REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THIRD DIVISION

GRAND UNION SUPERMARKET, INC., *Petitioner,*	**CTA CASE NO. 10390**
	Members:
- versus -	**MANAHAN**, *Chairperson,* **REYES-FAJARDO, ANGELES**, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: DEC 17 2024 8:22 a.m.

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DECISION

ANGELES, *J.*:

THE CASE

Before the Court is a *Petition for Review*[1] filed by Grand Union Supermarket, Inc. (petitioner) against the Commissioner of Internal Revenue (CIR/respondent), praying that the *Final Decision on Disputed Assessment* (FDDA) issued by respondent for alleged deficiency taxes, interests and penalties of petitioner for fiscal year (FY) ending 31 August 2012, in the amount of ₱ 1,700,394,334.31, be declared null and void.

FACTS

The parties have admitted and stipulated upon the following facts:

1. Petitioner is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal offices at Amang Rodriguez Avenue, Barangay Dela Paz, Pasig City;

[1] Docket, Vol. I, pp. 6-54.

2. Petitioner is registered with the Bureau of Internal Revenue (BIR) as a taxpayer in accordance with Section 236 of the Tax Code, with Taxpayer Identification No. (TIN) 000-123-826;

3. Respondent is the duly appointed Commissioner of the BIR, the government agency tasked to, among others, collect all national internal revenue taxes. As Commissioner, respondent has the power to decide disputed assessments or other matters arising under the Tax Code or other laws administered by the BIR;

4. The existence of issued Letter of Authority (LOA) No. LOA-116-2014-00000030 for the examination of all internal revenue taxes of petitioner for the fiscal year ending 31 August 2012 and the receipt of the said LOA on 14 May 2014;

5. On 26 May 2015, petitioner executed a Waiver, which was effective until 30 June 2016 (Waiver # 1). The BIR, through its then Officer-in-Charge, Assistant Commissioner of Large Taxpayer Services, Nestor S. Valeroso (OIC-ACIR Valeroso), accepted Waiver # 1 on 29 May 2015;

6. On 09 December 2015, before the expiration of Waiver # 1, petitioner executed a second Waiver, which was effective until 31 December 2016 (Waiver # 2). The BIR, through OIC-ACIR Valeroso, accepted Waiver # 2 on 21 December 2015.

7. On 28 October 2016, before the expiration of Waiver # 2, petitioner executed a third Waiver, which was effective until 31 December 2017 (Waiver # 3). The BIR, through then Officer-in-Charge, Assistant Commissioner for Large Taxpayers Services, Teresita M. Angeles (OIC-ACIR Angeles), accepted Waiver # 3 on 16 November 2016;

8. The existence of the Preliminary Assessment Notice (PAN) dated 28 December 2016, wherein it assessed petitioner for deficiency income tax, Documentary Stamp Tax (DST), Value-Added Tax (VAT), Expanded Withholding Tax (EWT), Improperly Accumulated Earnings Tax (IAET), and the corresponding interest and penalties, for the fiscal year ending 31 August 2012, in the total amount of One Billion Two Hundred Thirty One Million Five Hundred Forty Five Thousand Seven Hundred Eighty Four Pesos and Seventy Two Centavos (Php1,231,545,784.72) and receipt of petitioner of said PAN on the same date;

9. The existence of the Formal Letter of Demand (FLD) dated 21 November 2017, wherein the BIR assessed petitioner for deficiency income tax, DST, VAT, EWT, IAET, and the corresponding interest and penalties, for the fiscal year ending 31 August 2012, in the total amount of One Billion Three Hundred Sixty Two Million Two Hundred Seventeen Thousand One Hundred Two Pesos and Sixty Eight Centavos (Php1,362,217,102.68) and receipt of petitioner of said FLD on 22 November 2017;

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10. The existence of the Final Decision on Disputed Assessment (FDDA) dated 25 September 2021, wherein respondent assessed petitioner for deficiency income tax, DST, VAT, EWT, IAET, and the corresponding interest and penalties, for the fiscal year ending 31 August 2012 in the total amount of One Billion Seven Hundred Million Three Hundred Ninety Four Thousand Three Hundred Thirty Four Pesos and Thirty One Centavos (Php1,700,394,334.31) and receipt of petitioner of said FDDA on 30 September 2021.[2]

A perusal of the records also reveals that petitioner filed its *Protest*[3] to the *Formal Letter of Demand* (FLD) on December 22, 2017, and that the FDDA was actually received on September 30, **2020**, not 2021.[4]

PROCEEDINGS BEFORE THE COURT

On October 30, 2020, petitioner filed the present *Petition for Review*[5] praying that the Court declare all the deficiency tax assessments, in the amount of ₱ 1,700,394,334.31, under the FDDA for fiscal year ending 31 August 2012 as null and void.

On November 17, 2020, petitioner was directed to comply with requirements of Sections 4(b) and 6 of Rule 7 of the 2019 Amendments to the 1997 Rules of Civil Procedure, which took effect on May 1, 2020.[6] On December 11, 2020, petitioner filed its *Compliance*,[7] which the Court found sufficient;[8] thus summons was issued.[9]

Within the extended period granted,[10] respondent filed his *Answer*[11] on March 8, 2021. The *BIR Records* were subsequently transmitted to the Court on May 20, 2021.[12]

The case was also referred to mediation,[13] however, the parties decided not to have their case mediated.[14]

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[2] Pre-Trial Order (PTO), Docket, Vol. III, pp. 1146-1147.
[3] Exhibit "P-7", Docket, Vol. I, pp. 320-329.
[4] Exhibit "P-1", Docket, Vol. I, pp. 75-87.
[5] *Id.*, note 1.
[6] Docket, Vol. I, pp. 258-260.
[7] Docket, Vol. I, pp. 261-528.
[8] Resolution dated December 21, 2020, Docket, Vol. I, pp. 529-530.
[9] Docket, Vol. I, p. 531.
[10] Resolution dated February 15, 2021, Docket, Vol. I, pp. 543-544.
[11] Docket, Vol. II, pp. 544-569.
[12] Compliance, Docket, Vol. II, pp. 649-652, as noted by Minute Resolution dated June 3, 2021, Docket, Vol. II, p. 654.
[13] Order dated March 16, 2021, Docket, Vol. II, p. 647.
[14] No Agreement to Mediate, Docket, Vol. II, p. 655.

On September 13, 2021, the parties filed their respective *Pre-Trial Briefs*.[15] Pre-trial proceeded on September 16, 2021.[16]

The parties then filed their *Joint Stipulation of Facts and Issues (JSFI)*,[17] electronically on September 30, 2021,[18] and by personal service on October 25, 2021. The *JSFI* was approved in the Resolution dated December 7, 2021,[19] and the Pre-Trial Order[20] was issued on May 13, 2022.

During trial, petitioner presented Mr. Niño Geyn D. España, whose testimony was offered to prove that: (a) the right of respondent to assess deficiency income tax, Documentary Stamp Tax (DST), Value-Added Tax (VAT), Expanded Withholding Tax (EWT), and Improperly Accumulated Earnings Tax (IAET) for the FY ending 31 August 2012, has already prescribed; (b) respondent violated the right of petitioner to due process when it issued the FDDA; (c) the Letter of Authority (LOA) authorizing the revenue officers of respondent to examine and assess petitioner is invalid; and (d) petitioner is not liable for the assessed deficiency income tax, DST, VAT, EWT, IAET, and the corresponding interests and penalties, for the fiscal year ending 31 August 2012.[21]

Petitioner also presented the court-commissioned Independent Certified Public Accountant (ICPA), Mr. Eric J. Magcale, who testified on his ICPA Report.[22]

Petitioner filed its *Formal Offer of Evidence*[23] (FOE) on December 7, 2022, while respondent filed his *Comment (On Petitioner's Formal Offer of Evidence)*[24] on December 16, 2022. Petitioner's FOE was resolved in the Resolution dated February 6, 2023, resulting in the admission and denial of certain exhibits.[25]

Respondent thereafter presented his witnesses: (a) Revenue Officer (RO) Carolyn V. Mendoza;[26] and (b) RO Rosario A. Arriola.[27]

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[15] Docket, Vol. II, pp. 704-711 and 713-721.
[16] Order, Docket, Vol. II, pp. 689-691.
[17] Docket, Vol. II, pp. 744-750.
[18] Docket, Vol. II, pp. 697-704.
[19] Docket, Vol. II, pp. 783-784.
[20] Docket, Vol. III, pp. 1136-1155.
[21] Amended Judicial Affidavit of Mr. Niño Geyn D. España, Docket, Vol. II, pp. 826-856.
[22] Judicial Affidavit of Mr. Eric J. Magcale, Docket, Vol. III, pp. 1251-1276; ICPA Report at pp. 1277-1382.
[23] Docket, Vol. III, pp. 1510-1535.
[24] Docket, Vol. III, pp. 1536-1539.
[25] Docket, Vol. III, pp. 1541-1549.
[26] Judicial Affidavit of Revenue Officer Carolyn V. Mendoza, Docket, Vol. II, pp. 573-579.
[27] Judicial Affidavit of Revenue Officer Rosario A. Arriola, Docket, Vol. II, pp. 617-620.

RO Mendoza and RO Arriola were presented to prove: (a) the factual basis for the issuance of the assessment; (b) that the assessments were issued in accordance with the provisions of law, rules and regulations; (c) that petitioner is liable to pay the amount of ₱1,700,394,334.31 representing petitioner's deficiency income tax, VAT, DST, EWT, IAET and compromise penalty inclusive of surcharge and interest, for fiscal year ending 31 August 2012, plus 25% surcharge and 20% deficiency and delinquency interest for late payment, pursuant to Section 249(C) of the National Internal Revenue Code (NIRC); and delinquency interest at the rate of 12% per annum from January 1, 2018 until the amount is fully paid, pursuant to Section 249(C) of the NIRC, in relation to Section 249(A) of the same Code, as amended by the Tax Reform for Acceleration and Inclusion (TRAIN) law; (d) that respondent complied with the audit procedures required under the NIRC, as amended; and, (e) all other allegations in respondent's *Answer*.[28]

Respondent filed his *Formal Offer of Evidence*[29] on May 18, 2023, with petitioner's *Comment/Opposition to Formal Offer of Evidence of Respondent*[30] filed on June 2, 2023.

On June 2, 2023, the instant case was transferred to the CTA 3rd Division in view of the reorganization of the CTA Divisions.[31]

Respondent's evidence were all admitted in the Resolution[32] dated June 23, 2023.

On August 22, 2023, petitioner filed its *Memorandum*,[33] while respondent filed a *Manifestation*[34] on November 15, 2023, stating that he is adopting the arguments in his *Answer* for his memorandum.

On November 20, 2023, the instant case was submitted for decision.[35]

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[28] Offer of Testimony of Revenue Officer Carolyn V. Mendoza, Docket, Vol. II, pp. 570-572; Offer of Testimony of Revenue Officer Rosario A. Arriola, Docket, Vol. II, pp. 614-616.
[29] Docket, Vol. III, pp. 1566-1575.
[30] Docket, Vol. III, pp. 1579-1598.
[31] Docket, Vol. III, p. 1578.
[32] Docket, Vol. III, pp. 1601-1602.
[33] Docket, Vol. III, pp. 1603-1668.
[34] Docket, Vol. III, pp. 1670-1673.
[35] Docket, Vol. III, p. 1674.

