax Code, as amended, and RR No. 2-98, as amended.

c) Final Withholding Tax

xxx xxx xxx

Our Position:

Upon careful scrutiny of the documents submitted to support the aforesaid allegations payment to CSFB was subjected to EWT (15%) instead of final withholding tax (25%). Also, final tax withheld from payments to Baker Botts LLP was now applied against final withholding tax due from payments to Renton. Other issues were reiterated since the taxpayer did not interpose any objections against the assessments. Interest Expense on foreign loans was subjected to 20% final withholding tax pursuant to Sec. 57(A) of the Tax Code, as amended, in relation to Sec. 28(B)(5)(a) of the same Tax Code. Various payments in the succeeding year were considered in the computation of deficiency tax. In view of the foregoing, deficiency final withholding tax totaling to **P90,528,072.10** exclusive of penalties thereto was assessed from herein taxpayer pursuant to Sec. 57(A) of the Tax Code, as amended, and RR No. 2-98, as amended.

d) Final Withholding VAT / Percentage Tax

xxx xxx xxx

Our Position:

After careful evaluation of the arguments and various documents presented after PAN deficiency withholding percentage tax was deleted from the assessments. With regards to professional fees of foreign advisors, it was verified that, contrary to their allegations, the same have been subjected to final withholding VAT however there was **underwithholding of tax**. Accordingly, after considering certain tax payments made in 2008, it was determined that the taxpayer is still deficient of withholding final VAT amounting to **P6,745,914.80** pursuant to Sec. 114(C) of the Tax Code, as amended.

III. PENALTIES FOR LATE REMITTANCE

Verification of the alleged unremitted withholding taxes totaling to P19,542,763.51 as of 12/31/06 per COA report disclosed that, except for P340,445.06 (part of the above assessments), the same were remitted in various months in 2007 and 2008 as per various returns and schedules submitted by the taxpayer. Also, there was additional remittance of withholding tax on compensation amounting to P1,821,021.11 in August 2008 (*not part of P19,542,763.51*). In view thereof, penalty interest and compromise totaling to **P3,409,879.37** were imposed for late remittance pursuant to Sections 249 and 250 of the Tax Code, as amended.

xxx xxx xxx

8.4 It is well-settled rule in taxation that the burden of proof is on the taxpayer to present evidence to show the incorrectness of the assessment.

8.5 In case of disputed assessments, the burden of proof is on the taxpayer to establish the fact that it is indeed not liable for any deficiency taxes subject of the assessment. The failure to show documents that would substantiate a claim that no deficiency taxes are due, would result to upholding the validity of the assessment for deficiency income taxes ***(Camara Steel Industries, Inc. vs. Commissioner of Internal Revenue)***.

8.6 Well-settled is the rule that tax assessments are entitled to the presumption of correctness and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner, and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments ***(Sy Po vs. Court of Tax Appeals)***. Dereliction on the part of petitioner to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notices." *(Citations omitted)*

On December 7, 2010, this Court issued a Notice of Pre-Trial Conference[24], notifying the parties that the case is set for pre-trial conference on January 21, 2011 and directing the parties and their respective counsels to be present at the pre-trial and to file with this Court their respective Pre-Trial Briefs at least three (3) days before the date of pre-trial.

On January 17, 2011, petitioner filed its Pre-Trial Brief[25]; while respondent filed her Pre-Trial Brief[26] on January 18, 2011.

During the pre-trial proceedings held on January 21, 2011, this Court gave the counsel for petitioner a period of fifteen (15) days from January 21, 2011 or until February 5, 2011 within which to submit the Joint Stipulation of Facts and Issues.[27]

On March 7, 2011, the parties submitted their Joint Stipulation of Facts and Issues.[28]

On March 28, 2011, this Court issued the Pre-Trial Order[29], summarizing the facts and issues stipulated by the parties, the evidence to be presented by the parties, and the hearing dates; and stating that the pre-trial is deemed terminated.

During trial, the parties presented and formally offered their respective witnesses and documentary evidence in support of their respective claims and contentions. The case was submitted for decision on October 3, 2012[30], taking into consideration petitioner's Memorandum[31] filed on September 17, 2012 and Memorandum (for Respondent)[32] filed on September 28, 2012.

STATEMENT OF ISSUE

[24] Docket, p. 154.
[25] Docket, pp. 155 to 167.
[26] Docket, pp. 171 to 176.
[27] Minutes of the January 21, 2011 Pre-Trial Proceedings, docket, p. 178.
[28] Docket, pp. 221 to 228.
[29] Docket, pp. 249 to 261.
[30] Resolution dated October 3, 2012, docket, p. 1288.
[31] Docket, pp. 1209 to 1262.
[32] Docket, pp. 1264 to 1285.

The parties submitted the following issue[33] for this Court's resolution:

Whether or not petitioner is liable for outstanding tax liabilities, inclusive of increments, in the amount of ₱315,472,516.55, representing deficiency VAT, WTC, EWT, FWT, FWV, and WPT for the taxable year ending December 31, 2006.

DISCUSSION/RULING

The Court's jurisdiction

As stated above, on December 15, 2009, petitioner received the FLD and FAN Nos. VT-06-00031, CP-06-00006, WF-06-00039, WG-06-00040, WE-06-00061, and WC-06-00037, all dated December 14, 2009, issued by respondent, holding petitioner liable for alleged deficiency VAT, WTC, EWT, FWT, FWV, and WPT, in the total amount of ₱315,472,516.55, inclusive of interests and compromise penalties, for the taxable year ending December 31, 2006.

On January 13, 2010, or within the thirty-day period prescribed under Section 228 of the 1997 NIRC, as amended, petitioner filed its protest letter dated January 13, 2010 with the BIR LTAID II.[34] On March 12, 2010, or within the sixty-day period prescribed under Section 228 of the 1997 NIRC, as amended, to submit relevant supporting documents, petitioner submitted to BIR LTAID II a supplemental protest, reiterating its substantive defenses and disagreement with the subject withholding tax assessments and submitting all relevant documents in support of its position against the assessment.[35]

Pursuant to Section 228 of the 1997 NIRC, as amended, if the protest is not acted upon within 180 days from submission of supporting documents, the taxpayer may appeal the inaction to this Court within thirty (30) days from the lapse of the 180-day period. In this case, the 180-day period lapsed on September 8, 2010 without any action on the part of respondent.[36] Thus, petitioner had thirty (30) days from September 8, 2010 or until October 8, 2010 within which to file an appeal before this Court. Indeed, petitioner timely filed the instant Petition for Review with this Court on October 8, 2010.

---

[33] Statement of the Issue, Joint Stipulation of Facts and Issues, docket, p. 225.
[34] Par. 2, Joint Stipulation of Facts, Joint Stipulation of Facts and Issues, docket, p. 222.
[35] Par. 3, *id.*
[36] Par. 4, *id.*

Since the Petition for Review was filed on time, this Court has jurisdiction to take cognizance of the same pursuant to Section 7(a)(2) of RA No. 1125, as amended by Section 7 of RA No. 9282.[37]

The Court shall now proceed to resolve this case on the merits.

A. Deficiency VAT Assessment – ₱146,823,586.76

In the FLD, respondent found petitioner liable for deficiency VAT in the amount of ₱146,823,586.76, computed as follows:

Taxable Sales per Return		-
Add: Income not subjected to VAT		₱ 761,070,571.46
Adjusted Vatable Sales		₱ 761,070,571.46
Output Tax Due		₱ 91,328,468.58
Less: Creditable Input Tax per Return	₱10,302,026.05	
Less: Disallowed Input Tax	1,220,611.92	
Forwarded to Succeeding Quarter	10,302,026.05	(1,220,611.92)
VAT Payable		₱ 92,549,080.50
Less: VAT Payments		
Deficiency Tax		₱ 92,549,080.50
Add: Interest (1/26/2007 to 12/30/2009=58.59%)		54,224,506.26
Compromise Penalty		50,000.00
TOTAL DEFICIENCY VAT		**₱ 146,823,586.76**

A.1. VAT on forfeited performance bond and participation fees – ₱91,328,468.58

RA No. 9136, otherwise known as the Electric Power Industry Reform Act (EPIRA) came into law on June 26, 2001. The EPIRA aims to provide a framework for the restructuring of the electric power industry, including the privatization of the assets of the National Power Corporation,

---

[37] SEC. 7. *Jurisdiction.* - The CTA shall exercise:
(a) Exclusive appellate jurisdiction to review by appeal, as herein provided:
(1) xxx
(2) Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relations thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, where the National Internal Revenue Code provides a specific period for action, in which case the inaction shall be deemed a denial.

the transition to the desired competitive structure, and the definition of the responsibilities of the various government agencies and private entities.[38]

Petitioner is a government-owned and -controlled corporation created pursuant to Section 49[39] of the EPIRA. The principal purpose of petitioner is to manage the orderly sale, disposition and privatization of NPC generation assets, real estate and other disposable assets, and IPP contracts with the objective of liquidating all NPC financial obligations, stranded contract costs, and stranded debts in an optimal manner.[40] In the performance of its function and for the attainment of its objective, petitioner shall have the power to, among others, "formulate and implement a program for the sale and privatization of the NPC assets and IPP contracts"[41] and "to sell or dispose of the same at such price and under such terms and conditions as it may deem necessary or proper, subject to applicable laws, rules and regulations."[42]

For taxable year ending December 31, 2006, respondent assessed petitioner for deficiency VAT for its alleged failure to subject to 12% VAT the various sales of goods and services in the amount of ₱3,350,390.39 as well as the proceeds from the forfeited bond amounting to ₱757,720,181.07. Respondent assessed petitioner for output tax amounting to ₱91,328,468.58 pursuant to Sections 106 and 108 of the 1997 NIRC, as amended, in relation to Section 105 of the said Code and Section 4.105-3 of Revenue Regulations (RR) No. 16-2005.

