Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

EN BANC

ACES PHILIPPINES CELLULAR SATELLITE CORPORATION, Petitioner,	**CTA EB CASE NO. 1242** (CTA Case No. 8567)
	Present: **DEL ROSARIO, P.J., CASTAÑEDA, JR. BAUTISTA UY CASANOVA FABON-VICTORINO MINDARO-GRULLA COTANGCO-MANALASTAS and RINGPIS-LIBAN, JJ.**
-versus-	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	Promulgated: JUN 08 2016 10:19 a.m.

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision is a Petition for Review for the Court *En Banc* under Rule 4, Section 2(a)(1), in relation to Rule 8, Section 4(b) of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA)[1], as amended, of the Decision[2]

[1] Sec. 2. *Cases within the jurisdiction of the Court en banc.*- The Court en banc shall exercise exclusive appellate jurisdiction to review by appeal the following:

(a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Division in the exercise of its exclusive appellate jurisdiction over:

(1) Cases arising from administrative agencies- Bureau of Internal Revenue, Bureau of Customs, Department of Finance, Department of Trade and Industry, Department of Agriculture;

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Sec. 4. *Where to appeal; mode of appeal.*-
(a) xxx.
(b) An appeal from a decision or resolution of the Court in Division on a motion for reconsideration or new trial shall be taken to the Court by petition for review as provided in Rule 43 of the Rules of Court. The Court en banc shall act on the appeal.
(c) xxx.

dated July 23, 2014, rendered by the Second Division of this Court in CTA Case No. 8567, and its Resolution[3] dated October 15, 2014. The Second Division of this Court affirmed with modification respondent Commissioner of Internal Revenue's (CIR) Final Decision on Disputed Assessment dated August 23, 2012.

Petitioner Aces Philippines Cellular Satellite Corporation ("Aces" for brevity) assails both the aforesaid Decision and Resolution, the dispositive portions of which, respectively, read as follows:

<u>Decision dated July 23, 2014:</u>

*"**WHEREFORE**, premises considered, the assessment issued by respondent against petitioner covering deficiency final withholding tax for taxable year 2006 as per assailed Final Decision on Disputed Assessment dated August 23, 2012 is hereby **AFFIRMED** with some modifications. Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of P87, 199,073.94, representing deficiency final withholding tax for taxable year 2006, inclusive of the twenty five percent (25%) surcharge imposed under Section 248(3) of the NIRC of 1997, computed as follows:*

Basic Final Withholding Tax Due	*P 69,759,259.15*
Add: 25% Surcharge	*17,439,814.79*
TOTAL AMOUNT DUE	***P 87,199,073.94***

*Likewise, petitioner is **ORDERED TO PAY** the following:*

(a) deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency final withholding tax of P69,759,259.15 computed from January 10, 2007 until full payment thereof pursuant to Section 249(B) of the NIRC of 1997;and

(b) delinquency interest at the rate of 20% per annum on the total amount of P87,199,073.94 and on the 20% deficiency interest which have accrued as afore-stated in (a), computed from October 3, 2012 until full

[2] En banc Docket, pp. 307-333.
[3] En banc Docket, pp. 382-387.

payment thereof pursuant to Section 249(C) of the NIRC of 1997.

SO ORDERED."

Resolution dated October 15, 2014:

*"**WHEREFORE**, premises considered, petitioner's Motion for Reconsideration is hereby **DENIED** for lack of merit.*

***SO ORDERED**."*

The petition seeks that the Court en banc rule that petitioner Aces Philippines Cellular Satellite Corporation's payment of satellite air time fee to Aces International Limited (AIL) be treated as income from sources outside of the Philippines. It is not.

The pertinent facts as narrated by this Court's Division in its Decision read as follows:

"Petitioner Aces Philippines Cellular Satellite Corporation is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office address at Group V Naval Magazine, Subic Bay Freeport Zone. It is registered with the Subic Bay Metropolitan Authority as a Subic Bay Freeport Enterprise for the purpose of engaging in the business of providing communication services via satellite, having been issued a Certificate of Registration and Tax Exemption No. 99-0010 dated November 12, 2006.

On the other hand, respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) vested with authority to exercise the functions of said office, including, inter alia, 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. She holds office at the BIR National Office Building, Diliman, Quezon City.

In 1995, petitioner was incorporated in the Philippines to operate telecommunications gateways and *equipment involving the processing, storage, monitoring and retrieval of data, image, voice, audio and tone.*

On March 12, 1997, petitioner, through its parent company Philippine Long Distance Telephone Company (PLDT), entered into an Air Time Purchase Agreement with P.T. Asia Cellular Satellite (PTACS), a company duly established and organized in Indonesia. The said agreement was subsequently assigned by PLDT to petitioner, while PTACS assigned the same agreement to Aces International Limited (AIL) in 1998. AIL is a foreign corporation duly established and organized in Bermuda. Its principal business objective is to provide and develop a mobile satellite telecommunication network in the Asia-Pacific region and to engage in any other business required to achieve the said objective.

The agreement granted petitioner the right to purchase satellite communications time from AIL which petitioner sells and furnishes to its subscribers, the consideration for which is the payment of satellite airtime fees by petitioner to AIL.

Petitioner received a copy of the BIR Letter of Authority (LOA) No. 00051992 dated August 21, 2007 on September 5, 2007, designating Revenue Officer Leilani Arellano under the supervision of OTC-Assistant Revenue District Officer Esperanza Castro of Revenue District Office (RDO) No. 19, Revenue Region No. 4, to examine petitioner's books of accounts and other accounting records for all internal revenue taxes for taxable year 2006.

Subsequently, petitioner received the First Notice for Presentation of Records (BIR First Notice) from the BIR dated August 28, 2007, enumerating the list of audit requirements pursuant to BIR LOA No. 00051992. Petitioner likewise received a Second Notice for Presentation of Records dated September 20, 2007, reiterating BIR's request for the presentation of petitioner's books of accounts and accounting records for taxable year 2006 pursuant to BTR LOA No. 00051992.