ISSUE

As agreed upon by the parties, the issue to be resolved by this Court is whether or not petitioner is liable to pay the amount of ₱ 1,700,394,334.31, representing petitioner's income tax, VAT, DST, EWT, IAET, and compromise penalty, inclusive of surcharge and interest, for FY ending 31 August 2012, plus 25% surcharge and 20% deficiency and delinquent interest for late payment, pursuant to Section 249(C) of the NIRC, and delinquency interest at the rate of 12% per annum from January 1, 2018 until the amount is fully paid, pursuant to Section 249(C) of the NIRC, in relation to Section 249(A) of the same Code, as amended by the TRAIN Law.[36]

ARGUMENTS OF THE PARTIES

Petitioner's arguments

Petitioner alleges that respondent's right to assess the alleged deficiency EWT for the period 1 September 2011 to 30 April 2012, has already prescribed even before the execution of the Waiver effective until 30 June 2016 (Waiver # 1). Petitioner also questions the validity of the Waivers on the ground that the same were signed and accepted only by Officers-in-Charge (OICs)-Assistant Commissioner of the Large Taxpayer Service (ACIR-LTS), which is allegedly a violation of Revenue Delegation Authority Order (RDAO) No. 05-01.

Petitioner also alleges that its right to due process was violated when the FLD and FDDA contained indefinite assessments, due to the statement "interest will have to be adjusted if paid beyond the date specified," when the assessment notices attached to the FLD did not contain a due date, and when the assessment notices attached to the FDDA contained a due date (*i.e.*, August 31, 2020) that had already lapsed when the same was issued on September 25, 2020. Petitioner also states that the FLD and FDDA were issued based on an expired LOA since the ROs failed to conclude the tax examination within one hundred twenty (120) days from petitioner's receipt of the same, and that some of the ROs who conducted the examination were not duly authorized under the said LOA.

Finally, petitioner maintains that it is not liable for deficiency income tax, VAT, DST, EWT, and IAET, as well as the surcharges, interest, and compromise penalties.

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[36] PTO, Docket, Vol. III, p. 1147-1148.

Respondent's counter-arguments

Respondent contends that petitioner should not be allowed to raise issues for the first time on appeal, particularly, the issues on the validity of the LOA, prescription, and due process. He also states that the LOA does not become invalid after the lapse of the 120-day period even without revalidation.

Respondent further asserts that the Waivers were validly executed and that his right to asses deficiency taxes has not prescribed.

Respondent further argues that the FLD/FAN and FDDA are valid since the said notices state the facts, laws, rules and regulations upon which the assessments are based. He reiterates that the adjustment of interests does not render an assessment indefinite.

Finally, respondent reiterates the findings that led to the deficiency tax assessments.

RULING OF THE COURT

The present *Petition for Review* is partly meritorious.

Before we rule on the merits of the case, the Court shall first determine whether the present *Petition for Review* was timely filed.

Records show that petitioner received the assailed FDDA on September 30, 2020.[37] Considering that petitioner filed the present *Petition for Review* on October 30, 2020 or within thirty (30) days from such receipt[38], the said Petition was timely filed.

The Court can rule on issues not raised at the administrative level.

Respondent argues that petitioner cannot attack the validity of the assessment for the first time on appeal.

We disagree.

[37] Exhibit "R-15", BIR Records, pp. 220-222.
[38] Section 228 of the Tax Code, as amended.

It is settled that cases filed before this Court are litigated *de novo*, and party litigants must prove every minute aspect of their case.[39] Section 1, Rule 14 of the Revised Rules of the Court of Tax Appeals (RRCTA) specifically provides that "[i]n deciding the case, the Court may not limit itself to the issues stipulated by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case."

The resolution of the issue of whether petitioner is liable for the alleged deficiency taxes, necessarily involves the determination of the validity of the assessment, even if the same is raised for the first time on appeal before this Court.

The LOA dated May 9, 2014 need not be revalidated.

LOA No. SN: eLA201100077674 (LOA-116-2014-00000030)[40] was issued on May 9, 2014, authorizing ROs Carolyn Mendoza, Rosario Arriola, Reynante Martirez, and Shella Samaniego, under Group Supervisor (GS) Rolando Balbido, to examine petitioner's books of accounts and other accounting records, for FY September 1, 2011 to August 31, 2012. The same was received by petitioner on May 14, 2014.[41]

Petitioner argues that the ROs failed to conclude the examination of petitioner's books of accounts within one hundred twenty (120) days from petitioner's receipt of the LOA, and that they also failed to revalidate the LOA, rendering the assessments void.

Petitioner's arguments deserve scant consideration.

In *AFP General Insurance Corporation vs. Commissioner of Internal Revenue*,[42] the Supreme Court held as follows:

> Without revalidation, the LOA shall be considered void and the assigned revenue officer is 'prohibited from *further* investigation and contact with the taxpayer.' The revalidation requirement here is aimed at *reconfirming* the revenue officer's authority and *extending the period of audit*. It contemplates a *served LOA* and *an on-going audit investigation*. Stated differently, the revenue officer was

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[39] *Commissioner of Internal Revenue v. Philippine Bank of Commerce*, G.R. No. 211348, February 23, 2022.
[40] Exhibit "P-2", Docket, Vol. I, p. 311.
[41] Par. 4, JSFI, Docket, Vol. II, p. 745.
[42] G.R. No. 222133, November 4, 2020.

> already authorized to commence an audit only that he was unable to conclude it within 120 days.
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> Given this context, it is clear that failure to comply with the 120-day rule does not void LOA *ab initio*. The expiration of the 120-day period merely renders an LOA *unenforceable*, inasmuch as the revenue officer must first seek ratification of his *expired authority to audit* to be able to validly continue investigation beyond the first 120 days.
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> That the revenue officer is unable to conduct *further* investigation does not invalidate his/her authority during the first 120 days or the procedures he/she had already performed within that period. He/she may instead render a report based on the results of his/her initial investigation from which an assessment may be legitimately issued.
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> In any case, AGIC[43] does not even allege facts showing that the assigned revenue officers continued with their audit investigation beyond the first 120 days after issuance/service of the LOA. Failure to revalidate the LOA in accordance with the 120-day rule shall only be an issue in cases where tax authorities proceeded with an extended audit without first seeking the requisite revalidation.
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> **Furthermore, <u>even if the Court assumes that the BIR illegally extended their investigation</u>, AGIC could have also resisted further investigation as early as the 121st day after the LOA's issuance/service if it truly believed that the assigned revenue officers no longer possessed the requisite authority. <u>That it kept silent about the supposed violation and complained only when it was already found liable for deficiency taxes, once again, only show that it acquiesced to the BIR's extended audit, if any</u>.**
>
> **Based on the foregoing, absent any showing that the failure to revalidate resulted in a violation of AGIC's right to due process, the Court upholds the subject LOA's validity.** *(Emphasis and underscoring supplied)*

Thus, on the basis of the foregoing jurisprudential pronouncements, even granting that the BIR illegally extended their investigation of petitioner, it is noteworthy that the latter did not resist further investigation despite the lapse of the 120-day period from the issuance of the subject LOA. To be sure, petitioner acquiesced to the BIR's extended audit, as it kept silent about the supposed violation and raised the same only at this stage of the proceedings.

In any case, failure to revalidate the subject LOA does not result in the violation of petitioner's right to due process.

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[43] That is, the AFP General Insurance Corporation.

It must be pointed out that Revenue Memorandum Circular (RMC) No. 23-2009 dated April 16, 2009[44] categorically states that neither the failure on the part of the concerned ROs to request for revalidation of an LOA, nor the expiration of the *"revalidation period,"* shall nullify the same, nor affect or modify the rules on the reglementary period within which an assessment may be validly issued. The said issuance states, in part, as follows:

> **I. Revalidation of LAs**
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> The revalidation of LA[45] shall give rise to the extension of the period within which the Revenue Officer (RO) assigned to the case shall submit the report of investigation to higher authorities for review and approval, without the imposition of applicable administrative sanctions. Depending on the classification of the pending tax case, said extension period shall be equivalent to the original prescribed number of days within which to report the case under existing revenue issuances. **Failure on the part of the RO to request for the revalidation of LA or the expiration of the 'revalidation period' does not nullify the LA nor will it affect or modify the rules on the reglementary period within which an assessment may be validly issued.** However, this shall be considered as a ground for the imposition of disciplinary action and demerit in the performance rating of the concerned RO, including the reassignment of the case to another RO if the Regional Director, upon the recommendation of the Revenue District Officer, deems it necessary." *(Emphasis supplied)*

After one (1) year from the issuance of RMC No. 23-2009, respondent issued Revenue Memorandum Order (RMO) No. 44-2010 dated May 12, 2010,[46] whereby respondent declares that there is no need for revalidation of the LOA beginning June 1, 2010, to wit:

> xxx xxx xxx
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> 8. **Beginning June 1, 2010**, the rule on the need for revalidation of LAs for failure of the revenue officials to complete the audit within the prescribed period shall be withdrawn. Accordingly, **there is no need for revalidation of the LA even if the prescribed audit period has been exceeded**. However, the failure of the RO to complete the audit within the prescribed period shall be subject to the applicable administrative sanctions.
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> xxx xxx xxx
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> V. REPEALING CLAUSE

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[44] SUBJECT: Reiteration of Policies and Procedures Relative to Revalidation of Letters of Authority, Issuance of Subpoena Duces Tecum, and Review of Cases by the Assessment Division.

[45] That is, an LOA or a Letter of Authority.

[46] SUBJECT: Electronic Issuance of Letters of Authority.

> **The provisions of existing issuance that are inconsistent herewith are hereby repealed, amended, or modified.**" *(Emphasis supplied)*

On the basis thereof, it is clear that the requirement of revalidation of an LOA has been withdrawn beginning on June 1, 2010. The effect of such failure is merely to subject the concerned ROs to applicable administrative sanctions, but not to render null the issued LOA. More significantly, the lapse of the said period of audit would not have the effect of revoking the authority given to the concerned ROs.

Thus, considering that LOA No. SN: eLA201100077674 (LOA-116-2014-00000030) was issued on May 9, 2014, the above-quoted provisions of RMO No. 044-2010 must already govern the present case, as the same was already in full effect at the time of the issuance of the said LOA. Correspondingly, the lack of revalidation of the same LOA, despite the lapse of the 120-day period, does not nullify the same.

The FLD remains valid despite the infirmity in the FDDA with respect to the due date for payment.

Petitioner argues that its right to due process was violated when the FDDA indicated a payment deadline that lapsed before its issuance.

We agree.

The FDDA was issued on September 25, 2020 but it was indicated therein that payment was due on August 31, 2020 or twenty-five (25) days prior to its issuance.[47] Despite the infirmity of the FDDA, however, the FLD remains valid in the absence of any other ground which may nullify it.

In *Commissioner of Internal Revenue v. Liquigaz Philippines Corporation*,[48] the Supreme Court had the occasion to rule that a void FDDA does not *ipso facto* render an assessment void. In resolving the issue of the effects of a void FDDA, the Supreme Court differentiated an assessment from a decision. An assessment becomes a disputed assessment after a taxpayer has filed its protest to the assessment in

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[47] Exhibits "P-1" and "P-1-A" to "P-1-F", Docket, Vol. I, pp. 75-87.
[48] GR No. 215534, 18 April 2016.

the administrative level. Thereafter, the CIR either issues a decision on the disputed assessment or fails to act on it and is, therefore, considered denied. The taxpayer may appeal the decision on the disputed assessment or the inaction of the CIR. Hence, an FDDA provides an assessment of the CIR but is not the only means that the final tax liability of a taxpayer is fixed.

