REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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PNOC DEVELOPMENT AND MANAGEMENT CORPORATION, Petitioner,	**CTA Case No. 8649**
	Members:
- versus -	**DEL ROSARIO,** *Chairperson*, **UY,** and **MINDARO-GRULLA,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	***Promulgated:*** JAN 22 2016 ; 1:52 p.m.

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DECISION

UY, *J.*:

The instant Petition for Review filed by PNOC Development and Management Corporation on April 26, 2013 seeks the cancellation and withdrawal of the Formal Assessment Notice (FAN) dated August 31, 2012 issued by respondent Commissioner of Internal Revenue, finding petitioner liable for alleged deficiency income tax, value-added tax (VAT), expanded withholding tax (EWT), withholding tax on compensation (WTC), and final withholding VAT, inclusive of surcharge and interest, in the aggregate amount of ₱155,384,621.84 for the taxable year 2007.

THE FACTS

Petitioner PNOC Development and Management Corporation (PDMC) is a government-owned and -controlled corporation created under the Corporation Code. It is the real estate arm of the Philippine National Oil Company (PNOC) and holds business at the 2nd Floor PNOC Building 5, Energy Center, Rizal Drive, Bonifacio Global City, Taguig City.[1]

The Bureau of Internal Revenue (BIR), through public respondent Commissioner of Internal Revenue, is the agency of the government tasked with the enforcement of revenue laws and collection of taxes and duties, including, among others, the power to examine tax returns and determine tax due, credit or refund internal revenue taxes erroneously/excessively or illegally paid, assessed or collected.[2]

On August 31, 2012, petitioner received the Formal Assessment Notice dated August 31, 2012,[3] relative to the investigation of petitioner's internal revenue tax liabilities for 2007 under Letter of Authority No. 12471 dated February 16, 2009, the summary of which is shown hereunder:

Internal Revenue Taxes	
Income Tax	₱ 8,624,441.50
VAT	142,051,725.12
EWT	604,093.34
WTC	1,829,658.69
Final Withholding Tax of VAT	2,274,703.19
Total	**₱155,384,621.84**

A twenty percent (20%) interest has been imposed pursuant to Section 249 of the NIRC of 1997, as amended. The fifty percent (50%) surcharge has been imposed on deficiency VAT pursuant to Section 248(B) of the NIRC of 1997, as amended, for substantial under-declaration of sale of more than thirty percent (30%) of the actual sales declared per return.[4]

On September 28, 2012, petitioner filed with the BIR its Administrative Protest Letters, all dated September 25, 2012,[5] against each of the assessed deficiency taxes.[6]

Respondent failed to act on petitioner's protest,[7] prompting

[1] Par. 6, Stipulation of Facts, Joint Motion to Approve Stipulation of Facts and Issues (JSFI), Docket, p. 546.
[2] Par. 2, Stipulation of Facts, JSFI, Docket, pp. 544 to 545.
[3] Exhibit "P-6", Docket, pp. 692 to 693.
[4] Par. 3, Stipulation of Facts, JSFI, Docket, p. 545.
[5] Exhibits "P-39" and "P-40", Docket, pp. 882 to 885 and pp. 898 to 907.
[6] Par. 4, Stipulation of Facts, JSFI, Docket, p. 545.
[7] Par. 5, Stipulation of Facts, JSFI, Docket, p. 545.

petitioner to file the instant Petition for Review[8] on April 26, 2013.

Within the extended time granted by the Court,[9] respondent filed her Answer on June 24, 2013,[10] interposing the following special and affirmative defenses:

"**<u>SPECIAL AND AFFIRMATIVE DEFENSES</u>**

5. Petitioner's claim for the cancellation of assessment against it in the instant *Petition* has no basis in fact and in law. Allow us to state the reasons below.

6. ***On the question of deficiency of income tax:***

6.1 **Disallowed expense due to non-withholding of tax (₱8,965,389.20).** Upon examination and verification, it was revealed that petitioner failed to withhold and remit the expanded withholding tax on its income payments to Top 10K, Directors Fee, Management and Consultancy Fees, commissions, and rentals pursuant to Sections 57 and 58 of the National Internal Revenue Code of 1997, as amended *('Tax Code')*. Thus, those expenses claimed by petitioner were disallowed pursuant to Section 34(K) of the Tax Code, which provides that:

> 'xxx any amount paid or payable which is otherwise deductible from, or taken into account in computing gross income or for which depreciation or amortization may be allowed under this Section, shall be allowed as a deduction **<u>only if it is shown that the tax required to be deducted and withheld therefrom has been paid to the Bureau of Internal Revenue.</u>**' ***(Emphases and underlining all provided)***

Petitioner also argues that the discrepancy in its claims refers to income payments which are not subject to expanded withholding taxes. However, it failed to substantiate its claim as no supporting documents were submitted, resulting in the denial of its claim.

6.2 **As to salaries and wages not subjected to withholding tax (₱3,801,744.22).** Investigation of petitioner's account revealed that it failed to withhold

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[8] Docket, pp. 6 to 21.
[9] Order dated June 3, 2013, Docket, p. 141.
[10] Docket, pp. 142 to 152.

and remit the required withholding tax from its compensation payment in the amount of ₱3,801,744.22, resulting in the disallowance of its claim for deduction from gross income pursuant to Sec. 34(K) of the Tax Code.

Petitioner presented a reconciliation showing its revised computation of those compensation payments not subject to a withholding tax amounting to ₱492,914.26. However, it failed to submit substantiating documents to back up its claims, hence, it was also disallowed.

6.3 **As to the under-declared income from unaccounted expenses (₱91,677.34).** Further verification of petitioner's claimed expenses in relation to its income payments subject to expanded withholding tax revealed that there was an undisclosed professional fee amounting to ₱91,677.34, which is presumed as under-declared income following the case of *Perez vs. CTA* (G.R. No. L-10507, May 30, 1958). Also, a reconciliation was also presented by petitioner, but it was also not substantiated. For those reasons, petitioner was assessed in accordance with Sec. 32 of the Tax Code.

6.4 **Disallowed creditable tax withheld (₱53,700.00).** In the investigation of petitioner's tax records, its claimed creditable tax withheld resulted to disallowance in the total amount of ₱6,866,742.80.

The amount of ₱53,700.00 thereof represents the amount claimed to be withheld by Sta. Lucia Realty & Development, Inc. covers the period from January 1, 2006 up to December 31, 2006, which was disallowed for those claims are out of period.

As to the amount of ₱7,066,958.75 representing rental income withheld by SM Prime Holdings, Inc., further analysis has shown that only the amount of ₱253,915.43 representing only five percent (5%) of the rental income declared as ₱5,078,318.65 can be allowed following Sec. 2.58.3(A) and (B) of Revenue Regulations ('RR') No. 2-98, which we reproduce below:

'SECTION 2.58.3. Claim for Tax Credit or Refund. –

(A) The amount of creditable tax withheld shall

> be allowed as a tax credit against the income tax liability of the payee **in the quarter of the taxable year in which the income was earned or received.**
>
> (B) Claims for tax credit or refund of any creditable income tax which was deducted and withheld on income payments shall be given due course only **when it is shown that the income payment has been declared as part of the gross income and the fact of withholding is established by a copy of the withholding tax statement duly issued by the payor to the payee showing the amount paid and the amount of tax withheld therefrom.**" ***(emphases and underlining all provided)***

Finally, petitioner also contends that the certificate dated 2006 of Sta. Lucia Realty & Development, Inc. should be given credit since the corresponding income was reported in 2007. However, such claim cannot be verified and no other substantiating document was submitted by petitioner, resulting in the disallowance of petitioner's claim.

7. ***On the question of deficiency value added tax:***

7.1. As to various sales/receipts not subjected to Value-Added Tax ('VAT') (₱142,545,406.66). Upon investigation, it was disclosed that petitioner failed to subject to corresponding output tax its sales/receipts amounting to ₱129,389,138.10, resulting in its assessment following Sec. 106 of the Tax Code.

Petitioner claims that its housing sales are socialized housing sales which are not covered by VAT, including also its other transactions. But it failed to provide specific details with supporting documents on which of its sales are socialized housing and VAT-exempt sales. For that, its claims were not given merit.

Lastly, petitioner claims that its sales to SM Prime Holdings, Inc. was made in a public bidding, thus, the VAT should be computed based on bid/selling price, even citing BIR Rulings and Revenue Memorandum Orders ('RMO'). But those citations are not applicable in the matter at hand, as the subject in petitioner's citations involve income tax and documentary stamp tax, and not VAT. Also, notification alone to prospective buyers does not in any way establish that there was a sale that passed through a public bidding as laid down in RMO No.

41-91. And finally, petitioner once more failed to submit pertinent documents that will substantiate its allegations, hence, the assessment.

7.2. **As to the sale of real property to Majestic Technical Skills (₱336,913,020.20).** Petitioner contends that the real property it sold to Majestic Technical Skills is a capital asset as it was previously owned by the then-Filoil Refinery Corporation *('Filoil')*; that the same asset was sold in accordance with privatization; and that the same property is idle and being treated and held as an asset account that is considered as property equipment in its books, hence, not subject to VAT.

However, investigation made by the respondent shows that even when Filoil held the subject real property, it was already treated as an ordinary asset for it was intended and used primarily in the business of oil refinery and its related businesses. Moreover, it must be pointed out that petitioner was incorporated under the *Batas Pambansa Bilang 68* or the Corporation Code, therefore, it is also taxable in the same way and manner as any other regular corporations incorporated under the general corporation laws.

7.3. **As to unsupported tax credit deducted against payable VAT (₱492,436.66).** Verification disclosed that petitioner claimed a tax credit amounting to ₱492,436.66, but it was found out that there neither was there a proper classification of said claim nor was it supported by proper documents, which inevitably resulted in the disallowance of such claim in accordance with Sec. 110 of the Tax Code.

Furthermore, petitioner's attempts to prove its entitlement in the said tax credit by presenting ledger and VAT Return for the first quarter of taxable year 2007 as evidence of alleged excess input tax for purchases from prior years was also not given due course, for the proper and best evidence to substantiate such claim was not submitted, that is, the VAT Return(s) for taxable year 2006.

8. ***On the question of deficiency in the expanded withholding tax*** **(₱310,817.69).** Investigation of petitioner disclosed that it failed to withhold and remit the required expanded withholding tax and there was no submission of supporting documents as to the income payments,

resulting in the assessment of ₱310,817.69 representing deficient expanded withholding tax, in accordance with the provisions of Sec. 2.57.2 of RR No. 2-98, as amended.

9. ***On the question of deficiency in the withholding tax on compensation.* (₱941,394.73).** Verification of the petitioner's records also reveals that there it failed to withhold and remit the required withholding tax of ₱941,394.73 from its compensation payment in the total amount of ₱3,801,744.22, in accordance with the provisions of Sec. 2.58 of RR No. 2-98, as amended.