Thereafter, petitioner transmitted the documents requested in the BIR's First and Second Notices in a letter dated October 4, 2007, which was received by BIR RDO No. 19 on October 10, 2007. Petitioner, in the same letter, requested to be allowed to complete the rest of the requirements until the end of October 2007.

On December 8, 2009 petitioner executed a Waiver of the Defense of Prescription under Statute of Limitation *of the National Internal Revenue Code to extend the period for the assessment of taxes up to December 31, 2010. This waiver was received by the BIR on December 9, 2009.*

Petitioner then submitted to the BIR additional documents relative to the BIR audit through a transmittal memo dated June 1, 2010, which was received on June 3, 2010.

On June 10, 2010, petitioner received a Notice of Informal Conference dated May 27, 2010 from respondent, through then OIC-Revenue District Officer Rey Roberto Manalili of RDO No. 19, relative to petitioner's alleged deficiency income tax, expanded withholding tax (EWT), final withholding tax (FWT), and documentary stamp tax (DST), inclusive of penalties, the total of which amounted to P176,688,087.39. The said Notice further advised petitioner to attend the informal conference within fifteen (15) days from receipt, otherwise, an assessment will be issued for approval by higher authorities.

Petitioner attended the informal conference on June 28, 2010, wherein petitioner and respondent discussed the details of the initial findings in the Notice and petitioner informed respondent that it will submit a position paper to address the said findings.

On July 1, 2010, petitioner wrote OIC-Revenue District Officer Rey Roberto Manalili, requesting an extension of fifteen days from date of informal conference to submit the position paper. This letter was received on July 6, 2010.

On July 2, 2010, petitioner executed another Waiver of the Defense of Prescription under Statute of Limitation of the National Internal Revenue Code to extend the period for the assessment of taxes up to March 31, 2011.

Petitioner submitted its position paper on the findings of deficiency taxes enumerated in the Notice of Informal Conference on July 12, 2010.

On August 2, 2010, petitioner received a letter from RDO No. 19 dated July 23, 2010, containing revised findings of deficiency taxes after taking into consideration the position paper filed by petitioner. The letter stated that there is still found due from petitioner deficiency EWT and FWT, inclusive of penalties, amounting to P136,458,794.53.

Thereafter, petitioner filed a supplemental position paper dated August 12, 2010, addressing the issues raised *in the revised findings, which was received by the office of Atty. Romulo Aguila, Jr., Regional Director of Revenue Region No. 4, on August 18, 2010.*

On January 21, 2011, respondent, as represented by the Regional Director of Revenue Region No. 4, issued a Preliminary Assessment Notice (PAN) to inform petitioner of its final withholding tax, value-added tax, and expanded withholding tax liabilities, inclusive of penalties, amounting to P147,755,274.69. Petitioner received the PAN on March 2, 2011.

Petitioner filed a position paper against the PAN dated March 22, 2011, which was received by respondent through the Office of the Regional Director of Revenue Region No. 4 on March 28, 2011.

Petitioner received a Formal Letter of Demand and FAN No. 019-E-0704006650 with the corresponding details of discrepancies dated February 14, 2011 from respondent as represented by the Regional Director of BIR Revenue Region No. 4, reiterating the demand for payment of deficiency FWT, VAT, and EWT, inclusive of penalties, amounting to P152,759,792.12. Petitioner received the FAN on March 22, 2011.

On April 14, 2011, petitioner filed its protest letter to the FAN dated April 8, 2011, pursuant to Section 228 of the NIRC of 1997, as amended, which allows a taxpayer thirty (30) days from receipt of the assessment to protest the FAN.

On May 23, 2011, petitioner received a facsimile copy of a letter from respondent, stating the following matters: (1) referral of the BIR audit of petitioner for taxable year 2006 to another BIR revenue officer, Ms. Gracita Agaton; (2) reinvestigation of the alleged deficiency taxes indicated in the FAN; and (3) request for detailed schedule of gross receipts and audit transaction trail of interconnection fee.

On June 13, 2011 , petitioner transmitted the requested documents in a letter dated June 9, 2011 to respondent through Atty. Maglangit S. Decampong, the OIC-Assistant Revenue District Officer of RDO No. 19.

Petitioner received a facsimile copy of an Amended Notice of Informal Conference dated August 10, 2011 from respondent through the OIC-Assistant Revenue District Officer of RDO No. 19, informing petitioner of the revised findings of alleged deficiency taxes after the results of *reinvestigation. The Amended Notice showed deficiency expanded withholding taxes and final withholding taxes, inclusive of penalties, amounting to P147,762,520.41.*

On August 23, 2011, petitioner paid the deficiency expanded withholding taxes, inclusive of penalties, as indicated in the Amended Notice amounting to P80,421.88 through the BIR e-filing and e-payment system.

In a letter dated August 24, 2011, petitioner protested the deficiency final withholding tax assessment in the Amended Notice, which was received by the Revenue District Officer of RDO No. 19 on September 7, 2011.

On October 12, 2011, petitioner received a facsimile copy of a letter dated October 11, 2011 from respondent, requiring petitioner to submit additional documents in order to clarify issues raised by the Assessment Division of Revenue Region No. 4.

Petitioner submitted the requested documents to respondent, through the office of the Revenue District Officer of RDO No. 19, in a letter dated October 25, 2011. The said letter and the requested documents were received on November 2, 2011 by Ms. Gracita Agaton, Revenue Officer of the Assessment Division.

On December 15, 2011, petitioner received a facsimile copy of another Amended Notice of Informal Conference (Second Amended Notice) from respondent through Mr. Rey Roberto Manalili, the Revenue District Officer of RDO No. 19, informing petitioner of the revised findings involving the alleged deficiency final withholding taxes. Petitioner in a letter dated December 20, 2011 filed a position paper to the Second Amended Notice which was received on December 22, 2011.

On February 28, 2012, petitioner received a facsimile copy of a letter dated on the same date from the office of Atty. Maglangit S. Decampong, the OIC-Assistant Revenue District Officer of RDO No. 19, informing petitioner that the Legal Division of Revenue Region No. 4 has issued a memorandum bearing the final resolution on the issue of the deficiency final withholding taxes. The letter likewise mentioned the endorsement of the case to Revenue Region No. 4 for the issuance of the final decision on disputed assessment.

On March 7, 2012, petitioner submitted to respondent, through the office of Ms. Araceli Francisco, the

Regional Director of Revenue Region No. 4 , a copy of the financial statements of the non-resident payee subject of the alleged deficiency final withholding taxes in order to bolster petitioner's stance that the purported deficiency final withholding taxes should be withdrawn and cancelled.

Petitioner received a copy of the Revised Report of Investigation dated June 13, 2012 from the office of Atty. Maglangit S. Decampong, the OIC-Assistant Revenue District Officer, on June 19, 2012, stating the remaining findings of alleged deficiency final withholding taxes, inclusive of penalties, amounting to P163,377,931.84, and inviting petitioner to an informal conference within ten (10) days from receipt of said Revised Report.

Respondent finally issued on August 23, 2012 a Final Decision on Disputed Assessment through Ms. Araceli Francisco, which was received by petitioner on October 3, 2012.

As a result, petitioner filed the instant Petition for Review on November 5, 2012, assailing the FDDA issued on August 23, 2012.

Respondent interposed the following special and affirmative defenses in her Answer filed on January 14, 2013:

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7. The primary issue of the instant case is whether the Air Time fees paid by petitioner to AIL, a non-resident foreign corporation, are income from services rendered within the Philippines, hence, subject to 35% Final Withholding Tax.

8. Substantial to the foregoing, the assessment made by respondent against the petitioner is based on factual and legal basis.

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9. The tax deficiency against the petitioner is proper and valid. The records show that petitioner has an Air Time Purchase Agreement with AIL, a non-resident foreign corporation and not engaged in trade or business in the Philippines. In the said agreement, it was stipulated that petitioner has the right to satellite communications time to serve its subscribers and for which it paid airtime fees to AIL.

10. Based on the foregoing, it is clear that the airtime fees paid by petitioner to AIL are income derived from sources within the Philippines. Those fees are the income from services rendered in the Philippines. It can be noted that the communication time rendered by AIL, through petitioner, was made available within the Philippines, subscribed and patronized by Filipinos and, consequently, they paid their subscription fees for such services. All of these transactions and activities occurred within the Philippines.

11. Non-residents foreign corporations are liable to pay taxes for income derived from sources within the Philippines. The source or origin of income is determined by the situs where the activity or service was performed. As claimed by the petitioner, it cannot be said that the situs of the activity, in this case, took place outside the Philippines because the nature of the business of AIL speaks otherwise. The activity in which the AIL is engaged in providing a satellite communication time. As such, there can only be an income-producing activity when such communication time is subscribed into. Petitioner, on its part, entered into an Airtime Purchase Agreement with AIL to make this satellite communication time available in the Philippines. With that, the services, which is making the satellite communication time available in the Philippines, is actually offered in the Philippines, and subscribed within the Philippines. There is, indeed, no doubt that the fact that the exchange of service and money, as payment for such service, occurred within the Philippines.

12. xxx. Contrary to such claim, the absence of such ground station in the Philippines is not determinative of the situs of the income-producing activity. On the contrary, what determines situs is place where the income generating activity took place. Based on the factual findings of the respondent, the income derived by AIL are sourced within the Philippines.

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On July 23, 2014, this Court's Division affirmed with modification respondent CIR's Final Decision on Disputed Assessment dated August 23, 2012. The findings of this Court's Division is that petitioner pays AIL airtime fees only when the satellite air time is delivered to petitioner and to its subscribers and is subsequently utilized by them in the Philippines for a voice or data call, excluding satellite utilization time for call set-up, unanswered calls and incomplete calls. Thus, the Court's Division ruled that the activity that produces income is the undertaking of providing satellite communication time to be delivered by AIL and utilized by petitioner and its subscriber in the Philippines

Petitioner ACES filed a Motion for Reconsideration insisting that all the services made by AIL was outside of the Philippines and that it is not the intent of the law to simultaneously impose 20% deficiency and delinquency interest but was denied for lack of merit, hence, the present petition.

On May 28, 2015, the petition was submitted for decision after petitioner ACES and respondent CIR filed their respective memoranda on May 13, 2015 and May 5, 2015.

Petitioner ACES raises the following issues:

A. WHETHER OR NOT THE SATELLITE AIRTIME FEES PAID BY PETITIONER TO THE NONRESIDENT PAYEE IS CONSIDERED INCOME SOURCED WITHIN THE PHILIPPINES, HENCE SUBJECT TO PHILIPPINE INCOME TAX AND CONSEQUENTLY TO FINAL WITHHOLDING TAX.

B. WHETHER OR NOT THE SERVICE SUBJECT OF THE SATELLITE AIRTIME FEES CONSIDERED PERFORMED IN THE PHILIPPINES SO AS TO BE DEEMED PHILIPPINE SOURCED INCOME.

Petitioner argues that payments for satellite air transmission received by a non-resident foreign company are from sources outside the Philippines, hence, not subject to final withholding tax. Petitioner claims that AIL is paid the satellite air time fees only when the satellite air time is delivered to petitioner and its subscribers and subsequently utilized by them in the Philippines[4]. Petitioner insists that the services rendered by AIL such as the use of Garuda Satellite (located in outer space), Network Control Center (located in Indonesia) are made outside of the Philippines. Petitioner claims that AIL's service is terminated when its Network Control Center (located in Indonesia) provides information to Garuda Satellite (located in outer space) on which gateway the call shall be routed. Without petitioner's own gateway located in the Philippines, the call cannot be terminated and would be incomplete.[5]

Petitioner argues that the BIR has opined that satellite services fees are considered derived from sources outside of the Philippines, not subject to income tax. Likewise, petitioner claims that under United States tax laws, jurisprudence and tax regulations (which has persuasive effect in our jurisdiction) the source of AIL's income derived from satellite airtime services is the act of transmission of the call which occurs in outer space, and not the property, activity or service that produced the income.[6] Nonetheless, petitioner insists that none of AIL's income is derived from sources within the Philippines.

Respondent on the other hand maintains that in our jurisdiction "source of income" relates to the property, activity or service that produced the income. Respondent argued that AIL's activity which produced the income took place in the Philippines considering that the AIL's activity provides the satellite communication time available in the Philippines.

We resolve.

It is a settled jurisprudence that the "source of income" relates to the property, activity or service that produced the income. [7] In this case, both petitioner and respondent

[4] En banc Docket, Vol. 1, Petition for Review Memorandum, p. 51.
[5] En banc Docket, Vol. 2, Memorandum p. 488.
[6] En banc Docket, Vol. 2, Memorandum p. 498
[7] Commissioner of Internal Revenue, vs. Juliane Baier-Nickel, as represented by Marina Q. Guzman (Attorney-in-fact) G.R. No. 153793 August 29, 2006; Commissioner of Internal Revenue vs. American Airlines, Inc. and Court of Tax

maintain the position that the payment of satellite air time fees is a service fee. Thus, petitioner insists that use or services rendered by the Garuda Satellite (located in outer space) and the Network Control Center (located in Indonesia) are services made outside of the Philippines rendering the satellite air time fees as income outside of the Philippines.

We are not persuaded. The satellite air time fees are considered as income from sources within the Philippines. The services for satellite air time fees do not only compound with use of the Garuda Satellite (located in outer space) and the Network Control Center (located in Indonesia), but also require that satellite communication time be available and delivered in the Philippines. There is a continuous and very real connection starting from the Philippines (that is the agreement to sell satellite communications time for the ACES System in the Philippines), Garuda Satellite (located in outer space), the Network Control Center (located in Indonesia) and again the Philippines, through petitioner's gateway facilities.

In fact, the activity and services that produces the income is the undertaking of providing satellite communication to be delivered in the Philippines by AIL to petitioner. In our income tax law, it is sufficient that the income is derived from an activity within the Philippines.[8] Place of activity, not place of business, is controlling. Since an activity may consist of only a single transaction whereas business implies a continuity of transaction[9]. Thus, this Court's Division aptly ruled that respondent CIR is correct in imposing final withholding tax on the service fees paid to AIL which are considered income from sources within the Philippines, to wit:

Appeals, G.R. No. 67938, December 19, 1989; Commissioner of Internal Revenue vs. Air India and The Court of Tax Appeals, G.R. No. 72443 January 29, 1988; Commissioner of Internal Revenue vs. British Overseas Airways Corporation, G.R. No. L-65773-74, April 30, 1987.

[8] British Traders' Insurance Co., Ltd. vs. Commissioner of Internal Revenue, G.R. No. L-20501, April 30, 1965.
[9] Ibid.

"The Court found instructive Section 28(B) of the NIRC of 1997, as amended , which provides:

> *'SEC. 28. Rates of Income Tax on Foreign Corporations. -*
>
> *xxx xxx xxx*
>
> *(B) Tax on Nonresident Foreign Corporation. -*
>
> *(1) In General. - Except as otherwise provided in this Code, a foreign corporation not engaged in trade or business in the Philippines shall pay a tax equal to thirty-five percent (35%) of the gross income received during each taxable year* ***from all sources within the Philippines*** *xxx' (Emphasis supplied)*

Simply put, the income of the non-resident foreign corporation, AIL in this case , is taxable in the Philippines if the income is received from all sources within the Philippines. In relation thereto, Section 57 of the NIRC of 1997, as amended, requires the payor-corporation, such as petitioner, to withhold the tax imposed under Section 28(B)(1) of the N IRC of 1997, as amended.

Significantly, in order for the service fees to be treated as gross income from sources within the Philippines, the income or compensation for labor or personal services should be performed in the Philippines as provided under Section 42(A)(3) of the NIRC of 1997, as amended.

In the case of Commissioner of Internal Revenue vs. Juliane Baier-Nickel, as represented by Marina Q. Guzman, (Attorney-in-fact), the Supreme Court held that the important factor which determines the ***source of income*** *of personal services is not the residence of the payor, or the place where the contract for service is entered into, or the place of payment,* ***but the place where the services were actually rendered****.*

In the same case, the High Court cited the case of Alexander Howden and Co., Ltd. vs. Collector of Internal Revenue, wherein the Supreme Court addressed the issue on the applicable source rule relating to reinsurance premiums paid by a local insurance company to a foreign insurance company in respect of risks located in the Philippines. It was held therein that ***the undertaking of the foreign insurance company to indemnify the local insurance company is the activity that produced the income. Since the activity took place in the Philippines, the income derived therefrom is***

taxable in our jurisdiction. *Citing Mertens, The Law of Federal Income Taxation, the Supreme Court emphasized that the technical meaning of* ***source of income is the property, activity or service that produced the same****.*

Clearly, the 'source of income' is the place where the service was performed or the place where the activity that produced the income took place.

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In the Founder NSP Air Time Purchase Agreement dated March 12, 1997 between PT Asia Cellular Satellite (PTACS) and Philippine Long Distance Telephone Company (PLDT), PTACS agreed to sell satellite communications time for the ACES System to PLDT, and PLDT agreed to purchase satellite communications time for the ACES System from PTACS and be the sole supplier of ACES Services to subscribers residing in the Philippines. ACES Services is defined in the agreement as the services utilizing the ACES System.

It is further provided in the agreement that PLDT will, throughout the term of the contract, ***purchase from PTACS such Billable Units of satellite communications time as PLDT requires to provide the ACES Services in the Philippines and as PTACS is able to deliver.***

Also, as to the term of payment, it was stipulated that PTACS will invoice PLDT, and PLDT will pay, ***for all satellite communications time, measured in Billable Units, used by PLDT during each Billing Month in a Billing Period****.*

Billable Unit is defined in the agreement as each six-second interval (fractions thereof to be rounded up to the next six-second interval) of ***satellite utilization time for a voice or data call to or from a terminal, excluding satellite utilization time for call set-up, unanswered calls and incomplete calls.***

It must be noted that the said agreement was subsequently assigned by PLDT to petitioner while PTACS assigned the same agreement to AIL in 1998. After consideration of the relevant portions of the agreement and its subsequent assignment to petitioner and AIL, the Court finds that petitioner pays AIL airtime fees only when the satellite airtime is delivered to petitioner and to its subscribers and is subsequently utilized by them in the Philippines for a voice or data call, excluding satellite

> *utilization time for call set-up, unanswered calls and incomplete calls.*
>
> *In other words, the activity that produces income is the undertaking of providing satellite communication time to be delivered by AIL and utilized by petitioner and its subscribers in the Philippines. Therefore, the activity which produced the income took place in the Philippines. Accordingly, respondent is correct in imposing final withholding tax on the service fees paid to AIL which are considered income from sources within the Philippines."*

The contract reveals that the consideration is the undertaking assumed by AIL of providing successful transmission of satellite signals to petitioner in the Philippines. It is only when the satellite signals are received by petitioner's gateway facilities situated in the Philippines that it can be said that the performance of the contractual services was fully consummated or rendered. Petitioner pays air time fees only when the satellite air time is successfully delivered to the petitioner through its gateway facilities in the Philippines. For unanswered or incomplete calls no charges are billed against petitioner even if the Garuda Satellite (located in outer space), the Network Control Center (located in Indonesia) were used. Clearly the absence of successful transmission of the satellite signal by AIL to petitioner's gateway facilities located in the Philippines, income or payment for satellite airtime fees will not arise. Thus, it is incorrect to state that the act of transmission of satellite signals occurs entirely outside of the Philippines considering that there is no satellite transmission to speak of if the signal does not reach the gateway facilities situated in the Philippines.

"Income" in our income tax law refers to the flow of wealth. [10] AIL's contract with petitioner extended its activities within the Philippine boundaries. It arises from the activity and services that produces the income within the Philippines. The satellite air time fees are income from sources within the Philippines. Thus, it enjoyed the protection of the government and should be controlled by the government. As wealth flowing from within the taxing

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[10] Alexander Howden & Co. Ltd., H.G. Chester & Others, et. al. vs. The Collector (Now Commissioner) of Internal Revenue, G.R. No. L-19392, April 14, 1965.

jurisdiction of the Philippines, said income should properly share the burden of maintaining the government. [11] Accordingly, the jurisdiction of the Philippine government to tax must be upheld.

As to whether deficiency interest may not properly be imposed on Final Withholding Tax (FWT) assessed against petitioner, We rule that deficiency interest should be imposed on FWT.

Final withholding tax is the **full and final payment of income tax due from the recipient of the income and the obligation to withhold the tax is imposed by law on the payor of the goods or service** pursuant to Section 2.57(A) of Revenue Regulations No. 2-98 which states:

> (A) Final Withholding Tax. Under the final withholding tax system the amount of income tax withheld by the withholding agent is constituted as a full and final payment of the income tax due from the payee on the said income. **The liability for payment of the tax rests primarily on the payor as a withholding agent. Thus, in case of his failure to withhold the tax or in case of under withholding, the deficiency tax shall be collected from the payor/withholding agent.** The payee is not required to file an income tax return for the particular income. (Emphasis supplied)

Clearly, the liability for payment of the final withholding tax or deficiency tax rests upon petitioner as the payor/withholding agent. Petitioner is considered a taxpayer under the NIRC as he is personally liable for the withholding tax as well as for deficiency assessments, surcharges, and penalties, should the amount of the tax withheld be finally found to be less than the amount that should have been withheld under law.[12]

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[11] Ibid.
[12] Commissioner of Internal Revenue vs. Smart Communications Inc., G.R. Nos. 179045-46, August 25, 2010; Commissioner of Internal Revenue v. Procter & Gamble Philippine Manufacturing Corporation, G.R. No. 66838, December 2, 1991, 204 SCRA 377.

Deficiency interest is imposed on tax that is still due and unpaid to the government. [13] Otherwise stated, deficiency interest is imposed on shortage of taxes. [14] Concomitantly, shortage of taxes either because of the failure to withhold the final tax or in case of under withholding of the final tax shall render the payor/withholding agent liable to deficiency interest. In this case, petitioner failed to withhold the final tax and as such shall be subject to deficiency interest. Moreover, the issue of whether the satellite air time fees are income from sources within the Philippines in order to be subject to Final Withholding Tax, is within "TITLE II - Tax on Income" of the National Internal Revenue Code, as amended.

In sum, there is no compelling reason to disturb the findings and conclusion of the Court in Division as it is supported by the evidence on record and is consistent with prevailing law and jurisprudence.

WHEREFORE, the Petition for Review is **DENIED,** for lack of merit. Accordingly, the Decision of the Second Division promulgated on July 23, 2014 and Resolution dated October 15, 2014 are **AFFIRMED**. No pronouncement as to costs.

SO ORDERED.

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

WE CONCUR:

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

[13] Takenaka Corporation Philippine Branch vs. Commissioner of Internal Revenue, CTA EB Case No. 745, September 4, 2012.
[14] Ibid.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

(with Dissenting Opinion)
LOVELL R. BAUTISTA
Associate Justice

(joins PJ del Rosario's Concurring and Dissenting Opinion)
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

(On Leave)

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation among the members of the Court En Banc before the case was assigned to the writer of the opinion of the Court En Banc.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

ACES PHILIPPINES CELLULAR SATELLITE CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 1242
(CTA Case No. 8567)

Present:

Del Rosario, P.J.,
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalasta, and
Ringpis-Liban, JJ.

Promulgated:
JUN 08 2016 10:19a.m.

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CONCURRING AND DISSENTING OPINION

DEL ROSARIO, PJ:

I concur with the *ponencia* in denying the Petition for Review and in affirming the assailed Decision and Resolution of the Court in Division with the exception, however, on the propriety of the imposition of 20% deficiency interest which I submit is without valid basis under the law.

With due respect, I submit that the 20% deficiency interest on the basic deficiency Final Withholding Tax (FWT) cannot be imposed against petitioner. In this regard, I quote below the recent position I have taken in the consolidated cases of *Commissioner of Internal Revenue vs. Philippine Tobacco Flue-Curing & Redrying Corporation*[1] on the imposition of deficiency interest:

[1] CTA EB Nos. 1218 and 1220, April 11, 2016. This is consistent with my earlier opinion in *Avon Products Manufacturing, Inc. vs. Commissioner of Internal Revenue, CTA EB No. 1062, January 15, 2016; CIR vs. Staedtler (Philippines),*

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

> "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
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> **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**.

Inc., CTA EB No. 1310, January 28, 2016; Medicard Philippines, Inc. vs. CIR, CTA EB No. 1224, January 29, 2016; Lourdes College vs. CIR, CTA EB No. 1164, February 2, 2016; Philippine Aerospace Development Corporation vs. CIR, CTA EB No. 1035, February 9, 2016; CIR vs. BPI-Philam Life Assurance Corporation, CTA EB No. 1240, February 11, 2016; CIR vs. OfficeMetro Philippines, Inc. (formerly Regus Centres, Inc.), and OfficeMetro Philippines, Inc. vs. CIR, CTA EB Nos. 1210 & 1213, March 7, 2016; and CIR vs. ESS Manufacturing Company, Inc., ESS Manufacturing Company, Inc. vs. CIR, CTA EB Nos. 1169 & 1175, March 30, 2016.

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

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

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-
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> (B) Deficiency Interest. – Any deficiency in the tax due, **as the term is defined in this Code**,

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> 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."

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 basic deficiency FWT assessed against petitioner**.

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

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

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

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> **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.**

All told, I vote to DENY the Petition for Review and to AFFIRM the assailed Decision and Resolution of the Court in Division WITH MODIFICATION relating to the assessed 20% deficiency interest on Final Withholding Tax which should appropriately be CANCELLED AND SET ASIDE.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

ACES PHILIPPINES CELLULAR SATELLITE CORPORATION, *Petitioner,*	**CTA *EB* NO. 1242** CTA Case No. 8567
- *versus* -	Present: ***Del Rosario, P.J., Castañeda, Jr., Bautista, Uy, Casanova, Fabon-Victorino, Mindaro-Grulla, Cotangco-Manalastas,*** *and* ***Ringpis-Liban, JJ.***
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: JUN 08 2016 10:19a.m.

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DISSENTING OPINION

BAUTISTA, J:

With great respect and reluctance, I dissent from the opinion of Justice Mindaro-Grulla speaking for the majority. In my opinion, the assessment for final withholding tax ("FWT") against petitioner ACeS Philippines Cellular Satellite Corporation ("ACeS") for taxable year 2006, including surcharge, should be cancelled and set aside.

The fundamental issue to be resolved by the Court *En Banc* is whether income derived by a non-resident foreign corporation, *i.e.*, ACeS International Limited ("AIL"), from satellite air transmission is Philippine-sourced income subject to final withholding income tax.

The subject of the deficiency FWT assessment against ACeS in the present case is essentially an assessment on the income received by AIL from the satellite air transmission services AIL rendered in favor of ACeS; however, under the final withholding tax system[1], ACeS, as withholding agent, was mandated to withhold the income tax due from AIL (if any). Hence, the issue boils down to whether the income of AIL from services it rendered in favor of ACeS is subject to Philippine income tax, which should have been subjected by ACeS to FWT.

It is a general principle of Philippine income taxation that foreign corporations are taxable only on their income from sources derived in the Philippines.[2] According to the source rules, compensation for labor or personal services performed within the Philippines is considered sourced from the Philippines and subject to income tax.[3] On the other hand, compensation for labor or personal services performed outside the Philippines is considered sourced from outside the Philippines and not subject to income tax.[4]

In determining the *situs* of taxation, the Supreme Court has held that the source of an income is the property, activity, or service that produced the income,[5] and that it is sufficient that the income is derived from activity within the Philippines for the source of income to be Philippine-sourced.[6] As applied to income from the rendition of services, the Supreme Court has held that the place where the labor or service is performed determines the source of the income.[7]

In the CTA Second Division's Decision[8] promulgated on July 23, 2014, the Court in Division dissected the nature of the services performed by AIL, as follows:

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[1] *See* Consolidated Withholding Tax Regulations, § 2.57(A).
[2] 1997 NIRC, § 23(F).
[3] Section 23(F) in relation to Section 42(A)(3), 1997 NIRC.
[4] Section 23(F) in relation to Section 42(C)(3), 1997 NIRC.
[5] *See Commissioner of Internal Revenue ("CIR") v. British Overseas Airways Corporation*, G.R. Nos. L-65773-74, April 30, 1987, 149 SCRA 395; *Alexander Howden & Co., Ltd. v. Collector of Internal Revenue*, G.R. No. L-19392, April 14, 1965, 130 SCRA 601.
[6] *See CIR v. British Overseas Airways Corporation*, G.R. Nos. L-65773-74, April 30, 1987, 149 SCRA 395.
[7] *See CIR v. Baier-Nickel*, G.R. No. 153793, August 29, 2006, 500 SCRA 87.
[8] *Records, CTA Case No. 8567, Vol. V*, pp. 2202-2228; penned by Associate Justice Amelia R. Contangco-Manalastas, with Associate Justices Juanito C. Castañeda, Jr. and Caesar A. Casanova.

Accordingly, the Court shall determine whether the evidence presented by petitioner is sufficient to prove that the services rendered by the non-resident foreign corporation were not performed in the Philippines in order for the income to be exempt from tax in the Philippines.

In the Founder NSP Air Time Purchase Agreement dated March 12, 1997 between PT Asia Cellular Satellite (PTACS) and Philippine Long Distance Telephone Company (PLDT), PTACS agreed to sell satellite communications time for the ACeS System to PLDT, and PLDT agreed to purchase satellite communications time for the ACeS System from PTACS and be the sole supplier of ACeS Services to subscribers residing in the Philippines. ACeS Services is defined in the agreement as the services utilizing the ACeS System.

It is further provided in the agreement that PLDT will, throughout the term of the contract, purchase from PTACS such Billable Units of satellite communications time as PLDT requires to provide the ACeS Services in the Philippines and as PTACS is able to deliver.

Also, as to the term of payment, it was stipulated that PTACS will invoice PLDT, and PLDT will pay, for all satellite communications time, measured in Billable Units, used by PLDT during each Billing Month in a Billing Period.

Billable Unit is defined in the agreement as each six-second interval (fractions thereof to be rounded up to the next six-second interval) of satellite utilization time for a voice or data call to or from a terminal, excluding satellite utilization time for call set-up, unanswered calls and incomplete calls.

It must be noted that the said agreement was subsequently assigned by PLDT to petitioner while PTACS assigned the same agreement to AIL in 1998.[9]

From the foregoing facts, the Court in Division then arrived at the conclusion that the activity that produced AIL's income is AIL's undertaking to provide satellite communication time utilized by petitioner and its subscribers in the Philippines - which activity took place in the Philippines.

[9] *Records, Vol. V*, pp. 2223-2224.

At this junction, a distinction must be made between the services rendered by ACeS and that rendered by AIL. ACeS renders satellite communication services to its Philippine subscribers while AIL is a satellite airtime provider.[10] In the provision of communications services to its subscribers, ACeS utilizes the services of AIL to receive and route calls of ACeS' subscribers.

The nature of the relationship between ACeS and AIL may be gleaned from the recitals of the parties' Founder NSP Air Time Purchase Agreement dated March 12, 1997[11], the relevant portion of which provides:

> A. ACeS [presently, AIL] has contracted with Lockheed Martin and its affiliates for the manufacture and launch of a satellite that is expected to be located in geostationary orbit at 123 degrees East Longitude and to have the capacity to receive, switch, amplify and transmit radio signals from and to (i) terminals and (ii) ground station interlinks with terrestrial fixed-line telephone systems and terrestrial cellular telephone systems ("Gateways"). This system is herein referred to as the "ACeS System", and the satellite, together with any satellite ACeS [presently, AIL] elects to launch in lieu thereof or in replacement thereof having substantially equivalent coverage and the capacity to receive, switch, amplify and transmit radio signals from and to (i) terminals and (ii) Gateways, is herein called the "Satellite". The ACeS System is designed to allow ACeS [presently, AIL] to sell satellite communication time to providers of the communication services supported by ACeS [presently, AIL] ("Service Providers") for resale to subscribers in the ACeS System coverage area.
>
> B. Buyer [presently, ACeS] has entered into a contract with ACeS [presently, AIL] and Martin Marietta Overseas Corporation, dated August 28, 1995 (the "Gateway Agreement"), for the supply of certain equipment, software, data and documentation to enable Buyer to construct, own and operate a Gateway or Gateways in the Philippines (the "Territory").
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> C. ACeS [presently, AIL] wishes to sell satellite communications time for the ACeS System to Buyer

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[10] *Records, Vol. V, Exhibit* "EE," pp. 2082-2083.
[11] *Id., Exhibit* "DD" at 2049-2080.

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> [presently, ACeS], and Buyer [presently, ACeS] wishes to (i) purchase satellite communications time for the ACeS System from ACeS [presently, AIL] and (ii) be the sole supplier of ACeS Services to subscribers resident in the Territory. In return for being designated as the sole supplier of ACeS Services in the Territory, Buyer [presently, ACeS] is willing to agree to the payment obligations and other terms and conditions set forth herein and to the various obligations and standards of service with respect to the ACeS System and the provision of the ACeS Services to its subscribers set forth in the Founder NSP Operating Agreement, dated the date hereof, between Buyer [presently, ACeS] and ACeS [presently, AIL].

Essentially, under the terms of the Founder NSP Air Time Purchase Agreement, AIL operates the geostationary satellite which has the capacity to receive, switch, amplify, and transmit radio signals to and from terminals and gateways (such as the gateway of ACeS). AIL sells satellite communications time to ACeS, the latter being the sole supplier of AIL in the Philippines, for which ACeS pays AIL based on Billable Units used.

Petitioner's witness, Mr. Felimon R. Llavore, further explained the relationship between ACeS and AIL in this wise:

> Q6: The other witness has mentioned the agreement entered into by the Petitioner with ACeS International Limited or AIL for the purchase of satellite communications time. In this regard, can you provide us a brief background as to how a satellite system works?
>
> A6: A satellite airtime provider such as AIL owns a satellite system which is comprised of the following: (a) Gardua 1 satellite, a geosynchronous communications satellite situated at 123° East, at a distance of 22,000 miles from earth, equipped with 88 transponders equivalent to 88 cell sites, which has the capacity to receive, amplify and transmit radio signals from and to user terminals and earth station or gateway. Gateway is interconnected with fixed-line telephone systems and cellular telephone systems for the termination of calls; (b) Satellite Network Control Center which monitors and controls the satellite and route calls to the proper earth station or gateway. It is located and manned at AIL's facility in Batam Island, Indonesia. This satellite system is designed to allow it

to sell communication time to providers of satellite communication services such as the Petitioner. . .

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Q7: How does the satellite system of AIL aid in providing the satellite communication service by the Petitioner to its subscribers?

A7: When a subscriber of the Petitioner makes a call using the satellite user terminal, AIL's Garuda 1 Satellite receives the call and beam the signal back to AIL's Network Control Center, located in Indonesia, which would determine as to where to route the call which, in this case, is the gateway facilities owned by the Petitioner.

Q8: When is the satellite airtime service that has been provided by AIL to Petitioner terminated?

A8: It is terminated at the time when AIL's Network Control Center provides information to the Garuda Satellite on which gateway will the call be routed to. From then on, it any task or function to complete the satellite communication service is done by the Petitioner.

Q9: Can you expound on the task or functions to be done by the Petitioner in order to complete the satellite communication service to the subscriber?

A9: As earlier mentioned, AIL's service to the Petitioner is terminated or finished when its Network Control Center provide information to the Garuda Satellite on which gateway the call shall be routed to. After which, it is the Petitioner's gateway which will receive the call and route said call to its switch. The switch will then process the call for routing and termination.

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Q14: Let us go back to the billing made by AIL to the Petitioner, can you discuss what covers the billing made by AIL to the Petitioner?

