REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

COLGATE-PALMOLIVE PHILIPPINES, INC.,
Petitioner,

-*versus*-

COMMISSIONER OF CUSTOMS,
Respondent.

CTA *EB* No. 1471
(CTA Case No. 7806)

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COMMISSIONER OF CUSTOMS,
Petitioner,

-*versus*-

COLGATE-PALMOLIVE PHILIPPINES, INC.,
Respondent.

CTA *EB* No. 1475
(CTA Case No. 7806)

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

Promulgated:
JAN 04 2018 4:02 p.m.

x -- x

DECISION

BAUTISTA, J.:

The Case

These consolidated Petitions for Review[1] filed under *Section 3(b)*[2], *Rule 8 of the Revised Rules of the Court of Tax Appeals ("RRCTA")*[3] seek the Court *En Banc* to:

1. CTA *EB* No. 1471 - issue a decision cancelling the assessment for deficiency customs duties and value-added tax ("VAT") on royalty fees, arrastre, and wharfage fees in the total amount of Php39,373,571.93, inclusive of surcharge and delinquency interest;[4] and

2. CTA *EB* No. 1475 - *(a)* partially reverse and set aside the assailed Decision[5] promulgated on January 26, 2016 rendered by the First Division of the Court of Tax Appeals ("CTA") ("Court in Division"); and *(b)* order Colgate-Palmolive Philippines, Inc. ("CPPI") to remit to the Bureau of Customs ("BOC") the entire assessed amount of Php204,170,803.00 representing duties and VAT, including penalties.

The Parties[6]

CPPI is a corporation duly organized and existing under, and by virtue of, the laws of the Philippines, with principal office at J. P. Rizal Avenue, Makati City.

Commissioner of Customs ("COC") is the duly appointed Commissioner of the BOC.

The Facts

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[1] *Rollo, CTA EB No. 1471, Petition for Review ("PFR")*, pp. 6-66, with annexes; *Rollo, CTA EB No. 1475, PFR*, pp. 64-119, with annexes.

[2] SECTION 3. *Who May Appeal; Period to File Petition.* — xxx

xxx xxx xxx

(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review.

[3] *A.M. No. 05-11-07-CTA*, November 22, 2005.

[4] *Rollo, CTA EB No. 1471, PFR*, pp. 22.

[5] *Records, CTA Case No. 7806, Vol. 5, Decision*, pp. 3629-3652; penned by Presiding Justice Roman G. Del Rosario, with Associate Justices Erlinda P. Uy and Cielito N. Mindaro-Grulla concurring.

[6] *Records, Vol. 5, Decision, The Parties*, p. 3629.

As stated in the Decision[7] promulgated on January 26, 2016, the factual antecedents of this case are as follows:

> On October 26, 2006, pursuant to [his] power under *[Republic Act ("RA")] No. 9135*, as implemented by *Section IV.A.2 of [Customs Administrative Order ("CAO")] No. 4-2004*, [the COC] issued an Audit Notification Letter [("ANL")] No. 0610210 to [CPPI], which the latter received on November 7, 2006. A pre-audit conference was conducted in the premises of [CPPI].
>
> On May 8, 2007, [CPPI] received a Summary of Findings and Recommendation [("SFR")] issued by the Post-Entry Audit Group [("PEAG")], a body created under *Executive Order [("EO")] No. 160* dated January 6, 2003 under the direct supervision and control of [the COC], assessing [CPPI] of the following:
>
> (i) [Php]183,701,180.74 for deficiency duty on royalties/license fees, for the years 2004, 2005, and 2006, inclusive of two (2) times penalty; and
>
> (ii) [Php]753,137.61 for deficiency VAT on arrastre and wharfage fees, for the years 2004, 2005, and 2006, inclusive of two (2) times penalty.
>
> On June 12, 2007, [CPPI] objected to the aforesaid assessment in a letter addressed to Atty. Rolando Ligon, Jr. [("Atty. Ligon")], the Acting Assistant Commissioner in charge of PEAG. The letter detailed [CPPI's] position and legal basis in opposing the assessed deficiency duties, taxes and penalties.
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> On June 25, 2007, the PEAG issued its Final Audit Report and Recommendations [("FARR")]. The FARR recommended that, for the period from October 27, 2003 to October 26, 2006, [CPPI] should be made liable for additional assessment on customs duties and taxes, inclusive of two (2) times the penalty for revenue loss in the total amount of [Php]204,170,803.00.
>
> On July 27, 2007, [CPPI] sent a letter to [the COC] detailing its position and legal basis in opposing the FARR.
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> On August 31, 2007, [Atty. Ligon] indorsed and recommended the approval of the FARR to [the COC].

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[7] *Records, Vol. 5, Decision, The Facts,* pp. 3630-3633.

[CPPI] submitted letters dated September 3, 2007 and September 11, 2007 to [the COC] to supplement its July 27, 2007 letter.

On May 26, 2008, [CPPI] received a letter, dated May 5, 2008, from [the COC], informing [CPPI] of the assessment of [Php]204,170,803.00 as a result of the compliance audit.

Aggrieved, on June 24, 2008, [CPPI] filed through registered mail [a] Petition for Review [with the Court in Division], praying for the reversal of the decision of [the COC], declaring that it is not liable for any deficiency customs duties and tax, and suspending the payment of the assessed duties and penalties pending the decision of the Court [in Division].

On September 23, 2008, [the COC] filed his Comment contending that [CPPI] failed to exhaust administrative remedies; that [CPPI] is liable for deficiency customs duties and taxes on royalties paid to Colgate Palmolive Corporation [("CPC")]; that [CPPI] is liable for VAT on arrastre and wharfage fees; and the penalties imposed on deficiency duties and taxes are correct. In the Resolution dated November 21, 2008, the Court [in Division] treated the Comment as [the COC's] Answer.

On January 20, 2009, [CPPI's] Motion to Suspend Collection of Customs Taxes and Duties ancillary to its Petition for Review was granted, subject to the filing of a bond. Upon [CPPI's] compliance therewith, the bond issued by Philippine Charter Insurance Corporation in favor of [the COC] was approved in the Resolution dated April 22, 2009.

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On October 14, 2009, [CPPI] filed a Motion to Reset Hearing and informed the Court [in Division] of the possible amicable settlement of th[e] case with [the COC]. The Court [in Division] reset the hearings scheduled on October 15, 2009, November 12, 2009, January 12, 2010, February 2, 2010, March 11, 2010, April 29, 2010, June 10, 2010, and July 20, 2010 for the parties to submit the compromise agreement.

On December 10, 2010, the Court [in Division] issued a resolution waiving the right of [CPPI] to present further evidence due to its failure to present the compromise agreement, or to present its case for unreasonable length of

> time. On May 10, 2011, [CPPI's] Motion for Reconsideration on the waiver of its right to present evidence was likewise denied.
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> xxx xxx xxx
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> With the filing of [CPPI's] Memorandum on June 5, 2015, and [the COC's] Memorandum on June 29, 2015, th[e] case was submitted for decision on July 28, 2015.[8]

The Court in Division partially granted CPPI's Petition for Review on January 26, 2016. The dispositive portion[9] of the Decision reads as follows:

> **WHEREFORE,** premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED.** Accordingly, [CPPI] is hereby **ORDERED** to **PAY** [the COC] the basic deficiency duties and taxes on royalty fees, arrastre and wharfage in the amount of [Php]39,373,571.93, inclusive of the 25% surcharge imposed under *Section 248(A)(3) of the [1997 National Internal Revenue Code*[10]*, as amended ("1997 NIRC")]*, computed as follows:

	Basic Tax Due	25% Surcharge	Total
I. Deficiency Duties and Taxes on Royalty Fees			
Customs duty	[Php] 34,531,402.34	[Php] -	[Php] 34,531,402.34
VAT on duty	3,622,689.80	905,672.45	4,528,362.25
II. Deficiency VAT on Arrastre & Wharfage			
VAT	251,045.87	62,761.47	313,807.34
Total Assessment	**[Php] 38,405,138.01**	**[Php] 968,433.92**	**[Php] 39,373,571.93**

> In addition, [CPPI] is liable to pay delinquency interest at the rate of twenty percent (20%) *per* annum on the amount due of [Php]4,842,169.59, computed from June 9, 2008 until full payment thereof, pursuant to *Section 249(C)(3) of the [1997 NIRC]*.
>
> **SO ORDERED.**[11]

Not satisfied with the Decision, the COC filed his Motion for Partial Reconsideration [Of the Decision dated 26 January 2016][12] on

[8] Emphases retained, italics ours.
[9] *Records, Vol. 5, Decision, Dispositive Portion,* pp. 3651-3652.
[10] *Republic Act No. 8424,* January 1, 1998.
[11] Emphases retained, italics ours.
[12] *Records, Vol. 5, Motion for Partial Reconsideration [Of the Decision dated 26 January 2016],* pp. 3653-3668.

