REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

AFP GENERAL INSURANCE CORPORATION, *Petitioner,*	**CTA EB No. 1223** (CTA Case No. 8191)
	Present:
- versus -	Del Rosario, *PJ*, Castañeda, Jr., Bautista, Uy, Casanova, Fabon-Victorino, Mindaro-Grulla, Cotangco-Manalastas, and Ringpis-Liban, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: JAN 04 2016 11:05 a.m.

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D E C I S I O N

COTANGCO-MANALASTAS, J.:

Before the Court *En Banc* is a Petition for Review filed by petitioner, AFP General Insurance Corporation, assailing the *Decision*[1] dated March 13, 2014 and the *Amended Decision*[2] dated September 1, 2014 of the Third Division of the Court ordering petitioner to pay deficiency taxes for taxable year 2006.

The Facts

The facts[3], as found by the Court in Division, are as follows:

Petitioner, AFP General Insurance Corporation, is a domestic corporation duly registered under Philippine laws,

[1] *Rollo*, pp. 63-79.
[2] *Rollo*, pp. 48-62.
[3] *Rollo*, pp. 64-68, citations omitted.

with principal office address at AFP Gen. Building, B. Serrano corner EDSA, Barangay Socorro, Cubao, Quezon City.

On the other hand, respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) mandated by law to enforce and implement the National Internal Revenue Code and related statutes, including, among others, the power to cancel disputed assessments, with office address at the 5th Floor, BIR National Office Building, East Triangle, Diliman, Quezon City.

On May 7, 2008, respondent issued Letter of Authority No. 00021964, addressed to petitioner, for the examination of its books of accounts and other accounting records covering the taxable year 2006.

Pursuant to the said Letter of Authority, on January 12, 2010, petitioner received a Preliminary Assessment Notice (PAN), with attached Details of Discrepancy, for deficiency Income Tax, Documentary Stamp Tax, Value-added Tax, and Expanded Withholding Tax covering taxable year 2006.

Consequently, on January 25, 2010, petitioner filed its Letter-Reply against the said PAN.

On February 19, 2010, respondent issued a revised PAN, with attached Details of Discrepancy, for the same deficiency taxes covering the same taxable year; which was received by petitioner on March 19, 2010.

And on April 6, 2010, respondent issued the subject Formal Letter of Demand, with attached Assessment Notices, against petitioner for the following deficiency taxes:

Income Tax			
Basic Tax Due			₱ 8,294,889.09
Add:	Interest (until April 15, 2010)		4,976,933.45
	Compromise Penalty		25,000.00
TOTAL			**₱13,296,822.54**
Documentary Stamp Tax (Increase in Capital Stock)			
Basic Tax Due			₱ 250,000.00
Add:	Surcharge		62,500,00
	Interest (until April 15, 2010)		162,500.00
	Compromise		16,000.00
TOTAL			**₱491,000.00**

Documentary Stamp Tax (Insurance Policies)		
Basic Tax Due		₱ 316,237.83
Add:	Surcharge	1,114,521.99
	Interest	710,216.39
	Compromise	77,000.00
TOTAL		**₱2,217,976.20**
Value-added Tax		
Basic Tax Due		₱ 4,092,402.38
Add:	50% Surcharge	2,046,201.19
	Interest (until April 25, 2010)	2,660,061.55
	Compromise	-
TOTAL		**₱8,798,665.12**
Expanded Withholding Tax		
Basic Tax Due		₱ 470,863.74
Add:	Interest (April 10, 2010)	306,061.43
	Compromise	16,000.00
TOTAL		**₱792,925.17**
Civil Penalty		
No Permit to Use Loose Leaf Books of Accounts (Computerized Books of Accounts)		₱50,000.00
GRAND TOTAL		**₱25,647,389.03**

On April 26, 2010, petitioner then filed its Letter-Protest dated April 22, 2010, against the above assessments.

Alleging inaction on the part of respondent, on November 19, 2010, petitioner thus filed the Petition for Review before the Court in Division.

On January 3, 2011, respondent filed her Answer while petitioner filed its Reply on January 26, 2011.

On April 7, 2011, the parties filed their Joint Stipulation of Facts/Issues. On April 26, 2011, the Court issued the Pre-Trial Order.

Trial ensued. Both parties presented and offered their respective documentary and testimonial evidence.

On April 17, 2013, the case was submitted for decision, taking into consideration the Memoranda for Petitioner and Memorandum filed by respondent.

On March 13, 2014, the Court in Division, promulgated the assailed *Decision*[4], partially granting the petition, the dispositive portion of which reads:

> "**WHEREFORE**, the Petition for Review is hereby **PARTLY GRANTED**.
>
> Accordingly, the deficiency assessments for Value-added Tax covering taxable year 2006 in the total amount of ₱8,798,665.12; Documentary Stamp Tax on insurance policies covering taxable year 2005 in the total amount of ₱680,099.44; and Civil Penalties in the amounts of ₱25,000.00 for deficiency Income Tax, ₱16,000.00 for deficiency Documentary Stamp Tax on the increase in capital stock, ₱16,000.00, ₱20,000.00 and ₱25,000.00, for the respective months of January, February and May for deficiency Documentary Stamp Tax on insurance policies, ₱16,000.00 for deficiency Expanded Withholding Tax, and ₱50,000.00 for using unregistered computerized books of accounts, are hereby **CANCELLED** and **SET ASIDE**.
>
> On the other hand, as regards the deficiency assessments for Income Tax, Documentary Stamp Taxes, and Expanded Withholding Tax for the taxable year 2006, petitioner is hereby **ORDERED** to **PAY** the amount of **₱12,746,567.80**, inclusive of the twenty five percent (25%) surcharge imposed under Section 248(A)(3) of the 1997 NIRC, as amended, and the twenty percent (20%) interest imposed under Section 249 of the 1997 NIRC, as amended, computed as follows:

Type of Tax	Basic Tax	25% Surcharge	20% Interest	Total
Income Tax	₱ 8,294,889.09	₱ 2,073,722.27	-	₱ 10,368,611.36
Documentary Stamp Tax on Increase in Capital Stock	250,000.00	62,500.00	-	312,500.00
Expanded Withholding Tax	470,863.74	117,715.94	-	588,579.68
Subtotal	**₱9,015,752.83**	**₱2,253,938.21**	-	**₱11,269,691.04**
Increments for Late Remittance of Documentary Stamp Tax on Policies of Insurance				
January		₱ 626,994.63	₱ 250,795.34	₱ 877,789.97
February		126,876.14	59,209.03	186,085.17
May		281,591.76	131,409.86	413,001.62
Subtotal		**1,035,462.53**	**441,414.23**	**1,476,876.76**
Total	**₱9,015,752.83**	**₱3,289,400.74**	**₱441,414.23**	**₱12,746,567.80**

> In addition, petitioner is hereby **ORDERED** to **PAY**, as follows:
>
> (a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency Income Tax, Documentary Stamp Tax on the increase in capital stock,

[4] *Supra*, Note 1.

and Expanded Withholding Tax computed from the dates indicated below, until full payment thereof pursuant to Section 249(B) of the 1997 NIRC, as amended;

Tax Type	Basic Tax	Deficiency Interest computed from
Income Tax	₱ 8,294,889.09	April 15, 2007
Documentary Stamp Tax on Increase in Capital Stock	₱250,000.00	January 5, 2007
Expanded Withholding Tax	₱470,863.74	January 15, 2007

b) Delinquency interest at the rate of twenty percent (20%) per annum on the total amount of ₱11,269,691.04, representing basic deficiency Income Tax, Documentary Stamp Tax on the increase in capital stock, and Expanded Withholding Tax, plus twenty five percent (25%) surcharge, computed from the dates indicated below until full payment thereof pursuant to Section 249(C) of the 1997 NIRC, as amended;

Tax Type	Basic Tax plus 25% Surcharge	Deficiency Interest computed from
Income Tax	₱ 10,368,611.36	4/15/2010
Documentary Stamp Tax on increase in capital stock	312,500.00	4/15/2010
Expanded Withholding Tax	588,579.68	4/10/2010
	₱11,269,691.04	

c) Delinquency interest at the rate of twenty percent (20%) per annum on the increments for late remittance of Documentary Stamp Tax on insurance policies in the amount of ₱1,476,876.76, computed from April 15, 2010, until full payment thereof pursuant to Section 249(C) of the 1997 NIRC, as amended; and

d) Delinquency interest at the rate of twenty percent (20%) per annum on the twenty percent (20%) deficiency interest which have accrued as afore-stated in (a), computed from April 15, 2010, until full payment thereof pursuant to Section 249(C) of the 1997 NIRC, as amended.

SO ORDERED.”

Petitioner filed a Motion for Reconsideration on April 2, 2014 while respondent filed a Motion for Partial Reconsideration (Re: Decision dated March 13, 2014) on April 3, 2014.

Thereafter, the Court in Division issued the assailed *Amended Decision*[5] dated September 1, 2014, partly granting

[5] *Supra*, Note 2.

respondent's motion while denying petitioner's motion, the dispositive portion of which reads:

> **"WHEREFORE**, the Court hereby **RESOLVES**, as follows:
>
> 1) The "Motion for Partial Reconsideration (Re: Decision dated March 13, 2014)" filed by respondent is hereby **PARTLY GRANTED**.
>
> Accordingly, the Decision dated March 13, 2014 is hereby **MODIFIED**.
>
> In addition to the amount to be paid in accordance with the Decision dated March 13, 2014, petitioner is hereby **ORDERED** to **PAY** the basic deficiency Value-added Tax for taxable year 2006 in the amount of **₱4,092,402.38** and the fifty percent (50%) Surcharge in the amount of **₱2,046,201.19** imposed under Section 248 (B) of the 1997 National Internal Revenue Code, as amended; or in the total amount of **₱6,138,603.57**:

	Basic Tax	**50% Surcharge**	**TOTAL**
Deficiency Value-added Tax	₱4,092,402.38	₱2,046,201.19	₱6,138,603.57

> In addition, petitioner is hereby **ORDERED** to **PAY**, as follows:
>
> a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency Value-added Tax of ₱4,092,402.38, computed from April 25, 2007 until full payment thereof pursuant to Section 249 (B) of the 1997 National Internal Revenue Code, as amended; and
>
> b) Delinquency interest at the rate of twenty percent (20%) per annum on the total amount of ₱6,138,603.57 and on the twenty percent (20%) deficiency interest which have accrued as aforestated in (a), computed from April 25, 2010, until full payment thereof pursuant to Section 249 (C) of the 1997 National Internal Revenue Code, as amended.
>
> 2) The "Motion for Reconsideration" filed by petitioner is hereby **DENIED** for lack of merit.
>
> **SO ORDERED."**

Aggrieved, petitioner filed the instant *Petition for Review* on September 23, 2014.

Respondent was ordered to file her comment within ten (10) days from receipt of the Resolution[6] dated October 23, 2014.

Respondent filed her Comment (Re: Petitioner's Petition for Review)[7] on November 26, 2014.

Considering the issues raised by petitioner and the arguments proffered by respondent, the Court *En Banc* resolved to require the parties to submit their respective memoranda[8].

Respondent filed her Manifestation[9] on February 11, 2015 stating that she is adopting the arguments raised in her comment to petitioner's petition for review while the Memorandum for Petitioner[10] was filed on March 9, 2015. Thus, the above-captioned case was submitted for decision on March 31, 2015.[11]

The Issues

Petitioner raises the following grounds[12] for the allowance of the petition:

a. The Honorable Third Division committed serious error of law in giving retroactive application to Revenue Memorandum Order (RMO) No. 19-2009 and in failing to hold that the Letter of Authority (LA) No. 00021964 dated May 7, 2008 is invalid, ineffective and void.

b. The Honorable Third Division committed serious error of law in failing to hold that RMO No. 19-2009 is not applicable to the disputed tax assessment for the latter covers the taxable year ending December 31, 2006 while RMO No. 19-2009 covers taxable year ending July 31, 2008 to June 30, 2009.

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[6] *Rollo*, pp. 387-388.
[7] *Rollo*, pp. 393-405.
[8] *Rollo*, pp. 410-411, Resolution dated December 22, 2014.
[9] *Rollo*, pp. 412-413.
[10] *Rollo*, pp. 427-465.
[11] *Rollo*, pp. 471-472.
[12] *Rollo*, pp. 12-13.

c. The Honorable Third Division committed serious error of law in failing to hold that petitioner received the LA No. 00021964 dated May 7, 2008 on June 13, 2008 or after the expiration of the mandated period of thirty (30) days for the service of the same.

d. The Honorable Third Division committed serious error of law in giving probative value to Exhibit "1" of respondent and in holding that petitioner received the questioned LA No. 00021964 on May 13, 2008.

e. The Honorable Third Division committed serious error of law in failing to hold that petitioner is not liable for the deficiency assessment for documentary stamp tax (DST) for the taxable year 2006.

f. The Honorable Third Division committed serious error of law in failing to hold that petitioner is not liable for deficiency income tax and expanded withholding tax (EWT) for taxable year 2006.

g. The Honorable Third Division committed serious error of law in failing to hold that the petitioner is only liable for the deficiency EWT of ₱792,925.17 and the deficiency CWT[13] of ₱1,209,943.16 or the total sum of ₱2,002,868.33 for deficiency EWT and CWT.

h. The Honorable Third Division committed serious error of law in holding petitioner liable for basic value-added tax (VAT) for taxable year 2006 in the amount of ₱4,092,402.38 and the fifty percent (50%) surcharge in the amount of ₱2,046,201.19, or in the total amount of ₱6,138,603.57 considering that prescription has set in against the assessment for said VAT and/or the same has been already extinguished by petitioner's availment of the tax amnesty law.

i. The Honorable Third Division committed serious error of law in holding petitioner liable for deficiency interest at the rate of twenty percent (20%) per

[13] The acronym "CWT" (as seen in the FLD and PAN) was mistakenly understood by petitioner to mean "Creditable Withholding Tax" but the same actually pertains to Withholding Tax on Compensation.

annum on the basic VAT of ₱4,092,402.38 and delinquency interest at the rate of twenty percent (20%) per annum on the total amount of ₱6,138,603.57 and on the twenty percent (20%) deficiency interest.

j. The Honorable Third Division committed serious error of law in holding petitioner liable for assessment for deficiency VAT for the year 2006 due to the alleged filing by petitioner of false VAT return as this judgment goes beyond the issue and the evidence on the records of the case and thus the same is not only irregular, but extra-judicial and invalid.

From the foregoing, the issues can be summarized as follows:

> "Whether or not petitioner is liable for deficiency income tax, DST, EWT and VAT for taxable year 2006."

The Ruling of the Court

A perusal of the instant petition for review shows that petitioner's arguments are basically the same as its previous arguments raised before the Court in Division which had been considered and discussed at length in the assailed Decision and Amended Decision. Be that as it may, the Court will address these arguments anew to emphasize certain points. Moreover, as will be discussed later on, the deficiency VAT assessment will be slightly modified.

Letter of Authority

Petitioner argues that the Court in Division committed serious error of law in giving retroactive application to RMO No. 19-2009[14]. RMO No. 19-2009 is not applicable to the disputed tax assessment for the latter covers taxable year ending December 31, 2006 while RMO No. 19-2009 covers taxable year ending July 31, 2008 to June 30, 2009.

[14] 2009 Audit Program for Revenue District Offices.

However, contrary to petitioner's argument, the Court in Division did not apply RMO No. 19-2009. In fact, the Court in Division expressly held that RMO No. 19-2009 is not applicable to the subject assessment. For petitioner's easy reference, the pertinent portion of the assailed Amended Decision is quoted below:

> "xxx On the other hand, the lastly-quoted Revenue Memorandum Order [RMO No. 19-2009], which respondent cited, evidently, is not applicable in the case at bench, taking into consideration that the same 'shall cover the audit/investigation of 2008 internal revenue tax returns, including tax returns of fiscal period taxpayers whose taxable year ended on July 31, 2008 up to June 30, 2009.'"

Petitioner insists that under RMO No. 38-88[15], August 24, 1998, which was reiterated in Revenue Memorandum Circular (RMC) No. 40-2006[16], July 13, 2006, a Letter of Authority (LA) must be served to the concerned taxpayer within thirty (30) days from its date of issuance, otherwise, it shall become null and void. The taxpayer shall then have the right to refuse the service of this LA, unless the LA is revalidated. A Revenue Officer (RO) is allowed only one hundred twenty (120) days from the date of receipt of a Letter of Authority by the taxpayer to conduct the audit and submit the required report of investigation. If the RO is unable to submit his final report of investigation within the 120-day period, he must then submit a progress report to his head of office, and surrender the LA for revalidation.

However, *We* agree with the observation made by the Court in Division that there is nothing in RMO No. 38-88 and RMC No. 40-2006 that indicates that the LA will be invalidated if not revalidated within the 120-day period. Pertinent portions of the assailed Decision are quoted hereunder:

> "For easy reference, Revenue Memorandum Order No. 38-88, states as follows:
>
> > 'This Order aims to set the guidelines on the revalidation of Letters of Authority (LAs) for a more effective and efficient investigation and reporting on cases:

[15] Guidelines on Revalidation of Letters of Authority.

[16] Clarification on the Jurisdictions of the Large Taxpayer Service, the Enforcement Service and the Revenue Regions Including the Revenue District Offices and Divisions under Them, Performing Audit and Investigation Functions, and Guidelines for the Exercise of Such Jurisdictions and Functions.

The following are henceforth prescribed:

1. Revalidation of Letters of Authority shall be limited to only once in the regional offices and twice in the National Office after issuance of the original LA.

2. A revalidation shall be covered by the issuance of a new Letter of Authority under the name(s) of the same investigating officer(s), and the superseded LA(s) shall be attached to the new LA issued.

3. Requests for revalidation shall be supported with a progress report on the case and a justification for said revalidation.

4. The Division Chief/RDO shall indorse the request for revalidation which shall be duly approved or disapproved by the Assistant Commissioner (SOS)/Regional Director.

5. The Division Chief/RDO shall be responsible for the monthly monitoring of LAs issued to ensure that reports are rendered within the reglementary 120-day period. The Division Chief/RDO shall be jointly responsible with the REOs for cases with LAs pending beyond the 120-day period.

6. It shall be the duty of the Division Chief/RDO to report immediately to the Inspection Service any tax case for which no report of investigation has been rendered 120 days after the issuance of an LA.'

And the pertinent portions of Revenue Memorandum Circular No. 40-2006, provides as follows:

'B. POLICIES — The following guidelines shall be strictly implemented, observed and complied with:

B.1 General

xxx xxx xxx

e) The 120-day rule on the revalidation of LA/AN shall be applicable in all cases (RMO No. 38-88).

xxx xxx xxx

C. VIOLATIONS AND PENALTIES — Any violation of the foregoing instruction by any revenue

> official or official shall be a ground for the imposition of appropriate administrative sanctions/penalties.'
>
> xxx xxx xxx
>
> A plain reading of the above-quoted Revenue Memorandum Order and Revenue Memorandum Circular provide the duties as well as the administrative sanctions/penalties on the issuance, effectivity and revalidation, or failure thereof, of a Letter of Authority; and the Court notes that the mentioned rules, which petitioner itself invoked, do not provide for the invalidity, as a result of failure to revalidate a Letter of Authority. xxx"

Petitioner also argues that it was erroneous for the Court in Division to rule that the LA was received by petitioner on May 13, 2008 citing Exhibit "1" of respondent. A closer examination of Exhibit "1" will show that there is no entry or any specific indication therein showing that the questioned LA was received by petitioner on May 13, 2008. Instead, the Court in Division should have considered and gave probative value to the testimony under oath of petitioner's witness Maria Victoria D. Dizon who attested in her Judicial Affidavit dated November 9, 2011[17] that petitioner received the questioned LA on June 13, 2008 or after the expiration of thirty (30) days for the service of the same. Thus, the questioned LA is void as provided under RMO No. 38-88 and RMC No. 40-2006.

The Court noted that there is no mention of the 30-day mandated period for serving of the LA in either RMO No. 38-88 or RMC No. 40-2006 cited by petitioner as its basis for the invalidation of the LA.

However, Revenue Audit Memorandum Order (RAMO) No. 1-2000[18] does provide that a Letter of Authority must be served or presented to the taxpayer within 30 days from its date of issue; otherwise, it becomes null and void unless revalidated. The taxpayer has all the right to refuse its service if presented beyond the 30-day period depending on the policy set by top management.

In this case, the Court in Division ruled that the LA was received by petitioner on May 13, 2008 citing Exhibit "1" of respondent.

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[17] Exhibit "Q".

[18] Updated Handbook on Audit Procedures and Techniques Volume I (Revision —Year 2000).

An examination of the lower portion of respondent's Exhibit "1" shows that the LA was received by "Patrick Joseph G. Santos", "Chief Accountant" on "May 13, 2008". Hence, petitioner was mistaken when it argued that there was no entry or any specific indication therein showing that the questioned LA was received by petitioner on May 13, 2008. Accordingly, LA No. 00021964 dated May 7, 2008 was served to petitioner within 30 days from its date of issue.

Moreover, petitioner admitted that it received the LA on June 13, 2008 or beyond the 30-day period for the service of the same. Hence, pursuant to RAMO No. 1-2000, it had every right to refuse the service of the same, yet it did not do so.

Deficiency DST and Prescription

Anent the deficiency DST assessment on the increase in capital stock and insurance policies, petitioner is insisting that it can no longer be held liable for the same as prescription has already set in.

Petitioner argues that since the law prescribed that the filing of the DST return shall be within five days after the close of the month when the taxable document was made, signed, issued, accepted or transferred, necessarily, the DST for taxable year 2006 is due (at the latest) on January 5, 2007. Thus, the three-year prescriptive period for final assessment of deficiency DST had prescribed (at the latest) on January 5, 2010. And assuming for the sake of argument that no return is filed by petitioner, still the latest date for the reckoning of the filing of said return is January 5, 2007 and thus the three-year prescriptive period had prescribed on January 5, 2010. However, the final demand for payment of the deficiency DST for taxable year 2006 was made by respondent on April 6, 2010 only or after the expiration of the prescribed period of three years.

The Court is not convinced.

Section 203 of the National Internal Revenue Code (NIRC) of 1997, as amended, expressly provides that:

> "SECTION 203. *Period of Limitation Upon Assessment and Collection.* — Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after

> the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided,* That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day."

From the foregoing, respondent has three years, counted from the date of *actual* filing of the return or from the last day prescribed by law for the filing of such return, whichever comes later, to assess internal revenue taxes.

But it must be remembered that prescription is a matter of defense; hence, the burden is on the taxpayer to prove that the full period of limitation has expired, and this requires him to positively establish the date when the period started running, and when the same was fully accomplished.[19]

Unfortunately, petitioner did not present in evidence its DST returns for taxable year 2006. The presentation of the DST returns would have proven the actual filing and the date of filing of the returns. Having failed to do so, then petitioner failed to prove that the subject deficiency DST assessment is already barred by prescription pursuant to Section 203 of the NIRC of 1997, as amended.

Moreover, *We* cannot make a proper ruling on the matter of prescription on the mere basis of assumptions as petitioner would want us to do. The Court cannot assume that the DST returns for taxable year 2006 were filed by petitioner on the last day prescribed by law for filing the same. It is possible that petitioner filed the DST returns much later than the prescribed date, in which case, the prescriptive period shall be counted from the date of actual filing of the return. It is also possible that petitioner did not file the DST returns, in which case, the Section 222(a)[20] of the NIRC of 1997, as amended, provides for a different prescriptive period for failure to file a

[19] *Querol vs. Collector of Internal Revenue*, G.R. No. L-16705, October 30, 1962.

[20] "SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* —

(a) In the case of a false or fraudulent return with intent to evade tax or of **failure to file a return**, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within **ten (10) years after the discovery** of the falsity, fraud or **omission**: *Provided,* That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof. (*Emphasis supplied*) return - respondent is given 10 years after discovery of the omission within which to make an assessment.[21]

Deficiency Income Tax and EWT

Respondent assessed petitioner for basic deficiency income tax in the amount of ₱8,294,889.09, computed as follows:[22]

Taxable Income/(Loss) per return			(2,166,485.00)
Add: Findings per Audit			
Salaries and Wages not subjected to CWT		5,669,921.87	
Expenses not subjected to EWT		14,391,140.56	
Contributions and Donations		139,745.00	
Disallowed Direct Losses claimed for 2006	5,409,397.73		
TY 2005 Losses claimed in TY 2006	255,962.95	5,665,360.68	25,866,168.11
Taxable Income per Audit			23,699,683.11
			35%
Basic Tax Due			**8,294,889.09**

And for income payments not subjected to EWT in the total amount of ₱14,391,140.56, respondent assessed petitioner for the corresponding (basic) deficiency EWT in the total amount of ₱470,863.74.[23]

Petitioner maintains that it has presented sufficient evidence to prove that it is not liable for deficiency income tax and EWT. In her Judicial Affidavit, Ms. Maria Victoria D. Dizon, Chief Accountant of petitioner, testified and succinctly explained the reason why petitioner is not liable for deficiency income tax and EWT.

However, this Court agrees with the findings of the Court in Division, *to wit*:

> "To put on record, petitioner failed to present and/or even offer any evidence to substantiate its claims of undue disallowance of its legitimate expenses, erroneous assessment for Expanded Withholding Tax, and the correct computation of its deficiency taxes."

From a reading of the testimony of Ms. Dizon, by way of judicial affidavit, she explained that there was allegedly direct double taxation imposed by respondent because petitioner was assessed for deficiency income tax by disallowing the expenses

[21] See discussion on prescription in the case of *Philippine National Oil Company vs. Court of Appeals, et al.*, G.R. Nos. 109976 and 112800, April 26, 2005.
[22] Exhibit "A".
[23] *Ibid.*

that were not subjected to EWT and at the same time assessing petitioner for deficiency EWT on the basis of the same expenses. Moreover, petitioner repeatedly alleges that the disallowed expenses are all legitimate expenses.

Again, the Court is not convinced.

First, there is no double taxation in this case. For double taxation in the objectionable or prohibited sense to exist, the same property must be taxed twice, when it should be taxed but once. Both taxes must be imposed on the same property or subject-matter, for the same purpose, by the same taxing authority, within the same jurisdiction or taxing district, during the same taxing period, and they must be the same kind or character of tax.[24]

Income tax and withholding tax are different kinds of taxes. An income tax is a national tax imposed on the net or the gross income realized in a taxable year[25] for which petitioner is liable to pay in its personality as a taxpayer while withholding tax is imposed on the petitioner as a "withholding agent" who is "required to deduct and withhold any tax"[26]. Under the withholding tax system, the payor is the taxpayer upon whom the tax is imposed, while the withholding agent simply acts as an agent or a collector of the government to ensure the collection of taxes.[27] The Tax Code only makes the agent personally liable for the tax arising from the breach of its legal duty to withhold as distinguished from its duty to pay tax.[28] Thus, there can be no double taxation here as the Tax Code imposes two different kinds of taxes and for two different purposes.

Second, Section 34(K)[29] of the NIRC of 1997, as amended, mandates the disallowance of an expense as deduction from

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[24] *La Suerte Cigar & Cigarette Factory vs. Court of Appeals and CIR*, G.R. Nos. 125346, 136328-29, 144942, 148605, 158197, 165499, November 11, 2014.

[25] *CIR vs. Citytrust Investment Philippines, Inc. and Asianbank Corporation vs. CIR*, G.R. Nos. 139786 and 140857, September 27, 2006

[26] Section 22(K), NIRC of 1997, as amended.

[27] *Rizal Commercial Banking Corp. vs. CIR*, G.R. No. 170257, September 7, 2011.

[28] *CIR vs. Court of Appeals, Court of Tax Appeals and A. Soriano Corporation*, G.R. No. 108576, January 20, 1999.

[29] *(K) Additional Requirements for Deductibility of Certain Payments.* — **Any amount paid or payable which is otherwise deductible from**, or taken into account in computing **gross income** or for which depreciation or amortization may be allowed under this Section, **shall be allowed as a deduction only if it is shown that the tax required to be deducted and withheld therefrom has been paid** to the Bureau of Internal Revenue in accordance with this Section, sections 58 [refers to Returns and Payments of Taxes Withheld at Source] and 81 [refers to Filing of Return and Payment of Taxes Withheld by the employer from the employees] of this Code. (*Emphasis supplied*)

gross income if not subjected to EWT or withholding taxes on compensation, as the case may be. In other words, the consequence of non-withholding of taxes is the disallowance of the related expense as deduction from gross income, resulting in an increase in taxable income and consequently to the income tax due.

Lastly, other than petitioner's allegations and testimonial evidence, no documentary evidence was presented by petitioner to substantiate its claim that it is not liable for deficiency income tax and EWT.

It should be noted that a portion of the deficiency income tax assessment was brought by the disallowance of salaries and wages not subjected to withholding taxes on compensation (₱5,669,921.87) and disallowance of expenses not subjected to EWT (₱14,391,140.56). Simply put, these expenses were disallowed due to non-withholding of taxes and not because they were illegitimate expenses as petitioner mistakenly understood of the disallowance since it kept arguing that the disallowed expenses are all "legitimate expenses" which should not be disallowed. Therefore, in order to cancel the disallowance of these expenses, it was incumbent upon petitioner to prove that these expenses were subjected to withholding taxes or that these expenses are not subject to withholding taxes at all. Unfortunately, petitioner failed to present sufficient documentary evidence to disprove the deficiency income tax and EWT assessments.

Petitioner also maintains that it is only liable for deficiency EWT in the amount of ₱792,925.17 and deficiency CWT (referring to withholding tax on compensation) of ₱1,209,943.16 or the total sum of ₱2,002,868.33 for deficiency EWT and CWT. Thus, after payment thereof, petitioner can no longer be held liable for deficiency income tax for the year 2006.

Section 2.58.5 of RR No. 2-98, as amended by RR No. 14-2002, reads:

> "Sec. 2.58.5. *Requirements for Deductibility* – Any income payment which is otherwise deductible under the Code shall be allowed as a deduction from the payor's gross income only if it is shown that the income tax required to be withheld has been paid to the Bureau in accordance with Secs. 57 and 58 of the Code.

A deduction will also be allowed in the following cases where no withholding of tax was made:

xxx xxx xxx

(C) The withholding agent erroneously underwithheld the tax but **pays the difference between the correct amount and the amount of tax withheld**, including the **interest**, incident to such error, and **surcharges,** if applicable, **at the time of the audit/investigation or reinvestigation/reconsideration**." (*Emphasis supplied*)

From the foregoing provision, in order to cancel the corresponding disallowance of expenses despite non-withholding of taxes, the payment of the deficiency withholding taxes, including interest and surcharges, should have been made at the time of the audit/investigation or reinvestigation/reconsideration.

Since petitioner has not yet paid the deficiency withholding taxes, the related disallowed expenses cannot likewise be cancelled. Even if petitioner will pay for the deficiency withholding taxes at this time, still, it will not have the effect of cancelling the disallowed expenses, because, obviously, the time of audit/investigation or reinvestigation/reconsideration had already passed.

The Court noted that petitioner did not dispute nor offer any evidence, testimonial or otherwise, to refute the following items under the deficiency income tax assessment: Contributions and Donations (₱139,745.00), Disallowed Direct Losses claimed for 2006 (₱5,409,397.73) and TY 2005 Losses claimed in TY 2006 (₱255,962.95), hence, these items of assessment shall be upheld.

Deficiency VAT

Respondent assessed petitioner for basic deficiency VAT in the amount of ₱4,092,402.38, computed as follows:[30]

Vatable Income for the year:			
Premium Receivable - Beginning			20,117,558.00
Add: 2006 Direct Premium Written – Net of Returns			87,331,504.92
Total			107,449,062.92
Less: Premium Receivable – End			9,419,392.33

[30] Exhibit "A".

Vatable Premium			98,029,670.59
Add: Other Vatable Income			
Commissions		8,204,552.43	
Rental		1,623,286.65	
Other Underwriting Income		24,062.00	
Miscellaneous Income		6,400,938.80	16,252,839.88
Gross Income for TY 2006			114,282,510.47
Less: PA Premium collections for 2006 (subject to 5% Premium Tax)			186,210.71
			114,096,299.76
			12%
Output VAT			13,691,555.97
Less: Output VAT per VAT Returns			9,858,426.12
Unremitted Output VAT			**3,833,129.85**
Add: Adjustments:			
Overclaim of Carried Over Input Tax for the 4th Quarter of TY 2005			
Per VAT Return	226,002.97		
Actual Balance of Input Tax per GL as of December 31, 2005	132,743.45	93,259.52	
TY 2005 Creditable VAT claimed on TY 2006		15,359.11	
Over claimed – Input Tax for TY 2006		150,653.90	259,272.53
Basic Deficiency VAT			**4,092,402.38**

Petitioner contends that the Court in Division erroneously held petitioner liable for deficiency VAT for taxable year 2006 inclusive of the fifty percent (50%) surcharge, twenty percent (20%) deficiency interest and twenty percent (20%) delinquency interest considering that prescription has set in. The Court in Division ruled that there is an alleged discrepancy between the Audited Financial Statement and the unregistered General Ledger which resulted to an underdeclaration in gross income subject to VAT, making the return false. However, petitioner stresses that the records of this case will show that respondent did not present even a single evidence regarding the alleged filing by petitioner of false VAT return. Neither was there any evidence presented by respondent showing the alleged discrepancy between the Audited Financial Statement and unregistered General Ledger, which resulted to an underdeclaration in the gross income subject to VAT.

Section 222 of the NIRC of 1997, as amended, provides the exceptions to Section 203 of the NIRC of 1997, as amended. In particular, as stated under paragraph (a) thereof, the three-year period of limitation in making assessment shall not apply in cases where it involves false or fraudulent return with intent to evade tax or of failure to file a return. Section 222(a) of the NIRC of 1997, as amended, provides:

> "SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* –
>
> (a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: *Provided,* That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof."

The Supreme Court held in the case of *Jose B. Aznar vs. Court of Tax Appeals and Collector of Internal Revenue*[31] that the afore-quoted provision should be interpreted to mean a separation of the three different situations of false return, fraudulent return with intent to evade tax, and failure to file a return; which is strengthened immeasurably by the last portion of the provision that segregates the situations into three different classes, namely "falsity", "fraud" and "omission". That there is a difference between "false return" and "fraudulent return" cannot be denied. While the first merely implies deviation from the truth, whether intentional or not, the second implies intentional or deceitful entry with intent to evade the taxes due.

Pertinent thereto is Section 248(B) of the NIRC of 1997, as amended, which states:

> "(B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud: *Provided,* That a **substantial underdeclaration of taxable sales, receipts or income**, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, **shall constitute *prima facie* evidence of a false or fraudulent return**: *Provided, further,* That **failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return**, and a claim of deductions in an amount exceeding thirty percent (30%) of actual deductions, **shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income**

[31] G.R. No. L-20569, August 23, 1974.

or for overstatement of deductions, as mentioned herein." *(Emphasis supplied)*

Thus, in resolving whether there was indeed falsity in the return, the Court shall consider the findings made by respondent in the assessment and compare it with the VAT returns filed by petitioner for taxable year 2006 and then consider the evidence presented by petitioner to refute the same.

Unfortunately, other than the testimony of petitioner's witness, Ms. Maria Victoria D. Dizon, that the alleged unremitted output VAT of ₱3,833,129.85 is already included in the VAT remittance, no other evidence was presented by petitioner to refute the assessment.

As observed by the Court in Division, petitioner did not even offer any explanation in its reply to the PAN and protest to the Formal Letter of Demand (FLD) and Assessment Notice to refute the deficiency VAT assessment, *to wit*:

> "A perusal of the records shows that in the Preliminary Assessment Notice, with attached Details of Discrepancy, petitioner is liable for deficiency Value-added Tax for taxable year 2006 in the total amount of ₱3,911,057.03. Petitioner then filed its Letter-Reply, stating that 'We are still verifying the Company's records relative to the BIR's findings above.' Respondent then issued a revised Preliminary Assessment Notice, with attached Details of Discrepancy, in the increased amount of ₱8,730,457.05; imposed therein is the fifty percent (50%) Surcharge, pursuant to Section 248 (B), in relation to Section 255 of the 1997 National Internal Revenue Code, as amended, due to substantial underdeclaration of taxable sales, receipts or income and failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, or by filing false and fraudulent return. Based on the records, petitioner failed to file any protest thereto. Thus, respondent issued the subject Formal Letter of Demand, with attached Assessment Notices, for deficiency Value-added Tax in the amount of ₱8,798,665.12; imposed therein, as well, is the fifty percent (50%) Surcharge for filing false and fraudulent return. Petitioner filed its Letter-Protest, requesting respondent to 'cancel and set aside the Formal Letter of Demand dated April 6, 2010 for payment of the so-called deficiency taxes and to make a re-computation of the same after the submission by our client of the needed financial records/documents in support of its position that it has no pending liability for deficiency taxes.' However, petitioner failed to file its supporting documents, and alleging inaction

on the part of respondent, filed the present Petition for Review." (*Citations omitted*)

Assessments are *prima facie* presumed correct and made in good faith. It is the taxpayer and not the BIR who has the duty of proving otherwise.[32] Hence, it is upon petitioner to show proof that it is indeed not liable for the deficiency VAT assessment. Petitioner could have presented a reconciliation, with supporting documents, explaining the alleged discrepancy between the figures shown on the Audited Financial Statement and unregistered General Ledger, or to present any other evidence that will prove that there was no underdeclaration of gross income subject to VAT.

Unfortunately, petitioner failed to present evidence to refute the said undeclared gross receipts. Hence, the deficiency VAT assessment shall be upheld.