10. ***As to deficiency in the final withholding VAT* (₱1,168,731.23).** As per investigation, there are income payments/expenses not subjected by petitioner to a final withholding VAT amounting to ₱1,168,731.23. Also, no supporting documents were submitted to justify those income payments/expenses. Accordingly, it was assessed following the provisions of Sec. 4.114(A)(1) of RR 2-98, as amended.

11. It is worth stressing that petitioner judicially admitted in its petition that its primary purpose, among others, are to '**<u>acquire by purchase, exchange, lease, donation grant, foreclosure or otherwise,</u>** lands, interest in lands, real property and buildings of every class and description and to own, hold, establish, provide, possess, rebuild, alter, improve, reforest, develop, utilize, manage, subdivide, sell, exchange, lease, mortgage, securitize and **<u>hold for investment or otherwise, real estate</u>**.' Thus, for such fact alone, petitioner cannot lay claim that its actions of selling real estate does not come under the conduct of being in the course of trade or business making them exempt from VAT, when facts and even petitioner's records otherwise holds.

12. Moreover, petitioner is laying claim to the Commission on Audit's *('COA')* classification of its real properties as enough basis to be treated as capital assets, hence, exempt from VAT. However such claim has no merit for **<u>nowhere in the Balance Sheet issued by the COA that such properties were clearly and explicitly stated as capital asset</u>**. It is only petitioner that makes such assertion when the COA Balance Sheet does not show on its face such fact.

13. As to petitioner's invocation of BIR Rulings which allegedly exempts it from the operation of VAT, suffice it to state that such rulings cannot be claimed by petitioner, for **those rulings are issued in favor of another taxpayer, and not**

to petitioner. For petitioner to be exempt from VAT, its position must first be verified and confirmed by the BIR through a specific ruling secured by it. Otherwise, petitioner cannot be allowed to claim an outright exemption.

14. ***As to assessment of interest and surcharge.*** Suffice it to state that for substantial under-declaration of sales of more than 30% of the actual sales declared per return, it is but proper that such imposition is made pursuant to Sec. 248(B) of the Tax Code.

15. Also, as it is found out that there is a false return with intent to evade tax or failure to file a return, the assessment of taxes was made within the prescription period, that is, ten (10) years after the discovery of the falsity, in accordance with Sec. 203 of the Tax Code.

16. No evidence was submitted by the petitioner to disprove such findings by the respondent. Thus, the assailed assessments are to be presumed correct. As held by the Honorable Supreme Court in the case of ***Tan Guan vs. The Court of Tax Appeals*** **(G.R. No. L-23676, April 27, 1967)**:

> 'The Commissioner of Internal Revenue, sustained by the Tax Court, found for a fact that the expenses in the amount of ₱206,870.00 are fictitious. **Tan Guan presented no evidence to disprove such finding. In appeals to the Court of Tax Appeals, the determination of the Commissioner of Internal Revenue is presumed correct and it behooves the taxpayer to rebut such presumption** (*Perez vs. Court of Tax Appeals, et al., L-10507*, May 30, 1958). **Tan Guan failed to overcome his burden. Hence, the finding that the expenses are fictitious must be sustained. And being fictitious, the expenses cannot be claimed as deduction from gross income**. ***(emphases and underlining all provided)***

17. Even as early as in the case of ***Collector of Internal Revenue vs. Bohol Land Transportation Co.*** **(G.R. Nos. L-13099 & L-13462, April 29, 1960)**, the Honorable Supreme Court had the occasion to rule that:

> '**Since no evidence was presented to substantiate the errors that are claimed to have been committed by the Collector in making the assessments for the years 1948, 1949 and 1950, the trial court had no other alternative than to**

> **<u>resort to the legal truism that 'all presumptions are in favor of the correctness of tax assessments'. The burden of proof is on the taxpayer to show the contrary.</u>** This the company failed to do. This action find support in the following authorities:
>
> > '**<u>All presumptions are in favor of the correctness of tax assessments. The good faith of tax assessors and the validity of their actions are presumed.</u>** They will be presumed to have taken into consideration all the facts to which their attention was called. No presumption can be indulged that all of the public officials of the state in the various counties who have to do with the assessment of property for taxation will knowingly violate the duties imposed upon them by law.
> >
> > '**<u>As a logical outgrowth of the presumption in favor of the validity of assessments, when such assessments are assailed, the burden of proof is upon the complaining party. It is incumbent upon the property owner clearly to show that the assessment was erroneous, in order to relieve himself from it</u>**.' (51 Am. Jur. pages 620-621).' (*Interprovincial Autobus Co., Inc. vs. Collector of Internal Revenue,* 98 Phil., 290; 52 Off. Gaz., [2] 791.)
> >
> > 'When an importer challenges by legal steps the correctness of the assessment of a duty by the Collector of Customs, **<u>the question to be decided is not whether the Collector was wrong but whether the importer was right, the burden being on the latter to establish the correctness of his own contention</u>**.' (*Behn, Meyer & Co. vs. Collector of Customs,* 26 Phil., 647)
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> > '**<u>That the determination of the tax deficiency by the Government has *prima facie* validity and the burden rests upon the taxpayer to overcome this presumption and to show to the satisfaction of the Tax Court that the determination was not correct</u>**.' (*Perez vs. Court of Tax Appeals, et al.,* G.R. No. L-10507, May 30, 1958)' ***(emphases and underlining all provided)***

18. Petitioner cannot question the assessments made against it for all presumptions are **<u>in favor of tax assessments</u>** (***Interprovincial Autobus Co., Inc. v. Collector*** **[98 Phil.**

> **290]; *Cecilia Teodoro Dayrit v. Hon. Fernando Cruz and Commissioner* [L-39910, Sept. 26, 1988]; and *Bonifacio Sy Po vs. CTA & Commissioner,* [G.R. No. 81446, Aug. 18, 1988]).**
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> 19. Thus, applying the pertinent provisions of the law, rules and jurisprudence in the matter at hand, it is crystal clear that the instant *Petition* lacks basis and merit, and should be dismissed outright by this Honorable Court/ Consequently, petitioner should already be made to pay the deficient taxes."

In the Notice of Pre-Trial Conference,[11] the pre-trial conference was set on August 9, 2013. Both the petitioner's Pre-Trial Brief[12] and the respondent's Pre-Trial Brief[13] were filed on September 11, 2013.

On September 30, 2013, the parties filed a Joint Motion to Approve Stipulation of Facts and Issues.[14] In the Resolution dated October 11, 2013,[15] the Court directed the parties to submit a Supplemental Joint Stipulation of Facts and Issues indicating the names of their witnesses and the agreed trial dates. Thereafter, the parties filed their Supplemental Joint Stipulation of Facts and Issues on November 12, 2013.[16]

On November 19, 2013, the parties' Joint Motion to Approve Stipulation of Facts and Issues and their Supplemental Joint Stipulation of Facts and Issues were approved by the Court.[17] Subsequently, the Court issued the Pre-Trial Order on December 16, 2013.[18]

During trial, petitioner presented the following witnesses: Atty. Joseph John M. Literal, its Vice President and Legal Manager; Ms. Aprilee M. Mena, its Accounting Officer; and Ms. Brigitte D. Cañita, its Finance and Budget Manager.

Petitioner filed its Formal Offer of Evidence on April 8, 2014.[19]

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[11] Docket, p. 153.
[12] Docket, pp. 162 to 172.
[13] Docket, pp. 457 to 459.
[14] Docket, pp. 544 to 548.
[15] Docket, pp. 557 to 558.
[16] Docket, pp. 559 to 566.
[17] Resolution dated November 19, 2013, Docket, pp. 574 to 575.
[18] Docket, pp. 577 to 584.
[19] Docket, pp. 636 to 659.

In the Resolution dated June 25, 2014,[20] the Court admitted petitioner's Exhibits "P-49", "P-49-a", "P-1", "P-2", "P-3", "P-4", "P-5", "P-6", "P-7", "P-8", "P-8-a", "P-9", "P-10", "P-11", "P-14", "P-14-a", "P-15", "P-15-a", "P-16", "P-17", "P-19", "P-20", "P-21", "P-22", "P-23", "P-32", "P-32-a", "P-33", "P-34", "P-35", "P-36", "P-36-a", "P-37", "P-38", "P-39", "P-39-a", "P-40", "P-40-a", "P-50", "P-50-a", "P-41", "P-42", "P-42-a" to "P-42-c", "P-43", "P-43-a" to "P-43-b", "P-43-e" to "P-43-f", "P-44", "P-44-a", "P-44-c" to "P-44-d", "P-45", "P-45-a", "P-46", "P-47", "P-48", "P-51", "P-51-a" and "P-41-b", "P-42-b", "P-43-c", "P-43-d", "P-44-b", and "P-45-b". The Court, however, denied the admission of Exhibits "P-12", "P-13", "P-18", "P-24", "P-25", "P-26", "P-27", "P-28", "P-29", "P-30", and "P-31" for failure of petitioner to submit the original documents for comparison.

On September 18, 2014, petitioner filed its Supplemental Formal Offer of Evidence.[21] In the Resolution dated November 5, 2014,[22] petitioner's Exhibits "P-52", "P-52-a", "P-52-b", "P-52-c", "P-53", "P-53-a", "P-53-b" and "P-53-c" were admitted into evidence.

On the other hand, respondent presented as its lone witness, Revenue Officer Renan A. Plata.

Respondent filed her Formal Offer of Evidence on September 16, 2014.[23] The Court admitted respondent's Exhibits "R-1", "R-1-a", "R-2", "R-2-a", "R-2-b", "R-3", "R-3-a", "R-3-b", "R-3-c", "R-4", "R-4-a", "R-4-b", "R-5", "R-5-a", "R-5-b", "R-6", "R-6-a", "R-6-b", "R-7", "R-8", "R-8-a", "R-8-b", "R-9", "R-9-a", "R-9-b", "R-9-c", "R-10", "R-10-a", "R-10-b", "R-10-c", "R-11", "R-11-a", "R-12", "R-12-a", "R-13", and "R-13-a" in the Resolution dated November 5, 2014.[24]

Petitioner filed its Memorandum on December 10, 2014;[25] while respondent failed to submit her Memorandum.[26] Thus, in the Resolution dated January 13, 2015,[27] the Court deemed the case submitted for decision.

Hence, this Decision.

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[20] Docket, pp. 932 to 933.
[21] Docket, pp. 948 to 951.
[22] Docket, pp. 969 to 970.
[23] Docket, pp. 952 to 958.
[24] Docket, pp. 969 to 970.
[25] Docket, pp. 971 to 991.
[26] Records Verification dated January 5, 2015, Docket, p. 992.
[27] Docket, p. 994.

