Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SECOND DIVISION

TRUSTMARK HOLDINGS CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 9072

Members:
CASTAÑEDA, JR., *Chairperson*,
CASANOVA, *and*
MANAHAN, *JJ.*

Promulgated:
MAY 19 2017
1:25 p.m.

x---x

DECISION

CASANOVA, J.:

This is a Petition for Review[1] filed by Trustmark Holdings Corporation praying that respondent's Assessment Notice No. ELTAD-II-DS-09-0019 issued against petitioner for surcharge, deficiency interest and delinquency interest arising from deficiency documentary stamp tax assessment (DST) in the aggregate amount of ₱310,262,534.02 for taxable year 2009 and prior years be declared null and void.

Petitioner is a domestic corporation duly registered with the Securities and Exchange Commission with S.E.C. Reg. No. A200009678, whose primary purpose is to be a holding corporation, without, however, engaging as a stockbroker or as dealer of securities.[2] It is duly registered with the Bureau of Internal Revenue (BIR) with Taxpayer's Identification Number 207-483-528-000.[3]

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[1] Docket, pp. 10-33
[2] Exhibit "P-1".
[3] Exhibit "P-2".

Respondent is the duly appointed Commissioner of Internal Revenue (CIR) vested with the power to decide disputed assessments, cancel and abate tax liabilities pursuant to the provisions of the National Internal Revenue Code (NIRC) of 1997, as amended. He holds office at the 5th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City.

Sometime in May 2010[4], petitioner received from respondent Letter of Authority (LOA-124-2010-00000086)[5], dated May 14, 2010[6], which authorized Revenue Officers Olivia Aviles, Teofilo Jr Barbiran, Dominic Morales, Katherine Mary Reyes and Group Supervisor Ernesto Gamad to examine petitioner's books of accounts and other accounting records for all internal revenue taxes for taxable period January 1, 2009 to December 31, 2009. Later on, the continuation of the conduct of the audit was assigned to Revenue Officer Flor Jasmin R. Soriano.[7]

Thereafter, a Notice of Informal Conference (NIC)[8] dated October 19, 2011 was issued to and received by petitioner.[9]

On November 25, 2011, petitioner filed a letter[10] dated November 10, 2011 stating that it is willing to pay the basic taxes due upon receipt of the corresponding PAN but made a reservation as to its right to apply for an abatement of the penalties pursuant to Section 204(B) of the NIRC of 1997, as amended, and its implementing regulations.

The Preliminary Assessment Notice (PAN) with Details of Discrepancies[11] dated December 1, 2011, was, thereafter, issued to and received by petitioner[12] on December 23, 2011[13], assessing petitioner for deficiency DST, computed as follows:

Transactions subject to DST:		
Advances to Affiliates		5,391,387,600.00
Advances from Affiliates		28,760,767,675.00
Payable-Others		136,000,000.00
Notes Payable		20,936,804.00

[4] Par. 10, Petition for Review, Docket, p. 12.
[5] Exhibit "P-4"; Exhibit "R-1".
[6] Par. 2, Admitted Facts, Joint Stipulation of Facts and Issues (JSFI), Docket, p. 206.
[7] Exhibit "R-5".
[8] Exhibit "P-5"; Exhibit "R-7".
[9] Par. 3, Admitted Facts, JSFI, Docket, p. 206.
[10] Exhibit "P-7".
[11] Exhibits "P-6" and "P-6-a"; Exhibit "R-9".
[12] Par. 4, Admitted Facts, JSFI, Docket, p. 206;
[13] Par. 13, Petition for Review, Docket, p. 12.

Total Amount subject to DST		34,309,092,079.00
DST Due Thereon		171,545,463.00
Add: 25% Surcharge for failure to file DST Return and pay corresponding tax due	42,886,365.75	
20% Interest p.a. until December 31, 2011	150,762,445.67	193,648,811.42
Total Amount due		**365,194,274.42**

On December 28, 2011, petitioner paid the basic DST due amounting to ₱171,545,463.00.[14]

On April 18, 2012, petitioner filed a letter[15] dated April 16, 2012 with respondent informing the latter that it has already paid the basic DST. With regard to the surcharge and interest, it requested that these be waived on the ground that the late payment of DST was due to a difficult interpretation of the law.

On June 25, 2012, petitioner filed an Application for Abatement or Cancellation of Tax, Penalties and/or Interest[16] for the cancellation of the surcharge and interest imposed amounting to ₱193,648,811.42 based on "non-compliance due to difficult interpretation of the law".

On October 28, 2014[17], petitioner received respondent's Formal Letter of Demand (FLD) dated October 28, 2014 together with the Details of Discrepancies and Assessment Notice No. ELTAD-II-DS-09-0019[18], assessing petitioner for deficiency DST, computed as follows:

Total Deficiency Tax Per PAN	365,194,274.42
Less: Amount Paid on Dec. 28, 2011	171,545,463.00
Deficiency DST	193,648,811.42
Add:	
Interest 20% p.a. Dec. 28, 2011 to Dec. 31, 2014	116,613,722.60
TOTAL AMOUNT DUE	**310,262,534.02**

On November 27, 2014, petitioner filed its administrative protest[19] by way of a request for reconsideration.

[14] Exhibits "P-8" to "P-8-a".
[15] Exhibit "P-9".
[16] Exhibit "P-10".
[17] Par. 16, Petition for Review, p. 13. However, Exhibits "R-11" and "R-11-a", show that it was received on October 29, 2014 by a certain Nette Ong.
[18] Par. 5, Admitted Facts, JSFI, Docket, p. 206; Exhibits "P-3", "P-3-a", "P-3-b" and "P-3-c"; Exhibits "R-11" and "R-11-a".
[19] Exhibit "P-11".

On May 21, 2015, petitioner received respondent's Final Decision on Disputed Assessment (FDDA)[20] dated March 31, 2015[21], denying petitioner's request for reconsideration and stating, among others, that petitioner was not able to introduce any evidence to overthrow the validity of respondent's findings.

Hence, petitioner filed the instant Petition for Review before this Court on June 19, 2015.

In his Answer[22] filed on September 9, 2015, respondent raised the following special and affirmative defenses:

> **"RESPONDENT OBSERVED BOTH PROCEDURAL AND SUBSTANTIAL DUE PROCESS IN ISSUING THE ASSESSMENT.**
>
> 7. The assessment for deficiency Documentary Stamp Tax in the amount of P 310,262,534.02 for calendar year 2009 was made in accordance with law, rules and jurisprudence.
>
> 8. Respondent accorded procedural and substantial due process to petitioner in issuing the assessment subject of this case. The Letter of Authority (LOA), Notice for Informal Conference, Preliminary Assessment Notice with attached Details of Discrepancies, Formal Letter of Demand with attached Details of Discrepancies as well as Audit Result/ Assessment Notice and Final Decision on Disputed Assessment were issued in accordance with law, rules and jurisprudence.
>
> 9. Petitioner was also informed of the factual and legal basis of the assessment. The Preliminary Assessment Notice with attached Details of Discrepancies, Formal Letter of Demand with attached Details of Discrepancies as well as Audit Result/ Assessment

[20] Exhibit "P-12"; Exhibit "R-14".
[21] Par. 6, Admitted Facts, JSFI, Docket, p. 207.
[22] Docket, pp. 104-120.

Notice and Final Decision on Disputed Assessment indicated not only the deficiency tax involved, surcharge and interest due thereon, but also sufficiently stated the facts, the law, rules and regulations on which the assessment is based.

THE ASSESSMENT ISSUED AGAINST PETITIONER IS VALID AND LAWFUL.

10. Assessments are presumed correct and made in good faith. The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed. Even an assessment based on estimates is *prima facie* valid and lawful where it does not appear to have been arrived at arbitrarily or capriciously. **(Marcos II vs. Court of Appeals G.R. No. 120880 June 5, 1997)**

11. The burden of proof is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the Commissioner of Internal Revenue is wrong but the taxpayer is right. Otherwise the presumption of the correctness of tax assessment stands **(Commissioner of Internal Revenue vs. Hantex Trading Co., Inc., G.R. No. 136975, March 31, 2005).** The presumption in favor of the correctness of tax assessment stands where evidence to the contrary is wanting. Hence, the assessment issued against petitioner is imbued with factual and legal bases.

12. All presumptions are in favor of the correctness of tax assessments *(Sy Po vs. Court of tax Appeals, 164 SCRA 524)*. Dereliction on the part of petitioner to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notice.

PETITIONER IS LIABLE TO PAY DEFICIENCY DOCUMENTARY STAMP TAX IN THE AMOUNT OF P310,262,534.02.

13. The Revenue Officers performed a comprehensive audit procedure taking into account relevant documents. Consequently, petitioner is liable to pay deficiency documentary stamp tax for calendar year 2009 in the aggregate amount of P 310,262,534.02. The following is a summary of the findings of the revenue examiner as a result of the investigation conducted, to wit:

Assessment Notice No. ELTAD-II-DS-09-0019

Total Deficiency Tax Per PAN	365,194,274.42
Less: Amount Paid on Dec. 28, 2011	171,545,463.00
Deficiency DST	193,648,811.42
Add:	
Interest 20% p.a. Dec. 28, 2011 to Dec. 31, 2014	116,613,722.60
TOTAL AMOUNT DUE	**310,262,534.02**

14. The assessments issued against petitioner must stand as supported by the following factual and legal bases stated in the Details of Discrepancies (attached to the Formal Letter of Demand and Final Assessment Notice dated 28 October 2014), reiterated and incorporated hereunder to wit:

DETAILS OF DISCREPANCIES

Assessment No. ELTAD-II-DS-09-0019

The law on documentary stamp tax was previously amended by Republic Act No. 7660 [*An Act Retionalizing Further the Structure and Administration of the Documentary Stamp Tax, Amending for the Purpose Certain Provisions of the National Internal Revenue Code, As Amended*] as implemented by Revenue Regulations No. 9-94. Subsequent amendment was brought about by the passage of RA 8424, the Comprehensive Tax Reform Program of

1997, where only the time of filing of return and payment of DST was changed. [*Salient feature of RA 8424, Revenue Memorandum Circular 1-98*]. The last significant changes in DST law were introduced beginning March 2004 when Republic Act No. 9243 [*An Act Rationalizing the Provisions on the Documentary Stamp Tax of the National Internal Revenue Code of 1997, as Amended, and for other purposes*] took effect and implemented by Revenue Regulations No. 13-04. DST shall be levied wherever the document made is made, signed, issued or accepted when the obligation or right arises from Philippine sources or the property is situated in the Philippines [*Section 173, NIRC of 1997*].

The latest and significant change in DST law was brought about by the decision of the Supreme Court in *CIR vs. Filinvest Development Corporation, G.R. No.163653 and GR 167689* both dated July 19, 2011 whereby the Supreme Court held that intercompany advances to affiliates supported by journal vouchers, check vouchers, and even instructional letters are subject to the imposition of documentary stamp tax pursuant to Section 180 of the Tax Code. When RA 9243 amended that Tax Code, Section 180 was renumbered and renamed as Section 179.

Any of the parties to a transaction shall be liable for the full amount of tax documentary stamp tax due. However, whenever one of the parties to the taxable transaction is exempt from the tax imposed under Title VII of the Code, the other party thereto who is not exempt shall be the one directly liable for the tax. (*Section 2(a) & (b), Revenue Regulations No. 9-00 November 22, 2000*).

Under Section 222 of the Tax Code of 1997, in case of failure to file a return, the tax maybe assessed at any time within ten (10) years after the discovery of the omission. The Supreme

Court has already spoken on this issue. 'In case of failure to file a return, the tax maybe assessed at any time within ten years after the omission, and the tax so assessed maybe collected by levy upon real property within three years following the assessment of the tax' (*CIR vs. Arturo Tulio, G.R. No. 139858, October 25, 2005*).

DST shall be levied wherever the document is made, signed, issued or accepted when the obligation or right arises from Philippine sources or the property is situated in the Philippines (*Section 173, NIRC of 1997*).

Our review of the accounting records disclosed transactions with affiliates that partake the nature of borrowing and lending transactions subject to the imposition of DST under Section 179 of the Tax Code of 1997, as amended, in relation to the recent decision of the Supreme Court in the case of GR No. 163653 and GR No. 167689 both dated July 19, 2011. As there was failure to file return and pay the tax due thereon, surcharge was imposed pursuant to Section 248 of the Tax Code of 1997, as amended.

Accordingly, there was found due from you a deficiency documentary stamp tax amounting to P 365,194,274.42, (*please see Annex A*) inclusive of surcharge and interest amounting to P 193,648,811.42. You were informed of your DST liabilities and demand payment thereof through our Pre-Assessment Notice dated December 1, 2011 and received in your end on December 23, 2011.

You must have understood and found merit in the assessment that you paid 100% of the basic tax amounting to P 171,545,463.00 on December 28, 2011 and opted to apply for the abatement of surcharge and interest amounting to P 193,648,811.42 under the

provisions of Revenue Regulations No. 13-2001 on the ground of difficult interpretation of law. However, your application for abatement of penalties was subsequently denied by the Commissioner of Internal Revenue. Consequently, Formal Letter of Demand and Assessment Notice must be issued to effect collection of the unpaid amount plus interest.

As provided for under Revenue Memorandum Circular no. (sic) 46-99, the 20% interest per annum shall be imposed, computed based on the 'unpaid amount', pursuant to the provisions of Section 249 (D)of the Code. This is also consistent with the provisions of ARTICLE 1253 of the Civil Code which provides: 'If the debt produces interest, payment of the principal shall not be deemed to have been made until the interest have been covered.'

The records of this case disclosed that you have not introduced any evidence to overthrow the validity of our said findings.

15. Portions of the Final Decision on Disputed Assessment is likewise incorporated herein, to wit:

FINAL DECISION ON DISPUTED ASSESSMENT

xxx xxx xxx

'In fine, when you paid the basic deficiency documentary stamp tax on our findings that your liabilities indicated as Advances From/To Affiliates, Payable-Others and Notes Payable, you must have expressly admitted that all these transactions partake the nature of borrowing transactions subject to the imposition of DST as identified in our assessment notices.

It should be noted that even in the year subject of examination, the BIR ruling

obtaining at that time was that inter-office memos evidencing lendings or borrowings extended by a corporation to its affiliates area akin to promissory notes, hence, subject to documentary stamp taxes. The BIR ruled 'After careful restudy of the aforementioned ruling, this office is of the opinion as it hereby hold that inter-office memo covering the advances granted by a corporation affiliate company, i.e., or inter-office memo evidencing lendings/borrowings is in the nature of a promissory note subject to the documentary stamp tax imposed under Section 180 of the Tax Code of 1997. This modifies BIR Ruling No. 116-98 dated 30 July 1998 insofar as inter-office memo covering the advances granted by a corporation affiliate company, i.e., inter-office memo evidencing lending/borrowings, is concerned which shall be subject to documentary stamp tax imposed under Section 180 of the Tax Code of 1997 (*BIR Ruling No 108-99 dated 15 July 1999*).

The legal basis of the assessment is anchored in the Supreme Court decision in CIR vs. Filinvest Development Corporation, G.R. No. 167689. 'It is elementary that the interpretation of a law by this Court constitutes part of that law from the date it was originally passed, since this Court's construction merely established the contemporaneous legislative intent that the interpreted law carried into effect. (*Senarillos vs. Hermosisima, 100 Phil 501 (1956), as cited in Accenture, Inc. vs. Commissioner of Internal Revenue, G.R. No. 190102, July 11, 2012*). Accordingly, the taxability of instructional letters, journal and check vouchers for documentary stamp purposes must already be obtaining when the DST law were last amended by Republic Act no. 9234 in 2004.'

16. As decreed by the Honorable Supreme Court:

> 'Tax assessments by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments.'

17. Well settled in the field of taxation – the burden of proof is on the taxpayer to present evidence to show the incorrectness of the assessment. Petitioner miserably failed to provide any concrete proof to justify its claim in assailing the assessments issued against it.

THE PREVAILING LAW IS SECTION 179 OF THE TAX CODE AS CORRECTLY INTERPRETED IN THE FILINVEST CASE. HENCE, THERE IS NO RETROACTIVE EFFECT IN THE INSTANT CASE.

18 Petitioner contends that BIR Ruling No. 108-99 dated July 15, 1999 **runs counter** to the prevailing rule for the year under audit 2009.

19. Petitioner hinged it's contention on its supposed conclusion that **starting 2002, the prevailing rule as pronounced by the CA** is that board resolutions, inter-office memoranda, letters of instructions, journal or cash vouchers evidencing lending/borrowings are not subject to DST. In relation thereto, it also asseverated that the case of *CIR vs. Filinvest Development Corporation* cannot be given retroactive effect.

20. With all due respect, respondent begs to disagree.

21. On the contrary, the basis of the deficiency DST assessment is Section 179 of the Tax Code which is the law on the imposition of DST on all debt instrument for the year under audit. The ruling of the Supreme Court in the case of *Commissioner of Internal Revenue vs. Filinvest Development Corporation* is an affirmation of respondent's position that intercompany loans and advances covered by mere office memo, instructional letter and/or cash and journal vouchers qualify as loan agreements that are subject to DST. Hence, there is no retroactive effect in the instant case.

22. In the case of *Diageo Philippines, Inc. vs. CIR*, the Honorable Court of Tax Appeals En Banc ruled, to wit:

> 'In refuting the application of *Aichi* Case in the instant petition, **petitioner argues that the rule enunciated in the *Aichi* Case should not be applied retroactively as its vested rights would be unduly impaired. Petitioner asseverates that at the time it filed the instant Petition for Review, the controlling jurisprudence insofar as the prescriptive period for filing a judicial claim for refund under *Section 112(A) of the NIRC of 1997, as amended*, was that both the administrative and judicial claims for input VAT refund must** be filed within two years reckoned from the filing of the VAT return citing *Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue* (the *'Atlas Case'*).
>
> Petitioner's argument is misplaced.
>
> **It is axiomatic that when the Supreme Court decides a case, it does not amount to a passage of a new law but merely interprets a pre-existing one, and such judicial interpretation of a statute constitutes part of that law as of the date of its original passage. It merely casts**

light upon the contemporaneous legislative intent of the law.

In the recent case of *Accenture, Inc. v. Commissioner of Internal Revenue*, the Supreme Court elucidated the foregoing principle in this wise:

> 'Moreover, even though Accenture's Petition was filed before *Burmeister* was promulgated, the pronouncements made in the case may be applied to the present one without violating the rule against retroactive application. **When this Court decides a case, it does not pass a new law, but merely interprets pre-existing one**. When this Court interpreted Section 102(b) of the 1997 Tax Code in *Burmeister*, this interpretation became part of the law from the moment it became effective. **It is elementary that the interpretation of a law by this Court constitutes part of that law from the date it was originally passed, since this Court's construction merely establishes the contemporaneous legislative intent that the interpreted law carried into effect.**'
>
> Thus, contrary to petitioner's assertion, the Supreme Court's interpretation of *Section 112(C) of the NIRC of 1997, as amended*, in **the *Aichi* Case may be applied to the instant case without violating the rule against retroactive application as such interpretation constitutes part of the law as of the date of its original passage**. (Emphasis and underscoring supplied)

23. Additionally, Petitioner is also arguing that respondent issued Rulings delving on the same subject which allegedly contradicts respondent's position in her FDDA and likewise concluded that rulings and circulars, rules and regulations promulgated by the CIR cannot be given retroactive application xxx.

24. Petitioner's reliance on the Rulings cited is manifestly misplaced.

25. It must be stressed that the BIR Rulings cited by petitioner do not apply in the instant case since these are based only on a set of facts as represented by a taxpayer and made applicable only to the facts and circumstances thereto.

26. Besides, the BIR Rulings cited can only be utilized by the taxpayer who applied for the same. Since petitioner is not the one who applied for the BIR Rulings, then it cannot invoke the principle on non-retroactivity of BIR rulings. Thus, it is not a bar on the government to enforce its power to tax.

27. In the case of *CIR vs. Filinvest Development Corporation, G.R. No. 163653 and GR 167689 both dated July 19, 2011*, the Honorable Supreme Court ruled that:

> 'Applying the aforesaid provisions to the case at bench, we find that the instructional letters as well as the journal and cash vouchers evidencing the advances FDC extended to its affiliates in 1996 and 1997 qualified as loan agreements upon which documentary stamp taxes may be imposed. **In keeping with the caveat attendant to every BIR Ruling to the effect that it is valid only if the facts claimed by the taxpayer are correct, we find that the CA reversibly erred in utilizing BIR Ruling No. 116-98, dated 30 July 1998 which, strictly speaking, could**

be invoked only by ASB Development Corporation, the taxpayer who sought the same.' xxx

xxx xxx xxx

In its appeal before the CA, the CIR argued that the foregoing ruling was later modified in BIR Ruling No. 108-99 dated 15 July 1999, which opined that inter-office memos evidencing lendings or borrowings extended by a corporation to its affiliates are akin to promissory notes, hence, subject to documentary stamp taxes. In brushing aside the foregoing argument, however, the CAT applied Section 246 of the 1993 NIRC from which proceeds the settled principle that rulings, circulars, rules and regulations promulgated by the BIR have no retroactive application if to so apply them would be prejudicial to the taxpayers. Admittedly, this rule does not apply: (a) where the taxpayer deliberately misstates or omits material facts from his return or in any document required of him by the Bureau of Internal Revenue; (b) where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or (c) where the taxpayer acted in bad faith. **Not being the taxpayer who, in the first instance, sought a ruling from the CIR, however, FDC cannot invoke the foregoing principle on non-retroactivity of BIR rulings.** (Empahsis and underscoring supplied)

28. Moreover, petitioner already admitted that it relied on a **pronouncement made by the Honorable Court of Appeals** which **only have a persuasive effect** since **only Decisions of the Supreme Court establish jurisprudence and doctrine on this jurisdiction.**

29. Based on the foregoing, since petitioner's reliance on the supposed prevailing rule and jurisprudence as well as BIR Rulings is inappropriate, it is liable to pay for the deficiency tax due, surcharge, deficiency and delinquency interest.

SECTION 204 OF THE TAX CODE DOES NOT CONFER AN ABSOLUTE RIGHT TO BE ENTITLED TO THE REMEDY OF AN ABATEMENT.

30. The power of the Commissioner to abate surcharges on tax liabilities is enshrined in Section 204 of the Tax Code. However, Section 204 of the Tax Code, and its related implementing regulations and issuances, does not confer to a taxpayer absolute right to be entitled to the remedy of an abatement.

31. Moreover, the burden clearly is on the taxpayer to convince the Commissioner that an abatement is in order. The taxpayer must be able to provide evidence to cast doubt on the correctness of the assessment since tax assessments are presumed to have been valid when issued.

32. This can be attributable to the fact that the grounds for abatement are very specific, and failure to qualify under any of those cases would automatically warrant a denial of the application.

33. Section 204 of the Tax Code, provides:

> Section 204. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes
>
> xxx xxx xxx
>
> (B) Abate or cancel a tax liability, when:

(1) **The tax or any portion thereof appears to be unjustly and excessively assessed; or**

(2) The administration and collection costs involved do not justify and collection of the amount due. (Emphasis and underscoring supplied)

34. The taxpayer must likewise be able to prove sufficiently that the abatement recourse meets the qualifications and complies with the stringent requirements under applicable laws and regulations. Failure to do so will leave the taxpayer with no choice but to fulfill his or her tax obligations.

35. The Commissioner by exercising the power to abate tax liabilities diminishes or decreases the amount that is rightfully due the government.

36. Simply stated, abatement takes the form of a waiver on the part of the government of its right to demand and receive contribution from its inhabitants. Therefore, the waiver in order to be valid must be made voluntarily. In the case of *Spouses Valderama vs. Macalde*, citing the case of *People v. Bodoso*, no less than the Honorable Supreme Court made it explicit that: For a waiver of rights to exist, three elements are essential: (a) existence of a right; (b) the knowledge of the evidence thereof; and (c) an intention to relinquish such right. In People v. Bodoso, this Court held that it is elementary that the existence of waiver must be positively demonstrated since a waiver by implication cannot be presumed. The standard of waiver requires that it **"not only must be voluntary, but must be knowing, intelligent, and done with sufficient awareness of the relevant circumstances and likely consequences."** There must thus be persuasive evidence of an actual intention to relinquish the right. (Emphasis ours)

37. Furthermore, the approval of an abatement is within the judgment and discretion of the Commissioner of

Internal Revenue, or any other authorized officer, as the case may be. To reiterate, what has been bestowed to the Commissioner by law is not only the power to abate tax liabilities but also the discretion when or when not to exercise it.

38. In the case of *Licomcen, Inc. vs. Guillermo T. Parayno, et al.*, the Honorable Court of Tax Appeals En Banc, held to wit:

> '**<u>It must be emphasized that the authority of the Commissioner of Internal Revenue (CIR) to abate a tax liability involves the exercise of discretion and thus, would depend on the CIR's own judgment. Hence, petitioner should not anticipate that is application for abatement would be approved by its mere filing of the same.</u>** This especially holds true since more than one (1) year had already elapsed from the filing of such application, i.e., on March 29, 2007.
>
> **<u>Moreover, at this stage, the subject assessment of the BIR is presumed correct and made good faith. The taxpayer, petitioner herein, has the duty of proving otherwise.</u>** Thus, petitioner, notwithstanding its application for abatement of its tax liability, is expected to prosecute the instant Petition for Review without unnecessary delay'. (Emphasis and underscoring supplied)

39. Since tax abatement is a diminution or decrease in the amount of tax imposed, the BIR expectedly has to act upon these offer of abatement with extreme caution. In the matter of abatement of tax penalties, the Commissioner of Internal Revenue should not act from motives merely out of compassion or charity, but should consider the pecuniary interest of the government, justice and equity and public policy.

THE COLLECTION OF SURCHARGE AND PENALTIES ACCOMPANYING THE TAX LIABILITIES IS JUSTIFIED.

40. Section 248 of the National Internal Revenue Code provides:

> Section 248. Civil Penalties. – There shall be imposed, in addition to the tax required to be paid, a penalty equivalent to twenty-five percent (25%) of the amount due, in the following cases:
>
> 1. Failure to file any return and pay the tax due thereon as required under the provisions of this Code or rules and regulations on the date prescribed. xxx (Emphasis ours)

41. In addition, Section 249 of the same Tax Code provides:

> Section 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 rules and regulations, from the date prescribed for payment until the payment is fully paid. (Emphasis ours)

42. The imposition of surcharge and interest is justified because the intention of the law is precisely to discourage delay in the payment of taxes due to the State and, in this sense, the surcharge and interest charged is not penal but compensatory in nature. They are compensation to the State for the delay in payment of the tax and for the concomitant use by the taxpayer of the funds that rightfully should be in

> the government's hands. Thus for failure of Petitioner to timely comply with its obligation, imposition of surcharge is nothing but a consequence of its own act.

A Notice of Pre-Trial Conference[23] was issued by the Court on September 11, 2015, setting the case for pre-trial conference on October 15, 2015,but later reset[24] to November 12, 2015. Accordingly, Respondent's Pre-Trial Brief[25] was filed on October 6, 2015 while the Pre-Trial Brief for the Petitioner[26] was filed on October 9, 2015.

The parties submitted their Joint Stipulation of Facts and Issues[27] on November 27, 2015. Thereafter, on January 18, 2016, the Court issued a Pre-Trial Order approving the same and the pre-trial was deemed terminated.[28]

During trial, petitioner presented Ms. Zerlynette C. Ong, petitioner's accountant, as its witness.[29] Petitioner formally offered[30] Exhibits "P-1" to "P-13", inclusive of sub-markings, which were all admitted in evidence.[31]

On the other hand, respondent presented Revenue Officer Flor Jasmin R. Soriano[32]. Respondent formally offered[33] Exhibits "R-1" to "R-15", inclusive of sub-markings, which were all admitted in evidence.[34]

The case was submitted for decision[35] on September 15, 2016 considering the Memorandum for the Petitioner[36] filed on September 7, 2016 and respondent's Manifestation[37] filed on August 3, 2016, adopting his Answer dated September 8, 2015 as his memorandum in this case.

