REPUBLIC OF THE PHILIPPINES

Court of Tax Appeals

QUEZON CITY

En Banc

COMMISSIONER OF INTERNAL REVENUE; OFFICE OF THE REGIONAL DIRECTOR, BUREAU OF INTERNAL REVENUE, REVENUE REGION NO. 7 - QUEZON CITY; BUREAU OF INTERNAL REVENUE, REVENUE DISTRICT OFFICE NO. 43A, EAST PASIG,

Petitioners,

- versus -

GLOBAL QUICKSERVICE RESTAURANT, INC.,

Respondent.

CTA *EB* NO. 1393
(CTA Case No. 8704)

x---x

GLOBAL QUICKSERVICE RESTAURANT, INC.,

Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE; OFFICE OF THE REGIONAL DIRECTOR, BUREAU OF INTERNAL REVENUE, REVENUE REGION NO. 7 - QUEZON CITY; BUREAU OF INTERNAL REVENUE, REVENUE DISTRICT OFFICE NO. 43A, EAST PASIG,

Respondents.

CTA *EB* NO. 1405
(CTA Case No. 8704)

Present:

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

Promulgated:

MAR 15 2017 3:20 pm

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D E C I S I O N

BAUTISTA, J:

These are consolidated Petitions for Review[1] filed pursuant to *Rule 8, Section 3(b)*[2] *of the 2005 Revised Rules of the Court of Tax Appeals, as amended ("RRCTA")*, with prayers for the Court *En Banc*:

1. *CTA EB No. 1393* - to uphold the imposition of compromise penalty in the amount of Php15,000.00;[3] and

2. *CTA EB No. 1405* - to reverse and set aside the Court of Tax Appeals ("CTA") Second Division's ("Court in Division") August 11, 2015 Decision[4] ("Assailed Decision") and November 12, 2015 Resolution[5] ("Assailed Resolution"), and in lieu thereof, for another decision to be issued in favor of Global Quickservice Restaurant, Inc. ("GQRI"), cancelling and nullifying the final assessment made through a Formal Letter of Demand ("FLD") and Final Assessment Notices ("FANs"), for being issued without factual and legal basis.[6]

The Parties[7]

The Commissioner of Internal Revenue ("CIR") is the duly appointed Commissioner of the Bureau of Internal Revenue ("BIR"), vested with the power to decide tax cases, including disputed assessments pursuant to *Section 4 of the 1997 National Internal Revenue Code, as amended ("1997 NIRC")*, with principal office at 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City. The CIR, the Office of the Regional Director of BIR Revenue Region No. 7

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[1] *Rollo, CTA EB No. 1393, Petition for Review ("PFR"),* pp. 1-56, with annexes; and *Rollo, CTA EB No. 1405, PFR,* pp. 13-93, with annexes.

[2] "Sec. 3. *Who may appeal; period to file petition.*

xxx xxx xxx

(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."

[3] *Rollo, CTA EB No. 1393, PFR,* p. 7.

[4] *Records, CTA Case No. 8704, Vol. 3, Assailed Decision,* pp. 1611-1643; penned by Associate Justice Amelia R. Cotangco-Manalastas, with Associate Justices Juanito C. Castañeda, Jr. and Caesar A. Casanova concurring.

[5] *Id., Assailed Resolution,* pp. 1677-1684; penned by Associate Justice Amelia R. Cotangco-Manalastas, with Associate Justice Juanito C. Castañeda, Jr. concurring and Associate Justice Caesar A. Casanova on leave.

[6] *Rollo, CTA EB No. 1405, PFR, Prayer,* p. 41.

[7] *Records, Vol. 3, Assailed Decision, Facts,* pp. 1611-1612.