THE ISSUES

The parties submitted the following issues for resolution of this Court, to wit: [28]

1. Whether or not petitioner is liable for the deficiency income tax assessments of ₱8,624,441.50;

2. Whether or not petitioner is liable for VAT of ₱142,051,725.12;

3. Whether or not petitioner is liable for EWT of ₱604,093.34;

4. Whether or not petitioner is liable for WTC of ₱1,829,658.69; and

5. Whether or not petitioner is liable for final withholding tax on VAT of ₱2,274,703.19.

THE COURT'S RULING

Since the resolution of the issues on the deficiency EWT and WTC assessments also affects the deficiency income tax assessment, the Court shall discuss the validity of the subject assessments in the following sequence:

Deficiency Tax	Amount
EWT	₱ 604,093.34
WTC	1,829,658.69
Income Tax	8,624,441.50
VAT	142,051,725.12
Final Withholding of VAT	2,274,703.19
Total	**₱155,384,621.84**

I. Deficiency EWT – ₱604,093.34

Respondent's investigation disclosed that petitioner failed to withhold and remit the EWT on certain income payments/expenses pursuant to Section 2.57.2 of Revenue Regulations (RR) No. 02-98[29],

[28] Issues, Joint Stipulation of Facts and Issues, Docket, p. 546.

[29] SUBJECT: Implementing Republic Act No. 8424, "An Act Amending The National Internal Revenue Code, as Amended" Relative to the Withholding on Income Subject to the Expanded Withholding Tax and Final Withholding

as amended, in relation to Sections 57 and 58 of the National Internal Revenue Code (NIRC) of 1997. Hence, petitioner was assessed of the corresponding deficiency EWT, inclusive of interest, in the amount of ₱604,093.34, computed as follows:[30]

Basic tax due	₱ 310,817.69
Add: Interest (1-16-08 to 10-3-12)	293,275.65
Total amount due	**₱604,093.34**

Schedule 1 of the Details of Discrepancy[31] attached to the FAN shows the breakdown of the said income payments/expenses resulting in basic deficiency EWT of ₱310,817.69 as follows:

Income Payments	Per Financial Statements (FS)/Income Tax Return (ITR)	Per Alphalist	Difference	EWT Rate	EWT Due
Top 10K-Services					
Insurance benefit	₱ 186,176.00				
Security services	661,366.50				
Other outside services	626,403.26				
Advertising	120,127.14				
Repairs and Maintenance - Labor	66,830.35				
Insurance	468,589.42				
Representation and entertainment	360,312.90				
Transportation and travel	441,176.51				
Communication light & water	873,380.19				
Photocopying	57,559.49				
Other business expense	5,431,441.43				
Subtotal	₱ 9,293,363.19	₱ 2,523,817.02	₱ 6,769,546.17	2%	₱ 135,390.92
Top 10K-Goods					
Repairs and maintenance – materials	₱ 80,801.31				
Office supplies	231,878.22				
Fuel and oil	208,501.98				
Subtotal	₱ 521,181.51	₱ 202,981.72	₱ ₱ 318,199.79	1%	₱ 3,182.00
Income Payment Subject to 15% EWT Rate					
Directors fee	₱ 5,590,341.32				
Management and consultancy fees	1,578,170.03				
Subtotal	₱ 7,168,511.35	₱ 6,499,766.86	₱ 668,744.49	15%	₱ 100,311.67
Commission	₱ 10,042,599.52	₱ 9,812,836.27	₱ 229,763.25	10%	₱ 22,976.33
Rental	₱ 979,135.50	-	₱ ₱ 979,135.50	5%	₱ 48,956.78
TOTAL	₱ **28,004,791.07**	₱ **19,039,401.87**	₱ **8,965,389.20**		₱ **310,817.69**

Tax, Withholding of Income Tax on Compensation, Withholding of Creditable Value-Added Tax and Other Percentage Taxes, April 17, 1998.

[30] Exhibit "P-6", Docket, p. 692 and Exhibit "P-7", Docket, p. 694.

[31] Exhibit "P-7", Docket, p. 694.

Petitioner asserts that the said amounts are legitimate business expenses incurred and that the necessary taxes were withheld.

To substantiate its claim, petitioner submitted its April 8, 2011 protest letter[32] to the Revenue District Office No. 050, the Summary of Expenses[33], Expenses Details[34], and Contract of Lease[35] between PNOC and petitioner.

Also, petitioner presented a reconciliation[36] of respondent's EWT assessment in relation to petitioner's own verification, whereby petitioner admits liability to a deficiency EWT of only the amount of ₱190,908.46.[37] Under the "Not included in EWT" and "REMARKS" columns of said reconciliation, petitioner indicated the assessed amounts and their individual brief descriptions which allegedly must not be subjected to EWT, to wit:

Not included in EWT	Remarks
₱ 218,104.32	Insurance Premium for beneficiaries of socialized housing (GSIS)
209,847.99	Cash payments for various meetings and conferences
388,029.46	Local travel-Various cash reimbursement of employees on field work
112,952.57	Communication expenses of employees reimbursed on cash
26,095.18	Cash payment for raffle prizes, beverages and meals
1,935,235.48	Representation expenses and legal fees for civil case
3,060,997.13	Share on development cost to PEZA on the investment property of PDMC
131,440.53	Cash purchase of emergency supplies
38,381.91	Cash payment thru officer's reimbursements
₱6,121,084.57	

In support of the above expenses, petitioner claimed to have submitted to respondent copies of the Payment Orders – Cash Disbursement Vouchers and JV-05/Liquidation of Cash Advances for the period January to December 2007.

However, said Payment Orders – Cash Disbursement Vouchers, Liquidation of Cash Advances, together with the related

[32] Exhibit "P-8", Docket, pp. 701 to 719.
[33] Exhibit "P-9", Docket, p. 720.
[34] Exhibit "P-10", Docket, p. 721 to 738.
[35] Exhibit "P-11", Docket, pp. 739 to 745.
[36] Exhibit "P-41", Docket, p. 908.
[37] Exhibit "P-50", Q&A No. 14, Docket, pp. 889 to 890; Exhibit "P-51", Q&A Nos. 12 and 13, Docket, p. 921.

invoices, receipts and other documents that may support its claim, were not furnished to this Court for proper evaluation of whether or not the transactions are subject to EWT.

Thus, despite petitioner being amenable up to the amount of ₱190,908.46 deficiency EWT, it failed to substantiate the remaining refuted difference. Accordingly, the basic deficiency EWT assessment should be upheld in the entire amount of ₱310,817.73.

II. Deficiency WTC – ₱1,829,658.69

Upon verification that the compensation paid by petitioner in the amount of ₱3,801,744.22 was not subjected to the required withholding tax pursuant to Section 2.80 of RR No. 02-98, as amended, respondent assessed petitioner of deficiency WTC in the amount of ₱1,829,658.69, inclusive of interest, computed as follows:[38]

Basic tax due	₱ 941,394.73
Add: Interest (1-16-08 to 10-03-12)	888,263.96
Total amount due	**₱ 1,829,658.69**

Detailed computation of the basic deficiency WTC of ₱941,394.73 is reproduced hereunder:[39]

Salaries and wages per investigation		
Salaries	₱ 8,514,940.00	
Other employees cost	8,030,681.00	₱ 16,545,621.00
Less: Salaries and wages per alphabetical list		
Taxable salaries	₱ 11,933,876.78	
13th month pay and other benefits	810,000.00	12,743,876.78
Salaries not subjected to withholding tax		**₱ 3,801,744.22**
Average rate of withholding tax withheld to taxable compensation[40]		24.76218%
Withholding tax on compensation		**₱ 941,394.73**

Petitioner vehemently objects to said assessment alleging that

[38] Exhibit "P-6", Docket, p. 693 and Exhibit "P-7", Docket, p. 695.

[39] Exhibit "P-7", Schedule 2, Docket, p. 695.

[40] Average rate based on the following computation (BIR Records, pp. 141 to 142):

$$\frac{\text{Tax Paid}}{\text{Taxable Compensation}} = \frac{₱2,955,088.00}{₱11,933,876.78} = 24.76218\%$$

respondent's use of an average rate of withholding tax is based on a mere presumption.

The Court disagrees.

Respondent's imputation of an average rate in computing the deficiency WTC was based on facts. The factors used in the computation of the average rate were obtained from petitioner's alphalist[41] submitted to respondent. Therefore, respondent's computation was with proper basis and was not done arbitrarily and capriciously.

Petitioner, however, based on its reconciliation[42], admits to incurring a basic deficiency WTC but only to an amount of ₱141,127.87[43] on compensation payment of ₱569,933.14, computed as follows:

	Per Alphalist	Per FS	Difference
Basic Salaries	₱ 7,614,350.80	₱ 8,514,940.00	
Bonus and Other Benefits	4,319,525.98	8,030,681.00	
Total	₱11,933,876.78	₱16,545,621.00	
Reconciling Items:			
(1) Mispunching of amount under alphalist but taxes have been duly paid (under employees R.D. Ama and J.R. Tirambulo)	749,000.00		
(2) Corporate Secretary and Treasurer's Salaries and other benefits (presented under separate account code in F.S. under 410 acct.)		1,002,437.82	
(3) President & CEO's Basic and other Benefits paid thru 1601E		(2,476,235.35)	
(4) "De minimis" benefits not subject to income tax		(347,120.00)	
Rice subsidy & ECOLA		(82,847.36)	
Non-taxable Leave Monetization		(163,698.99)	
Medical Expenses		(104,000.00)	
Uniform allowance		(230,520.20)	
(5) SSS/Pag-ibig		(810,000.00)	
(6) Tax-free bonus		(80,827.00)	

[41] BIR Records, pp. 141 to 142.
[42] Exhibit "P-42", Docket, p. 909.
[43] Exhibit "P-50", Q&A, No. 18, Docket, pp. 890 to 891; Exhibit "P-51", Q&A Nos. 16 and 17, Docket, pp. 921 and 922.

(7) Recreation		(3,292,811.08)	
	₱12,682,876.78	₱13,252,809.92	₱ 569,933.14
			24.762180%
			₱141,127.87

Based on the above reconciliation, certain items were added to or deducted from the total compensation per alphalist and per FS. However, save for the amount of ₱2,476,235.35 which petitioner indicated as pertaining to its "President & CEO's Basic and other Benefits paid thru 1601E", petitioner failed to present documents by which the Court can ascertain the actual nature and propriety of the above reconciling items.

While petitioner submitted its alphalist[44] of payees from whom taxes were withheld for the months of January to December 2007 in support of the reconciling amount of ₱2,476,235.35 allegedly representing its "President & CEO's Basic and other Benefits paid thru 1601E", the same is insufficient to prove that such amount is not subject to WTC but to EWT pursuant to Section 2.57.2(A)(9) of RR No. 02-98, as amended, by RR No. 30-03[45], quoted as follows:

> "Sec. 2.57.2. *Income payments subject to creditable withholding tax and rates prescribed thereon.* – xxx
>
> (A) *Professional fees, talent fees, etc., for services rendered by individuals.* – On the gross professional, promotional and talent fees or any other form of remuneration for the services of the following individuals – Fifteen percent (15%), if the gross income for the current year exceeds P720,000; and Ten percent (10%), if otherwise;
>
> xxx xxx xxx
>
> (9) Fees of directors who are not employees of the company paying such fees, whose duties are confined to attendance at and participation in the meetings of the board of directors.