In disputing said assessment, petitioner contends that respondent failed to consider petitioner's mandate when it assessed petitioner for

---

[38] SECTION 3. *Scope*. - This Act shall provide a framework for the restructuring of the electric power industry, including the privatization of the assets of NPC, the transition to the desired competitive structure, and the definition of the responsibilities of the various government agencies and private entities. (EPIRA)

[39] SECTION 49. *Creation of Power Sector Assets and Liabilities Management Corporation*. - There is hereby created a government-owned and -controlled corporation to be known as the "Power Sector Assets and Liabilities Management Corporation", hereinafter referred to as the "PSALM Corp.", which shall take ownership of all existing NPC generation assets, liabilities, IPP contracts, real estate and all other disposable assets. All outstanding obligations of the NPC arising from loans, issuances of bonds, securities and other instruments of indebtedness shall be transferred to and assumed by the PSALM Corp. within one hundred eighty (180) days from the approval of this Act. (EPIRA)

[40] SECTION 50. *Purpose and Objective, Domicile and Term of Existence*. - The principal purpose of the PSALM Corp. is to manage the orderly sale, disposition, and privatization of NPC generation assets, real estate and other disposable assets, and IPP contracts with the objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner.

[41] Section 51(a), EPIRA.

[42] Section 51(b), EPIRA.

deficiency VAT on the forfeited performance bond and participation fees. Petitioner avers that its mandate is to conduct public and competitive biddings for an orderly sale, disposition and privatization of various NPC assets in accordance with its principal purpose under the EPIRA. Petitioner also claims that the purported sale of goods and services not subjected to VAT (amounting to ₱3,350,390.39) actually pertains to fees interested bidders paid for the sale of bid documents necessary to participate in PSALM's privatization of NPC assets pursuant to the EPIRA (participation fees). Petitioner further alleges that the forfeited performance bond (amounting to ₱757,720,181.07) relates to PSALM's unsuccessful bidding of the 600-megawatt Masinloc Coal-Fired Thermal Power Plant ("Masinloc Plant") during taxable year 2006.

Petitioner's position is that the sale of bidding documents to interested bidders and the forfeiture of bid performance bond were neither made in petitioner's ordinary course of trade or business nor incidental thereto because they were not carried out in pursuit of a commercial or an economic activity, but by legislative *fiat*, hence, the same are not subject to VAT.

The crucial issue that this Court has to resolve is whether or not the participation fees and forfeited performance bond generated by petitioner are subject to 12% VAT.

Section 105 of the 1997 NIRC, as amended, provides:

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

Notably, **BIR Ruling No. 020-2002** dated May 13, 2002, invoked by petitioner and issued by former BIR Commissioner Rene G. Bañez to petitioner, states that the privatization of NPC assets by petitioner, being an isolated transaction, is not subject to VAT. Pertinent portion of said ruling is quoted hereunder:

> "C. *Privatization of Assets.*
>
> As stated earlier, the following ruling is based on the law existing as of the date of this ruling.
>
> 1. *Gain from the sale by PSALM of the generation facilities to qualified buyers is not subject to income tax.*
>
> xxx xxx xxx
>
> 2. *Privatization of assets by PSALM is not subject to VAT.*
>
> Pursuant to Section 105 in relation to Section 106, both of the Tax Code of 1997, a value-added tax equivalent to ten percent (10%) of the gross selling price or gross value in money of the goods, is collected from any person, who, in the course of trade or business, sells, barters, exchanges, leases goods or properties, which tax shall be paid by the seller or transferor.
>
> The phrase 'in the course of trade or business' means the regular conduct or pursuit of a commercial activity, including transactions incidental thereto.
>
> Since the disposition or sale of the assets is a consequence of PSALM's mandate to ensure the orderly sale or disposition of the property and thereafter to liquidate the outstanding loans and obligations of NPC, utilizing the proceeds from sales and other property contributed to it, including the proceeds from the Universal Charge, and not conducted in pursuit of any commercial or profitable activity, including transactions incidental thereto, the same will be considered an isolated transaction, which will therefore not be subject to VAT. (BIR Ruling No. 113-98 dated July 23, 1998)"

In the case of *Commissioner of Internal Revenue vs. Philippine Health Care Providers, Inc.*[43], the Supreme Court, citing the case of *ABS-CBN Broadcasting Corp. vs. Court of Tax Appeals*[44], noted that the "Commissioner of Internal Revenue is precluded from adopting a position contrary to one previously taken where injustice would result to the taxpayer." Pertinent portion of said decision reads:

> "In *ABS-CBN Broadcasting Corp. v. Court of Tax Appeals*, this Court held that under Section 246 of the 1997 Tax Code, the Commissioner of Internal Revenue is precluded from adopting a position contrary to one previously taken where injustice would result to the taxpayer. Hence, where an assessment for deficiency withholding income taxes was made, three years after a new BIR Circular reversed a previous one upon which the taxpayer had relied upon, such an assessment was prejudicial to the taxpayer. To rule otherwise, opined the Court, would be contrary to the tenets of good faith, equity, and fair play.
>
> This Court has consistently reaffirmed its ruling in *ABS-CBN Broadcasting Corp.* in the later cases of *Commissioner of Internal Revenue v. Borroughs, Ltd.*, *Commissioner of Internal Revenue v. Mega Gen. Mdsg. Corp.*, *Commissioner of Internal Revenue v. Telefunken Semiconductor (Phils.) Inc.*, and *Commissioner of Internal Revenue v. Court of Appeals*. The rule is that the BIR rulings have no retroactive effect where a grossly unfair deal would result to the prejudice of the taxpayer, as in this case." *(Citations omitted)*

BIR Ruling No. 020-02, a specific ruling addressed to petitioner, was issued by respondent CIR in the exercise of her power to interpret tax laws under the first paragraph of Section 4 of the NIRC of 1997, as amended. Said ruling is binding upon respondent CIR, and petitioner should not be prejudiced when it relied, in good faith, on BIR Ruling No. 020-02.

---

[43] G.R. No. 168129, April 24, 2007, cited in the recent consolidated cases of *Commissioner of Internal Revenue vs. San Roque Power Corporation*, G.R. No. 187485, *Taganito Mining Corporation vs. Commissioner of Internal*, G.R. No. 196113, *Philex Mining Corporation vs. Commissioner of Internal Revenue*, G.R. No. 197156, February 12, 2013.

[44] G.R. No. 52306, October 12, 1981, 108 SCRA 142.

In view of the foregoing, the deficiency VAT assessment in the amount of ₱91,328,468.58, representing 12% VAT on the forfeited performance bond and participation fees in the total amount of ₱761,070,571.46 is hereby cancelled.

A.2. Disallowed input tax credits – ₱1,220,611.92

The BIR disallowed the input tax credit for taxable year 2006 in the aggregate amount of ₱1,220,611.92 on the grounds that petitioner failed to provide sufficient documentation on the VAT-registration of the suppliers/contractors-payees, and also to impose the limitation set forth in claiming input tax on depreciable goods as per Section 4.110-3 of RR No. 16-2005.

Petitioner argues that the disallowances were misplaced and without basis because petitioner did not claim any input tax credit during the year 2006 as it had no sale transactions subject to VAT during the same year. This Court agrees with petitioner.

As already discussed, petitioner shall not be subjected to 12% VAT on the participation fees and forfeited performance bond. Consequently, this Court holds that the assessment for deficiency VAT arising from the disallowance of input tax credits, which were not actually applied as credits against any output tax, has no legal and factual bases.