- Quezon City, and the BIR Revenue District Office No. 43A - East Pasig will be collectively referred to as "CIR, *et. al.*"

GQRI is a corporation duly organized and registered under and by virtue of the laws of the Philippines, duly registered with the Securities and Exchange Commission under Company Reg. No. CS200501537; and is an affiliate of Global Restaurant Concepts, Inc., the latter being the parent company. It operates under the name and style of California Pizza Kitchen located in Promenade Mall, Greenhills Shopping Center, San Juan, Metro Manila.

The Facts

GQRI was sent a Letter of Authority ("LOA") No. 43A-2010-00000496 dated October 13, 2010, which authorized Revenue Officer ("RO") Dolores Gillego and Group Supervisor ("GS") Ramon Navarro to examine GQRI's books of accounts and other accounting records for all internal revenue taxes for taxable period January 1 to December 31, 2009.[8]

Subsequently, a Notice of Informal Conference ("NIC") dated August 31, 2012 was received by GQRI, stating that an audit report was received from RO Gillego under GS Navarro pursuant to LOA No. 43A-2010-00000496 dated October 13, 2010.[9] The NIC requested GQRI or its representatives to appear before BIR Revenue District Office No. 43A on or before September 11, 2012, to enable them to go over the findings, offer explanations, or present objections to said findings.[10]

Thereafter, through the Preliminary Assessment Notice ("PAN") dated January 3, 2013, GQRI was initially assessed for several tax deficiencies, namely: Php1,993,077.94 as income tax, Php230,702.02 as VAT, and Php15,000.00 as compromise penalty.[11]

GQRI was sent an FLD, with FANs all numbered 043A-B219-09, dated January 25, 2013, assessing the amounts of Php2,029,842.77 for

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[8] *Records, Vol. 3, Assailed Decision, Facts,* p. 1612.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 1612-1613.

income tax, Php234,840.18 for VAT, and Php15,000.00 for compromise penalty.[12]

On February 8, 2013, within the period allowed by law, GQRI filed its January 28, 2013 Legal Petition Notice.[13] On the same day, GQRI paid the following taxes, as assessed in the FLD: *(1)* Php53,795.96 for withholding taxes on income payments subject to expanded withholding tax ("EWT"), *(2)* Php28,204.44 for withholding taxes on compensation ("WTC"), and *(3)* Php2,000.00 for compromise penalty.[14]

On February 11, 2013, GQRI filed a Supplemental Protest to raise additional arguments in support of its earlier protest.[15] Consequently, on April 1, 2013, it submitted its March 26, 2013 Legal Petition Notice, along with its additional supporting documents.[16]

On August 1, 2013, the CIR denied the protest for the reason that GQRI failed to submit documents in support of its protest, with a statement that it is the Final Decision of the CIR.[17]

GQRI, then, filed its Petition for Review with the Court in Division on September 2, 2013.[18] After trial and on August 11, 2015, the Court in Division rendered the Assailed Decision, which partially granted the Petition. The dispositive portion[19] thereof provides:

> **WHEREFORE**, premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED**. The compromise penalty imposed by respondents for taxable year 2009 in the amount of P[hp]15,000.00 is hereby **CANCELLED AND WITHDRAWN**. However, the assessments issued by respondents against petitioner for taxable year 2009 covering deficiency income and value-added taxes are **AFFIRMED** with some modifications. Accordingly, petitioner is **ORDERED TO PAY ONE MILLION SEVEN HUNDRED NINETY-FOUR THOUSAND FOUR HUNDRED TWENTY-ONE PESOS AND 67/100 (P[hp]1,794,421.67)**, inclusive of the

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[12] *Records, Vol. 3, Assailed Decision, Facts,* p. 1613.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Records, Vol. 3, Assailed Decision, Facts,* p. 1613.
[19] *Id., Dispositive Portion,* pp. 1642-1643.

twenty-five percent (25%) surcharge imposed under Section 248(A)(3) of the [1997 NIRC], computed as follows:

Tax Type	Basic	25% Surcharge	Total
Income Tax	[Php] 1,290,304.09	[Php] 322,576.02	[Php] 1,612,880.11
Value-added Tax	145,233.25	36,308.31	181,541.56
Total	**[Php] 1,435,537.34**	**[Php] 358,884.33**	**[Php] 1,794,421.67**

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

(a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency income and value-added taxes computed from the dates indicated below until full payment thereof pursuant to Section 249(B) of the [1997 NIRC]:

Tax Type	Basic Tax	Deficiency Interest Computed From
Income Tax	[Php] 1,290,304.09	April 15, 2010
Value-added Tax	[Php] 145,233.25	January 25, 2010

(b) Delinquency interest at the rate of [twenty percent] 20% per annum on the total amount of [Php]1,794,421.67 and on the [twenty percent] 20% deficiency interest which have accrued as afore-stated in (a), computed from February 25, 2013 until full payment thereof pursuant to Section 249(C) of the [1997 NIRC].

SO ORDERED.[20]

On August 27, 2015, the CIR, *el. al.*, filed their Motion for Partial Reconsideration (Notice of Decision promulgated on August 11, 2015[21]; and GQRI filed its Motion for Reconsideration[22]. After failure of both parties to file their respective comments to the other's Motion for Reconsideration,[23] the Court in Division issued its Assailed Resolution[24] on November 12, 2015, denying the Motions for Reconsideration for lack of merit in the following manner:

WHEREFORE, premises considered, respondent's *Motion for Partial Reconsideration* and petitioner's *Motion for Reconsideration* are hereby **DENIED** for lack of merit.

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[20] Emphases retained.
[21] *Records, Vol. 3, Motion for Partial Reconsideration (Notice of Decision promulgated on August 11, 2015,* pp. 1646-1651.
[22] *Id., Motion for Reconsideration,* pp. 1652-1671.
[23] *Id., Vol. 3,* pp. 1674-1675, in relation to p. 1673.
[24] *Id., Assailed Resolution,* pp. 1677-1684.

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SO ORDERED.[25]

On December 4, 2015, the CIR, *et. al.*, filed their Petition for Review[26] docketed as CTA *EB* No. 1393. On the other hand, GQRI filed its Petition for Review[27] on January 18, 2016, docketed as CTA *EB* No. 1405. These Petitions were subsequently consolidated on January 16, 2016.[28]

After notice,[29] GQRI filed its Comment (To the Petition for Review dated December 4, 2015)[30] in CTA *EB* No. 1393 on February 1, 2016. However, the CIR, *et. al.*, failed to file their comment/s in CTA *EB* No. 1405.[31] The parties were then ordered to submit their respective Memoranda.[32]

On May 6, 2016, the CIR, *et. al.*, submitted their Memorandum[33], while GQRI submitted its Memorandum[34] on May 23, 2016. Thereafter, the case was submitted for decision on June 10, 2016[35]; hence, this Decision.

The Issues

On one hand, the CIR, *et. al.*, submit the following assigned error:

> WHETHER THE COURT IN DIVISION ERRED IN RULING THAT GQRI IS NOT LIABLE TO PAY COMPROMISE PENALTY IN THE AMOUNT OF PHP15,000.00.[36]

On the other hand, GQRI submits the following assigned error:

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[25] Emphases retained.
[26] *Rollo, CTA EB No. 1393, PFR,* pp. 1-56, with annexes.
[27] *Id., CTA EB No. 1405, PFR,* pp. 13-93, with annexes.
[28] *Id., CTA EB No. 1393,* pp. 61-62.
[29] *Id.,* pp. 59-60, 72-73.
[30] *Id., Comment (To the Petition for Review dated December 4, 2015),* pp. 63-69.
[31] *Id., Records Verification dated March 9, 2016,* p. 74.
[32] *Rollo, CTA EB No. 1393,* pp. 76-77.
[33] *Id., CIR, et. al.,'s Memorandum,* pp. 78-85.
[34] *Id., GQRI's Memorandum,* pp. 86-116.
[35] *Id.* at 118-119.
[36] *Id., PFR, The Ground,* p. 4.

WHETHER THE COURT IN DIVISION ERRED IN RULING THAT GQRI IS LIABLE TO PAY DEFICIENCY INCOME TAX AND VAT, ALONG WITH SURCHARGES, DEFICIENCY INTEREST AND DELINQUENCY INTEREST FOR TAXABLE YEAR 2009.

The CIR, et. al.'s Arguments[37]

The CIR, *et. al.* argues that the Court in Division erred in cancelling the compromise penalty of Php15,000.00, considering that such penalty is suggested in settlement of criminal liability; and that GQRI has agreed to the compromise penalty when it voluntarily paid the amount of Php2,000.00 as partial payment thereof.

GQRI's Arguments[38]

GQRI argues that it is not liable for the alleged deficiency income tax for taxable year 2009, as the assessment was issued without factual and legal justifications; that the items under the assessment for income tax were sufficiently refuted, such that the transfers of supplies to other branches should not be considered as deemed-sales transactions amounting to Php282,620.82; that the service charges collected amounting to Php 438,020.09 were actually distributed to the employees; that the Php100,000.00 rental deposit written-off was subsequently returned to GQRI; and that the income payments of Php3,429,494.55 allegedly not subjected to withholding tax were wrongfully assessed since company policies show that these items of income should not be subject to WTC. Further, it avers that it already paid the WTC after final assessment was made; and that such payment of the assessed WTC should have rendered the said income payments as allowable deductions. GQRI also argues that it has already paid the assessed deficiency EWT of Php53,975.96 and thus, the income payments related thereto should be allowed as deductions.

As to the assessment on VAT, GQRI claims that it arose from undeclared sales/revenues/receipts, as found in the assessment for deficiency income tax; it likewise repleads its arguments thereto. Also, GQRI disputes the assessment for taxable sales/revenues not subject to VAT, which was found by the BIR by comparing the Trade

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[37] *Rollo, CIR, et. al.'s Memorandum,* pp. 81-83.
[38] *Id., GQRI's Memorandum,* pp. 90-112.

Receivables account from taxable years 2008 and 2009. GQRI asserts that the trade receivables account contains credit card sales on which VAT has already been paid.

Finally, GQRI states that the Court in Division correctly cancelled the assessment for compromise penalty.

The Ruling of the Court En Banc

The Court *En Banc* finds no merit in the Petitions for Review.

The Court *En Banc* has jurisdiction over the present cases.

Section 3(b), Rule 8 of the RRCTA provides the following:

> RULE 8
> Procedure in Civil Cases
>
> xxx xxx xxx
>
> SECTION 3. *Who May Appeal; Period to File Petition.* —
>
> xxx xxx xxx
>
> (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.[39]

On November 12, 2015, the Court in Division promulgated its Assailed Resolution denying reconsideration of its August 11, 2015

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[39] Underscoring ours.

Decision. This Assailed Resolution was received by the CIR on November 27, 2015 and by GQRI on December 9, 2015.[40]

As to CTA *EB* No. 1393, the CIR, *et. al.* had until December 14, 2015[41] to file their appeal. Therefore, they timely filed an appeal on December 4, 2015, and the Court *En Banc* has jurisdiction over the case.

Moving to CTA *EB* No. 1405, GQRI had until December 28, 2015[42] to file an appeal. On December 28, 2015, it filed a Motion for Extension of Time to File Petition for Review[43] praying for an additional fifteen (15) days, which the Court *En Banc* granted[44] by giving it until January 8, 2015 to file an appeal. Thereafter, GQRI filed its Motion for a Final Extension of Time to File Petition for Review[45] praying for an additional (10) ten days or until January 18, 2015. On January 18, 2015, GQRI filed its Petition for Review[46], thus, the Court *En Banc* assumes jurisdiction over this case.

There is no compelling reason to reverse or modify the Court in Division's Decision, which partially upheld the assessments.

A perusal of the parties' arguments show that these are mere rehashes of the arguments raised before the Court in Division, and were already considered and thoroughly threshed out in the Assailed Decision and reiterated in the Assailed Resolution. Upon review, the Court *En Banc* affirms the rulings of the Court in Division.

The Court *En Banc* will now discuss the items of the assessments briefly.

As to the deemed-sale transactions, the Court in Division correctly found that GQRI only proved the policy of distribution and sharing of supplies between affiliates. As the Court in Division

[40] *Records, Vol. 3,* p. 1676.
[41] December 12, 2015 fell on a Saturday.
[42] December 24 and 25, 2015 fell on holidays, while December 26 and 27, 2015 fell on weekends.
[43] *Rollo,* CTA *EB* No. 1405, pp. 1-6.
[44] *Id.* at 7.
[45] *Id.* at 8-12.
[46] *Id., PFR,* pp. 13-93, with annexes.

correctly ruled, such transfers and alleged replenishment must be shown through proper documentation, which would also prove that no income or profit was derived therefrom.[47] This, GQRI failed to do.

With respect to the service charges, the Court *En Banc* reiterates the Court in Division's findings, to wit:

> It should be remembered that petitioner's argument, in its Petition for Review, is that the subject service charges were collected during the period of December 15-31, 2009, and that the same were only distributed to the employees on January 15 of the following year (2010). Petitioner concludes that respondent's assessment on amounts not yet distributed to the employees is erroneous to say the least considering that petitioner has yet to distribute them.
>
> Hence, petitioner must present evidence that will support its claim that it had distributed the subject service charge to its employees only on the following year 2010.
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> xxx xxx xxx
>
> In its memorandum, petitioner explains that as a matter of practice, it collects service charges for the following periods in a month: (a) 1st day until the 15th day of the month, and (b) 16th until the last day of the month. The collected service charges in a given period are distributed to the employees in the next payday of the following collection period.
>
> Petitioner then alleged that, for the year 2009, it collected services charges of [Php]1,958,204.31 (presenting petitioner's Sales Report for January 1, 2009 to December 31, 2009, Exhibit "P-28"), 85% of which ([Php]1,664,473.66) goes to the employees. Petitioner then presented its Service Charge Payroll Summary (Exhibit "P-27") for the period January 1, 2009 to December 31, 2009 to show that it distributed service charges to its employees in the amount of [Php]1,358,566.50 (supported with Payroll Registers, Exhibits "P-26" to "P-28-W"), to GRCI's Restaurant Support Center (RSC) employees in the amount of [Php]244,528.88, and commissary employees in the amount of [Php]61,378.03 or in the total amount of [Php]1,664,473.42.

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[47] *Records, Vol. 3, Decision,* pp. 1627-1628.

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> However, following the practice of petitioner in the distribution of the collected service charges to its employees, then it was erroneous for petitioner to compare the service charges collected for the year 2009 with the service charges distributed during the payroll period of January 1 to December 31, 2009 as the service charges distributed to petitioner's employees for payroll period January 1-15, 2009 pertained to service charges collected in December 16-31, 2008. Moroever, the service charges distributed to petitioner's employees for payroll period January 1-15, 2010, which pertained to service charges collected in December 16-31, 2009, should have been included in the comparison.[48]

Thus, the assessment with regard to service charges was correctly upheld.

As to the rental deposit, GQRI also failed to prove that the amount of Php100,000.00 was actually returned to it, hence the assessment was rightfully sustained.

As to the expense items which were disallowed for failure to subject the same to WTC, the Court *En Banc* agrees with the Court in Division's findings that GQRI failed to prove that the involved income payments are not subject to WTC. Thus, the Court in Division found:

> The Court wishes to emphasize that the evidence presented by petitioner to prove that Personnel Costs in the aggregate amount of [Php]551,897.06 is not subject to withholding taxes on compensation (i.e., Exhibit "P-14" on Cellphones, Exhibits "P-15" and "P-16" on Training and Seminars, Exhibit "P-17" on Employee Meals and Exhibit "P-18" on Scholarship Program) only prove petitioner's policies on these benefits. Consequently, without submitting additional documentary evidence to support its claim, the Court cannot ascertain the nature of the purported employee benefits not subject to withholding tax. By merely presenting these policies, it only shows that petitioner provides or offers these benefits to its employees but does not prove that the amount expended actually pertains to these benefits and that it met petitioner's policy and is in consonance with the provisions of Section 2.78.1 of Revenue Regulations No. 2-98,

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[48] *Records, Vol. 3, Assailed Resolution*, pp. 1681-1682.

as amended, or Revenue Regulations 3-98, whichever is applicable.

In other words, petitioner must present evidence that would prove the factual basis of its claim that these expenses actually pertain to employee benefits that are not subject to withholding taxes.[49]

GQRI also submits that upon its payment of the assessed WTC and EWT, the said assessments should be cancelled and allowed as deductions. However, as the Court in Division noted, GQRI only paid the basic deficiency WTC and EWT. Its failure to pay the attendant surcharge and interest rendered its payment incomplete, which does not cancel the assessment and does not comply with the requirements for deductibility under *Section 2.58.5*[50] *of Revenue Regulations ("RR") No. 2-98.*

As to the deficiency VAT assessment, GQRI once again failed to provide any evidence to support its claim that VAT has already been paid on the amounts reported as trade receivables.

Finally, as to the compromise penalty, GQRI voluntarily paid Php2,000.00 out of the Php15,000.00 imposed thereto. Because of this payment, the CIR argues that GQRI is estopped from questioning the validity of the imposition of the Php15,000.00 compromise penalty. The Court *En Banc* disagrees. As oft-repeated, compromise penalties, under *Revenue Memorandum Order ("RMO") No. 1-90,* are only suggested in settlement of criminal liability, and may not be imposed or exacted on the taxpayer in the event that a taxpayer refuses the same. It is well-settled that the Court has no jurisdiction to compel a taxpayer to pay the compromise penalty because, by its very nature, it implies a mutual agreement between the parties in respect to the thing or the subject matter that is so compromised, and the choice of

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[49] *Records, Vol. 3, Assailed Resolution,* p. 1683.

[50] "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.

A deduction will also be allowed in the following cases where no withholding of tax was made:

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(C) The withholding agent erroneously underwithheld the tax but pays the difference between the correct amount and the amount of tax withheld, including the interest, incident to such error, and surcharges, if applicable, at the time of the audit/investigation or reinvestigation/reconsideration."

paying or not paying it distinctly belongs to the taxpayer.[51] The imposition of the same without the conformity of the taxpayer is illegal and unauthorized.[52]

In sum, the Court *En Banc* finds no cogent reason to reverse the findings of the Court in Division.

WHEREFORE, premises considered, the present consolidated Petitions for Review are hereby **DENIED** for lack of merit.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

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

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

(I join PJ's Concurring and Dissenting Opinion)
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

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

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[51] *The Philippines International Fair, Inc. v. The Collector of Internal Revenue,* G.R. Nos. L-12928 and L-12932, March 31, 1962, 4 SCRA 774.
[52] *Commissioner of Internal Revenue v. Lianga Bay Logging Co., Inc. et al.,* G.R. No. L-35266, January 21, 1991, 193 SCRA 86.

CATHERINE T. MANAHAN
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 case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OR INTERNAL REVENUE; OFFICE OF THE REGIONAL DIRECTOR, BUREAU OF INTERNAL REVENUE, REVENUE REGION NO. 7 – QUEZON CITY; BUREAU OF INTERNAL REVENUE, REVENUE DISTRICT OFFICE NO. 43A, EAST PASIG,
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-versus-

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Respondent.

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Present:
DEL ROSARIO, PJ,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, and
MANAHAN, JJ.

Promulgated:
MAR 15 2017

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CONCURRING AND DISSENTING OPINION

DEL ROSARIO, <u>PJ.</u>:

I concur with the conclusions reached by the *ponencia* denying both petitions for lack of merit, however, I withhold my assent with regard to the affirmation of the imposition of deficiency interest on the assessed deficieny Value Added Tax (VAT).

I reiterate my consistent position that deficiency interest may only be imposed on tax specifically covered and defined by the relevant provisions of the National Internal Revenue Code (NIRC), *i.e.*, income tax, donor's tax and estate tax. Consequently, the imposition of deficiency interest on the assessed deficiency VAT in the present case must be cancelled.

In this regard, I quote below the position I have taken in the consolidated cases of *Commissioner of Internal Revenue vs. Philippine Tobacco Flue-Curing & Redrying Corporation*[1] on the imposition of deficiency interest:

> "xxx I am not unaware of *Paper Industries Corporation of the Philippines vs. Court of Appeals, Commissioner of Internal Revenue, and Court of Tax Appeals (PICOP)*,[2] which somehow made mention of deficiency interest under the NIRC of 1977. **I must stress, however, that *PICOP* cannot be relied upon to justify the imposition of deficiency interest on petitioner's excise tax liability. *PICOP* did not state nor resolve the issue whether or not the deficiency interest provided for in Section 249 (B) of the NIRC of 1997, as amended, may be imposed on tax other than donor's, estate, and income taxes.** Thus, not having been resolved therein, *PICOP* cannot be considered as a doctrine on the matter. The case of *Office of the Ombudsman vs. Honorable Court of Appeals and Former Deputy Ombudsman for the Visayas Arturo C. Mojica*,[3] is instructive:

[1] CTA EB Nos. 1218 and 1220, April 11, 2016. This is consistent with my earlier opinion in *Avon Products Manufacturing, Inc. vs. Commissioner of Internal Revenue, CTA EB No. 1062, January 15, 2016; CIR vs. Staedtler (Philippines), Inc., CTA EB No. 1310, January 28, 2016; Medicard Philippines, Inc. vs. CIR, CTA EB No. 1224, January 29, 2016; Lourdes College vs. CIR, CTA EB No. 1164, February 2, 2016; Philippine Aerospace Development Corporation vs. CIR, CTA EB No. 1035, February 9, 2016; CIR vs. BPI-Philam Life Assurance Corporation, CTA EB No. 1240, February 11, 2016; CIR vs. OfficeMetro Philippines, Inc. (formerly Regus Centres, Inc.), and OfficeMetro Philippines, Inc. vs. CIR, CTA EB Nos. 1210 & 1213, March 7, 2016; CIR vs. ESS Manufacturing Company, Inc., ESS Manufacturing Company, Inc. vs. CIR, CTA EB Nos. 1169 & 1175, March 30, 2016; and Lourdes College vs. Commissioner of Internal Revenue, CTA EB No. 1164, July 28, 2016.*
[2] G.R. Nos. 106949-50, December 1, 1995.
[3] G.R. No. 146486, March 4, 2005.

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

If *PICOP* has any relevance to the present controversy, it is the doctrinal precedent that **deficiency interest may be imposed only on tax specifically covered by the relevant provision of the NIRC of 1977**. Thus, the Court in *PICOP*, while recognizing that transaction tax is in the nature of income tax and that deficiency interest is imposable on income tax, nonetheless declined to impose such deficiency interest on transaction tax after noting the significant provisions of the NIRC of 1977: ***first*, it is Section 51 (c)(1), (e)(1), and (3) which impose deficiency interest; *second*, Section 51(c)(1) confines such deficiency interest on taxes covered by TITLE II; and, *third*, that transaction tax does not fall within TITLE II.** Thus:

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

> (35%) transaction tax is *not* one of the taxes in respect of which Section 51 (e) authorized the imposition of surcharge and interest and Section 72 the imposition of a fraud surcharge.'

True, the Supreme Court in *PICOP* declared that the present provision of the NIRC mentions that **additions** on tax applies to all taxes. While such pronouncement may not be construed beyond the context in which it was made, *PICOP* simply confirmed that *in general*, certain penalties and charges are applicable to all types of tax or deficiency tax; **PICOP, however, did not categorically construe the provision of Section 249 (B) that deals with "deficiency interest" on the type of tax "as defined in [the] Code."** Note that the present NIRC is explicit with respect to the type of tax on which deficiency interest may be imposed, viz:

> 'Section 249.Interest-
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> (B) Deficiency Interest. – Any deficiency in the tax due, **as the term is defined in this Code**, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof.' (Emphasis supplied)

Section 249 (B) cannot be any clearer: the deficiency interest must refer only to 'deficiency in the tax due, <u>as the term is defined in [the] Code</u>.'

Verily, as the law stands, only donor's, estate, and income taxes carry a provision on deficiency tax; they are the types of taxes on which such deficiency interest may be imposed.

Finally, Sections 247 (a) and 249 (A) are **general provisions** that impose "additions" to the tax and "interest" thereon. Both sections may not be read in isolation from the relevant and **specific provision** of Section 249 (B) with respect to the imposition of "deficiency" interest, more so as all these provisions fall within the same Chapter I of Title X of the NIRC of 1997, as amended.

Otherwise stated, Sections 247 (a) and 249 (A) must reasonably be read and construed subject to the provision of Section 249 (B) -- all these provisions being covered by the **same** Chapter I of Title X of the NIRC of 1997, as amended."

In sum, deficiency interest may be imposed only on tax specifically covered and defined by the relevant provisions of the NIRC, *i.e., income tax, donor's tax and estate tax*; **conversely,**

deficiency interest may not properly be imposed on the VAT assessed against Global Quickservice Restaurant, Inc.

Also apt is my discussion in my Concurring and Dissenting Opinion in *Philippine Aerospace Development Corporation vs. Commissioner of Internal Revenue*[4] which I quote below:

> 'Settled is the rule that laws imposing tax is construed strictly against the government and liberally in favor of the taxpayer. **Unless clearly imposed by pertinent provision of law, deficiency interest as an additional tax burden should not simply be presumed. Thus, the obligation to pay deficiency interest may not be applied to taxes other than income tax, donor's tax and estate tax, irrespective of whether an assessment is issued or not. After all, the deficiency tax assessed is still subject to the delinquency interest rate of 20% per annum until fully paid. Truth be told, the delinquency interest rate of 20% is way more than the legal interest of 12% per annum.**'

The power of taxation is sometimes called also the power to destroy. It should, therefore, be exercised with caution to minimize injury to the proprietary rights of a taxpayer. **It must be exercised fairly, equally and uniformly, lest the tax collector kills the hen that lays the golden egg. Indeed, the imposition of 20% deficiency interest per annum on a <u>tax not clearly within the context of the law</u>, in addition to 20% delinquency interest per annum and a surcharge of 25% on the amount due under Section 248 of the NIRC, is too burdensome for a taxpayer to survive and continue with its business affairs.**[5]

All told, I vote to DENY the Petitions for Review and to AFFIRM the judgment of the Court in Division WITH MODIFICATION relating to the imposition of 20% deficiency interest on the assessed VAT which imposition should appropriately be CANCELLED AND SET ASIDE.

ROMAN G. DEL ROSARIO
Presiding Justice

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[4] CTA EB No. 1035, February 9, 2016.
[5] Concurring and Dissenting Opinion, CIR v. Officemetro Philippines, Inc., CTA EB Nos. 1210 & 1213, July 1, 2016.