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[44] Exhibit "P-38", Docket, pp. 870 to 881.

[45] SUBJECT: Amending Further Pertinent Provisions of Revenue Regulations No. 2-98, as Last Amended by Revenue Regulations No. 17-2003, and Revenue Regulations No. 8-98, as Amended, Providing for the Imposition of Final Withholding Tax on the Sale, Exchange or Other Disposition of Real Property Classified as Capital Assets by Non-resident Aliens, Increasing the Withholding Tax Rates on Certain Income Payments, Inclusion of Certain Income Payments, Sanctions to be Imposed on Payees Who Refuse the Withholding of Tax on Their Income/Receipts, and for Other Purposes, November 12, 2003.

xxx xxx xxx

> Notwithstanding the foregoing, if an individual recipient receives professional fees/talent fees/directors fees in addition to salaries from the same payor, the said fees shall be considered as supplemental compensation and, thus be subject to the withholding tax on compensation."

In sum, petitioner failed to sufficiently overcome the remaining disputed assessment amount; hence, the Court deems it appropriate to uphold the entire basic deficiency WTC of ₱941,394.73.

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."[46] Moreover, "failure to present proof of error in the assessment will justify the judicial affirmance of said assessment."[47]

III. Deficiency Income Tax – ₱8,624,441.50

Respondent computed the deficiency income tax assessment as follows:[48]

I. Income Tax			
Taxable income per ITR			₱ 111,820,630.44
Add:	a. Income payments not subjected to withholding tax	₱ 8,965,389.20	
	b. Salaries and wages not subjected to withholding tax	3,801,744.22	
	c. Undeclared income from unaccounted purchases	91,677.34	12,858,810.76
Total income per investigation			₱ 124,679,441.20
Income tax due			₱ 43,637,804.42
Less:	Paid per return	₱ 7,627,254.19	
	Creditable tax withheld	31,509,966.16	
	Total	₱ 39,137,220.35	
	Less: Disallowed creditable tax withheld	53,700.00	39,083,520.35
Basic tax still due			₱ 4,554,284.07
Add:	Interest (4-16-08 to 10-3-12)		4,070,157.43
Total amount due			**₱ 8,624,441.50**

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46 *FELS Energy, Inc. vs. The Province of Batangas, et al.*, G.R. Nos. 168557 and 170628, February 16, 2007.

47 *Commissioner of Internal Revenue vs. Hon. Raul M. Gonzales, et al.*, G.R. No. 177279, October 13, 2010, citing *Marcos II vs. Court of Appeals, et al.*, G.R. No. 120880, June 5, 1997.

48 Exhibit "P-6", Docket, p. 692.

As can be seen from the above computation, the deficiency income tax assessment resulted from the following items which shall be discussed individually hereafter:

A. Income payments not subjected to withholding tax	₱ 8,965,389.20
B. Salaries and wages not subjected to withholding tax	3,801,744.22
C. Undeclared income from unaccounted purchases	91,677.34
D. Disallowed creditable tax withheld	53,700.00

A. <u>Income payments not subjected to withholding tax – ₱8,965,389.20</u>

Based on the finding that petitioner failed to withhold and remit the EWT on certain income payments/expenses in the amount of ₱8,965,389.20 pursuant to Section 2.57.2 of RR No. 02-98, as amended, in relation to Sections 57 and 58 of the NIRC of 1997, respondent disallowed the said amount as deduction from petitioner's taxable gross income.[49]

Section 34(K) of the NIRC of 1997, provides that:

> "SEC. 34. *Deductions from Gross Income.* –
>
> xxx xxx xxx
>
> (K) *Additional Requirements for Deductibility of Certain Payments.* – Any amount paid or payable which is otherwise deductible from, or taken into account in computing gross income or for which depreciation or amortization may be allowed under this Section, shall be allowed as a deduction only if it is shown that the tax required to be deducted and withheld therefrom has been paid to the Bureau of Internal Revenue in accordance with this Section, Sections 58 and 81 of this Code."

In the case of *ING Bank N.V., engaged in banking operations in the Philippines as ING Bank N.V. Manila Branch vs. Commissioner of Internal Revenue*[50], the Supreme Court held that:

> "xxx (Section 34(K) of the 1997 National Internal Revenue Code) expressly requires, as a **condition for deductibility of an expense, that the tax required to be withheld on the amount paid or payable is shown to have been remitted to the Bureau of Internal Revenue by the**

[49] Exhibit "P-7", Docket, pp. 694 and 697.
[50] G.R. No. 167679, July 22, 2015.

taxpayer constituted as a withholding agent of the government." *(Emphasis supplied)*

In this case, as discussed earlier (under the deficiency EWT assessment), petitioner failed to prove that it properly withheld and remitted the EWT due on the income payments/expenses of ₱8,965,389.20. Consequently, the same shall be disallowed from petitioner's claimed deductible expenses.

B. Salaries and wages not subjected to withholding tax – ₱3,801,744.22

Respondent claims that the salaries and wages for the year 2007 in the amount of ₱3,801,744.22 was not subjected by petitioner to withholding tax pursuant to Section 2.80 of RR No. 02-98, as amended. As a consequence of the alleged non-withholding, respondent disallowed said amount from petitioner's claimed deductible expenses.[51]

As earlier stated under the deficiency WTC assessment, petitioner failed to prove that it withheld and remitted the withholding tax due on the salaries and wages of ₱3,801,744.22. Hence, the same cannot be deducted by petitioner from its taxable gross income pursuant to the earlier quoted Section 34(K) of the NIRC of 1997.

C. Undeclared income from unaccounted purchases – ₱91,677.34

Respondent's examiner compared petitioner's claimed expenses per FS with the income payments subjected to EWT and found that professional fees in the amount of ₱91,677.34 was unaccounted/unreported per FS, computed as follows:[52]

Professional fee subjected to WE	₱ 843,201.25
Less: Professional fee accounted in the FS	751,523.91
Unaccounted professional fee	**₱91,677.34**

Citing the case of *Perez vs. Court of Tax Appeals*[53], respondent considered the unaccounted professional fee of ₱91,677.34 as petitioner's undeclared income and assessed the latter of the corresponding deficiency income tax pursuant to Section 32 of the

[51] Exhibit "P-7", Docket, pp. 695 and 697.
[52] Exhibit "P-7", Schedule 3, Docket, p. 695.
[53] G.R. No. L-10507, May 30, 1958.

NIRC of 1997.

Petitioner submits that the said discrepancy arose by comparing the schedule submitted by petitioner to the Commission on Audit (COA) and the Schedule annexed to its ITR. According to petitioner, the procedure employed by respondent begs the minimal amount of rationality. The resulting difference, if any, does not automatically translate to a tax deficiency, it clearly does not take into account other factors to justify the purported difference.

The Court agrees with petitioner.

The imputation of alleged undeclared income is based on a mere presumption that since there was an undeclared expense, there was likewise undeclared income which corresponds to it. Even if this alleged unaccounted expense is to be considered as income, the same shall be offset by recording the equivalent payment as expense. Hence, no taxable income will result from the said transaction.

While axiomatic is the fact that all presumptions are in favor of the correctness of tax assessments, the assessment itself should not be based on presumptions no matter how logical the presumption might be. In order to stand the test of judicial scrutiny, the assessment must be based on actual facts.[54] For lack of factual basis, the deficiency income tax assessment corresponding to the alleged undeclared income from unaccounted professional fee of ₱91,677.34 should be cancelled.

D. <u>Disallowed creditable tax withheld – ₱53,700.00</u>

Finding that the creditable tax withheld by Sta. Lucia Realty & Development Inc. in the amount of ₱53,700.00 covered the period of January 1, 2006 to December 31, 2006, respondent disallowed the same from petitioner's total tax credits for the year 2007 for being out of period pursuant to Section 2.58.3(A) and (B) of RR No. 2-98, which states:

> "SECTION 2.58.3. *Claim for Tax Credit or Refund.* –
>
> (A) The amount of creditable tax withheld shall be allowed as a tax credit against the income tax liability of the

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[54] *Collector of Internal Revenue vs. Benipayo*, G.R. No. L-13656, January 31, 1962.

payee in the quarter of the taxable year in which income was earned or received.

(B) Claims for tax credit or refund of any creditable income tax which was deducted and withheld on income payments shall be given due course only when it is shown that the income payment has been declared as part of the gross income and the fact of withholding is established by a copy of the withholding tax statement duly issued by the payor to the payee showing the amount paid and the amount of tax withheld therefrom."

Petitioner, on the other hand, avers that it received payment from Sta. Lucia Realty and Development Inc. (Sta. Lucia) for rental of surveying equipment (Theodolite) and payment for survey team for the period June 1, 2005 – August 31, 2006. Thus, Sta. Lucia issued a creditable withholding tax certificate in such amount covering the period January 1 to December 31, 2006. According to petitioner, it recognized/reported Sta. Lucia's payment as prior period income in its 2007 FS and since it was included in the computation of income tax, it also claimed the creditable tax of ₱53,700.00 as tax credit in its 2007 income tax payment.

Respondent argues that such claim cannot be verified and no other supporting document was submitted by petitioner, resulting in the disallowance of petitioner's claim.

The Court finds for respondent.

Petitioner presented BIR Form No. 2307[55] to prove that Sta. Lucia withheld the amount of ₱53,700.00, representing creditable tax withheld at source for the period January to December 2006 and the Official Receipt No. 53261 dated January 24, 2007[56] to prove that Sta. Lucia made income payments to petitioner amounting to ₱542,012.00 which corresponds to the tax withheld.

However, while the BIR Form No. 2307 satisfies the fact of withholding as stated by Section 2.58.3(B) of RR No. 02-98, the Official Receipt, however, is not sufficient to prove that the income arising from such withholding was recorded and reported as income for the subject period of assessment, or in taxable year 2007. Petitioner did not furnish this Court its general ledger, audited

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[55] Exhibit "P-47", Docket, p. 916.
[56] Exhibit "P-48", Docket, p. 917.

financial statements, and annual income tax return for taxable year 2007 to serve as basis to ascertain the alleged recognition of income. Hence, the Court cannot determine if the corresponding withholding tax is allowable as tax credit for taxable year 2007 as required under Section 2.58.3(A) and (B) of RR No. 02-98.

Considering the foregoing, respondent's disallowance of petitioner's claimed tax credit amounting to ₱53,700.00 should be upheld.