A14: Yes. As earlier mentioned, AIL bills the Petitioner for the use of satellite communications time also commonly called satellite airtime fees, which pertains to each six-second interval of satellite utilization time for the transmission of a

> voice or data to or from a terminal and gateways. The billing of AIL for the Petitioner's purchase of satellite airtime fees covers the utilization of satellite airtime from the time when AIL's Garuda 1 Satellite receives the call and beam the signal back to AIL's Network Control Center located in Indonesia up to the point when said Network Control Center provides information to the Garuda Satellite on which gateway the call will be routed to.
>
> Q15: How about from the time the Petitioner's gateway receives the call and route said call to its switch, and said switch processes the call for routing and termination, who bills the Petitioner or who does the Petitioner bills?
>
> A15: Since it is now the Petitioner's facilities that are performing the functions of receiving the call and routing of said call, the Petitioner is billed by the corresponding telecommunication company who terminate the call to its subscriber.[12]

Based on Mr. Llavore's testimony, the satellite communications process in the present case can be outlined, as follows: an ACeS subscriber (who may or may not be located in the Philippines) makes a call using the satellite user terminal; AIL's satellite (located in space) receives the call and beams the signal to AIL's Network Control Center (located in Indonesia); AIL's Network Control Center informs the satellite to route the call to the gateway facilities of ACeS (located in the Philippines); ACeS will then receive the call and route it to ACeS' switch (located in the Philippines), which processes the call for routing and termination.

As a satellite airtime provider, AIL's activity in the communications process consists primarily in receiving the call of ACeS' subscribers (in space), beaming the signal to AIL's Network Control Center (in Indonesia), receiving information that the call should be routed to ACeS's gateway (in space), and routing the call to ACeS's gateway (in the Philippines). Except for routing the call to the Philippines, where ACeS will necessary receive the call for further routing and termination considering ACeS's facilities are located in the Philippines, AIL's services are all performed outside the Philippines. For these services, AIL is paid for each six-second interval of satellite utilization time beginning when AIL's satellite

[12] *Records, Vol. V, Exhibit* "EE," pp. 2082-2083.

receives the call until the call is routed to ACeS's gateway. These factors leads to the conclusion that AIL's services are rendered outside the Philippines, and are therefore not subject to Philippine income tax.

Notably, the *National Internal Revenue Code of 1997* ("*1997 NIRC*") is a law of American origin,[13] which has persuasive effect in our jurisdiction.[14] Applying the same to income from international communications, the rule may be stated thus: if, as a general rule, the recipient of international communications income[15] is a non-Philippine person[16], the income is foreign-sourced income.[17] The test

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[13] *See Chamber of Real Estate and Builders' Associations, Inc. v. Romulo*, G.R. No. 160756, March 9, 2010, 614 SCRA 605; *CIR v. Baier-Nickel*, G.R. No. 153793, August 29, 2006, 500 SCRA 87; *Bañas, Jr. v. Court of Appeals*, G.R. No. 102967, February 10, 2000, 325 SCRA 259.
[14] *See Chamber of Real Estate and Builders' Associations, Inc. v. Romulo*, G.R. No. 160756, March 9, 2010, 614 SCRA 605; *CIR v. Baier-Nickel*, G.R. No. 153793, August 29, 2006, 500 SCRA 87; *Bañas, Jr. v. Court of Appeals*, G.R. No. 102967, February 10, 2000, 325 SCRA 259.
[15] International communications income is defined as all income derived from the transmission of communications or data from the Philippines to a foreign country or vice versa [*see* 12 J. Mertens, The Law of Federal Income Taxation, p. 105 (1992)].
[16] Non-Philippine person is defined as a person who is not a Philippine citizen or resident, domestic partnership, domestic corporation, or estate or trust which is not a foreign estate or trust [*see* 12 J. Mertens, The Law of Federal Income Taxation, p. 106 (1992)].
[17] Section 45C.23 of Mertens Law of Federal Income Taxation [12 J. Mertens, The Law of Federal Income Taxation, pp. 105-106 (1992)] discusses the source rules for international communications income, and is reproduced as follows:

> **§ 45C.22. International Communications Income.**
>
> International communications income may be foreign source or United States source income. Section 863(c)(1)(A) provides that a United States person treats international communications income as 50% United States source and 50% foreign source. Section 863(c)(1)(B)(i) provides that a non-United States person treats international communications income as a foreign source.
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> Definition of International Communications Income
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> International communications income is all income derived from the transmission of communications or data from the United States to a foreign country or vice versa.
>
> Unlike the definition of transportation income or space and ocean income, the only income considered as international communication income is income which originates or ends in the United States, but not both.
>
> Sourcing Criterion
>
> The sourcing criterion applicable to international communication income is whether or not the recipient is a United States person.
>
> If the recipient is a United States person, the international communication income is 50% United States source and 50% foreign source.
>
> <u>Unless the office or fixed place of business exception is applicable</u>, <u>if the recipient of international communication income is a non-United States person, the income is foreign source income</u>.

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in the present case is therefore whether AIL (as the recipient of the international communications income) is a domestic corporation – which it is not, AIL being established and organized under the laws of Bermuda. Accordingly, AIL's income is deemed foreign-sourced.

From the foregoing, I submit that AIL's income from the satellite air transmission services it rendered in favor of ACeS is foreign-sourced considering AIL performed its services outside the Philippines, and it is a non-resident foreign corporation. As foreign-sourced income, the same is not subject to Philippine income tax and, consequently, to FWT. Consequently, ACeS had no duty to impose FWT on the payments it made to AIL as no income tax was due on AIL's income from services rendered in favor of ACeS.

Accordingly, I vote to grant the instant Petition for Review, and reverse and set aside the Decision promulgated on July 23, 2014 and the Resolution promulgated on October 15, 2014 by the Second Division.

LOVELL R. BAUTISTA
Associate Justice

Office or Fixed Place of Business Exception

If a non-United States person maintains an office or fixed place of business in the United States, the international communications income attributable to that office is United States source income.

Meaning of United States Person

A United States person is a United States citizen or resident, a domestic partnership, a domestic corporation, or an estate or trust which is not a foreign estate or trust. [Emphasis ours.]