B. Deficiency WTC Assessment – ₱10,555,169.57

In the FLD, respondent found petitioner liable for deficiency WTC in the amount of ₱10,555,169.57, computed as follows:[45]

Taxable Basis per Alphalist		₱ 98,073,440.41
Add: Compensation not subjected to WT		23,533,000.05
Total Taxable Basis per Audit		121,606,440.46
Withholding Tax Due on Compensation		28,594,404.38
Less: Tax Paid - 2006	₱ 15,446,687.72	
Succeeding Years' Payments	7,545,480.59	22,992,168.31
Deficiency Tax		₱ 5,602,236.07
Add: Interest (1/11/2007 to 12/30/2009=59.43%)		3,329,408.90
Interest for late payments		1,482,524.60

[45] Exhibit "9".

Compromise Penalty		50,000.00
Compromise Penalty for late payments		91,000.00
Total Deficiency WTC		**₱ 10,555,169.57**

Petitioner was assessed due to the alleged under-remittance of withholding taxes on its employees' salaries and wages. As reflected in petitioner's Monthly Remittance Returns of Income Taxes Withheld on Compensation (BIR Form No. 1601-C) the total gross compensation income subjected to tax was ₱81,614,479.30 and the withholding tax remitted thereon was ₱15,446,687.72.[46] However, per alphalist attached to the Annual Information Return (BIR Form 1604-CF)[47], the total gross compensation subjected to tax is ₱98,073,440.41 and allegedly, the corresponding withholding tax that should have been withheld by petitioner is ₱19,262,207.97; hence, there is an under-remittance of ₱3,815,520.25.

Also, after reconciliation of the Salaries, Wages and Benefits reported per FS/Trial Balance as against the total amount of taxable and non-taxable compensation per Alphalist of Employees, respondent found a discrepancy of ₱23,533,000.05 which is comprised of Corporate Performance Bonus (CPB) and Corporate Incentive Bonus (CIB) amounting to ₱16,858,396.05 and ₱6,674,604.00,[48] respectively, booked under the account Other Maintenance and Operating Expenses. Per documents submitted, it was verified that a separate alphalist for recipients of CPB was maintained wherein the ₱30,000.00 allowable threshold exemption was applied against the CPB of each recipient which led to lower amount of taxable bonus/rate. Since the ₱30,000.00 threshold exemption was already applied against the salaries and employee benefits booked under Personal Services and reported per Alphalist of Employees, the gross amounts of CPB and CIB were subjected to 32% rate.

Likewise, the amount of taxes withheld from year 2005 expenses amounting to ₱1,801,636.39 (which formed part of the ₱19,542,764.00 Due to Government-Others account per FS) which remained outstanding as of December 31, 2006 was assessed by respondent for petitioner's failure to remit the same.

The foregoing may be summarized as follows: /

---

46 BIR Records, Folder 2, pp. 262-320

47 Exhibits "EEE" to "EEE-3".

48 Exhibit "YYYY"; Part of the total amount of ₱26,592,213.00 as presented in the Detailed Statement of Income and Expense, BIR Records, p. 176.

	Tax Base	Withholding Tax
Withholding tax on Salaries and Wages per Alphalist	₱98,073,440.41	₱ 19,262,207.97
Less: Tax payments per 2006 Monthly Remittance Returns	81,614,479.30	15,446,687.72
Underremittance of withholding tax on Salaries and Wages		₱ 3,815,520.25
Add: Corporate Performance Bonus	16,858,396.05	5,394,686.74
Corporate Incentive Bonus	6,674,604.00	2,135,873.28
Tax Due for 2005 Expense		1,801,636.39
Total		**₱13,147,716.66**
Less: Succeeding year's payments		* 7,545,480.59
Deficiency Tax		**₱ 5,602,236.07**

* This amount includes payments for the assessed withholding taxes on CIB, CPB and belatedly remitted withholding tax on 2005 Expense, detailed as follows:

CPB remitted on 2/12/07		₱ 2,931,473.60
CIB remitted on 8/12/08		1,821,021.11
Due to BIR part of 19M (2005 Expense) remitted only on 4/14/08		1,801,636.39
Others		
Honoraria remitted on 2/12/07	₱ 9,461.87	
Overtime and Night Pay remitted on 6/12/08	111,566.83	
Cash Gift remitted on 2/12/07	117,342.85	
Year-End-Bonus remitted on 2/12/07	752,977.94	991,349.49
Total Succeeding Payments		₱ 7,545,480.59

For its part, petitioner maintains that the withholding taxes due on CPB and CIB for 2006 have been paid and remitted completely by 2008. Petitioner further explains that the CPB for 2006 was given to the employees in two (2) tranches. The first tranche was given in December 2006, while the second tranche was given in February 2007. Inasmuch as the second tranche was released in 2007, the ₱30,000.00 allowable exemption threshold was applied for the CPB portion that was released in 2006, which led to a lower tax due.

Based on records, the CPB and the CIB totaling ₱23,533,000.05 were indeed reported as "Expense" item in the 2006 Trial Balance. As regards the CPB, the first tranche amounting to ₱10,114,949.70[49] was clearly given in December 2006 for which the corresponding withholding tax amounting to ₱3,014,795.51, which was already due for remittance on January 15, 2007, was belatedly remitted by petitioner on February 12, 2007.[50] As a result, this Court finds that the assessment pertaining thereto should be cancelled. Since the withholding taxes in the amount of ₱3,014,795.51 were, however, already due for payment on January 15, 2007, the same shall be imputed with surcharges and interest computed from January 15, 2007 until February 12, 2007, pursuant to Sections 248(A)(4) and 249(A) of the

[49] Exhibit "DDDD"
[50] Exhibit "EEEE".

1997 NIRC. As to the remaining CPB of ₱6,743,446.35 (₱16,858,396.05 less ₱10,114,949.70), petitioner fell short in proving that the same was given to its employees only in February 2007 and not in year 2006. This Court would thus sustain the assessment for deficiency withholding tax amounting to ₱2,379,891.23 (₱5,394,686.74 less ₱3,014,795.51).

As regards the CIB, the same was booked under the Other Maintenance and Operating Expense (OMOE) account for financial accounting purposes and in compliance with a DBM directive and is still subject to the approval of the President of PSALM for its release. The same cannot be considered in 2006 as due, demandable or legally enforceable from PSALM as the request for payment of the CIB was made only in November 2007. In other words, as of taxable year 2006, PSALM has no obligation to withhold taxes on the said CIB until the same is approved by its President and is actually given to the employees concerned. As a consequence, the assessment on CIB amounting to ₱6,674,604.00 should be cancelled.

With regard to the under-remittance of withholding tax amounting to ₱3,815,520.25, upon verification of the supporting documents presented, such as the Alphalist of Employees and various Monthly Remittance Returns for year 2006, this Court finds that indeed petitioner under-remitted the same. Therefore, the assessment shall be sustained.

As to the amount of ₱1,801,636.39 tax due for 2005 expenses, the same was actually cancelled out as the same was part of the Succeeding Year's Payments of ₱7,545,480.59 taken into account by respondent.

In sum, this Court finds petitioner liable for basic deficiency withholding tax on compensation, as computed below:

	Withholding Tax
Withholding tax on Salaries and Wages per Alphalist	₱19,262,207.97
Less: Tax payments per 2006 Monthly Remittance Return	15,446,687.72
Under-remittance of withholding tax on Salaries and Wages	₱ 3,815,520.25
Corporate Performance Bonus	2,379,891.23
Total	₱ 6,195,411.48
Less: Succeeding years' payments	*991,349.49
Deficiency Withholding Tax on Compensation	**₱ 5,204,061.99**

*The withholding tax payments of ₱6,554,131.10 (₱2,931,473.60 + ₱1,821,021.11 + ₱1,801,636.39) has been deducted from the tax payments of ₱7,545,480.59 since the related compensation/bonus assessed by the respondent has been cancelled as per this Court's findings.

L

Likewise, petitioner shall be held liable to pay interest and surcharges in the total amount of ₱1,992,295.01 for the late remittance of its taxes due, detailed as follows:

Deficiency on Increments for Late Remittances		
Corporate Performance Bonus		₱ 3,014,795.51
Add: 25% Surcharges	₱ 753,698.88	
Interest (01-15-07 to 02-12-07)		
[₱3,014,795.51 x 20% x 28 days/365]	46,254.40	799,953.28
Total		₱ 3,814,748.79
Less: Payment (02-12-07)		3,014,795.51
Total Amount Due		**₱ 799,953.28**
Unremitted Withholding Tax for 2005 Expense		₱ 1,801,636.39
Add: 25% Surcharges	₱ 450,409.10	
Interest (01-15-07 to 04-14-08)		
[₱1,801,636.39 x 20% x 455 days/365]	449,175.10	899,584.20
Total		₱ 2,701,220.59
Less: Payment (02-12-07)		1,801,636.39
Total Amount Due		**₱ 899,584.20**
Honoraria		₱ 9,461.87
Cash Gift		117,342.85
Year End Bonus		752,977.94
Total		₱ 879,782.66
Add: 25% Surcharges	₱ 219,945.67	
Interest (01-15-07 to 02-12-07)		
[₱879,782.66 x 20% x 28 days/365]	13,498.04	233,443.71
Total		₱ 1,113,226.37
Less: Payment (02-12-07)		879,782.66
Total Amount Due		**₱ 233,443.71**
Overtime and Night Pay		₱ 111,566.83
Add: 25% Surcharges	₱ 27,891.71	
Interest (01-15-07 to 06-12-08)		
[₱111,566.83 x 20% x 514 days/365]	31,422.11	59,313.82
Total		₱ 170,880.65
Less: Payment (02-12-07)		111,566.83
Total Amount Due		**₱ 59,313.82**

C. Deficiency EWT Assessment – ₱1,095,009.92

In the FLD, respondent found petitioner liable for deficiency EWT in the amount of ₱1,095,009.92, computed as follows:

Taxable Basis per Return		₱79,656,682.07
Add: Income payments not subjected to EWT		14,375,234.49
Total Taxable Basis per Audit		₱94,031,916.56
Expanded Withholding Tax Due		₱ 4,824,623.58
Less: Tax Paid – 2006	₱ 4,064,695.38	
Succeeding Year's Payments	117,961.11	4,182,656.49
Deficiency Expanded Withholding Tax		₱ 641,967.09
Add: Interest (1/11/2007 to 12/30/2009=59.43%)		381,521.04
Interest for late payments		4,021.79
Compromise Penalty		50,000.00
Compromise Penalty for late payments		17,500.00
Total Deficiency Expanded Withholding Tax		**₱ 1,095,009.92**

Respondent alleges that various income payments claimed by petitioner as expenses/purchases per ITR and/or capitalized per FS which were verified to be subject to EWT were reconciled with the amounts subjected to various rates per Alphalist of Income Recipients and BIR Form No. 1601-E returns, determined as follows:

	Per Trial Balance	SUBJECT	PER FS	PER ALPHALIST (Subtotal)	DIFFERENCE
RENTALS (5%)					
Rent Expenses	₱ 10,413,853.50	₱10,413,853.50	₱ 520,692.68	₱ 515,341.55	**₱ 5,351.13**
Subtotal			***₱ 520,692.68***	***₱ 515,341.55***	***₱ 5,351.13***
INCOME PAYMENTS MADE BY THE GOVERNMENT TO THE LOCAL RESIDENT SUPPLIERS OF SERVICES (2%)					
Training Expense	₱ 4,782,682.74	₱ 2,715,474.89	₱ 54,309.50		**₱ 54,309.50**
Utility Expenses					
Water Expenses	245,536.05	245,536.05	4,910.72		
Electricity Expenses	5,114,624.77	5,114,624.77	102,292.50		
Janitorial Services	1,774,985.61	1,774,985.61	35,499.71		
Security Services	2,331,572.13	2,331,572.13	46,631.44		
Communication Expenses					
Postage and Deliveries	181,908.92	181,908.92	3,638.18		
Telephone Expenses - Landline	1,590,396.64	1,590,396.64	31,807.93		
Telephone Expenses - Mobile	758,632.75	758,632.75	15,172.66		
Internet Expenses - BIZ DSL and dial up service	586,342.71	586,342.71	11,726.85		
Internet Expenses - Reuters	835,560.52	835,560.52	16,711.21		
Internet Expenses - Innove	682,200.00	682,200.00	13,644.00		
Consultancy Services – Feria & Feria	11,738,374.51	11,738,374.51	234,767.49		
Repairs and Maintenance					
Buildings					
Repairs and Maintenance - Office Buildings	118,105.00	118,105.00	2,362.10		
Office Equipment, Furniture and Fixtures					
Repairs and Maintenance - Furniture and Fixtures	62,890.63	62,890.63	1,257.81		
Repairs and Maintenance - IT Equipment and Software	62,965.78	62,965.78	1,259.32		
Machineries and Equipment					
Repairs and Maintenance - Communication Equipment	7,770.00	7,770.00	155.40		
Transportation Equipment					

L

Repairs and Maintenance - Motor Vehicles	777,920.00	777,920.00	15,558.40		
Taxes, Insurance Premiums and Other Fees					
Fidelity Bond Premiums	144,750.00	144,750.00	2,895.00		
Insurance Expenses	175,179.18	175,179.18	3,503.58		
Other Maintenance and Operating Expenses					
Moodys Investor Services-annual monitority Fee	486,447.68	486,447.68	9,728.95		
HMI APE	245,831.99	245,831.99	4,916.64		
Miscellaneous	535,616.74	535,616.74	10,712.33		
Advertising Expense	1,058,220.00	1,058,220.00	21,164.40		
Printing and Binding Expenses	627,894.05	627,894.05	12,557.88		
Financial Expenses					
Bank Charges	19,412.58	19,412.58	388.25		
Interest Expenses					
Interest on Capital Lease Equipment	367,690.51	367,690.51	7,353.81		
Subtotal			***664,926.07***	***569,993.05***	***94,933.02***
INCOME PAYMENTS MADE BY THE GOVERNMENT TO THE LOCAL RESIDENT SUPPLIERS OF GOODS (1%)					
Supplies and Material Expenses					
Office Supplies Expenses	3,564,188.11	3,564,188.11	35,641.88		
Purchases PF Property and Equipment (FS Note 8)		17,957,738.00	179,577.38		
Purchases of Other PPR		184,474.00	1,844.74		
Subtotal			***217,064.00***	***157,078.29***	***59,985.71***
MANAGEMENT AND TECHNICAL CONSULTANTS (10%)					
Training and Scholarship Expenses					
Training Expense	4,782,682.74	13,333.33	1,333.33		**1,333.33**
Professional Services					
Consultancy Services					
ERC-Transco					
Jose Abinoja	201,600.00	201,600.00	20,160.00		**20,160.00**
Debt Transfer					
Inter-agency Com	80,000.00	80,000.00	8,000.00		**8,000.00**
Admin					
Rescina Bhagwan	490,000.00	490,000.00	49,000.00		**49,000.00**
Other Professional Services					
Amount Paid to all contractuals	16,772,328.01	16,772,328.01	1,677,232.80		**1,677,232.80**
Subtotal			***1,755,726.13***	***1,898,486.74***	***(142,760.61)***
OTHER RECIPIENT OF TALENT FEES (15%)					
Professional Services					
Consultancy Services					
Transco					
Atty. Cornelio Gison	5,009,735.01	5,009,735.01	751,460.25		
Bernardino Ramos	2,500,000.00	2,500,000.00	375,000.00		
Edgardo M. Del Fonso	1,178,342.78	1,178,342.78	176,751.42		
Genco					
CSFB-NRFC	1,214,723.73	1,214,723.73	182,208.56		
Debt Transfer					
Angelito Imperio	1,205,296.45	1,205,296.45	180,794.47		
Subtotal			***1,666,214.70***	***923,795.75***	***742,418.95***
TOTAL			***₱4,824,623.58***	***₱ 4,064,695.38***	***₱ 759,928.20***
Less: Payments in 2007 (₱112,575.96 + ₱5,385.15)					117,961.11
Adjusted Deficiency Basic EWT					**₱ 641,967.09**

Petitioner, on the other hand, alleges that based on the schedule of payments presented by respondent's revenue examiner to its officers, the income payments not subjected to EWT pertain to: (a) income payments to Feria & Feria Law Office; (b) the Certified Obligations which were not yet paid or payable by PSALM in 2006; and (c) pure reimbursements of cost to the payees, which are mere returns of capital and do not represent gross sales or receipts of the recipient, and therefore not subject to EWT.

A close scrutiny of the records reveals that, indeed, respondent also subjected to deficiency taxes the payments made by petitioner to Feria & Feria Law Office in the amount of ₱234,767.49. Petitioner maintains that income payments to Feria & Feria Law Office are not subject to withholding tax because Feria & Feria Law Office is a general professional partnership. Section 26 of the 1997 NIRC specifically provides that general professional partnerships are not subject to income tax, and consequently, to expanded withholding tax. Further, Feria & Feria Law Office is a Third Party Advisor of Credit Suisse First Boston Bank (CSFB) and the payments[51] made by petitioner to Feria & Feria Law Office represent reimbursements of cost to CSFB and covered by the December 4, 2003 BIR Ruling No. DA-438-03. Since Feria & Feria Law Office is CSFB's Third Party Advisor, petitioner's income payments to Feria & Feria Law Office represent mere reimbursements of cost to CSFB. Thus, the Court finds that this particular item of assessment should be cancelled.

Petitioner also claims that a portion of the assessment pertains to its Certain Obligations and reimbursements to payees. However, petitioner was not able to prove which of its accounts per FS pertain to Certain Obligations and reimbursements and how much of the said income payments should not be subjected to withholding taxes. Petitioner should have provided a breakdown of the amount of each account that would correspond to the assessed amount to substantiate its claim and to show that no deficiency taxes are due.

As to the remaining expenses assessed by the BIR, the same shall be sustained for petitioner did not present supporting documents to prove that those are indeed not to be subjected to EWT.

In sum, this Court finds that only the payments made by petitioner to Feria & Feria Law Office are not subject to EWT. Accordingly, the related EWT assessment in the amount of ₱234,767.49 shall be cancelled; while the remaining amount of ₱407,199.60 (₱641,967.09 less ₱234,767.49) shall be a proper subject of assessment for deficiency EWT.

[51] Exhibits "QQQ" to "BBBB".

Likewise, petitioner shall be held liable to pay interest and surcharges for the late remittance of the amount of ₱117,961.11, computed as follows:

Deficiency on Increments for Late Remittances		
Succeeding years payments		₱ 117,961.11
Add: 25% Surcharges	₱ 29,490.28	
Interest (01-15-07 to 03-12-07) / (01-15-07 to 04-13-07)		
[₱112,575.96 x 20% x 56 days/365]	3,454.39	
[₱5,385.15x 20% x 88 days/365]	259.67	33,204.34
Total		₱ 151,165.45
Less: Payment (02-12-07)		117,961.11
Total Amount Due		**₱ 33,204.34**

D. Deficiency FWT Assessment – P144,568,737.68

In the FLD, respondent found petitioner liable for deficiency FWT in the amount of ₱144,568,737.68, computed as follows

Taxable Basis per Return		₱ 218,522.25
Add: Income payments not subjected to FT		476,507,983.39
Total Taxable Basis per Audit		₱ 476,726,505.64
Final Withholding Tax Due		₱ 97,863,367.77
Less: Tax Paid – 2006	₱ 76,482.79	
Succeeding Years' Payments	7,258,812.88	7,335,295.67
Deficiency Final Withholding Tax		₱ 90,528,072.10
Add: Interest (1/11/2007 to 12/30/2009=59.43%)		53,800,833.25
Interest for late payments		139,832.33
Compromise Penalty		50,000.00
Compromise Penalty for late payments		50,000.00
Total Deficiency Final Tax		**₱ 144,568,737.68**

The alleged deficiency FWT arose from respondent's reconciliation of the income payments made by petitioner to non-resident foreign individuals and corporations against the amounts subjected to FWT per returns (BIR Forms No. 1601-F), to wit:

	Bloomberg	Mr. David Renton	NM Rothschild	Malcolm Groom	Mr. David Dawson	Citibank - N.A. London	Interest Expense - Nomura Tranche A & B	Total
Income Payments	1,048,746.50	28,018,052.28	3,204,222.40	788,901.24	13,405,849.50	1,798,067.87	428,462,665.85	476,726,505.64
Tax Rate	35%	25%	25%	25%	25%	25%	20%	
Tax Due	367,061.28	7,004,513.07	801,055.60	197,225.31	3,351,462.38	449,516.97	85,692,533.17	97,863,367.77
Less: Payments	152,038.38	4,073,682.76	26,990.98	115,156.25	2,967,427.30	-	-	7,335,295.67
Deficiency FWT	**215,022.90**	**2,930,830.31**	**774,064.62**	**82,069.06**	**384,035.08**	**449,516.97**	**85,692,533.17**	**90,528,072.10**

D.1. Income Payments to Bloomberg - ₱1,048,746.50

Petitioner alleges that the subject income payments pertain to the information service and the optional rental of hardware service rendered by Bloomberg, an American Company based in New York City, USA with which PSALM entered into a Subscription Agreement[52] for the non-exclusive and non-transferable license and lease to use the Bloomberg Professional service software, data and equipment in the Philippines. This is supported by invoices[53] issued by Bloomberg to petitioner for taxable year 2006.

These subscription fees in leasing service software, data and equipment were paid through payment instructions/debit advices to Bangko Sentral ng Pilipinas to make telegraphic transfers to Bank of America[54] for the Account of Bloomberg in the amounts specified in the billing invoices.

Out of the payments made, petitioner claims that it had withheld and remitted to respondent the FWT totaling to ₱220,496.94, broken down as follows: ₱76,482.79 for September 2006; ₱75,555.59 for January 2007; and ₱68,458.56 for December 2007.[55]

A close scrutiny of the documents reveals that out of the total income payments of ₱1,048,746.50, petitioner had actually withheld and remitted FWT on the income payments amounting only to ₱630,019.80, to wit:

---

[52] Exhibit “FF”.
[53] Exhibits “GG”, “HH”, “II”, and “JJ”.
[54] Exhibits “GG-1 to GG-2”, “HH-1 to HH-2”, “II-1 to II-2”, and “JJ-1 to JJ-2”.
[55] Exhibit “AAAAA”, Q&A No. 7.

Exhibit	Income Payments	Tax Rate	FWT Paid	Date Remitted
"IIII"	₱ 218,522.25	35%	₱ 76,482.79	10/10/2006
"JJJJ"	215,873.10	35%	75,555.59	2/12/2007
"KKKK"	195,624.45	35%	68,468.56	1/14/2008
Total	**₱ 630,019.80**		**₱ 220,506.93**	

Since the total income payments subjected to FWT is lower than the total income payments to Bloomberg, it signifies then that there are still income payments not subjected to FWT amounting to ₱418,726.70 (₱1,048,746.50 less ₱630,019.80). Hence, petitioner is liable for the corresponding basic deficiency FWT in the amount of ₱146,554.35 (₱418,726.70 multiply by 35%).

D.2. Income Payments to Mr. David Renton - ₱28,018,052.28

Petitioner maintains that the income payments pertain to the professional fees for legal consultancy and reimbursement of out-of-pocket expenses by Mr. David Renton, a non-resident alien engaged by PSALM to provide confidential legal consultancy services to advise and assist PSALM in performing its mandate under RA No. 9136. In accordance with the engagement[56] between petitioner and Mr. David Renton, the latter issued billing statements[57] for services rendered and other expenses incurred that have been paid by petitioner *via* remittances to JP Morgan Chase Bank in Houston, Texas, USA to the account of Baker Botts LLP.

Petitioner claims that out of the total income payments of ₱28,018,052.28, it had subjected the amount of ₱16,294,731.04 to 25% FWT and remitted to the BIR the amount of ₱4,073,682.76. In addition, included in the total income payments were costs incurred by Mr. David Renton subject to reimbursement amounting to ₱439,766.88. These were not subjected to FWT because these were mere returns of capital and do not represent income in the hands of David Renton.

A careful evaluation of the documents reveals that petitioner had indeed withheld and remitted the FWT amounting to ₱4,073,682.76 on income payments of ₱16,294,731.04 as evidenced by Monthly Remittance Return of Final Income Taxes Withheld (BIR Form No. 1601-F) duly filed with the BIR on February 21, 2007.[58] In addition, this Court found that the amount of ₱439,766.88 was mere reimbursement of the fares, telephone and

[56] Exhibit "FF".
[57] Exhibits "LL", "MM", "NN", "OO", "PP", "QQ", "RR", and "SS".
[58] Exhibits "JJJJ" to "JJJJ-2".

fax, and printing expenses incurred by Mr. David Renton; hence, shall not be subjected to FWT.

Nevertheless, considering that petitioner failed to establish that the remaining income payments to Mr. David Renton in the amount of ₱27,578,285.40 is not subject to final withholding tax, petitioner is liable for the corresponding basic deficiency FWT in the amount of ₱2,820,888.59, computed as follows:

Income Payments Per Assessment	₱28,018,052.28
Less: Reimbursement of Expenses	439,766.88
Income Payments Subject to FWT	₱27,578,285.40
Tax Rate	25%
Final Withholding Tax Due	₱ 6,894,571.35
Less: Tax Payments	4,073,682.76
Deficiency FWT	**₱ 2,820,888.59**

D.3. Income Payments to N.M. Rothschild & Sons - ₱3,204,222.40

Petitioner alleges that N.M. Rothschild & Sons Ltd. is a foreign corporation which was engaged by PSALM as Privatization Advisor in connection with the design of a Privatization Plan for the sale of transmission assets, generation assets, real estate, and other disposable assets and existing Independent Power Producers contracts of the NPC in accordance with RA No. 9136.

Petitioner asserts that the total actual income payments made to N.M. Rothschild during taxable year 2006 amounted only to ₱271,274.30. The balance amounting to ₱2,932,948.10 (₱3,204,222.40 less ₱271,274.30) represents Certified Obligations, which had not been actually billed by N.M. Rothschild nor remitted or paid by PSALM to N.M. Rothschild in 2006. The said amount was supposedly booked as Certified Obligation of PSALM merely for budget for the remaining balance of the professional fees based on its engagement agreement with PSALM.