To summarize, petitioner's basic deficiency income tax for taxable year 2007 is reduced to ₱4,552,197.00, computed as follows:

Taxable income per ITR		₱ 111,820,630.44
Add: a. Income payments not subjected to withholding tax	₱ 8,965,389.20	
b. Salaries and wages not subjected to withholding tax	3,801,744.22	
c. Undeclared income from unaccounted purchases	–	12,767,133.42
Total income per investigation		₱ 124,587,763.86
Income tax due		₱ 43,605,717.35
Less: Paid per return	₱ 7,627,254.19	
Creditable tax withheld	31,509,966.16	
Total	₱39,137,220.35	
Less: Disallowed creditable tax withheld	53,700.00	39,083,520.35
Basic tax still due		**₱ 4,522,197.00**

IV. Deficiency VAT – ₱142,051,725.12

Respondent arrived at the deficiency VAT assessment as follows:[57]

Sales subject to VAT			₱ 50,067,740.34
Add:	Various sale/receipt not subjected to VAT	₱ 142,545,406.66	
	Sales to Majestic Technical Support not subjected to VAT	336,913,020.20	479,458,426.86
Total sales subjected to VAT per investigation			₱ 529,526,167.20
Output tax due per returns			63,543,140.06
Less:	Input tax claimed		1,110,141.92
VAT Payable			₱ 62,432,998.14

[57] Exhibit "P-6", Docket, p. 692.

Less:	Payment	₱ 4,169,283.49	
	Others	492,436.66	
	Total	₱ 4,661,720.15	
	Less: Unsupported tax credit deducted against VAT payable	492,436.66	4,169,283.49
Basic tax still due			₱ 58,263,714.65
Add:	50% surcharge	29,131,857.33	
	Interest (1-26-08 to 10-3-12)	54,656,153.14	83,788,010.47
Total amount due			**₱ 142,051,725.12**

To be able to determine the validity of the deficiency VAT assessment, it is necessary to individually ascertain the propriety of the discrepancies found by respondent, namely:

A. Various sales/receipts not subjected to VAT	₱142,545,406.66
B. Sales to Majestic Technical Support not subjected to VAT	336,913,020.20
C. Unsupported tax credit deducted against VAT payable	492,436.66

A. <u>Various sales/receipts not subjected to VAT – ₱142,545,406.66</u>

Respondent's investigation disclosed that petitioner failed to subject to the corresponding output tax its sales/receipts in the amount of ₱142,545,406.66, as computed below, resulting in its assessment pursuant to Section 106 of the NIRC of 1997, as amended, viz:[58]

Computation of sales/receipts not subject to VAT:		
Cash sales reported		₱ 109,954,139.00
Installment sales		52,898,513.00
Realized gross profit from previous period installment sales		24,440,253.00
Rental		5,078,318.66
Sale of transpo and office equipment		1,296,260.32
Scrap sales		6,000.00
Interest - housing projects		10,114,795.00
Survey		172,240.00
Others		2,266,357.24
Total sales/receipts - revenue per returns		₱ 206,226,876.22
Add: Excess of market value over consideration on sales to SM Prime Holdings		
Fair market value (excluding VAT) @ 51.50%	₱ 141,339,175.00	
Consideration (excluding VAT) @ 51.50%	100,956,553.57	40,382,621.43
Total sales/receipts subject to VAT		₱ 246,609,497.65
Less: Sales discount	₱ 1,162,057.00	
Unrealized gross profit from installment sales	39,897,948.00	
VAT exempt sales per investigation	12,936,345.65	53,996,350.65
Sales subject to VAT per investigation		192,613,147.00
Less: Sales subjected to VAT per VAT returns		50,067,740.34
Discrepancy - not subjected to VAT		**₱142,545,406.66**

[58] Exhibit "P-7", Schedule 5, Docket, p. 696.

According to respondent, petitioner claims that its housing sales are socialized housing sales which are not covered by VAT, including also its other transactions. But it failed to provide specific details with supporting documents on which of its sales are socialized housing and VAT-exempt sales. Thus, its claims were not given merit.[59]

On the other hand, petitioner insists that respondent disregarded its installment sales from Socialized Housing Contract which are exempt from VAT pursuant to RR No. 16-2005[60], as amended, as held in BIR Rulings DA-192-2003/DA-827-2004 and as per Certification from the Housing and Urban Development Coordinating Council (HUDCC).

The Court finds for respondent.

Section 109(P) of the NIRC of 1997, as amended, states:

> "SEC. 109. *Exempt Transactions.* – (1) Subject to the provisions of Subsection (2) hereof, the following transactions shall be exempt from the value-added tax:
>
> xxx xxx xxx
>
> (P) Sale of real properties not primarily held for sale to customers or held for lease in the ordinary course of trade or business, or real property utilized for low-cost and socialized housing as defined by Republic Act No. 7279, otherwise known as the Urban Development and Housing Act of 1992, and other related laws, residential lot valued at One million five hundred thousand pesos (P1,500,000) and below, house and lot, and other residential dwellings valued at Two million five hundred thousand pesos (P2,500,000) and below: *Provided*, That not later than January 31, 2009 and every three (3) years thereafter, the amounts herein stated shall be adjusted to their present values using the Consumer Price Index, as published by the National Statistics Office (NSO);"

Relative thereto, Section 4.109-1(B)(p)(3) of RR No. 16-05, as amended, implementing Section 109(P) of the NIRC of 1997, as amended, provides as follows:

> "SECTION 4.109-1. *VAT-Exempt Transactions.* –
>
> (A) *In general.* – '*VAT-exempt transactions*' refer to the

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[59] Respondent's Answer, Docket, pp. 142 to 152.
[60] SUBJECT: Consolidated Value-Added Tax Regulations of 2005, September 1, 2005.

sale of goods or properties and/or services and the use or lease of properties that is not subject to VAT (output tax) and the seller is not allowed any tax credit of VAT (input tax) on purchases.

The person making the exempt sale of goods, properties or services shall not bill any output tax to his customers because the said transaction is not subject to VAT.

xxx xxx xxx

(B) *Exempt transactions*. –

xxx xxx xxx

(p) The following sales of real properties are exempt from VAT, namely:

xxx xxx xxx

(3) Sale of real properties utilized for socialized housing as defined under RA No. 7279, and other related laws, such as RA No. 7835 and RA No. 8763, wherein the price ceiling per unit is P225,000.00 or as may from time to time be determined by the HUDCC and the NEDA and other related laws.

'*Socialized housing*' refers to housing programs and projects covering houses and lots or home lots only undertaken by the Government or the private sector for the underprivileged and homeless citizens which shall include sites and services development, long-term financing, liberated terms on interest payments, and such other benefits in accordance with the provisions of RA No. 7279, otherwise known as the 'Urban Development and Housing Act of 1992' and RA No. 7835 and RA No. 8763. 'Socialized housing' shall also refer to projects intended for the underprivileged and homeless wherein the housing package selling price is within the lowest interest rates under the Unified Home Lending Program (UHLP) or any equivalent housing program of the Government, the private sector or non-government organizations."

Clearly, from the foregoing, sale of real properties utilized for socialized housing as defined under Republic Act (R.A.) No. 7279[61], and other related laws, such as R.A. No. 7835[62] and R.A. No. 8763[63],

[61] Urban Development and Housing Act of 1992.
[62] Comprehensive and Integrated Shelter Financing Act of 1994.
[63] Home Guaranty Corporation Act of 2000.

wherein the price ceiling per unit is ₱225,000.00 or as may from time to time be determined by the HUDCC and the NEDA and other related laws is exempt from VAT.

A perusal of the Certification issued by HUDCC[64] on July 22, 2004 shows that petitioner was authorized to segregate and dispose of its 25-hectare properties located in Noveleta and Rosario, Cavite to the bonafide occupants pursuant to Executive Order No. 59 or the "GMA-Abot Kayang Pabahay at Palupa" socialized housing project signed by then President Gloria Macapagal-Arroyo. Thus, pursuant to Section 109(P) of the NIRC of 1997, as amended, and Section 4.109-1(B)(p)(3) of RR No. 16-05, the proceeds from petitioner's socialized housing project shall be exempt from VAT.

However, petitioner failed to provide the Court with documents to prove that the subject amount of the assessment is actually comprised of receipts from the socialized housing project. As a result, the assessment shall stand.

Sale of Properties to SM Prime Holdings, Inc.

Petitioner posits that respondent erroneously insisted that the sale of real property in favor of SM Prime Holdings should be based on zonal valuation, instead of basing the sale on the selling price, which is less than the zonal valuation, in accordance with Section 4.106-3 of RR No. 16-2005, as amended by RR No. 4-07[65].

According to petitioner, respondent totally disregarded Revenue Memorandum Order (RMO) No. 41-91, which excludes the use of zonal valuation as tax base in computing for the capital gains tax/creditable withholding tax and documentary stamp tax on sale, exchange, and other disposition of realties which are effected through public bidding.

Petitioner maintains that the sale of realties in that case (to SM Prime Holdings), having been effected through public bidding, the bid price rather than the zonal valuation established in the areas where the properties are located shall be used as tax base in computing the corresponding creditable expanded withholding tax on such sale

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[64] Exhibit "P-16", Docket, p. 784.

[65] SUBJECT: Amending Certain Provisions of Revenue Regulations No. 16-2005, As Amended, Otherwise Known as the Consolidated Value-Added Tax Regulations of 2005, February 7, 2007.

transaction.[66]

Further, petitioner puts forth that the gross selling price as determined under the circumstances shall be used uniformly as the tax base for payment of taxes imposed by the BIR, *i.e.*, income tax, documentary stamp tax, and the VAT. Petitioner cites BIR Ruling No. 150-98, dated October 19, 1998, which states:

> "Such being the case, the non-use or non-application of the prescribed zonal valuation under special circumstances that adversely impacts the value or marketability of a property like in this case, a deviation from the general rule or guidelines on valuation of such property is always justified, otherwise, the imposition of unjust or unreasonable tax or levy amounts to a confiscation of property without due process and runs afoul of the equal protection clause of the Constitution. Hence, in the instant case, the use of assessed value or selling price (actual consideration), whichever is higher, in lieu of zonal value, is in order for being analogous to the exceptions recognized under RMO No. 41-91, BIR Ruling No. 144-96 dated December 24, 1996 and Reyes vs. Almanzor, 196 SCRA 332, 328-329 (1991)."

The Court finds petitioner's contentions misplaced.

RMO No. 41-91[67] only pertains to the determination of tax base of sales, exchange or any disposition or conveyance of real property for purposes of computation of documentary stamp tax (DST) [which shall be the same tax base for the computation of capital gains tax (CGT)]. The same holds true with the BIR rulings cited by petitioner, which mainly delve on the issue of tax base for DST and CGT computations, all based on the said RMO. The said rulings and RMO do not state that the tax base contemplated therein is also applicable to the determination of VAT.

