REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB No. 1336
(CTA CASE No. 8411)

- versus -

Present:

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

AB CAPITAL AND INVESTMENT CORPORATION,
Respondent.

Promulgated:
MAY 12 2017 2:40pm

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DECISION

***Fabon-Victorino, J.*:**

In this Petition for Review dated August 7, 2015, petitioner Commissioner of Internal Revenue (CIR) assails the Decision dated April 30, 2015 rendered by the Court in Division which cancelled the assessment against respondent for deficiency income tax (IT), percentage tax (PT), and compromise penalties but upheld in part the assessment for deficiency withholding tax on compensation (WTC), expanded withholding tax (EWT), fringe benefits tax (FBT), final withholding tax (FWT), and documentary stamp tax (DST) in the aggregate amount of P829,040.64, all for the year 2008.

Petitioner equally assails the Resolution dated June 30, 2015, which denied for lack of merit its motion for reconsideration of the adverse Decision of April 30, 2015.

The undisputed facts are as follows:

Petitioner is authorized to decide disputed assessments and grant refunds of internal revenue taxes, fees, charges, and penalties imposed in relation thereto as provided by law.

Respondent AB Capital and Investment Corporation, on the other hand, is a domestic corporation, primarily engaged in conducting business as a full-service investment house with quasi-banking functions.

On May 27, 2009, petitioner issued Letter of Authority (LOA) No. 00049408 for the examination of respondent's books of accounts and other accounting records for all its internal revenue taxes for taxable year (TY) 2008.

On June 1, and 10, 2009, petitioner sent to respondent Notices for Presentation of Books of Accounts and Other Accounting Records.

On September 28, 2011, petitioner sent respondent a Preliminary Assessment Notice (PAN) indicating the latter's liability for deficiency taxes in the total amount of P16,556,170.87.

On October 28, 2011, petitioner issued against respondent a Formal Letter of Demand/Assessment Notice (FLD/FAN) to pay deficiency taxes for TY 2008, computed as follows:

TAX ASSESSED	ASSESSED AMOUNT
Income Tax	P 16,835,114.25
Withholding Tax on Compensation	1,844,567.66
Expanded Withholding Tax	928,670.60
Fringe Benefit Tax	171,797.16
Final Withholding Tax	342,402.28
Percentage Tax	953,435.15
Documentary Stamp Tax	P 4,089,696.27

On November 16, 2011, respondent protested the FLD/FAN.

On December 8, 2011, petitioner issued a Final Decision on Disputed Assessment (FDDA) finding respondent liable for deficiency IT, WTC, EWT, FBT, FWT, PT, and DST, plus penalties and interest in the total amount of P26,165,683.37.

On January 12, 2012, respondent appealed the said FDDA via a Petition for Review filed with the Court in Division.

On April 30, 2015, the Court in Division promulgated the assailed Decision, the dispositive portion of which reads as follows:

> "WHEREFORE, premises considered, the assessments issued by (petitioner) against (respondent) for taxable year 2008 covering deficiency income tax in the amount of P16,835,114.25, percentage tax in the amount of P953,435.15 and compromise penalties in the amount of P168,000.00 are hereby CANCELLED AND/OR WITHDRAWN. However, the assessments for deficiency withholding tax on compensation, expanded withholding tax, fringe benefits tax, final withholding tax, and documentary stamp tax are hereby UPHELD IN PART. Accordingly, (respondent) is hereby ordered to pay EIGHT HUNDRED TWENTY NINE THOUSAND FORTY PESOS AND SIXTY FOUR CENTAVOS (P829,040.64) for the taxable year 2008, inclusive of the 25% surcharge imposed under Section 248(3) of the 1997 NIRC, as amended, computed as follows:

Tax Type	Basic Tax Due	25% Surcharge	Total
Withholding Tax on Compensation (WTC)	P 399,583.10	P 99,895.78	P 499,478.88
Expanded Withholding Tax (EWT)	34,322.56	8,580.64	42,903.20
Fringe Benefit Tax (FBT)	18,590.92	4,647.73	23,238.65
Final Withholding Tax (FWT)	208,426.93	52,106.73	260,533.66

Documentary Stamp Tax (DST)	2,309.00	577.25	2,886.25
Total	**P 663,232.51**	**P 165,808.13**	**P 829,040.64**

In addition, (respondent) is hereby ORDERED to PAY:

a) Deficiency interest at the rate of 20% per annum on the basic deficiency WTC, EWT, FBT, FWT and DST 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
Withholding Tax on Compensation (WTC)	P 399,583.10	January 15, 2009
Expanded Withholding Tax (EWT)	34,322.56	January 15, 2009
Fringe Benefit Tax (FBT)	18,590.92	January 15, 2009
Final Withholding Tax (FWT)	208,426.93	January 15, 2009
Documentary Stamp Tax (DST)	2,309.00	January 15, 2009

b) Delinquency interest at the rate of 20% per annum on the total amount of P829,040.64 and 20% deficiency interest which have accrued in the aforestated in (a) computed from December 14, 2011 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED."

In the assailed Resolution of June 30, 2015, the Court in Division denied petitioner's plea for reconsideration of the adverse decision for lack of merit.

Hence, this Petition for Review before the Court *En Banc* posted by petitioner on August 10, 2015, with the following errors allegedly committed by the Court in Division, to wit:

> The Honorable Court erred in partially cancelling the assessment with respect to the deficiency taxes from January 2008 to September 2008 on ground of prescription.
>
> The Honorable Second Division erred in cancelling the assessment on deficiency percentage tax.
>
> The Honorable Second Division erred in cancelling the assessment on deficiency income tax.

Petitioner avers that the Court in Division is incorrect in ruling that the deficiency assessment for WTC, EWT, FBT, and FWT for the period of January-September 2008 against respondent was issued beyond the 3-year period mandated under Section 203 of the NIRC, as amended, hence, it should be cancelled and withdrawn on ground of prescription.

Further, the assessed WTC, EWT, FBT, and FWT are not internal revenue taxes but penalties imposed upon respondent for its failure to properly deduct and withhold taxes due from its transactions with the respective payees. Petitioner points out that respondent was assessed not as a taxpayer but as a withholding agent of the government, placing the assessment outside the ambit of the 3-year prescriptive period. Being imprescriptible, the said assessment against respondent was timely issued.

Likewise erroneous, is the cancellation of the assessment for PT for the period of January-September 2008 on ground of prescription given that respondent filed a false return, hence, the 10-year prescriptive period to assess under Section 222 of the NIRC, as amended, should apply. Petitioner claims that comparison of respondent's ITR with its monthly remittance returns done during the audit showed that there was an under-declaration of income by respondent, rendering the ITR false in which case, the 10-year prescriptive period to assess should apply.

Petitioner cannot also accept the cancellation of the assessment on deficiency IT claiming that it lacks basis. w/

Allegedly, the Court in Division erred in its finding that despite disallowance of deductions for salaries and wages, interest expense, and income payments not subjected to EWT, respondent was still in a net loss position. Petitioner opines that respondent is no longer entitled to claim unutilized net operating loss carry over (NOLCO) as deduction from any deficiency tax assessment for CY 2008 because by carrying over its net loss to the next three (3) consecutive taxable years immediately following 2008 when the loss occurred, respondent effectively waived its right to claim losses for CY 2008. Petitioner was therefore correct when it added back the NOLCO to the computation of income for the year 2008.

For its part, respondent counters that the theory invoked by petitioner that the assessment for withholding taxes are imprescriptible is without legal mooring. Allegedly, the Court has consistently ruled that withholding taxes are subject to the 3-year prescriptive period under Section 203 of the NIRC, as amended, reckoned from the date prescribed by law for the filing of the return or date of actual filing of such return for withholding taxes.

Respondent also rejects petitioner's claim that withholding taxes are not internal revenue taxes, thus, imprescriptible which notion he based on a ruling that the liability of a withholding agent such as respondent, is different from that of the principal taxpayer who has the burden to pay the tax. In no way, however, will the said distinction lead to a conclusion that withholding taxes are not internal revenue taxes. There is, likewise, no law or jurisprudence to back up the position that the 3-year prescriptive period applies only to the principal taxpayer and not to the withholding agent.

By insisting on the forgoing position, petitioner allegedly ignores the tenet that the statute of limitations on assessment and collection of taxes is for the benefit and protection of the taxpayer, hence, should be construed liberally in favor of the taxpayer. An opposite stance will subject the taxpayer to incessant investigation and assessment by petitioner.

The jurisprudence cited by petitioner will also not save the day for him as there is no express pronouncement therein sustaining petitioner's proposition that withholding taxes are not internal revenue taxes thus outside the coverage of Section 203 of the NIRC.

Respondent as well denies that it filed a false return pertaining to PT justifying the application of the 10-year period to assess under Section 222 of the NIRC, as amended. The imputation, per respondent, constitutes a change of theory on appeal as it was neither raised by petitioner in the FLD/FAN and FDDA, nor was it cited as an issue in his Answer and in the parties' Joint Stipulation of Facts and Issues filed with the Court in Division. As such, this new allegation deserves scant consideration by the Court.

Finally, respondent subscribes to the cancellation of the assessment for deficiency IT by allowing the application of its unutilized NOLCO as deduction for the year 2008. Respondent believes that the starting point in the computation of the subject deficiency assessment should be the taxable loss shown in its 2008 ITR. Moreover, adding respondent's unexpired NOLCO pertaining to the years 2005 to 2007 to its unapplied NOLCO for the year 2008 would amount to P99,117,350.00, which is sufficient to cover any alleged deficiency taxes for the year 2008 as said loss remains unutilized by respondent, even in the succeeding years.

The instant Petition was submitted for decision on May 12, 2016.[1]

THE RULING OF THE COURT

Section 203 of the NIRC of 1997, as amended, pertinently provides, thus:

> SEC. 203. *Period of Limitation Upon Assessment and Collection.* - Except as provided in Section 222, 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

[1] Resolution dated May 12, 2016, docket p. 165-166.

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> 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 (3)-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.

Plain from the foregoing provision that petitioner had only three years, counted from the date of respondent's 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.[2]

Corollary to the cited provision, Section 7[3] of RR No. 9-2000, as amended by RR No. 26-02, provides that as a full-service investment house performing quasi-banking functions, respondent had 15 days following the end of the month to file its Monthly Withholding Tax Returns, and 25 days following the end of the month to file Monthly VAT Declarations and Monthly Percentage Tax Returns.

Based on the record, respondent filed its WTC Monthly Returns for 2008, juxtaposed with the corresponding last day of the 3-year prescriptive period pursuant to Section 203 of the NIRC, as follows:

[2] See Commissioner of Internal Revenue vs. Standard Chartered Bank, G.R. No. 192173, July 29, 2015.

[3] Section 7. TIME OF FILING RETURN. – For purposes of filing returns under the EFPS, the taxpayers classified under the following business industries shall be required to file Monthly Withholding Tax Returns, except withholding of Value-Added Tax; Monthly VAT Declarations; and Monthly Percentage Tax Returns, on or before the dates prescribed herein below:

Business Industry	Monthly Withholding Tax Returns Except Withholding of Value Added Tax	Monthly VAT Declarations and Monthly Percentage Tax Returns
Group A Non-Bank Financial Intermediation Activities Auxiliary to Financial Intermediation	• Fifteen (15) days following end of the month	• Twenty five (25) days following end of the month

Period Covered	Date of filing	Last Day to File Return	Last Day of the 3-Year Period
January	February 14, 2008	February 15, 2008	February 15, 2011
February	March 14, 2008	March 15, 2008	March 15, 2011
March	April 14, 2008	April 15, 2008	April 15, 2011
April	May 15, 2008	May 15, 2008	May 15, 2011
May	June 13, 2008	June 15, 2008	June 15, 2011
June	July 11, 2008	July 15, 2008	July 15, 2011
July	August 8, 2008	August 15, 2008	August 15, 2011
August	September 10, 2008	September 15, 2008	September 15, 2011
September	October 10, 2008	October 15, 2008	October 15, 2011
October	November 10, 2008	November 15, 2008	November 15, 2011
November	December 9, 2008	December 15, 2008	December 15, 2011
December	January 9, 2009	January 15, 2009	January 15, 2012

As shown above, respondent filed its WTC Monthly Returns either before or on the last day prescribed by law for the filing of the return. Pursuant to Section 203 of the NIRC, such returns shall be considered filed on the last day, which shall also be the reckoning date for the 3-year prescriptive period.

Clearly, when the FLD/FAN to pay deficiency taxes for the year 2008 was issued on October 28, 2011, the assessment for the months of January to September had already prescribed on October 15, 2011.

The same is true with the assessment for EWT for the year 2008, as demonstrated in the above table, justifying the cancellation of the assessment for deficiency assessment for WTC for the year 2008.

The assessment for FBT suffers the same fate. Respondent filed its Quarterly Returns for the year 2008 on April 14, 2008, July 14, 2008, October 10, 2008, and January 9, 2009, all before the last day prescribed by law. Reckoned from the last day prescribed by law for the filing of quarterly returns, *viz.*, April 15, 2008, July 15, 2008, October 15, 2008, and January 15, 2009, petitioner had 3 years, or until April 15, 2011, July 15, 2011, October 15, 2011, and January 15, 2012, respectively, to issue an assessment. However, the FLD/FAN containing the FBT assessment for January to September 2008 was issued on October 28, 2011, or beyond the 3-year prescriptive period.

Anent the assessment for the FWT, the tabular presentation below indicating the dates when respondent filed its Monthly Returns for Final Tax for the year 2008 as well as the respective last day for filing the return for final tax shows the assessment for FWT for the period of January to September as contained in the FLD/FAN issued on October 28, 2011 had already prescribed, thus:

Period Covered	Date of filing	Last Day to File Return	Last Day of the 3-Year Period
January	February 13, 2008	February 15, 2008	February 15, 2011
February	March 14, 2008	March 15, 2008	March 15, 2011
March	April 14, 2008	April 15, 2008	April 15, 2011
April	May 15, 2008	May 15, 2008	May 15, 2011
May	June 13, 2008	June 15, 2008	June 15, 2011
June	July 14, 2008	July 15, 2008	July 15, 2011
July	August 8, 2008	August 15, 2008	August 15, 2011
August	September 10, 2008	September 15, 2008	September 15, 2011
September	October 9, 2008	October 15, 2008	October 15, 2011
October	November 8, 2008	November 15, 2008	November 15, 2011
November	December 9, 2008	December 15, 2008	December 15, 2011
December	January 9, 2009	January 15, 2009	January 15, 2012

As to the assessment for PT for the months of January to September 2008, the table below containing the dates of respondent's filing of its Monthly Returns for Percentage Tax for the year 2008 unveils the fact that prescription had also set in, precisely the order for its cancellation, thus:

Period Covered	Date of filing	Last Day to File Return	Last Day of the 3-Year Period
January	February 23, 2008	February 25, 2008	February 25, 2011
February	March 24, 2008	March 25, 2008	March 25, 2011
March	April 25, 2008	April 25, 2008	April 25, 2011
April	May 22, 2008	May 25, 2008	May 25, 2011
May	June 19, 2008	June 25, 2008	June 25, 2011
June	July 18, 2008	July 25, 2008	July 25, 2011
July	August 20, 2008	August 25, 2008	August 25, 2011
August	September 22, 2008	September 25, 2008	September 25, 2011
September	October 21, 2008	October 25, 2008	October 25, 2011
October	November 24, 2008	November 25, 2008	November 25, 2011
November	December 22, 2008	December 25, 2008	December 25, 2011
December	January 22, 2009	January 25, 2009	January 25, 2012

On the same ground, the assessment for DST for the same period was unerringly cancelled by the Court in Division as demonstrated in the following table showing the pertinent dates relative to respondent's filing of monthly returns in compliance with Section 5[4] of RR No. 06-01, thus:

Period Covered	Last Day to File Return	Last Day of the 3-Year Period
January	February 5, 2008	February 5, 2011
February	March 5, 2008	March 5, 2011
March	April 5, 2008	April 5, 2011
April	May 5, 2008	May 5, 2011
May	June 5, 2008	June 5, 2011
June	July 5, 2008	July 5, 2011
July	August 5, 2008	August 5, 2011
August	September 15, 2008	September 5, 2011
September	October 5, 2008	October 5, 2011
October	November 5, 2008	November 5, 2011
November	December 5, 2008	December 5, 2011
December	January 5, 2009	January 5, 2012

The 3-year period rule to assess internal revenue taxes is explicitly provided in Section 203 of the NIRC, as amended. Hence, an assessment notice issued after or beyond the three-year prescriptive period is no longer valid and effective.[5] Applying the law and jurisprudence on the matter, the assessed amounts for WTC, EWT, FBT, FWT, PT and DST can no longer be validly collected by petitioner from respondent for the period covering January to September 2008.

The law prescribing a limitation of actions for the collection of the income tax is beneficial both to the Government and to its citizens; to the Government because tax officers would be obliged to act properly in the making of the assessment, and to citizens because after the lapse of the period of prescription, citizens would have a feeling of security against unscrupulous tax agents who may find an excuse to inspect the books of taxpayers, not to determine the latter's real liability, but to take advantage of every

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[4] SECTION 5. *Time for Filing of Documentary Stamp Tax Returns and the Payment of Taxes Due Thereon.* – xxx
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(2) For large taxpayers, Section 4(3.6) of Revenue Regulations No. 1-98 is hereby amended to read as follows:
SECTION 4. *Filing of Returns and Payment of Taxes.* –
3. *When to File and Pay*
3.6 Documentary Stamp Tax
Large taxpayers shall pay their documentary stamp taxes within five (5) days after the close of the month when the taxable document was made, signed, issued, accepted or transferred by the filing of the documentary stamp tax returns, through purchase or actual affixture or by imprinting the documentary stamps through a documentary stamp tax metering machine.

[5] Commissioner of Internal Revenue vs. Kudos Metal Corporation, G.R. No. 178087, May 05, 2010.

opportunity to molest peaceful, law-abiding citizens. Without such a legal defense, taxpayers would furthermore be under obligation to always keep their books and keep them open for inspection subject to harassment by unscrupulous tax agents. The law on prescription being a remedial measure should be interpreted in a way conducive to bringing about the beneficent purpose of affording protection to the taxpayer within the contemplation of the Commission which recommends the approval of the law.[6]

On the theory that assessment for WTC, EWT, FBT, and FWT are not internal revenue taxes, *a fortiori* not covered by the 3- year period to assess under Section 203 of the NIRC, as amended, hence, may be issued at any time, suffice it to say that the NIRC, as amended, the law administered by the BIR says otherwise.

Several provisions of the NIRC, as amended, indicate that WTC, EWT, FBT and FWT are internal revenue taxes imposed and collected by the BIR. Foremost of these provisions is Section 21 of the NIRC of 1997, as amended, which enumerates the taxes deemed as national internal revenue taxes, thus:

> SEC. 21. Sources of Revenue. - The following taxes, fees and charges are deemed to be national internal revenue taxes:
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> (a) Income tax;
> (b) Estate and donor's taxes;
> (c) Value-added tax;
> (d) Other percentage taxes;
> (e) Excise taxes;
> (f) Documentary stamp taxes; and
> (g) Such other taxes as are or hereafter may be imposed and collected by the Bureau of Internal Revenue.

The other provisions indicating that WTC, EWT, FBT and FWT are internal revenue taxes are Sections 33, 57 to 59, 79 to 83 of the same Tax Code.

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[6] Commissioner of Internal Revenue vs. Standard Chartered Bank, G.R. No. 192173, July 29, 2015.

Even the cases cited by petitioner in support of his theory, to wit: *NDC case*[7], *Filipinas Synthetic case*[8], *Bank of Commerce case*[9], *RCBC case*[10], *CIR v CA case*[11], and *China bank case*[12] are not on all fours with the present case. The facts, subject matter and issues resolved therein are extremely different from the present case. In other words, the said cases cannot be deemed as authority to support petitioner's hypothesis. They are not binding jurisprudence and of no value as precedent as far as the present case is concerned given that the issues herein were not at all discussed or referred to in the cited cases. On this regard, the Supreme Court ruled in the following fashion, thus:

> **Any issue**, whether raised or not by the parties, ***but not passed upon by the Court,* does not have any value as precedent**. As this Court has explained as early as 1926:
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> > It is contended, however, that the question before us was answered and resolved against the contention of the appellant in the case of *Bautista vs. Fajardo* (38 Phil. 624). In that case no question was raised nor was it even suggested that said section 216 did not apply to a public officer. That question was not discussed nor referred to by any of the parties interested in that case. It has been frequently decided that the fact that a statute has been accepted as valid, and invoked and applied for many years in cases where its validity was not raised or passed on, does not prevent a court from later passing on its validity, where that question is squarely and properly raised and presented. **Where a question passes the Court *sub***

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[7] *National Development Company vs. Commissioner of Internal Revenue,* G.R. No. L-53961, June 30, 1987.
[8] *Filipinas Synthetic Fiber Corporation vs. Court of Appeals, et al.,* G.R. Nos. 118498 and 124377, October 12, 1999.
[9] *Commissioner of Internal Revenue vs. Bank of Commerce,* G.R. No. 149636, June 8, 2005.
[10] *Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue,* G.R. No. 170257, September 7, 2011.
[11] *Commissioner of Internal Revenue vs. Court of Appeals,* 361 Phil 103 as cited in RCBC vs. CIR, G.R. No. 170257, September 7, 2011.
[12] *China Banking Corp. vs. Court of Appeals,* G.R. Nos. 146749 and 147938, June 10, 2003.

> ***silentio*, the case in which the question was so passed is not binding on the Court (*McGirr vs. Hamilton and Abreu,* 30 Phil. 563), nor should it be considered as a precedent.** (*U.S. vs. Noriega and Tobias*, 31 Phil. 310; *Chicote vs. Acasio,* 31 Phil. 401; *U.S. vs. More*, 3 Cranch [U.S.] 159, 172; *U.S. vs. Sanges*, 144 U.S. 310, 319; *Cross vs. Burke*, 146 U.S. 82.) For the reasons given in the case of *McGirr vs. Hamilton and Abreu*, supra, the decision in the case of *Bautista vs. Fajardo*, supra, can have no binding force in the interpretation of the question presented here.
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> In *Cebu Toyo*, the nature of the 120-day period, whether it is mandatory or optional, was not even raised as an issue by any of the parties. **The Court never passed upon this issue.** Thus, *Cebu Toyo* does not constitute binding precedent on the nature of the 120-day period.[13]

While it is true that past decisions of this Court may be followed in the adjudication of subsequent cases, but for the past ruling to come within this principle, the Court must categorically rule on an issue directly raised by the parties. In the case of *San Roque-Taganito,* the Court ruled that "any issue, whether raised or not by the parties, but not passed upon by the court, does not have any value as precedent."[14]

By insisting that the assessed amounts are not internal revenue taxes, petitioner conveniently ignores his own directive to the revenue officers named in the LOA he issued against respondent. The Letter of Authority No. 00049408[15] dated May 27, 2009 issued by Zenaida G. Garcia authorizing the examination of the account of the respondent specifically states, thus: "The bearer(s) hereof, x x x is/are authorized

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[13] Commissioner of Internal Revenue vs. San Roque Power Corporation, G.R. No. 187485, Taganito Mining Corporation vs. Commissioner of Internal Revenue, G.R. No. 196113, Philex Mining Corporation vs. Commissioner of Internal Revenue, G.R. No. 197156, February 12, 2013.

[14] Procter and Gamble Asia PTE Ltd. vs. Commissioner of Internal Revenue, G.R. No. 204277, May 30, 2016.

[15] Exhibit R-1; BIR Record p.1.

to examine your books of accounts and other accounting records for <u>All Internal Revenue Taxes</u> for the period from January 1, 2008 to December 31, 2008. x x x"

Significantly, petitioner in the parties' Joint Stipulation of Facts and Issues dated April 23, 2012,[16] admitted this directive to wit: "On May 27, 2009, (petitioner) through Zenaida G. Garcia, then Officer in Charge-Assistant Commissioner for Large Taxpayers Service, issued Letter of Authority No. 00049408 against (Respondent) to examine its books of accounts and other accounting records for <u>all internal revenue taxes</u> for the period from January 1, to December 31, 2008.

The admission having been made in a stipulation of facts at the pre-trial by the parties, it must be treated as a judicial admission.[17] Verily, petitioner cannot repudiate his admission and is already estopped from claiming otherwise. A judicial admission binds the person who makes the same, and absent any showing that this was made thru palpable mistake, no amount of rationalization can offset it.[18]

There is also no merit to petitioner's allegation that the assessment against respondent is deemed an imposition of penalties for the latter's failure to withhold. The computation in the PAN, FLD/FAN, and FDDA issued by petitioner against respondent clearly shows the contrary. There is likewise nothing in the notices saying that the amount assessed represents the penalties for failure of respondent to withhold portions of its payments as taxes for remittance to the BIR. To insist on this theory is to exact taxes from respondent without informing it of the nature of the imposition in violation of its right to due process. Elementary is the rule that taxpayers must be informed in writing of the law and the facts upon which a tax assessment is based; otherwise, the assessment is void.[19] This is enshrined in Section 228 of the NIRC, as amended.

Anent petitioner's claim that the prescriptive period to assess percentage tax should be ten (10) years on the

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[16] Division docket pp. 501-510.
[17] Toshiba Information Equipment (Phils.), Inc. vs. CIR, G.R. No. 157594, March 9, 2010.
[18] Commissioner of Internal Revenue vs. Manila Electric Company (MERALCO), G.R. No. 181459, June 9, 2014.
[19] Commissioner of Internal Revenue vs. Reyes, G.R. No. 159694, January 27, 2006.

ground that respondent filed a false return, Section 222 of the NIRC, as amended, pertinently provides, thus:

> "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.
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> x x x x x x x x x
>
> (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."

Pursuant to Section 222 of the NIRC, as amended, the three (3)-year prescriptive period to assess and collect internal revenue taxes may be extended to ten (10) years under Section 203 of the 1997 NIRC, as amended, in cases of (1) fraudulent returns; (2) false returns with intent to evade tax; and (3) failure to file a return, to be computed from the time of discovery of the falsity, fraud, or omission.[20]

However, the issue of falsity of respondent's return meriting the application of Section 222 of the NIRC, as amended, was never raised by petitioner before the Court in

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[20] Banco De Oro, Bank of Commerce, China Banking Corporation, Metropolitan Bank & Trust Company, Philippine Bank of Communications, Philippine National Bank, Philippine Veterans Bank and Planters Development Bank, Petitioners, Rizal Commercial Banking Corporation and RCBC Capital Corporation, Petitioners-Intervenors, Caucus of Development NGO Networks, Petitioner-Intervenor vs. Republic of the Philippines, The Commissioner of Internal Revenue, Bureau of Internal Revenue, Secretary of Finance, Department of Finance, The National Treasurer and Bureau of Treasury, G.R. No. 198756, January 13, 2015.

Division. The said issue was never mentioned in petitioner's Answer,[21] Pre-Trial Brief,[22] Memorandum,[23] and even in his Motion for Partial Reconsideration[24] assailing the Decision dated April 30, 2015 filed before the Court in Division.

As a general rule, appeals can only raise questions of law or fact that (a) were raised in the court below, and (b) are within the issues framed by the parties therein. An issue which was neither averred in the pleadings nor raised during trial in the court below cannot be raised for the first time on appeal. The rule was made for the benefit of the adverse party and the trial court as well. Raising new issues at the appeal level is offensive to the basic rules of fair play and justice and is violative of a party's constitutional right to due process of law. Moreover, the trial court should be given a meaningful opportunity to consider and pass upon all the issues, and to avoid or correct any alleged errors before those issues or errors become the basis for an appeal.[25]

It is axiomatic in pleadings and practice that no new issue in a case can be raised in a pleading which by due diligence could have been raised in previous pleadings.[26] It is well settled that matters that were neither alleged in the pleadings nor raised during the proceedings below cannot be ventilated for the first time on appeal and are barred by estoppel. To allow the contrary would constitute a violation of the other party's right to due process, and is contrary to the principle of fair play.[27]

As such, raising this new argument only before the Court *En Banc* constitutes a proscribed change of theory on appeal which cannot be countenanced and given credence by the Court.

Corollarily, before petitioner can apply the ten (10) year prescriptive period under Section 222 of the NIRC,[28]

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[21] Division docket pp. 425-437.
[22] Division docket pp. 444-451.
[23] Division docket pp. 1880-1894.
[24] Division docket pp. 1966-1977.
[25] Commissioner of Internal Revenue vs. Eastern Telecommunications, G.R. No. 163835, July 07, 2010.
[26] Toshiba Information Equipment (Phils.), Inc. vs. Commissioner of Internal Revenue, G.R. No. 157594, March 9, 2010.
[27] Commissioner of Internal Revenue vs. Puregold Duty Free, Inc., G.R. No. 202789, June 22, 2015.
[28] Commissioner of Internal Revenue vs. Asalus Corporation, G.R. No. 221590, February 22, 2017.

still the taxpayer must be informed of such imposition and thereby be accorded due process by being informed of the law and the facts upon which the assessment is based, pursuant to Section 228 of the NIRC, as amended. This much was declared by the Supreme Court, as follows:

> It is true that neither the FAN nor the FDDA explicitly stated that the applicable prescriptive period was the ten (10)-year period set in Section 222 of the NIRC. They, however, made reference to the PAN, which categorically stated that "[t]he running of the three-year statute of limitation as provided under Section 203 of the 1997 National Internal Revenue Code (NIRC) is not applicable xxx but rather to the ten (10) year prescriptive period pursuant to Section 222(A) of the tax code xxx." In *Samar-I Electric Cooperative v. COMELEC,* the Court ruled that it sufficed that the taxpayer was substantially informed of the legal and factual bases of the assessment enabling him to file an effective protest, to wit:
>
> > Although the FAN and demand letter issued to petitioner were not accompanied by a written explanation of the legal and factual bases of the deficiency taxes assessed against the petitioner, the records showed that respondent in its letter dated April 10, 2003 responded to petitioner's October 14, 2002 letter-protest, explaining at length the factual and legal bases of the deficiency tax assessments and denying the protest.
> >
> > Considering the foregoing exchange of correspondence and documents between the parties, we find that the requirement of Section 228 was substantially complied with. Respondent had fully informed petitioner *in writing* of the factual and legal bases of the deficiency taxes assessment, which enabled the latter to file an "effective" protest, much unlike

> the taxpayer's situation in *Enron.* Petitioner's right to due process was thus not violated.
>
> Thus, substantial compliance with the requirement as laid down under Section 228 of the NIRC suffices, for what is important is that the taxpayer has been sufficiently informed of the factual and legal bases of the assessment so that it may file an effective protest against the assessment. In the case at bench, Asalus was sufficiently informed that with respect to its tax liability, the extraordinary period laid down in Section 222 of the NIRC would apply. This was categorically stated in the PAN and all subsequent communications from the CIR made reference to the PAN. Asalus was eventually able to file protest addressing the issue on prescription, although it was done only in its supplemental protest to the FAN.[29]

Thus, to apply the 10-year prescriptive period, the taxpayer must still be informed of such imposition either in the PAN or the FAN, or any correspondence from petitioner. In the instant case, petitioner raised this issue only on appeal before the Court *En Banc.* Moreover, respondent was never informed by petitioner in the PAN, FLD/FAN, and FDDA that the 10-year prescriptive period was applied due to filing of a false return pertaining to PT. Absent any such notification from petitioner, respondent was not accorded due process as it was not allowed the opportunity to dispute or present evidence to rebut this finding. In the absence of due process, the Court cannot subscribe to petitioner's view that there is basis to apply the 10-year prescriptive period under Section 222 of the NIRC, as amended.

Finally, petitioner posits that respondent is no longer entitled to claim unutilized NOLCO as deduction from any deficiency tax assessment for the year 2008 because by carrying over its net loss to the next three (3) consecutive taxable years immediately following the year of the loss, respondent in effect waived its right to claim losses for the year 2008.

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[29] Commissioner of Internal Revenue vs. Asalus Corporation, G.R. No. 221590, February 22, 2017.

Note that this issue is a mere rehash of petitioner's argument which has already been addressed by the Court in Division in its assailed Decision dated April 30, 2015.[30]

Further, Section 34(D)(3) of the NIRC, as amended, provides as follows:

> SEC. 34. *Deductions from Gross Income.*- x x x there shall be allowed the following deductions from gross income;
>
> (A) *Expenses.* – x x x
> (B) *Interest.* – x x x
> (C) *Taxes.* – x x x
> (D) *Losses.* – x x x
> (1) x x x
> (2) x x x
> (3) *Net Operating Loss Carry-Over.* – The net operating loss of the business or enterprise for any taxable year immediately preceding the current taxable year, which had not been previously offset as deduction from gross income shall be carried over as a deduction from gross income for the next three (3) consecutive taxable years immediately following the year of such loss: *Provided, however,* That any net loss incurred in a taxable year during which the taxpayer was exempt from income tax shall not be allowed as a deduction under this Subsection; *Provided, further,* That a net operating loss carry-over shall be allowed only if there has been no substantial change in the ownership of the business or enterprise in that –
>
> (i) Not less than seventy-five percent (75%) in nominal value of outstanding issued shares, if the business is in the name of a corporation, is held by or on behalf of the same persons; or

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[30] See Decision dated April 30, 2015 pp 37-39.

> (ii) Not less than seventy-five percent (75%) of the paid up capital of the corporation, if the business is in the name of a corporation, is held by or on behalf of the same persons.
>
> For purposes of this subsection, the term "*net operating loss*" shall mean the excess of allowable deduction over gross income of the business in a taxable year.
>
> *Provided*, That for mines other than oil and gas wells, a net operating loss without the benefit of incentives provided for under Executive Order No. 226, as amended, otherwise known as the Omnibus Investments Code of 1987, incurred in any of the first ten (10) years of operation may be carried over as a deduction from taxable income for the next five (5) years immediately following the year of such loss. The entire amount of the loss shall be carried over to the first of the five (5) taxable years following the loss, and any portion of such loss which exceeds the taxable income of such first year shall be deducted in like manner from the taxable income of the next remaining four (4) years.
>
> x x x x x x x x x

There is nothing in the foregoing provision which supports petitioner's stance that the mere carry-over of loss for the subject year 2008 to the succeeding year, without actually applying or utilizing such carry-over in the succeeding year, will automatically remove such loss from the equation in the year the loss was incurred. Petitioner likewise failed to cite any law or regulation to support this stance. In arriving at respondent's taxable income, petitioner erred in adding back the amount of P31,195,401.00, which represents respondent's net loss for taxable year 2008, as Net Operating Loss Carry-Over (NOLCO) carried over in 2009.

It can be argued that in assessing for the year 2008, petitioner found no loss and thereby added back the NOLCO for the said year 2008. However, this is unsupported by the evidence on record. From the ITRs for the years 2008,[31] 2009,[32] 2010,[33] and the first two (2) quarters[34] of the year 2011, respondent incurred continuous net losses from operations for the inclusive years, hence, it had no chance to utilize its NOLCO from the year 2008.

Even assuming that there was no loss in the year 2008, still petitioner had no basis to add back the NOLCO from 2008 through an assessment for the same year of 2008. In a case, this Court ruled that assuming that the NOLCO deduction is not proper as there was no loss for a particular year, still the same can only be the subject of assessment when the same was claimed as deduction for the succeeding year. The Court ruled:

> Besides, respondent failed to present evidence to prove that petitioner used its 2002 net loss as NOLCO in the succeeding year. Granting, for the sake of argument, that petitioner actually deducted its 2002 net loss as NOLCO in the succeeding year 2003 and the said deduction was not proper as petitioner did not incur net loss, **the same can only be the subject of assessment when it was claimed as deduction in the year 2003 and not in the year 2002, for such is beyond the scope of the present assessment. Therefore, adding back the net loss of P68,433.00 to petitioner's taxable income for the year 2002 is erroneous.** [35] (emphasis ours)

Applying the foregoing tenet, in issuing an assessment for the year 2008, assuming that the audit conducted revealed no loss, petitioner cannot add back the NOLCO or loss incurred for the year 2008 to the taxable income for the same year. The said NOLCO falls within the ambit and can only be applied in the succeeding year hence can only be added back during the assessment for the succeeding year

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[31] Exhibit F.
[32] Exhibit G.
[33] Exhibit H.
[34] Exhibit I-4 and J.
[35] Moneyline Telerate vs. Commissioner of Internal Revenue, CTA Case No. 7658, February 4, 2011.

2009. On this regard, Section 34(D)(3) of the NIRC, as amended, provides, to wit: "The net operating loss of the business or enterprise for any taxable year immediately preceding the current taxable year, which had not been previously offset as deduction from gross income shall be carried over as a deduction from gross income for the next three (3) consecutive taxable years immediately following the year of such loss."

Unarguably, the Court in Division was correct in cancelling the deficiency IT assessment for the year 2008 because after taking into account respondent's disallowed deductions for salaries and wages, interest expense and income payments not subjected to EWT, petitioner would still be in a net loss position in the amount of P11,453,357.20, computed as follows:

Net Income (Loss) per ITR	P	(31,195,401.00)
Add: Disallowed Deductions		
Compensation not subjected to WTC		1,465,443.07
Disallowed Interest expense		17,260,746.00
Income payments not subjected to EWT		1,015,854.73
Taxable Loss	P	(11,453,357.20)
Income Tax Due		
Less: Tax Credits		
Prior years excess credits	P	8,214,570.58
Creditable tax withheld		555,262.01
Total		8,769,832.59
Excess Tax Credits	**P**	**(8,769,832.59)**

Finally, since there is no question on the unprescribed portion, the same is deemed uncontested, hence, will no longer be discussed, pursuant to Section 8, Rule 51 of the 1997 Rules of Civil Procedure which expressly provides:

> SEC. 8. *Questions that may be decided.* -- No error which does not affect the jurisdiction over the subject matter or the validity of the judgment appealed from or the proceedings therein will be considered unless stated in the assignment of errors, or closely related to or dependent on an assigned error and properly argued in the brief, save as the court pass upon plain errors and clerical errors.[36]

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[36] PNB vs. Spouses Rabat, G.R. No. 134406, November 15, 2000

Case law has it that a prayer for equitable relief is of no avail, unless the petition states facts which will authorize the court to grant such relief. A court cannot set itself in motion, nor has it power to decide questions except as presented by the parties in their pleadings. Anything that is resolved or decided beyond them is *coram non judice* and void.[37]

WHEREFORE, the Petition for Review dated August 7, 2015 filed by the Commissioner of Internal Revenue is hereby **DENIED**, for lack of merit.

Consequently, the Decision dated April 30, 2015 and the Resolution dated June 30, 2015 both rendered by the Court in Division, are **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

(see Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

(I join PJ's Concurring Opinion)
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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

MA. BELEN RINGPIS-LIBAN
Associate Justice

[37] People of the Philippines, et al. vs. Panfilo M. Lacson, G.R. No. 149453, October 07, 2003.

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 OF INTERNAL REVENUE,
Petitioner,

-versus-

AB CAPITAL AND INVESTMENT CORPORATION
Respondent.

CTA EB NO. 1336
(CTA Case No. 8411)

Present:

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

Promulgated:
MAY 12 2017 2:40pm

X---X

CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur in the result so proficiently expounded in the *ponencia*, particularly in affirming the Court in Division's Decision dated April 30, 2015 and Resolution dated June 30, 2015 which: (a) cancelled and withdrew the assessments issued against respondent for the year 2008 for deficiency income tax in the amount of ₱16,835,114.25; deficiency percentage tax in the amount of ₱953,435.15; and, compromise penalties in the amount of ₱168,000.00; and, (b) upheld in part the 2008 basic deficiency tax assessments, inclusive of 25% surcharge, for the following: (i) withholding tax on compensation (WTC) in the amount of ₱499,478.88; (ii) expanded withholding tax (EWT) in the amount of ₱42,903.20; (iii) fringe benefit tax (FBT) in the amount of ₱23,238.65; (iv) final withholding tax in the amount of ₱260,533.66; and, (v) documentary stamp tax (DST) in the amount of ₱2,886.25.

I am, however, unprepared to give my assent to the Court in Division's pronouncement that deficiency interest at the rate of 20% per annum must be imposed and collected on the basic deficiency WTC, EWT, FBT, FWT and DST. In this regard, I reiterate 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:
>
> > "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.
> >
> > xxx xxx xxx
> >
> > **Thus, where the issue involved was not raised nor presented to the court and not**

[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.

> **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-
>
> (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."

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

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

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> "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. 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."[5] 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.

In fine, Section 249 (B) of the NIRC is clear and explicit as when **deficiency interest** may be imposed, i.e., it may be imposed only on *"any deficiency in the tax due as the term is defined in [the National Internal Revenue] Code."* While there are many situations which could give rise to deficiency tax liabilities, **Section 249 (B) of the NIRC <u>qualified</u> the imposition of <u>deficiency interest</u> to "deficiency in the tax due, as the term is defined in the Code."** This evidently means that not all situations involving deficiency tax liabilities should be subjected to deficiency interest.

In contrast, Sections 248 **[Civil Penalties]** and 249(C) **[Delinquency Interest]** of the NIRC, both of which fall under Chapter I of Title X [Statutory Offenses and Penalties], prescribe "Additions to the Tax"; yet, these Sections **<u>did not provide the same qualification</u>** as that which is stated with respect to **deficiency interest**. Moreover, Section 248(A) of the NIRC imposes the 25% surcharge simply in addition to the tax required to be paid, and Section 248(B) imposes the penalty of 50% of the tax or of the

[5] *Commissioner of Internal Revenue vs. SM Prime Holdings, Inc.*, G.R. No. 183505, February 26, 2010, *citing Roxas vs. Court of Tax Appeals*, G.R. No. L-25043, April 26, 1968.

deficiency tax, **without qualification** similar to that provided in Section 249(B) of the NIRC anent **deficiency interest**. In the same vein, **delinquency interest** provided in Section 249 of the NRIC is imposed **without qualification** on the amount of the tax due, or on the deficiency tax, or on any surcharge or interest thereon. Reasonably construed, in the absence of aforestated qualification, the "additions" to tax apply to all forms of tax.

While additions to tax that are "qualified" must be limited to the type of "deficiency in the tax due as the term is defined in the Code", to impose or demand payment of 20% deficiency interest on all deficiency tax liabilities would render senseless the unequivocal qualification in Section 249(B) of the NIRC that deficiency interest shall be imposed only on *"any deficiency in the tax due as the term is defined in [the National Internal Revenue] Code."* Had it been the intention to impose deficiency interest on all deficiency tax liabilities, this specific qualification would not have been incorporated at all, similar to Sections 248 and 249 (C) of the NIRC.

Since it is only with respect to the donor's tax, income tax and estate tax which incorporate provisions that specifically **define "deficiency"** and considering that Section 249(B) of the NIRC is categorical that deficiency interest shall be imposed only on any deficiency in the tax due **as the term is defined in the NIRC**, I reiterate that the deficiency interest must be imposed only on these three (3) types of taxes. The liability to pay deficiency interest springs from Section 249(B) of the NIRC and its imposition must be strictly exercised in accordance with its precepts. This is consistent with Article 1158 of the Civil Code of the Philippines which provides that "**Obligations derived from law are not presumed**. Only those expressly determined in this Code or in special laws are demandable, and shall be regulated by the precepts of the law which establishes them; xxx xxx xxx."

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 basic deficiency WTC, EWT, FBT, FWT and DST assessed against respondent.**

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The foregoing stance notwithstanding, I concur with the *ponencia* in affirming the assailed Decision and Resolution of the Court in Division. In view of respondent's failure to appeal the assailed Decision and Resolution of the Court in Division, specifically the imposition of the 20% deficiency interest on the basic deficiency WTC, EWT, FBT, FWT and DST assessed against respondent, no affirmative relief can be granted to respondent other than the relief granted in the Court in Division's assailed Decision. On this point, *Estrellita G. Salazar vs. Philippine Duplicators, Inc.*[6] is instructive:

> "As a general rule, 'a party who has not appealed cannot obtain from the appellate court any affirmative relief other than the ones granted in the appealed decision.'
>
> **The reason for this rule is that since parties did not appeal from the decision or resolution, they are presumed to be satisfied with the adjudication**. Furthermore, Rule 141 on Legal Fees provides that if the fee is not paid, then 'the court may refuse to proceed with the action until they are paid and may dismiss the appeal or the action or proceeding.' The case or appeal is deemed filed only upon payment of the docket or appeal fee considering that jurisdiction is acquired by the court over the case or the appeal only upon full payment of the prescribed fee. **Thus, the court has no jurisdiction or authority to grant affirmative relief to the party who did not appeal as there is no obligation to pay any fee. Furthermore, in the interest of fairness, it would not be proper and just to award affirmative relief to the appellees since they did not comply with the requirements of appeal**. xxx xxx xxx." (Boldfacing supplied)

All told, I vote to **DENY** the Petition for Review filed by the Commissioner of Internal Revenue and **AFFIRM** the assailed Decision and Resolution of the Court in Division.

ROMAN G. DEL ROSARIO
Presiding Justice

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[6] G.R. No. 154628, December 6, 2006.