REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

THUNDERBIRD PILIPINAS HOTELS AND RESORTS, INC.,
Petitioner,

\- *versus* -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 976
(CTA Case No. 7902)

Present:
Del Rosario, P.J.
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas, and
Ringpis-Liban, JJ.

Promulgated:

JAN 2 9 2014 awApolinario 8:35 a.m.

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DECISION

BAUTISTA, J.:

The Case

Before the Court *En Banc* is a Petition for Review,[1] filed on February 1, 2013, assailing the Decision dated July 18, 2012,[2] and Resolution dated December 11, 2012,[3] rendered by the then First Division of the Court ("Court in Division"), and accordingly, praying for the following: (1) to partially reconsider the Decision dated July 18, 2012 and Resolution dated December 11, 2012, and to order the cancellation and withdrawal of deficiency income tax and expanded withholding tax for taxable year 2006

[1] *Rollo*, CTA EB Case No. 976 (CTA Case No. 7902), pp. 101-237, with Annexes.
[2] Penned by then Presiding Justice Ernesto D. Acosta, with Associate Justices Erlinda P. Uy and Esperanza R. Fabon-Victorino, concurring; *Rollo*, pp. 156-191, *Annex "A."*
[3] *Rollo*, pp. 192-198; *Annex "B."*

in the aggregate amount of ₱15,331,711.00, inclusive of interest and penalties; (2) to reconsider and cancel the imposition of 25% surcharge on the deficiency income tax and expanded withholding tax for taxable year 2006; and (3) to order the withdrawal and cancellation of the abovementioned deficiency assessments.[4]

The Antecedent Facts

The relevant antecedents are succinctly recited by the Court in Division in its Decision dated July 18, 2012, as follows:

> "Petitioner is a domestic corporation duly incorporated and existing under Philippine laws, with business address at VOA Pennsylvania Avenue, Poro Point, San Fernando City, La Union. It is engaged in the business of conducting and operating hotels, clubs, restaurants and all other businesses appurtenant and/or related thereto. It is also registered as a Poro Point Special Economic and Freeport Zone ('PPSEFZ').
>
> Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue ('BIR') with power, among others, to decide disputed assessments of deficiency internal revenue taxes and penalties imposed in relation thereto, with office address at the Fifth Floor, BIR National Office Building, BIR Road, Diliman, Quezon City where she may be served with summons and other legal processes.
>
> Petitioner filed its Annual Income Tax Return (ITR) for taxable year 2006 on April 16, 2007 with the BIR RDO No. 3. Revenue Region No. 1 in accordance with Section 77 of the 1997 NIRC.
>
> Petitioner's ITR for taxable year 2006 shows the amount of ₱14,201,733.00 as deferred rent [expense] under Line 115 thereof as a reconciling item on the company's net income per books against its taxable income.
>
> On November 19, 2008, Assessment Notice ('Assessment Notices') Nos. IT-03-06-241-973-218 and WE-03-06-241-973-218 for deficiency income tax and expanded withholding tax, respectively, together with a Formal Letter of Demand ('FLD'), were issued against petitioner by the BIR through the Office of the Regional Director, Revenue Region No. 1 (Calasiao, Pangasinan), for the taxable year

[4] *Ibid.*, p. 149.

2006, in connection with the investigation conducted pursuant to Letter of Authority No. 00072404 dated September 20, 2007. Petitioner received the Assessment Notices and FLD on November 26, 2008.

Pursuant to the Assessment Notices, the BIR assessed petitioner for deficiency taxes in the aggregate amount of ₱15,331,711.00, inclusive of interest and penalties computed as follows:

xxx xxx xxx

However, as indicated in the FLD, basic deficiency income tax in the amount of ₱533,418.67 arising from a disallowance of certain purchases that were allegedly not in the name of petitioner, was already paid by petitioner on May 8, 2008. The total amount paid was ₱761,557.01, including interest and surcharge.

On December 23, 2008, petitioner filed with the Office of the Regional Director, BIR Revenue Region No. 1, a formal protest letter against the deficiency tax assessments, citing both legal and factual grounds.

On February 19, 2009, petitioner filed with the Office of the Regional Director, BIR Revenue Region No. 1 a supplemental protest dated February 18, 2009 and submitted supporting documents.

Through his letter dated February 24, 2009, BIR OIC Regional Director Tomas C. Rosales of Revenue Region No. 1 rendered a decision on petitioner's protest, denying the same with finality and sought to enforce collection of the alleged deficiency income tax and expanded withholding tax liability for taxable year 2006, in the aggregate amount of ₱15,331,711.00, inclusive of interest and penalties. Petitioner received the said letter on March 4, 2009.

On March 30, 2009, petitioner received a collection letter from the Revenue District Officer ('RDO') of San Fernando City, La Union, requesting payment of the assessed tax within ten (10) days from receipt. Petitioner replied on April 1, 2009 that it will appeal the decision of the Regional Director to the Court of Tax Appeals on or before April 3, 2009, and consequently, requested the RDO to defer collecting the tax pending petitioner's exhaustion of its legal remedies under the law.

On April 3, 2009, petitioner filed the Petition for Review. Thereafter, on August 24, 2009, it filed a Motion to Suspend Collection of Tax.

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On June 25, 2009, respondent filed a Motion to Admit Attached Answer.

In her Answer, respondent raised the following special and affirmative defenses:

> 4. Respondent adopts the abovementioned admission and denials defenses as part of his special and affirmative defenses.
>
> 5. Petitioner failed to submit all the required documents under the Notices sent by respondent.
>
> > 5.1. On 21 September 2007, respondent sent a First Request for Presentation of Records that required petitioner to submit the following documents in relation to its 2006 Income Tax (IT), Value-Added Tax (VAT) and Withholding Taxes for examination:
> >
> > xxx xxx xxx
> >
> > The First Request for Presentation of Records was signed by Revenue Officer Ernesto B. Penullar who was duly authorized to conduct examination on the books of accounts and records of petitioner for taxable year 2006 by virtue of Letter of Authority No. 00072404 dated 20 September 2007. The said First Request was received by a certain Maria Fe Ramos for petitioner.
> >
> > 5.2. On 23 October 2007, respondent, through Revenue Officer Penullar, sent a Second Request for Presentation of Records via registered mail. Respondent reiterated the need for petitioner to present the accounting records enumerated in the First Request. To emphasize this requirement, Section 20 of Revenue Regulations No. V-1 was quoted thereon as follows:
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> > xxx xxx xxx

5.3. On 17 December 2007, respondent, through Revenue District Officer Imelda A. Bueno, sent a Final Notice Before Issuance of *Subpoena Duces Tecum*. In the Final Notice, the need for petitioner to present the documents required under the previous notices were reiterated with emphasis on the submission of all the required documents or face the consequence of having a *Subpoena Duces Tecum* served upon petitioner. The Final Notice was served by constructive notice on 17 December 2007. Still, however, petitioner refused to comply with the duty imposed upon it by law.

5.4. In a Memorandum for the Regional Director of Revenue District Office No. 3 dated 21 January 2008, [R]evenue Officer Penullar reported that petitioner submitted photocopies of mandatory returns and made and oral request that it be given additional time to submit disbursements books and other source documents. Petitioner did not make good on its promise.

5.5. An audit under the auspices of LOA 00072404 conducted by Revenue Officer Penullar revealed the following material findings and discrepancies:

a. A total of ₱11,068,374.43 in trade purchases was paid for by another corporation (East Bay Resorts, Inc.) and hence disallowed in audit as taxpayer's paid purchases. Thus, petitioner was assessed ₱8,049,313.92 of gross income tax, excluding legal increments.

b. Compromise penalties, civil penalties and 20% interest were imposed for late filing of 1601C and 1601E returns for the months of April to November in the amounts of ₱911,540.29 and ₱254,726.77 respectively, pursuant to Revenue Memorandum Circular No. 19-2007 and Sections 248 and 249 of the National Internal Revenue Code of 1997.

c. Petitioner failed to file its Monthly Alpha List of Payees and its year-end Inventory List, hence, petitioner was penalized ₱12,000.00 and ₱1,000.00 respectively, in accordance with RMC No. 19-2007.

d. Although petitioner has not been notified officially as one of the top 10,000 taxpayers, it has nevertheless started to deduct and remit EWT as per schedule.

e. 25% surcharge and 20% interest pursuant to Section[s] 248 and 249 of the NIRC of 1997.

f. The result of the audit investigation is that petitioner is liable for the following internal revenue tax deficiencies: (i) income tax in the amount of ₱11,682,505.19; (ii) expanded withholding tax in the amount of ₱254,726.77; and (iii) withholding tax on compensation in the amount of ₱911,840.29.

Issuance of a Preliminary Assessment Notice to petitioner was therefore recommended.

6. The assessment is valid based on the best evidence obtainable.

6.1. Petitioner's obstinate failure to comply with the First Request for Presentation of Records, Second Request for Presentation of Records and Final Notice Before Issuance of *Subpoena Duces Tecum* did not in the least bit affect the validity of the assessment. Such lack of cooperation merely hampered the proceedings.

6.2. Section 6(B) of the NIRC of 1997 reads in part:

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By express provision of law, the photocopied documents sent by petitioner, although incomplete, are correct and sufficient for all legal purposes.

7. Petitioner's protest failed to sufficiently refute the respondent's assessment.

7.1. In a letter 11 November 2008, respondent denied petitioner's protest in this wise:

'A. Expanded Withholding Taxes

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2. **Rent —** your financial statements clearly showed the breakdown of rental expenses as follows:

xxx xxx xxx

Per available returns filed only ₱46,710.52 was paid thereby leaving a balance of ₱1,134,402.22. Your statement that your company remitted the Expanded Withholding Tax on rental without documentary evidence cannot be considered as basis for cancellation of the findings per record.

3. **Legal and Professional Fees —** In the absence of documentary evidence that payments under legal and professional fees were to general professional partnership, the findings cannot be adjusted. The list that was submitted as breakdown of payments to general professional partnership is not sufficient evidence to establish the fact of payments to the identified entities. Moreover, this was not presented during the time of verification for validation purposes. It is not even part of your previous protest letters.

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6. **Management Fee** - No records were submitted to show that the recipient of the management fee is exempt from income tax and consequently to withholding tax.

B. Expanded Withholding Tax on Compensation

The deficiency withholding tax on compensation per preliminary assessment notice dated May 14, 2008 has been deleted due to submission of BIR Form 1601-C returns and proof of payment.

Finally, we also reiterate our position in our reply letter dated July 28, 2008 that Thunderbird Pilipinas Hotel and Resorts, Inc. is subject to income tax because of the passage of Republic Act (RA) No. 9337 which amended some of the provisions of the exemption of government corporations, agencies or instrumentalities which includes PAGCOR but was deleted under RA No. 9337. The imposition of the tax on your income was therefore amply discussed in the aforementioned reply letter.'

7.2. Petitioner reiterated its protest in a letter dated 18 February 2009, to which, respondent replied through a letter dated 24 February 2009. Quoted hereunder are the relevant portions thereof:

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7.3. As discussed earlier, petitioner's obstinate failure to present the required documents for audit does not affect the validity of the assessment. On the contrary, it only bolsters the findings [of] respondent's examiners because failure to comply with the aforementioned notices implies non-existence of the required documents.

7.4. With the passage of RA No. 9337 on 01 July 2005, PAGCOR's tax exemption has been effectively removed, relegating it to the status of an ordinary corporation. In fact in one case, the Supreme Court said 'The Philippines Amusement and Gaming Corporation (PAGCOR) is not exempt from income taxes anymore.' Thus, for the taxable year in which petitioner was assessed, there is no exemption from which it may benefit from its dealings with PAGCOR.

7.5. In the case of *Commissioner of Internal Revenue vs. Bank of the Philippines Islands*, the Supreme Court held:

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Based on the foregoing, the presumption of correctness stands and the assessment remains indubitable.

8. Petitioner was afforded due process in the assessment of its tax liabilities for taxable year 2006.

8.1. On 16 January 2008, respondent sent a Notice of Informal Conference to petitioner, notifying the latter of the finding of the revenue officer assigned to the case pursuant to Section 228 of the National Internal Revenue Code of 1997 in relation to RR No. 12-99. The Notice of Informal Conference was received by petitioner on 16 January 2008.

8.2. On 17 June 2008, petitioner received from respondent a Preliminary Assessment Notice dated 14 May 2008 that appraised the former of its deficiency IT, EWT and WTC for taxable year 2006 in the aggregate amount of ₱14,949,710.45.

8.3. Respondent sent a Formal Letter of Demand (FLOD) dated October 2008 to petitioner appraising the former of the fact that there is still due from it deficiency IT and EWT for taxable year 2006 in the aggregate amount ₱15,331,711.00.

8.4. Petitioner also received Assessment Notices Nos. IT-03-06-241-973-218 for deficiency IT; WE-03-06-241-973-218 for deficiency EWT for taxable year 2006.

9. As a consequence of filing a *pro forma* protest, the assessment has become final and executory, thus, barring petitioner from filing a Petition for Review before the Court of Tax Appeals.

9.1. Section 228 of the NIRC of 1997 reads in part:

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As discussed above, petitioner has consistently failed to submit documents from the time of audit up to its protest. Petitioner cannot now seek recourse from the Honorable Court due to the finality of the assessment.

10. All told, the following facts are made clear: (i) petitioner was required by respondent to submit relevant documents for audit but the former failed to comply despite several notices; (ii) petitioner was assessed deficiency IT and EWT for taxable year 2006 based on the best evidence obtainable; (iii) petitioner was notified of such assessment based on laws, rules and jurisprudence; and (iv) the assessment is final, executor[y], and unappealable.

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xxx. The Court, however, denied petitioner's Motion to Suspend Collection of Tax as it was not verified and the facts and grounds alleged in support of said motion, together with the testimony of its witness, Mr. Elmer Pedrezuela, do not merit a favorable resolution since there was no concrete showing that respondent is carrying out the threatened enforcement of collection by administrative summary remedies.

On July 24, 2009, petitioner filed another Motion to Suspend Collection of Tax. This time, it attached a verification.

On August 3, 2009, as it appears that the collection of the assessed deficiency income tax and withholding tax in the total amount of ₱15,331,711.00 will jeopardize the interest of petitioner, the Court ordered the petitioner to post an acceptable surety bond in the amount of ₱30,663,422.00 within ten (10) days from notice and to comply with the requirements under A.M. 04-7-02 SC dated July 20, 2004. The grant of petitioner's Motion to Suspend Collection of Tax shall be subject to the fulfillment of the Court's conditions.

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The Joint Stipulation of Facts and Issues (JSFI) was filed by the parties. A corresponding Resolution dated October 14, 2009 approved said JSFI and thereafter terminated the pre-trial.

On October 19, 2009, petitioner filed its Submission (of Surety Bond).

On November 13, 2009, the Court issued a Resolution approving petitioner's surety bond and enjoining the CIR f[ro]m collecting the subject deficiency taxes.

During trial, the petitioner and respondent both presented their respective testimonial and documentary evidence in support of their positions.

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On March 23, 2012, petitioner filed its Memorandum while respondent filed her Memorandum on March 30, 2012.

On April 10, 2012, the Court issued a Resolution submitting the case for decision."[5]

The Ruling of the Court in Division

The Court in Division issued a Decision, ruling as follows:

"**WHEREFORE,** premises considered, the assessments against petitioner covering deficiency income tax and EWT for taxable year 2006 are hereby **AFFIRMED** with some modifications.

[5] *Ibid.*, pp. 157-168. Citations omitted.

Accordingly, petitioner is hereby **ORDERED** to pay respondent deficiency income tax and EWT for taxable year 2006 in the respective amounts of **₱12,488,946.65 and ₱5,440,870.44**, inclusive of 25% surcharge and 20% deficiency interest imposed pursuant to Sections 248(A)(3) and 249(B) of the NIRC of 1997, computed as follows:

Deficiency Income Tax		
	Basic Tax Due	₱7,584,170.25
	Add: 25% Surcharge	1,896,042.56
	20% Interest (04/16/07 to 04/09/09)	3,008,733.84
	Total Amount Due	**₱12,488,946.65**
Deficiency EWT		
	Basic Tax Due	₱3,208,008.58
	Add: 25% Surcharge	802,002.15
	20% Interest (01/16/07 to 04/09/09)	1,430,859.72
	Total Amount Due	**₱5,440,870.44**[6]
GRAND TOTAL - DEFICIENCY INCOME TAX AND EWT		**₱17,929,817.09**[7]

Likewise, petitioner is **ORDERED** to pay delinquency interest at the rate of 20% per annum on the total deficiency taxes of **₱17,929,817.09** computed from April 10, 2009 until full payment thereof pursuant to Section 249(C)(3) of the 1997 NIRC.

SO ORDERED."[8]

Aggrieved, petitioner filed a Motion for Reconsideration, which the Court in Division denied in a Resolution dated December 11, 2012.[9]

The Issues

Hence, the present Petition for Review, where petitioner assigns the following issues of:

I. WHETHER OR NOT PETITIONER IS LIABLE FOR DEFICIENCY INCOME TAX FOR TAXABLE YEAR 2006;

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[6] The correct amount is ₱5,440,870.45, due to rounding off.
[7] *Supra*, note 6; Due to adjustment, the correct amount is ₱17,929,817.10.
[8] *Supra*, note 2; *Rollo*, pp. 190-191.
[9] *Supra*, note 3.

II. WHETHER OR NOT THE DECISION OF THE SUPREME COURT IN *PHILIPPINE AMUSEMENT AND GAMING CORPORATION VS. BUREAU OF INTERNAL REVENUE* ("PAGCOR DECISION") [HAS] ESTABLISHED A NEW DOCTRINAL INTERPRETATION, HENCE, SHOULD BE APPLIED PROSPECTIVELY;

III. ASSUMING *ARGUENDO* THAT PETITIONER IS SUBJECT TO INCOME TAX, WHETHER OR NOT IT IS LIABLE TO PAY ONLY THREE PERCENT (3%) OF ITS GROSS INCOME TO THE NATIONAL GOVERNMENT INSTEAD OF 5% PURSUANT TO ITS REGISTRATION AS *PPSEFZ* ENTERPRISE;

IV. WHETHER OR NOT THE 5% TAX REMITTED BY PETITIONER TO PAGCOR CAN BE APPLIED AGAINST ITS DEFICIENCY INCOME TAX;

V. WHETHER OR NOT PETITIONER IS LIABLE FOR DEFICIENCY EWT ON PAYMENTS OF PROFESSIONAL FEES TO GENERAL PROFESSIONAL PARTNERSHIPS, RENTAL PAYMENTS TO PPMC AND MANAGEMENT FEES FOR SERVICES RENDERED OUTSIDE THE PHILIPPINES; and

VI. WHETHER OR NOT THE 25% SURCHARGE IMPOSED BY THE HONORABLE COURT ON ALLEGED DEFICIENCY TAXES IS WARRANTED AND VALID.[10]

Petitioner's Arguments

Petitioner maintains that pursuant to Presidential Decree ("PD") No. 1869,[11] otherwise known as the Philippine Amusement and Gaming Corporation ("PAGCOR") Charter, the exemptions granted to PAGCOR for earnings derived from casino operations shall inure to the benefit of the corporation with whom PAGCOR has contractual relations in connection with the operations of the casinos authorized to be conducted under the franchise. Further, even in *arguendo* that PAGCOR is no longer exempt from income tax in accordance with the pronouncement of the Supreme Court in the case of *Philippine Amusement and Gaming Corporation (PAGCOR) v. The Bureau of Internal Revenue*,[12] the said ruling should be

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[10] *Rollo*, pp. 113-114.
[11] Consolidating and Amending Presidential Decree Nos. 1067-a, 1067-b, 1067-c, 1399 and 1632, Relative to the Franchise and Powers of the Philippine Amusement and Gaming Corporation (PAGCOR) dated July 11, 1983.
[12] G.R. No. 172087, March 15, 2011, 645 SCRA 338.

applied prospectively, considering that it establishes a new doctrinal interpretation of the PAGCOR's Charter. Furthermore, in the case of *Abakada Guro Party List v. Honourable Secretary Ermita, et al.*,[13] the issue therein is the constitutionality of Republic Act ("RA") No. 9337,[14] and not about the withdrawal of PAGCOR's exemption from income taxation.

Petitioner also claims that in the assailed Decision, the Court in Division has categorically ruled that it is only liable to the five percent (5%) gross income tax as a duly registered enterprise in Poro Point Special Economic and Freeport Zone ("PPSEFZ"); considering that from the said five percent (5%), only three percent (3%) is payable to the national government, while the remaining two percent (2%) is payable to the local government, thus, it posits that respondent can only collect up to the extent of three percent (3%) on its gross income for the taxable year 2006. In addition, it reiterates that the twenty five percent (25%) franchise fee, which includes as well the five percent (5%) income tax imposed on its gross revenues, should be considered and applied against its deficiency income tax, if any.

Petitioner still insists on the following: (a) that professional fees in the amounts of ₱795,000.00 and ₱216,223.38 respectively payable to Punongbayan & Araullo ("P&A"), and Fortun Narvasa Salazar Law ("Fortun Narvasa") are not subject to expanded withholding tax; (b) that rental payments to Poro Point Management Corporation ("PPMC") is not subject to expanded withholding tax; and (c) that payments for management fees made for services rendered outside the Philippines is not subject to expanded withholding tax.

Finally, petitioner argues that the imposition of twenty five percent (25%) surcharge pursuant to Section 248 of the 1997 National Internal Revenue Code ("NIRC"), as amended,[15] is not warranted under the present case; hence, the same is void.

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[13] G.R. No. 168461, September 1, 2005, 469 SCRA 2.
[14] An Act Amending Sections 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 and 288 of the National Internal Revenue Code of 1997, as Amended, and for Other Purposes.
[15] SECTION 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:

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

Respondent's Counter-Arguments

On the other hand, respondent counters that with the enactment of RA No. 9337, Section 27(C) of the 1997 NIRC, as amended,[16] was effectively amended by excluding PAGCOR from the enumeration of GOCCs that are exempt from payment of corporate income tax.

Respondent likewise points out that Department of Finance Order No. 3-08 dated February 13, 2008 took effect only after fifteen (15) days after its publication, while the subject period of assessment covers the year 2006; thus, the Implementing Rules of Republic Act ("RA") No. 7227,[17] governs the manner of collection of the five percent (5%) income tax, which is payable to the national government. Further, she argues that petitioner failed to present any evidence to prove its allegation that the five percent (5%) gross income tax had been paid to PAGCOR, which in turn has been remitted to the national government.

Respondent maintains as well that petitioner is liable for deficiency expanded withholding tax in the total amount of ₱3,984,845.23 for failure to withhold on payments made for outside services, rentals, legal and professional fees, marketing and promotions, directors fees and management fees for the taxable year 2006.

Lastly, respondent argues that with the factual milieu present in this case, the imposition of the twenty five (25%) percent surcharge is in accordance with Section 248 of the 1997 NIRC, as amended, in relation to Revenue Regulations No. 12-99.[18]

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[16] SECTION 27. *Rates of Income Tax on Domestic Corporations.* –

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(C) *Government-owned or Controlled Corporations, Agencies or Instrumentalities.* – The provisions of existing special or general laws to the contrary notwithstanding, all corporations, agencies, or instrumentalities owned or controlled by the Government, except the Government Service Insurance System (GSIS), the Social Security System (SSS), the Philippine Health Insurance Corporation (PHIC), the Philippine Charity Sweepstakes Office (PCSO) and the Philippine Amusement and Gaming Corporation (PAGCOR), shall pay such rate of tax upon their taxable income as are imposed by this Section upon corporations or associations engaged in a similar business, industry, or activity.

[17] An Act Accelerating the Conversion of Military Reservations Into Other Productive Uses, Creating the Bases Conversion and Development Authority for the Purpose, Providing Funds Therefor and For Other Purposes, dated March 13, 1992.

[18] Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extra-Judicial Settlement of a Taxpayer's Criminal Violation of the Code Through Payment of a Suggested Compromise Penalty, dated September 6, 1999.

The Ruling of the Court En Banc

The Court *En Banc* finds the Petition for Review unmeritorious.

First Issue. In the assailed Decision, the Court in Division ruled on petitioner's liability for deficiency income tax for the taxable year 2006, as follows:

> "The issue on whether PAGCOR is still exempt from payment of income tax is not novel. The Supreme Court has already ruled in the case of *Abakada Guro Party List vs. Honourable Secretary Ermita, et al., GR No. 168056, September 1, 2005,* that the Philippine Amusement and Gaming Corporation is not exempt from income taxes anymore.
>
> More direct and firm was the pronouncement by the Supreme Court of the removal of PAGCOR's exemption in the more recent case of *Philippine Amusement and Gaming Corporation (PAGCOR) vs. The Bureau of Internal Revenue, represented herein by Hon. Jose Mario Buñag, GR No. 172087, March 15, 2011* (PAGCOR case), wherein it was emphasized that with the passage of Republic Act (RA) No. 9337, PAGCOR is no longer exempt from corporate income tax. Pertinent to quote the disquisition of the Supreme Court in the PAGCOR case, to wit:
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> xxx xxx xxx
>
> It is very clear in the foregoing pronounced PAGCOR case that PAGCOR's exemption was already eliminated, hence, it is now subject to income tax. Thus, petitioner, as the licensee or contractee of PAGCOR, cannot rely with the exemption of PAGCOR to renege on its obligation to pay the proper income tax."[19]

The Court *En Banc* finding the above discussions in order, thus, affirms that petitioner is indeed liable for basic deficiency income tax in the amount of ₱7,584,170.25 for the taxable year 2006.

Second Issue. In addressing that the ruling in the case of *Philippine Amusement and Gaming Corporation (PAGCOR) v. The Bureau of Internal*

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[19] *Rollo*, pp. 170-176. Citations omitted.

Revenue,[20] should be applied prospectively, the Court *En Banc* finds the case of *Cemco Holdings, Inc., v. National Life Insurance Company of the Philippines, Inc.*,[21] instructive:

> "While a judicial interpretation becomes a part of the law as of the date that law was originally passed, this is subject to the qualification that when a doctrine of this Court is overruled and a different view is adopted, and more so when there is a reversal thereof, the new doctrine should be applied prospectively and should not apply to parties who relied on the old doctrine and acted in good faith. To hold otherwise would be to deprive the law of its quality of fairness and justice then, if there is no recognition of what had transpired prior to such adjudication.
>
> It is apparent that private respondent misconceived the import of the ruling. The decision in Columbia Pictures does not mean that if a new rule is laid down in a case, it should not be applied in that case but that said rule should apply prospectively to cases arising afterwards. Private respondent's view of the principle of prospective application of new judicial doctrines would turn the judicial function into a mere academic exercise with the result that the doctrine laid down would be no more than a dictum and would deprive the holding in the case of any force.
>
> Indeed, when the Court formulated the Wenphil doctrine, which we reversed in this case, the Court did not defer application of the rule laid down imposing a fine on the employer for failure to give notice in a case of dismissal for cause. To the contrary, the new rule was applied right then and there. ."

Bearing in mind that the Supreme Court's pronouncement in the PAGCOR's case merely establishes the contemporaneous legislative intent that the interpreted law carried into effect, the same constitutes a part of the law as of the date it was originally passed;[22] thus, petitioner's argument has no leg to stand on.

Third Issue. In the assailed Resolution, the Court in Division has sufficiently ruled on the same issue considering that it is a mere rehash of the arguments made in its Motion for Reconsideration, to quote:

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[20] *Supra*, note 12.
[21] G.R. No. 171815, August 7, 2007, 529 SCRA 355, *citing Serrano v. NLRC, 387 Phil 345 (2000)*.
[22] Eagle Realty *v.* Republic of the Philippines, G.R. No. 151424, July 31, 2009, 594 SCRA 555.

"As correctly raised in its Motion for Reconsideration, petitioner is entitled to enjoy the rights, privileges, and benefits established under Proclamation No. 216, in relation to RA 7227, known as the Bases Conversion and Development Act.

Section 5 of Proclamation No. 216 provides:

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On the other hand, Section 12(c) of RA 7227 states:

xxx xxx xxx

However, the petitioner is incorrect in arguing that Department of Finance ('DOF') Order No. 3-08 dated February 13, 2008 should govern the manner of collection of the 5% income tax. The subject matter of this case is taxable year 2006. Hence, the said DOF Order dated February 13, 2008 is not applicable since the same shall only take effect fifteen (15)-days after its publication in two (2) newspapers of general circulation.

Instead, Section 58 of the Implementing Rules and Regulations of RA 7227 governs the manner of collection of the 5% income tax. The pertinent portion of the said IRR states:

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Therefore, petitioner is liable to pay five percent (5%) of its gross income to the national government subject to the abovementioned condition provided in the IRR of RA 7227."[23]

Fourth Issue. The Court *En Banc* agrees with the Court in Division when it ruled that:

"The assessment by the respondent is based on a 5% computation, not on the regular rate of 35% basic income tax computation. The 5% computation by the respondent clearly recognizes the privilege of the petitioner as a duly registered enterprise in the PPSEFZ.

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[23] *Supra*, note 3; *Rollo*, pp. 195-196. Citations omitted.

The Court, further, does not agree with the argument of petitioner that its payment of the 25% license fee/gross gaming revenue is already inclusive of the 5% income tax imposed on gross revenues. The 25% license fee/gross gaming revenue paid by petitioner is different and distinct from the income tax to which petitioner is being assessed. The 25% gross gaming revenue is being paid by virtue of the License entered into by petitioner with PAGCOR. It is based on the aggregate gross gaming revenue of the Fiesta Casino. On the other hand, 5% income tax is based on the total gross revenues of the petitioner regardless from where it is obtained and even if not specifically originating from the Fiesta Casino. Thus, the Court is not convinced that the 25% license fee/gross gaming tax is inclusive of the 5% income tax as there was no substantial evidence nor argument presented by petitioner to bolster the same."[24]

Thus, in the absence of any evidence to prove petitioner's claim, the Court *En Banc* has no recourse but to affirm the assessment made by respondent.

Fifth Issue. Petitioner raised to the Court *En Banc*'s consideration the deficiency Expanded Withholding Tax on the following payments: (a) professional fees made to general professional partnerships; (b) rental payments to PPMC; and (c) management fees for services rendered outside the Philippines. And after due consideration, the Court *En Banc* sees no reason to depart from the findings made by the Court in Division when it ruled as follows:

*"**B. Expanded Withholding Tax on Rent***

xxx xxx xxx

Section 2.57.4 of RR No. 2-98, as amended, prescribes the time of withholding of the subject EWT as follows:

xxx xxx xxx

Accordingly, petitioner is required to withhold EWT on its rental when it is either paid, becomes payable or was accrued or claimed as expense for income tax purposes, whichever comes first.

[24] *Rollo*, pp. 178-179. Citations omitted.

The Deferred Rent Expense of ₱14,201,733.00 was not yet paid or payable in 2006 but was reported in petitioner's audited financial statements for financial statement purposes to comply with PAS No. 17. Moreover, it appears that petitioner did not accrue or claimed the amount of ₱14,201,733.00 as deductible expense for income tax purposes. Thus, pursuant to Section 2.57.4 of RR No. 2-98, petitioner is not mandated to withhold 5% EWT on the Deferred Rent of ₱14,201,733.00. Consequently, said amount of ₱14,201,733.00 should be deducted from the total tax base of ₱23,622,249.00 reducing the basic deficiency EWT on rent to ₱424,315.57, computed as follows:

xxx xxx xxx

C. Expanded Withholding Tax on Legal and Professional Fees

xxx xxx xxx

Indeed, income payments made to professional partnerships as juridical persons are exempt from income tax *vis-à-vis* the expanded withholding tax. The partners of the GPPs are the ones liable, in their individual capacity, for the payment of income tax pursuant to Section 26 of the NIRC of 1997. This was elucidated by the Supreme Court in the case of *Rufino R. Tan, et al. vs. Ramon R. del Rosario Jr., as Secretary of Finance and Jose U. Ong, as Commissioner of Internal Revenue*, to wit:

xxx xxx xxx

Petitioner submitted Certificates of Corporate Filing/Information issued by the Securities and Exchange Commission in order to prove that P&A and Fortun Narvasa are GPPs.

In support of the professional fees paid to Fortun Narvasa, petitioner presented its 'Transaction Reprint Journal' showing the amount of ₱216,223.38 as legal fees due to Fortun Narvasa and 'Manual Payments Reprint Journal' showing that the amount of ₱216,223.38 was debited to 'Trade Payables' and credited to 'Cash.'