Consequently, the BIR's finding of a 38.88%[33] under-declaration in the amount of ₱31,942,748.01[34] in petitioner's VATable gross receipts in taxable year 2006, which petitioner was unable to disprove, makes petitioner's VAT returns for the said year false. Accordingly, the ten-year prescriptive period applies and not the three-year prescriptive period as alleged by petitioner.

Respondent likewise made an adjustment of ₱259,272.53 on the total unremitted output VAT of ₱3,833,129.85 increasing the total basic deficiency VAT to ₱4,092,402.38

Petitioner argues that this item of assessment (₱259,272.53) has already been extinguished by the availment of petitioner of the Tax Amnesty Law in 2007.

This item is broken down as follows:

Overclaim of Carried Over Input Tax for the 4th Quarter of TY 2005		
Per VAT Return	226,002.97	
Actual Balance of Input Tax per GL as of December 31, 2005	132,743.45	93,259.52
TY 2005 Creditable VAT claimed on TY 2006		15,359.11
Over claimed – Input Tax for TY 2006		150,653.90
		259,272.53

[32] *Commissioner of Internal Revenue vs. Court of Appeals, et al.*, G.R. Nos. 104151 & 105563, March 10, 1995.

[33]

$$\frac{\text{Underdeclaration per BIR audit} \quad ₱31,942,748.01}{\text{Gross Receipts declared per 2006 VAT returns} \quad ₱82,153,551.75} = 38.88\%$$

[34] ₱114,096,299.76 (Gross receipts subject to VAT per BIR audit) minus ₱82,153,551.75.

Upon an examination of the above breakdown, the Court finds that this item of assessment is not an assessment for deficiency VAT for 2005, as mistakenly understood by petitioner.

Even though 2005 figures are involved, respondent is not assessing petitioner for deficiency VAT for 2005, rather respondent is questioning the discrepancy of ₱93,259.52 between the amount of input tax carried over from the 4th quarter of 2005 declared per return[35] (₱226,002.97) and per general ledger (₱132,743.45). The input tax carried over from the 4th quarter of 2005 will have an effect on the total allowable input tax for 2006 (and consequently on the VAT payable for 2006) since the Tax Code allows the excess input tax in a given quarter to be carried over to the succeeding quarter/s[36]. Hence, petitioner should account for the alleged discrepancy, unfortunately, petitioner failed to do so.

Respondent also made an adjustment of ₱15,359.11, alleging that this amount was claimed as creditable input VAT for 2006 but pertains to 2005, hence, was deducted from the input VAT claimed, which has the effect of increasing the output VAT due. Hence, petitioner should prove that this amount is not "out-of-period" input taxes. Again, petitioner failed to do so.

Lastly, respondent made an adjustment of ₱150,653.90, alleging that this amount is an "Over-claimed - Input Tax for TY 2006". The Details of Discrepancy[37] (Annex A-1, page 2) merely made the following explanation:

> "Proper Reconciliation/Verification disclosed that the above were the: a.) Actual Gross Income/Receipts subject to VAT; **b.) Actual Disallowances/Adjustments deducted from Input Tax Claimed** and c.) the Total Deficiency Tax Taxable Year 2006 in accordance with NIRC Sections 105, 108, 110 and 114 as amended" (*Emphasis supplied*)

From the foregoing, it is not clear on what basis the amount of ₱150,653.90 was over-claimed; was there a

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[35] See petitioner's 1st quarter 2006 VAT return, Exhibit "I-2", Line 20A.

[36] Section 110(3)(B), NIRC of 1997, as amended, provides: "(B) *Excess Output or Input Tax.* — If at the end of any taxable quarter the output tax exceeds the input tax, the excess shall be paid by the VAT-registered person. **If the input tax exceeds the output tax, the excess shall be carried over to the succeeding quarter or quarters**: *Provided, however,* That any input tax attributable to zero-rated sales by a VAT-registered person may at his option be refunded or credited against other internal revenue taxes, subject to the provisions of Section 112." (*Emphasis supplied*)

[37] Exhibit "A".

discrepancy between the VAT schedule/summary list, purchase invoices/official receipts, third-party information, and VAT return? or was it unsupported by invoices/official receipts? Moreover, there was no breakdown or schedule provided showing how this amount was arrived at. The respondent should have at least attached a detailed notice of discrepancy or stated an explanation why the amount of ₱150,653.90 is collectible against petitioner [or why it was disallowed] and how the same was arrived at.[38]

For lack of factual basis, this item of assessment in the amount of ₱150,653.90 pertaining to alleged over-claimed input tax is hereby cancelled pursuant to Section 228 of the NIRC of 1997, as amended, which provides that the taxpayer shall be informed in writing of the law and the facts on which the assessment is made, otherwise, the assessment shall be void.

Petitioner also contends that it was erroneous for the Court in Division to hold petitioner liable for deficiency VAT due to the alleged filing of false VAT return as this judgment goes beyond the issue and the evidence on the records of the case and thus the same is not only irregular, but extra-judicial and invalid.

Suffice it to say that paragraph 2, Section 1 of Rule 14 of the Revised Rules of the Court of Tax Appeals expressly provides that in deciding the case, the Court may not limit itself to the issues stipulated by the parties but may also rule upon related issues necessary to achieve an orderly disposition of the case.

Thus, the issue on the filing of a false return, may be tackled by the Court considering that it is necessarily intertwined and intimately connected with the issue on prescription and necessary for the complete and orderly adjudication of the case.

Moreover, it should be noted that the Revised PAN[39] states that "[t]he 50% surcharge has been imposed pursuant to the provision of Section 248(B) in relation to Section 255 of National Internal Revenue Code (NIRC) of 1997 as amended by R.A. 8424 for substantial under-declaration of taxable sales,

[38] *CIR vs. United Salvage and Towage (Phils.), Inc.*, G.R. No. 197515, July 2, 2014.
[39] Exhibit "E".

receipts or income and failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return prescribed by NIRC of 1997 as amended or by filing false and fraudulent return" while the FLD[40] states that "[t]he 50% surcharge has been imposed pursuant to the provisions of Section 248(B) of National Internal Revenue Code (NIRC) of 1997 as amended by R.A. 8424 for filing false and fraudulent return."