Furthermore, petitioner's evidence to prove that the sale in question was made through public bidding (*i.e.*, letters of invitation to bid and recipient's replies[68]) were denied by the Court for its failure to present the original documents for comparison.[69]

Even granting that these pieces of evidence were admitted,

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[66] BIR Ruling No. 300-93 and BIR Ruling No. [DA-(C-331) 807-09].

[67] Determination of the Tax Base of Sales, Exchange or Any Disposition or Conveyance of Real Property for Documentary Stamp Tax Purposes, November 11, 1991.

[68] Exhibits "P-24" to "P-31", Docket, pp. 830 to 840.

[69] Resolution dated June 25, 2014, Docket, p. 933.

petitioner's cause must still fail since none of these documents prove that SM Prime Holdings won the bid and the eventual execution of the sale so as to prove the actual selling (bid) price.

B. Sales to Majestic Technical Support (MTS) not subjected to VAT - ₱336,913,020.20

Respondent's investigation disclosed that petitioner's sales of real property to Majestic Technical Skills in the amount of ₱336,913,020.20 was not subjected to VAT but treated as capital asset and subjected to final capital gains tax. Respondent cited BIR Ruling No. [DA-(C-130) 413-08] involving the same issue but concerning Sta. Elena Properties Inc., (SEPI) wherein it was held that inasmuch as SEPI is a company engaged in the real estate business, all the real properties owned and acquired by SEPI are considered as ordinary asset. Thus, petitioner was assessed of deficiency VAT thereon pursuant to Section 108 of the NIRC of 1997, as amended.[70]

Petitioner maintains that such sale of realties to MTS was outside the course of trade or business. The said sale of assets was allegedly an isolated transaction, mandated by the National Government's (NG) avowed policy to privatize certain government-owned or -controlled corporations (GOCC), such as petitioner. Records bear that as early as 1986, through Proclamation No. 50[71] of former President Corazon C. Aquino, petitioner was identified as one of the GOCCs to be disposed and privatized. In December 2000, an Inter-Agency Privatization Council (IAPC) was created pursuant to Executive Order No. 323[72] to continue implementing the privatization of GOCCs.

The Privatization Plan (PP) for the direct sale of petitioner's assets was approved by its Board of Directors on March 20, 2006 and ratified by at least two-thirds of its stockholders on March 31, 2006. The PP was further approved by the PNOC Board of Directors on April 19, 2006 with its passage of Resolution No. 1607, S'2006[73], constituting the PNOC Privatization Committee to undertake the privatization of all PNOC Subsidiaries.

In its May 26, 2006 letter[74] to Hon. Margarita B. Teves, former

[70] Exhibit "P-7", Docket, p. 697.
[71] Exhibit "P-19", Docket, pp. 790 to 805.
[72] Exhibit "P-20", Docket, pp. 806 to 811.
[73] Exhibit "P-21", Docket, pp. 812 to 813.
[74] Exhibit "P-22", Docket, pp. 814 to 815.

Secretary of the Department of Finance (DOF) and Chairman of the Privatization Council, petitioner submitted its proposed sale of assets to the Privatization Council of the Department of Finance (DOF) for approval. The proposal, among others, contained the following subject matters, to wit:

> "ASSET FOR DISPOSAL
>
> The major assets for disposal are:
>
> - Site 2A as an industrial estate and ecozone
> - A piece of property included in Site 2A with a lease to CEPZ locator xxx
> - Site 1B, a prime commercial property xxx
> - Site 1D suitable for low cost and economic housing xxx
> - Site 2B suitable for low cost and economic housing xxx
> - Outstanding contracts to sell generated from the property (Costa Verde) developed by Sta. Lucia Realty
> - Outstanding contracts to sell and remaining parcels of the socialized housing program"[75]

The IAPC approved petitioner's May 26, 2006 proposal during its September 12, 2006 meeting. This was evidenced by the former's approval[76] in its September 14, 2006 letter to Atty. Wilfreda R. Bacareza, Jr., former President and CEO of petitioner.

According to petitioner, the Site 2A approved by the IAPC is more specifically referred to as the property sold to Majestic Technical Skills.

Invoking the case of *Commissioner of Internal Revenue vs. Magsaysay Lines, Inc., et al.*[77], petitioner asserts that the sale of these realties to MTS was not in the course of trade or business as it was involuntary, pursued neither by reason of any commercial or economic activity nor in the exercise of a corporate purpose as real estate developer, but in obeisance to a long-standing Governmental plan to privatize all the PNOC subsidiaries.

The Court finds the assessment in order.

Per its Amended Articles of Incorporation[78], petitioner's primary purpose is to acquire by purchase, exchange, lease, donation, grant,

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[75] Privatization Plan attached to Exhibit "P-22", Docket, pp. 816 to 827.
[76] Exhibit "P-23", Docket, pp. 828 to 829.
[77] G.R. No. 146984, July 28, 2006.
[78] Par. No. 3, Exhibit "P-8", p. 2, Docket, p. 702.

foreclosure or otherwise, lands, interest in lands, real property and buildings of every class and description (hereinafter individually and collectively referred to as "real estate"); and to own, hold, establish, provide, possess, rebuild, alter, improve, reforest, develop, utilize, manage, subdivide, sell, exchange, lease, mortgage, securitize and hold for investment or otherwise, real estate xxx." As real estate developer, petitioner is considered as a "taxpayer engaged in the real estate business" defined in Section 2(g) of RR No. 07-03 as follows:

> "g. **Taxpayers engaged in the real estate business** shall refer collectively to real estate dealers, real estate developers, and/or real estate lessors. Conversely, the term 'taxpayers not engaged in the real estate business' shall refer to persons other than real estate dealers, real estate developers and/or real estate lessors. A taxpayer whose primary purpose of engaging in business, or whose Articles of Incorporation states that its primary purpose is to engage in the real estate business shall be deemed to be engaged in the real estate business for purposes of these Regulations." *(Emphasis supplied)*

As set forth under Section 3 of RR No. 07-03, the Site 2A property sold by petitioner to MTS, subject of the assessment, is an ordinary asset contrary to petitioner's claim, thus:

> "SECTION 3. *Guidelines in Determining Whether a Particular Real Property is a Capital Asset or Ordinary Asset.* -
>
> a. *Taxpayers engaged in the real estate business.* – Real property shall be classified with respect to taxpayers engaged in the real estate business as follows:
>
> 1. *Real Estate Dealer.* – All real properties acquired by the real estate dealer shall be considered as ordinary assets.
>
> 2. *Real Estate Developer.* – **All real properties acquired by the real estate developer, whether developed or undeveloped as of the time of acquisition,** and all real properties which are held by the real estate developer primarily for sale or for lease to customers in the ordinary course of his trade or business or which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year and all real properties used in the trade or business, whether in the form of land, building, or other improvements, **shall be considered as ordinary assets**.
>
> 3. *Real Estate Lessor.* – All real properties of the real estate lessor, whether land and/or improvements, which are

for lease/rent or being offered for lease/rent, or otherwise for use or being used in the trade or business shall likewise be considered as ordinary assets.

xxx xxx xxx

e. ***Treatment of abandoned and idle real properties***. – Real properties formerly forming part of the stock in trade of a taxpayer engaged in the real estate business, or formerly being used in the trade or business of a taxpayer engaged or not engaged in the real estate business, which were later on abandoned and became idle, **shall continue to be treated as ordinary assets**. Real property initially acquired by a taxpayer engaged in the real estate business **shall not result in its conversion into a capital asset even if the same is subsequently abandoned or becomes idle**." *(Emphasis supplied)*

Considering that petitioner's sale of the Site 2A property to MTS was made in the ordinary course of its real estate business, the proceeds therefrom in the amount of ₱336,913,020.20 shall be subjected to 12% VAT pursuant to Sections 105 and 106(A) of the NIRC of 1997, as amended, which provide:

"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. xxx"

"SEC. 106. *Value-added Tax on Sale of Goods or Properties*. –

(A) *Rate and Base of Tax*. – There shall be levied, assessed and collected on every sale, barter or exchange of goods or properties, a value-added tax equivalent to ten percent (10%) of the gross selling price or gross value in money of the goods or properties sold, bartered or exchanged, such tax to be paid by the seller or transferor: *Provided*, That the President, upon the recommendation of the Secretary of Finance, shall, effective January 1, 2006, raise the rate of value-added tax to twelve percent (12%), after any of the following conditions has been satisfied: xxx"

C. *Unsupported tax credit deducted against VAT payable – ₱492,436.66*

Respondent's verification disclosed that petitioner had claimed input tax credit in the amount of ₱492,436.66, which was not properly classified or supported with proper documents; hence, the said tax credit was disallowed pursuant to Section 110 of the NIRC of 1997, as amended.

Petitioner submitted a detailed ledger of the excess input VAT for the months of February and March 2007[79] and the Quarterly VAT Return[80] for the first quarter of 2007 to prove that it has incurred excess input VAT which was carried over from the previous year.

The Court sustains the disallowance.

Examination of petitioner's Quarterly VAT Return[81] for the first quarter of 2007 shows that petitioner did not carry over any input VAT from the previous quarter/s (line 20A) and the amount of ₱492,436.66 indicated as "Others" (line 26F) was claimed as deduction against petitioner's Net VAT Payable (line 27). Petitioner claims that the amount of ₱492,436.66 represents excess input tax from prior years' purchases.[82] However, without VAT invoices (in cases of purchases of goods) or official receipts (in cases of purchases of services), the amount of ₱492,436.66 cannot be credited against petitioner's output VAT liability for taxable year 2007 pursuant to Section 110(A) and (B) of the NIRC of 1997, as amended, to wit:

"SEC. 110. *Tax Credits.* –

(A) *Creditable Input Tax.* –

(1) Any input tax evidenced by a VAT invoice or official receipt issued in accordance with Section 113 hereof on the following transactions shall be creditable against the output

[79] Exhibits "P-33" to "P-34", Docket, pp. 856 to 857.
[80] Exhibit "P-35", Docket, pp. 858 to 859.
[81] Exhibit "P-35", Docket, pp. 858 to 859.
[82] Exhibit "P-49", Q&A No. 73, Docket, p. 679.

tax:

xxx xxx xxx

(B) *Excess Output or Input Tax.* – If at the end of any taxable quarter the output tax exceeds the input tax, the excess shall be paid by the VAT-registered person. If the input tax exceeds the output tax, the excess shall be carried over to the succeeding quarter or quarters. xxx"

To summarize, petitioner is liable for basic deficiency VAT for taxable year 2007 in the amount of ₱58,263,714.65, computed as follows:

Sales subject to VAT			₱ 50,067,740.34
Add:	Various sale/receipt not subjected to VAT	₱ 142,545,406.66	
	Sales to Majestic Technical Support not subjected to VAT	336,913,020.20	479,458,426.86
Total sales subjected to VAT per investigation			₱ 529,526,167.20
Output tax due per returns			63,543,140.06
Less:	Input tax claimed		1,110,141.92
VAT Payable			₱ 62,432,998.14
Less:	Payment	₱ 4,169,283.49	
	Others	492,436.66	
	Total	₱ 4,661,720.15	
	Less: Unsupported tax credit deducted against VAT payable	492,436.66	4,169,283.49
Basic deficiency VAT			**₱ 58,263,714.65**

Respondent imposed 50% surcharge on petitioner's deficiency VAT by reason of substantial under-declaration of sales of more than 30% of the actual sales declared per return pursuant to Section 248(B) of the NIRC of 1997, as amended, to wit:

"SEC. 248. *Civil Penalties.* –

xxx xxx xxx

(B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case, any payment has been made on the basis of such return before the discovery of the falsity or fraud: *Provided*, That a substantial underdeclaration of taxable

> sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, shall constitute *prima facie* evidence of a false or fraudulent return: *Provided, further*, That failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding thirty percent (30%) of actual deductions, shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions, as mentioned herein."

In the case of *Estate of Fidel F. Reyes and Estate of Teresita R. Reyes vs. Commissioner of Internal Revenue*[83], the Court of Tax Appeals *En Banc* ruled that to justify the imposition of the 50% surcharge for fraud, a false or fraudulent return must be willfully made, to wit:

> "Section 248 (B) imposes the surcharge of fifty percent (50%) only in two instances. First, in case of willful neglect to file the return within the period prescribed, and second, in case a false or fraudulent return is willfully made. **Thus, it is not enough that the taxpayer failed to file the required tax return or that the return is false to justify the imposition of the 50% for fraud. The law is clear that 'a false or fraudulent return is willfully made'.** It must be emphasized that respondent did not present evidence to directly prove that there was a willful intention on the part of petitioners to evade the payment of taxes. **What is evident in this case is the negligence and mistake of the petitioners in the interpretation of the law that caused the deficiencies found by the respondent in his assessments.** However, We find no actual and intentional fraud through willful and deliberate misleading of the government agency concerned, the Bureau of Internal Revenue. The government was not induced to give up some legal right and place itself at a disadvantage so as to prevent its lawful agents from proper assessment of tax liabilities because petitioners did not conceal anything. Error or mistake of law is not fraud. *(Commissioner of Internal Revenue vs. Javier, Jr. 199 SCRA 824)." (Emphasis supplied)*

Guided by this, the Court finds that respondent's imposition of the 50% surcharge by the mere fact of substantial under-declaration of sales/receipts is incorrect, as it cannot be proven that there was "willful falsity" on the part of petitioner. Records of the case show that there was no willful falsity, only a mere error in the interpretation of

[83] CTA EB No. 189, March 21, 2007.

laws and regulations as to the treatment of sales from public bidding and the insufficiency of the pieces of evidence presented to warrant petitioner's coverage within the exemptions provided by law.

Hence, the surcharge should be reduced to 25% pursuant to Section 248(A) of the NIRC of 1997, as amended.

V. Deficiency Final Withholding VAT – ₱2,274,703.19

Respondent finds that the following items[84], as found in the deficiency income tax and EWT were not subjected to final withholding VAT in the amount of ₱23,374,624.63, hence was assessed pursuant to Section 4.114(A)(1) of RR No. 02-98:

Insurance benefits	₱ 186,176.00
Meals and sundry expenses	184,955.00
Training and education	55,680.00
Professional fees	751,523.91
Management and consultancy fees	1,578,170.03
Security services	661,366.50
Other outside services	626,403.26
Advertising	120,127.14
Commissions	10,042,599.52
Repairs and maintenance-labor	66,830.35
Repairs and maintenance-materials and supplies	80,801.31
Office supplies	231,878.22
Insurance	468,589.42
Representation and entertainment	360,312.90
Transportation and travel	441,176.51
Fuel and oil	208,501.98
Communication, light and water	873,380.19
Miscellaneous	126,149.66
Photocopying	57,559.49
Discretionary	2,287,979.04
Other business expenses	5,431,441.43
Rental	979,135.50
Total	**₱ 25,820,737.36**
Less: Payment to Non-VAT per alphalist	431,636.13
Payment to VAT taxpayers	25,389,101.23
Less: Subjected to final withholding VAT	2,014,476.60
Expenses not subjected to final withholding VAT	23,374,624.63
Rate of withholding Tax	5%
Final Withholding VAT	**₱ 1,168,731.23**

[84] Exhibit "P-7", Docket, p. 698.

Petitioner refutes respondent's allegations and reiterates that these disallowed expenses due to non-withholding of final VAT are supported by the following documents annexed to its April 8, 2011 protest letter[85] to the Revenue District Office No. 050: Summary of Expenses[86], Expenses Details[87], and Contract of Lease between PNOC and petitioner.

Also, in compliance with the alleged request of Revenue Officer Renan A. Plata, petitioner claims that it also furnished respondent with the following documents in support of its Protest and to refute the FAN: (a) Copies of the Payment Order – Cash Disbursement Voucher; and (b) JV-05/Liquidation of Cash Advances for the period January to December 2007.

Petitioner asserts that the expenses incurred in 2007 totaling ₱25,590,589.52 were either paid in cash, check, Authority to Transfer Fund (ATTF) and included adjustments based on accrual of expenses. Of the expenses paid in check and included in the adjustments, only ₱598,730.00 out of the total expenses were subject to final withholding VAT.

Petitioner made a verification of its records to reconcile it with the final withholding VAT assessment by respondent. Based on the said reconciliation[88], petitioner admits to incurring only ₱855,390.94 deficiency final withholding VAT[89], upon a base amount of ₱17,107,818.83.

Again, petitioner's claims must be denied.

As in the case of the deficiency EWT assessment, said Payment Orders – Cash Disbursement Vouchers, Liquidation of Cash Advances together with the related invoices, official receipts and other documents which may support petitioner's claim were not furnished to this Court for proper evaluation of the transactions and to enable the Court to assess the tax implications of such.

In the case of *Commissioner of Internal Revenue vs. Manila*

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[85] Exhibit "P-8", Docket, pp. 701 to 719.
[86] Exhibit "P-9", Docket, p. 720.
[87] Exhibit "P-10", Docket, p. 721.
[88] Exhibit "P-44", Docket, p. 913.
[89] Exhibit "P-50", Q&A No. 22, Docket, pp. 892 to 893; Exhibit "P-51", Q&A Nos. 21 and 22, Docket, pp. 922 to 923.

Mining Corporation[90], the Supreme Court ruled that cases in the Court of Tax Appeals are litigated *de novo*, thus no evidentiary value can be given to purchase invoices or receipts submitted to the BIR, to wit:

> "Under Section 8 of RA 1125, the CTA is described as a court of record. As cases filed before it are litigated *de novo*, party litigants should prove every minute aspect of their cases. **No evidentiary value can be given the purchase invoices or receipts submitted to the BIR as the rules on documentary evidence require that these documents must be formally offered before the CTA.**" *(Emphasis supplied)*

Moreover, the "Summary of Expenses" and "Expense Details" that laid down the nature of each expense are self-serving and thus, cannot be relied upon by the Court. As for the Contract of Lease, it only shows the existence of a lease agreement but does not sufficiently prove that due taxes arising from the transaction were withheld and remitted.

Consequently, respondent's assessment for basic deficiency final withholding VAT in the whole amount of ₱1,168,731.23 shall be upheld.

VI. Imposition of Deficiency Interest under Section 249 of the NIRC of 1997

In the subject deficiency EWT, WTC, income tax, VAT, and final withholding VAT assessments, respondent imposed deficiency interests under Section 249 of the NIRC of 1997, summarized as follows:

Tax	Amount of Deficiency Interest
EWT	₱ 293,275.65
WTC	₱ 888,263.96
Income Tax	₱ 4,070,157.43
VAT	₱ 54,656,153.14
Final Withholding VAT	₱ 1,105,971.96
Total	**₱ 61,013,822.14**

[90] G.R. No. 153204, August 31, 2005.

We do not totally agree on the said impositions.

No deficiency interest should have been imposed on the said assessments, except on the deficiency income tax assessment.

Section 249 of the NIRC of 1997 reads:

> "SEC. 249. *Interest.* –
>
> (A) *In General.* – There shall be assessed and collected on any unpaid amount of tax, interest at the rate of twenty percent (20%) *per annum,* or such higher rate as may be prescribed by the rules and regulations, from the date prescribed for its payment until the amount is fully paid.
>
> (B) *Deficiency Interest.* – Any **deficiency** in the tax due, **as the term is defined in this Code**, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof.
>
> xxx xxx xxx" *(Emphases supplied)*

Based on the foregoing Section 249(B), the *"Deficiency Interest"* shall be imposed on "[a]*ny deficiency in the tax due, as the term is defined in this Code", i.e.*, as the term "deficiency" is defined in the NIRC of 1997. Relative thereto, an examination of the said Code discloses that there are only three (3) instances where it defines the term "deficiency", and this relates only and respectively to three (3) types of internal revenue taxes, namely, income tax, estate tax, and donor's tax, pursuant to Sections 56(B), 93 and 104 of the NIRC of 1997, viz:

> "SEC. 56. *Payment and Assessment of Income Tax for Individuals and Corporations.—*
>
> xxx xxx xxx
>
> (B) *Assessment and Payment of Deficiency Tax.—* After the return is filed, the Commissioner shall examine its and assess the correct amount of the tax. The tax or deficiency income tax so discovered shall be paid upon notice and demand from the Commissioner.

As used in this Chapter[91], in respect of a tax imposed by this Title[92], the term **'deficiency'** means:

(1) The amount by which the tax imposed by this Title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amount previously abated, credited, returned or otherwise repaid in respect of such tax; or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed or collected without assessment shall first be decreased by the amounts previously abated, credited, returned or otherwise repaid in respect of such tax." *(Emphasis supplied)*

"SEC. 93. *Definition of Deficiency.* — As used in this Chapter[93], the term **'deficiency'** means:

(a) The amount by which the tax imposed by this Chapter exceeds the amount shown as the tax by the executor, administrator or any of the heirs upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency and decreased by the amounts previously abated, refunded or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the executor, administrator or any of the heirs upon his return, or if no return is made by the executor, administrator, or any heir, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed or collected without assessment shall first be decreased by the amounts previously

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[91] Chapter IX – RETURNS AND PAYMENT OF TAX.
[92] Title II – TAX ON INCOME.
[93] CHAPTER I – ESTATE TAX (under TITLE III – ESTATE AND DONOR'S TAXES).