February 12, 2016. On even date, CPPI filed its Motion for Partial Reconsideration (Re: Decision dated January 26, 2016)[13] *via* registered mail. The Court in Division directed both parties to file their respective Comments within ten (10) days from notice in a Resolution[14] dated March 1, 2016.

On March 18, 2016, the COC filed his Manifestation[15] stating that he is adopting his Memorandum dated June 24, 2015 as his comment on CPPI's Motion for Partial Reconsideration. Said Manifestation was noted by the Court in Division in a Resolution[16] dated April 26, 2016.

In the same Resolution[17] dated April 26, 2016, the Court in Division granted CPPI's Motion to Admit Comment[18] filed on April 1, 2016, and accordingly admitted the attached Comment (Re: Respondent's Motion for Partial Reconsideration)[19].

In a Resolution[20] dated May 26, 2016, the Court in Division denied the parties' Motions for Partial Reconsideration, the dispositive portion[21] thereof states the following:

> **WHEREFORE,** premises considered, [the COC's] **Motion for Partial Reconsideration [Of the Decision dated 26 January 2016]** filed on February 12, 2016 and [CPPI's] **Motion for Partial Reconsideration (Re: Decision dated January 26, 2016)** filed on February 12, 2016 are **DENIED** for lack of merit.
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> **SO ORDERED.**[22]

On one hand, after being granted an extension,[23] CPPI raised the instant case to the Court *En Banc* when it filed a Petition for

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[13] *Records, Vol. 5, Motion for Partial Reconsideration (Re: Decision dated January 26, 2016),* pp. 3684-3696.
[14] *Id., Resolution,* p. 3699.
[15] *Id., Manifestation,* pp. 3700-3702.
[16] *Id., Resolution,* pp. 3716-3717.
[17] *Id., Resolution,* pp. 3716-3717.
[18] *Id., Motion to Admit Comment,* pp. 3703-3706.
[19] *Records, Vol. 5, Comment (Re: Respondent's Motion for Partial Reconsideration),* pp. 3707-3713.
[20] *Records, Vol. 5, Resolution,* pp. 3720-3729; penned by Presiding Justice Roman G. Del Rosario, with Associate Justice Erlinda P. Uy concurring, and Associate Justice Cielito N. Mindaro-Grulla on leave.
[21] *Records, Vol. 5, Resolution, Dispositive Portion,* p. 3729.
[22] Emphases retained.

Review[24] on June 29, 2016 docketed as CTA *EB* No. 1471. On the other hand, after also being granted an extension,[25] the COC filed his Petition for Review[26] on June 28, 2016, docketed as CTA *EB* No. 1475. These Petitions were subsequently consolidated on July 11, 2016.[27]

In a Resolution[28] dated July 26, 2016, the parties were ordered to file their respective Comments to the Petitions.

On August 30, 2016 and after being granted an extension,[29] CPPI filed its Comment (Re: COC's Petition for Review dated June 22, 2016)[30] in CTA *EB* No. 1475. Likewise, after being granted two (2) extensions,[31] the COC also filed his Comment[32] in CTA *EB* No. 1471 on October 12, 2016.

On October 27, 2016, the Court *En Banc* gave due course to the Petitions for Review, and required the parties to submit their respective memoranda within thirty (30) days from notice.[33]

After both parties were granted an extension,[34] CPPI filed *via* registered mail its Memorandum[35] on December 29, 2016; and the COC filed his Memorandum[36] on January 6, 2017 by registered mail.

On February 13, 2017, the Court *En Banc* promulgated a Resolution[37] submitting the case for decision; hence, this Decision.

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[23] *Rollo, CTA EB No. 1471, Motion for Extension of Time to File Petition for Review,* pp. 1-4; *Rollo, CTA EB No. 1471, Minute Resolution,* pp. 5-5-A.
[24] *Rollo, CTA EB No. 1471, PFR,* pp. 6-66, with annexes.
[25] *Rollo, CTA EB No. 1475, Motion for Extension of Time to File Petition for Review,* pp. 1-62, with annexes; *Rollo, CTA EB No. 1475, Minute Resolution,* p. 63.
[26] *Rollo, CTA EB No. 1475, PFR,* pp. 64-119, with annexes.
[27] *Id., CTA EB No. 1471, Minute Resolution,* pp. 67-67-A.
[28] *Id., Resolution,* pp. 69-70.
[29] *Rollo, CTA EB No. 1471, Motion for Extension of Time to File Comment,* pp. 71-73; *Rollo, CTA EB No. 1471, Minute Resolution,* p. 74; *Rollo, CTA EB No. 1471, Motion for Final Extension of Time to File Comment,* pp. 96-99; *Rollo, CTA EB No. 1471, Minute Resolution,* pp. 101-102.
[30] *Rollo, CTA EB No. 1471, Comment (Re: COC's Petition for Review dated June 22, 2016),* pp. 79-94.
[31] *Rollo, CTA EB No. 1471, Motion for Extension of Time to File Comment,* pp. 75-78; *Rollo, CTA EB No. 1471, Minute Resolution,* pp. 95-95-A, 101-102.
[32] *Rollo, CTA EB No. 1471, Comment,* pp. 103-120.
[33] *Id., Resolution,* pp. 122-123.
[34] *Rollo, CTA EB No. 1471, Motion for Extension of Time to File Memorandum,* pp. 124-126; *Rollo, CTA EB No. 1471, Minute Resolution,* p. 127; *Rollo, CTA EB No. 1471, Motion for Extension of Time to File Memorandum,* pp. 128-132; *Rollo, CTA EB No. 1471, Minute Resolution,* pp. 133-133-A.
[35] *Rollo, CTA EB No. 1471, CPPI's Memorandum,* pp. 134-158.
[36] *Id., COC's Memorandum,* pp. 159-190.
[37] *Id., Resolution,* pp. 192-193.

The Issues

On one hand, CPPI submits the following issues for resolution of the Court *En Banc*:[38]

> WHETHER THE COURT IN DIVISION ERRED IN HOLDING THAT CPPI IS LIABLE FOR DEFICIENCY DUTIES ON ROYALTIES IN RELATION TO ITS IMPORTATION FROM ITS AFFILIATES FOR THE FOURTH QUARTER OF CALENDAR YEAR ("CY") 2003 TO THE THIRD QUARTER OF CY 2006 IN THE TOTAL AMOUNT OF PHP34,531,402.34;
>
> WHETHER THE COURT IN DIVISION ERRED IN HOLDING THAT CPPI IS LIABLE FOR VAT ON ROYALTY FEES FOR THE FOURTH QUARTER OF CY 2003 TO THE THIRD QUARTER OF CY 2006 IN THE TOTAL AMOUNT OF PHP3,622,689.80;
>
> WHETHER THE COURT IN DIVISION ERRED IN HOLDING THAT CPPI IS LIABLE FOR VAT ON ARRASTRE AND WHARFAGE FEES FOR THE FOURTH QUARTER OF CY 2003 TO THE THIRD QUARTER OF CY 2006 IN THE TOTAL AMOUNT OF PHP251,045.87; AND
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> WHETHER THE COURT IN DIVISION ERRED IN HOLDING THAT CPPI IS LIABLE FOR 20% DELINQUENCY INTEREST ON THE DEFICIENCY VAT OF PHP4,842,169.59 COMPUTED FROM JUNE 9, 2008 UNTIL FULL PAYMENT THEREOF, PURSUANT TO *SECTION 249(C)(3) OF THE 1997 NIRC.*

On the other hand, the COC raised the following lone issue:[39]

> WHETHER THE COURT IN DIVISION ERRED IN PARTIALLY GRANTING CPPI'S PETITION FOR REVIEW, RULING THAT IT IS NOT LIABLE TO PAY

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[38] *Rollo, CTA EB No. 1471, PFR, Assignment of Errors and Summary of Arguments in Support of the Petition for Review,* pp. 12-13.
[39] *Id., CTA EB No. 1475, PFR, Assignment of Errors,* pp. 69-70.

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THE ENTIRE ASSESSED AMOUNT OF PHP204,170,803.00 REPRESENTING DEFICIENCY DUTIES AND VAT, INCLUDING PENALTIES.

***CPPI's Arguments*[40]**

CPPI avers that the Court in Division erred in ruling that it is liable for deficiency duties and VAT on royalties, in relation to its importation of goods from CPC for the fourth quarter of CY 2003 to third quarter of CY 2006 in the amounts of Php34,531,402.34 and Php3,622,689.80, respectively. CPPI posits that the royalty fees it paid to CPC should not be added to the transaction value of the imported goods pursuant to *Section 201*[41] *of RA No. 9135*[42] *("TCCP")* because: *(1)* the imported products were produced under patent by CPC; *(2)* the royalty payments are in consideration for its right to use CPC's patent, trademarks, and other intellectual property in the Philippines, and not for the importation of specific goods for sale in the Philippines; and *(3)* it can buy the products without paying the royalties to CPC. Since the royalty it paid to CPC is not inextricably intertwined with the production of the imported merchandise or is optional or is paid for the exclusive right to manufacture and sell in a designated area, CPPI concludes, it is not dutiable.

CPPI further claims that, citing *In Re: Estee Lauder Pty. Limited and Comptroller General of Customs and Anor*[43], royalties will form part of the price of the goods imported if they are so closely connected with the contract for which the goods are imported, such that they form a "single transaction;" and as ruled in the *United States Customs and Border Protection Ruling HQ H024566,*[44] royalty is not dutiable if the same is paid for the right to manufacture and sell a finished

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[40] *Rollo, CTA EB No. 1471, CPPI's Memorandum, Discussion,* pp. 141-153.

[41] SEC. 201. *Basis of Dutiable Value.* - (A) *Method One. - Transaction Value.* - The dutiable value of an imported article subject to an *ad valorem* rate of duty shall be the transaction value, which shall be the price actually paid or payable for the goods when sold for export to the Philippines, adjusted by adding:

(1) The following to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods:

xxx xxx xxx

(e) The amount of royalties and license fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods to the buyer;

xxx xxx xxx

[42] An Act Amending Certain Provisions of Presidential Decree No. 1464, Otherwise Known as The Tariff And Customs Code Of The Philippines, as amended, and For Other Purposes, April 27, 2001.

[43] FCA 359, June 28, 1991.

[44] October 15, 2008.

product using the licensor's patents, and not for the imported merchandise itself. It is CPPI's stance that these rulings are applicable to its case, where the royalty payments are in consideration of its right to use the patents, trademarks, and other intellectual property of CPC in the Philippines, and not for the importation of specific goods for sale in the Philippines.

CPPI likewise avers that the Court in Division erred in ruling that it is liable for deficiency VAT on wharfage fees and arrastre charges. According to CPPI, these fees cannot be considered "other charges" under *Section 107*[45] *of the 1997 NIRC* because, applying the principle of *ejusdem generis,* they are not of the same nature as customs duties and excise taxes, which are State taxes. CPPI further claims that since wharfage and arrastre fees are assessed or computed on the basis of the quantity, weight, or measure of the cargo, and not on the dutiable value of the goods, the issue on whether royalty payments made to CPC shall form part of the dutiable value of the imported goods could not have resulted in deficiency VAT on arrastre and wharfage fees, because such royalty payments did not result in the increase in the quantity or measurement of the imported goods, and therefore, could not have also increased the amount of wharfage fees and arrastre charges. CPPI continues that the assessment of deficiency VAT on these fees will amount to double taxation since CPPI will have to pay VAT on arrastre and wharfage fees to the COC, on top of its payment of wharfage fees to the Philippine Ports Authority ("PPA"), and arrastre fees to International Container Terminal Services, Inc. ("ICTSI").

Lastly, CPPI claims that it is erroneous for the Court in Division to impose twenty percent (20%) delinquency interest on the alleged deficiency VAT because the notice and demand to pay VAT was made by the COC, and not by the Commissioner of Internal Revenue ("CIR"), as required under *Section 249(C)(3)*[46] *of the 1997 NIRC.*

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[45] SEC. 107. *Value-added Tax on Importation of Goods.* -

(A) *In General.* - There shall be levied, assessed and collected on every importation of goods a value-added tax equivalent to ten percent (10%) based on the total value used by the Bureau of Customs in determining tariff and customs duties, plus customs duties, excise taxes, if any, and other charges, such tax to be paid by the importer prior to the release of such goods from customs custody: *Provided,* That where the customs duties are determined on the basis of the quantity or volume of the goods, the value-added tax shall be based on the landed cost plus excise taxes, if any: xxx.

[46] SEC. 249. *Interest.* -

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

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The COC's Arguments[47]

The COC counters that the royalties are dutiable pursuant to *Section 201 of the TCCP*, and thus, subject to customs duties and VAT. According to the COC, the two (2) conditions for dutiability are present: *(1)* the royalties are related to the goods being valued; and *(2)* the payment of royalties is a condition of sale of the goods. The COC avers that a reading of *Addendum I* (Patents Contract) and *Addendum II* (Trademarks Contract) of the Memorandum of Agreement ("MOA") between CPPI and CPC will show that the imported goods are related to the royalties paid. This is bolstered by the fact that CPPI, according to the COC, does not maintain any manufacturing facility. As to the second condition, the COC avers that the same is evident by the fact that non-payment of royalties may result in the termination of the MOA. Without the MOA, the COC concludes, CPPI could not be expected to continue importing CPC products without being exposed to intellectual property infringement charges.

The COC continues that the fact that the royalties were paid to CPC and not to CPPI's suppliers is of no moment, considering that CPC also wholly owns CPPI's sources of imported products, namely Colgate Palmolive (Thailand) Ltd., Colgate San Xiao Ltd., and Colgate Palmolive Malaysia ("Colgate entities"). Further, whether such royalties accrue directly or indirectly to the supplier of goods is, according to the COC, immaterial. The COC avers that *Section 201(A)(1)(e) of the TCCP* refers to royalties required to be paid as a condition of sale and does not state to whom, or for whose benefit, in particular, the payment was made. As to the letter dated May 17, 2007 by CPC stating that the royalties are not a condition for the sale of goods, the COC avers that the same is totally unreliable for being self-serving. As to the contention of CPPI that the royalties are not conditions of sale because these are calculated upon the net sales of the licensed products, the COC submits that the same is without merit as the method of calculating the royalty is not relevant in determining its dutiable status.

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

[47] *Rollo, CTA EB No. 1471, COC's Memorandum, Discussion,* pp. 165-187.

However, the COC submits that deficiency duties and VAT should be based on the total amount of royalty fees remitted to CPC, as reported by CPPI itself. According to the COC, the Court in Division erred in using the formula proposed by the ICPA. The COC allege that said formula is inconsistent with what was stated in the MOA between CPPI and CPC that the royalty is five percent (5%) of net sales of the licensed products. The COC posits that the MOA is the law between the parties, governing their rights and obligations; and that the ICPA, a non-party to the agreement, cannot therefore deviate from the express provisions of the MOA on the computation of royalties that CPPI obligates itself to pay to CPC. The COC also asserts that it is erroneous for the ICPA to compute the tax base of royalty only on imported products, excluding those supposedly manufactured locally. According to the COC, even if CPPI sold locally manufactured products, this does not automatically exempt such products from being dutiable. Thus, the Php1,249,810,680.87 amount representing total royalties paid by CPPI should be included in the tax base for royalty tax; and hence, the COC concludes that the assessment contained in the ANL must be paid by CPPI in its entirety.

The COC maintains that CPPI is liable for VAT on arrastre and wharfage fees, as well as delinquency interest thereon. It is the COC's view that arrastre and wharfage fees are included in the term "charges" under *Section 107 of the 1997 NIRC* because otherwise, the legislature could have easily stated other "taxes" or other "duties," which are more accurate. As regards the claim of double taxation by CPPI, the COC's submits that the same is without merit. The COC stressed that the VAT paid to PPA and ICTSI involves a different subject matter of tax. The VAT under *Section 107 of the 1997 NIRC* is VAT on the importation of goods, while the VAT paid to PPA and ICTSI is VAT on services under *Section 108*. As to CPPI's claim against the imposition of delinquency interest, the COC maintains otherwise. It is the COC's stance that to allow the imposition of delinquency interest only when the assessment originated from the CIR would lead to the absurd situation where the COC is authorized to assess VAT but cannot demand delinquency interest just because the *1997 NIRC* refers to the CIR.

Finally, the COC claims that CPPI was granted opportunities to explain its position and contest the administrative penalties imposed by him, thus, CPPI was not deprived of its right to due process.

The Ruling of the Court En Banc

In the Decision of the Court in Division, it found that there is no violation of the doctrine of exhaustion of administrative remedies. The Court in Division ruled that the May 5, 2008 letter of the COC affirming the FARR partakes of the nature of a final decision that is appealable to the Court under *Section 11*[48] *of RA No. 1125*[49].

Thereafter, the Court in Division went on to determine whether the royalties paid to CPC form part of the dutiable value of the imported goods pursuant to *Section 201 of the TCCP*, in which case, subject to customs duties and taxes, to wit: *(1)* the royalties are related to the goods being valued (relationship); *(2)* the royalties are paid by the buyer directly or indirectly (payment); and *(3)* the payment of royalties is a condition of sale of the goods to the buyer (condition).

The Court in Division ruled that all the aforesaid requirements are present. A review of the MOA and its *addenda* reveals that: *(1)* the royalties are related to the imported goods since these are computed at the rate of five percent (5%) based on the net sales of the licensed products without distinction as to the source of the products sold whether imported or locally manufactured; *(2)* the royalties are paid by CPPI to the seller, CPC; and *(3)* the payment of royalties is a condition of sale of the goods to the buyer because without the royalties, CPPI could not have sold the licensed products in the Philippines under the trademark of CPC, as the MOA provides that the agreement may be terminated once CPPI fails to pay the royalty. The Court in Division noted that CPPI did not present evidence to establish that the imported products would have been sold separately in the Philippines under a different brand other than that of CPC. Accordingly, the royalty payments are dutiable.

However, the Court in Division noted that a portion of the royalty payments are for locally manufactured products. Upon

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[48] SEC. 11. *Who May Appeal; Mode of Appeal; Effect of Appeal.* - Any party adversely affected by a decision, ruling or inaction of the Commissioner of Internal Revenue, the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry or the Secretary of Agriculture or the Central Board of Assessment Appeals or the Regional Trial Courts may file an appeal with the CTA within thirty (30) days after the receipt of such decision or ruling or after the expiration of the period fixed by law for action as referred to in Section 7(a)(2) herein.

[49] An Act Creating the Court of Tax Appeals, as amended.

review of the ICPA Report and the documents submitted by CPPI, the Court in Division found that for the fourth quarter of CY 2003 up to third quarter of CY 2006, CPPI's total importation of goods other than capital goods amounted to Php7,929,015,520.02; that after considering the freight charges of Php73,502,445.00, the total adjusted importations is Php8,002,517,965.02; that, however, a further verification and examination of the records discloses that Php46,439,545.34 out of the Php1,612,304,113.35 importations from non-Colgate entities have no supporting documents; and that thus, since it cannot be ascertained whether the Php46,439,545.34 actually pertains to importations from non-Colgate entities, the same was added back to the total importations from Colgate entities, resulting to the total adjusted importations of Php6,436,653,397.01. The Court in Division found that the equivalent sales thereof based on the cost ratio of 46.6% is Php13,812,560,937.79; and that applying the five percent (5%) royalty rate, the total royalties which will be used as basis in computing the deficiency customs duties and taxes is Php690,628,046.89. Consequently, the Court in Division ruled that CPPI is liable for deficiency customs duties and VAT on royalties in the amount of Php34,531,402.34 and Php3,622,689.80, respectively.

The Court in Division also discovered no error in the imposition of VAT on arrastre and wharfage fees. It declared that *Section 107 of the 1997 NIRC* is clear, plain and unequivocal that VAT on importation of goods is imposed on the total value used by the BOC in determining tariff and customs duties, plus customs taxes, excise taxes, if any, and other charges; and that following the *verba legis* or plain meaning rule, arrastre and wharfage fees are considered as "other charges" contemplated under said *Section 107 of the 1997 NIRC.*

Anent the issue on double taxation, the Court in Division ruled in the negative because the taxes levied under *Sections 107* and *108 of the 1997 NIRC* are not imposed on the same subject matter for the same purpose. The Court in Division explained that the subject matter of *Section 107 of the 1997 NIRC* is the importation of goods, the tax base of which is the total value used by the BOC in determining tariff and customs duties, plus customs duties, excise taxes, if any, and other charges; that in *Section 108 of the 1997 NIRC,* the subject matter is the sale or exchange of services, including the use or lease of properties, and the tax base thereof is the gross receipt derived from such sale or exchange of services. The Court in Division went on to state that CPPI is not the taxpayer under *Section 108 of the 1997 NIRC* considering that it merely shoulders the tax burden passed on by the seller of the service, that is, PPA and ICTSI. Further, the VAT under *Section 107 of the 1997 NIRC* is imposed on CPPI for being the importer of the product. Clearly, there is no double taxation. Hence, the Court in Division ruled that CPPI is liable for deficiency VAT on arrastre and wharfage fees in the amount of Php251,045.87.

Finally, since there is no showing that the procedure prescribed under *Customs Memorandum Order ("CMO") No. 2-2002*[50] *vis-à-vis CMO No. 1-2002*[51] were duly followed, the Court in Division ruled that the penalty cannot be imposed without violating CPPI's right to due process.

In the assailed Resolution[52], the Court in Division reiterated that royalty payments relating to the importation of CPC's products form part of the transaction value of imported goods subject to customs duties and VAT; and that arrastre and wharfage fees are considered "other charges" subject to VAT. As regards CPPI's objection on the imposition of delinquency interest on VAT, the Court in Division ruled that the power of the COC to assess and collect taxes, like VAT, necessarily includes the authority to assess and collect penalties imposed under *Section 249(C)(3) of the 1997 NIRC.* The Court in Division did not also sustain the COC's position that additional duties should be imposed on the total royalty payments of Php1,249,810,687.75 because a portion of the royalties paid pertain to the net sales of CPPI for locally manufactured products, wherein most of the raw materials used in the production were obtained from local suppliers. It also dismissed the COC's argument that he complied with the strict tenets of administrative due process in the imposition of penalties. Accordingly, the Court in Division did not find any basis to reconsider the assailed Decision.

The Court *En Banc* will now resolve the present Petitions for Review.

At the outset, it must be emphasized that the Court *En Banc* finds no merit in the instant Petitions for Review. Both parties failed to raise matters which have not been considered and passed upon by

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[50] Record-keeping and Post Entry Audit Guidelines, January 2, 2002.

[51] Procedure in the determination of administrative liability and the imposition of administrative fines provided for in Section VI subsections A, B, and C of Customs Administrative Order (CAO) No. 5-2001, January 2, 2002.

[52] *Records, Vol. 5, Resolution,* pp. 3720-3729; penned by Presiding Justice Roman G. Del Rosario, with Associate Justice Erlinda P. Uy concurring and Associate Justice Cielito N. Mindaro-Grulla on leave.

the Court in Division in the assailed Decision and Resolution; and that the arguments raised in the consolidated Petitions for Review are mere reiterations, if not repetitions, of the very same arguments which both parties have raised in their Motions for Partial Reconsideration, which the Court in Division denied for lack of merit.

Royalty payments made by CPPI to CPC are dutiable pursuant to *Section 201 of the TCCP.*

Section 201 of the TCCP governs the rule on customs valuation, the relevant portion of which states:

> SEC. 201. *Basis of Dutiable Value.* - (A) *Method One. - Transaction Value.* - The dutiable value of an imported article subject to an *ad valorem* rate of duty shall be the transaction value, which shall be the price actually paid or payable for the goods when sold for export to the Philippines, adjusted by adding:
>
> (1) The following to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods:
>
> xxx xxx xxx
>
> (e) <u>The amount of royalties and license fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods to the buyer;</u>[53]

Further, *CAO No. 4-2004,*[54] amending *CAO No. 5-2001,*[55] implementing the above *Section 201 of the TCCP* provides as follows:

> SEC. II. DUTIABLE VALUE

[53] Underscoring ours.

[54] Amendment to Customs Administrative Order 5-2001 (Implementing Republic Act 9135: An Act Amending Certain Provisions of Presidential Decree No. 1464, Otherwise Known as the Tariff and Customs Code of the Philippines, As Amended (Customs Code), And for Other Purposes), November 8, 2004.

[55] Implementing Republic Act 9135: An Act Amending Certain Provisions of Presidential Decree No. 1464, Otherwise Known as the Tariff and Customs Code of the Philippines, As Amended (Customs Code), And for Other Purposes, November 16, 2001.

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B. Method 1 – The Transaction Value

1. The dutiable value of an imported article shall be the Transaction Value which is the price actually paid or payable for the goods when sold for import to the Philippines adjusted in accordance with the provisions of Section II.B.3 of this Order, and subject to the conditions specified in Section II.B.2 herein.

xxx xxx xxx

3. <u>In determining the Transaction Value, the following adjustments shall be added to the price actually paid or payable for the imported goods being valued if such value has not been included in the price actually paid or payable</u>:

xxx xxx xxx

e. <u>Royalties and license fees related to the goods being valued</u>;

xxx xxx xxx[56]

Based on the foregoing, the dutiable value of an imported article shall be the transaction value, which is the price actually paid or payable for the goods when sold for import in the Philippines. The transaction value of the imported goods includes royalties and license fees when: *(1)* they are related to the goods being valued (Relationship Test); *(2)* paid by the buyer, directly or indirectly, to the seller (Payment Test); and *(3)* the payment is a condition for the sale of the goods (Condition Test). All tests must be satisfied separately and the absence of one will result in the non-dutiability of royalties.

As found by the Court in Division, which the Court *En Banc* agrees with after re-evaluation of all the documents presented, all the aforesaid requirements are obtaining in this case.

The second test is not disputed. For the period from October 2003 to October 2006, CPPI paid royalties to CPC in the total amount

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[56] Underscoring ours.

of Php1,249,810,687.75.[57] The royalties were paid pursuant to *Clause 10 of the MOA*, which provides:

> 10. In consideration of the rights hereby granted to [CPPI], [CPPI] shall pay to [CPC] as royalty, exclusive of value-added tax (VAT), Five Percent (5%) of its total Net Sales of Licensed Products.[58]

Anent the relationship test, it is essential that there must be some connection between the royalties paid and the imported goods being valued. In the assailed Decision and Resolution, the Court in Division found that the royalty payments are related to the imported goods because the same was computed at the rate of five percent (5%) based on the net sales of the licensed products, without distinction as to the source of the products sold, *i.e.* imported or locally manufactured. The Court *En Banc* agrees therewith.

Under the MOA, the royalties paid by CPPI to CPC are in consideration for the use of CPC's intellectual property rights in the Philippines. The pertinent provisions of the MOA provides, to wit:

> 5. [CPC] agrees to grant [CPPI] the non-exclusive right to use all of its Patents and Trademarks, trade names, packaging trade dress and its Know-how in the TERRITORY. Said rights are set forth in Addendum I (Patents), Addendum II (Trademarks) and Addendum III (Know-how) which are attached hereto and the terms and conditions set forth in said Addenda are incorporated herein.[59]
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> xxx xxx xxx
>
> ADDENDUM I
> PATENTS CONTRACT
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> xxx xxx xxx
>
> 3. [CPC] hereby grants to [CPPI] the non-exclusive right to use The Patent including the right to make, have made, use and sell Licensed Products.[60]
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> xxx xxx xxx

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[57] *Records, Vol. 2, Exhibit "V," Judicial Affidavit ("JA") of Mr. Luis N. Tura*, p. 1532.
[58] *Id., Exhibit "I-9," Memorandum of Agreement ("MOA")*, p. 1367.
[59] *Id., Exhibit "I-9-1," MOA*, p. 1366.
[60] *Id., Exhibit "I-9-4," MOA Attachment: Addendum I*, p. 1370.

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ADDENDUM II
TRADEMARKS CONTRACT

xxx xxx xxx

2. [CPC] hereby grants to [CPPI] the right to use The Trademarks on products manufactured, packaged, or sold by [CPPI] in accordance with standards specified by [CPC]. [CPPI] may apply The Trademarks to such goods and use the same in selling and advertising and otherwise as approved by [CPC], including but not limited to the use thereof in conjunction with [CPPI]'s corporate name.[61]

xxx xxx xxx

ADDENDUM III
KNOW-HOW CONTRACT

xxx xxx xxx

2. [CPC] hereby grants to [CPPI] the right to use its Know-how to make, have made, use and sell the Licensed Products.[62]

xxx xxx xxx.

CPPI's witness, Mr. Luis N. Tura testified through his judicial affidavit[63] that the royalties paid by CPPI to CPC are in consideration for the right to use the intellectual property rights of CPC in the Philippines:

Q: In October 2003 to October 2006, did CPPI pay royalty?
A: Yes. <u>CPPI paid royalty to [CPC] for the right to use the patents, trademarks, trade names, packaging and trade dress and know-how in the Philippines of CPC</u> pursuant to a Memorandum of Agreement.

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Q: What was the basis of the royalty paid?
A: The royalty paid was based on 5% of the net sales of the licensed products in the Philippines pursuant to the MOA.

[61] *Records, Vol. 2, Exhibit "I-9-5," MOA Attachment: Addendum II,* p. 1404.
[62] *Id., Exhibit "I-9-6," MOA Attachment: Addendum III,* p. 1412.
[63] *Id., Exhibit "V," JA of Mr. Luis N. Tura,* pp. 1524-1534.

> Clause 10 of the MOA reads: "in consideration of the rights hereby granted to [CPPI], [CPPI] shall pay to [CPC] as royalty, exclusive of [VAT], five percent (5%) of its total Net Sales of Licensed Products.[64]

Admittedly, the imported products from CPC, which consist of finished goods and raw materials,[65] are manufactured under a patent. Based on the amount of licensed products sold, CPPI pays royalties to CPC. Notably, as found by the Court in Division, the MOA did not distinguish the source of the products sold, whether it refers to the finished goods, or those locally manufactured. Clearly, the royalty payments are closely intertwined with the goods imported.

Under the condition test, the question is whether CPPI could have made the importation without payment of royalty. Simply put, royalties which are separable from the purchase of the imported goods are not dutiable.

It is CPPI's stance that the waiver of royalty fees pursuant to *Clause 11(a) of the MOA* is inconsistent with the conclusion that royalty payments are being made as a condition of sale of goods by CPC to CPPI. However, the COC invokes *Clauses 18 and 19 of the MOA*, which provides for its termination on account of non-payment of royalties by CPPI. Further, according to the COC, the continued existence of the MOA despite absence of CPPI's manufacturing facility and the constant importation of licensed products from suppliers related to CPC negated CPPI's claim that it can import products without paying the fee.

The Court *En Banc* finds in favor of the COC. *Clauses 11(a), 18 and 19* of the MOA read:[66]

> 11. (a) The above royalty shall be waived for the entire year following any year in which the "market value index" as defined herein is negative, and shall be paid for the entire year following any year in which the "market value index" is positive...[67]

xxx xxx xxx

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[64] Underscoring ours.
[65] *Records, Vol. 5, Exhibit "P-16," Sworn Statement of Mr. Edwin F. Ramos to Questions Propounded by Atty. Maricon Z. Maralit-Soriano, A8,* p. 3337; *Records, Exhibit "P-1," ICPA Report,* p. 13.
[66] *Records, Vol. 5, Exhibit "P-10," MOA,* pp. 3401-3408.
[67] *Id., Exhibit "P-10-1," MOA,* p. 3403.

> 18. This agreement shall remain in force for a period of ten (10) years unless earlier terminated as of the last day of any month by at least sixty days' prior written notice by either party. Subject to the approval of the Intellectual Property Office, this agreement may be renewed under such terms and conditions as may be agreed upon by the parties. <u>If [CPPI] fails to pay the royalty herein provided</u> or to observe the standards specified by [CPC] or otherwise violates the terms of this agreement in any way, <u>[CPC] may terminate this agreement forthwith by written notice to [CPPI]</u>, provided, however, that [CPC] may terminate this agreement forthwith if [CPPI] ceases to be controlled by [CPC].
>
> 19. <u>When and if this agreement shall be terminated for any cause whatever, all rights granted hereunder shall automatically revert to [CPC] and [CPPI] agrees that i[t] will promptly desist from the use of the trade names "Colgate" and "Palmolive" as well as all the Patents and Trademarks licensed hereunder including the goodwill of the business with which such trademarks are used</u> provided that such trade names are covered by valid industrial property rights in the name of [CPC] at the time of the termination of this Agreement.[68]

A careful reading of the above reveals that payment of royalty is inseparable from the purchase of CPC's goods. CPPI must pay for the royalty, otherwise, the MOA will be terminated. It must be remembered that the MOA is the source of the rights and obligations of both parties without which, CPPI has no basis to enforce its rights under the Agreement. Otherwise stated, CPPI must pay for the royalty as a condition for the continuous enforcement of the MOA, and consequently, for the continuous importation of goods from CPC or for the continuous sale by CPC of its goods to CPPI. In fact, CPPI has no choice but to pay for the royalty, lest it discontinue selling CPC's products.

Anent the waiver provision under *Clause 11(a) of the MOA*, the Court *En Banc* cannot rely on the same for being conditional. The payment of royalty may be waived only when the "market value index" is negative; but in all other cases, CPPI has to pay for them.

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[68] Underscoring ours.

With respect to the letter[69] dated May 17, 2007 issued by CPC confirming that the payment of royalty is not a condition for the sale of any goods to CPPI, and that CPPI may import any of CPC's licensed products at any time and without condition, the same cannot be given credence for being self-serving. The Court *En Banc* is not persuaded with this self-serving claim, without any other proof whatsoever that the payment of royalty is indeed optional for CPPI. On the other hand, the Court *En Banc* is inclined to give more evidentiary weight to the specific provisions of the MOA. Notably, as found by the Court in Division, CPPI did not present any proof to establish that the imported products could have been sold separately in the Philippines under a different brand name other than that of CPC. Clearly, the payment of royalty is a condition of sale of the goods.