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[23] Docket, pp. 121-122.
[24] Notice of Resetting dated October 13, 2015, Docket, p. 142.
[25] Docket, pp. 123-128.
[26] Docket, pp. 133-140.
[27] Docket, pp. 206-212.
[28] Docket, pp. 214-218.
[29] Minutes of the Hearing dated February 10, 2016, Docket, p. 226; Exhibit "P-13".
[30] Resolution dated April 25, 2016, docket, pp. 274-275.
[31] Formal Offer of Evidence for the Petitioner filed on March 22, 2016; Docket, pp. 244-250.
[32] Minutes of the Hearing dated June 8, 2016, Docket, p. 290; Exhibit "R-15".
[33] Formal Offer of Documentary Evidence filed on June 22, 2016; Docket, pp. 296-305.
[34] Resolution dated July 26, 2016, Docket, pp. 319-320.
[35] Resolution dated September 15, 2016, Docket, p. 351.
[36] Docket, pp. 330-350.
[37] Docket, pp. 321-324.

The sole issue presented by the parties for this Court's resolution is whether petitioner is liable to pay the surcharge, deficiency interest and delinquency interest in the amount of ₱310,262,534.02 pursuant to Sections 248 and 249 of the NIRC of 1997, as amended.[38]

As mentioned earlier, the PAN with Details of Discrepancies[39] assessed petitioner for deficiency DST, computed as follows:

Transactions subject to DST:		
Advances to Affiliates		5,391,387,600.00
Advances from Affiliates		28,760,767,675.00
Payable-Others		136,000,000.00
Notes Payable		20,936,804.00
Total Amount subject to DST		34,309,098,079.00
DST Due Thereon		171,545,463.00
Add: 25% Surcharge for failure to file DST Return and pay corresponding tax due	42,886,365.75	
20% Interest p.a. until December 31, 2011	150,762,445.67	193,648,811.42
Total Amount due		**365,194,274.42**

In the Details of Discrepancies, respondent states that a review of petitioner's financial statements disclosed outstanding transactions that are qualified for imposition of DST in light of the recent decision of the Supreme Court in *CIR vs. Filinvest Development Corporation*, G.R. Nos. 163653 and 167689, July 19, 2011 (*Filinvest* case). One of the issues resolved in the said case pertains to DST on intercompany advances to affiliates. The Supreme Court ruled that the "documentary stamp taxes due on the instructional letters as well as journal and cash vouchers evidencing the advances FDC extended to its affiliates are declared valid."

Respondent found that the Advances to Affiliates were made in 2008, Advances from Affiliates were received in the years 2000, 2006, 2007 and 2008, while Payable-Others and Notes Payable were transactions in 2008. However, upon checking the BIR's Integrated Tax System, respondent found no payment for DST in those mentioned years, hence, the deficiency DST assessment.

Respondent also assessed petitioner with 25% surcharge pursuant to Section 248(A) of the NIRC of 1997, as amended, in view of petitioner's failure to file any return and pay the tax due thereon.

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[38] Issue, JSFI, Docket, p. 207.
[39] Exhibits "P-6" and "P-6-a"; Exhibit "R-9".

while the 20% interest was based on Section 249(B) of the NIRC of 1997, as amended.

Thereafter, respondent issued the FLD dated October 28, 2014 with the Details of Discrepancies and Assessment Notice No. ELTAD-II-DS-09-0019[40], reiterating its assessment in the PAN but took into consideration petitioner's payment of the basic deficiency DST amounting to ₱171,545,463.00, hence, the amount still due was computed as follows:

Total Deficiency Tax Per PAN	365,194,274.42
Less: Amount Paid on Dec. 28, 2011	171,545,463.00
Deficiency DST	193,648,811.42
Add:	
Interest 20% p.a. Dec. 28, 2011 to Dec. 31, 2014	116,613,722.60
TOTAL AMOUNT DUE	**310,262,534.02**

The Details of Discrepancies explained that the latest and significant change in DST law was brought about by the decision of the Supreme Court in *CIR vs. Filinvest Development Corporation* whereby the Supreme Court held that intercompany advances to affiliates supported by journal vouchers, check vouchers, and even instructional letters are subject to the imposition of DST pursuant to Section 180 of the Tax Code. When Republic Act No. 9243 amended the Tax Code, Section 180 was renumbered as Section 179.

It was further stated in the Details of Discrepancies that:

> "You must have understood and found merit in the assessment that you paid 100% of the basic tax amounting to ₱171,545,463.00 on December 28, 2011 and opted to apply for the abatement of surcharge and interest amounting to ₱193,648,811.42 under the provisions of Revenue Regulations No. 13-2001 on ground of difficult interpretation of law. However, your application for abatement of penalties was subsequently denied by the Commissioner of Internal Revenue. Consequently, Formal Letter of Demand and Assessment Notices must be issued to effect collection of the unpaid amount plus interest.

[40] Par. 5, Admitted Facts, JSFI, Docket, p. 206; Exhibits "P-3", "P-3-a", "P-3-b" and "P-3-c"; Exhibits "R-11" and "R-11-a".

> As provided for under Revenue Memorandum Circular No. 46-99, the 20% interest per annum shall be imposed, computed based on the 'unpaid amount' pursuant the to provisions of Section 249(D) of the Code. This is also consistent with the provisions of ARTICLE 1253 of the Civil Code which provides: 'If the debt produces interest, payment of the principal shall not be deemed to have been made until the interests have been covered.'
>
> The records of this case disclosed that you have not introduced any evidence to overthrow the validity of our said findings."

The FDDA[41] basically reiterated the findings of the PAN and FLD and added that:

> "In fine, when you paid the basic deficiency documentary stamp tax on our findings that your liabilities indicated as Advances From/To Affiliates, Payable-Others and Notes Payable, you must have expressly admitted that all these transactions partake the nature of borrowing transactions subject to the imposition of DST as identified in our assessment notices.
>
> It should be noted that even in the year subject of examination, the BIR ruling obtaining at that time was that inter-office memos evidencing lendings or borrowings extended by a corporation to its affiliates are akin to promissory notes, hence, subject to documentary stamp taxes. The BIR ruled that 'After a careful restudy of the aforementioned ruling, this office is of the opinion as it hereby hold that inter-office memo covering the advances granted by a corporation affiliate company, i.e. or inter-office memo evidencing lendings/borrowings is in the nature of a promissory note subject to the documentary stamp tax imposed under Section 180 of the Tax Code of 1997. This modifies BIR Ruling No. 116-98 dated July 30, 1998 insofar as inter-office memo covering the advances granted by a corporation affiliate company, i.e., inter-office memo evidencing lendings/borrowings is concerned which shall be subject to documentary stamp tax imposed under

[41] Exhibit "P-12"; Exhibit "R-14".

Section 180 of the Tax Code of 1997. (*BIR Ruling No. 108-99 dated 15 July 1999*).

The legal basis of the assessment is anchored in the Supreme Court decision in CIR vs. Filinvest Development Corporation, G.R. No. 167689. 'It is elementary that the interpretation of a law by this Court constitutes part of that law from the date it was originally passed, since this Court's construction merely established the contemporaneous legislative intent that the interpreted law carried into effect. (*Senarillos vs. Hermosisima, 100 Phil 501 (1956) as cited in Accenture, Inc. vs. Commissioner of Internal Revenue, G.R. No. 190102, July 11, 2012*). Accordingly, the taxability of instructional letters, journal and check vouchers for documentary stamp purposes must already be obtaining when the DST laws were last amended by Republic Act No. 9243 in 2004."

At the outset, petitioner points out that the present assessment of ₱310,262,534.02 pertains only to the surcharge and interest which remain from the total assessment indicated in the PAN, with the additional assessment for interest coming from the issuance of the FLD.

From the foregoing, the Court finds that petitioner already paid the basic deficiency DST assessed by respondent. Petitioner only contests respondent's imposition of the corresponding surcharge and interest arising from the DST assessment. This is confirmed by petitioner's statement in its Memorandum, to wit:

"**32)** It must be noted that there is no dispute as to the correctness of the CY 2009 assessment of Basic DST against Petitioner for it is moot in view of Petitioner's payment of Basic DST, without protest, on December 28, 2011, or merely five (5) days from the issuance of PAN in December 23, 2011. What remains as an issue is the propriety or equitableness of the imposition of interests and surcharge, which was the subject of the questioned assessment".[42]

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[42] Par. 32, IV. Discussions/Arguments, Memorandum for the Petitioner, Docket, p. 340.

Petitioner argues there were conflicting rulings on the imposition of DST on intercompany advances prior to the Supreme Court decision in the *Filinvest* case. The BIR itself has been inconsistent with its position as to the imposition of DST on intercompany advances. If the agency tasked to enforce tax laws was indecisive as to the scope of Section 179 of the NIRC, much less should be expected from taxpayers who are not tasked to make such interpretations and merely take as guidance the BIR rulings and court decision at that time.

The Court agrees with petitioner's observation that there were conflicting BIR rulings on the imposition of DST on intercompany advances covered by board resolution, office memo, instructional letter and/or cash and journal vouchers prior to the 2011 *Filinvest* case.

In BIR Ruling No. 116-98 dated July 30, 1998, the BIR held that "inter-office memo evidencing lendings/borrowings which is neither a form of promissory note nor a certificate of indebtedness issued by the corporation-affiliate", is not subject to DST. Rather, inter-office memo is "being prepared for accounting purposes only in order to avoid the co-mingling of funds of the corporate affiliates".

However, in BIR Ruling No. 108-99 dated July 15, 1999, the BIR modified its earlier ruling and held that inter-office memo covering the advances granted by a corporation affiliate company is in the nature of a promissory note subject to DST.

Subsequently, in BIR Ruling No. DA-666-A-99 dated December 3, 1999, the BIR reverted to its earlier position and held that since inter-company advances are not covered by loan agreements, promissory notes, debit and credit memos nor by inter-company loan memos and since the only documents relating to the inter-company advances are the board resolutions of the lenders and the cash vouchers issued by the lenders which are acknowledged by the borrowers, the said inter-company advances are not subject to DST. Such board resolutions of the lenders and the cash voucher acknowledged by the borrowers are not in the nature of promissory note subject to DST.

Significantly, in a number of rulings, *e.g.*, BIR Ruling Nos. DA-696-06 dated December 11, 2006, DA-701-07 dated December 28, 2007, DA-016-08 dated January 17, 2008, and DA-(C-035) 127-08 dated August 8, 2008, the BIR held that board resolution, inter-office

memoranda, letters of instructions, bank transfer forms, journal or cash/check vouchers or similar documents evidencing intercompany lending/borrowings are not subject to DST.

In *APC Group, Inc. vs. CIR*, CTA Case No. 6155, March 11, 2002, *CIR vs. APC Group, Inc.*, CA-G.R. SP No. 69869 dated November 29, 2002 and *Filinvest Development Corporation and Filinvest Alabang, Inc. vs. CIR*, CTA Case No. 6182, September 10, 2002, *CIR vs. Filinvest Development Corporation and Filinvest Alabang, Inc.*, CA-G.R. No. SP No. 74510, January 26, 2005, both the Court of Tax Appeals (CTA) and Court of Appeals (CA) held that board resolutions, inter-office memoranda, letters of instructions, journal or cash vouchers evidencing lending/borrowings are not subject to DST.

While BIR rulings are not conclusive in the interpretation of tax laws, still, the interpretation placed upon a tax statute by the BIR, the administrative agency tasked to enforce tax laws, is entitled to great respect.[43]

As to decisions of the CTA/CA, although only the decisions of the Supreme Court establish jurisprudence or doctrines in this jurisdiction, nonetheless the decisions of subordinate courts have a persuasive effect and may serve as judicial guides.[44]

From the foregoing rulings of the BIR and CTA/CA issued prior to *Filinvest* case promulgated on July 19, 2011, the taxpayer cannot be faulted if it relied on these rulings and believed in good faith that intercompany advances covered by board resolution, office memo, instructional letter and/or cash and journal vouchers or similar documents are not subject to DST.