> abated, credited, returned or otherwise repaid in respect of such tax." *(Emphasis supplied)*
>
> "SEC. 104. *Definitions.* — xxx
>
> The term **'deficiency'** means: (a) the amount by which the tax imposed by this Chapter[94] exceeds the amount shown as the tax by the donor upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, refunded or otherwise repaid in respect of such tax, or (b) if no amount is shown as the tax by the donor upon his return, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency, but such amounts previously assessed or collected without assessment shall first be decreased by the amounts previously abated, credited, returned or otherwise repaid in respect of such tax." *(Emphasis supplied)*

Such being the case, the deficiency interest under Section 249(B) should be applied only whenever there is a deficiency income tax, a deficiency estate tax, and a deficiency donor's tax. For this reason, in this case, no deficiency interest under Section 249(B) should be imposed on the deficiency EWT, WTC, VAT, and Final Withholding VAT assessed against petitioner. Thus, these impositions should be cancelled.

WHEREFORE, all the foregoing considered, the instant Petition for Review is **PARTIALLY GRANTED**. The assessments issued by respondent against petitioner for taxable year 2007 covering deficiency EWT, WTC, income tax, VAT, and final withholding VAT are **AFFIRMED** with some modifications. Accordingly, petitioner is **ORDERED TO PAY** the amount of **EIGHTY-ONE MILLION FIVE HUNDRED EIGHT THOUSAND FIVE HUNDRED SIXTY-NINE PESOS AND TWELVE CENTAVOS (₱81,508,569.12)**, representing basic deficiency EWT, WTC, income tax, VAT, and final withholding VAT, inclusive of the twenty-five percent (25%) surcharge imposed under Section 248(A)(3) of the NIRC of 1997, computed as follows:

Deficiency Tax	Basic Tax	25% Surcharge	Total
EWT	₱ 310,817.69	₱ 77,704.42	₱ 388,522.11

[94] CHAPTER II – DONOR'S TAX (under TITLE III – ESTATE AND DONOR'S TAXES).

WTC	941,394.73	235,348.68	1,176,743.41
Income Tax	4,522,197.00	1,130,549.25	5,652,746.25
VAT	58,263,714.65	14,565,928.66	72,829,643.31
Final Withholding VAT	1,168,731.23	292,182.81	1,460,914.04
Total	**₱65,206,855.30**	**₱16,301,713.82**	**₱81,508,569.12**

In addition, petitioner is **ORDERED TO PAY**:

(a) Deficiency interest at the rate of twenty percent (20%) *per annum* on the basic deficiency income tax, computed from April 15, 2008 until full payment thereof, pursuant to Section 249(B) of the NIRC of 1997;

(b) Delinquency interest at the rate of 20% *per annum* on the total amount of **₱81,508,569.12**, and on the 20% deficiency interest which has accrued as stated in subparagraph (a) hereof, computed from October 1, 2012 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

(With Separate Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

Cielito N. Mindaro-Grulla
(With Separate Dissenting and Concurring Opinion)
CIELITO N. MINDARO-GRULLA
Associate Justice

CERTIFICATION

I hereby certify that this Decision was reached after due consultation among the members of this Division in accordance with the provisions of Section 13, Article VIII of the Constitution.

ROMAN G. DEL ROSARIO
Chairperson
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

First Division

PNOC DEVELOPMENT AND MANAGEMENT CORPORATION, *Petitioners,*	**CTA CASE NO. 8649**
	Members:
-versus-	**DEL ROSARIO,** *Chairperson,* **UY,** and **MINDARO-GRULLA,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: JAN 22 2016 1:52 pm.

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SEPARATE CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the findings of the *ponencia* in partially granting petitioner PNOC Development and Management Corporation's (PNOC) Petition for Review and affirming with some modifications the assessments issued by respondent Commissioner of Internal Revenue against PNOC for taxable year 2007 covering deficiency Expanded Withholding Tax (EWT), Withholding Tax on Compensation (WTC), Income Tax, Value-Added Tax (VAT), and Final Withholding VAT.

I also agree with the *ponencia* in not imposing the 20% deficiency interest on deficiency EWT, WTC, VAT and Final Withholding VAT. In this regard, I wish to reiterate my position in *Ace/Saatchi & Saatchi Advertising, Inc. vs. The Commissioner of Internal Revenue,*[1] where the Court extensively discussed the imposition of deficiency interest, to wit:

> "The imposition of 20% deficiency interests is governed by Section 249(B) of the NIRC of 1997, as amended, which states:
>
> '**Section 249.** *xxx*

[1] CTA Case No. 8439, December 9, 2015

> (B) *Deficiency Interest.* - **Any deficiency in the tax due, as the term is defined in this Code**, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof.' (*Emphasis supplied*)

As the provision is worded, deficiency interest may be imposed only when there is deficiency in the tax due as the term is defined in the Code. A review of the Code, however, disclosed that it defines "deficiency in the tax due" only in three (3) types of taxes, first in income tax (Section 56); second in estate tax (Section 93); and third, in donor's tax (Section 104).

Prescinding from the foregoing, deficiency interest may not properly be imposed on the deficiency FWT, deficiency WTC, deficiency EWT, and deficiency VAT assessed against petitioner.

The Court is not unaware of *Paper Industries Corporation of the Philippines vs. Court of Appeals, et al.* (*PICOP case*).[2] A reading of the *PICOP case* reveals that it did not, however, resolve the issue on whether the deficiency interest provided for in Section 249 (B) may be imposed on tax other than donor's, estate, and income taxes. Not being an issue submitted for resolution before the Supreme Court, the *PICOP case* cannot be relied upon as doctrine on the matter, *viz:*

> 'The legal maxim "*stare decisis et non quieta movere*" (follow past precedents and do not disturb what has been settled) states that where the same questions relating to the same event have been put forward by parties similarly situated as in a previous case litigated and decided by a competent court, the rule of *stare decisis* is a bar to any attempt to relitigate the same issue.
>
> xxx xxx xxx
>
> **Thus, where the issue involved was not raised nor presented to the court and not passed upon by the court in the previous case, the decision in the previous case is not *stare decisis* of the question presented.**' (*Citations omitted and emphasis supplied*)

Sections 247 (a) and 249 (A) of the NIRC of 1997, as amended, are admittedly provisions that impose "addition" to the tax and "interest" thereon. But these provisions, general in their context, must necessarily be **subject to the relevant and specific provision of Section 249 (B) with respect to the imposition of "deficiency" interest as they all fall within the same Chapter 1 of Title X of the NIRC of 1997, as amended.**

Not only that, if the *PICOP case* has any relevance to the present controversy, it is the doctrinal precedent that deficiency interest may be imposed only on tax specifically covered by the relevant provisions of the NIRC. Thus, the Court in the *PICOP case*, while recognizing that transaction tax is in the nature of INCOME TAX and that deficiency interest is imposable on income tax, nonetheless declined to impose such deficiency interest on transaction tax after noting three (3) significant provisions in the NIRC of 1977: *first*, it is Section 51 particularly

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[2] *Paper Industries Corporation of the Philippines (PICOP) vs. Court of Appeals, Commissioner of Internal Revenue; Court of Tax Appeals,* G.R. Nos 106949-50, December 1, 1995.

paragraphs (c)(1), (e)(1) and (3) that impose deficiency interest; *second*, Section 51 (c)(1) confines the imposition of deficiency interest on **taxes covered by TITLE II**; and *third*, transaction tax does not fall within TITLE II. Thus:

> **'It will be seen that Section 51 (c) (1) and (e) (1) and (3), of the 1977 Tax Code, authorize the imposition of surcharge and interest only in respect of a "*tax imposed by this Title*," that is to say, *Title II on "Income Tax.*"** It will also be seen that Section 72 of the 1977 Tax Code imposes a surcharge only in case of failure to file a return or list "*required by this Title*," that is, *Title II on "Income Tax."* **The thirty-five percent (35%) transaction tax is, however, imposed in the 1977 Tax Code by *Section 210 (b) thereof which Section is embraced in Title V on "Taxes on Business"* of that Code.** Thus, while the thirty-five percent (35%) transaction tax is in truth a *tax imposed on* interest *income* earned by lenders or creditors purchasing commercial paper on the money market, the relevant provisions, *i.e.*, Section 210 (b), were *not* inserted in Title II of the 1977 Tax Code. The end result is that the thirty-five percent (35%) transaction tax is *not* one of the taxes in respect of which Section 51 (e) authorized the imposition of surcharge and interest and Section 72 the imposition of a fraud surcharge.[3]' (*Emphases supplied*)

True, the Court in the *PICOP case* declared that the present provision of the NIRC mentions that additions and interest on tax applies to all taxes yet, such general provision must necessarily be confined to those specifically subject to such coverage. The present Section 249 (B) of the NIRC is explicit with respect to deficiency interest as afore-cited."

In sum, deficiency interest may be imposed only on tax covered by the relevant provisions of the NIRC of 1997, as amended *i.e.* Income Tax, Donor's Tax and Estate Tax; conversely, deficiency interest may not properly be imposed on deficiency EWT, WTC, VAT and Final Withholding VAT.

All told, I **VOTE** to **GRANT** the present Petition for Review.

ROMAN G. DEL ROSARIO
Presiding Justice

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[3] Id.

Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

FIRST DIVISION

PNOC DEVELOPMENT AND MANAGEMENT CORPORATION, Petitioner,	**CTA CASE NO. 8649**
	Members: DEL ROSARIO, PJ, *Chairperson* UY, and
-versus-	MINDARO-GRULLA, JJ.
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: JAN 22 2016 1:52 pm.

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SEPARATE DISSENTING and CONCURRING OPINION

With due respect, I concur with the result and disquisition on "Deficiency Income Tax and Deficiency VAT" but dissent from the majority's non-imposition of deficiency interest on deficiency Final Withholding Tax (FWT), deficiency Withholding Tax on Compensation (WTC), deficiency Expanded Withholding Tax (EWT) and deficiency Value Added Tax (VAT).

It is the opinion of the majority that deficiency interest may be imposed only on "deficiency in the tax due" as defined in the Code on these types of taxes- (a)income tax (Section 56), (b)estate tax (Section 56) and (c)donor's tax (Section 104). Thus, the conclusion that deficiency interest may not be properly imposed to deficiency FWT, WTC, EWT and VAT.

I disagree. Final Withholding Tax (FWT), Withholding Tax on Compensation (WTC), and Expanded Withholding Tax (EWT) are taxes on income under the withholding tax system which are likewise covered by "TITLE II – Tax on Income" of the National Internal Revenue Code, as amended. Nonetheless, I reiterate my position that the imposition of deficiency interest under Section 249(B) of the NIRC of 1997, as amended, clearly applies to all internal revenue taxes imposed by the present Tax Code in accordance with my dissenting opinion in *Ace/Saatchi Advertising, Inc. vs. The Honorable Commissioner of Internal Revenue*, CTA Case No. 8439, December 9, 2015 (First Division) and the Court's En Banc Decision dated September 4, 2012 in the case of *Takenaka Corporation Philippine Branch vs. Commissioner of Internal Revenue*, CTA EB Case No. 745.

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice