REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

FSM CINEMAS, INC. Petitioner,	CTA EB NO. 1441 (CTA Case No. 8551)
- versus -	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	

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COMMISSIONER OF INTERNAL REVENUE, Petitioner,	CTA EB NO. 1445 (CTA Case No. 8551)
	Present:
- versus -	DEL ROSARIO, *PJ* CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, *JJ.*
	Promulgated:
FSM CINEMAS, INC., Respondent.	NOV 16 2017 2:10 p.m.

x- x

DECISION

Fabon-Victorino, J.:

In these consolidated *Petitions for Review*, FSM Cinemas, Inc. (FSM) and the Commissioner of Internal

Revenue (CIR) assail the Decision[1] dated October 2, 2015 and the Resolution[2] dated March 2, 2016, promulgated by the Court in Division in CTA Case No. 8551 entitled *FSM Cinemas, Inc. v. Commissioner of Internal Revenue*. The dispositive portion of the assailed Decision and Resolution read as follows:

<u>*Assailed Decision of October 2, 2015*</u>:

WHEREFORE, premises considered, the Petition for Review is PARTIALLY GRANTED. The assessments issued by respondent against petitioner for taxable year 2008 covering deficiency income tax, Value-Added Tax, Expanded Withholding Tax and deficiency Withholding Tax on Compensation are hereby AFFIRMED but with MODIFICATIONS. Accordingly, petitioner FSM Cinemas, Inc., is ordered to pay the amount of ₱6,620,713.81, inclusive of the 25% surcharge imposed under Section 248(3) of the 1997 NIRC, as amended, computed as follows:

Tax Type	Basic Tax Due	25% Surcharge	Total
Deficiency Income Tax	₱ 4,622,212.41	₱ 1,155,553.10	₱ 5,777,765.51
Deficiency VAT	56,913.32	14,228.33	71,141.65
Deficiency EWT	592,630.87	148,157.72	740,788.59
Deficiency WTC	24,814.45	6,203.61	31,018.06
Total	**₱ 5,296,571.05**	**₱ 1,324,142.76**	**₱ 6,620,713.81**

In addition, petitioner is hereby ORDERED to PAY:

a) Deficiency interest at the rate of 20% per annum on the basic deficiency Income Tax, VAT, EWT and WTC computed from the dates indicated below until full payment thereof pursuant to Section 249 (B) of the NIRC of 1997, as amended:

Tax Type	Basic Tax	Deficiency interest computed from
Deficiency Income Tax	₱ 4,622,212.41	15-Apr-09
Deficiency VAT	56,913.32	25-Jan-09
Deficiency EWT	592,630.87	11-Jan-09
Deficiency WTC	24,814.45	11-Jan-09

[1] *En Banc* Docket, CTA EB No. 1441, pp. 31-67; CTA EB No. 1445, pp. 13-49.
[2] *En Banc* Docket, CTA EB No. 1441, pp. 21-29; CTA EB No. 1445, pp. 51-60.

> b) Delinquency interest at the rate of 20% per annum on the total amount of P6,620,713.81 and on the 20% deficiency interest which have accrued as aforestated in (a) computed from September 28, 2012 until full payment thereof pursuant to Section 249 (C) of the NIRC of 1997, as amended.
>
> SO ORDERED.

<u>Assailed Resolution of March 2, 2016:</u>

> WHEREFORE, premises considered, petitioner's Motion for Partial Reconsideration and respondent's Motion for Reconsideration are DENIED for lack of merit
>
> SO ORDERED.

In its *Petition for Review*[3] filed on April 6, 2016 and docketed as CTA EB No. 1441, FSM prays for the modification of the assailed Decision and Resolution dated October 2, 2015 and March 2, 2016, respectively, which partially granted its Petition by reducing its liability for deficiency Income Tax (IT), value-added tax (VAT), expanded withholding tax (EWT) and withholding tax on compensation (WTC) for taxable year (TY) 2008 in the aggregate amount of ₱6,620,713.81, inclusive of the 25% surcharge imposed under Section 248 (A)(3) of the National Internal Revenue Code (NIRC) of 1997, as amended.

On the other hand, in the *Petition for Review*[4] filed through registered mail on March 15, 2016 and docketed as CTA EB No. 1445, the CIR seeks the partial modification of the assailed Decision and Resolution dated October 2, 2015 and March 2, 2016, respectively, and prays that the Court orders FSM to pay the assessed deficiency IT, VAT, EWT and WTC for TY 2008, as stated in the Final Decision on Disputed Assessment (FDDA) dated August 29, 2012.

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[3] *En Banc* docket, CTA EB No. 1441, pp. 5-17.
[4] *En Banc* docket, CTA EB No. 1445, pp. 6-31.

THE FACTS AND THE PROCEEDINGS

FSM is a domestic corporation with principal office address at Festival Supermall, Filinvest Corporate City, Alabang, Muntinlupa City.

On the other hand, the CIR is the head of the Bureau of Internal Revenue (BIR), with the power to assess and collect all national internal revenue taxes, fees, and charges, and to enforce all forfeitures, penalties, and fines connected therewith.

On April 15, 2009, FSM filed its Annual Income Tax Return (AITR) for TY 2008 with attachments.

On July 7, 2009, the CIR issued the Letter of Authority (LOA) 2008 00026891, authorizing Revenue Officer (RO) Josefina Amador and Group Supervisor (GS) Nora Y. Tadiwan, to examine FSM's books of accounts and other accounting records for all internal revenue taxes, for the period January 1, 2008 to December 31, 2008, which was received by FSM on July 13, 2009.

On May 3, 2011, the CIR issued a Preliminary Assessment Notice (PAN) with Details of Discrepancies, which FSM received on May 11, 2011.

On May 24, 2011, FSM requested with the CIR an extension of fifteen (15) days to file a written reply and supporting documents.

On June 27, 2011, FSM received a Formal Assessment Notice (FAN) with Details of Discrepancies and Assessment Notices dated June 23, 2011, from the BIR assessing it of the following deficiency taxes:

Assessment No.	Tax Type	Amount
IT-LA26891-08-11-0518	Income Tax	₱10,511,941.84
VT-LA26891-08-11-0518	Value-Added Tax	85,416.76
WE-LA26891-08-11-0518	Withholding Tax-Expanded	892,680.69
WC-LA26891-08-11-0518	Withholding Tax-Compensation	93,558.44

On July 27, 2011, FSM filed with the CIR, through the Assessment Division-Revenue Region No. 8 (Makati City), its written protest against the aforementioned assessments.

On August 8, 2011, the CIR informed FSM, that the entire docket of its tax case would be forwarded to RDO No. 53B — Muntinlupa City.

On September 1, 2012, FSM received the FDDA with Details of Discrepancies dated August 29, 2012, finding FSM liable to pay deficiency IT, VAT, EWT and WTC for TY 2008.

On October 1, 2012, FSM filed a Petition for Review before the Court in Division docketed as CTA Case No. 8551.

On December 5, 2012, the CIR filed his Answer to the Petition for Review basically arguing that FSM's claim for the cancellation of the assessment issued against it has no basis in fact and in law.

With respect to the questioned assessment of deficiency IT, the CIR claimed that FSM failed to substantiate its protest, insisting that the assessment must be deemed valid.

Anent the questioned assessment of deficiency VAT, the CIR stressed that per verification, FSM's sales in the amount of ₱474,308.48 were not subjected to VAT as required under Section 105, in relation to Sections 106 and 108 of the NIRC of 1997, as amended. Further, FSM failed to submit the breakdown/schedule of its sale items as proof. Thus, it cannot now assail the validity of said assessment.

With respect to the questioned assessment of deficiency EWT, the CIR claimed that verification disclosed that FSM failed to pay the corresponding EWT on its income payments pursuant to Section 2.57.2 of Revenue Regulations (RR) No. 2-98.

Further, FSM did not pay the appropriate WTC due on a portion of its payment of salaries and wages as mandated under Section 79(A) of the NIRC of 1997, as amended, and as implemented by Section 2.78 of RR No. 2-98. Investigation of FSM's alphalist of compensation subjected to withholding tax and tax dues paid per BIR's Integrated Tax System likewise disclosed that FSM failed to remit in full the amount of ₱20,115.57.

To further advance his position, the CIR argued that the invocation of prescription must be clearly shown since prescription is an affirmative defense, for which FSM failed.[5]

In addition, the CIR argued that when assessments are assailed, the burden of proof is upon the taxpayer to clearly show that the assessment is erroneous, in order to relieve himself from it. Considering that FSM's claims were found not in accordance with the requirements of the law and following the prevailing principles, the disallowances he made in the assailed assessments must be deemed proper and valid especially considering that FSM did not submit any evidence to disprove his findings.

During the trial, both parties presented their respective evidence.

On October 2, 2015, the Court in Division issued the assailed Decision partially granting FSM's *Petition for Review.* The assessments issued by the CIR against FSM for TY 2008 covering deficiency IT, VAT, EWT and WTC were affirmed with modifications. Accordingly, FSM was ordered to pay the amount of ₱6,620,713.81, inclusive of the 25% surcharge plus deficiency and delinquency interests.

Both not satisfied, the CIR filed through registered mail, a *Motion for Reconsideration*[6] on October 15, 2015; while FSM filed its *Motion for Partial Reconsideration* on October 19, 2015[7].

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[5] Taligaman Lumber Co. v. Collector, G.R. No. L-15716, March 31, 1962.
[6] Respondent's Motion for Partial Reconsideration, *en banc* docket, EB No. 1445, pp.61-66.
[7] CTA Case No. 8551, vol. II docket, pp. 547-561.

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On March 2, 2016, the Court in Division issued the equally assailed Resolution denying the plea for reconsideration of both the CIR and FSM for lack of merit.

Hence, the two (2) *Petitions for Review* separately filed by FSM and the CIR docketed as CTA EB No. 1441 and CTA EB No. 1445, respectively.

On April 7, 2016, the Court *En Banc* ordered the consolidation[8] of the 2 *Petitions for Review* pursuant to Section 1, Rule 31 of the Revised Rules of Court. Subsequently, the 2 consolidated petitions were given due course.[9]

On September 7, 2016, FSM, in compliance with the Court's directive filed its *Comment*[10]. On the other hand, the CIR failed to file any comment/opposition to FSM's *Petition for Review*[11], despite directive.

In a Resolution[12] dated November 15, 2016, the instant consolidated *Petitions for Review* were submitted for decision.

<u>THE ISSUES</u>

<u>CTA EB No. 1441 (FSM's Petition for Review)</u>:

FSM argues that the Court in Division erred in denying its *Motion for Partial Reconsideration* due to the following grounds, to wit:

a. The imposition of the 25% surcharge requires that demand for payment be made by respondent. The Final Decision on Disputed Assessment subject of the petition for review did not contain any imposition of the 25% surcharge

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[8] *En Banc* Docket, CTA EB No. 1441, pp. 78-78-A.
[9] *En Banc* Docket, CTA EB No. 1441, pp. 89-91.
[10] *En Banc* Docket, CTA EB No. 1441, pp. 92-100.
[11] Per Records Verification Report of the Judicial Record Division dated September 27, 2015, *en banc* docket, CTA EB No. 1441, p. 101.
[12] *En Banc* Docket, CTA EB No. 1441, pp. 103-104.

provided under Section 248 of the Tax Code of 1997 as amended. Where the respondent did not impose the penalty in its appealed Final Decision on Disputed Assessment, the same could not be an issue which could be taken cognizant by the Court *a quo*.

b. Petitioner cannot be "deemed a top ten thousand tax payer". A top ten thousand tax payer is established through the required notification from the Commissioner.

CTA EB No. 1445 (CIR's Petition for Review):

The CIR advances the following arguments in support of his Petition:

1. Respondent failed to present evidence which are relevant and will warrant the cancellation of the assessment.

2. Petitioner was able to prove that petitioner's *(sic)* expanded withholding tax returns and withholding tax returns were false returns, hence, the 10-year prescriptive period under Section 222(a) of the 1997 Tax Code shall apply in the instant case.

FSM's arguments

FSM argues that the imposition of the 25% surcharge requires demand for payment by the CIR. However, the FDDA issued by the CIR, did not contain imposition of a 25% surcharge as provided under Section 248(A)(3) of the NIRC of 1997, as amended. Likewise, the imposition of said surcharge was never raised as an issue by the parties before the Court in Division. In other words, the Court in Division cannot rule on this liability considering that imposition of 25% surcharge under Section 248(A)(3) of the NIRC of 1997, as amended, is within the power of the CIR and not the Court. Since the CIR did not impose such surcharge, the Court in Division cannot as well impose it.

FSM further contends that a taxpayer is not deemed a top ten thousand (10,000) taxpayer by its voluntary or erroneous withholding of the 1% tax from its purchases. To be considered one of the top 10,000 taxpayers, the criteria provided under Revenue Regulations (RR) No. 17-03[13] must first be satisfied.

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[13] Top ten thousand (10,000) private corporations shall include a corporate taxpayer who has been determined and notified by the Bureau of Internal Revenue (BIR) as having satisfied any of the following criteria:

a) Classified and duly notified by the Commissioner as a large taxpayer under Revenue Regulations No. 1-98, as amended (automatic inclusion);

b) Any taxpayer with net VAT paid or payable for the preceding year of at least P100,000.00;

c) Any taxpayer with annual income tax paid or payable for the preceding year of at least P200,000.00;

d) Any taxpayer with percentage taxes for the preceding year of at least P100,000.00;

e) Any taxpayer whose gross sales for the preceding year is over P10,000,000.00; or

f) Any taxpayer whose gross purchases for the preceding year is over 5,000,000.00.

The term "goods" pertains to tangible personal property. It does not include intangible personal property as well as real property.

The term "local/resident supplier of goods" pertains to a supplier from whom any of the top ten thousand (10,000) private corporations, as determined by the Commissioner, regularly makes its purchases of goods. As a general rule, this term does not include a casual purchase of goods, that is, purchases made from non-regular suppliers and oftentimes involving single purchases. However, a single purchase which involves ten thousand pesos (P10,000.00) or more shall be subject to a withholding tax. The term "regular suppliers" refers to suppliers who are engaged in business or exercise of profession/calling with whom the taxpayer-buyer has transacted at least six (6) transactions, regardless of amount per transaction, either in the previous year or current year. The same rules apply to local/resident supplier of services other than those covered by separate rates of withholding tax.

A corporation shall not be considered a withholding agent for purposes of this Section, unless such corporation has been determined and duly notified, in writing, by the Commissioner that it has been selected as one of the top ten thousand (10,000) private corporations.

Any corporation which has been duly classified and notified as large taxpayer by the Commissioner pursuant to RR 1-98, as amended, shall be automatically considered one of the top ten thousand (10,000) private corporations, provided, however, that its authority as a withholding agent shall be effective only upon receipt of written notice from the Commissioner that it has been classified as a large taxpayer, as well as one of the top ten thousand (10,000) private corporations, for purposes of these regulations.

Any corporation shall remain a withholding agent for purposes of these regulations, unless the Commissioner notifies it in writing that it shall cease to be one. The following, however, are some of the reasons that a taxpayer shall

CIR's arguments:

In support of his first ground for appeal, the CIR argues that FSM failed to submit the documents it cited in its Letter-Protest to the FAN, that would justify its grounds for the protest. Thus, in the FDDA, he specifically stated that due to FSM's failure to submit documents that are relevant to the cancellation of the disputed assessment, within 60 days from the filing of its protest as provided by Section 228 of the NIRC of 1997, as amended, the questioned assessment became final. Accordingly, FSM was not able to overturn the presumption of the correctness of his assessment. Consequently, FSM is liable to pay the assessed deficiency IT, VAT, EWT and WTC for TY 2008.

As for his second ground for appeal, the CIR contends that it is incumbent upon FSM to establish its defense of prescription by showing when the prescriptive period started to run and when it ended. A scrutiny of the monthly withholding tax returns filed by FSM however, revealed that the declaration made therein were substantially deficient in amount and that FSM did not disclose the truth regarding the correct amount of income subject to tax compared to the amount remitted to the BIR. Such factual findings were clearly established through the testimony of his witness, GS Nora Tadiwan and by her Memorandum Report. Likewise, the said findings were clearly indicated in the Details of Discrepancies attached to the FAN dated June 23, 2011 and the FDDA dated August 29, 2012.

Considering that FSM's returns are false, the applicable period is ten (10) years from the discovery of falsity as provided by Section 222(a) of the NIRC of 1997, as amended. Hence, the FAN dated June 23, 2011 against FSM for deficiency EWT and WTC for TY 2008 was validly issued within the 10-year prescriptive period.

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automatically cease to be a withholding agent, and therefore no prior written notice, for purposes of these Regulations, is required, to wit:

a) closure/cessation of business/dissolution (for taxpayer with notice of dissolution given to the BIR),

b) merger/consolidation (for dissolved or absorbed corporation);

c) any other form of business combination wherein by operation of law a corporate taxpayer loses its juridical personality.

In its *Comment*[14] filed thereto on September 7, 2016, FSM counters that it submitted documentary evidence and invoked legal arguments sufficient to warrant the cancellation of the assessment, as follows:

1. Contrary to the CIR's allegation on its undeclared income, FSM explains that the seeming discrepancy in its 2008 ITR/Audited Financial Statement (AFS) against its 2008 Alphalist was due to the different account groupings used for financial reporting (AFS) and that used for tax purposes (Alphalist);

2. On its disallowed expenses due to non-withholding, FSM argues that not all company payments in the course of business are subject to EWT. Only income payments enumerated in RR No. 2-98 should be subjected to EWT. However, the CIR failed to establish that the expenses he disallowed were subject to withholding.

3. With respect to the salaries allegedly not subjected to withholding tax, FSM states that it submitted evidence that it had subjected said expense to the appropriate withholding tax and that the difference represents items which do not form part of taxable compensation.

4. With respect to the penalties disallowed by the BIR, FSM posits that it submitted official receipts to establish that its expenses were properly supported. Such expenses according to FSM, represent payment for taxes and licenses which were directly connected with its business.

5. Anent the disallowance of the net operating loss carry-over (NOLCO) as a deduction from its gross income and the disallowance of the minimum corporate income tax (MCIT) as a credit against its income tax payable, FSM claims that NOLCO should only be disallowed on the succeeding years

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[14] *En Banc* Docket, CTA EB No. 1441, pp. 92-100.

when it is claimed as a deduction from gross income.

6. As to the deficiency VAT assessed allegedly due to sales not subjected to VAT, FSM states that it presented sufficient evidence to establish its non-liability and points out that said assessment is improper since said transactions involved an exempt sale and sales not subject to VAT.

With respect to CIR's allegation that it failed to substantiate its claim in the administrative level, FSM counter-argues that it is not precluded to submit additional evidence before the Court in Division since cases filed before the Court are litigated *de novo*[15]. Thus, the ruling of the Court reducing the assessment based on evidence presented during trial is proper.

Lastly, anent the CIR's argument on prescription, FSM contends that falsity of return was never alleged or established in the FAN nor was it alleged by the CIR in his Answer. Further, the jurisprudence relied upon by the CIR is not applicable to the instant case.

RULING OF THE COURT EN BANC

Both *Petitions for Review* lack merit.

CTA EB No. 1441 (FSM's Petition for Review):

A judicious review of the arguments raised by FSM in its *Petition for Review* shows that they were the very same flawed arguments it raised in its *Motion for Partial Reconsideration* filed before the Court in Division, which have been thoroughly discussed and passed upon by the Court in Division in the assailed Resolution dated March 2, 2016. Be that as it may, the Court *En Banc* sees no compelling reason to deviate from the findings of the Court in Division that the imposition of the 25% surcharge as

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[15] Commissioner of Internal Revenue v. Philippine National Bank, 746 SCRA 609, G.R. No. 180290, September 29, 2014.

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provided by Section 248(A)(3) of the NIRC of 1997, as amended[16], is based on FSM's failure to pay the deficiency tax assessments within the time given by the BIR for its payment, as stated in the FDDA[17].

Contrary to FSM's argument that there was no demand for payment which is required for the imposition of the 25% surcharge, the FDDA reveals that the CIR indicated in the subject FDDA that payments should be made on or before September 28, 2012[18], and that said FDDA is his final decision, which is appealable to the Court.

Further, the law is very clear. The imposition of surcharge is mandatory. This is justified because the intention of the law is precisely to discourage delay in the payment of taxes due to the State.[19] The delay in the payment of the deficiency tax within the time prescribed for its payment in the notice of assessment justifies the imposition of a 25% surcharge, pursuant to Section 248 (A)(3) of the Tax Code.[20]

Further, basic is the principle that "surcharge" is an overcharge or exaction imposed by law as an addition to the main tax required to be paid. It is not really a penalty as used in criminal law but a civil administrative sanction provided primarily as a safeguard for the protection of the State revenue and to reimburse the government for the expenses in investigating and the losses resulting from the taxpayer's fraud. In other words, the imposition of a surcharge is not penal but compensatory in nature — they are compensation to the State for the delay in payment, or

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[16] SEC. 248. Civil Penalties. - (A)There shall be imposed, in addition to the tax required to be paid, a penalty equivalent to twenty-five percent (25%) of the amount due, in the following cases:

xxx xxx xxx

(3) Failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment; or

[17] Exhibit "P-9"

[18] Exhibit "P-9-a".

[19] Tambunting Pawnshop, Inc. v. Commissioner of Internal Revenue, CTA EB No. 245, May 24, 2007.

[20] Dr. Felisa L. Vda. De San Agustin v. Commissioner of Internal Revenue, G.R. No. 138485, September 10, 2001 (364 SCRA 802, 810).

for the concomitant use of the funds by the taxpayer beyond the date he is supposed to have paid them to the State.[21]

Anent FSM's contention that it cannot be "deemed a top ten thousand taxpayer" without the required notification from the CIR, however, per record it is obvious that FSM's Monthly Remittance Return of EWT and the Monthly Alphalist of Payees submitted to the BIR include remittances of EWT with Alphanumeric Tax Codes (ATC) of WC158 and WC160, which represent income payments of a Top 10,000 Corporation for its purchases of goods and services, respectively. Thus, when FSM remitted the EWT under the ATCs of WC158 and WC160, it deemed itself as a Top 10,000 Corporation. Accordingly, the income payments of FSM on its purchases of goods and services as well as the Common Usage Service Area (CUSA) and airconditioning charges, are subject to withholding tax in accordance with Section 2.57.2(M) of RR No. 2-98, as amended by RR No. 17-2003.

CTA EB No. 1445 (CIR's Petition for Review):

Glaringly, except for its second argument in its Petition for Review that the 10-year prescriptive period under Section 222(a) of the NIRC of 1997, as amended, is applicable to the instant case since he was able to prove that FSM's expanded withholding tax returns and withholding tax returns were false returns, the CIR's first ground for appeal is an exact replica of the arguments he raised in his *Motion for Reconsideration*[22], as well as reiterations of his defense in his Answer he filed with the Court in Division. The said arguments have already been considered, weighed and found wanting in the assailed Decision of October 2, 2015 and Resolution of March 2, 2016. Nevertheless, the Court *En Banc* will address the issues raised by the CIR in the present Petition.

For its first ground of appeal, the CIR asserts that FSM failed to present evidence which are relevant and will warrant the cancellation of the assessment. The CIR argues

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[21] Commissioner of Internal Revenue v. Royal Interocean Lines and The Court of Tax Appeals, No. L-26806, July 30, 1970 (34 SCRA 9).
[22] Annex "C" to the Petition for Review, *en banc* docket, CTA EB No. 1445, pp. 61-66.

that FSM failed to submit the documents it enumerated in its Letter-Protest to the FAN that would justify its grounds for the protest. Thus, FSM was not able to overturn the presumption of the correctness of his assessment and its failure to submit its supporting documents within 60 days from the filing of its protest made the questioned assessment final.

The Court *En Banc* does not agree.

A revisit of the record shows that the Court in Division rightfully modified the amount of deficiency tax liabilities of FSM by cancelling the assessment of some items on deficiency income tax, such as the alleged FSM's undeclared income, the disallowed NOLCO, MCIT and excess MCIT carry-over, either for lack of factual or legal basis.

The Court *En Banc* is one with the Court in Division in its findings that the imputation of alleged undeclared income is based on a mere presumption since there were unaccounted expenses and unaccounted income which correspond to such undeclared income. In such case, the undeclared income would be effectively offset by recording the equivalent payments as expenses. Consequently, no taxable income will result from the said transactions.

With respect to FSM's disallowed NOLCO which the CIR added back to the former's gross taxable income for TY 2009, the Court *En Banc* finds its cancellation by the Court in Division correct. As ruled in the assailed Decision, the said NOLCO should be carried over as such for the next consecutive TYs 2009, 2010 and 2011 since FSM did not offset the NOLCO it incurred for TY 2008 as deduction from its gross income for the same year.

Further, the disallowance of FSM's MCIT and excess MCIT carry-over was improper as any tax benefit derived by FSM from its carry-over redounds to the succeeding year. Since the tax benefit will be in the succeeding year, at most, FSM may only be assessed in the said succeeding year.

In any event, FSM should pay the other deficiency assessments such as, the basic deficiency IT in the amount of ₱4,622,212.41, basic deficiency VAT in the amount of ₱56,913.32, basic deficiency EWT in the amount of ₱592,630.87 and deficiency basic WTC in the amount of ₱24,814.45, all of which were based and computed relying on the evidence presented during the trial of the case.

Therefore, the Court *En Banc* cannot subscribe to the CIR's insistence that FSM was not able to overturn the presumption of the correctness of his assessment.

Time and again, it has been ruled that the *prima facie* correctness of a tax assessment does not apply upon proof that an assessment is utterly without foundation, meaning it is arbitrary and capricious.[23] In order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption. Hence, assessment should not be based on mere presumptions no matter how reasonable or logical said presumptions may be.[24]

The Court must likewise reject the CIR's allegation that this case falls under the exception of the three (3)-year prescriptive period for assessment, and that the ten (10)-year prescriptive period should apply on the ground of FSM's filing of false expanded withholding tax returns and withholding tax returns.

Under Section 222(a) of the NIRC of 1997, as amended, in case a taxpayer filed a false return, the CIR may assess a taxpayer for deficiency tax within ten (10) years after the discovery of the falsity.

A re-examination of the PAN[25], FAN[26], and FDDA[27] reveals that the issue of falsity was neither mentioned

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[23] Commissioner of Internal Revenue v. Hantex Trading Co., *Inc.*, G.R. No. 136975, March 31, 2005.
[24] Commissioner of Internal Revenue v. Island Garment Manufacturing Corporation and the Court of Tax Appeals, G.R. No. L-46644, September 11, 1987, citing Commissioner of Internal Revenue v. Alberto D. Benipayo, G.R. No. L-13656, January 31, 1962.
[25] Exhibits "R-8" to "R-9".

during the examination of FSM's record nor considered by the CIR in his computation of civil penalties. The contents of said documents contradict CIR's invocation of falsity. In fact, nothing in the PAN, FAN and FDDA that suggests falsity on the part of FSM.

At most, the issue of falsity is a mere afterthought or a figment of imagination to justify the application of the 10-year prescriptive period to assess FSM. Moreover, CIR failed to substantiate the belated claim of falsity. The basic rule is that bare allegations which are not supported by any evidence, documentary or otherwise, sufficient to support a claim, fall short to satisfy the degree of proof needed.[28] Thus, the Court will not disturb its previous findings absent any compelling evidence to the contrary.

Finding the ruling of the Court in Division, within the ambit of what law and jurisprudence provide, the same must be sustained and not disturbed.

WHEREFORE, the *Petitions for Review* filed on April 6, 2016 by FSM Cinemas, Inc, and by the Commissioner of Internal Revenue on March 15, 2016, are hereby **DENIED**, for lack of merit.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

(See Concurring and Dissenting Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

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[26] Exhibits "P-6" to "P-6-a" and "P-7" to "P-7-b"; Exhibits "R-13" to "R-14".
[27] Exhibits "P-9" to "P-9-a" and "P-10"; Exhibits "R-22" to "R-23".
[28] LNS International Manpower Services v. Armando C. Padua, Jr., G.R. No. 179792, March 5, 2010.

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

LOVELL R. BAUTISTA
Associate Justice

ON LEAVE
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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

Ma. Belen
(With due respect, I join the CDO of J.CTM)
MA. BELEN RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
(With due respect, please see my CDO)
CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII 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

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FSM CINEMAS, INC., *Petitioner,*	**CTA EB NO. 1441** (CTA Case No. 8551)
-versus-	
COMMISSIONER OF INTERNAL REVENUE, *Respondent,*	

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COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA EB NO. 1445** (CTA Case No. 8551)
	Present:
-versus-	**DEL ROSARIO,** ***P.J.,*** **CASTANEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** and **MANAHAN,** *JJ.*
FSM CINEMAS, INC., *Respondent.*	Promulgated: NOV 16 2017 2:10 p.m.

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CONCURRING AND DISSENTING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* in affirming the assailed Decision and Resolution of the Court in Division but only insofar as FSM Cinemas, Inc. (FSM) is directed to pay the following: (i) deficiency income tax, value-added tax (VAT), expanded withholding tax (EWT), and withholding tax on compensation (WTC) in the total amount of ₱5,296,571.05; (ii) 20% deficiency interest on the basic deficiency income tax; and, (iii) 20% delinquency interest based only on the basic deficiency taxes of ₱5,296,571.05, and on the 20% deficiency interest on the basic deficiency income tax.

With due respect to the *ponencia*, I wish to express a different view regarding the **imposition of the 25% surcharge and the 20% deficiency interest on the assessed deficiency VAT, EWT, and WTC.**

25% Surcharge

I submit that the failure of the Bureau of Internal Revenue (BIR) to assess FSM of the twenty-five percent (25%) surcharge in the PAN and FAN prevents the Court from directing FSM to pay the same.

The 25% surcharge may be imposed only on specific instances mentioned under Section 248(A)(3) of the National Internal Revenue Code (NIRC) of 1997, as amended, and as implemented by Section 4 of Revenue Regulations (RR) No. 12-99, *viz.*:

> "Section 248. *Civil Penalties.* –
>
> (A) There shall be imposed, in addition to the tax required to be paid, a penalty equivalent to twenty-five percent (25%) of the amount due, in the **following cases**:
>
> (1) Failure to file any return and pay the tax due thereon as required under the provisions of this Code or rules and regulations on the date prescribed; **or**
>
> (2) Unless otherwise authorized by the Commissioner, filing a return with an internal revenue officer other than those with whom the return is required to be filed; **or**
>
> (3) Failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment; **or**
>
> (4) Failure to pay the full or part of the amount of tax shown on any return required to be filed under the provisions of this Code or rules and regulations, or the full amount of tax due for which no return is required to be filed, on or before the date prescribed for its payment.
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> xxx xxx xxx." (Boldfacing supplied)
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> RR No. 12-99:
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> "SECTION 4. Civil Penalties. —

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> 4.1 Twenty-Five Percent (25%) Surcharge. — There shall be imposed, in addition to the basic tax required to be paid, a penalty equivalent to twenty-five percent (25%) thereof, in **any the following cases**:
>
> 4.1.1 Failure to file any return and pay the tax due thereon as required under the provisions of this Code or rules and regulations on the date prescribed; **or**
>
> 4.1.2 Unless otherwise authorized by the Commissioner, filing a return with an internal revenue officer other than those with whom the return is required to be filed; **or**
>
> 4.1.3 Failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment; **or**
>
> 4.1.4 Failure to pay the full or part of the amount of tax shown on any return required to be filed under the provisions of this Code or rules and regulations, or the full amount of tax due for which no return is required to be filed, on or before the date prescribed for its payment." (Boldfacing supplied)

It is settled that the imposition of the 25% surcharge is mandatory in the aforementioned instances. The Supreme Court has ruled, however, that where the assessment appears to be highly controversial (as when the CIR himself was not, at the outset, certain as to the taxpayer's income tax liability), the taxpayer should be held liable only for the basic tax and not for the surcharge and interest.[1]

While the imposition of 25% surcharge is mandatory in cases specifically enumerated under Section 248(A)(3) of the NIRC of 1997, as amended, and as implemented by Section 4 of RR No. 12-99, I am of the humble view that its imposition should be subject to assessment procedures as laid down in Section 228 of the NIRC of 1997, as amended, and RR No. 12-99. The requirement for the BIR to state in the PAN and FAN as well as in the FDDA the factual and legal basis upon which the imposition of the 25% surcharge is based cannot be over emphasized. This is so because FSM must be duly informed of which of the four (4) instances enumerated in Section 248 (A)(3) of the NIRC of 1997, as amended, and Section 4 of RR No. 12-99 is applicable, thereby giving it the opportunity to make a reasonable protest on such imposition.

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[1] Cagayan Electric Power & Light Co., Inc. vs. Commissioner of Internal Revenue, G.R. No. L-60126, September 25, 1985, citing Advertising Associates, Inc. vs. Commissioner of Internal Revenue and Court of Tax Appeals, G. R. No. 59758, December 26, 1984,133 SCRA 765; Imus Electric Co., Inc. vs. Commissioner of Internal Revenue, 125 Phil. 1024; C.M. Hoskins & Co., Inc. vs. Commissioner of Internal Revenue, L-28383, June 22, 1976, 71 SCRA 511.

The essence of due process in tax assessment was very well articulated in ***Commissioner of Internal Revenue vs. Fitness by Design***,[2] *viz.*:

> "The word "shall" in Section 228 of the National Internal Revenue Code and Revenue Regulations No. 12-99 means the act of **informing the taxpayer of both the legal and factual bases of the assessment is mandatory. The law requires that the bases be reflected in the formal letter of demand and assessment notice. This cannot be presumed.** Otherwise, the express mandate of Section 228 and Revenue Regulations No. 12-99 would be nugatory. The requirement enables the taxpayer to make an effective protest or appeal of the assessment or decision.
>
> The rationale behind the requirement that taxpayers should be informed of the facts and the law on which the assessments are based conforms to the constitutional mandate that no person shall be deprived of his or her property without due process of law. Between the power of the State to tax and an individual's right to due process, the scale favors the right of the taxpayer to due process.
>
> **The purpose of the written notice requirement is to aid the taxpayer in making a reasonable protest, if necessary.** Merely notifying the taxpayer of his or her tax liabilities without details or particulars is not enough.
>
> xxx xxx xxx
>
> A final assessment notice provides for the amount of tax due with a demand for payment. This is to determine the amount of tax due to a taxpayer. **However, due process requires that taxpayers be informed in writing of the facts and law on which the assessment is based in order to aid the taxpayer in making a reasonable protest.** To immediately ensue with tax collection without initially substantiating a valid assessment contravenes the principle in administrative investigations 'that taxpayers should be able to present their case and adduce supporting evidence.'" (Boldfacing supplied)

Since the 25% surcharge was not imposed by the BIR per the PAN, FAN and even the FDDA, I submit that it would be erroneous for the Court to require FSM to pay the same. As held in ***SMI-ED Philippines Technology Inc. vs. Commissioner of Internal Revenue,***[3] "<u>[t]he Court cannot be expected to perform the BIR's duties whenever it fails to do so either through neglect or oversight. Neither can court processes be used as a tool to circumvent laws protecting the rights of taxpayers</u>."

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[2] G.R. No. 215957, November 9, 2016.
[3] G.R. No. 175410, November 12, 2014.

The *ponencia* cited the case of ***Tambunting Pawnshop, Inc. vs. Commissioner of Internal Revenue,***[4] ***Dr. Felisa Vda. De San Agustin vs. Commissioner of Internal Revenue***,[5] and ***Commissioner of Internal Revenue vs. Royal Interocean Lines and The Court of Tax Appeals***,[6] in justifying the imposition by the Court of the 25% surcharge, albeit the same was not indicated in the PAN, FAN and FDDA issued against FSM. The aforementioned cases have, however, different factual circumstances as compared to the present case. Notably, in the aforecited cases of ***Tambunting***, ***Vda. De San Agustin***, ***and Royal Interocean Lines***, the BIR assessed and imposed the surcharge when it issued the deficiency tax assessments against the taxpayers.

In sum, while I agree that the imposition of the 25% surcharge is mandatory in cases enumerated under Section 248(A)(3) of the NIRC of 1997, as amended, and as implemented by Section 4 of RR No. 12-99, the Court cannot, on its own, assess and impose it for the first time without violating FSM's right to due process of law.

20% deficiency interest

As to the imposition of the 20% deficiency interest on the deficiency VAT, EWT, and WTC, I reiterate the position I have taken in the consolidated cases of ***Commissioner of Internal Revenue vs. Philippine Tobacco Flue-Curing & Redrying Corporation***[7] 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)*, 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*

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[4] CTA EB No. 245 (CTA Case No. 6776), May 24, 2007.
[5] G.R. No. 138485, September 10, 2001.
[6] G.R. No. L-26808, July 30, 1970.
[7] CTA EB Nos. 1218 and 1220, April 11, 2016.

Appeals and Former Deputy Ombudsman for the Visayas Arturo C. Mojica, is instructive:

> "The legal maxim "*stare decisis et non quieta movere*" (follow past precedents and do not disturb what has been settled) states that where the same questions relating to the same event have been put forward by parties similarly situated as in a previous case litigated and decided by a competent court, the rule of *stare decisis* is a bar to any attempt relitigate the same issues.
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> 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."** (Emphasis supplied)

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

> **"It will be seen that Section 51 (c) (1) and (e) (1) and (3), of the 1977 Tax Code, authorize the imposition of surcharge and interest only in respect of a *"tax imposed by this Title,"* that is to say, Title II on "Income Tax."** It will also be seen that Section 72 of the 1977 Tax Code imposes a surcharge only in case of failure to file a return or list *"required by this Title,"* that is, *Title II on "Income Tax."* **The thirty-five percent (35%) transaction tax is, however, imposed in the 1977 Tax Code by *Section 210 (b) thereof which Section is***

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

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

> 'Section 249.Interest-
>
> (B) Deficiency Interest. – Any deficiency in the tax due, **as the term is defined in this Code**, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof.' (Emphasis supplied)

Section 249 (B) cannot be any clearer: the deficiency interest must refer only to 'deficiency in the tax due, <u>as the term is defined in [the] Code</u>.'

Verily, as the law stands, only donor's, estate, and income taxes carry a provision on deficiency tax; they are the types of taxes on which such deficiency interest may be imposed.

Finally, Sections 247 (a) and 249 (A) are **general provisions** that impose "additions" to the tax and "interest" thereon. Both sections may not be read in isolation from the relevant and **specific provision** of

> Section 249 (B) with respect to the imposition of "deficiency" interest, more so as all these provisions fall within the same Chapter I of Title X of the NIRC of 1997, as amended.
>
> Otherwise stated, Sections 247 (a) and 249 (A) must reasonably be read and construed subject to the provision of Section 249 (B) - - all these provisions being covered by the **same** Chapter I of Title X of the NIRC of 1997, as amended."

Also apt is my Concurring and Dissenting Opinion in ***Philippine Aerospace Development Corporation vs. Commissioner of Internal Revenue***[8] 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**."

The power of taxation is sometimes called also the power to destroy. Therefore, it should be exercised with caution to minimize injury to the proprietary rights of a taxpayer. It must be exercised fairly, equally and uniformly, lest the tax collector kills the "hen that lays the golden egg."[9] Indeed, the imposition of 20% deficiency interest per annum on a tax not clearly within the context of the law, in addition to 20% delinquency interest per annum <u>and</u> a surcharge of 25% on the amount due under Section 248 of the NIRC of 1997, as amended, is too burdensome for a taxpayer to survive and continue its business affairs.

[8] CTA EB No. 1035, February 9, 2016.
[9] *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.

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

In contrast, Sections 248 **[Civil Penalties]** and 249(C) **[Delinquency Interest]** of the NIRC, both of which fall under Chapter I of Title X [Statutory Offenses and Penalties], prescribe "Additions to the Tax"; yet, these Sections **<u>did not provide the same qualification</u>** as that which is stated with respect to **deficiency interest**. Moreover, Section 248(A) of the NIRC imposes the 25% surcharge simply in addition to the tax required to be paid, and Section 248(B) imposes the penalty of 50% of the tax or of the deficiency tax, **<u>without qualification</u>** similar to that provided in Section 249(B) of the NIRC anent **deficiency interest**. In the same vein, **delinquency interest** provided in Section 249 of the NRIC is imposed **<u>without qualification</u>** on the amount of the tax due, or on the deficiency tax, or on any surcharge or interest thereon. Reasonably construed, in the absence of aforestated qualification, the "additions" to tax apply to all forms of tax.

While additions to tax that are "qualified" must be limited to the type of "deficiency in the tax due as the term is defined in the Code", to impose or demand payment of 20% deficiency interest on all deficiency tax liabilities would render senseless the unequivocal qualification in Section 249(B) of the NIRC that deficiency interest shall be imposed <u>only</u> 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

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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."

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 VAT, EWT, and WTC assessed against FSM.**

All told, I **VOTE** to: (i) **PARTIALLY GRANT** the Petition for Review filed by FSM Cinemas, Inc. in CTA EB No. 1441; (ii) **DENY** the Petition for Review filed by the CIR in CTA EB No. 1445; and, (iii) **AFFIRM** the assailed Decision and assailed Resolution of the Court in Division, with modification, that is, by cancelling and setting aside the imposition of the twenty-five percent (25%) surcharge and the twenty percent (20%) deficiency interest on the deficiency VAT, EWT, and WTC.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

FSM CINEMAS, INC.,
Petitioner,

CTA *EB* NO. 1441
(CTA Case No. 8551)

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

x--x

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA *EB* NO. 1445
(CTA Case No. 8551)

Present:

-versus-

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

FSM CINEMAS, INC.,
Respondent.

Promulgated:
NOV 16 2017 2:10 p.m.

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Concurring and Dissenting Opinion

MANAHAN, J.:

I concur with the *ponencia*'s decision to deny the Commissioner of Internal Revenue (CIR)'s petition for review. With respect to FSM Cinemas, Inc.'s petition for review, I concur with upholding the imposition of the 25% surcharge as it is merely an application of the mandatory nature of Section 248(A)(3) of the 1997 National Internal Revenue Code, as amended (NIRC). However, I disagree with the majority's decision that by using the Alphanumeric Tax Codes (ATC) of

WC 158 and WC 160 representing income payments of a Top 10,000 corporation for its purchases of goods and services, FSM deemed itself as a top 10,000 corporation and thus may be assessed for deficiency expanded withholding tax (EWT) pursuant to Section 2.57.2(M) of Revenue Regulations No. (RR) 2-98, as amended by RR 17-2003.

Under RR 2-98 as amended, classification as a Top 10,000/20,000 corporate taxpayer requires the determination and notification from the CIR, as follows:

> (M) Income payments made by the top twenty thousand (20,000) private corporations to their local/resident supplier of goods and local/resident supplier of services other than those covered by other rates of withholding tax. – Income payments made by any of the top 20,000 private corporations, <u>as determined by the Commissioner</u>, ...
>
> Top 20,000 private corporations shall include a corporate taxpayer <u>who has been determined and notified by the Bureau of Internal Revenue (BIR)</u> as having satisfied any of the following criteria:
>
> a. Classified and duly notified by the Commissioner as a large taxpayer under Revenue Regulations No. 1-98, as amended, or belonging to the top five thousand (5,000) private corporations under RR 12-94, or to the top ten thousand (10,000) private corporations under RR 17-2003, unless previously de-classified as such or had already ceased business operations (automatic inclusion);
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> b. xxx
>
> (3) A corporation <u>shall not be considered a withholding agent for purposes of this Section, unless such corporation has been determined and duly notified in writing by the Commissioner that it has been selected as on of the top twenty thousand (20,000) private corporations</u>. (*Underscoring ours*)

In the instant case, FSM alleged that the CIR failed to inform it that it is a top 10,000 corporation. Following the rules quoted above, FSM has no obligation to withhold as a Top 10,000 corporation absent a written notice from the CIR.

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It is also noteworthy that the Letter of Authority (LOA)[1] emanated from Revenue District Office (RDO) No. 53B-Muntinlupa City, and the assessment notices[2] from Revenue Region No. 8-Makati, to which RDO No. 53B belongs, and not the Large Taxpayer's Office, which bolsters FSM's position that it is not classified and has not been notified as belonging to the top 10,000 private corporations.

While it does not appear how FSM explained its usage of ATC Codes representing income payments of a Top 10,000 corporation for its purchases of goods and services, such usage of the ATC Codes should not lead to the conclusion that FSM is already a <u>notified</u> Top 10,000 Corporation which would make it liable for an assessment of 1% on its purchases of goods.

In *Willore Pharma Corp v. CIR,*[3] the Court cancelled a portion of an assessment for deficiency EWT pertaining to a period <u>before</u> receipt of the notice of inclusion as a top 20,000 corporation, *to wit:*

> The expenses for training room and function room ... were ascertained to be purchases of food services from Valle Verde Country Club, Inc.,....Since the expenses are not in the nature of rentals, it was erroneous on the part of respondent to assess petitioner with deficiency 5% EWT thereon. Neither can these amounts be subjected to a 2% EWT on purchase of services made by top 20,000 corporations under Section 2.57.2(M) of RR No. 2-98, as amended by RR No. 14-08, <u>because petitioner was notified by respondent as belonging to the top 20,000 corporations only on January 29, 2009</u>.
>
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> ...<u>As stated earlier, respondent notified petitioner that it belongs to the top 20,000 corporations only on January 29, 2009. Thus, it was not yet required to withhold 1% EWT on its purchases of goods in 2008</u>. (*Underscoring ours*)

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[1] Division Docket, CTA Case No. 8551, Vol. 1, Exhibit "P-1", p. 318.
[2] Division Docket, Vol. 1, Exhibits "P-6" and "P-6-a" Formal Assessment Notice, pp. 323-324; and, Exhibits "P-9" and "P-9-a" Final Decision on Disputed Assessment, pp. 335-336.
[3] CTA Case No. 8602, June 22, 2016.

Thus, absent any evidence showing that FSM was indeed notified as belonging to the top 20000/10000 corporations, the assessment for deficiency EWT under Section 2.57.2(M) should be cancelled. Without such notice of inclusion in the top 10,000 corporations, FSM has no obligation to withhold the 1% EWT on its purchases of goods and services under Section 2.57.2(M) of RR 2-98 as amended.

For all the foregoing, I vote to deny the CIR's Petition for Review docketed as CTA EB No. 1445. However, I vote to partially grant FSM Cinemas, Inc.'s Petition for Review docketed as CTA EB No. 1441.

Catherine T. Manahan

CATHERINE T. MANAHAN
Associate Justice