REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
Quezon City

EN BANC

HOTEL SPECIALIST (TAGAYTAY), INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 2084
(CTA Case No. 9349)

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

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

HOTEL SPECIALIST (TAGAYTAY), INC.,
Respondent.

CTA EB NO. 2092
(CTA Case No. 9349)

Present:

DEL ROSARIO, ***P.J.,***
CASTAÑEDA, JR.,
UY,
RINGPIS-LIBAN,
MANAHAN,
BACORRO-VILLENA, *and*
MODESTO-SAN PEDRO, ***JJ.***

Promulgated:
NOV 25 2020 4:10 p.m.

x - x

DECISION

BACORRO-VILLENA, J.:

Before the Court *En Banc* are separate appeals filed by Hotel Specialist (Tagaytay), Inc. (**HSTI**) and Commissioner of Internal Revenue (**CIR**) from the Decision dated 18 January 2019[1] (**assailed Decision**) and Resolution dated 30 May 2019[2] (**assailed Resolution**), respectively, of this Court's Special Second Division in CTA Case No. 9349, entitled *Hotel Specialist (Tagaytay), Inc. v. Commissioner of Internal Revenue.*

HSTI filed its Petition for Review on 19 June 2019[3] while the CIR filed his own Petition for Review on 01 July 2019[4], both pursuant to Section 3(b), Rule 8[5], in relation to Section 2(a)[6], Rule 4of the Revised Rules of the Court of Tax Appeals[7] (**RRCTA**).

HSTI is a corporation duly organized and existing under the laws of the Philippines and registered with the Securities and Exchange Commission (**SEC**) to engage in and carry on the business of hotel and resort operations, including maintaining any and all services and

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1 Division Docket, Volume II, pp. 543-570; Penned by Honorable Associate Justice Catherine T. Manahan with Honorable Associate Justice Juanito C. Castañeda, Jr., concurring.

2 Id., pp. 664-673.

3 *Rollo* (CTA EB No. 2084), pp. 1-22.

4 *Rollo* (CTA EB No. 2092), pp. 1-15.

5 **SEC. 3.** *Who may appeal; period to file petition.*

...

(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review.

6 **SEC. 2.** *Cases within the jurisdiction of the Court en banc.* – The Court en banc shall exercise exclusive appellate jurisdiction to review by appeal the following:

(a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Divisions in the exercise of its exclusive appellate jurisdiction over:

...

(1) Cases arising from administrative agencies – Bureau of Internal Revenue, Bureau of Customs, Department of Finance, Department of Trade and Industry, Department of Agriculture[.]

7 A.M. No. 05-11-07-CTA dated 22 November 2005.

facilities incidental thereto.[8] On the other hand, the CIR is the head of the Bureau of Internal Revenue (**BIR**), the government agency tasked to, among others, collect all national internal revenue taxes. As the CIR, he has the power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto or other matters arising under the National Internal Revenue Code (**NIRC**) of 1997, as amended, or other laws or portions thereof administered by the BIR.[9]

FACTS OF THE CASE

On 14 May 2010, Letter of Authority (**LOA**) No. 125-2010-00000052[10] was issued authorizing the examination of books of accounts and other accounting records of HSTI for all internal revenue taxes covering the period from 01 January to 31 December 2009.[11]

Thereafter, on 11 July 2014, the CIR issued a Preliminary Assessment Notice[12] (**PAN**) for alleged deficiency taxes, penalties and interests for taxable year (**TY**) 2009.[13]

On 30 July 2014, HSTI filed a Protest Letter[14] to the PAN questioning its validity on the ground that it lacks factual and legal bases.[15]

Subsequently, the CIR issued a Formal Letter of Demand (**FLD**)/Assessment Notices[16] (**ANs**) on 25 February 2015 which HSTI received on 26 February 2015 for alleged deficiency taxes, penalties and interests for TY 2009, as follows:[17]

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8 See paragraphs 6 and 7, Joint Stipulation of Facts and Issues (JSFI), Division Docket, Volume I, p. 368; Exhibits "P-1", "P-2" and "P-2-A", id., Volume II, pp. 418-420.
9 See paragraph 1, JSFI, id., Volume I, p. 367.
10 Exhibit "P-4", id., Volume II, p. 429.
11 See paragraph 3, JSFI, id., Volume I, p. 368.
12 Exhibit "P-5", id., Volume II, pp. 432-438.
13 See paragraph 8, JSFI, id., Volume I, p. 368.
14 Exhibit "P-6", id., Volume II, pp. 439-447.
15 See paragraph 9, JSFI, id., Volume I, p. 368.
16 Exhibit "P-7", id., Volume II, pp. 448-458.
17 See paragraph 4, JSFI, id., Volume I, p. 368.

	Amount
Income Tax (**IT**)	₱19,577,251.79
Value-Added Tax (**VAT**)	₱8,630,777.53
Withholding Tax on Compensation (**WTC**)	₱916,614.58
Expanded Withholding Tax (**EWT**)	₱2,523,457.86

Thus, on 30 March 2015, HSTI filed a Protest[18] against the FLD questioning again the validity of the assessments on the similar ground that the same lack factual and legal bases.[19]

On 14 April 2016, HSTI received the Final Decision on Disputed Assessment[20] (**FDDA**) from the CIR, denying the former's Protest and found it liable for alleged deficiency taxes, penalties and interests for TY 2009 as follows:[21]

	Amount
IT	₱19,970,328.16
VAT	₱6,520,974.97
WTC	₱711,587.35
EWT	₱3,642,803.50

PROCEEDINGS BEFORE THE SECOND DIVISION

On 16 May 2016, HSTI filed its prior Petition for Review[22] and the same was raffled to the Second Division. The CIR filed his Answer[23] on 15 August 2016.

After the parties submitted their Joint Stipulation of Facts and Issues[24] (**JSFI**), the Second Division issued the Pre-Trial Order dated 27 December 2016.[25] Trial thereafter ensued where HSTI presented its two (2) witnesses, namely: (1) Cecilia R. Patricio (**Patricio**); and, (2) Susana R. Magpantay (**Magpantay**).[26]

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18 Exhibit "P-8", id., Volume II, pp. 459-468.
19 See paragraph 10, JSFI, id., Volume I, p. 369.
20 Exhibit "P-9", id., pp. 18-24.
21 See paragraph 5, JSFI, id., p. 368.
22 Id., pp. 10-17.
23 Id., pp. 97-105.
24 Id., pp. 367-380.
25 Id., pp. 381-387.
26 See TSN of 29 March 2017.

Patricio[27] testified essentially on: (1) the fact that she is the Senior Vice-President for Corporate Tax Division of SM Investments Corporation (**SMIC**) and in charge of providing policy direction with regard to the appropriate tax treatment and implication of SMIC's and its affiliates' (that includes HSTI) business activities and other related transaction; (2) HSTI's justifications and arguments against the issuance of PAN and FAN; and, (3) HSTI's payment of the following amounts on 11 May 2016 after its receipt of the subject FDDA:

a. IT – on the items pertaining to "revenue not subjected to tax" (Schedule 1) and "Disallowed per Allocation of Expenses" (Schedule 3, Annex A.2) in the amounts of ₱3,028,002.69 and ₱2,111,292.93, respectively, excluding the disallowed expenses due to non-withholding in the amount of ₱24,915,762.99;

b. WTC - based on the FDDA, subject to adjustment of the interest due thereon;

c. EWT - based on the FDDA, subject to the adjustment of the interest due thereon; and,

d. VAT - based on the company share on the service charges excluding that earmarked and actually distributed to the employees during the year in question.[28]

The CIR did not conduct any cross examination.[29]

Magpantay[30] also took the witness stand where she declared that: (1) she is the Chief Accountant of HSTI; (2) HSTI timely filed all its internal revenue tax returns and paid all taxes due thereon for TY 2009; (3) HSTI earmarked and actually distributed to the employees as their share in the service charges the total amount of ₱19,449,112.96 which may be computed by subtracting the year to date (**YTD**) basic pay from the YTD gross salary; and, (4) HSTI decided to pay on 11 May 2016 the total amount of ₱8,388,442.69 as deficiency taxes, inclusive of increments, broken down, as follows:

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27 Judicial Affidavit, Exhibit "P-33", Division Docket, Volume I, pp. 122-142.
28 Answer to Question No. 38, Judicial Affidavit of Cecilia R. Patricio, Exhibit "P-33", id., Volume I, pp. 138-139.
29 See TSN of 29 March 2017, p. 6.
30 Judicial Affidavit, Exhibit "P-32", Division Docket, Volume I, pp. 197-210.

	Basic Tax	Penalties and Interests	Total
IT	₱ 1,541,788.69	₱ 1,915,490.89	₱ 3,457,279.58
VAT	238,032.85	319,986.61	558,019.46
WTC	306,197.70	408,409.69	714,607.39
EWT	1,595,127.70	2,062,408.56[31]	3,658,536.26
Total			**₱ 8,388,442.69**

During her cross examination, Magpantay was asked for proof on the claim that the employees received 85% of the service charges and the same was part of their income. In response, Magpantay referred to the alphalist and insisted that the employees' total compensation included the basic pay and the service charge.

On re-direct examination, Magpantay testified further that the BIR did not indicate in its assessment that the service charges were not actually distributed to the employees. On re-cross examination, Magpantay confirmed that HSTI was aware of the breakdown of the said assessment item.[32]

Thereafter, HSTI filed its Formal Offer of Evidence[33] (**FOE**) on 20 April 2017. Without the CIR's comment[34], the Second Division admitted all of HSTI's exhibits in its Resolution dated 06 June 2017.[35]

The CIR then presented his lone witness, Revenue Officer (**RO**) Manuel Tasarra (**Tasarra**), who testified that: (1) he is one of the ROs authorized to conduct audit and examination of all internal revenue taxes for TY 2009 of HSTI, by virtue of LOA No. 125-2010-00000052; (2) after conducting the audit, they prepared a Memorandum recommending the issuance of the PAN; (3) the PAN was subsequently served upon HSTI on 14 July 2014; (4) after HSTI replied to the PAN, they evaluated the said reply but still found the former liable for deficiency taxes and thus recommended the FLD's issuance; (5) the FLD was subsequently served upon HSTI on 26 February 2015; (6) after HSTI submitted documents in reply to the FLD, they recommended the issuance of the FDDA; (7) the basis for the issuance of FDDA is

[31] The correct amount is ₱2,063,408.56; See Exhibit "P-14", id., p. 67.
[32] See TSN of 29 March 2017, pp. 9-12.
[33] Division Docket, Volume II, pp. 405-417.
[34] *Per* Records Verification dated 02 May 2017, id., p. 481.
[35] Exhibits "P-1" to "P-33", inclusive of the sub-markings, id., pp. 484-485.

that it was ascertained that HSTI's manner of reporting revenue/sales for VAT purposes is based on billing and accrual and not on receipts; and, (8) HSTI executed seven Waivers of Defense of Prescription.[36] HSTI did not conduct any cross examination upon Tasarra.[37]

On 29 August 2017, the CIR filed his FOE[38] with HSTI's Comment.[39] The Second Division, in its Resolution dated 01 December 2017, admitted all of the CIR's exhibits.[40] On 05 January 2018, HSTI filed its Memorandum[41], while the CIR failed to file the same.[42]

On 18 January 2019, the Special Second Division issued the assailed Decision[43], the dispositive portion of which reads:

> ...
>
> **WHEREFORE**, premises considered, the Petition for Review is **PARTIALLY GRANTED**. The assessment issued by respondent against petitioner for taxable year 2009 is **AFFIRMED with MODIFICATION**. Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of ₱17,350,792.92, ₱9,780,127.69, ₱542,523.63, and ₱104,141.81, representing deficiency income tax, value-added tax, expanded withholding tax, and withholding tax on compensation, respectively, inclusive of the 25% surcharge, 20% deficiency interest and 20% delinquency interest imposed thereon under Sections 248 (A)(3), and 249(B) and (C) of the 1997 NIRC, as amended, respectively, computed until December 31, 2017, detailed below:
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> ...
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> In addition, petitioner is **ORDERED TO PAY** delinquency interest at the rate of 12% computed from January 1, 2018 until full payment thereof, pursuant to Section 249(C) of the 1997 NIRC, as amended by Republic Act No. 10963, also known as the Tax Reform for Acceleration and Inclusion (TRAIN) and as implemented by RR No. 21-2018, on the following amounts:

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36 See TSN of 12 July 2017; See also Judicial Affidavit of Revenue Officer Manuel Tasarra, Exhibit "R-19", Division Docket, Volume II, pp. 493-499.
37 See TSN of 12 July 2017, p. 5.
38 Division Docket, Volume II, pp. 507-513.
39 Filed on 26 September 2017, id., pp. 515-520.
40 Id., pp. 522-523; See Exhibits "R-1" to "R-18", without any document marked and offered as Exhibit "R-11".
41 Division Docket, Volume II, pp. 524-537.
42 *Per* Records Verification dated 23 January 2018, id., p. 538.
43 Supra at note 1.

Income Tax	₱ 11,844,475.66
VAT	₱ 6,677,818.02
EWT	₱ 391,789.59
WTC	₱ 75,207.19

SO ORDERED.

...

HSTI thus filed its MR on 04 February 2019 while the CIR posted his own Motion for Partial Reconsideration (**MPR**) on 06 February 2019.

In its MR[44], HSTI alleged that the Special Second Division erred: (1) in holding the former still liable for 25% surcharge and 20% delinquency interests with respect to deficiency WTC and EWT; (2) when it did not allow the deduction of disallowed expenses due to non-withholding even if HSTI already paid the assessed deficiency WTC and EWT on 10 May 2016[45] after it received the FDDA; (3) in holding HSTI still liable for the 25% surcharge and 20% delinquency interests as regards the deficiency IT on the items "revenue not subjected to tax" and "disallowed per allocation of expense"; (4) when it ruled that HSTI is still liable for VAT on its service charges; and, (5) when it imposed 20% deficiency interest on VAT, EWT and WTC as the same may only be imposed on "deficiency in the tax due as the term is defined in this Code" such as on deficiency IT, donor's tax and estate tax. The CIR filed his Comment[46] thereto on 11 March 2019.

In his MPR, the CIR also argues that the Special Second Division erred: (1) in ruling on matters that were never substantiated in the administrative level and were not raised in the prior Petition for Review; (2) in cancelling the assessment arising from disallowed excess tax credits carried over to succeeding periods and disallowed Minimum Corporate Income Tax (**MCIT**) credits on the ground that he failed to provide factual and legal bases for the disallowance; and,

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44 Division Docket, Volume II, pp. 571-586.

45 Patricio and Magpantay both testified that the payment was made on 11 May 2016. "Authorizer Payment Acknowledgement Receipt" commonly states that the "Payment Instruction Date" is 10 May 2016 while the "Transaction Date" is 11 May 2016 (See Exhibit "P-11", id., Volume I, p. 275; Exhibit "P-16", id., p. 280; Exhibit "P-21", id., p. 285; and, Exhibit "P-26", id., p. 290).

46 Division Docket, Volume II, pp. 650-656.

(3) in cancelling the compromise penalty.[47] HSTI filed its Comment/Opposition to the said MPR on 08 March 2019.[48]

On 30 May 2019, the Special Second Division issued the assailed Resolution denying both parties' MR and MPR.[49] Both parties thus appealed to the Court *En Banc*.

PROCEEDINGS BEFORE THE COURT *EN BANC*

HSTI filed its Petition for Review[50] (CTA EB No. 2084) with the Court *En Banc* on 19 June 2019 without the CIR's comment.[51] On the other hand, the CIR filed his own Petition for Review[52] (CTA EB No. 2092) on 01 July 2019 with HSTI's Comment/Opposition filed on 23 July 2019. Both parties reiterated their respective positions in their previous submissions before the Special Second Division in assailing the 18 January 2019 Decision.

Specifically, in attacking the imposition of the 25% surcharge and 20% delinquency interest as regards deficiency WTC and deficiency EWT as well as on the deficiency IT (insofar as the items "revenue not subjected to tax" and "disallowed *per* allocation of expense" are concerned), HSTI argues that imposing the 25% surcharge would be tantamount to amending the CIR's assessment and imposing something which was not stated therein. HSTI also adds that the imposition of the 20% delinquency interest is erroneous since it paid the said assessment items on 10 May 2016 prior to the filing of the present Petition for Review.[53]

With respect to the disallowance of the deduction of "disallowed expenses due to non-withholding", HSTI contends that the same is incorrect since it already paid the assessed deficiency WTC and EWT after the FDDA's issuance. It further argues that the phrase "at the time of the audit/investigation or reinvestigation/ reconsideration"

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47 Id., pp. 618-633.
48 Id., pp. 642-649.
49 Supra at note 2.
50 Supra at note 3.
51 *Per* Records Verification dated 08 November 2019, *Rollo* (CTA EB No. 2084), p. 82.
52 Supra at note 4.
53 Supra at note 45.

should be interpreted to cover the period given to the taxpayer within which to agree with the assessment and pay the same, prior to the filing of a petition with this Court, as the FDDA itself gave the taxpayer the option to pay.

With respect to the service charges, HSTI maintains that the issue involved therein is a mere a legal question since the assessment thereof resulted only from the CIR's legal position that the same is subject to VAT.

Lastly, HSTI maintains that deficiency interest under Section 249(B)[54] of the NIRC of 1997, as amended, should only be applied whenever there is a deficiency IT, estate tax or donor's tax.

As for the CIR, he contends that the Special Second Division erred when it cancelled the assessment from the disallowance of excess tax credit in the amount of ₱2,783,986.00 and disallowed MCIT credits in the amount of ₱40,634.00. According to him, HSTI never raised these as issues in its protest to the PAN, FLD and even in its previous Petition for Review with the Court in Division. For the CIR, this issue of disallowance is undisputed; therefore, HSTI can be deemed to have admitted the validity of the foregoing assessment items.

Additionally, the CIR avers that the Special Second Division likewise erred in cancelling the compromise penalty as HSTI itself never questioned nor assailed the validity of its imposition in both of its Protest to the PAN and FAN.

In opposition, HSTI counters that this Court is not only bound by the issues that the parties raised and it may also rule on related issues necessary to achieve an orderly disposition of the case.

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54 **SEC. 249.** *Interest.* -

...

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

As regards the cancellation of the assessment arising from disallowance of excess tax and MCIT credits, HSTI maintains that it was not fully informed of the factual and legal bases thereof.

Lastly, HSTI finds no error in the Special Second Division's Decision to cancel the compromise penalty.

ISSUES

In sum, the parties' arguments in their respective Petitions for Review call for the resolution of the following issues:

I.

WHETHER THE SPECIAL SECOND DIVISION ERRED IN IMPOSING THE 25% SURCHARGE AND 20% DELINQUENCY INTEREST ON THE UNDISPUTED ITEMS OF ASSESSMENT WHICH WERE PAID AFTER THE ISSUANCE OF THE FINAL DECISION ON DISPUTED ASSESSMENT (FDDA), ABSENT ANY IMPOSITION THEREOF IN THE PRELIMINARY ASSESSMENT NOTICE (PAN), FORMAL LETTER OF DEMAND (FLD) AND FINAL DECISION ON DISPUTED ASSESSMENT (FDDA);

II.

WHETHER THE SPECIAL SECOND DIVISION ERRED IN DISALLOWING THE DEDUCTION OF "DISALLOWED EXPENSES DUE TO NON-WITHHOLDING" FROM INCOME TAX (IT) DESPITE THE PAYMENT OF SUCH WITHHOLDING TAXES AFTER THE ISSUANCE OF THE FINAL DECISION ON DISPUTED ASSESSMENT (FDDA);

III

WHETHER THE SPECIAL SECOND DIVISION ERRED IN UPHOLDING THE DEFICIENCY VALUE-ADDED TAX (VAT) ASSESSMENT FOR FAILURE TO ADDUCE EVIDENCE TO SUPPORT THE CLAIM THAT THE AMOUNT ASSESSED REPRESENTS 100% OF THE SERVICE CHARGES COLLECTED;

IV

WHETHER THE SPECIAL SECOND DIVISION ERRED IN IMPOSING 20% DEFICIENCY INTEREST UNDER SECTION 249(B) OF THE NATIONAL INTERNAL REVENUE CODE OF 1997, AS AMENDED, EVEN IN DEFICIENCY VALUE-ADDED TAX (VAT), EXPANDED WITHHOLDING TAX (EWT) AND WITHHOLDING TAX ON COMPENSATION (WTC);

V

WHETHER THE SPECIAL SECOND DIVISION ERRED IN CANCELLING THE ASSESSMENT ARISING FROM THE DISALLOWANCE OF EXCESS TAX CREDITS ARISING FROM OVERPAYMENT AND EXCESS MINIMUM CORPORATION INCOME TAX (MCIT); AND,

VI

WHETHER THE SPECIAL SECOND DIVISION ERRED IN CANCELLING THE COMPROMISE PENALTY FOR NOT HAVING BEEN AGREED UPON VOLUNTARILY.

RULING OF THE COURT *EN BANC*

After considering the arguments of both parties and a thorough examination of the records of the case, the Court *En Banc* is constrained to deny both Petitions for Review filed by HSTI and the CIR.

The reasons are discussed below, in *seriatim*.

THE IMPOSITION OF THE 25% SURCHARGE AND 20% DELINQUENCY INTEREST IS PROPER.

Sections 248(A)(3) and 249(A) and (C)(3) of the NIRC of 1997, as amended, prior to the passage of Republic Act (**RA**) No. 10963[55], state:

...

SEC. 248. *Civil Penalties.* -

(A) There shall be imposed, in addition to the tax required to be paid, a penalty equivalent to twenty-five percent (25%) of the amount due, in the following cases:

...

(3) **Failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment**; or

...

55 Tax Reform for Acceleration and Inclusion (TRAIN).

> **SEC. 249.** *Interest.* -
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> *(A) In General.* - There shall be assessed and collected on any unpaid amount of tax, interest at the rate of twenty percent (20%) per annum, or such higher rate as may be prescribed by the rules and regulations, from date prescribed for payment until the amount is fully paid.
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> ...
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> *(C) Delinquency Interest.* - **In case of failure to pay**:
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> ...
>
> (3) **A deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner**, there shall be assessed and collected on the unpaid amount, interest at the rate prescribed in Subsection (A) hereof until the amount is fully paid, which interest shall form part of the tax.[56]
>
> ...

From the afore-cited provisions, it is clear that the 25% surcharge and 20% delinquency interest are both imposable when there is failure to pay deficiency tax within the time prescribed for its payment as provided in the CIR's notice of assessment or demand.

In the instant case, the ANs[57] attached to the FDDA state that the due date for the payment of the assessment is on <u>30 April 2016</u>. However, HSTI paid the undisputed portions of the assessment only on <u>10 May 2016</u>.[58] Since HSTI paid the subject assessment items beyond the period prescribed in the notice of assessment (within which said deficiency taxes should be paid), the imposition of the 25% surcharge and 20% delinquency interest is proper.

We do not subscribe to HSTI's insistence that such imposition is tantamount to amending the assessment by imposing something that has not been stated there in the first place.

In *Philippine Refining Company (now known as "Unilever Philippines [PRC], Inc.") v. Court of Appeals, et al.*[59], the CIR assessed

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[56] Emphasis supplied.
[57] Exhibit "P-9", Division Docket, Volume I, pp. 25-28.
[58] Supra at note 45.
[59] G.R. No. 118794, 08 May 1996; Citations omitted and emphasis supplied.

and demanded the petitioner therein to pay a deficiency tax in the amount of ₱1,892,584.00, composed only of deficiency income tax in the amount of ₱1,182,865.00 and 20% interest (60% max) of ₱709,719.00. This Court modified the CIR's findings by reducing the deficiency income tax assessment to ₱237,381.26, *but with surcharge and interest incident to delinquency*.[60] As to the argument that the imposition of the 25% surcharge and the 20% delinquency interest (due to the delay in the payment of the tax assessed) is improper and unwarranted, the Supreme Court ruled:

> ...
>
> **As correctly pointed out by the Solicitor General, the deficiency tax assessment in this case, which was the subject of the demand letter of respondent Commissioner dated April 11, 1989, should have been paid within thirty (30) days from receipt thereof. By reason of petitioner's default thereon, the delinquency penalties of 25% surcharge and interest of 20% accrued** from April 11, 1989. The fact that petitioner appealed the assessment to the CTA and that the same was modified does not relieve petitioner of the penalties incident to delinquency. The reduced amount of P237,381.25 is but a part of the original assessment of P1,892,584.00.
>
> Our attention has also been called to two of our previous rulings and these we set out here for the benefit of petitioner and whosoever may be minded to take the same stance it has adopted in this case. **Tax laws imposing penalties for delinquencies, so we have long held, are intended to hasten tax payments by punishing evasions or neglect of duty in respect thereof. If penalties could be condoned for flimsy reasons, the law imposing penalties for delinquencies would be rendered nugatory, and the maintenance of the Government and its multifarious activities will be adversely affected.**
>
> **We have likewise explained that it is mandatory to collect penalty and interest at the stated rate in case of delinquency. The intention of the law is to discourage delay in the payment of taxes due the Government and, in this sense, the penalty and interest are not penal but compensatory for the concomitant use of the funds by the taxpayer beyond the date when he is supposed to have paid them to the Government.** Unquestionably, petitioner chose to turn a deaf ear to these injunctions.
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> ...

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60 Decision dated 03 February 1993.

Based on the foregoing, the imposition of surcharge and delinquency interest is proper notwithstanding the absence of its imposition in the CIR's assessments since the collection thereof is mandatory.

In yet another case[61], the Supreme Court similarly ruled that "[t]he payment of the surcharge is mandatory and the BIR is not vested with any authority to waive the collection thereof".

THE PAYMENT OF THE ASSESSED DEFICIENCY WITHHOLDING TAX AFTER THE ISSUANCE OF THE FINAL DECISION ON DISPUTED ASSESSMENT (FDDA) WOULD NOT ENTITLE THE TAXPAYER TO CLAIM THE SAME AS DEDUCTION.

HSTI claims that, since it paid the assessed deficiency EWT and WTC after the issuance of the FDDA, the assessment item of "disallowed expenses due to non-withholding" in the amount of ₱24,915,762.99 should already be deleted.

The Court *En Banc* finds no merit in the said contention.

At the time HSTI paid the undisputed items of assessment in the FDDA on 10 May 2016[62], Revenue Regulations (**RR**) No. 12-2013 was the governing rule on deductibility of expenses for which withholding tax were only paid at the time of the audit investigation or reinvestigation/reconsideration.[63] Section 2 thereof, which amended RR 2-98[64], reads:

61 *Philex Mining Corporation v. Commissioner of Internal Revenue, et al.*, G.R. No. 125704, 28 August 1998.

62 Supra at note 45.

63 Amending Section 2.58.5 of Revenue Regulations No. 2-98, as amended, Relative to the Requirements for Deductibility of Certain Income Payments.

64 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.

> ...
>
> SEC. 2. *Amendment.* – Section 2.58.5 of RR 2-98, as amended, is hereby further amended to read as follows:
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> > "Sec. 2.58.5. *Requirements for Deductibility.* – Any income payment which is otherwise deductible under the Code shall be allowed as a deduction from the payor's gross income only if it is shown that the income tax required to be withheld has been paid to the Bureau in accordance with Secs. 57 and 58 of the Code.
> >
> > **No deduction will also be allowed notwithstanding payments of withholding tax at the time of the audit investigation or reinvestigation/reconsideration in cases where no withholding of tax was made in accordance with Secs. 57 and 58 of the Code.**"[65]
>
> ...

Based on the quoted provision, deduction will not be allowed notwithstanding the payment of withholding tax at the time of the audit investigation or reinvestigation/reconsideration. As such, it is clear that HSTI is not entitled to claim the deduction from IT even if it subsequently paid the deficiency EWT and WTC assessments.

Moreover, even if such payment is to be considered due to subsequent repeal of RR 12-2013 by RR 6-2018[66] (that reinstated the provisions of Section 2.58.5 of RR 2-98, as amended by RR 14-2002 and RR 17-2003 allowing the deduction if the payment was made at the time of the audit investigation or reinvestigation/reconsideration), HSTI may not still claim the deduction since it only paid the deficiency EWT and WTC after the FDDA's issuance and not at the time of the audit investigation or reinvestigation/reconsideration.

We disagree with HSTI's insistence that the phrase "at the time of the audit investigation or reinvestigation/reconsideration" should be interpreted to cover the period given to the taxpayer within which to

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65 Emphasis supplied.

66 Revoking Revenue Regulations (RR) No. 12-2013 Thereby Reinstating the Provisions of Section 2.58.5 of RR No. 14-2002, as Amended by RR No. 17-2003.

agree with the assessment and pay the same, prior to the filing of a Petition for Review with this Court.

A plain reading of the subject provision would reveal that the time prescribed for the taxpayer to pay the deficiency withholding taxes (in order to claim the same as deduction from IT) is very clear in limiting the same to the time of the audit investigation or reinvestigation/reconsideration. If the CIR and the Secretary of Finance deemed it appropriate to include the period extending prior to the filing of an appeal with this Court, they could have easily provided so in the subject RR.

When the statute is clear and free from ambiguity, it must be given its literal meaning and applied without attempted interpretation. This is the plain meaning rule or *verba legis*, as expressed in the maxim *index animi sermo* or speech is the index of intention.[67]

HOTEL SPECIALIST (TAGAYTAY), INC. (HSTI) FAILED TO ADDUCE PROOF TO SUPPORT ITS CLAIM THAT THE AMOUNT ASSESSED FOR VALUE-ADDED TAX (VAT) REPRESENTS 100% OF THE SERVICE CHARGES.

In the assailed Decision, the Special Second Division, while agreeing with HSTI's legal argument that the portion of the service charges collected and to be distributed to the employees should not be subject to VAT, nonetheless found that HSTI failed to adduce sufficient evidence to support its claim that the amount of ₱25,014,441.24 represents 100% of the service charges it collected.

In differing with the Special Second Division, HSTI argued that since the CIR's assessment thereof is based only on the latter's legal position that service charges collected must be subject to VAT, the issue involved is only a question of law.

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67 *Bloomberry Resorts and Hotels, Inc. v. Bureau of Internal Revenue*, G.R. No. 212530, 10 August 2016.

We do not agree with the CIR.

It is a well-known rule that "failure to present proof of error in the assessment will justify judicial affirmance of said assessment"[68] and "the burden of proof is on the taxpayer to show the contrary".[69]

It must be emphasized that HSTI's evidence only supported its claim that a portion of the service charges were distributed to its employees in the total amount of ₱19,449,112.96. As the Special Second Division correctly observed, it failed to adduce evidence to support its contention that the amount of ₱25,014,441.24 represents 100% of the service charges it collected. Considering the dearth of evidence in substantiating this allegation, the subject assessment item must thus be upheld.

Moreover, in examining HSTI's assertions that the amount of ₱25,014,441.24 represents 100% of the service charges it collected, a closer perusal of its own evidence proves the same to be inaccurate.

First, HSTI alleges that the amount of ₱3,208,002.69 pertains to the 15% share of the employer (HSTI)[70] pursuant to Article 96[71] of the Labor Code of the Philippines. However, grossing-up the same to 100% would merely result to ₱21,386,684.60 or ₱3,627,756.64 less than the alleged amount of ₱25,014,441.24.

Second, HSTI's witness (Magpantay) likewise testified that the amount of service charges collected and distributed to the employees as their share totaled to ₱19,449,112.96.[72] In the same manner, grossing

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68 *Commissioner of Internal Revenue v. Court of Appeals, Atlas Consolidated Mining and Development Corporation and Court of Tax Appeals*, G.R. No. 104151, 10 March 1995.

69 *Collector of Internal Revenue v. Bohol Land Transportation Co.*, G.R. Nos. L-13099 and L-13462, 29 April 1960.

70 Answer to Question No. 36, Judicial Affidavit of Susana R. Magpantay, Division Docket, Volume I, p. 205; paragraph 47 of the Memorandum, Division Docket, Volume II, p. 534.

71 **Article 96.** *Service charges.* All service charges collected by hotels, restaurants and similar establishments shall be distributed at the rate of eighty-five percent (85%) for all covered employees and fifteen percent (15%) for management. The share of the employees shall be equally distributed among them. In case the service charge is abolished, the share of the covered employees shall be considered integrated in their wages.

72 Answer to Question No. 39, Judicial Affidavit of Susana R. Magpantay, Division Docket, Volume I, p. 206.

the same up to 100% would only amount to ₱22,881,309.36 or ₱2,133,131.88 less of the same alleged amount of ₱25,014,441.24.

With these inaccuracies and discrepancies brought about by HSTI's own evidence, it becomes more difficult for this Court to be swayed to agree with its claim that it successfully substantiated the amount of ₱25,014,441.24 as the full (100%) service charges collected.

Incidentally, by merely presenting proof that a portion of the service charges were distributed to its employees in the total amount of ₱19,449,112.96, the Court *En Banc* could not likewise conclude if such amount was not indeed subjected to VAT. Thus, in the absence of evidence on how such receipt was substantiated and recorded by HSTI (in order to determine if no VAT was in fact charged to its customers with respect to such portion), the subject assessment must necessarily be upheld.

In challenging the correctness of a tax assessment, the question to be decided is not whether the tax collector is wrong, but whether the taxpayer is right; the burden being on the latter to establish the correctness of his own contention.[73] In HSTI's case, it failed to discharge that burden or duty.

20% DEFICIENCY INTEREST UNDER SECTION 249(B) MAY BE IMPOSED EVEN IF THE DEFICIENCY IS NOT INCOME TAX (IT), DONOR'S TAX OR ESTATE TAX.

We likewise find HSTI's argument that 20% deficiency interest under Section 249(B)[74] of the NIRC of 1997, as amended, may be imposed only on "deficiency in the tax due as the term is defined in the Code" to be lacking in merit. Its insistence that the same is applicable only to those kinds of taxes wherein the term "deficiency" has been defined in the NIRC of 1997, as amended, such as IT, donor's tax and estate tax is erroneous.

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[73] *Behn, Meyer & Co., Limited v. The Insular Collector of Customs*, G.R. No. 7987, 11 September 1913.

[74] Supra at note 54.

Sections 247(a) and 249(A) of the NIRC of 1997, as amended, clearly state:

> ...
>
> **SEC. 247.** *General Provisions.* -
>
> (a) The additions to the tax or deficiency tax prescribed in this Chapter **shall apply to all taxes, fees and charges imposed in this Code**. The amount so added to the tax shall be collected at the same time, in the same manner and as part of the tax.
>
> ...
>
> **SEC. 249.** *Interest.* –
>
> *(A) In General.* - There shall be assessed and collected **on any unpaid amount of tax**, interest at the rate of twenty percent (20%) per annum, or such higher rate as may be prescribed by the rules and regulations, from date prescribed for payment until the amount is fully paid.[75]
>
> ...

Based on the said provisions, 20% deficiency interest may be imposed on any and all unpaid taxes and is not limited to deficiency IT, donor's tax or estate tax. In *E.E. Black Ltd. – Philippine Branch v. The Commissioner of Internal Revenue*[76], this Court, in addressing a similar issue advanced herein by HSTI, ruled that:

> ...
>
> The text of Section 247(a) states without any doubt that the additions under Chapter I, Title X are applicable to *all taxes* imposed under the code, *i.e.*, the 1997 NIRC. The authority to impose additions under that provision clearly extends to *all taxes* regardless of the title under which they are classified.
>
> Therefore, the law does *not* limit these additions *only* to the three (3) types of internal revenue taxes, namely, income (Title II), estate (Title III) and donor's tax (Title III). Their imposition applies with equal force and effect to the other taxes under the 1997 NIRC such as the value-added tax (Title IV), other percentage taxes (Title V), excise tax (Title VI) and documentary stamp tax (Title VII).

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75 Emphasis supplied.

76 CTA EB No. 1611 (CTA Case No. 8719), 22 January 2019; Italics in the original text.

> Accordingly, the additions to the tax or deficiency tax such as, among others, *Civil Penalties or Surcharges* under Section 248, *Deficiency Interest* under Section 249(B), *Delinquency Interest* under Section 249(C), and *Interest on Extended Payment* under Section 249(D) are applicable to petitioner's deficiency DST.
>
> ...

THERE WERE NO FACTUAL OR LEGAL BASES FOR THE DISALLOWANCE OF TAX CREDITS.

The Special Second Division cancelled the assessment insofar as the disallowance of tax credits arising from overpayment and excess MCIT over the regular corporate income tax (**RCIT**) because the CIR failed to provide factual and legal bases therefor. According to the CIR, the Special Second Division erred as HSTI was fully informed of the factual and legal bases of the assessment. Likewise, that the said issue was never raised in HSTI's Protest to the PAN and FAN and even in the prior Petition for Review.

The CIR's arguments are bereft of merit.

First, it is settled that this Court may not limit itself to the parties' stipulated issues and it may also rule upon related issues necessary to achieve an orderly disposition of the case.[77]

Second, the CIR evidently failed to state the facts and the law upon which the subject item of assessment is based, in violation of Section 228 of the NIRC of 1997, as amended, which reads in part:

> ...
>
> **SEC. 228.** *Protesting of Assessment.* - ...
>
> ...
>
> 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.
>
> ...

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77 *Commissioner of Internal Revenue v. Lancaster Philippines, Inc.*, G.R. No. 183408, 12 July 2017 citing Section 1, Rule 14 of the RRCTA.

In the FLD and FDDA, the CIR simply deducted the amounts of ₱2,783,986.00 and ₱30,634.00, representing tax credits "carried over to succeeding period" and "MCIT", respectively, for a total of ₱2,824,620.00, from HSTI's tax credits (effectively resulting in its disallowance), without providing any reason for such disallowance. The FLD and FDDA thus reveal the absence of the statement of facts and the law upon which such disallowance has been based making the subject assessment void.

In *Commissioner of Internal Revenue v. Avon Products Manufacturing, Inc.*[78], the Supreme Court ruled:

> ...
>
> **The importance of providing the taxpayer with adequate written notice of his or her tax liability is undeniable. Under Section 228, it is explicitly required that the taxpayer be informed in writing of the law and of the facts on which the assessment is made; otherwise, the assessment shall be void.** Section 3.1.2 of Revenue Regulations No. 12-99 requires the Preliminary Assessment Notice to show in detail the facts and law, rules and regulations, or jurisprudence on which the proposed assessment is based. Further, Section 3.1.4 requires that the Final Letter of Demand must state the facts and law on which it is based; otherwise, the Final Letter of Demand and Final Assessment Notices themselves shall be void. Finally, Section 3.1.6 specifically requires that the decision of the Commissioner or of his or her duly authorized representative on a disputed assessment shall state the facts and law, rules and regulations, or jurisprudence on which the decision is based. Failure to do so would invalidate the Final Decision on Disputed Assessment.
>
> **"The use of the word 'shall' in Section 228 of the [National Internal Revenue Code] and in [Revenue Regulations] No. 12-99 indicates that the requirement of informing the taxpayer of the legal and factual bases of the assessment and the decision made against him [or her] is mandatory." This is an essential requirement of due process and applies to the Preliminary Assessment Notice, Final Letter of Demand with the Final Assessment Notices, and the Final Decision on Disputed Assessment.**
>
> ...

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78 G.R. Nos. 201398-99, 03 October 2018; Citation omitted and emphasis supplied.

Thus, contrary to HSTI's claim, the Special Second Division correctly cancelled the assessment insofar as the disallowance of tax credits arising from overpayment and excess MCIT.

THE CANCELLATION OF THE COMPROMISE PENALTY IS CORRECT FOR HAVING BEEN IMPOSED WITHOUT THE CONSENT OF HOTEL SPECIALIST (TAGYTAY), INC. (HSTI).

We also find the CIR's argument that the Special Second Division erred in cancelling the compromise penalty, inasmuch as HSTI did not question or assail the validity thereof in its Protests to the PAN and FLD as well as its Petition for Review, to be devoid of merit.

As earlier mentioned, this Court may not limit itself to the parties' stipulated issues but may also rule upon related issues necessary to achieve an orderly disposition of the case.[79] It is, therefore, not an error for the Special Second Division to have ruled on cancellation of the compromise penalty notwithstanding the parties' failure to deem it an issue, especially so with the glaring evidence that HSTI never consented to the imposition of the penalty.

In *Commissioner of Internal Revenue v. Lianga Bay Logging Co., Inc. and the Court of Tax Appeals*[80], the Supreme Court held:

> ...
>
> As to the "compromise penalty" of P300.00 also sought to be imposed, there is no basis therefor, and, as the Court of Tax Appeals finally declares, "the imposition of the same without the conformity of the taxpayer is illegal and unauthorized (Coll. v. U.S.T., 104 Phil. 1062, Phil. Int. Fair v. Coll., G.R. Nos. L-12928 & L-12932, March 31, 1962)."
>
> ...

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79 Supra at note 77.

80 G.R. No. L-35266, 21 January 1991.

Similarly, in *Dr. Felisa L. Vda. De San Agustin, in Substitution of Jose Y. Feria, in his capacity as Executor of the Estate of Jose San Agustin v. Commissioner of Internal Revenue*[81], the Supreme Court further held:

> ...
> The Court of Tax Appeals correctly held that the compromise penalty of P20,000.00 could not be imposed on petitioner, a compromise being, by its nature, mutual in essence. The payment made under protest by petitioner could only signify that there was no agreement that had effectively been reached between the parties.
> ...

Although the Court *En Banc* finds no sufficient reason to disturb the assailed Decision and Resolution, We find the need to correct the typographical errors found in the dispositive portion of the assailed Decision, insofar as the deficiency VAT and EWT are concerned.

In the dispositive portion, with respect to deficiency VAT, the figures "1999" under the column "Remaining Balance" across the row "Total Amount Due, April 30, 2016" is stated but is found to be of no significance. Hence, the said clerical or typographical error must be deleted.

On the other hand, with respect to deficiency EWT, in computing the delinquency interest from 11 May 2016 until 31 December 2017, it was stated that the amount of the principal is "₱398,781.93" but the amount used in computing the interest is nevertheless the correct amount of "₱391,789.59". Thus, while there was a misstatement in the principal (for computing the delinquency interest from 11 May 2016 until 31 December 2017), the correct amount of interest of ₱128,807.54[82] was still arrived at. As such, the amount "₱398,781.93" needs only to be replaced by the correct amount of "₱391,789.59" without affecting the computation of such delinquency interest.

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[81] G.R. No. 138485, 10 September 2001.

[82] ₱391,789.59 x 20% x 600 days/ 365 days.

WHEREFORE, with the foregoing, Hotel Specialist (Tagaytay), Inc.'s Petition for Review filed on 19 June 2019 and the Commissioner of Internal Revenue's Petition for Review filed on 01 July 2019 are both **DENIED** for lack of merit. Accordingly, the Decision dated 18 January 2019 and the Resolution dated 30 May 2019 of the Special Second Division, respectively, in CTA Case No. 9349, entitled *Hotel Specialist (Tagaytay), Inc. v. Commissioner of Internal Revenue,* are hereby **AFFIRMED** with modification but *only* to correct the *typographical errors in the dispositive portion* of the Decision dated 18 January 2019 insofar as deficiency Value-Added Tax and deficiency Expanded Withholding Tax are concerned, which should read as follows:

	Deficiency VAT	**Less: Payment on May 10, 2016**	**Remaining Balance**
Basic Deficiency VAT	₱2,876,405.48	₱238,032.85	₱2,638,372.63
Surcharge (25%)	719,101.37		719,101.37
Deficiency Interest (20%) from January 25, 2010 to April 30, 2016 (₱2,876,405.48 x 20% x 2,287 days/ 365 days)	3,604,569.50	299,986.61	3,304,582.89
Total Amount Due, April 30, 2016	**₱7,200,076.35**		
Deficiency Interest (20%) from May 1, 2016 until payment on May 10, 2016 (₱2,876,405.48 x 20% x 10 days/ 365 days)	15,761.13		15,761.13
Total Amount Due, May 10, 2016	**₱7,215,837.48**	**₱538,019.46**	**₱6,677,818.02**
Deficiency Interest (20%) from May 11, 2016 to December 31, 2017 (₱2,638,372.63 x 20% x 600 days/ 365 days)			867,410.18
Delinquency Interest (20%)			
From May 1, 2016 until payment on May 10, 2016 (₱7,200,076.35 x 20% x 10 days/ 365 days)			39,452.47
From May 11, 2016 until December 31, 2017 (₱6,677,818.02 x 20% x 600 days/ 365 days)			2,195,447.02
Total Deficiency VAT Due as of December 31, 2017			**₱9,780,127.69**

	Deficiency EWT	Less: Payment on May 10, 2016	Remaining Balance
Basic Deficiency EWT	₱1,595,127.70	₱1,595,127.70	₱ -
Surcharge (25%)	398,781.93		398,781.93
Deficiency Interest (20%) from January 15, 2010 to April 30, 2016 (₱1,595,127.70 x 20% x 2,297 days/ 365 days)	2,007,675.80	2,023,408.56	(15,732.76)
Total Amount Due, April 30, 2016	**₱4,001,585.42**		
Deficiency Interest (20%) from May 1, 2016 until payment on May 10, 2016 (₱1,595,127.70 x 20% x 10 days/ 365 days)	8,740.43		8,740.43
Total Amount Due, May 10, 2016	**₱4,010,325.85**	**₱3,618,536.26**	**₱391,789.59**
Delinquency Interest (20%)			
From May 1, 2016 until payment on May 10, 2016 (₱4,001,585.42 x 20% x 10 days/ 365 days)			21,926.50
From May 11, 2016 until December 31, 2017 (₱391,789.59 x 20% x 600 days/ 365 days)			128,807.54
Total Deficiency EWT Due as of December 31, 2017			**₱542,523.63**

SO ORDERED.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

Ma. Belen M. Ringpis-Liban
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

(On Leave)
MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the cases were assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice