REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

1MAPLE SALES, INC., Petitioner,	**CTA EB NO. 1662** (CTA Case No. 8925)
- versus -	Present: **DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** *and* **MANAHAN,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: FEB 21 2019 11:51 a.m.

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DECISION

RINGPIS-LIBAN, *J.:*

The Case

Before the Court is a Petition for Review seeking the nullification of the Decision[1] dated December 16, 2016 ("Assailed Decision") and Resolution[2] dated May 15, 2017 ("Assailed Resolution") of the Court of Tax Appeals Second Division ("Second Division"), upholding the assessment Respondent issued against Petitioner for deficiency improperly accumulated earnings tax ("IAET") for taxable year 2009 amounting to Php8,758,914.75 basic tax, plus deficiency and delinquency interests.

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1 Penned by Associate Justice Juanito C. Castañeda, Jr., with Associate Justice Caesar A. Casanova concurring; Docket, pp. 686-711.

2 Penned by Associate Justice Juanito C. Castañeda, Jr., with Associate Justice Caesar A. Casanova concurring; *Id.*, pp. 733-745.

The Facts

The facts as found by the Second Division are as follows:

"Petitioner 1Maple Sales, Inc. is a corporation duly organized and existing under the laws of the Philippines, with business address at Abelarde Compound, Brgy. Pusok, Cebu City. It is engaged in the business of trading goods on wholesale or retail basis, dealing mainly in cigarette products produced by Fortune Tobacco Corporation.

Petitioner is registered with the Securities and Exchange Commission (SEC) as evidenced by its SEC Certificate No. CS 20059949. It is likewise registered with the Bureau of Internal Revenue (BIR) under Revenue District Office (RDO) No. 80 of Revenue Region No. 13, bearing Taxpayer Identification No. (TIN) 242-452-902-000. It was classified by the BIR as a Large Taxpayer under the jurisdiction of Large Taxpayers Service.

Respondent is the duly appointed Commissioner of the Bureau of Internal Revenue, empowered to perform the duties of his office, including, among others, the approval of claims for refund or tax credit as provided by law. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

On May 14, 2010, a Letter of Authority (LOA) was issued authorizing Revenue Officers Juan Luna, Jr., Gloria Morales, Alexander Atienza, Melchor Gaytos, and Teodore Maroket to conduct the examination of the books of accounts and other accounting records of [P]etitioner for all internal revenue taxes for taxable year 2009.

On January 15, 2013, [P]etitioner received a Notice of Informal Conference. Subsequently, [P]etitioner received a copy of the Preliminary Assessment Notice (PAN) dated September 16, 2013 with attached Details of Discrepancies on November 22, 2013.

On March 19, 2014, [P]etitioner received a Formal Letter of Demand (FLD) dated March 17, 2014, together with Final Assessment Notice (FAN) No. ELTAD-II-IE-09-0002, assessing [P]etitioner of deficiency IAET for taxable year 2009.

On April 15, 2014, [P]etitioner filed its administrative protest by way of a request for reconsideration with the BIR. In view of

[R]espondent's failure to act on [P]etitioner's protest, [P]etitioner filed the present Petition for Review before this Court on November 10, 2014."[3]

The Ruling of the Second Division

On December 16, 2016, the Second Division promulgated the Assailed Decision denying the Petition for Review, the dispositive portion of which reads:

"**WHEREFORE**, premises considered, the instant Petition for Review is hereby **DENIED**. Accordingly, the assessment issued by respondent against [P]etitioner for Improperly Accumulated Earnings Tax for taxable year 2009 is **SUSTAINED**. Petitioner is hereby **ORDERED TO PAY** the amount of [Php]8,758,914.75, inclusive of the twenty-five percent (25%) surcharge imposed under Section 248 (A) (3) of the NIRC of 1997, as amended, computed as follows:

Taxable Income for 2009	Php71,738,452.00
Add: Income excluded from Gross Income	1,943,010.00
	73,681,462.00
Less: Income Tax Paid	21,521,536.00
Total	52,159,926.00
Add: Retained earnings from Prior Years	21,411,392.00
Less: Amount that may be retained	(3,500,000.00)
Net Retained earnings	70,071,318.00
Improperly Accumulated Earnings Tax	7,007,131.80
Add: Surcharge (25%)	1,751,782.95
TOTAL	**Php8,758,914.75**

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

(a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic Improperly Accumulated Earnings Tax in the amount of [Php]7,007,131.80 computed from January 15, 2011, pursuant to Section 249 (B) of the NIRC of 1997, as amended; and

(b) Delinquency interest at the rate of 20% per annum on the total amount of [Php]8,758,914.75 and on the deficiency interest which have accrued as afore-stated in (a) computed from March 31, 2014 until full payment thereof, pursuant to Section 249 (C) of the NIRC of 1997, as amended.

[3] *Id.*, pp. 686-688.

SO ORDERED."[4]

The Assailed Decision sustained the deficiency IAET assessment against Petitioner for taxable year 2009 for its failure to prove that its accumulation of earnings in excess of one hundred percent (100%) of paid-up capital is intended for the reasonable needs of the business.

Aggrieved, Petitioner filed a "Motion for Reconsideration [of the Decision promulgated on December 16, 2016]"[5] on January 05, 2017, which the Second Division denied in the Assailed Resolution on May 15, 2017, thus:

> "**WHEREFORE,** premises considered, [P]etitioner's **Motion for Reconsideration (of the Decision promulgated on December 16, 2016)** is **DENIED** for lack of merit.
>
> **SO ORDERED.**"[6]

In denying Petitioner's Motion for Reconsideration, the Second Division reiterated its finding that Petitioner failed to prove that its accumulated earnings in 2009 are for the immediate and reasonable needs of its business.

On June 01, 2017, Petitioner filed a "Motion for Extension of Time to File Verified Petition for Review (Pursuant to Rule 8, Sec. 3(b) of the Revised Rules of the Court of Tax Appeals)"[7], which the Court granted in a Minute Resolution dated June 02, 2017.[8]

On June 08, 2017 Petitioner filed the present "Petition for Review"[9].

On September 14, 2017, the Court issued a Resolution[10] which ordered Respondent to comment on the Petition for Review. Consequently, on October 09, 2017, Respondent filed his "Comment (Re: Petitioner's Petition for Review dated 31 May 2017)"[11].

On November 10, 2017, the Court issued a Resolution[12] which gave due course to the Petition for Review, and ordered the parties to submit their memoranda within thirty (30) days from receipt.

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[4] *Id.*, pp. 709-710.
[5] *Id.*, pp. 712-728.
[6] *Id.*, p. 745.
[7] Rollo, pp. 1-3. Record shows that Petitioner received the Assailed Resolution on June 09, 2017; Docket, p. 533.
[8] *Id.*, p. 4.
[9] *Id.*, pp. 5-25.
[10] *Id.*, pp. 78-79.
[11] *Id.*, pp. 80-82.
[12] *Id.*, pp. 84-85.

On December 21, 2017, Petitioner filed a "Memorandum for Petitioner"[13], while Respondent filed a "Motion for Extension of Time to File Memorandum"[14] which the Court granted in a Minute Resolution dated January 04, 2018.[15] On January 19, 2018, Respondent filed his "Memorandum".[16]

On February 01, 2018, the Court issued a Resolution[17] submitting the instant case for decision.

The Issues

Petitioner raises the following grounds in support of its petition:

1) The Second Division erred in its finding that Petitioner failed to pass the so-called "Immediacy Test";

2) The Second Division erred in its finding that for the year 2009, Petitioner failed to disclose in its Notes to Financial Statements the appropriations made, which are significant transactions and/or information that the stockholders, the government, and the public should be apprised about.

3) The Second Division erred in its finding that the Net Retained earnings Php70,071,318.00 as of December 31, 2009 is a proper subject in the examination of Petitioner's books of accounts for the taxable year 2009 instead of taxable year 2010; and

4) Assuming arguendo that Petitioner may be held liable for IAET in the year under audit (2009), the Second Division erred in its finding that the computation of IAET should include Retained earnings of prior years amounting to Php21,411,392.00.[18]

The Ruling of the Court

Petitioner claims that certain payments of payables and loans made by Petitioner in 2010 would have been difficult if not for the appropriation of retained earnings as of December 31, 2009. This is an immediate "reasonable needs of the business" that justifies the appropriation made in 2010, and is well within the meaning of the "immediacy test". Moreover, the increases in

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13 *Id.*, pp. 86-106.
14 *Id.*, pp. 107-110.
15 *Id.*, p. 111.
16 *Id.*, pp. 112-121.
17 *Id.*, pp. 123-124.
18 *Id.*, p. 10.

appropriation from 2007 to 2009 were justified by the increases in the volume of transactions, and should not be taken against Petitioner. Decisions to determine the reasonable needs of the business in order to justify an appropriation the retained earnings are best left to the Board of Directors in accord with the "business judgment rule" theory. The business combination and subsequent failure of Petitioner to secure an exclusive marketing agreement were unforeseeable supervening events done by third parties which were outside the control of Petitioner, and should not affect the evaluation of the immediacy of the business needs of Petitioner at the time it made the appropriation in 2010.

Petitioner maintains that the readers of the Financial Statements of the Petitioner as of year-end 2010 and 2009 were apprised of the appropriations of the retained earnings by the Notes to Financial Statements No. 10. Additionally, it was only after the preparation of the Financial Statements for year-end 2009 or specifically in Securities and Exchange Commission's Financial Reporting Bulletin No. 15 dated January 24, 2013, that the details of the expansion and the date of the approval by the Board of Directors of the said project, became requirements for disclosure in the Financial Statements.

Petitioner submits that prior to the end of the one-year period counting from the close of taxable year 2009, the corporate taxpayer cannot be said liable to IAET in relation to its retained earnings for taxable year 2009 at the close of 2009 itself. Retained earnings as of end of 2009 which was appropriated in 2010 should not be included in the 2009 IAET assessment as the tax is not yet due until January 15, 2011.

Lastly, the computation of IAET must not include retained earnings from prior years amounting to Php21,411,392.00.

Petitioner's arguments must perforce fail.

At the outset, Petitioner presents no new argument to persuade Us that it has a meritorious case. In fact, the instant Petition for Review is a replica of the "Motion for Reconsideration [of the Decision promulgated on December 16, 2016]" filed by Petitioner on January 05, 2017 before the Court in Division, the issues have been extensively addressed by this Court in the Assailed Decision and Assailed Resolution.

The Second Division properly upheld the IAET assessment

The Letter of Authority ("LOA") was for examination of Petitioner's books of accounts and other accounting records for all internal revenue taxes for taxable year 2009. The deficiency IAET assessment on the other hand was for the accumulated earnings declared as appropriated retained earnings through Petitioner's Board Resolution in February 12, 2010. However, records disclose and as admitted by Petitioner, the said appropriated retained earnings is with respect to the Php110 Million retained earnings **as of December 31, 2009**. The fact that the Board Resolution was issued in 2010 is of no moment since the appropriation pertains to retained earnings in taxable year 2009, which evidently forms part of the financial statements and books of account of Petitioner for 2009. Moreover, that Petitioner was only able to declare dividends in taxable year 2013 (and subsequently pay them on April 2014), makes the appropriation of retained earnings as of December 31, 2009 taxable, as Petitioner's declaration of dividends was made only after more than one year following the close of taxable year 2009.

While it is true that the LOA covers only the period from January 01, 2009 to December 31, 2009, said LOA merely grants Respondent the authority to examine the financial books and records of Petitioner within the given period. It does not, however, decrease the power of Respondent to make a deficiency IAET assessment later when it finds that based on the taxpayer's records, a deficiency IAET assessment is in order.

Definitely, a corporation is given one (1) year following the close of the taxable year in which such income was earned, to declare dividends. Nonetheless, Petitioner failed to prove that it declared and paid or issued dividends before the taxable year 2010 ended. Therefore, the imposition of IAET on Petitioner's accumulated income in taxable year 2009 is proper.

Petitioner wants this Court to trace the supposed planned expansion stated in the Secretary's Certificate to justify its retained earnings through the Executive Marketing Agreement that was not even mentioned in the said Secretary's Certificate. If the Exclusive Marketing Agreement, which allegedly requires Petitioner to make investments in additional goods and inventories for the purpose of generating sales and maintaining its presence in the whole Visayas Region, is precisely the "planned expansion" referred in the Board Resolution dated February 12, 2010, it was easy for Petitioner to present the Minutes of the Meeting to link the Executive Marketing Agreement with the said Board Resolution. However, Petitioner failed to do so.

The bare allegations[19] of its witnesses with respect to the connection of the Executive Marketing Agreement to the planned expansion are also self-serving, without any document presented as to their link. We cannot accept them hook, line and sinker, absent any substantiation. Earnings reserved for corporate expansion projects or programs requiring considerable capital expenditure as approved by the Board of Directors must be definite.[20] Since there is failure to connect the Executive Marketing Agreement with the intended "planned

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[19] Docket, Judicial Affidavit of Prudencio F. Tatunay and Connie Tan Bautista, pp. 178-179 and 352-354.

[20] Revenue Regulations No. 02-01, Section 3(b), February 12, 2001

expansion" for Petitioner's appropriation of retained earnings, its justification as to its increase in appropriation, as well as its insufficiency in its working capital in the year 2010, would no longer hold water. Tax exemptions are never presumed and are strictly construed against the taxpayer and liberally in favor of the taxing authority.[21]

Although there are no strict rules on how to prove the reasonable needs of a business for retained earnings to be exempted from IAET, Petitioner could have presented clear proof to substantiate its argument such as a copy of minutes of the meeting of its Boards, the Board Resolution itself, or a memorandum recommending the appropriation of such retained earnings for its definite planned expansion. A mere Secretary's Certificate without mentioning a definite planned expansion, as well as self-serving testimonies without supporting evidence of the definite planned expansion linked to the accumulation of retained earnings will not suffice.

The supposed unforeseeable events also run counter to the "immediacy test". The retained earnings were not even immediately utilized as there was in fact increase of the same in the succeeding years. The allegation that the increase was due to the success in the planned expansion is of no moment as the need to immediately utilize the retained earnings will matter for such to be exempted from IAET. In the case of *Cyanamid Philippines, Inc. v. The Court of Appeals, et. al.*[22], the Supreme Court explained:

> "In Manila Wine Merchants, Inc. vs. Commissioner of Internal Revenue, we ruled:
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> > To determine the 'reasonable needs' of the business in order to justify an accumulation of earnings, the Courts of the United States have invented the so-called **'Immediacy Test'** which construed the words 'reasonable needs of the business' **to mean the immediate needs of the business**, and it was generally held that if the corporation did not prove an immediate need for the accumulation of the earnings and profits, the accumulation was not for the reasonable needs of the business, and the penalty tax would apply. (Mertens. Law of Federal Income Taxation, Vol. 7, Chapter 39, p, 103)."[23]

[21] Smart Communications, Inc. v. The City of Davao, represented herein by its Mayor Hon. Rodrigo R. Duterte, and the Sangguniang Panlungsod Of Davao City, G.R. No. 155491, September 16, 2008.

[22] G.R. No. 108067, January 20, 2000.

[23] *Emphasis supplied.*

Earnings or profits of a corporation are permitted to accumulate beyond the reasonable needs of the business[24] and the law does not impose tax on retained earnings as standby capital. However, for it to be exempted from IAET, such appropriation must be for the immediate needs of the business and the definiteness of plans coupled with actions taken towards its consummation are essential.[25] The fact that it was only in 2013 when the retained earnings were reverted and declared as dividends would already negate the immediacy test and what was required by law for the retained earnings to be exempt from IAET.

As stated in Section 7 of Revenue Regulations ("RR") No. 02-01, implementing Section 29 of the National Internal Revenue Code ("NIRC") of 1997, as amended:

> "A speculative and indefinite purpose will not suffice. The mere recognition of a future problem or the discussion of possible and alternative solutions is not sufficient."

The Second Division properly included the retained earnings from prior years in the computation for the IAET assessment.

Petitioner submits that the IAET computation, assuming it is liable for the same, does not include earnings from prior years, insofar as Revenue Memorandum Circular No. 35-2011 was issued only after 2009, the period covered by the assessment.

The Court *En Banc* is not persuaded.

As early in 1967, in *Basilan Estates, Inc. v. The Commissioner of Internal Revenue*[26] ("*Basilan Estates*"), the Supreme Court *En Banc* has already stated that previous accumulations of earnings should be considered in determining unreasonable accumulations for the year concerned, to wit:

> "Petitioner questions why the examiner covered the period from 1948-1953 when the taxable year on review was 1953. The surplus of P347,507.01 was taken by the examiner from the balance sheet of petitioner for 1953. To check the figure arrived at, the examiner traced the accumulation process from 1947 until 1953, and petitioner's figure stood out to be correct. There was no error

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[24] NIRC of 1997, as amended, Section 29(C)(2).
[25] Revenue Regulations No. 02-01, Section 7.
[26] G.R. No. L-22492, September 05, 1967.

> in the process applied, for previous accumulations should be considered in determining unreasonable accumulations for the year concerned. **'In determining whether accumulations of earnings or profits in a particular year are within the reasonable needs of a corporation, <u>it is necessary to take into account prior accumulations</u>, since accumulations prior to the year involved may have been sufficient to cover the business needs and additional accumulations during the year involved would not reasonably be necessary.'"**[27]

In 1984, in *Manila Wine Merchants, Inc. v. The Commissioner of Internal Revenue*[28], the Supreme Court again cited the holding in *Basilan Estates* as authority in resolving if the twenty five percent (25%) (now ten percent) penalty tax imposed under Section 25 (now Section 29) of the NIRC of 1997, as amended, can be imposed on an improper accumulation in 1957 despite the fact that the accumulation occurred in 1951. The Supreme Court ruled in this wise:

> "Finally, petitioner asserts that the surplus profits allegedly accumulated in the form of U.S.A. Treasury shares in 1951 by it (petitioner) should not be subject to the surtax in 1957. In other words, petitioner claims that the surtax of 25% should be based on the surplus accumulated in 1951 and not in 1957.
>
> This is devoid of merit.
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> **The rule is now settled in Our jurisprudence that <u>undistributed earnings or profits of prior years are taken into consideration in determining unreasonable accumulation for purposes of the 25% surtax</u>.** The case of *Basilan Estates, Inc. v. Commissioner of Internal Revenue* further strengthen this rule, and We quote:
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>> 'Petitioner questions why the examiner covered the period from 1948-1953 when the taxable year on review was 1953. The surplus of P347,507.01 was taken by the examiner from the balance sheet of the petitioner for 1953. To check the figure arrived at, the examiner traced the accumulation process from 1947 until 1953, and petitioner's figure stood out to be correct. There was no error in the process applied, for previous accumulations should be considered in determining unreasonable accumulation for the year concerned. 'In determining whether accumulations of earnings or profits in a particular year are within the

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[27] *Emphasis and underscoring supplied.*
[28] G.R. No. L-26145, February 20, 1984.

> reasonable needs of a corporation, it is necessary to take into account prior accumulations, since accumulations prior to the year involved may have been sufficient to cover the business needs and additional accumulations during the year involved would not reasonably be necessary.'
>
> WHEREFORE, IN VIEW OF THE FOREGOING, the decision of the Court of Tax Appeals is AFFIRMED in toto, with costs against petitioner."[29]

Finally and most importantly, Section 3 of RR No. 02-01 spells out clearly that the computation of the ten percent (10%) IAET includes undistributed profits from prior years:

> "SECTION 3. *Determination of Reasonable Needs of the Business.* — **An accumulation of earnings or profits (<u>including undistributed earnings or profits of prior years</u>)** is unreasonable if it is not necessary for the purpose of the business, considering all the circumstances of the case. To determine the "reasonable needs" of the business in order to justify an accumulation of earnings, these Regulations hereby adhere to the so-called "Immediacy Test" under American jurisprudence as adopted in this jurisdiction. Accordingly, the term "reasonable needs of the business" are hereby construed to mean the immediate needs of the business, including reasonably anticipated needs. In either case, the corporation should be able to prove an immediate need for the accumulation of the earnings and profits, or the direct correlation of anticipated needs to such accumulation of profits. Otherwise, such accumulation would be deemed to be not for the reasonable needs of the business, and the penalty tax would apply."[30]

From the foregoing, We see no cogent reason to deviate from the findings and conclusion of the Court *a quo*.

WHEREFORE, premises considered, the Petition for Review filed with the Court *En Banc* on June 08, 2017 is **DENIED** for lack of merit. The Assailed Decision dated December 16, 2016 and Assailed Resolution dated May 15, 2017 are **AFFIRMED with MODIFICATION** in the computation of the deficiency interest and delinquency interests in view of the effectivity of Republic Act No.

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[29] *Emphasis and underscoring supplied.*
[30] *Emphasis and underscoring supplied.*

10963 ("TRAIN Law")[31] on January 01, 2018 and the issuance of RR No. 21-2018[32] dated September 14, 2018.

The assessment issued by CIR against Petitioner for taxable year 2009 covering deficiency IAET is **UPHELD** Accordingly, Petitioner is **ORDERED TO PAY TWENTY-EIGHT MILLION FOUR HUNDRED SEVENTY-SIX THOUSAND FIVE HUNDRED SEVENTY-FIVE AND 49/100 PESOS (Php28,476,575.49)** representing deficiency taxes for taxable year 2009, inclusive of twenty-five percent (25%) surcharge imposed under Section 248(A)(3) of the Tax Code, as amended, and twenty percent (20%) deficiency interest and 20% delinquency interest imposed under Section 249(A) and (B), respectively, of the same Code, computed until December 31, 2017, which is prior to its amendment under the TRAIN Law, thus:

Basic Tax Due	7,007,131.80
Add: 25% Surcharge	1,751,782.95
20% Deficiency Interest from January 16, 2011 to March 31, 2014	
[Php7,007,131.80 x 20% x 1171/365 days]	4,496,082.92
Total Amount Due, March 31, 2014	**13,254,997.67**
Add: 20% Deficiency Interest from April 01, 2014 to December 31, 2017	
[Php7,007,131.80 x 20% x 1371/365 days]	5,263,987.78
20% Delinquency Interest from April 01, 2014 to December 31, 2017	
[Php13,254,997.67 x 20% x 1371/365 days]	9,957,590.03
Total Amount Due, December 31, 2017	**28,476,575.49**

In addition, Petitioner is **ORDERED TO PAY** delinquency interest at the rate of twelve percent (12%), which is double the legal interest rate for loans or forbearance of any money, on the total amount due as of March 31, 2014 in the amount of **Php13,254,997.67**, as determined above, computed from January 01, 2018 until full payment thereof pursuant to Section 249(C) of the Tax Code, as amended by TRAIN Law and implemented by RR No. 21-2018.

31 An Act Amending Sections 5, 6, 24, 25, 27, 31, 32, 33, 34, 51, 52, 56, 57, 58, 74, 79, 84, 86, 90, 91, 97, 99, 100, 101, 106, 107, 108, 109, 110, 112, 114, 116, 127, 128, 129, 145, 148, 149, 151, 155, 171, 174, 175, 177, 178, 179, 180, 181, 182, 183, 186, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 232, 236, 237, 249, 254, 264, 269, and 288; Creating New Sections 51-A, 148-A, 150-A, 150-B, 237-A, 264-A, 264-B, and 265-A; and Repealing Sections 35, 62, And 89; All Under Republic Act No. 8424, Otherwise Known as the National Internal Revenue Code of 1997, as Amended, and for Other Purposes.

32 Regulations Implementing Section 249 (Interest) of the National Internal Revenue Code (NIRC) of 1997, as amended under Section 75 of the Republic Act (RA) No. I 0963 or the "Tax Reform for Acceleration and Inclusion (TRAIN Law)"

SO ORDERED.

Ma. Belen M. Ringpis-Liban

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

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

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

With Concurring and Dissenting Opinion:
Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

I join Justice Grulla's CDO.
Catherine T. Manahan
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

1MAPLE SALES, INC., *Petitioner,*	CTA EB No. 1662 (CTA CASE No. 8925)
	Present:
-versus-	DEL ROSARIO, P.J, CASTAÑEDA, JR., UY, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	
	Promulgated: FEB 21 2019 11:51 a.m.

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CONCURRING and DISSENTING OPINION

MINDARO-GRULLA, J.:

With due respect to my esteemed colleagues, while I agree that 1Maple Sales Inc. (1Maple)'s expansion plan which was used as basis for the earmarking of earnings failed the "immediacy test" for purposes of Improperly Accumulated Earnings Tax (IAET), it is my submission to partially grant the Petition for Review on the ground that the computation of IAET must not include the retained earnings from prior years amounting to ₱21,411,392.00.

1Maple insists that the computation of IAET must not include the retained earnings from prior years amounting to ₱21,411,392.00 since this computation indicated in Revenue Memorandum Circular No. 35-2011, which was issued only in 2011, must be prospectively applied. Prior to the issuance of such, IAET computation does not include earnings from prior years.

In the revenue regulation prevailing at such time, which is RR No. 02-2001, the IAET computation does not include earnings from prior years. Section 5 thereof states that "once the profit has been subjected to IAET, the same shall no longer be subjected to IAET in later years even if not declared as dividend." Thus, it is for the CIR to prove that IAET was not imposed on earnings from prior years because for taxable year 2009, retained earnings from prior years are not included in the computation of IAET. Moreover, it would be unjust to apply a new rule on the computation of IAET when such was not taxable beforehand. When a doctrine is overruled and a different view is adopted, the new doctrine should be applied prospectively, and should not apply to parties who had relied on the old doctrine and acted on the faith thereof.[1] A reversal of a BIR regulation or ruling cannot adversely prejudice a taxpayer who in good faith relied on the BIR regulation or ruling prior to its reversal.[2] As this Court's First Division explained:

> "As to the inclusion of retained earnings from prior years, such should no longer be taken into consideration in order to determine unreasonable accumulation of profits. Although there are Supreme Court decisions which held that the undistributed earnings or profits of prior years are taken into consideration in determining unreasonable accumulation for purposes of IAET,[3] such decisions are based on the 1939 Tax Code and not on the 1997 NIRC. The main difference between the two versions of IAET is the explicitly provided formula under the 1997 Tax Code, and this does not include retained earnings for the prior years. Even on the argument that R.R. No. 35-2011[4] already includes retained

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[1] *Albino S. Co v. Court of Appeals,* G.R. No. 100776, October 28, 1993.

[2] *Visayas Geothermal Company vs. Commissioner of Internal Revenue,* G.R. No. 197525, June 4, 2014.

[3] *Basilan Estates, Inc., vs. the Commissioner of Internal Revenue, et. al.*, G.R. No. L-22492, September 5, 1967; *The Manila Wine Merchants, Inc., vs. the Commissioner of Internal Revenue*, G.R. No. L-26145, February 20, 1984, citing Mertens, Law of Federal Income Taxation, Vol. 7, Chapter 39, p. 47.

[4] Clarifies issues concerning the imposition of Improperly Accumulated Earnings Tax pursuant to Section 29 of the Tax Code of 1997, in relation to RR No. 02-01, issued on August 17, 2011.

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earnings for prior years for computation of IAET, this specific regulation would not apply to taxable year 2009, as in this instant case, since Revenue Regulations must be applied prospectively."[5]

In view of the foregoing, I vote to **PARTIALLY GRANT** 1Maple Sales, Inc.'s Petition for Review by **CANCELLING** the retained earnings from prior years amounting to ₱21,411,392.00, subject to modification of computation of its liability pursuant to Section 249(C) of the National Internal Revenue Code of 1997, as amended by Republic Act No. 10963, also known as Tax Reform for Acceleration and Inclusion (TRAIN).

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

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[5] *Fortune Tobacco Corporation vs. Commissioner of Internal Revenue*, CTA Case No. 9105, August 15, 2018.