However, the Court finds the said documents insufficient to prove actual payment of the amount of ₱216,223.38 to Fortun Narvasa. Petitioner should have presented billing statements, invoices or official receipts issued by Fortun Narvasa.

As regards the accruals and/or payments made to P&A, petitioner submitted a print-out of its 'Computer Checks Posting

Journal,' P&A official receipts, P&A billing statements, and Reconciliation of Audit Fee for the year ending December 31, 2006.

A perusal of Bill No. 128026 issued by P&A to petitioner covering the audit of petitioner's 2006 financial statements shows that the agreed audit fee for the year 2006 amounted to ₱400,000.00 and a monthly retainer fee of ₱15,000.00 for the months of October, November and December 2006. Thus, audit fees due to P&A for the year 2006 amounted to ₱445,000.00.

In sum, the basic deficiency EWT on legal and professional fees should be adjusted to ₱693,145.33, computed as follows:

xxx xxx xxx

D. Expanded Withholding Tax on Management Fee

xxx xxx xxx

Section 23(F) of the NIRC of 1997, as amended, in relation to Section 42(A) of the same Code, states that a foreign corporation, whether engaged or not in trade or business in the Philippines, is taxable only on income derived from sources within the Philippines.

For the Court to clearly establish non-liability of the petitioner, It finds support to the 'Source of Income' doctrine. In the case of *CIR vs. Baier-Nickel, GR No. 153793, August 29, 2006,* the 'source of income' was explained by the Supreme Court, to wit:

xxx xxx xxx

Analyzing the evidence presented by petitioner, the Court is not convinced that the services were indeed performed outside the Philippines. While TRI's office is not in the Philippines, the actual services can actually be performed here in the Philippines, considering that the subject of the service, which is the Casino, is actually located in the Philippines. The actual performance of the services is important for the Court to determine.

After scrutiny of the records of the case, it appears that petitioner failed to discharge the burden of proving that the performance of the services was done outside the Philippines and exempt from the application of income tax. Thus, the Court finds petitioner liable for

EWT on Management Fees in the amount of ₱1,979,199.86 as assessed by respondent."[25]

Sixth Issue. Lastly, the Court *En Banc* quotes with approval the disquisitions made in the assailed Resolution regarding the imposition of the twenty five percent (25%) surcharge, to quote:

"With respect to the argument of petitioner that the 25% surcharge imposed by this Court should be cancelled and withdrawn, Section 248(A)(3) of the National Internal Revenue Code provides:

xxx xxx xxx

Petitioner argues that surcharge for late payment is only imposed if the deficiency income tax assessment is not paid by the deadline for payment of the assessment and that the assessment has already become final and collectible.

The lone provision where the 'requirement' that the assessment has already become final and collectible is Section 5.5 of Revenue Regulations No. 12-99 (*Implements the provisions of the National Internal Revenue Code of 1997 governing the rules on assessment of national internal revenue taxes, fees and charges*). However, the said provision is merely a regulation created for the sole and limited purpose of implementing a very exact law. Well-settled is the legal principle that administrative rules and regulations cannot expand the letter and spirit of the law they seek to enforce. Such rules and regulations should be confined and limited by the power conferred by the legislature. In case of conflict between the basic law and a rule or regulation issued to implement said law, the law prevails for the reason that the regulation or rule issued to implement a law cannot go beyond the terms and provisions of the latter. After all, a mere administrative issuance, like a BIR regulation, cannot amend the law. The courts will not countenance one that overrides the statute it seeks to apply and implement.

Therefore, since Section 248(A)(3) does not require that the assessment be final and collectible, the 25% surcharge imposed by this Court on deficiency income tax and EWT is proper.

In the case of *Dr. Felisa L. Vda De San Agustin vs. CIR*, the Supreme Court ruled that the delay in the payment of the deficiency

[25] *Rollo*, pp. 181-188. Citations omitted.

tax within the time prescribed for its payment in the notice of assessment justifies the imposition of a 25% surcharge in consonance with Section 248 (A) (3) of the Tax Code."[26]

In sum, the Court *En Banc* finds no compelling reason to warrant a reversal of the assailed Decision and Resolution.

WHEREFORE, the Petition for Review is hereby **DENIED.** Accordingly, the Decision dated July 18, 2012, and Resolution dated December 11, 2012, issued by the then First Division of the Court are hereby **AFFIRMED** *in toto.*

SO ORDERED.

LOVELL R. BAUTISTA
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

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

Ma. Belen M. R. L.
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

[26] *Supra,* note 3; *Rollo,* pp. 197-198. Citations omitted.

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of this Court.

ROMAN G. DEL ROSARIO
Presiding Justice