It is emphasized that an assessment differs from a decision. The invalidity of one does not necessarily result to the invalidity of the other. Thus, when the FDDA indicated an erroneous date of payment, it did not affect the validity of the FLD *per se*. In the present case, the FLD clearly indicated the date of payment to be December 31, 2017.[49] Therefore, petitioner was clearly apprised of the date of payment of its final tax liability.

The FLD remains valid despite the presence of other ROs who recommended the issuance of the FLD.

As mentioned, in the LOA No. SN: eLA201100077674 (LOA-116-2014-00000030)[50] dated May 9, 2014, ROs Carolyn **Mendoza**, Rosario **Arriola**, Reynante **Martirez**, and Shella **Samaniego**, under GS Rolando **Balbido**, were authorized to examine petitioner's books of accounts and other accounting records for fiscal year September 1, 2011 to August 31, 2012.

From the Checklist of Requirements[51], First Notice for Presentation of Records/Documents dated June 27, 2014[52] and Second and Final Notice for Presentation of Records/Documents[53] dated October 27, 2014, in relation to the said LOA and as received by petitioner on various dates, it appears that RO **Mendoza** was the only RO indicated as contact person. Further, in the RO's Audit Reports[54] and Memorandum[55] dated December 6, 2016 recommending the issuance of the Preliminary Assessment Notice (PAN), the sole RO who signed the same was RO **Mendoza**.

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[49] Exhibit "P-42", USB
[50] Exhibit "P-2", Docket, Vol. I, p. 311.
[51] Exhibit "R-2", BIR Records, Vol. I, p. 3.
[52] Exhibit "R-3", BIR Records, Vol. I, p. 6.
[53] Exhibit "R-4", BIR Records, Vol. I, p. 9.
[54] Exhibit "R-12", BIR Records, Vol. I, pp. 125-131.
[55] Exhibit "R-8", BIR Records, Vol. I, p. 132-136.

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However, in the RO's Audit Reports[56] and Memorandum dated November 6, 2017[57] recommending the issuance of the FLD, ROs R. **Sudano**, G. **Anaban** and T. **Monforte**, in addition to RO **Mendoza**, were found to be signatories thereof.

Petitioner argues that the ROs who conducted the examination were not duly authorized under LOA No. SN: eLA201100077674 (LOA-116-2014-00000030) dated May 9, 2014; thus, the FLD is void.

Petitioner's argument is partially correct.

Section 6 (A) of the NIRC grants the CIR or his duly authorized representative the power to authorize the examination of any taxpayer and the assessment of the correct amount of tax. Meanwhile, Section 10 of the NIRC enumerates the Revenue Regional Director's duties, including the duty to issue LOAs for the examination of taxpayers within the region.

Relative thereto, Section 13 of the NIRC grants the RO authority to examine taxpayers for tax assessment purposes, subject to several rules. One such rule is that the examination must be undertaken pursuant to a LOA issued by the Revenue Regional Director.

RMO No. 37-90, as amended by RMO No. 43-90, prescribes the policy guidelines for the issuance of LOAs. The pertinent portions of the said Rule is reproduced below:

> C. Other policies for issuance of [LOAs].
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> 1. **All audits/investigations, whether field audits or office audits, should be conducted under a Letter of Authority.**
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> xxx xxx xxx
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> 5. **Any reassignment/transfer of cases to another RO(s),** and revalidation of [LOAs] which have already expired, **shall require the issuance of a new [LOA],** with the corresponding notation thereto, including the previous [LOA] number and date of issue of said [LOAs].
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> xxx xxx xxx
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> D. Preparation and issuance of [LOAs].

[56] Exhibit "R-12", BIR Records, Vol. I, pp. 146-151.
[57] Exhibit "R-10", BIR Records (Exhibit "R-12"), pp. 153-155.

1. All [LOAs] for cases selected and listed pursuant to RMO No. 36-90 to be audited in the revenue regions shall be prepared and signed by the Regional Director (RD).

2. The Regional Director shall prepare and sign the [LOAs] for returns recommended by the RDO for assignment to the ROs, indicating therein the name and address of the taxpayer, the name of the RO(s) to whom the [LOA] is assigned, the taxable period and kind of tax; after which he shall forward the same to the RDO or Chief, Assessment Branch, who in turn shall indicate the date of issue of the [LOA] prior to its issuance.

3. The [LOAs] for investigation of taxpayers by National Office audit offices (including the audit division in the Sector Operations Service and Excise Tax Service) shall be prepared in accordance with the procedures in the preceding paragraph, by their respective Assistant Commissioners and signed by the Deputy Commissioner concerned or the Commissioner. The [LOAs] for investigation of taxpayer by the intelligence and Investigation Office and any other special audit teams formed by the Commissioner shall be signed by the Commissioner of Internal Revenue.

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

5. All issued [LOAs] shall be monitored in accordance with RMO No. 4-89 and 12-89. *(Emphasis supplied)*

In the case of *Commissioner of Internal Revenue vs. McDonald's Philippines Realty Corp.*[58] (McDonald's case), the Supreme Court clarified the significance of the foregoing provisions in relation to the taxpayer's due process rights in tax audits or investigations. On this matter, the Supreme Court held, *viz.*:

A. Due Process Requires Identification of Revenue Officers Authorized to Continue the Tax Audit or Investigation

The issuance of an LOA prior to examination and assessment is a requirement of due process. It is not a mere formality or technicality. In *Medicard Philippines, Inc. v. Commissioner of Internal Revenue*, We have ruled that the issuance of a Letter Notice to a taxpayer was not sufficient if no corresponding LOA was issued. In that case, We have stated that "[d]ue process demands x x x that after [a Letter Notice] has serve its purpose, the revenue officer should have properly secured an LOA before proceeding with the

[58] G.R. No. 242670, May 10, 2021.

further examination and assessment of the petitioner. Unfortunately, this was not done in this case." The result of the absence of a LOA is the nullity of the examination and assessment based on the violation of the taxpayer's right to due process.

To comply with due process in the audit or investigation by the BIR, the taxpayer needs to be informed that the revenue officer knocking at his or her door has the proper authority to examine his books of accounts. The only way for the taxpayer to verify the existence of that authority is when, upon reading the LOA, there is a link between the said LOA and the revenue officer who will conduct the examination and assessment; and the only way to make that link is by looking at the names of the revenue officers who are authorized in the said LOA. **If any revenue officer other than those named in the LOA conducted the examination and assessment, taxpayers would be in a situation where they cannot verify the existence of the authority of the revenue officer to conduct the examination and assessment. Due process requires that taxpayers must have the right to know that the revenue officers are duly authorized to conduct the examination and assessment, and this requires that the LOAs must contain the names of the authorized revenue officers. In other words, identifying the authorized revenue officers in the LOA is a jurisdictional requirement of a valid audit or investigation by the BIR, and therefore of a valid assessment.**

xxx xxx xxx

B. The Use of Memorandum of Assignment, Referral Memorandum, or Such Equivalent Document, Directing the Continuation of Audit or Investigation by an Unauthorized Revenue Officer Usurps the Functions of the LOA

It is true that the service of a copy of a memorandum of assignment, referral memorandum, or such other equivalent internal BIR document may notify the taxpayer of the fact of reassignment and transfer of cases of revenue officers. **However, notice of the fact of reassignment and transfer of cases is one thing; proof of the existence of authority to conduct an examination and assessment is another thing.** The memorandum of assignment, referral memorandum, or any equivalent document is not a proof of the existence of authority of the substitute or replacement revenue officer. The memorandum of assignment, referral memorandum, or any equivalent document is not issued by the CIR or his duly authorized representative for the purpose of vesting upon the revenue officer authority to examine a taxpayer's books of accounts. It is issued by the revenue district officer or other subordinate official for the purpose of reassignment and transfer of cases of revenue officers.

The petitioner wants the Court to believe that once an LOA has been issued in the names of certain revenue officers, a subordinate

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official of the BIR can then, through a mere memorandum of assignment, referral memorandum, or such equivalent document, rotate the work assignments of revenue officers who may then act under the general authority of a validly issued LOA. But an LOA is not a general authority to any revenue officer. It is a special authority granted to a particular revenue officer.

The practice of reassigning or transferring revenue officers, who are the original authorized officers named in the LOA, and subsequently substituting them with new revenue officers who do not have a separate LOA issued in their name, is in effect a usurpation of the statutory power of the CIR or his duly authorized representative. The memorandum of assignment, referral memorandum, or such other equivalent internal document of the BIR directing the reassignment or transfer of revenue officers, is typically signed by the revenue district officer or other subordinate official, and not signed or issued by the CIR or his duly authorized representative under Sections 6, 10 (c) and 13 of the NIRC. Hence, the issuance of such memorandum of assignment, and its subsequent use as a proof of authority to continue the audit or investigation, is in effect supplanting the functions of the LOA, since it seeks to exercise a power that belongs exclusively to the CIR himself or his duly authorized representatives.

C. Revenue Memorandum Order No. 43-90 dated September 20, 1990 Expressly and Specifically Requires the Issuance of a New LOA if Revenue Officers are Reassigned or Transferred

Section D (5) of RMO No. 43-90 dated September 20, 1990 provides xxx xxx xxx

The above provision expressly and specifically requires the issuance of a new LOA if revenue officers are reassigned or transferred to other cases. The provision involves the following two separate phrases: "re-assignment/transfer of cases to another RO(s)," on the one hand, and "revalidation of L/As which have already expired," on the other hand. The occurrence of one, independently of the other, requires the issuance of a new LOA. The new LOA must then have a corresponding relevant notation, including the previous LOA number and date of issue of the said LOAs.

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Even the Operations Group of the BIR now recognizes that the practice of reassigning or transferring revenue officers originally named in the LOA and substituting them with new revenue officers to continue the audit or investigation without a separate LOA, is no longer tenable. Thus, in Operations Memorandum No. 2018-02-03 dated February 9, 2018, the Operations Group has decided that "the issuance of a MOA for reassignment of cases in the aforementioned instances [*i.e.*, the original revenue officer's transfer to another office, resignation, retirement, *etc.*] shall be discontinued." *(Emphasis supplied)*

Applying the foregoing principles to the case at bar, ROs R. **Sudano**, G. **Anaban** and T. **Monforte** who prepared and signed the Audit Reports[59] and Memorandum dated November 6, 2017[60] recommending the issuance of the FLD, were not authorized under the original LOA No. SN: eLA201100077674 (LOA-116-2014-00000030)[61] dated May 9, 2014, nor under a new or amended LOA as required by RMO No. 37-90, as amended, and as clarified by the *McDonald's* case.

Consequently, the said ROs have no proof of their authority to conduct an examination and assessment of petitioner's books of accounts and other accounting records for fiscal year September 1, 2011 to August 31, 2012. Without such authority, their examination and assessment of petitioner for the said period is inescapably null and void.

The question that remains is whether the FLD is valid despite the lack of authority ROs R. Sudano, G. Anaban and T. Monforte.

After a careful review of the records of the case, we find the FLD **valid** as RO Mendoza's authority to examine petitioner's records was not diminished nor nullified by the mere presence of the other ROs.

It is undisputed that RO Mendoza was validly authorized to conduct the audit of petitioner's books of accounts and other accounting records for the covered period under LOA No. SN: eLA201100077674 (LOA-116-2014-00000030)[62] dated May 9, 2014.

The Court notes that RO Mendoza is the sole examiner who recommended the issuance of the PAN against petitioner, per the Memorandum dated December 6, 2016[63]. This resulted in the issuance of the PAN[64] dated December 28, 2016.

The Court also notes that petitioner did not file any response to the said PAN; hence, the FLD[65] was thereafter issued. It must be emphasized that the findings of tax liabilities in the said PAN are the same as those found in the subject FLD, with mere adjustments on the interest of the respective basic tax dues.

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[59] Exhibit "R-12", BIR Records, Vol. I, pp. 146-151.
[60] Exhibit "R-10", BIR Records (Exhibit "R-12"), pp. 153-155.
[61] Exhibit "P-2", Docket, Vol. I, p. 311.
[62] Exhibit "P-2", Docket, Vol. I, p. 311.
[63] BIR Records (Exhibit "R-12"), pp. 132-136.
[64] Exhibit "P-5", Docket, Vol. I, pp. 314-316; Exhibit "R-9", BIR Records (Exhibit "R-12"), pp. 138-145.
[65] Exhibits "P-6" and "R-11", Docket, Vol. I, pp. 317-319. Refer also to BIR Records (Exhibit "R-12"), pp. 165-172.

Due to the unique factual antecedents of the instant case, it can be surmised that at best, the only contribution or participation of ROs R. **Sudano**, G. **Anaban** and T. **Monforte** in petitioner's tax audit for the covered period, is the adjustment of the interest imposed on petitioner's tax liabilities. Such contribution or participation with respect to the adjustment of interest, in reality, does not entail an actual examination at all.

Therefore, the subject FLD cannot be rendered invalid on ground that the ROs who conducted the examination of petitioner were not authorized to do so, because in truth and in fact, RO Mendoza who actually conducted the tax audit of petitioner, was duly clothed with authority to do so under a valid LOA.

The FLD contains definite assessments.

Petitioner argues that the subject assessments are rendered indefinite because the FLD contained the statement: "Please take note that the interest will have to be adjusted if paid beyond the date specified therein."[66] Petitioner cites *Commissioner of Internal Revenue v. Fitness By Design, Inc.*[67] (*Fitness case*), in arguing that the adjustment of the interest rendered the assessment indefinite.

In the *Fitness case*, the Supreme Court characterized a final assessment, and discussed when such assessment fails to comply with the need for a definite demand for the payment of tax liability, as follows:

> A final assessment is a notice "to the effect that the amount therein stated is due as tax and a demand for payment thereof. This demand for payment signals the time "when penalties and interests begin to accrue against the taxpayer and enabling the latter to determine his remedies[.]" Thus, it must be "sent to and received by the taxpayer, and must demand payment of the taxes described therein within a specific period."
>
> The disputed Final Assessment Notice is not a valid assessment.
>
> **First, it lacks the definite amount of tax liability** for which respondent is accountable. It does not purport to be a demand for payment of the tax due, which a final assessment notice should supposedly be. An assessment, in the context of the National Internal Revenue Code, is a "written notice and demand made by the [Bureau of Internal Revenue] on the taxpayer for the settlement of a due tax

[66] Exhibit "P-6", Docket, Vol. I, pp. 317-319.
[67] G.R. No. 215957, November 9, 2016.

> liability that is there definitely set and fixed." Although the disputed notice provides that the tax due is still subject to modification, depending on the date of payment. xxx
>
> xxx xxx xxx
>
> **Second, there are no due dates in the Final Assessment Notice. This negates petitioner's demand for payment**. xxx (*Emphasis supplied*)

However, the Court finds that the circumstances in the *Fitness case* are not the same as in the present case. Specifically, the assessment notices contained a specific due date, which is **December 31, 2017**.[68]

Furthermore, that the interest "will have to be adjusted if paid beyond the due date specified therein" does not make the assessments indefinite. The statement merely served as a reminder to the taxpayer that the interest will have to be adjusted if the assessed tax liability remains unpaid on the stated date in the assessment notices. This is nothing but a natural consequence of Section 249 of the NIRC, as amended, which requires the imposition of interest on unpaid taxes from the time such tax is required to be paid until it is fully paid. Understandably, the interest in the assessment would be subject to changes, considering that the BIR would not have the foresight to determine when respondent would pay the deficiency taxes.[69]

Thus, on this score, the subject FLD cannot be invalidated.

The Waivers are valid. However, respondent's right to assess deficiency taxes for FY ending August 31, 2012 has partially prescribed.

Section 203 of the NIRC reads, to wit:

> SEC. 203. *Period of Limitation upon Assessment and Collection.* — **<u>Except as provided in Section 222</u>, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return,** and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That **in a case where a return is filed beyond the**

[68] Exhibit "P-42", USB
[69] *Commissioner of Internal Revenue v. Alphaland Makati Place, Inc.*, CTA EB No. 2292, March 14, 2022.

> **period prescribed by law, the three-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.** *(Emphasis and underscoring supplied)*

Based on the foregoing provision, internal revenue taxes must be assessed within three (3) years counted from the period fixed by law for the filing of the tax return or the actual date of filing, whichever is later. This mandate governs the question of prescription of the government's right to assess internal revenue taxes primarily to safeguard the interests of taxpayers from unreasonable investigation. Hence, an assessment notice issued after the three-year prescriptive period is not valid and effective.[70]

As an exception to the three-year prescriptive period on the assessment of taxes, Section 222(b) of the NIRC provides:

> SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* —
>
> xxx xxx xxx
>
> (b) **If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon.** The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon. *(Emphasis supplied)*

The above provision authorizes the extension of the original three-year prescriptive period by the execution of a valid waiver, where the taxpayer and the BIR agree in writing that the period to issue an assessment and to collect taxes due is extended to an agreed upon date.[71] To be sure, it must be emphasized that a *Waiver of the Defense of Prescription* is a bilateral agreement between a taxpayer and the BIR to extend the period of assessment and collection to a certain date.[72]

In this case, petitioner contends that the revenue officials who accepted the Waivers were not duly authorized. Petitioner questions

[70] *Commissioner of Internal Revenue vs. Next Mobile, Inc. (formerly Nextel Communications Phils., Inc.)*, G.R. No. 212825, December 7, 2015.
[71] *Commissioner of Internal Revenue vs. FMF Development Corporation*, G.R. No. 167765, June 30, 2008.
[72] *Commissioner of Internal Revenue vs. Avon Products Manufacturing, Inc., etseq.*, G.R. Nos. 201398-99 and 201418-19, October 3, 2018.

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Waiver # 1,[73] and another Waiver effective until December 31, 2016 (Waiver # 2),[74] as the signatories thereof were designated as "OIC-Assistant Commissioner Large Taxpayers Service." However, under RDAO No. 05-01,[75] it is the Assistant Commissioner or "ACIR" for the Large Taxpayers Service, who is the revenue official authorized to sign and accept the *Waiver of the Defense of Prescription under the Statute of Limitations.*

Considering that the signatories of the said Waivers merely had an "Officer-In-Charge" or "OIC" designation, petitioner invokes the ruling in Civil Service Commission (CSC) Resolution No. 93-5026, *viz.*:

> The designation of an OIC is nothing more than a temporary and convenient arrangement intended to avert paralyzation of the day to day operations of an office in the meantime that the chief o head of office is temporarily absent. The OIC has no power to appoint unless the designation issued by the proper appointing authority includes expressly the power to issue appointment. Moreover, in the case of Aytona v. Castillo et al., (G.R. No. L-19313, January 19, 1962) it was ruled that a designated <u>Officer-in-Charge does not exercise powers involving discretion of the regular incumbent. The rights and privileges of the latter do not normally descend upon the former unless specifically or stated in the designation</u>. *(Underscoring supplied by petitioner)*

Petitioner then concludes, in effect, that the said Waivers are invalid for being entered into by the said BIR officials in an OIC capacity, and thus, did not extend the prescriptive period to assess.

This Court is not persuaded.

The CSC Resolution being relied upon by petitioner rests upon a different issue, *i.e.*, on whether an OIC has the power to issue an appointment. Thus, it is apparent that the said CSC Resolution cannot be used as basis to nullify the subject Waivers. But even granting that the ruling therein may be applied to the present case, the same will not work in favor of petitioner.

In the said CSC Resolution, it is declared that "[t]he rights and privileges of the [regular incumbent] do not normally descend upon the [Officer-in-Charge] <u>**unless specifically or stated in the designation**</u>."

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[73] Exhibit "R-5", BIR Records (Exhibit "R-12"), p. 156.
[74] Exhibit "P-3", Docket, Vol. I, p. 312; Exhibit "R-6", BIR Records (Exhibit "R-12"), p. 157.
[75] SUBJECT: Delegation of Authority to Sign and Accept the Waiver of the Defense of Prescription Under the Statute of Limitations.

Relative thereto, RMO No. 10-2003[76] reads, in part, as follows:

> **An Officer-in-Charge shall immediately assume the functions of the position vacated** and shall be entitled to receive representation and transportation allowance (RATA) in accordance with Section 3.5 of DBM NCC#67 dated January 01, 1992, until such time that an Officer is duly designated for the position by the Commissioner through a Revenue Travel Assignment Order. *(Emphasis supplied)*

Moreover, RMO No. 9-2016[77] reiterates and clarifies the duties and responsibilities of a BIR personnel holding a position in an OIC capacity, *viz.*:

> **For the uniform understanding of all concerned, it is hereby reiterated and clarified that <u>all internal revenue personnel holding positions in an OIC capacity shall exercise authority and discharge duties and assume responsibilities as if they are holding the employment item for the particular office</u>,** subject to the limitations under the law and pertinent internal revenue issuances. *(Emphasis and underscoring supplied)*

Correspondingly, since an OIC designation in the BIR assumes the functions, duties and responsibilities of the vacated position, as if he/she is holding the employment item for the particular office, the respective signing and acceptance by "OIC-Assistant Commissioner" Nestor S. Valeroso did not render Waiver # 1 and Waiver # 2 as defective.

Petitioner opines, however, that even before the execution of the first Waiver, the assessments for deficiency EWT for the periods September 1, 2011 to April 30, 2012 have already prescribed.

On this score, we rule for petitioner.

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[76] SUBJECT: Automatic Designation of Officer-in-Charge of Personnel Next-in-Rank in Certain Positions.

[77] SUBJECT: Duties and Responsibilities of Personnel Holding Position In an Officer-In-Charged (OIC) Capacity.

Section 2.58 of Revenue Regulations (RR) No. 2-98,[78] as amended by RR No. 17-2003,[79] provides that the filing of withholding tax returns shall be made within ten (10) days after the end of each month, except for taxes withheld for the month of December, the return for which must be filed by January 15 of the following year. The relevant provision of RR No. 2-98, as amended, reads:

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

Applying the foregoing provision vis-à-vis the earlier quoted Section 203 of the NIRC, the following table shows the last day for filing of petitioner's the EWT returns, the date of actual filing of the same, and the end of the three-year prescriptive period for respondent to assess petitioner, to wit:

Return Period	**Date Filed (Original Return)**	**Deadline of Filing (10^{th} day from the close of the taxable month)**	**Prescriptive Period to Assess Deficiency Taxes**
September 2011	October 12, 2011[80]	October 10, 2011	October 12, 2014
October 2011	November 12, 2011[81]	November 10, 2011	November 12, 2014

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[78] 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 Tax, Withholding of Income Tax on Compensation, Withholding of Creditable Value-Added Tax and Other Percentage Taxes.

[79] SUBJECT: Amending Further Pertinent Provisions of Revenue Regulations No. 2-98, as Amended, Providing for Additional Transactions Subject to Creditable Withholding Tax; Re-Establishing the Policy that the Capital Gains Tax on the Sale, Exchange or Other Disposition of Real Property Classified as Capital Assets Shall be Collected as a Final Withholding Tax, Thereby Further Amending Revenue Regulations Nos. 8-98 and 13-99, as Amended by Revenue Regulations No. 14-2000; and for Other Purposes.

[80] Exhibits "P-14" and "P-14-1", Docket, Vol. II, pp. 992-994.

[81] Exhibits "P-14-A" and "P-14-A-1", Docket, Vol. II, pp. 995-997.

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November 2011	December 13, 2011[82]	December 10, 2011	December 13, 2014
December 2011	January 13, 2012[83]	January 10, 2012	January 13, 2015
January 2012	February 13, 2012[84]	February 10, 2012	February 13, 2015
February 2012	March 13, 2012[85]	March 10, 2012	March 13, 2015
March 2012	April 13, 2012[86]	April 10, 2012	April 13, 2015
April 2012	May 11, 2012[87]	May 10, 2012	May 11, 2015
May 2012	June 13, 2012[88]	June 10, 2012	June 13, 2015
June 2012	July 12, 2012[89]	July 10, 2012	July 12, 2015
July 2012	August 13, 2012[90]	August 10, 2012	August 13, 2015
August 2012	September 12, 2012[91]	September 10, 2012	September 12, 2015

Based on the above table, when Waiver # 1[92] was notarized and accepted on May 26, 2015 and May 29, 2015, respectively, the assessment period for EWT had already prescribed for the months of September 2011 to April 2012. In other words, the said Waiver did not validly extend the assessment period for the EWT for the said months. Thus, any tax assessment issued for the same months is already void.

The Court shall now determine the merits of the remaining tax assessments.

To recall, per the FLD[93] and Assessment Notices,[94] petitioner was assessed of deficiency income tax, DST, VAT, EWT, and IAET, for FY ending 31 August 2012, in the aggregate amount of ₱ 1,362,217,102.68, including interests and penalties, summarized as follows:

Tax Type	Basic tax	Interest	Penalties	Total
Income tax	₱ 349,303,597.42	₱ 277,026,462.64		₱ 626,330,060.06
DST	199,788.13	169,395.70		369,183.83
VAT	355,030,864.88	297,131,653.28		652,162,518.16
EWT	2,048,621.74	1,725,753.35		3,774,375.09
IAET	40,110,373.29	39,129,592.25		79,239,965.54
Compromise penalties			₱ 341,000.00	341,000.00
Total	**₱746,693,245.46**	**₱615,182,857.22**	**₱341,000.00**	**₱1,362,217,102.68**

[82] Exhibits "P-14-B" and "P-14-B-1", Docket, Vol. II, pp. 998-1000.
[83] Exhibits "P-14-C" and "P-14-C-1", Docket, Vol. II, pp. 1001-1003.
[84] Exhibits "P-14-D" and "P-14-D-1", Docket, Vol. II, pp. 1004-1006.
[85] Exhibits "P-14-E" and "P-14-E-1", Docket, Vol. II, pp. 1007-1009.
[86] Exhibits "P-14-F" and "P-14-F-1", Docket, Vol. II, pp. 1010-1012.
[87] Exhibits "P-14-G" and "P-14-G-1", Docket, Vol. II, pp. 1013-1015.
[88] Exhibits "P-14-H" and "P-14-H-1", Docket, Vol. II, pp. 1016-1018.
[89] Exhibits "P-14-I" and "P-14-I-1", Docket, Vol. II, pp. 1019-1021.
[90] Exhibits "P-14-J" and "P-14-J-1", Docket, Vol. II, pp. 1022-1024.
[91] Exhibits "P-14-K" and "P-14-K-1", Docket, Vol. II, pp. 1025-1027.
[92] Exhibit "R-5", BIR Records, Folder 1, p. 156.
[93] Exhibit "P-6", Docket, Vol. I, pp. 317 to 319.
[94] Exhibits "P-42-1" to "P-42-6", USB.

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Petitioner is liable for basic deficiency income tax in the reduced amount of ₱10,187,196.99.

Respondent assessed petitioner of deficiency income tax for FY ending 31 August 2012, in the amount of ₱ 626,330,060.06, computed as follows:[95]

Taxable Income per ITR		₱ 47,329,850.76
Add: Adjustments		
1 Gross Profit on undeclared income from unaccounted income payments	₱ 109,361.59	
2 Undeclared Sales per esales vs FS	943,645,597.78	
3 Unsupported contribution and benefit paid	12,417,344.44	
4 Disallowed senior citizen's discount	427,843.00	
5 Disallowed expenses for non-withholding of tax	164,248,642.36	
6 Disallowed miscellaneous expense-others- input tax allocated to exempt sales	2,172,936.16	1,123,021,725.33
Total adjusted taxable income		₱1,170,351,576.09
Tax Due		₱ 351,105,472.89
Less: Tax Credits/Payments per return		
Prior year's excess credit	₱ -	
Creditable tax withheld	12,397,079.76	
Tax Payments	1,801,875.47	
Total tax credits and payments per return	₱ 14,198,955.23	
Less: Adjustments		
7 Disallowed Creditable Withholding Tax	12,397,079.76	
Total Adjustments	₱ 12,397,079.76	1,801,875.47
Basic Deficiency Income Tax		₱ 349,303,597.42
Add: Penalty/Interest		
Interest until 12-31-17		277,026,462.64
Total Deficiency Income Tax		**₱626,330,060.06**

To summarize, the present deficiency income tax assessment arose from the following findings, to wit:

1. Gross Profit on undeclared income from unaccounted income payments	₱109,361.59
2. Undeclared Sales per E-sales vs. Financial Statements (FS)	₱943,645,597.78
3. Unsupported contribution and benefit paid	₱12,417,344.44
4. Disallowed senior citizen's discount	₱427,843.00
5. Disallowed expenses for non-withholding of tax	₱164,248,642.36
6. Disallowed miscellaneous expense-others- input tax allocated to exempt sales	₱2,172,936.16

[95] Exhibit "P-6", Docket, Vol. I, p. 317.

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7. Disallowed Creditable Withholding Tax (CWT)	₱12,397,079.76

1. Gross Profit on undeclared income from unaccounted income payments

Respondent found a discrepancy in petitioner's income payments and considered the same as undeclared revenue pursuant to the supposed doctrine that was held in the case of *CTA vs. Perez and CIR*[96] which states that unreflected sources of funds not accounted for in the taxpayer's returns led to the inference that part of the income has not been reported. Hence, the corresponding gross profit of ₱ 109,361.59 was assessed pursuant to Section 32 in relation to Section 27 of the NIRC, as amended, to wit:[97]

Excess of income payment subjected to EWT vs FS vs MAP - Schedule 1 & 2	₱776,392.73
Divided by Cost Ratio	88%
Sales on undeclared income payments	₱885,754.32
Multiplied by Gross profit ratio	12%
Gross Profit on Unaccounted income payments	₱109,361.59

The said item, however, must be cancelled for lack of merit.

Notably, the gross profit was imputed by respondent from the alleged undeclared income payments based on a mere presumption that since there were undeclared income payments/purchases, there were corresponding undeclared profit to it which petitioner failed to declare.

Verily, a finding of underdeclaration of income payments/purchases does not by itself result in the imposition of income tax.

Income in tax law is an amount of money coming to a person within a specified time, whether as payment for services, interest, or profit from investment. It means cash or its equivalent. It is gain derived and severed from capital, from labor or from both combined.[98] Income is profit or gain or the flow of wealth. The determining factor for the imposition of income tax is whether any gain or profit was derived from a transaction.[99]

[96] G.R. No. L-10507, May 30, 1958.
[97] BIR Records (Exhibit "R-12"), p. 168.
[98] *Commissioner of Internal Revenue vs. Court of Appeals, et al.*, G.R. No. 108576, January 20, 1999.
[99] *Commissioner of Internal Revenue vs. Court of Appeals, et al.*, supra.

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It is apparent that in a *purchase* or an income payment transaction, no amount of money comes to a taxpayer. Instead, money is spent out by the latter. In other words, the said taxpayer does not derive any gain or profit from the transaction.

Moreover, it must be emphasized that for income tax purposes, a taxpayer is free to deduct from its gross income a lesser amount, or not to claim any deduction at all. What is prohibited by the income tax law is to claim a deduction beyond the amount authorized therein.[100] Thus, even when a taxpayer has not claimed purchases and expenses, or declared a lesser amount thereof, in the Income Tax Return, such action is allowed, and shall *not* necessarily result in the imposition of income tax on the undeclared or underdeclared purchases.

2. Undeclared Sales per E-sales vs FS

The BIR's matching of petitioner's vatable sales per FS as against the vatable sales per E-sales report revealed undeclared sales in the amount of ₱ 943,645,597.78, as shown below, which was assessed by respondent pursuant to Section 32 of the Tax Code, as amended:[101]

Vatable sales per E-sales report	₱ 4,732,004,930.78
Vatable sales per FS	3,788,359,333.00
Undeclared Sales per E-sales report vs SLS vs ITR	₱ 943,645,597.78

Petitioner argues that respondent failed to appreciate that the total sales as indicated in the e-sales report is not limited to just vatable sales but also includes zero-rated sales and VAT-exempt sales, and that the latter erred in comparing the total sales of petitioner as indicated in its e-sales report amounting to ₱ 4,732,004,930.78, with only the vatable sales of goods amounting to ₱ 3,788,359,333.00, as indicated in its Audited FS to arrive at an assessment of undeclared sales.

We find for petitioner.

As can be gleaned from the E-sales report for FY ending 31 August 2012,[102] the amount of ₱ 4,732,004,930.78 is actually reflected as total gross sales but was apparently assumed by respondent as

[100] *Commissioner of Internal Revenue vs. Phoenix Assurance Co. Ltd., et seq.*, G.R. Nos. L-19727 and L-19903, May 20, 1965.
[101] BIR Records (Exhibit "R-12"), p. 168.
[102] BIR Records (Exhibit "R-12"), pp. 32-60.

pertaining only to vatable sales even without any indication of the same being vatable sales or without further verification of the details thereof.

It is improper for respondent to assess as undeclared sales the difference between total gross sales per E-sales report and vatable sales per FS since these amounts do not cover the same types of sales. The total gross sales per E-sales report may include other types of sales, such as, zero-rated and exempt sales while the vatable sales per FS solely pertain to vatable sales. If at all, respondent should have done a comparison between the total sales per E-sales report and total sales per FS to determine any undeclared sales.

Nonetheless, a comparison of the total sales per E-sales report and the Audited FS would not result in a finding of undeclared sales since petitioner's total sales of ₱ 4,841,998,142.00 reported per Audited FS[103] is apparently more than the total sales of ₱ 4,732,004,930.78 reflected per E-sales report.

Thus, the assessed undeclared sales of ₱ 943,645,597.78 must be cancelled for lack of factual basis.

<u>*3. Unsupported contribution and benefit paid*</u>

Based on the FLD,[104] respondent's verification disclosed unsupported contribution and benefit paid in the amount of ₱ 12,417,344.44, thus, disallowed pursuant to unspecified provisions of the NIRC and RR, as amended.

However, the corresponding income tax assessment for this item must be considered void for having failed to indicate the legal basis thereof.

A reading of the details of the assessment shows the failure of respondent to indicate in the PAN[105] and FLD the legal bases for the same, as the sections of the law and the regulations upon which the assessments were supposedly based were not mentioned therein, which is in violation of the due process requirement.

Section 228 of the NIRC explicitly requires that the taxpayer be informed in writing of the law and the facts on which the assessment is

[103] Exhibit "P-9-E", Docket, Vol. I, p. 382.
[104] BIR Records (Exhibit "R-12"), p. 168.
[105] Exhibit "R-9" (item no. 3), BIR Records (Exhibit "R-12"), p. 142.

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made; otherwise, the assessment shall be void.[106] The requirement that the taxpayer must be informed of the factual and legal bases of the assessment is mandatory. Such bases cannot be presumed. As a requirement of due process, this rule allows the taxpayer to make an effective protest.[107] As the requirement set by law to state in writing the factual and legal bases for the assessment is not a hollow exhortation, the law imposes a substantive, not merely a formal, requirement.[108] Furthermore, it must be emphasized that failure to comply with Section 228 does not only render the assessment void, but also finds no validation in any provision in the Tax Code.[109]

4. Disallowed senior citizen's discount

Respondent's verification disclosed expenses amounting to ₱ 427,843.00 not supported with documents to manifest such claimed expenses, hence, were disallowed pursuant to Section 34(A)(1)(b) of the NIRC, as amended.[110]

Petitioner avers that it extends senior citizen discounts for the purchase by senior citizens of certain goods in accordance with the limits provided under RR No. 7-2010; and that it duly records such sales to senior citizens, together with the discounts extended to them, thus, the same are allowable.

However, petitioner did not present any documentary evidence to substantiate its claimed senior citizen's discount. *Apropos*, bare allegations which are not supported by any evidence, documentary or otherwise, sufficient to support a claim, fall short to satisfy the degree of proof needed.[111]

Thus, the disallowance of senior citizen's discount in the amount of ₱ 427,843.00 must be upheld.

5. Disallowed expenses for non-withholding of tax

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[106] *Commissioner of Internal Revenue vs. Avon Products Manufacturing, Inc., etseq.*, G.R. Nos. 201398-99 and 201418-19, October 3, 2018.
[107] *Commissioner of Internal Revenue vs. Spouses Remigio P. Magaan and Leticia L. Magaan*, G.R. No. 232663, May 3, 2021.
[108] *Commissioner of Internal Revenue vs. Unioil Corporation*, G.R. No. 204405, August 4, 2021.
[109] *Id.*, citing *Commissioner of Internal Revenue vs. Reyes*, 516 Phil. 176, 189 (2006).
[110] BIR Record (Exhibit "R-12"), p. 168.
[111] *LNS International Manpower Services vs. Armando C. Padua, Jr.*, G.R. No. 179792, March 5, 2010.

The matching of petitioner's schedule of purchases/income payments claimed per FS/Income Tax Return (ITR) as against the summary list of sales submitted by its suppliers/Alphalist disclosed that expenses amounting to ₱ 164,248,642.36, as shown below, were not subjected to withholding tax, hence, disallowed by respondent pursuant to Section 34(K) of the NIRC, as amended:[112]

Income payment not subjected to expanded withholding tax – Schedule 1	₱164,248,642.36

Relative thereto, petitioner contends, among others, that the period to assess EWT for the period from September 1, 2011 to April 30, 2012 had already prescribed, and that respondent failed to attach the "Schedule 1" that it referred to in the *Details of Discrepancies*. As such, respondent failed to show petitioner the details on how the BIR arrived at a discrepancy of income payments allegedly not subjected to EWT in the amount of ₱ 164,248,642.36, denying it the opportunity to intelligently understand and properly refute the same, again in clear violation of Section 228 of the NIRC which that "the taxpayers shall be informed in writing of the law and facts on which the assessment is made, otherwise, the assessment shall be void".

Petitioner's argument is impressed with merit.

As already earlier resolved, the assessment period for EWT has already prescribed for the months of September 2011 to April 2012. Thus, petitioner may be assessed for deficiency EWT only for the period from May 1, 2012 to August 31, 2012, and only the corresponding income payments for the said period may be disallowed.

Yet, regardless of the period covered by the subject disallowance, the entire disallowed expense of ₱ 164,248,642.36, for income tax purposes, is void for respondent's failure to inform petitioner of the details on which the subject income tax assessment was based, in violation of Section 228 of the NIRC, as amended,[113] and as implemented by Section 3.1.4 of RR No. 12-99.[114]

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[112] BIR Records, (Exhibit "R-12"), p. 167.

[113] "SEC. 228. *Protesting of Assessment.* — When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: xxx

xxx xxx xxx

The taxpayers shall be informed in writing of the law **and the facts on which the assessment is made; otherwise, the assessment shall be void**." *(Emphasis supplied).*

[114] "3.1.4. *Formal Letter of Demand and Assessment Notice.* – The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. **The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts,** the law, rules and regulations, or jurisprudence **on which**

To stress anew, it is a mandatory requirement under Section 228 of the NIRC, as amended, and as implemented by RR No. 12-99, that a taxpayer be informed not only of the law but also of the facts on which the assessment is made; otherwise, the assessment shall be void. The taxpayer needs to know the nature of the examiner's findings in order to be able to properly contest the same and submit supporting documents. The law requires that the legal and factual bases of the assessment be stated in the FLD and assessment notice. Thus, such bases cannot be presumed. Otherwise, the express provisions of Article 228 of the NIRC and RR No. 12-99 would be rendered nugatory. There was no going around the mandate of the law that the legal and factual bases of the assessment be stated in writing in the FLD accompanying the assessment notice.[115]

In *Commissioner of Internal Revenue v. Spouses Magaan* (*Spouses Magaan* case),[116] the Supreme Court held that the schedules attached to the FLD with audit result/assessments failed to show the factual basis of the assessments as they merely contain tabular summaries of the allegedly undeclared taxable income and deficiency taxation of respondents, thus:

> Here, petitioner contends that the deficiency income and percentage tax assessments were supported by factual and legal bases. Petitioner explains that these were computed using the alleged P5,000,000.00 loan and the total amount of checks issued by Maniwang.106 Respondents were also sufficiently informed of the bases during the investigation and assessment proceedings, as provided in the letter correspondences, the summary of check payments, and a detailed computation of their deficiency tax liabilities from 1998 to 2002. The criminal case that petitioner filed also allegedly showed that respondents were aware of the circumstances of the assessments. All these supposedly show that respondent spouses were given all the opportunity to dispute the assessments, but they ignored it.
>
> We are not persuaded.
>
> The Formal Letter of Demand with Audit Result/Assessment Notices states that the complete details of the deficiency assessments can be found in Schedules 1 and 2 of the letter. **However, an examination of the records reveals that these schedules do not show the factual basis of the assessments. These schedules merely contain tabular summaries of the allegedly undeclared taxable income and deficiency taxation of respondents. They only mentioned "payments received per information" but have no other details stating**

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the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void. Xxx *(Emphasis supplied).*

[115] *Commissioner of Internal Revenue vs. Enron Subic Power Corporation*, G.R. No. 166387, January 19, 2009.

[116] G.R. No. 232663, May 3, 2021.

> **the information received, or any other explanation that would enable the taxpayer to make an effective protest.**
>
> xxx
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> **In failing to provide respondents with material information, petitioner denied them the opportunity to effectively protest. This renders the assessments void, for which respondents cannot be held liable.** (Emphasis supplied)

In this case, respondent, in the FLD,[117] merely referred to "Schedule 1" for the alleged income payment not subjected to withholding tax worth ₱ 164,248,642.36. However, the Court notes that the actual "Schedule 1" was **not attached** to the FLD. Thus, the petitioner was not duly informed of the details of the breakdown of the income payments not subject to withholding, and how the discrepancy in the amount of ₱ 164,248,642.36 was arrived at. Worse than in the *Spouses Magaan* case where the subject schedule was actually attached to the assessment notices although still considered by the Supreme Court as insufficient, respondent in the instant case **completely failed** to attach "Schedule 1" to the FLD.

In view thereof, petitioner cannot be expected to be able to determine and thereafter refute respondent's finding without disclosure of the details of the basis of the said amount. Accordingly, the disallowed expense due to non-withholding amounting to ₱ 164,248,642.36 must be quashed.

6. Disallowed miscellaneous expense-others-input tax allocated to exempt sales

Respondent's verification disclosed expenses amounting to ₱ 2,172,936.16, supposedly representing input tax allocated to exempt sales and thus, disallowed pursuant to Section 34(A)(1)(b) of the NIRC, as amended.[118]

Petitioner claims that an examination of the ITR and the Audited FS, particularly, Note 22 thereof, will not show any reference to a specific amount of ₱ 2,172,936.16 as input tax allocated to exempt sale; that in alleging a random amount without explaining as to how it arrived at it, the assessment does not meet the requirements of informing the taxpayer of the facts on which the assessment is based, which clearly violates Section 228 of the NIRC; and that at any rate,

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[117] BIR Records (Exhibit "R-12"), p. 167.
[118] *Ibid.*

petitioner is allowed to claim as part of its cost or expense the input tax attributed to VAT-exempt sales pursuant to Section 4.110-4 of RR No. 16-2005, as amended.

The corresponding income tax assessment for this item lacks merit.

Respondent's disallowance of the expenses worth ₱ 2,172,936.16, being input taxes allocated to exempt sales, on the basis of Section 34(A)(1) (b) of the NIRC, as amended, is misplaced. Such provision of the law provides for the substantiation requirements of the expenses to be allowed as deductions from gross income, but does not state anything about the outright non-deductibility of expenses pertaining to input taxes allocated to exempt sales.

Further, there is no showing how respondent arrived at the said amount of ₱ 2,172,936.16. It cannot be traced or referenced from the respondent's records,[119] which reflects input taxes allocable to exempt sales in amounts different from the disallowance, or from petitioner's Note 22 of the Audited FS,[120] which disclosed input tax on exempt sales in the amount of ₱ 11,157,971.00. Since petitioner was not sufficiently informed of the facts upon which the said assessment was made, the same shall also be void pursuant to Section 228 of the NIRC, as amended.

Moreover, even granting that the said amount pertains to petitioner's input tax allocated to exempt sales, the disallowance of the same has no legal basis. In fact, the input tax attributable to VAT-exempt sales is allowed to be claimed as part the cost or expense of petitioner in accordance with Section 4.110-4 of RR No. 16-2005, as amended, which reads:

> SEC. 4.110-4. *Apportionment of Input tax on Mixed Transactions.* – A VAT-registered person who is also engaged in transactions not subject to VAT shall be allowed to recognize input tax credit on transactions subject to VAT as follows:
>
> xxx xxx xxx
>
> The **input tax attributable to VAT-exempt sales** shall not be allowed as credit against the output tax but **should be treated as part of cost or expense**. *(Emphasis supplied)*

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[119] BIR Records (Exhibit "R-11"), p. 20.
[120] Exhibit "P-9-D", Docket, Vol. I, p. 374.

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Thus, the disallowed miscellaneous expense-others in the amount of ₱ 2,172,936.16 must perforce be deleted.

7. Disallowed CWT

Respondent's verification disclosed that Creditable Withholding Tax (CWT) claimed per ITR amounting to ₱ 12,397,079.76 was not supported with sufficient evidence in violation of Section 2.58.3(B) of RR No. 2-98, in relation to Section 57 of the NIRC, as amended, thus, disallowed.[121]

Petitioner claims that during the course of examination, it presented the CWT certificates in the total amount of ₱ 12,397,079.76 that its customer issued to it and which it used as tax credits against its income tax due, and that the itemized list of CWTs was also indicated in the Summary Alphalist of Withholding Taxes (SAWT) that petitioner filed with the BIR.

In support of its claim, petitioner submitted various *Certificates of Creditable Tax Withheld at Source* (BIR Forms No. 2307), which were examined by the ICPA.

The ICPA's findings show CWTs with valid support amounting to ₱ 6,232,397.06.[122] However, further verification reveals that out of the said amount, the CWTs totaling ₱ 3,894,161.39 must be disallowed for the reasons stated hereunder:

Exhibit No.	Taxes withheld	Remarks
CWTs pertaining to period outside the scope of the subject FY ending August 31, 2012		
"P-90-6"	₱23,522.24	CWT pertaining to the 3rd month (September 2012) of the quarter
"P-90-11"	12,326.44	CWT pertaining to the 3rd month (September 2012) of the quarter
"P-90-14"	3,064,346.53	CWT pertaining to the 3rd month (September 2012) of the quarter
"P-90-19"	101,609.82	CWT pertaining to the 1st and 2nd months (July & August 2011) of the quarter
"P-90-20"	37,724.07	CWT pertaining to the 3rd month (September 2012) of the quarter
"P-90-25"	85,710.66	CWT pertaining to the 1st and 2nd months (July & August 2011) of the quarter
"P-90-26"	42,407.19	CWT pertaining to the 3rd month (September 2012) of the quarter
"P-90-27"	44,627.41	CWT pertaining to the 3rd month (September 2012) of the quarter
"P-90-32"	31,840.94	CWT pertaining to the 3rd month (September 2012) of the quarter
"P-90-33"	247,071.30	CWT pertaining to the 3rd month (September 2012) of the quarter
"P-90-34"	910.44	CWT pertaining to the 1st and 2nd months (July & August 2011) of the quarter
"P-90-37"	24,755.19	CWT pertaining to the 3rd month (September 2012) of the quarter

[121] BIR Records (Exhibit "R-12"), p. 167.
[122] Annex J of ICPA Report (Exhibit "P-32"), USB.

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"P-98-1"	204.63	CWT pertaining to the 3rd month (September 2012) of the quarter
"P-98-2"	7,058.13	CWT pertaining to the 3rd month (September 2012) of the quarter
"P-98-4"	3,884.64	CWT pertaining to the 3rd month (September 2012) of the quarter
"P-98-5"	304.21	CWT pertaining to the 3rd month (September 2012) of the quarter
"P-98-6"	13,002.58	CWT pertaining to the 3rd month (September 2012) of the quarter
"P-108-3"	6,237.00	CWT pertaining to the 1st and 2nd months (July & August 2011) of the quarter
"P-114-1"	1,100.00	CWT pertaining to the 1st and 2nd months (July & August 2011) of the quarter
"P-115-1"	1,050.00	CWT pertaining to the 3rd month (September 2012) of the quarter
"P-122-4"	1,600.00	CWT pertaining to the 1st and 2nd months (July & August 2011) of the quarter
"P-132-5"	3,784.82	CWT pertaining to the 1st and 2nd months (July & August 2011) of the quarter
"P-141-4"	8,029.80	CWT pertaining to the 1st and 2nd months (July & August 2011) of the quarter
"P-144-4"	8,029.80	CWT pertaining to the 1st and 2nd months (July & August 2011) of the quarter
"P-149"	7,562.50	CWT pertaining to the 1st and 2nd months (July & August 2011) of the quarter
"P-150-1"	7,562.50	CWT pertaining to the 1st and 2nd months (July & August 2011) of the quarter
CWTs with supporting CWT certificate but no payee information and income payment were indicated therein		
"P-119"	400.00	
CWTs the referenced exhibits of which were denied admission by the Court for not being found in the records		
"P-91-1"	750.00	
"P-127-1" to "P-127-21"	56,040.64	
"P-152-1" to "P-152-8"	3,883.33	
"P-158-1" to "P-158-11"	46,824.58	
Total	**₱3,894,161.39**	

Consequently, only the CWTs in the amount of ₱ 2,338,235.67[123] were duly substantiated by petitioner.

Thus, the disallowed CWT shall be sustained but only to the extent of ₱ 10,058,844.09.[124]

In sum, petitioner is liable for basic deficiency income tax for FY ending 31 August 2012 in the amount of ₱ 10,187,196.99, computed as follows:

Taxable Income per ITR	₱ 47,329,850.76
Add: Adjustments	
Disallowed senior citizen's discount	427,843.00

[123] Valid CWT as found by ICPA amounting to ₱6,232,397.06 less proper disallowances per Court's further verification amounting to ₱3,894,161.39.
[124] Assessed CWT disallowance of ₱12,397,079.76 less duly substantiated CWTs of ₱2,338,235.67.

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Total adjusted taxable income		₱ 47,757,693.76
Tax Due (30%)		₱ 14,327,308.13
Less: Tax Credits/Payments per return		
Creditable tax withheld	₱12,397,079.76	
Tax Payments	1,801,875.47	
Total tax credits and payments per return	**₱14,198,955.23**	
Less: Adjustments		
Disallowed Creditable Withholding Tax	10,058,844.09	
Total Adjustments	**₱10,058,844.09**	4,140,111.14
Basic Deficiency Income Tax		**₱10,187,196.99**

Petitioner is liable for basic deficiency DST in the reduced amount of ₱ 148,202.69.

Respondent assessed petitioner of deficiency DST for FY ending 31 August 2012, in the amount of ₱ 369,183.83, computed as follows:[125]

Basic Deficiency Documentary Stamp Tax	₱ 199,788.13
Add: Penalty/Interest	
Interest until 12-31-17	169,395.70
Total Deficiency Documentary Stamp Tax	**₱369,183.83**

The details of the basic deficiency DST of ₱ 199,788.13 is as follows:[126]

Nature of Transaction	NIRC, as amended	Tax Base	Tax Rate	Tax Due
a) All Debt Instruments	Sec. 179	₱ 5,441,246.00	₱1.00/200	₱ 27,207.00
Other receivables - non-trade		23,987,425.00	1.00/200	119,937.13
b) Rent expenses/Lease	Sec. 194			
Direct charges		-	1st 2,000.00 = 3.00	
Operating expenses		₱ 772,864.00	in excess	
Total		₱ 772,864.00	1.00/1,000.00	774.00
c) Rent Income	Sec. 194	₱ 13,539,944.00	1st 2,000.00 = 3.00; in excess 1.00/1,000.00	13,541.00
d) Increase in due to shareholders	Sec. 179			
Due to stockholders, ending		₱389,995,522.00		
Due to stockholders, beginning		365,929,813.00		
Difference		₱ 24,065,709.00	₱1.00/200 in excess 10.00/5,000.00	120,329.00
Total DST Due				₱281,788.13

[125] Exhibit "P-6", Docket – Vol. I, p. 317.
[126] BIR Records (Exhibit "R-12"), p. 167.

Less: DST Paid		82,000.00
Basic Deficiency DST	₱ 67,807,188.00	₱199,788.13

Petitioner asserts that the debt instruments with an alleged tax base of ₱ 5,441,246.00 is erroneous since the said amount used by respondent as basis in computing deficiency DST represents the interest cost paid and not the loan amount incurred during the FY; that the other receivables - non-trade with alleged deficiency tax base of ₱ 23,987,425.00 appears to be lifted from Note 5 of the Audited FS; that respondent merely imputed the entire amount of "Other Receivables" as pertaining exclusively to non-trade receivables, but failed to consider the portions of said receivables consisting of advances to employees, not subject to DST, being in the nature of salary advances, and also the beginning balance of "Other Receivables" carried over from previous FY, which should have been deducted from the total "Other Receivables", since it is outside the scope of examination for FY ending 31 August 2012; that the increase in due to shareholder with an alleged tax base of ₱ 24,065,709.00 is not covered by specific debt instruments with its shareholder for which respondent could have based any deficiency DST assessment; and that the DST payment of ₱ 82,000.00 subtracted by respondent from the DST due is erroneous as it had paid DST in the total amount of ₱ 86,485.00 as stated in the Supplementary Schedules found on p. 42 of the Audited FS for FY ending 31 August 2012.

The Court partially upholds the assessment.

The assessed DST due on Rent expense and Rent Income, in the respective amounts of ₱ 774.00 and ₱ 13,541.00, shall not be disturbed for being undisputed.

The DST due on All Debt Instruments in the amount of ₱ 27,207.00, however, cannot prosper for lack of factual basis. As correctly pointed out by petitioner, the tax base of ₱ 5,441,246.00 used by respondent in assessing DST on alleged Debt Instruments pertained to the finance cost or interest expense on short-term borrowings incurred in 2012, as gleaned from Notes 13 and 23 of petitioner's Audited FS,[127] and not the loan amount secured for which the loan agreement or debt instrument is issued.

As for the assessed tax base of Other receivables – non-trade of ₱ 23,987,425.00, petitioner was not able to present evidence to support its assertion regarding the advances to employees in the nature of salary advances allegedly included therein. Further, petitioner is

[127] Exhibits "P-9" and "P-9-C", Docket, Vol. I, pp. 369 and 374.

submitting to deduct from the assessed amount of ₱ 23,987,425.00,[128] which represents the ending balance of Other Receivables, the beginning balance of the same account amounting to ₱ 4,875,687.00,[129] which as it implies, is included in the former amount. Consequently, the remaining amount of ₱ 19,111,738.00[130] can be considered as consisting of transactions during the subject FY which is subject to DST, absent any proof or justification from petitioner to the contrary.

With regard to the DST due on increase in due to shareholder in the amount of ₱ 120,329.00, petitioner failed to adduce evidence to successfully refute the same.

Anent the alleged DST payment in the higher amount of ₱ 86,485.00, no DST return for the related transactions was submitted by petitioner to determine the veracity of its claim. Hence, the DST paid of ₱ 82,000.00 used by respondent stands.

In sum, petitioner is liable for basic deficiency DST for FY ending 31 August 2012 in the amount of ₱ 148,202.69, computed as follows:

Other receivables - non-trade (₱19,111,738.00 x 1.00/200)	₱ 95,558.69
Rent expenses/Lease	774.00
Rent Income	13,541.00
Increase in due to shareholders	120,329.00
Total DST Due	₱ 230,202.69
Less: DST Paid	82,000.00
Basic Deficiency DST	**₱148,202.69**

The VAT assessment must be cancelled.

Respondent assessed petitioner of deficiency VAT for FY ending 31 August 2012, in the amount of ₱ 652,162,518.16, computed as follows:[131]

Taxable sales per VAT returns		₱3,892,849,391.24
Add: Adjustments		
1 Taxable sales and other income subject to VAT	₱ 104,497,882.43	
2 Sales on undeclared income from unaccounted income payments	885,754.32	

[128] Exhibit "P-9-A", Docket, Vol. I, p. 363.
[129] *Ibid.*
[130] Ending balance of Other Receivables of ₱23,987,425.00 less beginning balance of Other Receivables of ₱4,875,687.00.
[131] Exhibit "P-6", Docket, Vol. I, p. 317.

3 Undeclared Sales per vatable sales per esales vs vatable sales per FS		943,645,597.78	
4 Sales not qualified for VAT exemption		1,053,190,684.07	2,102,219,918.60
Taxable Sales per audit			₱5,995,069,309.84
Output Tax			₱ 719,408,317.18
Less: Tax credits and payments per VAT returns			
Creditable input tax claimed per return		₱ 464,072,206.01	
Add(Less) Adjustments:			
Input tax allocated to exempt sales	₱88,060,035.06		
Deferred Input tax for the succeeding period	19,294,968.19	107,355,003.25	356,717,202.76
VAT DUE			₱ 362,691,114.42
Less: VAT payments			7,660,249.54
Basic Deficiency VAT			₱ 355,030,864.88
Add: Penalty/Interest			
Interest until 12-31-17			297,131,653.28
Total Deficiency VAT			**₱652,162,518.16**

It is noteworthy to mention that a perusal of the FLDs[132] offered and admitted by the Court shows no details of the items of assessment for VAT. Not even the FLD found in the BIR Records,[133] contains the details of discrepancies for the VAT assessment. Hence, there is no way for petitioner or the Court to know and verify the factual and legal bases upon which the VAT assessment was made.

Such being the case, the entire deficiency VAT assessment for FY ending 31 August 2012 is void as the FLD failed to comply with the due process requirement in the issuance of deficiency tax assessment under Section 228 of the NIRC.

To underscore, in order to implement Section 228 of the NIRC, the BIR issued RR 12-99, as amended by RR No. 18-13. Section 3.1.3 of RR No. 18-13 specifically states that, as part of the due process requirements for the issuance of tax assessments, the FLD/FAN must state the facts, the law, rules and regulations, or jurisprudence on which the assessments are based; otherwise, the FLD/FAN shall be void, thus:

> SEC. 3. *Due Process Requirement in the Issuance of a Deficiency Tax Assessment.* –
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> xxx

[132] Exhibits "P-6" and "R-11", Docket – Vol. I, pp. 317-319; Exhibit "P-41-1" to "P-41-3", USB.
[133] Exhibit "R-12" (Exhibit "R-12"), pp. 165-172.

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Petitioner is liable to the assessed IAET.

Respondent assessed petitioner of deficiency IAET for FY ending 31 August 2012, in the amount of ₱ 79,239,965.54, computed as follows:[137]

Basic Deficiency IAET	₱ 40,110,373.29
Add: Penalty/Interest	
Interest until 12-31-17	39,129,592.25
Total Deficiency IAET	**₱79,239,965.54**

Respondent's verification disclosed that the earnings and profits were improperly accumulated instead of being distributed through dividends declaration, hence, assessed of IAET pursuant to Section 29 of the NIRC, as implemented by RR No. 2-2001 and RMC 35-2011, as shown below:[138]

Taxable income for the year		₱ 47,329,850.76
Add:		
a. Income subjected to Final Tax	₱ 429,338.55	
b. NOLCO	-	
c. Income exempt from Tax	-	
d. Income excluded from Gross Income	12,430,568.83	12,859,907.38
Total		₱ 60,189,758.14
Less: Income tax paid/payable for the taxable year	₱14,198,955.23	
Dividends actually or constructively paid/issued	11,000,000.00	25,198,955.23
Total		₱ 34,990,802.91
Add: Retained Earnings from prior years		471,112,930.00
Accumulated Earnings as of taxable period under Audit		₱506,103,732.91
Less: 100% of paid-up Capital as of taxable year under Audit		105,000,000.00
Improperly Accumulated Taxable Income		₱401,103,732.91
Multiplied by IAET Rate		10%
Improperly Accumulated Earnings Tax		₱ 40,110,373.29

Petitioner posits that the adding back to the taxable income of the amount of ₱ 12,430,568.83 alleged as income excluded from gross income, is erroneous since petitioner does not have any other income that it excluded from its gross income in arriving at its taxable income for the year; that respondent also failed to offer any explanation and basis as to the alleged income excluded from gross income, which violates petitioner's right to be informed of the law and facts on which the assessment was made, thereby depriving petitioner the right to intelligibly refute the said assessment; that from the ₱ 471,112,930.00 retained earnings from prior years which was added back to taxable

[137] Exhibit "P-6", Docket, Vol. I, p. 318.
[138] BIR Records (Exhibit "R-12"), p. 166.

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income, the amount of ₱ 390,000,000.00 should have been deducted as it represents the appropriated retained earnings of petitioner for the reasonable needs of the business.

The Court finds for the respondent.

Contrary to petitioner's position, it had income excluded from its gross income, as can be inferred from Schedule 3 of its Annual ITR for FY ended August 2012, below line 65, and the line indicating "Less: Non-taxable Income and Income Subjected to Final Tax".[139] Out of the items and amounts listed therein, the "Contribution and Benefit Paid" and "Unrealized Forex Gain" in the respective amounts of ₱ 12,417,344.44 and ₱ 13,224.39 make the total amount of ₱ 12,430,568.83, which was considered by respondent in computing the assessment.

Moreover, it must be emphasized that petitioner failed to provide sufficient evidence to prove that the ₱ 390,000,000.00 appropriated retained earnings in 2010 constitute accumulation of earnings for the reasonable needs of the business, pursuant to Section 3 of RR No. 2-2001[140] to warrant the exemption of the same from IAET.

To support its position, petitioner presented the Minutes of the Meeting of the Board of Directors of petitioner held on August 28, 2010,[141] its Note 14 of 2010 Audited FS,[142] and various documents,[143] allegedly relating to appropriation of retained earnings. However, the Court is not convinced, considering that the said Minutes and Note 14 of 2010 Audited FS, albeit stating the appropriation of the ₱ 390,000,000.00 retained earnings for future expansion and renovation of existing business facilities, do not provide the details of the alleged planned expansion or renovation, and that the said documents cannot be determined as actually pertaining to the alleged expansion or renovation absent the detailed plan therefor.

Furthermore, it must be noted that Section 7 of RR No. 2-2001, explicitly provides that "a speculative and indefinite purpose will not suffice. Definiteness of plans coupled with actions taken towards its consummation are essential."

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[139] BIR Records (Exhibit "R-12"), p. 121.
[140] SUBJECT: Implementing the Provision on Improperly Accumulated Earnings Tax Under Section 29 of the Tax Code of 1997.
[141] Exhibit "P-15", Docket, Vol. I, p. 456.
[142] Exhibit "P-16-A", Docket, Vol. I, p. 492.
[143] Exhibits "P-171-1" to "P-752-4" (except for the denied exhibits), USB.

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Thus, the assessed IAET must be sustained. Accordingly, petitioner is liable for basic deficiency IAET for FY ending 31 August 2012 in the amount of ₱ 40,110,373.29.

The imposed compromise penalties must be cancelled.

The imposition of the ₱ 341,000.00 compromise penalties for FY ending 31 August 2012 must be cancelled absent a showing that petitioner consented to the same.

It must be stressed that a compromise penalty is imposed to avoid prosecution for violation of the provisions of the Tax Code.[144] Pursuant to RMO No. 1-90, as amended by RMO No. 19-2007, compromise penalties are only amounts suggested in settlement of criminal liability, and may not be imposed or exacted on the taxpayer in the event that a taxpayer refuses to pay the same. It is well-settled that this Court has no jurisdiction to compel a taxpayer to pay the compromise penalty because by its very nature, it implies a mutual agreement between the parties in respect to the thing or subject matter that is so compromised, and the choice of paying or not paying it distinctly belongs to the taxpayer. The imposition of the same without the conformity of the taxpayer is illegal and unauthorized.[145]

WHEREFORE, in light of the foregoing considerations the present *Petition for Review* is **PARTIALLY GRANTED**.

The assessments issued by respondent against petitioner covering deficiency VAT, EWT and compromise penalties for FY ending 31 August 2012 are **CANCELLED** and **SET ASIDE.** However, the assessments for the same FY issued against petitioner covering deficiency income tax and DST are **AFFIRMED WITH MODIFICATIONS**.

The deficiency IAET, likewise for the same FY, is **AFFIRMED**.

Accordingly, petitioner is **ORDERED TO PAY** respondent the aggregate amount of **₱ 107,959,046.35**, inclusive of 25% surcharge and 20% deficiency interest imposed under Sections 248(A)(3) and 249(B) of the NIRC, as amended, computed as follows:

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[144] *The Philippines International Fair, Inc. vs. The Collector of Internal Revenue et. al.*, G.R. Nos. L-12928 and L-12932, March 31, 1962.
[145] *Commissioner of Internal Revenue vs. Lianga Bay Logging Co., Inc.* et al., G.R. No. L-35266, January 21, 1991.

Particulars	Income tax	DST	IAET	Total
Basic Tax Due	₱10,187,196.99	₱148,202.69	₱40,110,373.29	₱50,445,772.97
Add: 25% Surcharge	2,546,799.25	37,050.67	10,027,593.32	12,611,443.24
20% Deficiency Interest:				
IT: From December 16, 2012 to December 31, 2017 *[₱10,187,196.99 x 20% x 1,842/365 days]*	10,282,091.43			10,282,091.43
DST: From September 6, 2012 to December 31, 2017 *[₱148,202.69 x 20% x 1,943/365 days]*		157,785.11		157,785.11
IAET: From September 16, 2013 to December 31, 2017 *[₱40,110,373.29 x 20% x 1,568/365 days]*			34,461,953.60	34,461,953.60
Total Amount Due as of December 31, 2017[146]	**₱23,016,087.67**	**₱343,038.47**	**₱84,599,920.21**	**₱107,959,046.35**

In addition, petitioner is **ORDERED TO PAY** respondent delinquency interest at the rate of 12% per annum on the total unpaid deficiency taxes due as of December 31, 2017, in the amount of ₱ 107,959,046.35 or equivalent to ₱ 35,493.39[147] per day, computed from January 1, 2018 until full payment thereof pursuant to Section 249(C) of the NIRC, as amended by Republic Act (RA) No. 10963, also known as the TRAIN law and as implemented by RR No. 21-2018.

Lastly, pursuant to Section 13 of RA No. 9282, considering that this decision is favorable to the national government, the BIR, through respondent, is hereby authorized to seize and distraint any goods, chattels, or effects, and the personal property, including stocks and other securities, debts, credits, bank accounts, and interests in and rights to personal property and/or levy the real property of petitioner in sufficient quantity to satisfy the tax or charge with any increment thereto incident to delinquency.

SO ORDERED.

HENRY S. ANGELES
Associate Justice

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[146] Per the FLD (Exhibit "P-6", Docket – Vol. I, p. 319), petitioner is requested to pay within the time shown in the assessment notice. December 31, 2017 is the due date appearing in the Assessment Notices (Exhibits "P-42-1" to "P-42-6").
[147] ₱107,959,046.35 x 12% / 365 days.

WE CONCUR:

CATHERINE T. MANAHAN
Associate Justice

Official time
MARIAN IVY F. REYES-FAJARDO
Associate Justice

ATTESTATION

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

CATHERINE T. MANAHAN
Associate Justice
Third Division Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's *Attestation*, it is hereby certified that the conclusions in the above *Decision* were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ROMAN G. DEL ROSARIO
Presiding Justice