Likewise, in respondent's Answer[41] and Memorandum[42] filed before the Court in Division, she alleged, quoting the Memorandum Report dated February 19, 2010[43], that the actual gross income/receipts subject to VAT for taxable year 2006 was ₱114,096,299.76 compared to the reported gross income subjected to VAT of ₱82,153,551.75, thus resulting in a 38.92%[44] underdeclaration of gross income subject to VAT[45] with an actual amount of ₱31,972,748.01[46].

From the foregoing, petitioner's argument that there was no evidence or any allegation at all that petitioner filed a false VAT return has no leg to stand on.

In sum, the deficiency assessments for Income Tax, Documentary Stamp Taxes, and Expanded Withholding Tax for taxable year 2006 in the total amount of **₱12,746,567.80**, inclusive of the 25% surcharge, and the 20% deficiency interest and 20% delinquency interest, petitioner was ordered to pay in the assailed *Decision* dated March 13, 2014 is upheld while the deficiency VAT assessment for taxable year 2006 petitioner was additionally ordered to pay in the *Amended Decision* dated September 1, 2014 assessment is reduced to **₱5,912,622.72**, inclusive of 50% surcharge, computed as follows:

Unremitted Output VAT			**3,833,129.85**
Add: Adjustments:			
Overclaim of Carried Over Input Tax for the 4th Quarter of TY 2005			
Per VAT Return	226,002.97		
Actual Balance of Input Tax per GL as of December 31, 2005	132,743.45	93,259.52	
TY 2005 Creditable VAT claimed on TY 2006		15,359.11	108,618.63

[40] Exhibit "A"
[41] Division docket, pp. 89-101.
[42] Division docket, pp. 1303-1317.
[43] Exhibit "6".
[44] Should be 38.88%.
[45] Division docket, p. 94.
[46] Should be ₱31,942,748.01.

Basic Deficiency VAT			**3,941,748.48**
Add: 50% Surcharge			1,970,874.24
Total			**5,912,622.72**

WHEREFORE, premises considered, the instant Petition for Review is **PARTIALLY GRANTED**. The *Amended Decision* dated September 1, 2014 of the Third Division is **MODIFIED.** Accordingly, the pertinent dispositive portion of the said Amended Decision is hereby modified to read as follows:

> "In addition to the amount to be paid in accordance with the Decision dated March 13, 2014, petitioner is hereby **ORDERED** to **PAY** the basic deficiency Value-added Tax for taxable year 2006 in the amount of **₱3,941,748.48** and the fifty percent (50%) Surcharge in the amount of **₱1,970,874.24** imposed under Section 248 (B) of the 1997 National Internal Revenue Code, as amended; or in the total amount of **₱5,912,622.72**:

	Basic Tax	**50% Surcharge**	**TOTAL**
Deficiency Value-added Tax	₱3,941,748.48	₱1,970,874.24	₱5,912,622.72

> In addition, petitioner is hereby **ORDERED** to **PAY**, as follows:
>
> a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency Value-added Tax of ₱3,941,748.48, computed from April 25, 2007 until full payment thereof pursuant to Section 249 (B) of the 1997 National Internal Revenue Code, as amended; and
>
> b) Delinquency interest at the rate of twenty percent (20%) per annum on the total amount of ₱5,912,622.72 and on the twenty percent (20%) deficiency interest which have accrued as aforestated in (a), computed from April 25, 2010, until full payment thereof pursuant to Section 249 (C) of the 1997 National Internal Revenue Code, as amended."

SO ORDERED.

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

WE CONCUR:

(Inhibited)
ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

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

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* 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
****

AFP GENERAL INSURANCE CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB No. 1223
(CTA Case No. 8191)

Present:

Del Rosario, PJ,
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas, *and*
Ringpis-Liban, JJ.

Promulgated:

JAN 04 2016 11:05 a.m.

x - x

CONCURRING AND DISSENTING OPINION

UY, J.:

With all due respect with the learned ponente and my other colleagues, while I concur with the imposition of the deficiency income tax, deficiency documentary stamp tax (DST), including the increments thereon for late remittance, and deficiency expanded withholding tax (EWT), including surcharges and interests, in the aggregate amount of ₱12,746,567.80, pursuant to the Decision dated March 13, 2014 in CTA Case No. 8191, and the additional imposition of deficiency value-added tax (VAT), plus the 50% surcharge thereon, in the total amount of ₱5,912,622.72, in accordance with the Amended Decision in the same case, as modified in the majority opinion in this case, I dissent on the imposition of the deficiency interests on the deficiency DST, deficiency EWT, and deficiency VAT, under Section 249(B) of the NIRC of 1997, and the inclusion of said deficiency interests in the computation of delinquency interests under Section 249(C) of the same Code..

Section 249 of the NIRC of 1997 reads:

> "SEC. 249. *Interest.* –
>
> (A) *In General.* – There shall be assessed and collected on any unpaid amount of tax, interest at the rate of twenty percent (20%) *per annum,* or such higher rate as may be prescribed by the rules and regulations, from the date prescribed for its payment until the amount is fully paid.
>
> (B) *Deficiency Interest.* – Any **deficiency** in the tax due, **as the term is defined in this Code**, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof.
>
> (C) *Delinquency Interest.* – In case of failure to pay:
>
> xxx xxx xxx
>
> (3) A deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner, there shall be assessed and collected on the unpaid amount, interest at the rate prescribed in Subsection (A) hereof until the amount is fully paid, which interest shall form part of the tax." *(Emphases supplied)*

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

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

xxx xxx xxx

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

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

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

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

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

(a) The amount by which the tax imposed by this Chapter exceeds the amount shown as the tax by the executor, administrator or any of the heirs upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or

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

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, credited, returned or otherwise repaid in respect of such tax." *(Emphasis supplied)*

"SEC. 104. *Definitions.* — xxx

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

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

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

Correspondingly, I vote for the DELETION of the following:

(1) in the Decision dated March 13, 2014, under paragraph (a) thereof, the imposition of deficiency interest at the rate of 20% *per annum* on the basic deficiency DST on the increase capital stock, and EWT; and under paragraph (d), the inclusion in the computation of delinquency interest at the rate of 20% *per annum* of the said 20% deficiency interests, but only insofar as the imposition thereof on the basic deficiency DST on the increase capital stock, and EWT, are concerned;

(2) in the Amended Decision, as modified by the Court *En Banc*, under paragraph (a) thereof, the imposition of deficiency interest at the rate of 20% *per annum* on the basic deficiency VAT; and under paragraph (b), the statement: *"and on the twenty percent (20%) deficiency interest which have accrued as aforestated in (a)"*.

ERLINDA P. UY
Associate Justice