REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

<u>SPECIAL SECOND DIVISION</u>

FIRST PHILIPPINE UTILITIES CORPORATION, Petitioner,	**CTA CASE NO. 8993**
	Members:
-versus-	**Castañeda, Jr.,** ***Chairperson,*** **Manahan,** and, **Fabon-Victorino,*** ***JJ.***
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: NOV 05 2018 9:00 a.m.

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DECISION

CASTAÑEDA, JR., *J.*:

THE CASE

This is a Petition for Review[1] filed on February 23, 2015 by First Philippine Utilities Corporation (FPUC) to seek the cancellation of tax assessments in the amount of ₱289,733,393.79,[2] allegedly representing its deficiency income tax (IT), documentary stamp tax (DST), and miscellaneous tax (MT) for taxable year 2009.

THE PARTIES

Petitioner FPUC is a corporation duly organized and existing under Philippine laws, with principal office at 4th Floor, Benpres Bldg.,

*Designated as a special member under Rule V Section 3(c) of the Internal Rules of the Court of Tax Appeals.

[1] Docket, CTA Case No. 8993, Vol. I, pp. 6-55.
[2] *Id.*, Vol. I, Prayer in the Supplemental Petition for Review filed on April 29, 2015, p. 186.

Exchange Road corner Meralco Avenue, Pasig City.[3]

On the other hand, respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) who has the power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto or other matters arising under the National Internal Revenue Code (NIRC) or other laws or portions thereof administered by the BIR. He holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

THE FACTS

On May 25, 2010, petitioner FPUC received Letter of Authority (LOA)[4] No. LOA-116-2010-00000059 dated May 14, 2010, authorizing the assigned revenue officers to examine petitioner's books of accounts and other accounting records for all internal revenue taxes for the period from January 1, 2009 to December 31, 2009.

On May 5, 2014, petitioner received a copy of the Preliminary Assessment Notice (PAN) with Details of Discrepancies[5] dated May 5, 2014, assessing petitioner for deficiency IT, DST, and MT in the total amount of ₱306,856,199.22 for taxable year 2009. Petitioner filed its Reply[6] to the PAN on May 20, 2014.

On June 30, 2014, petitioner received a copy of the Formal Letter of Demand/Final Assessment Notice (FLD/FAN), with Details of Discrepancies[7], all dated June 26, 2014, assessing petitioner for deficiency IT, DST, and MT, inclusive of surcharge and penalties for taxable year 2009 in the amount of ₱312,361,795.97. Petitioner filed a Protest to Assessments[8], together with supporting documents, on July 28, 2014.

On February 23, 2015, petitioner filed the present Petition for Review. Je

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[3] Par. 1, Facts Stipulated by the Parties, Joint Stipulation of Facts and Issues (JSFI), docket, vol. II, p. 564.
[4] BIR Records, Exhibits "P-2" and "R-1", pp. 1-3.
[5] Docket, Vol. II, Exhibit "P-8", pp. 633-636.
[6] *Id.*, Exhibit "P-9", pp. 637-638 and 640.
[7] *Id.*, Exhibit "P-10", pp. 698-704.
[8] *Id.*, Exhibits "P-11" and "P-12", pp. 705-731.

On April 1, 2015, petitioner received a copy of the Final Decision on Disputed Assessment (FFDA)[9] dated March 31, 2015, denying its protest and finding it liable in the amount of ₱289,733,393.80 for deficiency IT, DST, MT and their corresponding penalties, surcharges and interest for taxable year 2009. Petitioner then filed its Supplemental Petition for Review[10] on April 29, 2015.

Respondent filed his Answer,[11] through registered mail on June 15, 2015 and received by the Court on June 25, 2015, interposing the following Special and Affirmative Defenses:

"**SPECIAL AND AFFIRMATIVE DEFENSES**

On the basis of the foregoing allegations and in further support of the Specific Denials herein set forth, respondent respectfully alleges as her defense that:

The Waivers of the Defense of Prescription under the Statute of Limitations of the Tax Code which was accepted and approved by respondent and thereafter received by petitioner are valid and binding between them. Hence, the waivers validly extended the period to assess petitioner.

4. Petitioner executed four (4) separate Waivers of the Defense of Prescription under the Statute of Limitations of the National Internal Revenue Code covering all internal revenue taxes for taxable year 2009 on the following dates: (a) 17 August 2012, (b) 10 December 2012, (c) 24 May 2013 and (d) 03 October 2013. xxx These waivers were accepted and approved by respondent and thereafter duly received by petitioner. Nonetheless, petitioner alleges that the waivers were defective.

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26. Viewed in the light of the foregoing considerations the four waivers were valid and binding between petitioner and respondent.

27. If the first waiver was indeed defective as claimed by petitioner, why then did they sign and execute the rest of the waivers? Respondent humbly manifests that petitioner's voluntary act of signing the waivers is tantamount to an assent or consent to extend the period of assessment. The act of signing the rest of

[9] *Id.*, Exhibit "P-13", pp. 732-738.
[10] Docket, Vol. I, pp. 185-190.
[11] *Id.* at pp. 253-268.

the waivers already cured the alleged defect found in the prior waivers. Therefore, petitioner is now estopped from claiming otherwise.

The Assessments on Deficiency Income Tax, Documentary Stamp Tax and miscellaneous tax were issued in accordance with law, rules and jurisprudence and were fully substantiated by concrete and convincing evidence.

28. Under Revenue Regulations (RR) No. 12-99 as amended by RR No. 18-2013, a valid assessment is accomplished following the stages of Notice of Informal Conference, Preliminary Assessment Notice and Final Assessment Notice. The procedure prescribed under RR Nos. 12-99 and 18-2013 have been complied with by respondent as can be deduced from the following narration of facts.

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34. In view of the foregoing, petitioner is liable to pay the assessed deficiency taxes. The examiner's assessment should be given full weight and credit, in the absence of proof submitted by petitioner to the contrary. This is in line with the High Court's ruling in several cases wherein the Court said that tax assessments by tax examiners are prima facie presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments. xxx

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36. The burden of proof is on the taxpayer contesting the validity or correctness of the assessment to prove not only that the Commissioner of Internal Revenue is wrong but the taxpayer is right. Otherwise the presumption of correctness of tax assessment stands.

37. Unfortunately, petitioner failed to overcome the presumption of correctness of the respondent's assessment.

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There was no violation of petitioner's right to speedy disposition of cases.

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42. As here, there was no unreasonable, arbitrary and oppressive delay so as to violate petitioner's right to speedy disposition of cases. In fact, petitioner was the one which executed four (4) waivers of the defense of prescription to extend the period to

assessment for it to be able to submit documents to dispute the assessment – to which respondent only acceded.

43. Clearly, the validly extended assessment was not because of any unreasonableness and arbitrariness on the part of respondent; rather it was a request which has been granted so as to give time to petitioner to dispute the assessment.

It is incumbent upon petitioner to filed [sic] the necessary motion [to] suspend the collection of tax.

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45. The Honorable Supreme Court has been consistent in ruling that no suit enjoining the collection of tax, disputed or undisputed, can be brought, the remedy being to pay the tax first, formerly under protest and not, without the need of protest, file a claim with the collector and if he denies it, bring an action for recovery against him.

46. As the sole exception to the above-cited rule, the Court of Tax Appeals has the power to suspend the collection of taxes pursuant to the clear guidelines under Section 10 of the Revised Rules of the Court of Tax Appeals.

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49. It is incumbent upon petitioner to file the necessary motion to suspend the collection of tax. Moreover, as required by Section 10 of the Revised Rules of the Court of Tax Appeal, petitioner must prove that it will be prejudiced by the collection. And most importantly, the necessary bond must be deposited.

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53. Well-settled is the principle that taxes are imposed for the support of the government in return for the general advantage and protection which the government affords to taxpayers and their property. Taxes are the lifeblood of the government. It is imperative that the power to impose them to be clothed with the implied authority to devise ways and means to accomplish their collection in the most effective manner. Without this implied power the need of government may falter or fail."

On July 20, 2015, petitioner filed an Omnibus Motion[12], praying for the early resolution of the issue on prescription. In this regard, it requested that it be allowed to present evidence on the issue of whether or not the right of respondent to assess petitioner with deficiency taxes for taxable year 2009 has prescribed. Respondent, failed to file his comment on petitioner's motion.[13]

[12] Docket, Vol. I, pp. 277-281.
[13] Docket, Vol. I, Records Verification dated August 24, 2015, p. 284.

The Pre-Trial Conference was reset to September 3, 2015.[14] Petitioner's Pre-Trial Brief[15] and respondent's Pre-Trial Brief[16] were both filed on August 28, 2015.

In the Resolution[17] dated August 28, 2015, the Court granted petitioner's prayer in its Omnibus Motion to present first its evidence on the issue of whether or not the right of respondent to assess petitioner for taxable year 2009 has prescribed.

The parties filed their Joint Stipulation of Facts and Issues[18] (JSFI) on October 6, 2015, which was approved by the Court in the Pre-Trial Order[19] issued on October 9, 2015.

Petitioner presented its witnesses Atty. Esmeraldo C. Amistad and Ms. Victoria A. Martinez[20] to testify on the issue of prescription.

On October 26, 2015, petitioner filed its Formal Offer of Evidence[21] on the issue of prescription, offering Exhibits "P-1", "P-1-A", "P-2", "P-2-A", "P-3", "P-3-A", "P-3-B", "P-3-C", "P-4", "P-4-A", "P-4-B", "P-4-C", "P-5", "P-5-A", "P-5-B", "P-5-C", "P-6", "P-6-A", "P-6-B", "P-7", "P-8", "P-8-A", "P-8-B", "P-9", "P-9-A", "P-9-B", "P-10", "P-10-A", "P-10-B", "P-11", "P-12", "P-12-A", "P-13", "P-13-A", "P-13-B", "P-14", "P-15", "P-16", and "P-17" as its documentary evidence. Respondent filed his Comment (On Petitioner's Formal Offer of Evidence)[22] on November 26, 2015.

In the Resolution[23] dated December 4, 2015, the Court admitted Exhibits "P-1", "P-1-A", "P-2", "P-2-A", "P-3", "P-3-A", "P-3-B", "P-3-C", "P-4", "P-4-A", "P-4-B", "P-4-C", "P-5", "P-5-A", "P-5-B", "P-5-C", "P-6", "P-6-A", "P-6-B", "P-7", "P-8", "P-8-A", "P-8-B", "P-9", "P-9-A", "P-9-B", "P-10", "P-10-A", "P-10-B", "P-11", "P-12", "P-13", "P-13-A", "P-13-B", "P-14", "P-15", "P-16", and "P-17"; but denied the admission of Exhibit "P-12-A".

[14] *Id.*, Order dated July 20, 2015 and Resolution dated August 28, 2015, pp. 276 and 328-329.
[15] *Id.* at pp. 285-295.
[16] *Id.* at pp. 296-304.
[17] *Id.* at pp. 328-329.
[18] Docket, Vol. II, pp. 563-566.
[19] *Id.* at pp. 570-575.
[20] *Id.*, Minutes of the hearing dated October 14, 2015, p. 576.
[21] *Id.* at pp. 577-585.
[22] *Id.* at pp. 758-760.
[23] *Id.* at pp. 762-763.

Petitioner filed a Motion for Partial Reconsideration (Re: Resolution dated December 4, 2015)[24] on December 21, 2015. Respondent filed a Manifestation (re: Petitioner's Motion for Partial Reconsideration dated 21 December 2015)[25] on January 25, 2016. In the Resolution[26] dated February 4, 2016, the Court admitted Exhibit "P-12-A".

Petitioner presented Revenue Officer (RO) Olivia S. Sison to testify on the issue of prescription.[27]

Respondent filed her Formal Offer of Evidence (On the Issue of Prescription)[28] on June 6, 2016, offering Exhibits "R-1", "R-2", "R-3", "R-4", "R-5", "R-6", "R-7", "R-8", "R-9", "R-10", "R-11", "R-12", "R-13", "R-14", "R-15", "R-16", "R-17", and "R-17-1" as his documentary evidence. Petitioner filed its Comment and/or Objection (To Respondent's Formal Offer of Evidence Re: Issue on Prescription)[29] on September 13, 2016.

In the Resolution[30] dated September 21, 2016, the Court admitted all the exhibits formally offered by respondent.

Petitioner filed its Memorandum (Re: Issue of Prescription for Petitioner)[31] through registered mail on November 21, 2016 and received by the Court on November 24, 2016. Respondent failed to file his Memorandum.[32]

<u>In the Resolution[33] dated February 27, 2017, the Court, citing the case of *Commissioner of Internal Revenue v. Next Mobile, Inc. (formerly Nextel Communications Phils., Inc.)*,[34] denied petitioner's prayer in its Omnibus Motion to declare the deficiency tax assessments as null and void.</u>

Petitioner filed a Motion for Reconsideration [Re: Resolution dated February 27, 2017][35] on March 16, 2017. Respondent failed to

[24] Docket, Vol. II, at pp. 771-775.
[25] *Id.* at pp. 778-781.
[26] *Id.* at pp. 785-786.
[27] *Id.,* Minutes of the hearing dated May 2, 2016, p. 791.
[28] *Id.* at pp. 801-808.
[29] *Id.* at pp. 848-854.
[30] *Id.* at pp. 856-857.
[31] *Id.* at pp. 866-916.
[32] *Id.* Records Verification dated November 29, 2016, p. 918.
[33] *Id.* at pp. 920-932.
[34] G.R. No. 212825, December 7, 2015.
[35] Docket, Vol. II, pp. 933-952.

file his comment thereto.[36] In the Resolution[37] dated May 4, 2017, the Court denied petitioner's motion for lack of merit. Hence, the Court set the presentation of petitioner's evidence on June 5, 2017.

During the scheduled hearing, petitioner presented Ms. Victoria A. Martinez[38] as its witness.

Thereafter, petitioner filed its Formal Offer of Evidence[39] on July 10, 2017, offering Exhibits "P-1", "P-1-B", "P-1-C", "P-1-D", "P-1-E", "P-1-F", "P-1-G", "P-1-H", "P-10", "P-10-C", "P-13", "P-13-C", "P-18", "P-18-A", "P-18-B", "P-19", "P-19-A", "P-19-B", "P-20", "P-20-A", "P-20-B", and "P-25" as its documentary evidence. Respondent filed his Comment (Re: Petitioner's Formal Offer of Evidence)[40] on July 14, 2017.

In the Resolution[41] dated July 25, 2017, the Court admitted Exhibits "P-1", "P-1-B", "P-1-C", "P-1-D", "P-1-E", "P-1-F", "P-1-G", "P-1-H", "P-10", "P-10-C", "P-13", "P-13-C", "P-18", "P-18-A", "P-18-B", "P-19", "P-19-A", "P-19-B", "P-20", "P-20-A", "P-20-B", "P-25", and "P-25-A".

During the hearing on September 27, 2017, respondent manifested that the intended witness, RO Olivia Sison, has been presented during the hearing on the issue of prescription and he will be adopting the same testimony. He further stated that a Formal Offer of Evidence has already been filed and resolved by the Court.[42]

The Court declared the case submitted for decision on November 16, 2017,[43] considering respondent's Memorandum[44] filed on October 27, 2017 and petitioner's Memorandum (Re: Issue on the Validity of the Tax Assessments)[45] filed on November 6, 2017.

THE ISSUES

[36] *Id.*, Vol. III, Records Verification dated April 10, 2017, p. 959.
[37] *Id.* at pp. 961-963.
[38] *Id.*, Minutes of the hearing dated June 5, 2017 and July 5, 2017, pp. 1025 and 1038.
[39] *Id.* at pp. 1040-1044.
[40] Docket, Vol. III, pp. 1065-1068.
[41] *Id.* at pp. 1070-1071.
[42] *Id.*, Minutes of the hearing dated September 27, 2017, p. 1072.
[43] *Id.*, Resolution dated November 16, 2017, p. 1129.
[44] *Id.* at pp. 1074-1084.
[45] Docket, Vol. III, pp. 1089-1128.

The parties submitted the following issues for the Court's resolution:[46]

Petitioner:

1. Whether or not the period to assess petitioner for tax deficiencies has already prescribed.

2. Whether or not the tax investigation is null and void for failure of respondent to comply with Revenue Memorandum Order (RMO) No. 69-2010 in relation to the issuance of electronic Letters of Authority (LOAs).

3. Whether or not the assailed tax deficiency assessments against petitioner are void for having been arbitrarily issued by respondent.

4. Whether or not respondent violated the constitutional right of petitioner to speedy disposition of cases.

5. Whether or not petitioner is liable to pay ₱289,733,393.79 as deficiency IT, DST and MT for taxable year 2009 as well as the corresponding penalty and deficiency and delinquency interests, pursuant to Sections 248 and 249 of the 1997 Tax Code, as amended.

Respondent:

1. Whether petitioner is liable to pay ₱289,733,393.79 as deficiency IT, DST and MT for taxable year 2009 as well as the corresponding penalty and deficiency and delinquency interests, pursuant to Sections 248 and 249 of the 1997 Tax Code, as amended.

Petitioner's Arguments[47]

Petitioner argues that it is not liable for deficiency IT as the discrepancy of ₱10,000,000.00 was a result of sheer typographical

[46] Docket, Vol. II, JSFI, pp. 564-565.
[47] Docket, Vol. III, pp. 1089-1128.

error. Petitioner insists that neither the FLD/FAN nor the FDDA showed how it derived any income or tax benefit from the overclaimed Net Operating Loss Carry Over (NOLCO) and it did not obtain any tax benefit during the three-year period where it incurred taxable losses which the overclaimed NOLCO maybe carried over.

Petitioner also argues that it is not liable for deficiency DST as neither the FLD/FAN nor the FDDA identified the written debt instruments upon which such deficiency was imposed. The Supreme Court decision in the case of *Commissioner of Internal Revenue v. Filinvest Development Corporation* (G.R. Nos. 163653 and 167689, dated July 19. 2011), which was circularized under Revenue Memorandum Circular (RMC) No. 48-2011 and used as basis for the assessment of deficiency DST, is not applicable in this case and cannot be applied retroactively because it merely relied in good faith on the prevailing BIR rules, regulations, and rulings of the respondent, who has the exclusive and original jurisdiction to interpret the Tax Code and other tax laws.

Petitioner also argues that it is not liable for MT deficiency of compromise penalty as Section 255 and not Section 250 of the 1997 NIRC, as amended, is the applicable provision in the instant case and such cannot be imposed without its consent.

Respondent's Counter-Arguments[48]

Respondent argues that petitioner is liable for deficiency IT as there was a difference between NOLCO made available in 2009 and NOLCO per actual result of operations.

Respondent also argues that respondent is liable for deficiency DST as it failed to show proof of payment of DST on advances to stockholders, and loans payable and due from related parties.

Respondent insists that petitioner is liable for deficiency MT as there were no returns filed on said deficiency taxes, hence, a compromise penalty should be imposed.

[48] Docket, Vol. III, pp. 1074-1084.

THE COURT'S RULING

The petition was timely filed and the tax investigation is valid.

The Court shall first determine the timeliness of the filing of the case in accordance with Section 228 of the NIRC of 1997, as amended, which provides:

> "SEC. 228. *Protesting of Assessment.* – When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however*, That a preassessment notice shall not be required in the following cases:
>
> xxx xxx xxx
>
> The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.
>
> Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.
>
> Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.
>
> If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable."

Pursuant to Section 228 of the NIRC of 1997, petitioner has thirty (30) days from receipt of the FLD/FAN within which to file its administrative protest and another thirty (30) days from receipt of the respondent's decision, or from the lapse of one hundred eighty (180)-day period from submission of documents within which to file its Petition for Review with the Court of Tax Appeals.

Petitioner received the FLD/FAN with Details of Discrepancies, all dated June 26, 2014, assessing petitioner for deficiency IT, DST, and MT, inclusive of surcharge and penalties for taxable year 2009 in the amount of ₱312,361,795.97 on June 30, 2014. Petitioner had thirty (30) days from June 30, 2014 or until July 30, 2014 to file its administrative protest. Petitioner filed its Protest to Assessments with supporting documents on July 28, 2014.

Respondent therefore had 180 days from the filing of Protest to Assessments with supporting documents from July 28, 2014 or until January 24, 2015, within which to act on petitioner's administrative protest. There being no action taken by respondent, petitioner had thirty (30) days from the lapse of 180 days from submission of documents on January 24, 2015 or until February 23, 2015 to appeal to this Court. Petitioner filed the present Petition for Review on February 23, 2015. Hence, the Petition for Review was filed within the prescriptive period.

At this point, it must be noted that the issue on prescription has already been resolved by this Court in its Resolution dated February 27, 2017 in accordance with the Supreme Court's decision in *Commissioner of Internal Revenue v. Next Mobile, Inc. (formerly Nextel Communications Phils., Inc.)*. Said case ruled that, as general rule, a waiver which does not comply with the requisites for validity specified under Revenue Memorandum Order (RMO) No. 20-90 and Revenue Delegation Authority Order (RDAO) No. 05-01 is invalid and ineffective to extend the prescriptive period to assess taxes, there are, however, exceptions such as in cases where the parties are *in pari delicto*. It was held therein that parties who do not come to the court with clean hands cannot be allowed to benefit from their own wrongdoing.

In this case, petitioner FPUC voluntarily executed and submitted the Waivers, one after the other, and never raised a single objection thereto. Petitioner only assailed their validity after the issuance of the assessments on the ground that its own representative did not have the authority to sign the Waivers. Moreover, the signatory in the Waivers was FPUC's Treasurer. Consequently, the Court ruled that petitioner should not be allowed to benefit from its wrongdoing and should be deemed estopped from questioning the validity of the Waivers only after the assessment against it was issued.

As to petitioner's argument that the tax investigation is null and void for failure of respondent to comply with RMO No. 69-2010 in relation to the issuance of electronic LOAs, it did not, however, point out or identify which aspect of the tax investigation failed to comply with the RMO. In fact, petitioner did not discuss this issue in its Memorandum filed on November 6, 2017. This is a mere allegation not supported by evidence. It is a basic rule of evidence that bare allegations, unsubstantiated by evidence, are not equivalent to proof. In short, mere allegations are not evidence.[49] The burden of proof lies on the party who makes the allegations. This, however, petitioner failed to do.

Tax assessments by the examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a BIR examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments.[50]

Except for the DST assessment, the rest of the items in the assessment should be cancelled.

The Court shall now proceed to discuss the merits of the case.

Based on the FDDA[51], petitioner was assessed of the following deficiency taxes in the aggregate amount of ₱289,733,393.80 for taxable year 2009:

	Basic Tax Due	Interest	Compromise	Total
Income tax	₱ 3,000,000.00	₱ 2,926,027.40	₱ 25,000.00	₱ 5,951,027.40
Documentary stamp tax	139,767,103.56	143,979,262.84	25,000.00	283,771,366.40
Miscellaneous tax	-	-	11,000.00	11,000.00
Total	**₱142,767,103.56**	**₱146,905,290.24**	**₱61,000.00**	**₱289,733,393.80**

[49] *Real v. Belo*, G.R. No. 146224, January 26, 2007.
[50] *Commissioner of Internal Revenue v. Traders Royal Bank*, G.R. No. 167134, March 18, 2015.
[51] Docket, Vol. II, Exhibit "P-13", pp. 732-738.

I. Compromise Penalties - ₱61,000.00

The Court finds it proper to resolve first the issue regarding the imposition of compromise penalties before discussing the merits of the deficiency tax assessments since all these taxes were assessed with respective compromise penalties.

Respondent imposed compromise penalties on petitioner's deficiency IT and DST at ₱25,000.00 each, as shown in the above table while the deficiency MT was imposed the amount of ₱11,000.00 as compromise penalty for the non-filing of Final Tax Return.[52]

Pursuant to RMO No. 01-90, compromise penalties are only amounts suggested in settlement of criminal liability, and may not be imposed or exacted on the taxpayer in the event that a taxpayer refuses to pay the same. It is well-settled that the Court cannot compel a taxpayer to pay the compromise penalty because by its very nature, it implies a mutual agreement between the parties in respect to the thing or subject matter that is so compromised, and the choice of paying or not paying it distinctly belongs to the taxpayer.[53] Absent a showing that herein petitioner consented to the compromise penalty, its imposition should be deleted. The imposition of the compromise penalty without the taxpayer's conformity is illegal and unauthorized.[54]

II. Deficiency Income Tax

Respondent assessed petitioner of deficiency IT solely on the basis of an alleged over-claimed Net Operating Loss Carry-Over (NOLCO) in the amount of ₱10,000,000.00, computed as follows:[55]

Taxable income per return		₱ -
Add (less) adjustment:		
Overclaimed NOLCO		10,000,000.00
Adjusted net income		10,000,000.00
Rate		30%

[52] Docket, Vol. II, Details of Discrepancies, FDDA, Exhibit "P-13", p. 735.

[53] *The Philippines International Fair, Inc. v. The Collector of Internal Revenue, et al.*, G.R. Nos. L-12928 and L-12932, March 31, 1962.

[54] *Commissioner of Internal Revenue v. Lianga Bay Logging Co., Inc., et al.*, G.R. No. L-35266, January 21, 1991.

[55] Docket, Vol. II, Exhibit "P-13", p. 732.

Tax due		3,000,000.00
Less: Payments		-
Basic tax due		**₱3,000,000.00**
Add: Interest (computed up to 2.28.2015)	₱2,926,027.40	
Compromise penalty	25,000.00	2,951,027.40
TOTAL DEFICIENCY TAX - INCOME TAX		**₱5,951,027.40**

Respondent's verification disclosed that there is a difference between NOLCO made available in 2009 and NOLCO per actual result of operations as shown below:[56]

Amount carry over per ITR	₱ 54,859,236.00
Amount claim per taxable income ITR	44,859,236.00
Overclaimed amount on NOLCO	₱ 10,000,000.00

Petitioner argues that the ₱10,000,000.00 discrepancy was a result of mere typographical error as explained in the testimony of Ms. Victoria A. Martinez, to wit:[57]

"11. Q: Can you elaborate on your statement that the ₱10,000,000 overclaim was brought about by a typographical error?

A. Yes. Item 23 of the 2009 Annual Income Tax Return of FPUC shows that the company incurred a taxable loss of ₱44,859,236.00 for the year 2009. The computation of the taxable loss for the year 2009 also appears in Schedule 5A of the 2009 Annual Income Tax Return. Item 65 of the Schedule 5A of the return shows that FPUC incurred in 2009 the amount of ₱44,859,236 as net operating losses which may be carried over to succeeding years. Additionally, Item 65 of the same return provides that the value be copied over to the relevant space in Schedule 5B of the return.

Unfortunately, there was a mistake in copying the value of ₱44,859,236 from Item 65 of Schedule 5A of the return to Schedule 5B of the same return. Instead of the amount of ₱44,859,236, the amount of ₱54,859,236 was written instead

[56] Docket, Vol. II, Exhibit "P-10-C", p. 700.
[57] *Id.,* Vol. III, Pars. 20 and 21, Petitioner's Memorandum and Judicial Affidavit of Victoria A. Martinez, docket, pp. 1093-1094 and 972-973, respectively.

> in Item 69 of Schedule 5B. Instead of the number '4', the number '5' was written instead in the first digit. Hence, there is a ₱10,000,000.00 difference between the correct value, i.e., ₱44,859,236, and the amount which appears in Item 69 of the return, i.e., ₱54,859,236."

Given that petitioner incurred a taxable loss amounting to ₱44,859,236.00 and neither the FLD/FAN nor the FDDA showed how petitioner derived any income or tax benefit as to the result of the alleged overclaim, petitioner asserts that it was highly erroneous for respondent to add back the alleged overclaimed NOLCO of ₱10,000,000.00 to its taxable income in the year 2009.

Petitioner points out that what respondent should have done is to disallow the overclaimed amount if claimed as deduction for the three (3) taxable years following taxable year 2009.[58]

The Court rules to cancel the subject assessment.

The applicable law regarding NOLCO is Section 34(D)(3) of the NIRC of 1997, as amended, which provides as follows:

> "SEC. 34. *Deductions from Gross Income.* – Except for taxpayers earning compensation income arising from personal services rendered under an employer-employee relationship where no deductions shall be allowed under this Section other than under Subsection (M) hereof, in computing taxable income subject to income tax under Sections 24(A); 25(A); 26; 27(A), (B) and (C); and 28(A)(1), **there shall be allowed the following deductions from gross income:**
>
> xxx xxx xxx
>
> (D) *Losses.* –
>
> xxx xxx xxx
>
> (3) *Net Operating Loss Carryover.* – **The net operating loss of the business or enterprise for any taxable year immediately preceding the current taxable year, which had not been previously offset as deduction from gross income**

gc

[58] Docket, Vol. III, Pars. 46 and 47, Petitioner's Memorandum, pp. 1094 and 1102.

> **shall be carried over as a deduction from gross income for the next three (3) consecutive taxable years immediately following the year of such loss**: xxx
>
> xxx xxx xxx
>
> For purposes of this Subsection, **the term *'net operating loss'* shall mean the excess of allowable deduction over gross income of the business in a taxable year:**" (*Emphasis supplied*)

Based on the foregoing, it is clear that a NOLCO, which is defined as "the excess of allowable deduction over gross income of the business in a taxable year", may be allowed to be carried over to the next three (3) consecutive years, and may be made as a deduction from gross income for such periods.

It must be noted that the NOLCO involved in this case was incurred in taxable year 2009 as shown in petitioner's Annual Income Tax Return (AITR), the same taxable year covered by the present assessment.[59]

The Court finds that it was improper for respondent to disallow the said NOLCO because any tax benefit derived by petitioner from the carry-over of the said amount redounds to the succeeding years. Since the tax benefit will be in the succeeding year, at most, petitioner may only be assessed in the said succeeding year.

Hence, petitioner is not liable for any deficiency income tax for taxable year 2009.

III. Deficiency Documentary Stamp Tax

Respondent assessed petitioner of deficiency DST in the amount of ₱283,771,366.40, computed as follows:[60]

[59] Docket, Vol. II, Line 23B and Schedule 5A, 2009 AITR, Exhibit "P-1", pp. 586 to 587.
[60] Docket, Vol. II, Exhibit "P-13", p. 732.

	Amount	Rate	Tax Due
Advances from stockholders	₱ 2,000,000,000.00	1/200	₱ 10,000,000.00
Loans payable	11,205,000,000.00	1/200	34,075,479.45
Due from Parent Co.	27,953,420,711.00	1/200	139,767,103.56
Total	**₱43,301,343,955.98**		**₱183,842,583.01**
Less: Payment			44,075,479.45
Basic tax due - DST			**₱139,767,103.56**
Add: Interest (computed up to 2.28.2015)		₱143,979,262.84	
Compromise penalty		25,000.00	144,004,262.84
TOTAL DEFICIENCY TAX - DST			**₱283,771,366.40**

Based on the above computation, it appears that only one (1) item is being assessed by respondent with deficiency DST, *i.e.*, Due from Parent Co. with tax base amounting to ₱27,953,420,711 and DST due amounting to ₱139,767,103.56.

Respondent's verification disclosed that petitioner failed to pay the corresponding DST on Due from Parent Company (First Philippine Holding) in accordance with Section 179 of the NIRC of 1997, as amended.[61]

Respondent cited as legal basis Section 6 of Revenue Regulations (RR) No. 09-94, stating that "All loan agreements, whether made or signed in the Philippines, or abroad when the obligation or right arises from Philippine sources or the property or object of the contract is located or used in the Philippines shall be subject to the DST. In cases where no formal loan agreements or promissory notes have been executed to cover credit facilities, the DST shall be based on the amount of drawings or availment of the facilities, which may be evidenced by credit/debit memo, advice or drawings by any form of check or withdrawal slip."[62]

Respondent lifted the assessed amount from petitioner's 2009 Audited Financial Statement (AFS) under the account Due from Parent Company amounting to ₱27,953,420,711.00, classified as part of its Current Assets[63] and pertained to non-interest-bearing advances to the Parent Company with no definite repayment period.[64]

Petitioner posits that the DST cannot be imposed on a mere account name that appeared on a balance sheet. In order for a

[61] Docket, Vol. II, Details of Discrepancies, FLD, Exhibit "P-10-C", p. 700.
[62] *Id.*, Vol. II, Details of Discrepancies, FDDA, Exhibit "P-13", p. 735.
[63] *Id.*, Vol. II, 2009 AFS as attached to 2009 AITR, Exhibit "P-1", p. 593.
[64] Note 7, *Id.* at p. 612.

document to be taxable under Section 3 of RR No. 09-94,[65] the following elements must be present: (1) there is a written instrument; (2) the said instrument represents a borrowing or a lending transaction; and (3) the instrument must bear a specific maturity date.[66]

Petitioner alleges that it can only speculate that the only BIR issuance relied upon in imposing DST on Advances from Parent Company is RMC No. 48-2011, circularizing excerpts from the Supreme Court *En Banc* Decision in the case of *Commissioner of Internal Revenue v. Filinvest Development Corporation* (*Filinvest* case)[67] on the imposition of DST on inter-office covering advances granted to affiliated corporation. However, the *Filinvest* case is not applicable to petitioner for taxable year 2009.[68]

Petitioner avers that the applicable law and regulations in the imposition of DST beginning 1998 are Section 179 and RR No. 13-2004 dated December 23, 2004 and not Section 180 and RR No. 09-94 as used in the *Filinvest* case, which tackled assessments for taxable years 1996 and 1997.[69]

Under RR No. 13-2004, if the debt instrument has a term of less than one (1) year, the DST due shall be computed taking into consideration the number of days that the instrument is outstanding as a fraction of 365 days. If the debt instrument has a term of one

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[65] SECTION 3. *Definition of Terms.* - For purposes of these Regulations, the following terms shall mean:
(a) "Act" - refers to Republic Act No. 7660.
(b) "Loan agreement" - refers to a contract in writing where one of the parties delivers to another money or other consumable thing, upon the condition that the same amount of the same kind and quality shall be paid. The term shall include credit facilities, which may be evidenced by credit memo, advice or drawings.
The terms "Loan Agreement" under Section 180 and "Mortgage" under Section 195, both of the Tax Code, as amended, generally refer to distinct and separate instruments. A loan agreement shall be taxed under Section 180, while a deed of mortgage shall be taxed under Section 195.
xxx
(f) "Promissory note" - refers to an instrument, whether negotiable or non-negotiable, whereby the maker agrees (promises) to pay a sum certain in money or its equivalent at a definite time.
xxx
(i) "At the same time such act is done or transaction had" - means on the same date the document was executed, i.e., made, signed, issued, accepted or transferred.
xxx
[66] Par. 59, Petitioner's Memorandum, docket, vol. III, p. 1107.
[67] G.R. Nos. 163653 and 167689, July 19, 2011.
[68] Docket, Vol. III, Par. 62, Petitioner's Memorandum, p. 1108.
[69] Par. 73, *Id.* at p. 1112.

year or longer, the DST due shall be computed based on the issue price of the debt instrument.[70]

Petitioner argues that based on the new provision of RR No. 13-2004, the promissory note or whatever debt instrument must bear a specific maturity date to determine the number of days that the instrument is outstanding.

Hence, petitioner points out that a mere debit-credit memo, advice or drawings or any form of check that do not bear a specific maturity date lacks the essential element of a debt instrument. In which case, such document is allegedly no longer subject to DST under Section 179 of the Tax Code.[71]

Furthermore, petitioner claims that even assuming *arguendo* that the *Filinvest* case is applicable to Section 179 of the current Tax Code, its implementation should adhere to the principle on prospective application of laws. Hence, DST must not apply to loans extended by the shareholders prior to the promulgation of the *Filinvest* case.[72]

Petitioner's arguments are untenable.

The DST assessment on the ₱27,953,420,711 due from the parent company of petitioner FPUC, which was reflected as part of its Current Assets in its 2009 Audited Financial Statements finds basis in law and jurisprudence.

Specifically, the assessment should be upheld based on Section 179 of the 1997 NIRC, as amended, in line with the Supreme Court *En Banc's* decision in *Commissioner of Internal Revenue v. Filinvest Development Corporation.*[73]

Section 179 of the 1997 NIRC, as amended, provides:

> "SEC. 179. Stamp Tax on All Debt Instruments. - On every original issue of debt instruments, there shall be collected a documentary stamp tax on One peso (P1.00) on each Two hundred pesos (P200), or fractional part thereof, of the issue price of any such debt instruments: Provided, That for such debt instruments with terms of less than one (1) year, the documentary stamp tax to

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[70] Section 5, RR No. 13-2004.
[71] Docket, Vol. III, Pars. 68 to 69, Petitioner's Memorandum, p. 1111.
[72] Par. 75, *Id.* at p. 1113.
[73] G.R. Nos. 163653 and 167689, July 19, 2011.

be collected shall be of a proportional amount in accordance with the ration of its term in number of days to three hundred sixty-five (365) days: Provided, further, That only one documentary stamp tax shall be imposed on either loan agreement, or promissory notes issued to secure such loan.

For purposes of this section, the term debt instrument shall mean instruments representing borrowing and lending transactions including but not limited to debentures, certificates of indebtedness, due bills, bonds, loan agreements, including those signed abroad wherein the object of contract is located or used in the Philippines, instruments and securities issued by the government of any of its instrumentalities, deposit substitute debt instruments, certificates or other evidences of deposits that are either drawing interest significantly higher than the regular savings deposit taking into consideration the size of the deposit and the risks involved or drawing interest and having a specific maturity date, orders for payment of any sum of money otherwise than at sight or on demand, promissory notes, whether negotiable or non-negotiable, except bank notes issued for circulation."

In the case of *Commissioner of Internal Revenue v. Filinvest Development Corporation*,[74] the Supreme Court ruled in this wise:

"On the other hand, insofar as documentary stamp taxes on loan agreements and promissory notes are concerned, Section 180 of the NIRC provides follows:

'Sec. 180. **Stamp tax on all loan agreements, promissory notes, bills of exchange, drafts, instruments and securities issued by the government or any of its instrumentalities, certificates of deposit bearing interest and others not payable on sight or demand.** On all loan agreements signed abroad wherein the object of the contract is located or used in the Philippines; bill of exchange (between points within the Philippines), drafts, instruments and securities issued by the Government or any of its instrumentalities or certificates of deposits drawing interest, or orders for the payment of any sum of money otherwise than at sight or on demand, or on all promissory notes, whether negotiable or non-negotiable, except bank notes issued for circulation, and on each renewal of any such note, there shall be collected a documentary stamp tax of Thirty centavos (P0.30) on each two hundred pesos, or fractional part

[74] G.R. Nos. 163653 and 167680, July 19, 2011.

> thereof, of the face value of any such agreement, bill of exchange, draft, certificate of deposit or note: **Provided**, That only one documentary stamp tax shall be imposed on either loan agreement, or promissory notes issued to secure such loan, whichever will yield a higher tax: **Provided however**, That loan agreements or promissory notes the aggregate of which does not exceed Two hundred fifty thousand pesos (P250,000.00) executed by an individual for his purchase on installment for his personal use or that of his family and not for business, resale, barter or hire of a house, lot, motor vehicle, appliance or furniture shall be exempt from the payment of documentary stamp tax provided under this Section.

When read in conjunction with Section 173 of the 1993 NIRC, the foregoing provision concededly applies to "(a)ll loan agreements, whether made or signed in the Philippines, or abroad when the obligation or right arises from Philippine sources or the property or object of the contract is located or used in the Philippines." Correlatively, Section 3 (b) and Section 6 of Revenue Regulations No. 9-94 provide as follows:

> Section 3. Definition of Terms. For purposes of these Regulations, the following term shall mean:
>
> (b) 'Loan agreement' refers to a contract in writing where one of the parties delivers to another money or other consumable thing, upon the condition that the same amount of the same kind and quality shall be paid. The term shall include credit facilities, which may be evidenced by credit memo, advice or drawings.
>
> The terms 'Loan Agreement' under Section 180 and 'Mortgage' under Section 195, both of the Tax Code, as amended, generally refer to distinct and separate instruments. A loan agreement shall be taxed under Section 180, while a deed of mortgage shall be taxed under Section 195.
>
> Section 6. Stamp on all Loan Agreements. All loan agreements whether made or signed in the Philippines, or abroad when the obligation or right arises from Philippine sources or the property or object of the contract is located in the Philippines shall be subject to the documentary stamp tax of thirty centavos (₱0.30) on each two hundred pesos, or fractional part thereof, of the face value of any such agreements, pursuant to Section 180 in relation to Section 173 of the Tax Code.
>
> In cases where no formal agreements or promissory notes have been executed to cover credit facilities, the documentary stamp tax shall be based on the amount

> of drawings or availment of the facilities, which may be evidenced by credit/debit memo, advice or drawings by any form of check or withdrawal slip, under Section 180 of the Tax Code.
>
> Applying the aforesaid provisions to the case at bench, we find that the instructional letters as well as the journal and cash vouchers evidencing the advances FDC extended to its affiliates in 1996 and 1997 qualified as loan agreements upon which documentary stamp taxes may be imposed." (*underscoring supplied and citation omitted*)

The *Filinvest* holding merely reflects the contemporaneous legislative intent enacted in the NIRC by upholding the DST assessment and did not overturn any established precedent and, thus, should be given retroactive application in this case.

Petitioner contends that the decision of the Supreme Court in the *Filinvest* case, which was rendered on July 19, 2011, as well as RMC No. 48-2011, which was issued by the BIR on October 6, 2011, may not be applied to the 2009 advances to its parent company without violating the principle on non-retroactivity of laws and rulings under Section 246 of the 1997 NIRC.

It is further argued that petitioner merely relied upon court decisions and BIR issuances prevailing in 2009, viz., inter-office memos covering intercompany advances are not considered loan agreements subject to DST.

First, it must be stressed that *only* Supreme Court decisions can be relied upon as binding precedents.[75] Unlike rulings of the lower courts, which bind the parties to specific cases alone, judgments of the Supreme Court are universal in their scope and application, and equally mandatory in character.[76]

Second, the interpretation placed upon a law by the Supreme Court constitutes a part of the law as of the date it was originally passed since it establishes the contemporaneous legislative intent of the law, as held by the Supreme Court in the case of *Visayas*

[75] *Nippon Express (Philippines) Corporation v. Commissioner of Internal Revenue (CIR)*, G.R. No. 196907, March 13, 2013.
[76] *CIR v. San Roque Power Corporation*, G.R. No. 187485, February 12, 2013; *Taganito Mining Corporation v. CIR*, G.R. No. 196113, February 12, 2013; *Philex Mining Corporation v. CIR*, G.R. No. 197156, February 12, 2013 citing *The Philippine Veterans Affairs Office v. Segundo*, G.R. No. L-51570, August 15, 1988.

Geothermal Power Company v. Commissioner of Internal Revenue,[77] as follows:

> "Petitioner VGPC also argues that Aichi should be applied prospectively and, therefore, should not be applied to the present case. This position cannot be given consideration.
>
> Article 8 of the Civil Code provides that judicial decisions applying or interpreting the law shall form part of the legal system of the Philippines and shall have the force of law. The interpretation placed upon a law by a competent court establishes the contemporaneous legislative intent of the law. Thus, such interpretation constitutes a part of the law as of the date the statute is enacted. It is only when a prior ruling of the Court is overruled, and a different view adopted, that the new doctrine may have to be applied prospectively in favor of parties who have relied on the old doctrine and have acted in good faith." (*underscoring supplied*)

On December 23, 1993, it will be recalled that Section 180 (now Section 179) was incorporated in the NIRC, through Republic Act No. (RA) 7660. On January 1, 1998, the same Section 180 was carried over in RA 8424 (Tax Reform Act of 1997). Then on February 17, 2004, Section 180 was amended through RA 9243 and renumbered as the present Section 179 of the 1997 NIRC.

Accordingly, the Supreme Court's 2011 interpretation of this provision of law in *Filinvest* became part of the NIRC as early as December 23, 1993, the date the statute was enacted, until the present.

Considering that the 2011 *Filinvest* interpretation of Section 180 of the NIRC (now Section 179) was deemed constituted as part of the NIRC since December 23, 1993 until the present, therefore, the same may be applied to this case without violating the principle on non-retroactivity of laws and rulings.

Still another clear example of the retroactive application of jurisprudence is *Accenture, Inc. v. Commissioner of Internal Revenue*[78] where the Supreme Court upheld the Court of Tax Appeal's application of the pronouncements in *Commissioner of Internal Revenue v. Burmeister and Wain Scandinavian Contractor Mindanao, Inc.* (2007)[79] as basis in ruling that Accenture's services would qualify for zero-rating

[77] G.R. No. 197525, June 4, 2014.
[78] G.R. No. 190102, July 11, 2012.
[79] G.R. No. 153205, January 22, 2007.

under Section 108 (b) of the 1997 NIRC [formerly Section 102 (b) of the 1977 Tax Code], only if the recipient of the services was doing business outside of the Philippines. It was held that:

> "Moreover, even though Accenture's Petition was filed before *Burmeister* was promulgated, the pronouncements made in that case may be applied to the present one without violating the rule against retroactive application. When this Court decides a case, it does not pass a new law, but merely interprets a preexisting one. When this Court interpreted Section 102(b) of the 1977 Tax Code in *Burmeister*, this interpretation became part of the law from the moment it became effective. It is elementary that the interpretation of a law by this Court constitutes part of that law from the date it was originally passed, since this Court's construction merely establishes the contemporaneous legislative intent that the interpreted law carried into effect." (*underscoring supplied*)

Third, prospective application of decisions applies only in cases where an old doctrine of the Supreme Court is overruled by a subsequent decision which adopts a new doctrine. In such situation, the new doctrine must be applied prospectively. In the present case, however, there had been no doctrine previously established by the Supreme Court that was overturned by *Filinvest*.

In the case of *The People of the Philippines v. Jose Jabinal y Carmen*,[80] the Supreme Court ruled that prospective effect applies only to decisions enunciating new doctrines:

> "Decisions of this Court, although in themselves not laws, are nevertheless evidence of what the laws mean, and this is the reason why under Article 8 of the New Civil Code 'Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system xxx.' The interpretation upon a law by this Court constitutes, in a way, a part of the law as of the date that law originally passed, since this Court's construction merely establishes the contemporaneous legislative intent that law thus construed intends to effectuate. The settled rule supported by numerous authorities is a restatement of legal maxim '*legis interpretatio legis vim obtinet*' — the interpretation placed upon the written law by a competent court has the force of law. The doctrine laid down in *Lucero* and *Macarandang* was part of the jurisprudence, hence of the law, of the land, at the time appellant was found in possession of the firearm in question and when he [was] arraigned by the trial court. It is true that the doctrine was overruled in the *Mapa* case in 1967, but when a doctrine of this Court is overruled and a different

[80] G.R. No. L-30061, February 27, 1974.

> view is adopted, the new doctrine should be applied prospectively, and should not apply to parties who had relied on the old doctrine and acted on the faith thereof. This is especially true in the construction and application of criminal laws, where it is necessary that the punishability of an act be reasonably foreseen for the guidance of society." (*underscoring supplied*)

Considering that RMC No. 48-2011 merely implements the doctrine laid down in *Filinvest*, the same may also be applied to this case.

Finally, in the case of *Philacor Credit Corporation v. Commissioner of Internal Revenue*,[81] the Supreme Court ruled that BIR Ruling and Revenue Regulation issued even *after* the transaction took place are still applicable because they are issuances interpreting the same rule imposing a DST, thus:

> "The BIR Ruling and Revenue Regulation cited are still applicable to this case, even if they were issued after the transactions in question had already taken place. They apply because they are issuances interpreting the same rule imposing a DST on promissory notes. At the time BIR Ruling No. 139-97 was issued, the law in effect was the 1986 Tax Code; the 1997 NIRC took effect only on January 1, 1998. Moreover, the BIR Ruling referred to a transaction entered into in 1992, when the 1986 Tax Code had been in effect. On the other hand, the BIR issued Revenue Regulations No. 13-2004 when Section 180 of the 1986 Tax Code had already been amended. Nevertheless, the rule would still apply to this case because the pertinent part of Section 180 — the part dealing with promissory notes — remained the same; it imposed the DST on the promissory notes' issuances and renewals, but not on their assignment or transfer: xxx"

Petitioner is not liable to pay interest and surcharge.

On a final point, it is noted that prior to the *Filinvest* decision of the Supreme Court, the prevailing legal milieu was that "inter-office memos" covering intercompany advances were not considered loan agreements subject to the documentary stamp tax (DST) based on various BIR Rulings issued by the CIR, decisions of this Court and more significantly the decision of the Court of Appeals (CA) in the case entitled *Commissioner of Internal Revenue v. Filinvest Development*

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[81] G.R. No. 169899, February 6, 2013.

Corp.[82] In short, petitioner faithfully relied on the pronouncements made by the CIR and the CA on a similar matter, thus prompting its non-payment of said DST.

Accordingly, the Court notes that good faith and honest belief that one is not subject to tax on the basis of previous interpretation of government agencies tasked to interpret and implement the tax laws, are sufficient justification to delete the imposition of surcharges and interest.[83]

WHEREFORE, premises considered, the Petition for Review is partially **DENIED**. The deficiency assessments for income tax and miscellaneous tax for taxable year 2009 are **CANCELLED**. However, the basic DST assessment of ₱139,767,103.56 is **UPHELD**.

Accordingly, petitioner FPUC is ordered to pay **One Hundred Thirty-Nine Million Seven Hundred Sixty-Seven Thousand One Hundred Three and 56/100 Pesos (₱139,767,103.56)** representing basic deficiency DST.

SO ORDERED.

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

WE CONCUR:

Catherine T. Manahan
(With Dissenting Opinion)
CATHERINE T. MANAHAN
Associate Justice

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82 C.A.-G.R. SP No. 74510, January 26, 2005.

83 *Commissioner of Internal Revenue v. St. Luke's Medical Center, Inc.*, G.R. No. 203514, February 13, 2017; *Tambunting Pawnshop, Inc. v. Commissioner of Internal Revenue*, G.R. No. 179085, January 21, 2010; *Antam Pawnshop Corporation v. Commissioner of Internal Revenue*, G.R. No. 167962, September 19, 2008; *Michel J. Lhuillier Pawnshop, Inc. v. Commissioner of Internal Revenue*, G.R. No. 166786, September 11, 2006.

I join the position of Justice Castañeda

ESPERANZA R. FABON-VICTORINO
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL SECOND DIVISION

FIRST PHILIPPINE UTILITIES CORPORATION,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 8993

Members:

CASTAÑEDA, JR., *Chairperson*
MANAHAN, *and*
FABON-VICTORINO,* *JJ.*

Promulgated:
NOV 05 2018 9:N a.m.

x- x

CONCURRING AND DISSENTING OPINION

MANAHAN, *J.:*

I concur with the cancellation of the deficiency assessments for income tax and miscellaneous tax for taxable year 2009. I also concur with the ruling to delete the imposition of surcharges and interest on the deficiency Documentary Stamp Tax (DST). However, I respectfully dissent to the majority's position that a Supreme Court ruling decided in 2011 should apply to transactions which occurred in 2009, thus holding petitioner liable for deficiency DST and cancelling only the assessments for the portion on surcharge and interests.

In the case of *Commissioner of Internal Revenue vs. Filinvest Development Corporation*[1], the Supreme Court ruled in this wise:

> When read in conjunction with Section 173 of the 1993 NIRC, the foregoing provision concededly applies to "all loan agreements, whether made or signed in the Philippines, or abroad when the obligation or right arises from Philippine sources or the property or object of the contract is located or used in the Philippines.

[1] G.R. Nos. 163653 and 167680, July 19, 2011.

xx xxx xxx

> Applying the aforesaid provisions to the case at bench, we find that the instructional letters as well as the journal and cash vouchers evidencing the advances FDC extended to its affiliates in 1996 and 1997 qualified as loan agreements upon which documentary stamp taxes may be imposed.

The majority reasons that the *Filinvest* decision merely interpreted and applied Section 179 of the 1997 National Internal Revenue Code (NIRC), effectively forming part of the law as of the date of its enactment. Hence, the majority ruled that *Filinvest* is deemed effective from the time of enactment of the NIRC, and covers transactions even prior to 2011 when *Filinvest* was promulgated.

It is this legal conclusion that I respectfully disagree with, and proffer, instead, the view that the power to tax must be construed strictly against the government,[2] and any retroactive application of the *Filinvest* doctrine violates the taxpayer's constitutional rights to equity and due process.

There is no question that *Filinvest* provides the current interpretation of the DST provision on loan agreements, which now includes "inter-company advances covered by inter-office memos". However, prior to the afore-quoted decision of the Supreme Court, the prevailing legal milieu was that "inter-office memos" covering intercompany advances were not considered loan agreements subject to the documentary stamp tax (DST) based on various BIR Rulings issued by the respondent, decisions of this Court and more significantly the decision of the Court of Appeals (CA) in the case entitled *Commissioner of Internal Revenue vs. Filinvest Development Corp.*[3] In short, the doctrine enunciated by the Supreme Court in the *Filinvest* case was not controlling at the time herein petitioner entered into such transactions in 2009. In fact, petitioner faithfully relied on the pronouncements made by the respondent and the CA on a similar matter, thus prompting non-payment of said DST.

Article 8 of the Civil Code[4] expressly provides that judicial decisions applying or interpreting the laws shall form part of the

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[2] *Republic of the Philippines vs. Intermediate Appellate Court and Sps. Antonio and Clara Pastor*, G.R. No. 69344, April 26, 1991.

[3] C.A. -G.R. SP No. 74510, January 26, 2005.

[4] "Article 8. Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines."

legal system of the Philippines. Corollarily, Article 4 of the Civil Code[5] mandates the non-retroactivity of laws, unless expressly provided. The principle of prospectivity has also been applied to judicial decisions which although in themselves not laws, are nevertheless evidence of what the laws mean.[6] The reason for this is obvious – it will be inequitable and against the principles of fair play to penalize a taxpayer who relied on the pronouncements of the respondent who is authorized under the law to interpret tax statutes,[7] and from which taxpayers are enjoined to follow. In the absence of a definitive Supreme Court decision interpreting the often vague provisions of the 1997 NIRC on transactions which are subject to DST, the higher interests of justice should compel us not to apply a (fairly) recent Supreme Court decision retroactively to a time period where the CIR himself held and pronounced a contrary view.

The character of BIR Rulings, CTA decisions and the aforementioned decision of the CA all issued prior to the 2011 *Filinvest* case adhered to the theory that "inter-office memos" covering intercompany advances were not loan agreements subject to DST.

In his Memorandum,[8] aside from the *Filinvest case*, respondent cited RMC No. 48-2011 as the basis for the imposition of the alleged deficiency DST. It should be noted that the said rules and regulations were only issued on October 6, 2011.

Section 246 of the NIRC provides:

> SEC. 246. ***Non- Retroactivity of Rulings***. - Any revocation, modification or reversal of any of the rules and regulations promulgated in accordance with the preceding Sections or **any of the rulings or circulars promulgated by the Commissioner shall not be given retroactive application** if the revocation, modification or reversal will be prejudicial to the taxpayers, except in the following cases:

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[5] "Article 4. – Laws shall have no retroactive effect, unless the contrary is provided."

[6] Albino S. Co vs. Court of Appeals and People of the Philippines, G.R. 100776, October 28, 1993.

[7] Section 4 of the 1997 NIRC.
"Power of the Commissioner to Interpret Tax Laws and to Decide Tax Cases.- The power to interpret the provisions of this Code and other tax laws shall be under the exclusive and original jurisdiction of the Commissioner, subject to review by the Secretary of Finance."

xxx xxx xxx

[8] Docket, Vol. III, p. 1076.

> (a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;
>
> (b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or
>
> (c) Where the taxpayer acted in bad faith. (*Emphasis supplied*)

In *ABS-CBN Broadcasting Corporation v. Court of Tax Appeals and Commissioner of Internal Revenue*[9], the Supreme Court sustained the non-retroactivity provision of the previous tax law which is now Section 246 of NIRC as to respondent's rulings or circulars, *viz*:

> In point is Sec. 338-A (now Sec. 327) of the Tax Code. As inserted by Republic Act No. 6110 on August 9, 1969, it provides:
>
> > Sec. 338-A. *Non-retroactivity of rulings.* — Any revocation, modification, or reversal of and of the rules and regulations promulgated in accordance with the preceding section or any of the rulings or circulars promulgated by the Commissioner of Internal Revenue *shall not be given retroactive application if the relocation, modification, or reversal will be prejudicial to the taxpayers*, except in the following cases: (a) where the taxpayer deliberately mis-states or omits material facts from his return or any document required of him by the Bureau of Internal Revenue: (b) where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or (c) where the taxpayer acted in bad faith. (*italics for emphasis*)
>
> **It is clear from the foregoing that rulings or circulars promulgated by the Commissioner of Internal Revenue have no retroactive application where to so apply them would be prejudicial to taxpayers**. The prejudice to petitioner of the retroactive

[9] G.R. No. L-52306, October 12, 1981.

> application of Memorandum Circular No. 4-71 is beyond question. It was issued only in 1971, or three years after 1968, the last year that petitioner had withheld taxes under General Circular No. V-334. The assessment and demand on petitioner to pay deficiency withholding income tax was also made three years after 1968 for a period of time commencing in 1965. Petitioner was no longer in a position to withhold taxes due from foreign corporations because it had already remitted all film rentals and no longer had any control over them when the new Circular was issued. And in so far as the enumerated exceptions are concerned, admittedly, petitioner does not fall under any of them. (*Emphasis and underscoring ours*)

Also, in *Commissioner of Internal Revenue v. Court of Appeals, Court of Tax Appeals, and Alhambra Industries, Inc.*[10], it was ruled that:

> However, well-entrenched is the rule that *rulings and circulars, rules and regulations promulgated by the Commissioner of Internal Revenue would have no retroactive application if to so apply them would be prejudicial to the taxpayers.*
>
> The applicable law is Sec. 246 of the Tax Code which provides -
>
>> Sec. 246. *Non-retroactivity of rulings.*- Any revocation, modification, or reversal of any rules and regulations promulgated in accordance with the preceding section or any of the rulings or circulars promulgated by the Commissioner of Internal Revenue shall not be given retroactive application if the revocation, modification, or reversal will be prejudicial to the taxpayers except in the following cases: a) where the taxpayer deliberately misstates or omits material facts from his return or in any document required of him by the Bureau of Internal Revenue; b) where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or c) where the taxpayer acted in bad faith.
>
> Without doubt, private respondent would be prejudiced by the retroactive application of the revocation

[10] G.R. No. 117982, February 6, 1997.

> as it would be assessed deficiency excise tax. *(Underscoring ours)*

In the consolidated cases of *CIR vs. San Roque Power, Taganito Mining Corp vs. CIR and Philex Mining Corp vs. CIR*[11], the Supreme Court recognized the good faith of the taxpayers who relied on previous rulings which turn out to be erroneous under a recent interpretation:

> Since the Commissioner has exclusive and original jurisdiction to interpret tax laws, taxpayers acting in good faith should not be made to suffer for adhering to general interpretative rules of the Commissioner interpreting tax laws, **should such interpretation later turn out to be erroneous and be reversed by the Commissioner or this Court**. Indeed, Section 246 of the Tax Code expressly provides that a reversal of a BIR regulation or ruling cannot adversely prejudice a taxpayer who in good faith relied on the BIR regulation or ruling prior to its reversal. (emphasis supplied)

More recently, the Supreme Court cited equity and compassionate social justice in declaring that its ruling on a BIR Revenue Memorandum Order (RMO) is to be given only prospective effect:

> As a final point, the Court cannot turn a blind eye to the adverse effects of this Decision on ordinary government employees, including petitioners herein, who relied in good faith on the belief that the appropriate taxes on all the income they receive from their respective employers are withheld and paid. Nor does the Court ignore the situation of the relevant officers of the different departments of government that had believed, in good faith, that there was no need to withhold the taxes due on the compensation received by said ordinary government employees. Thus, as a measure of equity and compassionate social justice, the Court deems it proper to clarify and declare, *pro hac vice*, that its ruling on the validity of Sections III and IV of the assailed RMO is given only prospective effect.[12]

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[11] G.R. Nos. 187485,196113 and 197156, February 12, 2013.

[12] *Confederation for Unity, Recognition and Advancement of Government Employees (COURAGE), et al. v. Commissioner, Bureau of Internal Revenue and the Secretary, Department of Finance/Judge Armando A. Yanga and Cristina Carmela I. Japzon v. Hon. Commissioner Kim S. Jacinto-Henares*, G.R. Nos. 213446 and 213658, July 3, 2018.

While the abovequoted decision specifically stated that its prospectivity applies only *pro hac vice*, the interests of equity and social justice must also be protected in the instant case. Since the retroactive application of the *Filinvest case* as well as RMC No. 48-2011 will surely prejudice the interest of the petitioner, and other taxpayers in the same situation, which have relied on the previous BIR rulings, rules and regulation on the non-taxability of the inter-office memos covering advances granted to affiliated corporation, I vote that the *Filinvest* case be applied prospectively for fairness, equity and compassionate social justice.

WHEREFORE, I vote to grant the Petition for Review. Accordingly, the deficiency assessments for income tax, documentary stamp tax, and miscellaneous tax for taxable year 2009 amounting to ₱289,733,393.79 should be CANCELLED and DECLARED null and void.

SO ORDERED.

CATHERINE T. MANAHAN
Associate Justice