REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

PNB GENERAL INSURERS COMPANY INC., *Petitioner,*	**C.T.A. E.B. NO. 304** **(C.T.A. CASE NO. 6751)**
	Present:
-versus-	ACOSTA, Presiding Justice CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, and PALANCA-ENRIQUEZ, JJ.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	**Promulgated:**
	SEP 12 2008 GrApolinario 3:10 p.m.

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DECISION

PALANCA-ENRIQUEZ, J.:

THE CASE

This is a Petition for Review filed by Philippine General Insurers Company, Inc. (hereafter "petitioner") under *Section 11 of RA 9282 (An Act Expanding the Jurisdiction of the Court of Tax Appeals)*, in relation to *Rule 43* of the *1997 Rules of Civil Procedure, as amended,* praying for the reversal of the Decision dated March 16, 2007 and Resolution dated

July 9, 2007 rendered by the Second Division of this Court in C.T.A. Case No. 6751, the respective dispositive portions of which read, as follows:

> "WHEREFORE, the subject Petition for Review is hereby DISMISSED for lack of merit. The assailed Decision of the respondent dated July 14, 2003 is hereby AFFIRMED. Accordingly, petitioner is ORDERED TO PAY respondent the amount of SIX HUNDRED THIRTY THREE THOUSAND TWO HUNDRED TEN PESOS and 30/100 (P633,210.30) representing deficiency DST surcharge for the taxable year 1995, plus 20% delinquency interest per annum from August 18, 2003 until such time the said amount is fully paid.
>
> **SO ORDERED.**"

> "**WHEREFORE,** petitioner's Motion for Reconsideration is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

THE FACTS

The facts, as culled from the records, are as follows:

Petitioner is a corporation duly organized and existing under the laws of the Republic of the Philippines, which is principally engaged in non-life insurance business, with office address at the 2nd Floor, PNB Financial Center, President Diosdado Macapagal Boulevard, Pasay City.

Respondent, on the other hand, is the head of the Bureau of Internal Revenue, the government entity tasked with the duties/functions of assessing and collecting all national internal revenue taxes, fees, and charges, and enforcement of all forfeitures, penalties and fines connected therewith, including the execution of judgments in all cases decided in her favor by this Court and the ordinary courts, where she can be served with court processes at the BIR Head Office, BIR Road, Quezon City.

Sometime in August 1996, petitioner received a copy of BIR First Tracer/Formal preliminary assessment notice demanding the payment of P27,843,350.66, representing alleged DST discrepancy, inclusive of 25% surcharge.

Petitioner responded to said preliminary assessment through a Letter dated August 27, 1996, explaining that it has remitted the total amount of P25,907,303.34 under the metered and direct payment methods. In response to said letter, the BIR scheduled a formal dialogue to hear petitioner's explanation on the matter. As a result of such dialogue, Preliminary Assessment Notices dated March 4 and 19, 1997 were issued by the respondent finding petitioner not liable to any basic

DST, but assessed the latter only the amount of P633,210.33, representing surcharge for late payment of DST for taxable year 1995.

In its Application for Cancellation of VAT Registration of Petitioner dated February 28, 1997, duly received by BIR RDO-Makati City and BIR RDO-Pasay City on March 6, 1997 and April 10, 1997, respectively, petitioner effectively notified respondent of the change of its business address from Makati City to Pasay City.

On August 15, 1997, an Assessment Notice was issued by the BIR against the petitioner for the amount of P633,210.33, representing the 25% surcharge for late payment of DST for taxable year 1995. Thereafter, on November 24, 1997, a Collection Letter was sent by the BIR to the old address (Makati City) of petitioner.

Another Collection Letter dated October 12, 1998, together with the information regarding the Formal Notice of Assessment dated August 15, 1997, was again sent by the respondent to the old address of the petitioner, which petitioner received on January 14, 1999 only.

Petitioner filed a Request for Reconsideration (tantamount to an Assessment Protest) dated February 8, 1999, seeking reconsideration of the amount being assessed for P633,210.33 for penalty/surcharge, due to alleged late payment of documentary stamp tax in 1995. Nonetheless, a Collection Letter dated January 28, 2001 was again sent by the respondent to the petitioner, duly received by the latter, reiterating the previous demand for payment of surcharge.

On March 15, 2001, petitioner received a Final Notice Before Seizure dated March 8, 2001 and, subsequently, a Warrant of Distraint and/or Levy dated June 18, 2001 was issued by the respondent against the petitioner, duly received by the latter on June 20, 2001. On July 4, 2001, petitioner, through its Vice-President and Comptroller Ernaldo S. Yambot, requested to pay by compromise settlement 40% of the surcharge or the equivalent amount of P253,284.12. However, on July 13, 2001, petitioner, again through its VP and Comptroller wrote a letter to the respondent stating that: (1) the assessment/warrant would no longer be valid and enforceable considering that the BIR has already lost its right to collect the amount covered by the assessment due to its failure to enforce collection within the prescriptive period; and (2) it is effectively withdrawing its previous offer of compromise.

Respondent, through Ms. Eleanor N. Litao, Chief of Large Taxpayer Collection and Enforcement Division, insisted on the

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assessment alleging that petitioner failed to notify the BIR of the change of its address and stating that "Section 223 of the Tax Code of 1997, which provides that the running of statute of limitations may be suspended when the taxpayer cannot be located in the address given by him in the return filed upon which a tax is being assessed or collected, is applicable to the instant case". On the other hand, petitioner refuted said averment of respondent thru a letter dated September 7, 2001.

On July 14, 2001, respondent promulgated a Decision denying petitioner's protest, a copy of which was received by petitioner on July 18, 2003.

On August 18, 2003, petitioner filed a Petition for Review before this Court, docketed as C.T.A. Case No. 6751.

In her Answer, the Commissioner of Internal Revenue alleged by way of special and affirmative defenses that since there is no law or regulation requiring the filing of a return for DST, and none has been pointed to by petitioner, and stamp taxes are national internal revenue taxes, the right of the government to assess or collect the documentary and science stamp taxes in this case has not therefore prescribed; that the assessment has long become final and executory, hence, this Court is devoid of jurisdiction to entertain the instant Petition for Review; it is settled that the 30 day period to appeal to this Court prescribed under Section 11 of RA 1125, as amended, is a jurisdictional requirement; issues and defenses not raised in the administrative level cannot be raised for the first time on appeal; that assessments are prima facie presumed correct and made in good faith; and failure to present proof of error in the assessment will justify judicial affirmation of said assessment.

After trial on the merits, on March 16, 2007, the Second Division of this Court rendered the assailed Decision dismissing the Petition for Review for lack of merit.

On May 4, 2007, petitioner filed a Motion for Reconsideration, which was denied by the Second Division in a Resolution dated July 9, 2007.

On August 17, 2007, petitioner filed the instant Petition for Review before this Court En Banc raising the following:

ISSUES

I

THE HONORABLE SECOND DIVISION OF THE COURT OF TAX APPEALS ERRED IN RULING THAT THE RESPONDENT'S RIGHT TO COLLECT HAS NOT YET PRESCRIBED.

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II

THE HONORABLE SECOND DIVISION OF THE COURT OF TAX APPEALS GROSSLY ERRED IN HOLDING THAT EQUITABLE ESTOPPEL DOES NOT APPLY IN THE INSTANT CASE.

On September 4, 2007, without necessarily giving due course to the petition, We required the respondent to file her comment, not a motion to dismiss, within ten (10) days from notice.

On October 2, 2007, respondent filed her comment.

In a Resolution dated October 18, 2007, the Court en banc required both parties to file their simultaneous memoranda, within thirty (30) days from notice. Both parties having complied thereto, the case was deemed submitted for decision on December 4, 2007.

On October 10, 2007, this case was raffled for study and report to Associate Justice Caesar A. Casanova. During the deliberation of this case, Justice Casanova expressed his opinion that the assailed Decision and Resolution of the Second Division of this Court should be reversed, to which Presiding Justice Ernesto D. Acosta and Associate Justice Lovell R. Bautista concurred. However, Associate Justices Juanito C.

Castañeda, Jr., Erlinda P. Uy, and Olga Palanca-Enriquez voted to affirm the assailed Decision and Resolution.

Section 3 of Rule 2 of the Revised Rules of the Court of Tax Appeals provides:

> "SEC. 3. Court en banc; quorum and voting. — The presiding justice or, in his absence, the most senior justice in attendance shall preside over the sessions of the Court en banc. The attendance of four justices of the Court shall constitute a quorum for its session en banc. The presence at the deliberation and affirmative vote of four justices of the Court en banc shall be necessary for the rendition of a decision or resolution on any case or matter submitted for its consideration. Where the necessary majority vote cannot be had, the petition shall be dismissed; in appealed cases, the judgment or order appealed from shall stand affirmed; and on all incidental matters, the petition or motion shall be denied.
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> No decision of a Division of the Court may be reversed or modified except by the affirmative vote of four justices of the Court en banc acting on the case.
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> Interlocutory orders or resolutions shall be acted upon by majority vote of the justices present constituting a quorum."

Pursuant to the above provision, the affirmative vote of four justices of the Court *En Banc* shall be necessary for the rendition of a decision and that no decision of a Division of the Court may be reversed or modified except by the affirmative vote of four justices of the Court *En Banc* acting on the case. Where the necessary majority cannot be had, in appealed cases, the judgment appealed from shall stand affirmed.

Considering that the affirmative vote of four justices of the Court *En Banc* was not obtained in this case, the appealed decision shall stand affirmed. Accordingly, on July 4, 2008, the case was re-raffled and re-assigned to Associate Justice Olga Palanca Enriquez to write the majority opinion.

Hence, this decision.

THE COURT *EN BANC'S* RULING

We deny the petition.

First Issue on Prescription

Petitioner contends that respondent's right to collect had prescribed and that the subject assessment has not become final and executory. Respondent, according to petitioner, failed to take into account that the running of the prescriptive period has not been suspended by petitioner's "Request for Reconsideration" on February 8, 1999. Since the Assessment Notice was issued on August 15, 1997, respondent's right to assess would prescribe three years thereafter or on August 15, 2000, hence, the Warrant of Distraint or Levy issued on June 18, 2001 and received by petitioner on June 20, 2001, is no longer valid and enforceable on the ground of prescription.

Respondent, on the other hand, maintains that on the issue of prescription, there is a well-established rule that if there is no law or regulation requiring the filing of a return, the right of the government to assess or collect national internal revenue tax does not prescribe. Prior to 1998, there was no law or regulation requiring the filing of a return for DST, hence, there was no reckoning date from which we should start counting the prescriptive period within which to collect because there was no law or regulation requiring the filing of the return for DST. Further, respondent asserts that failure of petitioner to appeal the collection letters and the Final Notice Before Seizure renders the assessment final and executory.

We rule for the respondent.

Section 203 of the NIRC of 1977, as amended, provides:

> "**SEC. 203. Period of limitation upon assessment and collection.** – Except as provided in the succeeding section, internal revenue taxes shall be assessed within three years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That in a case where a return is filed beyond the period prescribed by law, the three-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day."

Corollary thereto, *Section 223* of the same Code provides:

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> "**SEC. 223. Exceptions as to period of limitation of assessment and collection of taxes.** – (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within ten (10) years after the discovery of the falsity, fraud, or omission: *Provided,* That, in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.
>
> (b) xxx.
>
> (c) Any internal revenue tax which has been assessed within the period of limitation above prescribed, may be collected by distraint or levy or by a proceeding in court within three (3) years following the assessment of the tax.
>
> xxx xxx"

Pursuant to the above provision, the law prescribed a period of three years from the date the return was actually filed or from the last date prescribed by law for the filing of such return, whichever comes later, within which the BIR may assess a national internal revenue tax. Thereafter, when the BIR validly issues the assessment within the three-year period, the law provided another three years after the assessment for the collection of the tax due thereon through the administrative process of distraint and/or levy or through judicial proceedings. The three-year period for collection of the assessed tax begins to run on the date the assessment notice has been released, mailed or sent by the BIR.

In the present case, petitioner is being assessed for deficiency DST for taxable year 1995. A careful reading of the *NIRC of 1977, as amended,* reveals that there is no specific provision which requires the

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filing of a DST return. The filing of DST returns was only required when the *NIRC of 1997, as amended*, was enacted and took effect on January 1, 1998, particularly *Section 200 (A)* thereof. Prior to the effectivity of the *NIRC of 1997, as amended*, there was no similar provision to that effect. Hence, there can be no reckoning point to count the prescriptive period to assess and collect deficiency DST from the taxpayer.

In this regard, it is well-settled that if there is no law or regulation requiring the filing of a return, the right of the Government to assess or collect any internal revenue tax does not prescribe. Thus, in *Commissioner of Internal Revenue vs. Ayala Securities Corporation, 101 SCRA 231,* the Supreme Court ruled:

> "The Court is persuaded by the fundamental principle invoked by petitioner that limitations upon the right of the government to assess and collect taxes will not be presumed in the absence of a clear legislation to the contrary and where the government has not by express statutory provision provided a limitation upon its right to assess unpaid taxes, such right is imprescriptible."

Applying the above ruling of the Supreme Court, in the case of *Philippine American Life Insurance Company vs. Commissioner of Internal Revenue, C.T.A. Case No. 4072, dated July 7, 1989*, involving

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the same issue of prescription of documentary and science stamp taxes, this Court ruled:

> "On the question of prescription, the rule now established is that if there is no law or regulation requiring the filing of a return, the right of the Government to assess or collect national internal revenue tax does not prescribe. Limitations upon the right of the government to assess and collect taxes will not be presumed in the absence of clear legislation to the contrary and where the government has not by express statutory provision provided a limitation upon its right to assess unpaid taxes, such right is imprescriptible (Commissioner of Internal Revenue vs. Ayala Securities Corporation, L-29485, November 21, 1980, 101 SCRA 231). Since there is no law or regulation requiring the filing of a return for documentary stamp tax, and none has been pointed to by petitioner, and stamp taxes are national internal revenue taxes, the right of the Government to assess or collect documentary stamp taxes involved in this case does not therefore prescribe."

For all the foregoing, We sustain the ruling of the Second Division that the right of the government to assess and collect deficiency DST during the effectivity of the *NIRC of 1977, as amended*, is imprescriptible. In the absence of a clear provision of the law, We cannot presume any limitation on the right of the government to assess or collect any revenue tax, for taxes are the lifeblood of the government. The existence of a time limit beyond which the government may recover unpaid taxes is purely dependent upon such express statutory provision.

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Second Issue on Equitable Estoppel

We now proceed to the determination of the applicability of the principle of equitable estoppel against the government.

Petitioner contends that the Doctrine of Equitable Estoppel applies against the respondent since petitioner has been led by the BIR to adopt the practice of paying the Documentary Stamp Tax by way of monthly lump sum through Direct Payment and no objection as to the proper procedure of payment was ever raised by respondent. Thus, petitioner maintains that the BIR is now estopped from alleging that it was delayed in the payment of DST for December 1995 and in imposing the 25% penalty or surcharge.

On the other hand, respondent counter-argues that the doctrine of equitable estoppel is not applicable to the instant case.

Petitioner's contention is devoid of merit.

Settled is the rule that the State cannot be put in estoppel by the mistakes or errors of its officials or agents. Even granting that the BIR caused the acceptance of remittance and payment of the DST in lump sum and on a monthly basis, still, the principle of estoppel will not apply against it. The BIR is an instrumentality of the Government, which functions as an administrative body. Its officers are public officials. The general rule is that the Government is not estopped by errors, mistakes or omissions of its officials or agents *(GSIS vs. Court of Appeals, 218 SCRA 234).*

As aptly ruled by the Second Division:

> "Sections 3 and 4 of Revenue Regulations (RR) No. 9-94, implementing Section 173 of the NIRC of 1977, as amended, clearly provide that the documentary stamp tax shall be paid at the time the act is done or transaction had, i.e., at the same time the document was executed, thus:
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> "**SEC. 4. Time and Manner of Payment of Documentary Stamp Tax.** — x x x
>
> If, however, the amount of the documentary stamp tax due on the taxable document is ten pesos (P10.00) or more, **the documentary stamp tax shall be paid by the taxpayer at the time the act is done or transaction had**, x x x" *(Emphasis Ours)*
>
> "**SEC. 3. Definition of Terms**. — For purposes of these Regulations, the following terms shall mean:
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> xxx xxx xxx
>
> (i) 'At the same time such act is done or transaction had' — means **on the same date the document was executed**, i.e., made, signed, issued, accepted or transferred." *(Emphasis Ours)*
>
> Clearly, the abovequoted sections are the appropriate and legal mode and manner of payment of DST. Failure to comply thereto would constitute failure to pay the tax within the time prescribed for its payment; and therefore, subject to civil penalties and interests provided for in Sections 248 and 249 of the NIRC of 1977, as amended. In the case at bench, petitioner has admitted that it followed a different manner of payment of its DST for taxable year 1995. Unfortunately, the alleged prevailing practice is inconsistent with the abovementioned provisions of law.
>
> "[I]t is axiomatic that the State can never be in estoppel, and this is particularly true in matters involving taxation. The errors of certain administrative officers should never be allowed to jeopardize the

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> government's financial position. Hence, notwithstanding respondent's alleged acceptance of petitioner's practice of remitting its DST payments, the same cannot justify its legality. This ruling is in accord with the legal maxim: "*dura lex sed lex*" or "the law may be harsh, but it is still the law", which should be strictly observed at all times."

Respondent is never estopped from questioning the wrong manner of payment of petitioner's DST. Thus, failure to comply with the prescribed manner of payment constitutes failure to pay the tax, within the prescribed period for payment. Such late payment gives rise to applicable civil penalties and interests, pursuant to *Sections 248* and *249* of the *NIRC of 1977, as amended.* And in this case, petitioner's remittance and payment of its DST on a monthly basis, instead of paying the appropriate DST upon the execution of the document, gave rise to the imposition of surcharge for late payment of DST for taxable year 1995, which is the subject of the present petition.

In sum, respondent's right to assess and collect the deficiency DST for taxable year 1995 has not yet prescribed. As a result thereof, the surcharge imposed for late payment of deficiency DST can still be recovered by the government, pursuant to *Sections 248* and *249* of the *NIRC of 1977, as amended.* abl

Finding no reversible error, We affirm the assailed Decision dated March 16, 2007, and Resolution dated July 9, 2007 of the Second Division of this Court.

WHEREFORE, premises considered, the present Petition for Review is hereby **DENIED DUE COURSE,** and, accordingly **DISMISSED** for lack of merit.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

See Concurring & Dissenting
ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

See Concurring and Dissenting Opinion
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

See Concurring and Dissenting Opinion
CAESAR A. CASANOVA
Associate Justice

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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 the Court.

ERNESTO D. ACOSTA
Presiding Justice

Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

PNB GENERAL INSURERS COMPANY, INC.,
Petitioner,

E.B. CASE NO. 304
(CTA Case No. 6751)

- versus -

Present:

ACOSTA, PJ,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, *and*
PALANCA-ENRIQUEZ, JJ.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
SEP 1 2 2008 ADApolinario
3:10 p.m.

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CONCURRING AND DISSENTING OPINION

With due respect to my esteemed colleagues, I am hereby rendering this concurring and dissenting opinion to be discussed in detail as follows:

Petitioner-PNB Gen submits the following assigned errors in support of the instant petition:

I. THE HONORABLE *SECOND DIVISION* OF THE COURT OF TAX APPEALS ERRED IN RULING THAT THE RESPONDENT'S RIGHT TO COLLECT HAS NOT YET PRESCRIBED.

II. THE HONORABLE *SECOND DIVISION* OF THE COURT OF TAX APPEALS GROSSLY ERRED IN HOLDING THAT EQUITABLE ESTOPPEL DOES NOT APPLY IN THE INSTANT CASE.

PNB Gen argued that "[f]rom the inception of this legal controversy, herein petitioner has vigorously asserted that the respondent's right to collect had prescribed already and that the subject assessment has not become final and executory. Respondent Commissioner failed to take into account that the running of the prescriptive period/statute of limitation has not been tolled or suspended by the petitioner's "Request for Reconsideration" dated February 8, 1999 (Exhibit "M"). It is crystal clear that since the Assessment Notice was issued on August 15, 1997, the right to collect of respondent Commissioner pursuant to Section 223(c) of the Tax Code of 1977, as amended, would prescribe three years thereafter or specifically on August 15, 2000. Considering that the Warrant of Distraint and/or Levy was issued only by the BIR on June 18, 2001 and received by the petitioner on June 20, 2001, the same is no longer valid and enforceable on the ground of prescription when the same was issued."[1]

It further argued that "it should be strongly emphasized that the 25% DST surcharge should not have been imposed because the DST differential payment was approved and accepted by the BIR by virtue of ATAP No. 2839583 dated January 23, 1996 (Exhibit "C") and the payment was made based on the existing practice of paying the DST on the 20th day of the following month or on a date thereafter which is not beyond the last day of the month. BIR's actuation should be taken or interpreted against the herein respondent and construed as a manifestation of bad faith. In the foregoing situation, EQUITABLE ESTOPPEL applies and it must be interpreted in favor of the taxpayer and against the respondent Commissioner."[2]

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[1] *Page 16 of Petition for Review, E.B. Rollo, p. 24.*
[2] *Page 25 of Petitioner's Memorandum, E.B. Rollo, p. 124.*

Respondent counter argued that "on the issue of prescription, well-established is the rule that if there is no law or regulation requiring the filing of a return, the right of the Government to assess or **collect** national internal revenue tax does not prescribe. Limitations upon the right of the government to assess and collect taxes will not be presumed in the absence of clear legislation to the contrary and where the government has not by express statutory provision provided a limitation upon its right to assess unpaid taxes, such right is imprescriptible."[3] *(Underscoring and Emphasis Supplied)*

Respondent also added that the *Second Division* did not err in holding that *equitable estoppel* does not apply in the instant case because the ruling was "in accord with the legal maxim *dura lex sed lex* or the law may be harsh but it is still the law. Sections 3 and 4 of Revenue Regulations No. 9-94 implementing Section 173 of the Tax Code of 1977, as amended, and the relevant section of the Tax Code of 1986, as amended, clearly provide that the documentary stamp tax shall be paid at the time the act is done or transaction had, i.e. at the same time the document was executed."[4]

It is of my opinion that petitioner-PNB Gen's Petition for Review is meritorious.

The instant case is similar to a recent Supreme Court case[5] with regard to the issue on assessment of DST and the prescriptive period on the collection of the same under the 1977 NIRC. In said case, the Highest Tribunal ruled and applied the prescriptive periods incorporated in the 1977 NIRC in the assessment and collection of DST for the taxable year 1985. However, such pronouncement was not the one used as legal basis by the CTA Second Division, when it ruled that the rights of the BIR in assessing and collecting deficiency DST are

[3] *Page 2 of Respondent's Comment, E.B. Rollo, p. 87.*
[4] *Page 21 of Respondent's Memorandum, E.B. Rollo, p. 151.*
[5] Bank of the Philippine Islands vs. Commissioner of Internal Revenue, G.R. No. 139736, October 17, 2005.

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imprescriptible since there was no specific provision under the 1977 NIRC, as amended, requiring the filing of documentary stamp tax returns.

We hereunder quote the pertinent portion of the said Supreme Court's Decision, to wit:

> "*The efforts of respondent Commissioner to collect on Assessment No. FAS-5-85-89-002054 were already barred by prescription.*
>
> Anent the question of prescription, this Court disagrees in the Decisions of the CTA and the Court of Appeals, and herein determines the statute of limitations on collection of the deficiency DST in Assessment No. FAS-5-85-89-002054 had already prescribed.
>
> The period for the BIR to assess and collect an internal revenue tax is limited to three years by Section 203 of the Tax Code of 1977, as amended,[6] which provides that —
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>> SEC. 203. Period of limitation upon assessment and collection. — *Except as provided in the succeeding section, internal revenue taxes shall be assessed within three years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: Provided, That in a case where a return is filed beyond the period prescribed by law, the three-year period shall be counted from the day the return was filed. For the purposes of this section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.*[7]
>
> The three-year period of limitations on the assessment and collection of national internal revenue taxes set by Section 203 of the Tax Code of 1977, as amended, can be affected, adjusted, or suspended, in accordance with the following provisions of the same Code —
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>> SEC. 223. — Exceptions as to period of limitation of assessment and collection of taxes. — *(a) In the case of a*

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[6] *Batas Pambansa Blg. 700 (approved on 05 April 1984) amended the Tax Code of 1977 by shortening the period of limitations on assessment and collection of national internal revenue taxes from the original five years to three years. The shorter three-year prescriptive period shall apply to assessments made on or after 05 April 1984 covering taxable years beginning 01 January 1984.*

[7] *Now Section 203 of the Tax Code of 1997, as amended.*

false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within ten years after the discovery of the falsity, fraud, or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

(b) If before the expiration of the time prescribed in the preceding section for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.

(c) Any internal revenue tax which has been assessed within the period of limitation above-prescribed may be collected by distraint or levy or by a proceeding in court within three years following the assessment of the tax.

(d) Any internal revenue tax which has been assessed within the period agreed upon as provided in paragraph (b) hereinabove may be collected by distraint or levy or by a proceeding in court within the period agreed upon in writing before the expiration of the three-year period. The period so agreed upon may be extended by subsequent written agreements made before the expiration of the period previously agreed upon.

(e) Provided, however, That nothing in the immediately preceding section and paragraph (a) hereof shall be construed to authorize the examination and investigation or inquiry into any tax returns filed in accordance with the provisions of any tax amnesty law or decree.[8]

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[8] *Presently, Section 222 of the Tax Code of 1997, as amended, which reads —*

SEC. 222. — Exceptions as to period of limitation of assessment and collection of taxes. — (a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud, or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

> SEC. 224. Suspension of running of statute. — *The running of the statute of limitation provided in Section[s] 203 and 223 on the making of assessment and the beginning of distraint or levy or a proceeding in court for collection, in respect of any deficiency, shall be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or levy or a proceeding in court and for sixty days thereafter; when the taxpayer requests for a reinvestigation which is granted by the Commissioner; when the taxpayer cannot be located in the address given by him in the return filed upon which a tax is being assessed or collected: Provided, That, if the taxpayer informs the Commissioner of any change in address, the running of the statute of limitations will not be suspended; when the warrant of distraint and levy is duly served upon the taxpayer, his authorized representative, or a member of his household with sufficient discretion, and no property could be located; and when the taxpayer is out of the Philippines.*[9]

As enunciated in these statutory provisions, the BIR has three years, counted from the date of actual filing of the return or from the last date prescribed by law for the filing of such return, whichever comes later, to assess a national internal revenue tax or to begin a court proceeding for the collection thereof without an assessment. In case of a false or fraudulent return with intent to evade tax or the failure to file any return at all, the prescriptive period for assessment of the tax due shall be 10 years from discovery by the BIR of the falsity, fraud, or omission.

(b) If before the expiration of the time prescribed in Section [203] for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.

(c) Any internal revenue tax which has been assessed within the period of limitation as prescribed in paragraph (a) hereof may be collected by distraint or levy or by a proceeding in court within five (5) years following the assessment of the tax.

(d) Any internal revenue tax, which has been assessed within the period agreed upon as provided in paragraph (b) hereinabove, may be collected by distraint or levy or by a proceeding in court within the period agreed upon in writing before the expiration of the five (5)-year period. The period so agreed upon may be extended by subsequent written agreements made before the expiration of the period previously agreed upon.

(e) Provided, however, That nothing in the immediately preceding Section and paragraph (a) hereof shall be construed to authorize the examination and investigation or inquiry into any tax return filed in accordance with the provisions of any tax amnesty law or decree.

[9] *Reproduced as Section 223 of the Tax Code of 1997, as amended.*

> When the BIR validly issues an assessment, within either the three-year or ten-year period, whichever is appropriate, then the BIR has another three years[10] after the assessment within which to collect the national internal revenue tax due thereon by distraint, levy, and/or court proceeding. **The assessment of the tax is deemed made and the three-year period for collection of the assessed tax begins to run on the date the assessment notice had been released, mailed or sent by the BIR to the taxpayer**.[11]" (Underscoring and Emphasis Supplied)

In the aforementioned *BPI* case, the Supreme Court ruled that the BIR's right to collect from BPI the assessed deficiency DST had already prescribed because the Warrant of Distraint and/or Levy was issued beyond the three (3)-year prescriptive period provided for under the 1977 NIRC.

In the instant case, the CTA *Second Division* correctly ruled that considering that the subject matter in this case involves the assessment and collection of petitioner's DST surcharge for taxable year 1995, it is apropos to discuss the nature of surcharge as provided for in Section 248 of the NIRC of 1977, as amended.

Hence, We reiterate that "surcharge" is defined as an overcharge or exaction imposed by law as addition to the main tax required to be paid.[12] Being penalties for delinquencies, tax laws imposing said surcharge are intended to hasten tax payments by punishing evasions or neglect of duty in respect thereof. Thus, 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.[13] Therefore, surcharge can neither be condoned nor waived without any valid and legal basis.

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[10] *Now a five-year period, under Section 222(c) of the Tax Code of 1997, as amended, supra, note 17.*
[11] *Basilan Estates, Inc. v. Commissioner of Internal Revenue, 128 Phil 19 (1967).*
[12] *Hector S. de Leon, National Internal Revenue Code, 5th Ed., 1994, p. 664.*
[13] *Justice Jose C. Vitug and Judge Ernesto D. Acosta, Tax Law and Jurisprudence, 2nd Ed., 2000, p. 322; Jamora vs. Meer, 74 Phil. 22 (1942).*

In addition, the *Second Division* further properly stated that Section 247 of the same Code states that "[t]he 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**". (Emphasis supplied)

Here, there is no controversy on the timeliness of the issuance of the Assessment, only on the prescription of the period to collect the deficiency DST surcharge for the taxable year 1995 following its Assessment amounting to P633,210.30.

Borrowing the words of the Supreme Court in the above mentioned *BPI* case, We restate that the assessment of the tax is deemed made and the three (3)-year period for collection of the assessed tax begins to run on the date the assessment notice had been released, mailed or sent by the BIR to the taxpayer.

A scrutiny of the records of this case disclosed that respondent issued Assessment No. 02-017-95B-97-347 and its corresponding Assessment Notice on August 15, 1997[14] and mailed on August 25, 1997.[15]

The High Tribunal established the rule that "[w]hen the BIR validly issues an assessment, within either the three-year or ten-year period, whichever is appropriate, then the BIR has another three years after the assessment within which to collect the national internal revenue tax due thereon by distraint, levy, and/or court proceeding."

Hence, counting three (3) years from August 25, 1997, the later date which is the date of mailing, the BIR has until August 25, 2000 within which to collect from the PNB Gen by distraint, levy, and/or court proceeding.

In PNB Gen's case, despite of the facts that the BIR sent several Collection Letters[16] dated November 24, 1997, October 12, 1998 and January 28, 2001 as

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[14] *Exhibit "J", Division Rollo. p. 55.*
[15] *Exhibit "J-1", Division Rollo. p. 56.*

well as the Final Notice Before Seizure[17] dated March 8, 2001, it is only on *June 18, 2001* that the BIR issued the "Warrant of Distraint and/or Levy"[18]. Furthermore, We also noted that the same was allegedly received by PNB Gen on June 20, 2001.

Clearly, the "Warrant of Distraint and/or Levy", which is a summary method of collection, was issued beyond the three (3)-year prescriptive period that expired on August 25, 2000. Nor was there any mentioned court proceeding instituted to collect the tax assessed by the BIR.

In the same *BPI* case, the High Court stated the rationale and held that under Section 223(c) of the Tax Code of 1977, as amended, it is not essential that the Warrant of Distraint and/or Levy be fully executed so that it can suspend the running of the statute of limitations on the collection of the tax. It is enough that the proceedings have validly began or commenced and that their execution has not been suspended by reason of the voluntary desistance of the respondent BIR Commissioner. Existing jurisprudence establishes that distraint and levy proceedings are validly begun or commenced by the issuance of the Warrant *and* service thereof on the taxpayer.[19] It is only logical to require that the Warrant of Distraint and/or Levy be, at the very least, served upon the taxpayer in order to suspend the running of the prescriptive period for collection of an assessed tax, because it may only be upon the service of the Warrant that the taxpayer is informed of the denial by the BIR of any pending protest of the said taxpayer, and the resolute intention of the BIR to collect the tax assessed.

Therefore, based on the above discussions, the BIR's right to collect from PNB Gen has already prescribed. The Warrant of Distraint and/or Levy issued by the respondent is null and void due to prescription.

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[16] *Exhibits "K", "L" and "N", ibid.*
[17] *Exhibit "O", ibid.*
[18] *Exhibit "P", ibid.*
[19] *Republic v. Hizon, G.R. No. 130430, 13 December 1999, 320 SCRA 574; Advertising Associates, Inc. v. Court of Appeals, G.R. No. L-59758, 26 December 1984, 133 SCRA 765; Palanca, et al. v. Commissioner of Internal Revenue, 114 Phil 203 (1962).*

The case of *CIR vs. Ayala Securities Corporation, L-29485, November 21, 1980, (101 SCRA 231),* cited by the Second Division is inapplicable in the instant case. The *Ayala Securities* case covers prescription of assessment which by law is being counted from the filing of the return while the instant case covers prescription of collection which is counted three (3) years following the assessment of the tax (Sc. 223 of the 1977 Tax Code). So, if the issue in the instant case is prescription of assessment, reliance by the Second Division on the *Ayala Securities* case will be correct. Naturally, if there is no return required to be filed, the counting of the 3-year prescriptive period becomes indeterminate hence, imprescriptible. Such is not the case where the issue is prescription of collection which by law, whether under the 1977 or 1997 NIRC, is counted from assessment.

Considering that the right of the respondent BIR Commissioner to collect from petitioner PNB Gen the deficiency DST surcharge in Assessment No. 02-017-95B-97-347 had already prescribed, then there is no need discuss the second assignment of error.

WHEREFORE, based on the foregoing, I vote that the instant Petition for Review be **GRANTED**. The Decision of the *Second Division* of this Court in CTA Case No. 6751, dated March 16, 2007 which required petitioner PNB Gen to pay the amount of P633,210.30 as deficiency DST surcharge for the taxable year 1995, plus interest, and its Resolution dated July 9, 2007 as well as the Decision of respondent Commissioner dated July 14, 2003 be **REVERSED and SET ASIDE**. Accordingly, Assessment No. 02-017-95B-97-347 be ordered **CANCELLED**.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

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