It should be noted that petitioner does not question the application of the *Filinvest* ruling to its case but rather seeks the cancellation of the surcharge and interest because of its good faith and honest belief that intercompany advances covered by board resolution, inter-office memo, instructional letter and/or cash and journal vouchers or similar documents are not subject to DST.

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[43] *Philippine Bank Communications vs. CIR, et al.*, G.R. No. 112024, January 28, 1999.

[44] *CIR vs. Court of Appeals, Atlas Consolidated Mining and Development Corporation and Court of Tax Appeals*, G.R. Nos. 104151 and 105563, March 10, 1995 citing Paras, E., Civil Code of the Philippines Annotated, Vol. 1, Twelfth Edition, 58-59, citing *Vda. de Miranda, et al. vs. Imperial, et al.*, 77 Phil. 1066 (1947).

In *Michel J. Lhuillier Pawnshop, Inc. vs. CIR*[45], the Supreme Court held that:

> "Nevertheless, all is not lost for petitioner. **The settled rule is that good faith and honest belief that one is not subject to tax on the basis of previous interpretation of government agencies tasked to implement the tax law, are sufficient justification to delete the imposition of surcharges and interest**. In *Connell Bros. Co. (Phil.) v. Collector of Internal Revenue*, it was held that:
>
> > We are convinced that appellant, in preparing its sales invoices as it did, was not guilty of an intentional violation of the law. It did not delay filing the returns for the sales taxes corresponding to the period in question, let alone did so purposely. The delay was in the payment of the deficiency, which arose from a mistaken understanding of the regulations laid down by appellee. The ensuing controversy was, in our opinion, generated in good faith and should furnish no justification for the imposition of a penalty.
> >
> > xxx xxx xxx
>
> This ruling was subsequently reiterated in *Tuason, Jr. v. Lingad*, where we deleted the order to pay interest and surcharges, and in *Commissioner of Internal Revenue v. Republic Cement Corporation*, where the same surcharge was dispensed with because of the taxpayer's good faith and the BIR's previous erroneous interpretation of the laws involved. **We see no reason not to apply the same doctrine in the instant case which settles the divergent rulings of the BIR on DST and establishes the foremost categorical pronouncement of the Court that pledge transactions entered into by pawnshops are subject to DST**." (*Emphasis supplied*)

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[45] G.R. No. 166786, September 11, 2006.

Applying the foregoing, the Court is convinced that petitioner acted in good faith when it believed that intercompany advances are not subject to DST prior to the 2011 *Filinvest* case. After all, it was based on numerous rulings of the BIR that intercompany advances are not subject to DST. Moreover, the CA and CTA, the specialized body handling tax cases, also had similar rulings. Hence, petitioner cannot be faulted if it relied in good faith on these rulings.

Moreover, after receipt of the PAN on December 23, 2011, petitioner immediately paid the basic deficiency DST on December 28, 2011. In fact, petitioner even paid the basic deficiency DST assessed by respondent for the years 2000, 2006, 2007 and 2008[46] even though the Letter of Authority[47] only authorizes the BIR to conduct an investigation of petitioner's books of accounts for taxable year 2009. The breakdown of the basic deficiency DST assessment is as follows (Annex A of the Details of Discrepancies of the FLD):

Particular	Total	DST Rate	DST Due
Advances to Affiliates			
Total- 2008	5,391,387,600.00	0.005	26,956,938.00
Advances from Affiliates			
Total-2000	251,033,996.00	0.005	1,255,170.00
Total-2006	23,117,262,225.00	0.005	115,586,312.00
Total-2007	1,083,854.00	0.005	5,420.00
Total-2008	5,391,387,600.00	0.005	26,956,938.00
Total-2009	(2,189,123,581.00)		
Total	26,571,644,094.00		
Payables-Others			
Total-2008	136,000,000.00	0.005	680,000.00
Notes Payable			
Total-2008	20,936,804.00	0.005	104,685.00
			171,545,463.00

In the case of *CIR vs. Sony Philippines, Inc.*[48], the BIR issued a Letter of Authority to examine the taxpayer's books of accounts and other accounting records for "the period 1997 and unverified prior years." The Supreme Court held that the CIR acting through its revenue officers went beyond the scope of their authority as to the deficiency tax assessment arrived at based on records from January to

[46] Exhibit "P-3-b"; Exhibit "R-11".
[47] Exhibit "P-4"; Exhibit "R-1".
[48] G.R. No. 178697, November 17, 2010.

ATTESTATION

I attest 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's Division.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson, Second Division

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, 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

March 1998. Thus, the deficiency tax assessment from January to March 1998 is not valid and must be disallowed.

On this point alone, the deficiency DST assessment for 2000, 2006, 2007 and 2008 should be disallowed since the Letter of Authority issued by the BIR covers only the period of January 1, 2009 to December 31, 2009. And, an examination of the breakdown of the DST assessment will show that for 2009 no DST was even assessed. Be that as it may, petitioner only wants to show that it was in good faith when confronted with an assessment for DST for the years 2000, 2006, 2007, 2008 and 2009.

All these circumstances demonstrate petitioner's good faith and are sufficient justification to delete the imposition of surcharge and interests.

WHEREFORE, premises considered, the instant Petition for Review is **GRANTED**. Accordingly, respondent's imposition of surcharge and interests arising from the deficiency DST assessment is **DELETED**. Consequently, respondent's Formal Letter of Demand dated October 28, 2014 and Assessment Notice No. ELTAD-II-DS-09-0019, essentially assessing petitioner for surcharge and interests, are **CANCELLED**.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

CATHERINE T. MANAHAN
Associate Justice