Section 2.57.4 of Revenue Regulations No. 2-98, as amended by RR No. 12-01, provides when the obligation to withhold the tax arises, thus:

> "SECTION 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." *(Emphasis supplied)*

Based on the foregoing provision, the duty of petitioner to withhold arises when the professional fees were paid, becomes payable, or were accrued/recorded as expense in petitioner's books, **whichever comes first**. After which, the corresponding return and remittances must be made within 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.[59]

Records show that the income payments made by petitioner to N.M. Rothschild & Sons in the amount of ₱3,204,222.40 formed part of petitioner's claimed deductible expense for Professional Fees in the amount of ₱116,125,601.00.[60] Even though the amount of ₱3,204,222.40 has not been fully paid by petitioner, since it has already been accrued as an expense as of December 31, 2006, the same is subject to FWT pursuant to the aforequoted provisions of Section 2.57.4 of RR No. 2-98 as amended by RR No. 12-01.

A closer review of the documents reveals that petitioner indeed withheld and remitted the FWT amounting to ₱26,990.98 on the income payments of ₱269,909.81 as evidenced by Monthly Remittance Return of Final Income Taxes Withheld (BIR Form No. 1601-F) duly filed with the BIR on March 12, 2007.[61] It is to be noted that the remitted FWT of ₱26,990.98 represents 10%, instead of 25%, of the income payments of ₱269,909.81. Thus, there is under withholding and under remittance in the amount of ₱40,486.47 representing 15% of ₱269,909.81.

[59] Section 2.58(A)(2) of Revenue Regulations No. 2-98, as amended by RR No. 17-03.
[60] Exhibit "YYYY"; petitioner's Statement of Income and Expenses for the year ended December 31, 2006, under Maintenance and Other Operating Expenses, BIR Records Folder 3, p. 786.
[61] Exhibits "MMMM" to "MMMM-2".

Hence, petitioner is liable to pay basic deficiency FWT for the year 2006 in the amount of ₱774,064.62, computed as follows:

Total Income Payments Per Assessment	₱3,204,222.40
Less: Income Payments Subjected to FWT	269,909.81
Income Payments not Subjected to FWT	₱2,934,312.59
Tax Rate	25%
FWT Due	₱ 733,578.15
Add: Under withheld and under remitted FWT	40,486.47
Total Deficiency FWT	**₱ 774,064.62**

D.4. Income Payments to Malcolm Groom - ₱788,901.24

Petitioner alleges that the income payments to Malcolm Groom consisted of ₱575,781.25 as professional fees and ₱213,119.99 as reimbursement of out-of-pocket expenses; and that it subjected the entire professional fees to FWT amounting to ₱115,156.25.

A careful scrutiny of the documents proves that petitioner duly withheld and remitted FWT amounting to ₱115,156.25 on professional fees of ₱575,781.25 as evidenced by Monthly Remittance Return of Final Income Taxes Withheld (BIR Form No. 1601-F) duly filed with the BIR on February 21, 2007.[62]

With regard to reimbursement of out-of-pocket expenses, petitioner submitted before this Court Invoice No. 2 dated October 8, 2006 containing the work done, time spent and total fees dues amounting to $1,237.50; Computation of Percentage Accomplishment for October 8, 2006 billing; and Payment Instruction with Peso equivalent in the amount of ₱288,444.26.[63] Upon examination of said documents, this Court finds that there is no way that it can ascertain that the amount constituting the out-of-pocket expenses claimed by petitioner also pertains to the out-of-pocket cost found by respondent to be subjected to FWT; hence, the basic deficiency FWT assessment in the amount of ₱82,069.06, computed as follows, is sustained:

[62] Exhibits "JJJJ" to "JJJJ-2".
[63] Exhibits "WW" to "WW-1".

Income Payments per Assessment	₱ 788,901.24
Tax rate	25%
Final Withholding Tax Due	₱ 197,225.31
Less: Tax Payments	115,156.25
Deficiency FWT	**₱ 82,069.06**

D.5. Income Payments to Mr. David Dawson - ₱13,405,849.50

Petitioner alleges that Mr. David Dawson is a non-resident individual with office address at Heidelberg, Victoria, Australia, and was engaged by PSALM to provide technical advisory assistance to the Energy Regulatory Commission (ERC) in administering the TRANSCO regulatory reset process. Petitioner also avers that the income payments to Mr. David Dawson which consisted of professional fees and reimbursement of out-of-pocket expenses were duly subjected to FWT.

A review of the documents reveals that for the period of September 12, 2005 to June 30, 2006, Mr. David Dawson issued billing invoices to petitioner totaling to ₱18,494,524.00, detailed as follows:

Exhibit	Invoice No.	Amount	Period
"YY" to "YY-2"	2005-002	₱ 2,862,574.00	September 12, 2005 to October 31, 2005
"ZZ" to "ZZ-2"	2005-003	4,089,392.00	November 1, 2005 to December 31, 2005
"AAA" to "AAA-2"	2006-001	4,089,392.00	January 1, 2006 to February 28, 2006
"BBB" to "BBB-2"	2006-002	593,621.00	March 1-11, 2006
"CCC"	2006-003	3,062,297.00	March 12, 2006 to April 30, 2006
"DDD" to "DDD-2"	2006-004	3,797,248.00	May 01, 2006 to June 30, 2006
Total		**₱ 18,494,524.00**	

Subsequently, petitioner withheld and remitted FWT amounting to ₱2,967,427.30 on the total amount billed as follows:

Exhibit	Date Remitted	Income Payments	Tax Rate	FWT
"JJJJ"	2/12/2007	₱ 7,453,166.00	25%	₱ 1,863,291.50
"MMMM"	3/12/2007	11,041,358.00	10%	1,104,135.80
Total		**₱ 18,494,524.00**		**₱ 2,967,427.30**

This Court notes that the ₱13,405,849.50 income payments, subject of the assessment, consisted of the amount billed per Invoice No. 2006-001 and the gross-up value of the amount billed per Invoice Nos. 2006-002, 2006-003 and 2006-004, summed-up as follows:

Invoice No.	Amount Billed	FWT	Total
2006-001	₱ 4,089,392.00	-	₱ 4,089,392.00
2006-002	593,621.00	₱ 148,405.25	742,026.25
2006-003	3,062,297.00	765,574.25	3,827,871.25
2006-004	3,797,248.00	949,312.00	4,746,560.00
Total	**₱ 11,542,558.00**	**₱ 1,863,291.50**	**₱ 13,405,849.50**

Considering that petitioner claimed the entire income payments of ₱13,405,849.50 as Professional Services for the year 2006, the 25% final withholding tax should be imposed thereon and not on the amount of ₱11,542,558.00.

However in computing the deficiency 25% FWT of ₱3,351,462.38, respondent deducted therefrom the amount of ₱2,967,427.30 FWT paid by petitioner, resulting in deficiency FWT of ₱384,035.08, as shown below:

Income Payments	₱13,405,849.50
Tax Rate	25%
Final Withholding Tax Due	₱ 3,351,462.38
Less: Tax Payments	2,967,427.30
Deficiency FWT	**₱ 384,035.08**

This Court notes that the total tax payments of ₱2,967,427.30 deducted by respondent actually pertain partly to 2005 and partly to 2006 accounts. Respondent should have deducted only ₱2,272,230.70, the amount of FWT referring only to income payments for year 2006. Thus, the basic deficiency FWT should be ₱1,079,231.68, computed as follows:

Income Payments	₱13,405,849.50
Tax Rate	25%
Final Withholding Tax Due	₱ 3,351,462.38
Less: Tax Payments	2,272,230.70
Deficiency FWT	**₱ 1,079,231.68**

D.6. Income Payments to Citibank N.A. London - ₱1,798,067.87

Respondent alleges that income payments for professional services rendered by Citicorp Trustee Company Ltd. (CTCL) as trustee were not subjected to FWT. /

Petitioner alleges that Citibank N.A. London is the Branch Office of Citibank in the United Kingdom (UK) and is part of Citibank Group of Companies (Citigroup). Citicorp Trustee Company Ltd. (CTCL) is the trust arm of Citibank N.A. London, also a non-resident foreign corporation not engaged in business in the Philippines and located in the United Kingdom.

CTCL was appointed as a Replacement Trustee in connection with the substitution of NPC as Issuer of the JPY 12 Billion Bonds. This appointment was brought about by the purchase and acquisition by Citibank of all Global Trust and Agency Services business of JP Morgan, which was the original Trustee to conduct review of the documentation for Noteholders and for the substitution of NPC as Issuer of the JPY Bonds. JP Morgan's services were engaged via a Trust Deed dated December 11, 1995[64] between and among NPC, Republic of the Philippines (ROP), and Citibank N.A. London.

In a letter agreement dated May 13, 1998[65], NPC, ROP, and JP Morgan have signified their respective consent on the substitution of CTCL for JP Morgan as Trustee under the Trust Deed dated December 11, 1995. Subsequently, the parties formalized the appointment of CTCL in the letter agreement dated May 26, 1998.[66]

Petitioner submitted the invoices[67] issued by Citibank N.A. London to PSALM for the professional charges incurred in its capacity as Trustee for the substitution of NPC as issuer of JPY 12 Billion Bonds. These represent the professional fees paid to CTCL and the same were not subjected to income and withholding taxes for the services were allegedly rendered outside the Philippines.

It bears stressing 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.[68] Since the documents proffered by petitioner failed to sufficiently establish that the services were rendered by Citibank N.A. London outside of the Philippines, this Court has to sustain respondent's finding that petitioner is liable for deficiency FWT in the amount of ₱449,516.97 on its income payments to Citibank N.A. London.

[64] Exhibit "PPPP".
[65] Exhibit "QQQQ".
[66] Exhibit "RRRR".
[67] Exhibits "SSSS", "TTTT", "UUUU", and "VVVV".
[68] *Marcos II vs. Court of Appeals, et al.*, G.R. No. 120880, June 5, 1997.

D.7. Interest Expense (Nomura Bonds Tranches A & B) - ₱428,462,665.85

A major portion of the alleged income payments not subjected to FWT is the interest expenses for taxable year 2006 amounting to ₱428,462,665.85. Respondent contends that these payments should be subject to 20% FWT pursuant to Section 28(B)(5)(a) of the 1997 NIRC, as amended, which provides that:

> "(a) *Interest on Foreign Loans.* - A final withholding tax at the rate of twenty percent (20%) is hereby imposed on the amount of interest on foreign loans contracted on or after August 1, 1986;"

Petitioner alleges that the Nomura Bonds refer to Subscription Agreement of the Japanese Yen-denominated bonds, Tranche A Bonds (¥24,750,000,000, 3.2 per cent, due 2020) and Tranche B Bonds (¥37,000,000,000, 3.55 per cent, due 2022), which were issued by PSALM on December 10, 2002 in the total amount of Y61.75 billion or ₱26.85 billion. The Nomura Bonds issuance is jointly guaranteed by the Republic of the Philippines and by the Asian Development Bank.[69]

Pursuant to the Subscription Agreement and On-Lending Agreement entered into between PSALM and NPC, the proceeds from the two tranches of Nomura Bonds (Tranche A and Tranche B) will be used by PSALM to subscribe to Japanese yen-denominated bonds issued by NPC (NPC Bonds) on December 12, 2002 in two tranches (Tranche A and Tranche B) exactly in the same amounts as the Nomura Bonds issued by petitioner.[70]

Petitioner explains that in accordance with the terms of the On-Lending Agreement, NPC has undertaken to pay interest on the Nomura Bonds; hence, it is NPC which should be responsible for the deficiency FWT on the interest payments on the Nomura Bonds.

Petitioner submits that the BIR issued an assessment to NPC dated November 26, 2007, amounting to ₱5,489,389,539.00[71] for taxable years 2005, 2006, and 2007 for failure to withhold FWT on interest payments to various non-resident foreign creditors. The assessment for taxable year 2006 allegedly included the disputed deficiency FWT on interest expense paid

[69] Exhibit "TTTTT".
[70] Exhibit "XXXX".
[71] Exhibit "JJJJJ".

with JP Morgan Chase Bank (Nomura Bond's fiscal agent, paying agent and common depository bank).

However, verification of the documents from NPC covering settlement of the deficiency FWT on November 29, 2007 disclosed that only ₱431,764,546.33 pertain to Nomura Bonds per schedule of interest expense that was used as basis in the computation of the said deficiency FWT due from NPC,[72] for which NPC paid the related deficiency FWT assessment. Thus, the balance of Interest on Nomura Bonds in the amount of ₱427,076,032.00 (₱858,840,578.33 less ₱431,764,546.33) shall remain subject to 10% (per tax treaty) FWT in the amount of ₱42,707,603.20.

In view of the foregoing, petitioner is liable for basic deficiency FWT in the amount of ₱48,059,928.47, computed as follows:

Income Payments to:	**FWT**
Bloomberg	₱ 146,554.35
Mr. David Renton	2,820,888.59
NM Rothschild & Sons	774,064.62
Malcolm Groom	82,069.06
Mr. David Dawson	1,079,231.68
Citibank N.A. London	449,516.97
Interest Expense - Nomura Bonds	42,707,603.20
Total Deficiency FWT	**₱ 48,059,928.47**

Likewise, petitioner shall be held liable to pay interest and surcharges in the total amount of ₱1,779,067.72 for the late remittances, detailed and summarized as follows:

Deficiency on Increments for Late Remittances		
Bloomberg		
Succeeding years payments		₱ 144,024.15
Add: 25% Surcharge	₱ 36,006.04	
Interest (01-15-07 to 02-12-07)/(01-15-07 to 01-14-08)		
[₱75,555.59 x 20% x 28 days/365]	1,159.21	
[₱68,468.56x 20% x 364 days/365]	13,656.19	50,821.44
Total		₱ 194,845.59
Less: Payments		144,024.15
Total Amount Due		**₱ 50,821.44**
Mr. David Renton		
Succeeding years payments		₱4,073,682.76

L

[72] BIR Records, Volume 4, pp. 666-674.

Add: 25% Surcharge	₱1,018,420.69	
Interest (01-15-07 to 02-12-07)		
[₱4,073,682.76 x 20% x 28 days/365]	62,500.34	1,080,921.03
Total		₱5,154,603.79
Less: Payments		4,073,682.76
Total Amount Due		**₱1,080,921.03**
NM Rothschild and Sons (HK Ltd)		
Succeeding years payments		₱ 26,990.98
Add: 25% Surcharge	₱ 6,747.75	
Interest (01-15-07 to 03-12-07)		
[₱26,990.98 x 20% x 56 days/365]	828.22	7,575.97
Total		₱ 34,566.95
Less: Payments		26,990.98
Total Amount Due		**₱ 7,575.97**
Malcolm Groom		
Succeeding years payments		₱ 115,156.25
Add: 25% Surcharge	₱ 28,789.06	
Interest (01-15-07 to 02-12-07)		
[₱115,156.25 x 20% x 28 days/365]	1,766.78	30,555.84
Total		₱ 145,712.09
Less: Payments		115,156.25
Total Amount Due		**₱ 30,555.84**
Mr. David Dawson		
Succeeding years payments		₱2,272,230.70
Add: 25% Surcharge	₱ 568,057.68	
Interest (01-15-07 to 02-12-07) / (01-15-07 to 03-12-07)		
[₱1,863,291.50 x 20% x 28 days/365]	28,587.49	
[₱408,939.20 x 20% x 56 days/365]	12,548.27	609,193.44
Total		₱2,881,424.14
Less: Payments		2,272,230.70
Total Amount Due		**₱ 609,193.44**

Deficiency on Increments for Late Remittances	**Surcharge**	**Interest**	**Total**
Bloomberg	₱ 36,006.04	₱ 14,815.40	₱ 50,821.44
Mr. David Renton	1,018,420.69	62,500.34	1,080,921.03
NM Rothschild & Sons	6,747.75	828.22	7,575.97
Malcolm Groom	28,789.06	1,766.78	30,555.84
Mr. David Dawson	568,057.68	41,135.76	609,193.44
Total Deficiency FWT	**₱ 1,658,021.22**	**₱ 121,046.50**	**₱1,779,067.72**

L

E. Deficiency FWV Assessment – P12,429,844.38

In the FLD, respondent found petitioner liable for deficiency FWV in the amount of P12,429,844.38, computed as follows:

Taxable Basis per Return		₱ 66,639,522.06
Add: Income Payments not Subjected to FWV		87,070,165.81
Total Taxable Basis per Audit		₱153,709,687.87
VAT Withholding Tax Due - ₱11,148,983.84(2006) + ₱2,451,670.20(2005)		13,600,654.04
Less: Tax Paid – 2006	₱ 3,331,976.10	
Succeeding Years' Payments	3,522,763.14	6,854,739.24
Deficiency VAT Withholding Tax		₱ 6,745,914.80
Add: Interest (1/11/2007 to 12/30/2009 = 59.43%)		4,009,097.17
Interest for Late Payments		1,562,332.41
Compromise Penalty		50,000.00
Compromise Penalty for Late Payments		62,500.00
Total Deficiency Final Withholding VAT		**₱ 12,429,844.38**

Respondent's findings were based on the alleged under withholding of VAT on certain income payments, thus, the assessment.

Petitioner alleged that the bulk of the disputed deficiency final withholding VAT of ₱6,745,914.80 pertains substantially on income payments to (1) Feria & Feria Law Office, a Third Party Advisor of CSFB; (2) certain Certified Obligations; and (3) foreign advisors Mr. David Renton of Baker Botts LLP and Mr. David Dawson.

Petitioner claimed that payments to Feria & Feria Law Office, a Third Party Advisor to the agreement between petitioner and Credit Suisse First Boston (CSFB), were remitted directly to CSFB and should not be subjected to final withholding VAT in accordance with BIR Ruling No. DA-438-03 dated December 4, 2003, which ruled that payments to CSFB for the fees and expenses of their Third Party Advisors do not constitute gross receipts of CSFB and consequently, such payments to be made by PSALM shall not be subject to the final withholding VAT.

A scrutiny of the records reveals that, indeed, respondent subjected to final withholding VAT petitioner's payment to Feria & Feria Law Office. As discussed earlier under the EWT assessment, petitioner's payments to CSFB represent mere reimbursement for advisory services rendered by Feria & Feria Law Office. In view thereof, this Court holds that said payments to

CSFB are not subject to final withholding VAT. The assessment thereon in the amount of ₱586,918.73 is, thus, cancelled.

In the verification of the deficiency assessment for final withholding VAT, petitioner also found that respondent included Certified Obligations, which petitioner allegedly recorded for budget forecasting and financial accounting purposes only to account for the remaining balance of the professional fees of the consultants and advisers based on their respective engagement agreements with petitioner. Said amounts were not yet billed by the consultants/advisers in taxable year 2006, hence, not subject to withholding VAT; while others were income payments for services rendered outside the country.

However, petitioner failed to provide evidence to prove that the income payments not subjected to FWV directly refer to that of Certified Obligations. Likewise, petitioner failed to present documents that will support the alleged services rendered outside the Philippines by non-resident foreign individuals and corporations.

It is a well-settled rule in taxation that the burden of proof is on the taxpayer to present evidence to show the incorrectness of the assessment.

Hence, this Court sustains the remaining basic deficiency FWV assessment in the amount of ₱6,158,996.07 (₱6,745,914.80 less ₱586,918.73).

Likewise, this Court finds petitioner liable to pay interest and surcharges for the late remittances of the taxes due on 2006 income payments, computed as follows:

DEFICIENCY ON INCREMENTS FOR LATE REMITTANCES – FWVAT		
Succeeding years' payments		₱ 1,071,092.94
Add: 25% Surcharges	₱ 267,773.24	
Interest (01-10-07 to 02-12-07) / (01-10-07 to 03-12-07)/ (01-10-07 to 08-11-08)		
[₱138,596.73 x 20% x 33 days/365]	2,506.13	
[₱6,932.74 x 20% x 61 days/365]	231.72	
[₱925,563.47 x 20% x 579 days/365]	293,644.52	564,155.61
Total		₱ 1,635,248.55
Less: Payments		1,071,092.94
Total Amount Due		**₱ 564,155.61**

/

F. Deficiency WPT Assessment – P168.24

In the FLD, respondent found petitioner liable for deficiency WPT in the amount of ₱168.24, computed as follows:

Taxable Basis per Return		₱16,496,496.64
Add: Income Payments not Subjected to WPT		275,831.37
Total Taxable Basis per Audit		₱16,772,328.01
Withholding Percentage Tax Due		₱ 503,169.84
Less: Tax Paid – 2006	₱494,894.89	
Succeeding Year's Payments	10,094.56	504,989.45
Withholding Percentage Tax (Overpayment)		₱ (1,819.61)
Add: Interest for Late Payments		168.24
Total Deficiency Withholding Percentage Tax		**₱ 168.24**

Petitioner contends that the deficiency WPT assessment issued by respondent shows an overpayment of ₱1,819.61. Notwithstanding the said overpayment, petitioner was still assessed for deficiency WPT.

As can be gleaned from the above computation, petitioner's deficiency on withholding percentage tax actually pertains to delinquency interest for belatedly paying its taxes due of ₱8,274.95 (₱503,169.84 less ₱494,894.89).[73] Under Section 249 of the NIRC of 1997, as amended, the imposition of the interest on delinquency is mandatory. Strong reasons of policy support a strict observance of the rule regarding the payment of tax. The laws imposing penalties for delinquencies are clearly intended to hasten tax payments or to punish evasions or neglect of duty in respect thereof. If delays in tax payments are to be condoned for light reasons, the law imposing penalties for delinquencies would be rendered nugatory and the maintenance of the government and its multifarious activities would be as precarious as taxpayers are willing or unwilling to pay their obligations to the State in time.[74] Thus, this Court finds petitioner liable to pay deficiency interest in the amount of ₱149.63 (₱8,274.95 x 20% x 33/365 days).

Likewise, pursuant to Section 248(A)(1) of the 1997 NIRC, as amended, petitioner shall be held liable to pay 25% surcharge in the amount of ₱2,068.74 (₱8,274.95 x 25%).

---

[73] Amount actually paid was ₱10,094.56

[74] *Celso B. Jamora and Asuncion M. Jamora vs. Bibiano L. Meer, as Collector of Internal Revenue*, G.R. No. L-48129, November 11, 1942.

G. Compromise Penalty

This Court holds that respondent's imposition of compromise penalties, without the consent of petitioner cannot be sustained. Pursuant to Revenue Memorandum Order (RMO) No. 01-90, compromise penalties are amounts suggested in settlement of criminal liability, and may not be imposed or exacted on the taxpayer in the event that a taxpayer refuses to pay the same. Thus, compromise penalties imply mutual agreement between the taxpayer, on one hand, and the CIR, on the other. Absent any showing that petitioner consented to the compromise penalties, the same should not be imposed.

WHEREFORE, premises considered, the Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, the assessment issued by respondent against petitioner for taxable year 2006 covering alleged deficiency VAT is hereby **CANCELLED AND/OR WITHDRAWN**. However, the assessments for deficiency WTC, EWT, FWT, FWV, and WPT are hereby **AFFIRMED** with **MODIFICATIONS**. Petitioner is hereby **ORDERED** to **PAY** the amount of **₱79,158,673.72** for the following deficiency taxes, inclusive of the 25% surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended:

Tax Type	Basic Tax Due	25% Surcharge	20% Interest	Total
WTC	₱ 5,204,061.99	₱ 1,301,015.50		₱ **6,505,077.49**
EWT	407,199.60	101,799.90		**508,999.50**
FWT	48,059,928.47	12,014,982.12		**60,074,910.59**
FWVAT	6,158,996.07	1,539,749.02		**7,698,745.09**
Sub-total	₱ **59,830,186.13**	₱ **14,957,546.54**	-	₱ **74,787,732.67**
Deficiency Increments for late remittance				
WTC		₱ 1,451,945.36	₱ 540,349.65	₱ **1,992,295.01**
EWT		29,490.28	3,714.06	**33,204.34**
FWT		1,658,021.22	121,046.50	**1,779,067.72**
FWVAT		267,773.24	296,382.37	**564,155.61**
WPT		2,068.74	149.63	**2,218.37**
Sub-total		₱ **3,409,298.84**	₱ **961,642.21**	₱ **4,370,941.05**
Total	₱ **59,830,186.13**	₱ **18,366,845.38**	₱ **961,642.21**	₱ **79,158,673.72**

In addition, petitioner is **ORDERED** to **PAY** the following:

(a) deficiency interest at the rate of twenty percent (20%) per annum on the following basic deficiency taxes computed from the dates indicated herein until full payment thereof pursuant to Section 249(B) of the NIRC of 1997:

Tax Type	Basic Tax Due	20% Deficiency Interest Computed from:
WTC	₱ 5,204,061.99	January 15, 2007
EWT	407,199.60	January 15, 2007
FWT	48,059,928.47	January 15, 2007
FWVAT	6,158,996.07	January 10, 2007
Total	**₱ 59,830,186.13**	

(b) delinquency interest at the rate of 20% per annum on the total amount due of **₱74,787,732.67** representing deficiency WTC, EWT, FWT, and FWVAT and on the deficiency interest which have accrued as aforestated in (a) computed from December 30, 2009 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997; and

(c) delinquency interest at the rate of 20% per annum on the deficiency increments for late remittance of withholding taxes in the amount of **₱4,370,941.05** computed from December 30, 2009 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997.

SO ORDERED.

AMELIA R. COTANGCO- MANALASTAS
Associate Justice

I CONCUR:

LOVELL R. BAUTISTA
Associate Justice

ATTESTATION

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

LOVELL R. BAUTISTA
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, 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