All told, the Court *En Banc* finds no cogent reason to reverse the finding of the Court in Division that all the requisites for dutiability of royalties are obtaining in this case.

Only royalty payments related to the goods imported from CPC are subject to customs duties and taxes.

The COC avers that it is erroneous for the Court in Division to adopt the computation and findings of the ICPA as to the amount of dutiable royalty. According to the COC, since it is undisputed that the amount paid by CPPI to CPC as royalty fee is Php1,249,810,687.75 or five percent (5%) of the net sales of licensed products, said entire amount should have been the basis of the computation for customs duties and taxes.

The Court *En Banc* is not convinced. After a careful re-evaluation of the documents submitted by CPPI and the ICPA Report, the Court *En Banc* agrees with the Court in Division that only a portion of the royalties paid by CPPI to CPC is subject to tax.

Clause 10 of the MOA provides:

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[69] *Records, Vol. 5, Exhibit "P-11," Letter dated May 17, 2007,* p. 3409.

> 10. In consideration of the rights hereby granted to [CPPI], [CPPI] shall pay to [CPC] as royalty, exclusive of value-added tax (VAT), Five Percent (5%) of its total Net Sales of Licensed Products.[70]

From the foregoing, five percent (5%) of CPPI's net sales of licensed products shall be the equivalent amount of royalty it should pay to CPC. It does not follow, however, that the entire amount paid by CPPI shall be the basis for computing the customs duty on royalties. As discussed above, royalties are dutiable only if, among others, they relate to the goods being valued. Thus, if the royalty is not related to the goods being subjected to customs duties, it is illogical to subject the same to duties and taxes under *Section 201 of the TCCP.*

In the instant case, CPPI's finished goods inventory consists of imported finished goods and locally manufactured products.[71] Meanwhile, the raw materials used for the production of locally manufactured products were sourced from both Colgate and non-Colgate entities.[72] Clearly, the Php1,249,810,687.75 royalty paid by CPPI is not representative of the amount of royalty related to the goods imported. It is thus only proper for the Court in Division to limit the dutiable royalty on the equivalent amount of sales of importations from CPC.

As found by the Court in Division, for the fourth quarter of CY 2003 to third quarter of CY 2006, CPPI's importations of finished goods and raw materials, which were sourced from Colgate entities, amounted to Php6,390,213,851.67.[73] However, since the amount of Php46,439,545.34 was not proven to be actually sourced from non-Colgate entities, the same was added back to arrive at the total importations from Colgate entities of Php6,436,653,397.01. The equivalent sales thereof applying the gross profit rate of 46.6%[74] is Php13,812,560,937.79. This amount represents the equivalent amount of sale of finished goods and raw materials imported by CPPI from Colgate entities.

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[70] *Records, Vol. 2, Exhibit "I-9," MOA,* p. 1367; Underscoring ours.
[71] *Records, Box 10, Folder 32, Exhibit "P-4-1a," Audited Financial Statements ("AFS") for the Years 2003 to 2006,* p. 16; *Records, Box 10, Folder 32, Exhibit "P-4-1b," AFS for the Years 2003 to 2006,* p. 13; *Records, Box 10, Folder 32, Exhibit "P-4-2a," AFS for the Years 2003 to 2006,* p. 24; *Records, Box 10, Folder 32, Exhibit "P-4-2b," AFS for the Years 2003 to 2006,* p. 24.
[72] *Records, Vol. 2, Exhibit "V," Judicial Affidavit of Mr. Luis N. Tura,* pp. 1530-1531; *Records, Exhibit "P-1," ICPA Report,* p. 7.
[73] *Records, Exhibit "P-1," ICPA Report,* p. 13.
[74] *Id.,* p. 14.

Accordingly, the Court *En Banc* agrees with the Court in Division that CPPI is liable for deficiency customs duties and VAT on royalty paid to CPC in the amounts of Php34,531,402.34 and Php3,622,689.80, respectively, computed as follows:

Importations from Colgate entities	Php	6,436,653,397.01
Grossed-up average based on cost ration of 46.6%		46.60%
Equivalent sales	Php	13,812,560,937.79
Royalty rate		5%
Tax base	Php	690,628,046.89
Duty rate		5%
CUSTOMS DUTIES	**PHP**	**34,531,402.34**
RELATED VAT	**PHP**	**3,622,689.80**

As to the parties' other arguments in their Petitions for Review, the Court *En Banc* finds no new and/or compelling averment. The arguments raised therein are mere rehash of previously discredited arguments or were sufficiently acted upon in the assailed Decision and Resolution. Therefore, the Court *En Banc* finds it unnecessary to discuss the other remaining issues.

The Court *En Banc* will not disturb the Court in Division's finding of CPPI's liability for deficiency customs duties and VAT on royalties paid to CPC, and deficiency VAT on arrastre and wharfage absent any compelling evidence to the contrary.

WHEREFORE, premises considered, the instant Petitions for Review are hereby **DENIED** for lack of merit. Accordingly, the Decision dated January 26, 2016, and the Resolution dated May 26, 2016, both promulgated by the First Division of the Court of Tax Appeals, are hereby **AFFIRMED**.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

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

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

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

Ma. Belen
(With Concurring and Dissenting Opinion)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

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

COLGATE-PALMOLIVE PHILIPPINES, INC., *Petitioner,*	**CTA EB NO. 1471** (CTA Case No. 7806)
-versus-	
COMMISSIONER OF CUSTOMS, *Respondent.*	

x---x

COMMISSIONER OF CUSTOMS, *Petitioner,*	**CTA EB No. 1475** (CTA Case No. 7806)
-versus-	Present: Del Rosario, *P.J.,* Castañeda, Jr., Bautista, Uy, Casanova, Fabon-Victorino, Mindaro-Grulla, Ringpis-Liban, *and* Manahan, *JJ.*
COLGATE-PALMOLIVE PHILIPPINES, INC., *Respondent.*	Promulgated: JAN 04 2018 4:02 p.m.

x --x

CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* in affirming the assailed Decision and Resolution of the Court in Division, thus, denying the petitions filed by Colgate-Palmolive Philippines, Inc. (CPPI) and the Commissioner of Customs (COC) for lack of merit.

Anent the Concurring and Dissenting Opinion of my esteemed colleague, the Honorable Associate Justice Ma. Belen M. Ringpis-Liban, disagreeing with the non-imposition of deficiency interest on the basic deficiency value added tax (VAT) on royalty, arrastre and wharfage fees assessed against CPPI, **I wish to reiterate that deficiency interest may only be imposed on tax specifically covered and defined by the relevant provisions of the National Internal Revenue Code (NIRC), *i.e.*, income tax, donor's tax and estate tax. Consequently, the non-imposition of deficiency interest on the assessed basic deficiency VAT on royalty, arrastre and wharfage fees of CPPI is consistent with the NIRC.**

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

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

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

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

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

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

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

> **'It will be seen that Section 51 (c) (1) and (e) (1) and (3), of the 1977 Tax Code, authorize the imposition of surcharge and interest only in respect of a *"tax imposed by this Title,"* that is to say, Title II on "Income Tax."** It will also be seen that Section 72 of the 1977 Tax Code imposes a surcharge only in case of failure to file a return or list *"required by*

> *this Title,"* that is, *Title II on "Income Tax."* **The thirty-five percent (35%) transaction tax is, however, imposed in the 1977 Tax Code by *Section 210 (b) thereof which Section is embraced in Title V on "Taxes on Business"* of that Code.** Thus, while the thirty-five percent (35%) transaction tax is in truth *a tax imposed on* interest *income* earned by lenders or creditors purchasing commercial paper on the money market, the relevant provisions, *i.e.,* Section 210 (b), were *not* inserted in Title II of the 1977 Tax Code. The end result is that the thirty-five percent (35%) transaction tax is *not* one of the taxes in respect of which Section 51 (e) authorized the imposition of surcharge and interest and Section 72 the imposition of a fraud surcharge.'

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

> 'Section 249.Interest-
>
> (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)

M

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." (Additional Boldfacing Supplied)

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

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

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

Thus, I submit that what is controlling in this case is the well-settled doctrine of strict interpretation in the imposition of taxes, not the similar doctrine as applied to tax exemptions. The rule in the interpretation of tax laws is that a statute will not be construed as imposing a tax unless it does so clearly, expressly, and unambiguously. **A tax cannot be imposed without clear and express words for that purpose. Accordingly, the general rule of requiring adherence to the letter in construing statutes applies with peculiar strictness to tax laws and the provisions of a taxing act are not to be extended by implication.** In answering the question of who is subject to tax statutes, it is basic that in case of doubt, such statutes are to be construed most strongly against the government and in favor of the subjects or citizens because **burdens are not to be imposed nor presumed to be imposed beyond what statutes expressly and clearly import. As burdens, taxes should not be unduly exacted nor assumed beyond the plain meaning of the tax laws.**[5]

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 qualified the imposition of deficiency interest 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. **(As oft-repeated, the NIRC defines "deficiency" only in the imposition of tax liabilities on donor's, income and estate taxes.)**

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 **did not provide the same qualification** as that which is stated with respect to **deficiency interest under Section 249 (B).** 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 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 NIRC is imposed **without qualification** on the amount of the tax due, or on the deficiency tax, or on any surcharge or interest

[5] *Medicard Philippines, Inc. vs. Commissioner of Internal Revenue,* G.R. No. 222743, April 26, 2017, citing *Commissioner of Internal Revenue vs. Fortune Tobacco Corporation*, G.R. Nos.167274-75, July 21, 2008.

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 made 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."

The power of taxation is sometimes called also the power to destroy. It should be exercised with caution to minimize injury to the proprietary rights of a taxpayer. It must be exercised fairly, equally and uniformly, lest the tax collector kills the "hen that lays the golden egg".[6] Indeed, the imposition of 20% deficiency interest per annum on a <u>tax not clearly within the context of the law</u>, 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, as amended, is too burdensome for a taxpayer to survive and continue with its business affairs. It is akin to the imposition of interest rates on loans to levels which could either enslave borrowers or lead to a hemorrhaging of their assets.[7]

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[6] *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.
[7] *Spouses Almeda vs. The Court of Appeals and Philippine National Bank*, G.R. No. 113412, April 17, 1986.

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 VAT assessed against CPPI.

All told, I VOTE TO DENY both Petitions for Review for lack of merit.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COLGATE-PALMOLIVE PHILIPPINES, INC.,
Petitioner,

- versus -

COMMISSIONER OF CUSTOMS,
Respondent.

CTA EB NO. 1471
(CTA Case No. 7806)

x - x

COMMISSIONER OF CUSTOMS,
Petitioner,

- versus -

COLGATE-PALMOLIVE PHILIPPINES, INC.,
Respondent.

CTA EB NO. 1475
(CTA Case No. 7806)

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

Promulgated:
JAN 04 2018 4:02 p.m.

x- -x

CONCURRING AND DISSENTING OPINION

RINGPIS-LIBAN, ***J.:***

I concur in the *ponencia* in denying the Petition for Review filed by Colgate Palmolive Philippines, Inc. ("CPPI") in CTA EB No. 1471 for lack of merit. Thus, I sustain the ruling of the First Division that CPPI is liable to pay the amount of Php39,373,571.93 representing basic deficiency customs duties and value-added tax ("VAT") on royalty fees, arrastre and wharfage, inclusive of the twenty-five percent (25%) surcharge imposed under Section 248(A)(3) of the National Internal Revenue Code of 1997, as amended.[1] I also concur that in addition thereto, CPPI is liable to pay delinquency interest at the rate of twenty percent (20%) per annum on the amount due of Php4,842,169.59[2], computed from June 9, 2008 until full payment thereof, pursuant to Section 249(C).

I do not agree, however, with the majority in not imposing deficiency interest at the rate of twenty percent (20%) per annum, on CPPI's basic deficiency VAT on royalty fees, arrastre and wharfage.

The relevant provisions of the National Internal Revenue Code of 1997, as amended state:

> **"TITLE X**
> **STATUTORY OFFENSES AND PENALTIES**
>
> **CHAPTER I**
> **ADDITIONS TO THE TAX**
>
> xxx xxx xxx
>
> Sec. 249. **Interest.** –
>
> (A) *In General.* – There shall be assessed and collected **on any unpaid amount of tax**, interest at the rate of twenty percent (20%) *per annum*, or such higher rate as may be prescribed by rules and regulations, from the date prescribed for payment until the amount is fully paid.
>
> (B) *Deficiency Interest.* – Any deficiency in the tax due, as the term is defined in this Code, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof.
>
> (C) *Delinquency Interest.* – In case of failure to pay:
>
> xxx xxx xxx

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1 All provisions of law pertain to the National Internal Revenue Code ("NIRC") of 1997 as amended, unless otherwise stated.

2 Php4,528,362.25 plus Php313,807.34.

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

From the above provisions, Section 249 patently provides that twenty percent (20%) interest per annum shall be imposed on any deficiency in the tax due. Specifically, Section 249(A) provides in general that twenty percent (20%) interest per annum shall be imposed on any unpaid amount of tax. Such interest may fall under two categories: deficiency interest and delinquency interest.

Deficiency interest provided under Section 249(B) shall be imposed from the date prescribed for its payment until the full payment thereof; while delinquency interest provided under Section 249(C)(3) shall be imposed from the due date appearing in the notice and demand until full payment thereof. Since CPPI in this case failed to pay VAT on its royalty fees, arrastre and wharfage; accordingly, it is my view that CPPI is liable for both deficiency interest and delinquency interest.

It is worthy to note that the imposition of deficiency interest is, similar to the imposition of surcharge and delinquency interest, proper and mandatory.[4] Moreover, I reiterate the position I have taken in the consolidated cases of *Maxicare Healthcare Corporation v. Commissioner of Internal Revenue*[5] that the imposition of deficiency interest applies to all types of taxes, such as in the instant case. The relevant portions of my Separate Concurring Opinion in *Maxicare* are quoted below:

> "I do not agree with their position...that deficiency interest under Section 249(B) of the National Internal Revenue Code (NIRC) of 1997, as amended, should be applied only where there is deficiency income tax, deficiency estate tax and deficiency donor's tax.
>
> On this score, I adopt the Separate Concurring Opinions of Justices Castaneda and Cotango-Manalastas in *Philippine Aerospace Development Corporation v. Commissioner of Internal Revenue*[6], which expound on why deficiency interest should be applied to all kinds of taxes. The relevant portions are quoted below:

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3 *Emphasis and underscoring supplied.*
4 Philippine Refining Company v. Court of Appeals, G.R. No. 118794, May 08, 1996.
5 Separate Concurring Opinion in CTA EB Nos. 1312 and 1317 (CTA Case No. 8441), May 08, 2017.
6 CTA EB. No. 1035, February 09, 2016.

Justice Castaneda wrote in his Separate Concurring Opinion:

> 'The law is clear. There is no room left for interpretation.
>
> xxx xxx xxx
>
> The text of Section 247(a) states without any doubt that the additions under Chapter I, Title X are applicable to all taxes imposed under the code, i.e. the 1997 NIRC. The authority under that provision extends to all taxes regardless of the title under which they are classified.
>
> Thus, contrary to the position taken in the dissent, the law does not limit these additions to only the three (3) types of internal revenue taxes, namely, income (Title II), estate (Title III) and donor's tax (Title III). Their imposition applies with equal force and effect to the other taxes under the 1997 NIRC such as the value-added tax (Title IV), other percentage taxes (Title V), excise tax (Title VI) and documentary stamp tax (Title VII).
>
> Accordingly, the additions to the tax or deficiency tax such as, among others, *Civil Penalties or Surcharges* under Section 248, *Deficiency Interest* under Section 249(B), *Delinquency Interest* under Section 249(C), and *Installment on Extended Payment* under Section 249(D) are applicable to petitioner's deficiency EWT, WTC and VAT, as well.
>
> The dissent reasoned that because there is no definition for deficiency EWT, WTC and VAT unlike those for income tax in Section 56(B), for estate tax in Section 93 and for donor's tax in Section 104 then no deficiency interest can be imposed on the deficiency EWT, WTC and VAT due from the petitioner. The lacuna or the missing definition noted in the dissent was precisely addressed by Section 247(a) when this provision was first legislated through the amendments to the 1977 NIRC and which were then subsequently reenacted in the 1997 NIRC.
>
> The Supreme Court had the occasion to discuss the history of this provision in *Paper*

Industries Corporation of the Philippines (PICOP) v. Court of Appeals, et al.[7]

In said case, the Supreme Court held that PICOP was not liable for interest and surcharge on the unpaid transaction tax because the 1977 Tax Code then applicable authorized the imposition of interest and surcharge only on taxes within Title II of the code (Income Tax). Therefore, since the transaction tax was embraced under a different title, Title V (Taxes on Business), then the Court concluded that transaction tax was not one of the taxes for which interest and surcharge could be imposed. Nonetheless, it further expounded that this inadvertence in the 1977 NIRC was cured subsequently by fiat. Thus:

> 'The CIR, both in its petition before the Court of Appeals and its Petition in the instant case, points to Section 51 (e) of the 1977 Tax Code as its source of authority for assessing a surcharge and penal interest in respect of the thirty-five percent (35%) transaction tax due from Picop.
>
> <u>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."*</u> 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 21 O(b), were *not* inserted in Title II of the 1977 Tax Code. <u>The end result is that the</u>

[7] *Citing* G.R. No. 106949-50, December 1, 1995 consolidated with Commissioner of Internal Revenue v. Paper Industries Corporation of the Philippines (PICOP), et al., G.R. No. 106984-85, December 1, 1995.

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.

It is not without reluctance that we reach the above conclusion on the basis of what may well have been an inadvertent error in legislative draftsmanship, a type of error common enough during the period of Martial Law in our country. Nevertheless, we are compelled to adopt this conclusion. We consider that the_authority [sic] to impose what the present Tax Code calls (in Section 248) *civil penalties* consisting of additions to the tax due, must be expressly given in the enabling statute, in language too clear to be mistaken. The grant of that authority is not lightly to be assumed to have been made to administrative officials, even to one as highly placed as the Secretary of Finance.

The state of the present law tends to reinforce our conclusion that Section 51(c) and (e) of the 1977 Tax Code did not authorize the imposition of a surcharge and penalty interest for failure to pay the thirty-five percent (35%) transaction tax imposed under Section 210 (b) of the same Code. The corresponding provision in the *current* Tax Code very clearly embraces failure *to pay all taxes imposed in the Tax Code*, without any regard to the Title of the Code where provisions imposing particular taxes are textually located.

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In other words, Section 247 (a) of the current NIRC supplies what did not exist back in 1977 when Picop's liability for the thirty-five percent (35%) transaction tax became fixed. **We do not believe we can fill that legislative lacuna by judicial fiat. There is nothing to suggest that Section 247(a) of the present Tax Code, which was inserted in 1985, was intended to be**

> **<u>given retroactive application by the legislative authority.</u>**" *(emphasis and underscoring supplied; citations omitted)*

xxx xxx xxx

Similarly, in *Aerospace*, the Separate Concurring Opinion of Justice Cotango-Manalastas also elucidates on the subject of deficiency interest thus:

> 'At the outset, Section 247 of the NIRC of 1997, as amended, provides that the additions (i.e., surcharge, interest) to deficiency tax prescribed under Chapter I[8] (Additions to the Tax), Title X (Statutory Offenses and Penalties) are applicable to ***all taxes*** imposed under the Tax Code. Thus, the NIRC does not limit deficiency interest to only three (3) types of internal revenue taxes.
>
> A reading of the definitions of the term 'deficiency' found in Sections 56(8), 93 and 104 of the NIRC of 1997, as amended, shows that these definitions relate to how deficiency income, estate and donor's tax are computed, the relevant provisions are quoted hereunder:
>
> '**SECTION 56.** *Payment and Assessment of Income Tax for Individuals and Corporations.* –
>
> xxx xxx xxx
>
> (B) Assessment and Payment of Deficiency Tax. - After the return is filed, the Commissioner shall examine it and assess the correct amount of the tax. The tax or deficiency income tax so discovered shall be paid upon notice and demand from the Commissioner.
>
> As used in this Chapter, in respect of a tax imposed
> by this Title, the term 'deficiency' means:
>
> (1) The amount by which the tax imposed by this Title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the

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8 Includes Sections 247-252 of the NIRC.

return shall be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amount previously abated, credited, returned or otherwise repaid in respect of such tax; or

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

SECTION 93. *Definition of Deficiency.* -As used in this Chapter, the term 'deficiency' means:

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

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

SECTION 104. *Definitions.* – xxx

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

These definitions, which are similar for the three types of taxes, are basic and standard definition of 'deficiency' which can likewise be adopted by analogy in defining 'deficiency' as to other internal revenue taxes. Hence, I believe the phrase '[a]ny deficiency in the tax due, as the term is defined in this Code' generally refers to deficiency tax that arises when the correct amount of tax due, as determined by the CIR, is more than the amount of tax shown in the taxpayer's return.

I described 'deficiency' as one determined by the CIR because the word 'deficiency' was used in Section 56(B) [under Chapter IX[9] , Title II] as follows:

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

and in Section 92 (under Chapter I[10], Title III) as follows:

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[9] Returns and Payment of Tax.

[10] Estate Tax.

> 'SECTION 92. *Discharge of Executor or Administrator from Personal Liability.* - xxx. The executor or administrator, upon payment of the amount of which he is notified, shall be discharged from personal liability for **any <u>deficiency</u> in the tax thereafter found to be due** and shall be entitled to a receipt or writing showing such discharge.'

Notably, the word 'deficiency' was not mentioned anywhere else in Chapter II (Donor's Tax) of Title III except when it was defined in Section 104.

Moreover, Section 6 of the NIRC of 1997, as amended, provides:

> 'SECTION 6. *Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.* –
>
> (A) *Examination of Returns and Determination of Tax Due.*- After a return has been filed as required under the provisions of this Code, the Commissioner or his duly authorized representative may authorize the examination of any taxpayer and the assessment of the correct amount of tax: *Provided, however,* That failure to file a return shall not prevent the Commissioner from authorizing the examination of any taxpayer.
>
> The tax or any **deficiency** tax so assessed shall be paid upon notice and demand from the Commissioner or from his duly authorized representative.'

xxx xxx xxx

Hence, from the foregoing, it appears that 'deficiency in the tax due' refers to deficiency as determined by the CIR [in this case the COC]. This distinction finds significance in determining whether interest is imposed under Section 249(A) or 249(8) of the NIRC of 1997, as amended.

Section 249(A) of the NIRC of 1997, as amended, provides:

> '(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 amount is fully paid**.'

Based on the above provision, Section 249(A) of the NIRC of 1997, as amended, applies to 'any unpaid amount of tax' and interest would run 'from the date prescribed for payment until the amount is fully paid' which is the same period provided in Section 249(B) of the NIRC of 1997, as amended.

Since 'any unpaid amount of tax' is an all-encompassing phrase, it follows that deficiency tax also falls within that phrase since, basically, deficiency tax is unpaid tax. Hence, it is reasonable to conclude that generally, any unpaid tax is subject to interest under Section 249(A) of the NIRC of 1997, as amended.

For example, a taxpayer filed his income tax return for taxable year 2003 and paid the income tax due as shown in his return (which was due for filing on April 15, 2004) only on May 30, 2004. Pursuant to Section 249(A) of the NIRC of 1997, as amended, the taxpayer is required to pay 20% interest p.a. from April 15, 2004 to May 30, 2004. However, if specifically, the unpaid amount of tax refers to 'deficiency in the tax due', then Section 249(B) of the NIRC of 1997, as amended, applies.

From the foregoing, assuming arguendo that deficiency interest is not applicable to the other types of taxes because they are not considered 'deficiency in the tax due, as the term is defined in this Code', then these other types of taxes will fall under Section 249(A) of the NIRC of 1997, as amended, since it applies to 'any unpaid amount of tax', an all-encompassing phrase.

Also, if deficiency interest under Section 249(B) of the NIRC of 1997, as amended, is not

> applicable to internal revenue taxes other than income, estate and donor's tax, then a taxpayer that was issued a deficiency tax assessment (Final Assessment Notice/Formal Letter of Demand) would be placed in a better position than a taxpayer who was not yet issued a deficiency tax assessment. In the former case, the taxpayer with an assessment is not required to pay interest from the date prescribed for its payment until full payment while the latter who self-assessed his unpaid tax, would have to pay for the same.
>
> For example, a taxpayer filed his VAT return for the 1st quarter of 2003 (calendar year) and paid the tax due thereon on April 25, 2003. Later on, he discovered that he underpaid his VAT due and hence, he filed an amended return on June 10,2003 and paid the corresponding deficiency VAT. Pursuant to Section 249(A) of the NIRC of 1997, as amended, he has to pay for interest from April 25, 2003 to June 10, 2003. On the other hand, if another taxpayer was assessed by the BIR for deficiency VAT for the 1st quarter of 2003, based on the position expressed in the Dissenting Opinion, then, he will not be required to pay for deficiency interest under Section 249(B) of the NIRC of 1997, as amended, from April 25, 2003 until full payment.
>
> Moreover, applying the argument that deficiency interest is only applicable for deficiencies that were defined in the NIRC, it would appear that 'deficiency' exists only for these particular tax types (income tax, estate tax and donor's tax). Does that mean the BIR cannot assess a taxpayer for 'deficiency' on taxes other than income, estate and donor's tax since the same were not defined in the NIRC? This could not have been the intention of Congress.'
>
> It is for the reasons above that, I believe, deficiency interest is not limited to merely deficiency income tax, deficiency estate tax and deficiency donor's tax."

All told, it is my view that CPPI should be also liable for deficiency interest.

In view of the foregoing, I vote for the **PARTIAL GRANT** of COC's Petition for Review in CTA EB No. 1475.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice