REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

En Banc

JUMBO EAST REALTY INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB No. 1322
(CTA Case No. 8380)

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

Promulgated:

OCT 17 2016 4:05 p.m.

x- x

DECISION

RINGPIS-LIBAN, *J.*:

Before the Court is a Petition for Review filed on July 3, 2015 against the Resolution of this Court's Second Division in CTA Case No. 8380 denying on May 18, 2015 the petitioner's Partial Motion for Reconsideration of the Second Division's Decision of March 16, 2016 which partially granted the Petition for Review.

The assailed Decision's dispositive portion reads as follows:

> "**WHEREFORE**, in view thereof, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, the assessments issued by respondent against petitioner for taxable year 2006 covering deficiency value-added tax in the amount of ₱12,185.87 and compromise penalties in the amount of ₱35,200.00 are hereby **CANCELLED**. However, respondent's assessments for taxable year 2006 covering deficiency income tax, expanded withholding tax, documentary stamp tax and final tax are hereby **UPHELD**, but in the modified amount of

₱1,043,135.19, inclusive of the 25% surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended, computed as follows:

Tax Type	Basic Tax	25% Surcharge	20% Interest	Total
Income Tax	₱ 246,850.16	₱ 61,712.54		₱ 308,562.70
Expanded W/holding Tax	1,599.72	399.93		1,999.65
Final Tax	101,100.00	25,275.00		126,375.00
Documentary Stamp Tax	3,532.30	883.08		4,415.38
Sub-total	**₱ 353,082.18**	**₱ 88,270.55**		**₱ 441,352.73**
Increments on Late Remittance of Final Tax		₱ 143,581.25	₱ 458,201.21	₱ 601,782.46
Sub-total		**₱ 143,581.25**	**₱ 458,201.21**	**₱ 601,782.46**
TOTAL	**₱ 353,082.18**	**₱ 231,851.80**	**₱ 458,201.21**	**₱ 1,043,135.19**

In addition, petitioner shall be liable to pay:

(a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency income tax, expanded withholding tax, final tax and documentary stamp tax computed from the dates indicated below until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended;

Tax Type	Basic Tax	Deficiency Interest Computed From
Income Tax	₱ 246,850.16	April 15, 2007
Expanded Withholding Tax	1,599.72	January 15 2007
Final Tax	101,100.00	January 15, 2007
Documentary Stamp Tax	3,532.30	January 5, 2007

(b) Delinquency interest at the rate of 20% per annum on the total amount of ₱441,352.73 and on the 20% deficiency interest which have accrued as afore-stated in (a), computed from October 17, 2011 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended; and

(c) Delinquency interest at the rate of 20% per annum on the deficiency increments for late remittance of final tax in the amount of ₱601,782.46 computed from October 17, 2011 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED."

The Petition for Review in CTA Case No. 8380 was filed pursuant to Section 7(a)(1) of Republic Act No. (RA) 1125, as amended[1], as well as Rule 4, Section 3(a)(1)[2] in relation to Section 4(a) of Rule 8[3] and Rule 4 of the Revised Rules of the Court of Tax Appeals (RRCTA), seeking the cancellation of Assessment Notice Nos. 34-06-IT-0916, 34-06-VT-0917, 34-06-WE-0918, 34-06-FT-0919 and 34-06-DS-0920, finding it liable to pay deficiency income tax, value added tax, expanded withholding tax, final tax and documentary stamp tax, respectively, for the taxable year 2006.

THE PARTIES

The petitioner, Petitioner Jumbo East Realty, Inc., is a corporation duly organized and existing under and by virtue of the laws of the Philippines, with principal office at 3rd floor, Pako Bldg., Pedro Gil corner Gen. Luna Streets, Paco, Manila.[4]

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[1] Sec. 7. Jurisdiction. –The CTA shall exercise:

(a) Exclusive appellate jurisdiction to review by appeal, as herein provided:

x x x x x x

(1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;

x x x x x x

[2] Rule 4. Sec. 3. Cases within the jurisdiction of the Court in Division. – The Court in Division shall exercise:

(a) Exclusive original over or appellate jurisdiction to review by appeal the following:

x x x x x x

(1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue;

x x x x x x

[3] Rule 8. Sec. 4. Where to appeal; mode of appeal. –

(a) An Appeal from a decision or ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claim for refund of internal revenue taxes erroneously or illegally collected; the decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade & Industry, the Secretary of Agriculture, and the Regional Trial Court in the exercise of their original jurisdiction, shall be taken to the Court by filing before it a petition for review as provided in Rule 42 of the Rules of Court. The Court in Division shall act on the appeal.

[4] Par. 1, Petition for Review, Docket, p. 6; Par. 1, Joint Stipulation of Facts and Issues (JSFI), Docket, p. 163.

The respondent, Commissioner of Internal Revenue (CIR), is the duly-appointed Commissioner of the Bureau of Internal Revenue (BIR), vested with authority to, *inter alia*, decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under the National Internal Revenue Code (NIRC) and other laws administered by the BIR, and holding office at the BIR National Office Building, Diliman, Quezon City.

THE COURT'S JURISDICTION

On June 3, 2015, petitioner received a copy of the Second Division's Resolution dated May 18, 2015. Under Section 3(b), Rule 8 of the Revised Rules of the CTA (A.M. No. 05-11-07-CTA),[5] petitioner had fifteen (15) days from receipt of the said Resolution, or until June 18, 2015, within which to appeal to the Court *En Banc* by way of a petition for review.

On June 18, 2015, petitioner filed a "Motion for Extension of Time to File Petitioner for Review" asking for fifteen (15) days from June 18, 2015 or until July 3, 2015 within which to file the petition, which the Court granted.

As the Petition for Review was filed on July 3, 2015, the Petition was timely filed.

THE FACTS[6]

On April 12, 2007, petitioner filed its Annual Income Tax Return (ITR) for taxable year 2006.[7]

On January 7, 2011, petitioner received a Formal Letter of Demand[8] (FLD). Attached thereto are the Details of Discrepancies[9] and Assessment Notice Nos. 34-06-IT-0916, 34-06-VT-0917, 34-06WE-0918, 34-06-FT-0919, and 34-06-DS-0920,[10] the details of which are as follows:[11]

[5] Dated November 22, 2005, and which took effect starting December 15, 2005.
[6] The facts of this case were culled from the Decision of the Second Division in CTA Case No. 8380 dated March 16, 2015.
[7] Par. 3, JSFI, Docket, p. 163.
[8] Exhibit "A", Docket, pp. 17-19; Par. 2, JSFI, docket, p. 163; Statement of Material Dates, Petition for Review, Docket, p. 7.
[9] Exhibit "A-1", Docket, p. 20.
[10] Exhibits "A-2" to "A-6", Docket, pp. 21-25.
[11] Exhibit "A", Docket, pp. 17-18.

DEFICIENCY INCOME TAX pursuant to Sec. 6(B) & 32 NIRC			
Net Income (Loss) per investigation			₱ 1,053,998.00
Add: Adjustment per investigation			
Disallowances - unsupported/ non-filing of schedule			
50% disallowance- operating expenses		₱ 337,588.50	
100% disallowance - taxes & licenses		209,706.00	547,294.50
Income - understated			155,681.36
Adjusted Taxable Income			**₱ 1,756,973.86**
Tax due			₱ 614,940.85
Less: payments			160,834.00
Deficiency Income Tax			₱ 454,106.85
Add: 25% Surcharqe (Sec. 248)			
20% Interest p.a. from UP to 12/31/2010			329,224.97
Compromise Penalty (Sec. 254 in relation to RMO 19-2007)			16,000.00
TOTAL AMOUNT DUE & COLLECTIBLE			**₱ 799,331.82**
DEFICIENCY VALUE-ADDED TAX pursuant to Sec. 108/110/113 NIRC			
Taxable Sales per Return			₱ 3,375,622.00
Add: Adjustment per investigation			
Income - understated			155,681.36
Adjusted taxable income			**₱ 3,531,303.36**
Output tax			₱ 417,870.88
Less: Input tax			
Value-added Tax payable			₱ 417,870.88
Less: payments per return			399,556.36
Tax still due & payable			₱ 18,314.52
Add: 25% Surcharqe (Sec. 248)			
20% Interest p.a. from ___ up to 12/31/2010			14,397.11
Compromise Penalty (Sec. 254 in relation to RMO 19-2007)			4,000.00
TOTAL AMOUNT DUE & COLLECTIBLE			**₱ 36,711.63**
DEFICIENCY EXPANDED WITHHOLDING TAX pursuant to Sec. 79/80 NIRC			
Legal & Audit fee	₱ 70,000.00	x 10%	₱ 7,000.00
Security Services	192,183.10	x 2%	3,843.66
Repairs & Maintenance	79,983.00	x 2%	1,599.66
Total EWT due			₱ 12,443.32
Less: remittances			10,843.60
Deficiency Expanded Withholding Tax			1,599.72
Add: 25% Surcharqe (Sec. 248)			
20% Interest p.a. from ___ up to 12/31/2010			1,266.43
Compromise Penalty (Sec. 254 in relation to RMO 19-2007)			700.00
TOTAL AMOUNT DUE & COLLECTIBLE			**₱ 3,566.15**
DEFICIENCY FINAL TAX pursuant to Sec. 24(2), NIRC			

Dividends payable			₱ 6,754,250.00
x Rate			10%
Final Tax Due - Dividends payable			₱ 675,425.00
Less: remittances -			
Deficiency Final Tax			₱ 675,425.00
Add: 25% Surcharge (Sec. 248)			168,856.25
20% Interest p.a. from ___ up to 12/31/2010			534,705.94
Compromise Penalty (Sec. 254 in relation to RMO 19-2007)			20,000.00
TOTAL AMOUNT DUE & COLLECTIBLE			**₱ 1,398,987.19**
DEFICIENCY DOCUMENTARY STAMP TAX pursuant to Sec. 24(2) NIRC			
Rental Income			₱ 3,531,303.36
DST Due			₱ 3,532.30
Less: payments			-
Deficiency Documentary Stamp Tax			₱ 3,532.30
Add : 25% Surcharge (Sec. 248)			883.08
20% Interest p.a. from ___ up to 12/31/2010			2,816.00
Compromise Penalty (Sec. 254 in relation to RMO 19-2007)			1,000.00
TOTAL AMOUNT DUE & COLLECTIBLE			**₱ 8,231.37**

On January 28, 2011,[12] petitioner filed a protest of the said assessments, attaching thereto its supporting documents.[13]

On March 25, 2011, petitioner received a letter[14] dated February 25, 2011 from respondent, informing it that its protest has been referred to Revenue Officer Rafael M. Lentejas II for re-investigation and at the same time, respondent revised the previous assessments.[15] The details of the revised assessments are as follows:

DEFICIENCY INCOME TAX[16]			
Net Income (Loss) per investigation			₱ 1,053,998.00
Add: Adjustment per investigation			
Disallowances - unsupported/ non-filing of schedule			
50% disallowance- operating expenses		₱ 337,588.50	
100% disallowance - taxes & licenses		209,706.00	547,294.50
Income - understated (Annex A)			155,681.36
Adjusted Taxable Income			**₱ 1,756,973.86**
Tax due			₱ 614,940.85
Less: Income Tax Payment			280,479.97

[12] Exhibit "B", Docket, pp. 26-28.
[13] Par. 2, JSFI, Docket, p. 163; Statement of Material Dates, Petition for Review, docket, p. 7.
[14] Exhibit "F", Docket, p. 64.
[15] Par. 2, JSFI, Docket, p. 163; Statement of Material Dates, Petition for Review, Docket, p. 7.
[16] Exhibit "F-2", Docket, p. 70.

Income Tax Deficiency			₱ 334,460.88
Add: Interest		₱ 262,070.72	
Compromise Penalty		16,000.00	278,070.72
INCOME TAX PAYABLE			**₱ 612,531.60**
DEFICIENCY VALUE-ADDED TAX[17]			
Sales			₱ 3,375,622.00
Add: Income - understated			155,681.36
			₱ 3,531,303.36
Output tax			₱ 417,870.88
Less: Input tax			-
Value-added Tax Due			₱ 417,870.88
Less: Value Added Tax Payment			399,556.36
Deficiency Value-added Tax			₱ 18,314.52
Add: Interest		₱ 14,397.11	
Compromise Penalty		4,000.00	18,397.11
TOTAL AMOUNT DUE & COLLECTIBLE			**₱ 36,711.62**
EXPANDED WITHHOLDING TAX ANALYSIS[18]			
Legal & Audit fee	₱ 70,000.00	x 10%	₱ 7,000.00
Security Services	192,183.10	x 2%	3,843.66
Repairs & Maintenance	79,983.00	x 2%	1,599.66
Total	**₱ 342,166.10**		**₱ 12,443.32**
Less: remittances			10,843.60
Deficiency Expanded Withholding Tax			1,599.72
Add: Interest			1,266.43
Compromise Penalty			700.00
TOTAL EWT DEFICIENCY			**₱ 3,566.15**
DEFICIENCY FINAL TAX[19]			
Dividends payable			₱ 6,754,250.00
Final Tax Rate			10%
Final Tax Due - Dividends payable			675,425.00
Less: Remittance			574,325.00
Final Tax Deficiency			101,100.00
Add: Interest (₱574 325.00 up to 01-05-2010)		₱ 344,909.70	
Interest (₱101 100.00 up to 03-15-2011)		84,757.81	429,667.51
Compromise Penalty			16,000.00
TOTAL DIVIDENDS TAX PAYABLE			**₱ 546,767.51**
DEFICIENCY DOCUMENTARY STAMP TAX[20]			
Rental Income			₱ 3,531,303.36
DST Due			₱ 3,531.30
Less: DST payments			-

[17] Exhibit "F-4", Docket, p. 72.
[18] Exhibit "F-3", Docket, p. 71.
[19] Exhibit "F-5", Docket, p. 73.
[20] Exhibit "F-6", docket, p. 74.

Deficiency DST			₱ 3,531.30
Add : Surcharge		₱ 882.83	
Interest		2,777.45	
Compromise Penalty		1,000.00	4,660.28
TOTAL DST PAYABLE			**₱ 8,191.58**

On April 19, 2011, petitioner submitted its Reply[21] dated April 15, 2011 to the revised assessment.

On October 17, 2011, petitioner received a letter dated September 19, 2011[22] from respondent, revising anew the assessments and reducing further the amounts of deficiency income tax, deficiency VAT, deficiency final tax, and deficiency DST.[23]

Thus, on November 16, 2011, petitioner filed its Petition for Review docketed as CTA Case No. 8380.

Respondent filed her Answer[24] on January 16, 2012, raising the Special and Affirmative Defenses that: 1) the CTA lacks jurisdiction to entertain the Petition due to prematurity as the findings of the reinvestigation are still subject for review; 2) petitioner has been fully informed of the legal and factual bases of the assessments, and that the FLD, Details of Discrepancies and the letters of Revenue District Officer Petronilla C. Fernando dated February 25, 2011 and September 19, 2011 likewise contain the facts and the laws on which the computations were made; 3) petitioner admitted that it cannot locate receipts or invoices to support its claim for ordinary and necessary expenses; 4) official receipts were issued in the name of EB Barcelon Inc., the former corporate name of petitioner; 5) petitioner was claiming as expenses on utilities and communications official receipts issued in the name of EB Barcelon Inc.; 6) petitioner possibly earned income under its old corporate name; and 7) the facts taken together show evident bad faith on the part of petitioner.

The parties submitted their Joint Stipulation of Facts and Issues[25] on April 12, 2012; and on April 24, 2012, the Court issued its Pre-Trial Order[26].

During trial, petitioner and respondent presented their testimonial and documentary evidence.

[21] Exhibit "G", docket, pp. 75-78.
[22] Exhibits "I" to "I -5", docket, pp. 110-117.
[23] Par. 2, JSFI, docket, p. 163; Statement of Material Dates, Petition for Review, docket, p. 7.
[24] Docket, pp. 125-132.
[25] Docket, pp. 163-164.
[26] Docket, pp. 177-185.

Pursuant to the March 3, 2014 order of this Court,[27] respondent filed her Memorandum[28] on March 27, 2014 and petitioner filed its Memorandum[29] on May 8, 2014. Thereafter, the case was submitted for decision.

On March 16, 2015, the Second Division of this Court rendered the Assailed Decision which partially granted the Petition for Review. Petitioner filed its Partial Motion for Reconsideration thereof on March 31, 2015 which the Court *a quo* denied in a Resolution promulgated on May 18, 2015.

After having been granted an extension of time to file a Petition for Review[30], petitioner filed its petition on July 3, 2015.[31]

In a Resolution dated August 11, 2015, the Court *En Banc* ordered petitioner to submit the requisite proof of service of its Petition for Review in accordance with Section 13, Rule 13 of the 1997 Rules of Civil Procedure. On September 11, 2015, petitioner filed its Compliance[32].

On October 5, 2015, the Court *En Banc* noted petitioner's Compliance and ordered respondent to file her Comment[33] which she filed on November 12, 2015[34].

In a Resolution dated December 9, 2015[35], the Court *en banc* deemed the case submitted for decision.

THE ASSIGNMENTS OF ERROR

The petition raises two assignments of errors of this Court's Second Division in the assailed Decision, as follows:

First, the Court in Division erred in partially granting the petition on the ground that Assessment Notice Nos. 34-06-IT-0916, 34-06-VT-0917, 34-06-WE-0918, 34-06-FT-0919 and 34-06-DS-0920 violate Section 228 of the 1997 NIRC; and

[27] Minutes of the hearing dated March 3, 2014, Docket, p. 431.
[28] Docket, pp. 432-445.
[29] Docket, pp. 452-464.
[30] *Rollo*, p. 4.
[31] *Id.*, pp. 5-52.
[32] *Id.*, pp. 57-61.
[33] *Id.*, pp. 63-66.
[34] *Id.*, pp. 67-73.
[35] *Id.*, p. 75-76.

Second, the Court in Division erred in partially granting the petition on the ground that the aforementioned assessments have no factual and legal bases.

THE RULING OF THE COURT

We deny the Petition.

Petitioner contends that the subject Assessment Notices are null and void for failure of respondent to sufficiently inform the petitioner of the legal and factual bases thereof thereby violating the right of petitioner to due process and of Section 228 of the 1997 NIRC. Petitioner further contends that the act of respondent in revising his assessments twice for the other alleged tax liabilities shows that he is uncertain not only as to how much is due from the petitioner but whether petitioner is liable at all for the supposed tax liabilities.

The progression of the assessments, as revised by respondent, is seen in the table below:

	Preliminary Assessment Notice December 6, 2010	**Revised Assessment Feb. 25, 2011**	**Revised Assessment Sept. 19, 2011**
Deficiency Income Tax	₱ 799,331.82	₱ 612,531.60	₱ 483,189.29
Deficiency VAT	36,711.63	36,711.62	12,185.87
Deficiency EWT	3,566.15	3,566.15	3,566.15
Deficiency Final Tax	1,398,987.19	546,767.51	546,767.51
Deficiency DST	8,231.37	8,191.58	8,191.58

While petitioner is correct in saying that the landmark case of *Ang Tibay vs. Court of Industrial Relations*[36] laid down the cardinal primary rights that must be respected by administrative agencies in proceedings affecting life, liberty, and property, its invocation of the same is **misplaced** and **inapplicable** to the case at bar.

The Court *En Banc* finds the disquisition of the Supreme Court in *Vivo vs. PAGCOR*[37] regarding administrative due process more apt, thus:

> "The observance of fairness in the conduct of any investigation is at the very heart of procedural due process. The

[36] G.R. No. L-46496, February 27, 1940, 40 Official Gazette, 7th Sup. 129.
[37] G.R. No. 187854, November 12, 2013.

essence of due process is to be heard, and, as applied to administrative proceedings, this means a fair and reasonable opportunity to explain one's side, or an opportunity to seek a reconsideration of the action or ruling complained of.[38] Administrative due process cannot be fully equated with due process in its strict judicial sense, for in the former a formal or trial-type hearing is not always necessary,[39] and technical rules of procedure are not strictly applied. *Ledesma v. Court of Appeals*[40] elaborates on the well-established meaning of due process in administrative proceedings in this wise:

> x x x Due process, as a constitutional precept, does not always and in all situations require a trial-type proceeding. **Due process is satisfied when a person is notified of the charge against him and given an opportunity to explain or defend himself. In administrative proceedings, the filing of charges and giving reasonable opportunity for the person so charged to answer the accusations against him constitute the minimum requirements of due process.** The essence of due process is simply to be heard, or as applied to administrative proceedings, an opportunity to explain one's side, or an opportunity to seek a reconsideration of the action or ruling complained of.[41]" *(Emphasis supplied)*

In a tax assessment, the opportunity to be heard comes in the form of a written protest. The records of the case show that petitioner actively participated in the entire course of the administrative investigation of respondent. **First**, it was able to file a timely protest to the PAN through its January 27, 2011 Protest Letter. **Second**, it is apparent that petitioner's protest was considered by respondent which resulted in the Revised Assessment of February 25, 2011. **Third**, petitioner again exercised its right to be heard when it filed its Reply to the Revised Assessment on April 19, 2011; and **Fourth**, respondent evidently considered petitioner's Reply when it issued another Revised Assessment dated September 19, 2011 further reducing the amounts of deficiency income tax and deficiency VAT petitioner was liable for.

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[38] *Id.* citing *Office of the Ombudsman v. Reyes*, G.R. No. 170512, October 5, 2011, 658 SCRA 626, 640; citing *Ledesma v. Court of Appeals*, G.R. No. 166780, December 27, 2007, 541 SCRA 444, 452.
[39] *Id.* at Note 37, citing *Imperial, Jr. v. Government Service Insurance System*, G.R. No. 191224, October 4, 2011, 658 SCRA 497, 505, cited in Pat-og, Sr. v. CSC, G.R. No. 198755, June 5, 2013.
[40] G.R. No. 166780, December 27, 2007, 541 SCRA 444.
[41] Id. at 451-452.

If any, the act of respondent in revising his assessments twice after hearing petitioner's side only confirms the fact that there has been no violation of due process and that petitioner was granted every opportunity to refute the assessments.

As regards the alleged failure of respondent to sufficiently inform the petitioner of the legal and factual bases of the assessments, a perusal of the subject assessments reveals that this is simply untrue.

Therefore, the Court *En Banc* has come to the same conclusion as the Court *a quo* that "[a] reading of the September 19, 2011 letter[42] denying the subject protest shows that the same set forth, in detail, the factual and legal bases of respondent's assessment. Hence, petitioner's right to due process was not violated and the subject assessments were lawfully issued by respondent."

Withdrawal of Testimony of Revenue Officer Rafael M. Lentejas II

Petitioner claims that the Court *a quo* did not seriously consider the withdrawal of the testimony of Revenue Officer Rafael M. Lentejas II. RO Lentejas, meanwhile, is the revenue officer who conducted the reinvestigation of petitioner's tax liabilities for the taxable year 2006, and his testimony was withdrawn during the June 5, 2013 hearing. Petitioner claims that the withdrawal of the witness' testimony was made after he admitted that there was no understatement of income of petitioner for 2006. Furthermore, respondent's Exhibit "37" states that *"Further evaluation of accounting records and documents submitted revealed that subject taxpayer has complied with the existing provisions of the National Internal Revenue Code, as amended."* Given the foregoing, petitioner argues that the assessments for deficiency income tax, EWT, DST, FT and delinquency interest cannot be legally justified.

Respondent, on the other hand, argues that the concept of no understatement of income and compliance with existing provisions of the 1997 NIRC are not incompatible with the findings of tax deficiency. This is because while petitioner complied with the submission requirements, it still failed to substantiate its expenses which resulted in a deficiency tax assessment.

The Court *En Banc* finds no persuasive argument put forth by the petitioner to modify, much less reverse, the findings[43] of the Court *a quo* on this score, *viz:*

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[42] *Supra.*, Note 13.
[43] *Rollo*, pp. 51-52.

> "It is noteworthy that the Judicial Affidavit of Rafael M. Lentejas II was **already expunged from records** during the hearing dated June 5, 2013. It necessarily follows, therefore, that **the Court may not consider the same** in resolving the present motion.
>
> On the other hand, **respondent did not formally offer Exhibit "37"** as its evidence. Basic is the rule that **the Court shall consider no evidence which has not been formally offered;**[44] it should be excluded and rejected[45] and cannot be used for or against a party litigant.[46] As such, the Court cannot likewise consider Exhibit "37" as evidence against the respondent." *(Emphasis supplied)*

Section 34, Rule 132 on "Offer of Evidence" states that, *"The court shall consider no evidence which has not been formally offered. The purpose for which the evidence is offered must be specified."* This is the general rule. However, according to the doctrine laid down in the case of *Rafael Arsenio S. Dizon vs. Court of Appeals*[47], there are **admitted exceptions to this rule** which enable the court to consider evidence not formally offered. In order for the exception to apply, the following requisites must be present: **1)** the same must have been duly identified by **testimony duly recorded**; and **2)** the same must have been **incorporated in the records** of the case.

These conditions must simultaneously exist for the exception to apply. Since the testimony of RO Lentejas was allowed to be withdrawn and expunged[48] by the Court *a quo* during the hearing on June 5, 2013, the first requisite cannot possibly be satisfied.

Considering the foregoing, *We* see no compelling ground to reverse the assailed Decision and Resolution.

WHEREFORE, premises considered, the assailed Decision of the Second Division dated March 16, 2015, and its Resolution dated May 18, 2015, are hereby **AFFIRMED** *in toto*, and the instant petition for review is **DENIED** for lack of merit.

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[44] *Id.*, citing *People of the Philippines v. Saturnino Villanueva*, G.R. No. 181829, September 1, 2010.
[45] *Id.* citing, *Heirs of Pedro Pasag, et al. v. Sps. Lorenzo and Florentina Paracha*, et al., G.R. No. 155483, April 27, 2007.
[46] *Id.* citing *Rebecca Ala-Martin v. Hon. Justo M. Sultan*, G.R. No. 117512, October 2, 2001.
[47] G.R. No. 140944, April 30, 2008.
[48] Transcript of Stenographic Notes (TSN) dated June 5, 2013, pp. 3-5.

SO ORDERED.

Ma. Belen

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO with concurring & dissenting opinion
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

WITH CONCURRING & DISSENTING OPINION
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

(On Leave)
ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
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 this Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

JUMBO EAST REALTY INC.,
Petitioner,

- *versus* -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1322
(CTA Case No. 8380)

Present:

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

Promulgated:
OCT 17 2016 4:05 p.m.

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CONCURRING AND DISSENTING OPINION

DEL ROSARIO, PJ:

I concur with the *ponencia* in denying the Petition for Review for lack of merit, but I join Justice Erlinda P. Uy in holding that the assailed Decision be modified so as to: (i) delete the imposition of deficiency interest on the Expanded Withholding Tax, Final Tax and Documentary Stamp Tax; and (ii) delete inclusion of the computed deficiency interests on the aforesaid taxes from the computation of delinquency interest.

This is not the first time I made an opinion that the 20% deficiency interest imposed under Section 249(B) of the National Internal Revenue Code (NIRC) of 1997, as amended, cannot be imposed indiscriminately to all forms of deficiency taxes. I submit that such kind of interest is imposable only on tax specifically covered and defined by the relevant provisions of the NIRC, *i.e., income tax, donor's tax and estate tax.*

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:
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> > "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

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[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; and CIR vs. ESS Manufacturing Company, Inc., ESS Manufacturing Company, Inc. vs. CIR, CTA EB Nos. 1169 & 1175, March 30, 2016.*

[2] G.R. Nos. 106949-50, December 1, 1995.

[3] G.R. No. 146486, March 4, 2005.

> court, the rule of *stare decisis* is a bar to any attempt relitigate the same issues.
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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."** (Emphasis supplied)

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." (Emphases supplied)

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

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> **in the tax due, as the term is defined in [the] Code.'**
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> 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.
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> 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." *(Emphasis supplied)*

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 EWT, FT and DST assessed against petitioner.**

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**

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[4] CTA EB No. 1035, February 9, 2016.

> **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.**

Finally, I would like to re-echo the admonition I made relative to the exercise of the power of taxation *vis-à-vis* the proprietary rights of taxpayers in *Commissioner of Internal Revenue v. Officemetro Philippines, Inc. (formerly REGUS CENTRES, INC.)*[5], which reads:

> **The power of taxation is sometimes called also the power to destroy. Therefore, it should 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."[6] Indeed, the imposition of 20% deficiency interest per annum on a tax not clearly within the context of the law, in addition to 20% delinquency interest per annum <u>and</u> a surcharge of 25% on the amount due under Section 248 of the NIRC of 1997, as amended, is too burdensome for a taxpayer to survive and continue its business affairs.**

All told, I vote to **DENY** the Petition for Review and to **AFFIRM** the judgment of the Court in Division **WITH MODIFICATION** relating to the imposition of 20% deficiency interest on Expanded Withholding Tax, Final Tax, and Documentary Stamp Tax which should appropriately be CANCELLED AND SET ASIDE.

ROMAN G. DEL ROSARIO
Presiding Justice

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[5] CTA EB Nos. 1210 & 1213, dated July 1, 2016.
[6] *Commissioner of Internal Revenue v. SM Prime Holdings, Inc.*, G.R. No. 183505, February 26, 2010, *citing Roxas v. Court of Tax Appeals*, G.R. No. L-25043, April 26, 1968.

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COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** OCT 17 2016 4:05 p.m.

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CONCURRING AND DISSENTING OPINION

UY, *J*.:

With all due respect with the learned ponente and my other colleagues, while I concur that the arguments raised in the instant Petition for Review lack merit, it is my humble view that the assailed Decision must be modified so as to remove the imposition of deficiency interest on the Expanded Withholding Tax (EWT), Final Tax (FT), and Documentary Stamp Tax (DST) under Section 249(B) of the National Internal Revenue Code (NIRC) of 1997 against petitioner, and the inclusion of said deficiency interest in the computation of delinquency interest under Section 249(C) of the same Code.

Section 249 of the NIRC of 1997 reads:
"SEC. 249. *Interest.* –

(A) *In General.* – There shall be assessed and collected on any unpaid amount of tax, interest at the rate of twenty percent (20%) *per annum,* or such higher rate as may be prescribed by the rules and regulations, from the date prescribed for its payment until the amount is fully paid.

(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.

(C) *Delinquency Interest.* – In case of failure to pay:

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(3) A deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner, there shall be assessed and collected on the unpaid amount, interest at the rate prescribed in Subsection (A) hereof until the amount is fully paid, which interest shall form part of the tax." *(Emphases supplied)*

Based on the foregoing Section 249(B), the *"Deficiency Interest"* shall be imposed on "[a]*ny deficiency in the tax due, as the term is defined in this Code"*, *i.e.*, as the term "deficiency" is defined in the NIRC of 1997. Relative thereto, an examination of the said Code discloses that there are only three (3) instances where it defines the term "deficiency", and this relates only and respectively to three (3) types of internal revenue taxes, namely, income tax, estate tax, and donor's tax, pursuant to Sections 56(B), 93 and 104 of the NIRC of 1997, viz:

"SEC. 56. *Payment and Assessment of Income Tax for Individuals and Corporations.*—

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(B) *Assessment and Payment of Deficiency Tax.*— After the return is filed, the Commissioner shall examine its and assess the correct amount of the tax. The tax or deficiency income tax so discovered shall be paid upon notice and demand from the Commissioner.

As used in this Chapter[1], in respect of a tax imposed by this Title[2], the term **'deficiency'** means:

(1) The amount by which the tax imposed by this Title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amount previously abated, credited, returned or otherwise repaid in respect of such tax; or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed or collected without assessment shall first be decreased by the amounts previously abated, credited, returned or otherwise repaid in respect of such tax." *(Emphasis supplied)*

"SEC. 93. *Definition of Deficiency.* — As used in this Chapter[3], the term **'deficiency'** means:

(a) The amount by which the tax imposed by this Chapter exceeds the amount shown as the tax by the executor, administrator or any of the heirs upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency and decreased by the amounts previously abated, refunded or otherwise repaid in respect of such tax; or

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[1] Chapter IX – RETURNS AND PAYMENT OF TAX.
[2] Title II – TAX ON INCOME.
[3] CHAPTER I – ESTATE TAX (under TITLE III – ESTATE AND DONOR'S TAXES).

(b) If no amount is shown as the tax by the executor, administrator or any of the heirs upon his return, or if no return is made by the executor, administrator, or any heir, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed or collected without assessment shall first be decreased by the amounts previously abated, credited, returned or otherwise repaid in respect of such tax." *(Emphasis supplied)*

"SEC. 104. *Definitions.* — xxx

The term **'deficiency'** means: (a) the amount by which the tax imposed by this Chapter[4] exceeds the amount shown as the tax by the donor upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, refunded or otherwise repaid in respect of such tax, or (b) if no amount is shown as the tax by the donor upon his return, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency, but such amounts previously assessed or collected without assessment shall first be decreased by the amounts previously abated, credited, returned or otherwise repaid in respect of such tax." *(Emphasis supplied)*

Such being the case, the deficiency interest under Section 249(B) should be applied only whenever there is a deficiency income tax, a deficiency estate tax, and a deficiency donor's tax. For this reason, in this case, no deficiency interest under Section 249(B) should be imposed on the deficiency EWT, FT and DST assessed against petitioner. Thus, the computation of the delinquency interest imposed under Section 249(C) should not as well include the said deficiency interest.

Correspondingly, I vote that the dispositive portion of the assailed Decision in CTA Case No. 8380 be modified so as to remove (1) the imposition of deficiency interest under Section 249(B) of the NIRC of 1997 on the deficiency EWT, FT and DST assessed against

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[4] CHAPTER II – DONOR'S TAX (under TITLE III – ESTATE AND DONOR'S TAXES).

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petitioner, and (2) in the computation of delinquency interest under Section 249(C) of the same Code, the portion representing the same deficiency interest.

ERLINDA P. UY
Associate Justice