REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

TUTUBAN PROPERTIES, INC.,
Respondent.

C.T.A. EB No. 389
(C.T.A. Case No. 6570)

x--x

TUTUBAN PROPERTIES, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB No. 391
(C.T.A. Case No. 6570)

x--x

TUTUBAN PROPERTIES, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB No. 418
(C.T.A. Case No. 6570)

(Re: Denial of Tutuban's "Motion for Partial Withdrawal of Petition")

Present:
Acosta, P.J.
Castañeda, Jr.
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, JJ.

Promulgated:
APR 2 1 2009 A. Apolinario 2:05 p.m.

x--x

D E C I S I O N

BAUTISTA, J.:

The Case

Before the Court En Banc are three consolidated Petitions for Review.[1]

[1] C.T.A. EB No. 389; C.T.A. EB No. 391; and C.T.A. EB No. 418.

In the first Petition for Review,[2] docketed as C.T.A. EB No. 389, the Commissioner of Internal Revenue ("CIR") is seeking that the Decision dated December 20, 2007 and the Partial Amended Decision dated April 21, 2008 of the Second Division of the Court ("Court in Division") in C.T.A. Case No. 6570 be reconsidered, and a new one be issued sustaining in full the assessments he made against Tutuban Properties, Inc. ("TPI") on its deficiency income tax, value added tax ("VAT") and expanded withholding tax ("EWT") for the fiscal year June 30, 1998.

On the other hand, in the second Petition for Review,[3] docketed as C.T.A. EB No. 391, TPI prays that the Decision dated December 20, 2007 and the Partial Amended Decision dated April 21, 2008 issued by the Court in Division in C.T.A. Case No. 6570 be reversed and set aside, and a new one be issued canceling *in toto* the tax assessments issued by the CIR against it.

While in the third Petition for Review,[4] docketed as C.T.A. EB No. 418, TPI seeks that the denial of its "Motion for Partial Withdrawal of Petition," embodied in the Partial Amended Decision dated April 21, 2008 and the Resolution dated August 1, 2008, be reversed and set aside, and that a new one be issued decreeing the withdrawal of the Petition for Review in the main case, save for the portion on the deficiency EWT.

[2] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), pp. 9 - 129 with Annexes.
[3] *Rollo*, C.T.A. EB No. 391 (C.T.A. Case No. 6570), pp. 1 - 177 with Annexes.
[4] *Rollo*, C.T.A. EB No. 418 (C.T.A. Case No. 6570), pp. 1 - 56 with Annexes.

Antecedent Facts

As recapitulated by the Court in Division, the following facts are undisputed:

"Petitioner[5] is a corporation duly organized and existing under and by virtue of the laws of the Philippines. It is registered with the Bureau of Internal Revenue (BIR) with taxpayer's identification number 029-001-178-585 and principal office address at Tutuban Center, Claro M. Recto Avenue, cor. Dagupan St., Tondo, Manila *(Joint Stipulation of Facts and Issues, par. 1)*.

Respondent is the duly appointed Commissioner of Internal Revenue mandated by law to enforce and implement the provisions of the National Internal Revenue Code (Tax Code), as well as related tax statutes, and their implementing rules and regulations, including the power to issue deficiency tax assessments and evaluate and decide on the merits of the protest against deficiency tax assessments, with office address at the BIR National Office Building, Diliman, Quezon City, where he may be served summons and other court processes *(Joint Stipulation of Facts and Issues, par. 2)*.

Respondent issued a Preliminary Assessment Notice dated January 10, 2002 to petitioner *(Joint Stipulation of Facts and Issues, par. 3)*.

On March 25, 2002, petitioner received from respondent a Formal Letter of Demand dated February 11, 2002, assessing it for alleged deficiency income tax, expanded withholding tax ('EWT') and value-added tax ('VAT') and their increments for fiscal year ended June 30, 1998 in the following amounts *(Joint Stipulation of Facts and Issues, par. 4, and Formal Letter of Demand and Assessment Notices, BIR Records, pp. 1098-1103)*:

A. Income Tax	
Basic	P179,276,456.56
Add: Surcharge	89,638,228.28
Interest	99,498,433.39
Total	**P368,413,118.23**
B. Expanded Withholding Tax	
Basic	P 2,940,920.35
Add: Surcharge	735,230.09
Interest	1,470,460.18
Total	**P 5,146,610.62**
C. Value-Added Tax	
Basic	P 55,981,539.43
Add: Surcharge	27,990,769.71
Interest	27,990,769.71

[5] Tutuban Properties, Inc.

Total **P111,963,078.85**

The following are respondent's detailed computation of the said assessment *(BIR Records, pp. 1094 to 1096)*:

INCOME TAX			
Income Before Income Tax Per F/S			P 6,256,531.00
Add: Undeclared Income:			
1 Creditable Withholding Tax During the year (P16,203,275.00/5%)		P324,065,500.00	
Less: Rent Income per ITR		194,220,340.00	129,845,160.00
2 Sale of Leaseright (Prime block)		P135,093,080.23	
Less: Sale of Leaseright per ITR		113,347,208.00	21,745,872.23
3 Construction in progress as of June 30, 1997		P254,452,013.00	
Less: Construction in progress as of June 30, 1998		–	
Construction in progress completed during 1998 & charge to Buildings		254,452,013.00	
Less: Buildings & Improvements balance:			
as of June 30, 1998	P889,778,989.00		
as of June 30, 1997	737,938,987.00	151,840,002.00	102,612,011.00
Add: Unexplained Expense Variance per ITR & per F/S			
Share in CUSA Expenses per FS		P 43,370,331.00	
Less: Share in CUSA Expenses per ITR		–	43,370,331.00
Add: Disallowed Expenses (no EWT):			
1 Rental PNR (P76,865,250.00 x 6 mo.) per F/S		P 38,432,625.00	
Less: Rental PNR per EWT		–	38,432,625.00
2 Professional Fees per F/S		P 958,160.00	
Less: Professional Fees per EWT		51,550.00	906,610.00
3 Commission per F/S		P 10,592,786.00	
Less: Commission to Real Estate Broker (Corp) per EWT	P 1,179,557.60		
Commission to Real Estate Broker (Ind) per EWT	5,437,433.00	6,616,990.60	3,975,795.40
4 Interest Expense per F/S		P 64,947,446.00	
Less: Interest Expense per Schedule		60,995,524.50	3,951,921.50
Add: Unexplained Source of Cash:			
1 Income Payment to top 5,000 Corp. per EWT		P 23,259,915.11	
Less: Office Supplies per F/S	P 511,731.00		
Miscellaneous	4,934.00		
Medical Supplies	15,432.00	532,097.00	22,727,818.11
2 Talent Fees per EWT		P 288,396.50	
Less: Talent Fees per F/S		–	288,396.50
3 Professional Fees paid to Juridical Persons per EWT		P 10,976,655.20	
Less: Management fees per F/S		6,736,612.00	4,240,043.20
4 Payment to Contractor & Subcontractor (Corp) per EWT		P189,848,150.00	
Payment to Contractor & Subcontractor (Ind) per EWT		60,378.00	
Total		189,908,528.00	
Less: Contracted Services per F/S	P 8,771,302.00		
Janitorial per F/S	5,420.00		
Repairs & Maintenance	70,122.00		
Share in CUSA	43,370,331.00	52,717,175.00	137,191,353.00
5 Awards Prizes exceeding P3,000.00 per EWT		P 180,194.35	
Less: Awards Prizes exceeding P3,000.00 per F/S			180,194.35
6 Other Payment (Corp) 5% per EWT		P 10,173,771.20	
Less: Other Payments (Corp) 5% per F/S		–	10,173,771.20
TAXABLE INCOME PER AUDIT			P525,898,433.49
TAX DUE 1997 P262,949,216.75@35%		92,032,225.86	
1998 P262,949,216.75@34%		89,402,733.70	P181,434,959.56
Less: Tax paid per ITR			2,158,503.00

AMOUNT STILL DUE			P179,270,456.56
50% Surcharge Fraud Penalty			89,638,228.28
Interest (10/15/98 to 7/25/01)			99,498,433.39
TOTAL AMOUNT STILL DUE			**P368,413,118.23**

WITHHOLDING TAX

No EWT (5%) Rent:			
Rental PNR (P76,865,250.00 x 6 mo.) per F/S		P 38,432,625.00	
Less: Rental PNR per EWT		–	
Difference		P 38,432,625.00	
Multiply by Tax Rate		5%	P 1,921,631.25
No EWT (10%) Professional & Technical Fees:			
Professional Fees per F/S		P 958,160.00	
Less: Professional Fees per EWT		51,550.00	
Difference		P 906,610.00	
Multiply by Tax Rate		10%	90,661.00
No EWT (5%) Commission to Real Estate Broker:			
Commission per F/S		P 10,592,786.00	
Less: Commission to Real Estate Broker (Corp) per EWT	P 1,179,557.60		
Commission to Real Estate Broker (Ind) per EWT	5,437,433.00	6,616,990.60	
Difference		3,975,795.40	
Multiply by Tax Rate		5%	198,789.80
No EWT (5%) Advertising Expense:			
Expenses per F/S		P 3,703,500.00	
Less: Expenses per (1601) W/holding Tax Return			
Difference		3,703,500.00	
Multiply by Tax Rate		5%	185,175.00
No EWT (10%) Management Fees:			
Management Fees per Alpha List		P12,609,657.74	
Less: Management Fees per (1601) W/holding Tax Return		4,055,148.20	
Difference		8,554,509.54	
Multiply by Tax Rate		5%	427,725.48
No EWT (10%) Professional Entertainers:			
Professional Entertainers per Alpha List		P 443,274.91	
Less: Professional Entertainers per (1601) W/holding Tax Return		105,572.20	
Difference		337,702.71	
Multiply by Tax Rate		10%	33,770.27
No EWT (1%) Income Payments made by top 5,000 Corp. to local suppliers:			
Income Payment per Alpha List		P31,172,709.31	
Less: Income Payment per (1601) W/holding Tax Return		22,855,954.00	
Difference		8,316,755.31	
Multiply by Tax Rate		1%	83,167.55
TOTAL WITHHOLDING TAX STILL DUE			P 2,940,920.35
25% Surcharge			735,230.09
Interest (1/25/99 to 7/25/01)			1,470,460.18
TOTAL AMOUNT STILL DUE			**P5,146,610.61**

VALUE ADDED TAX

Gross Sales/Receipts per books			P450,739,576.44
Add: Undeclared Income per CWT		P129,845,160.00	
Undeclared Income Sale of Leaseright		21,745,872.23	
Unaccounted variance per Construction in progress schedule		102,612,011.00	54,203,043.23
TOTAL			P704,942,619.67
Output Tax @ 10%			P 70,494,261.97
Less: Allowable Input Tax per F/S @ 10%			
Advertising & Promotion	P 3,703,500.00		
Dues & Subscription	45,636.00		
Insurance Expense	9,436,852.00		
Management Fee	6,736,612.00		
Medical Supplies	15,432.00		
Office Supplies	511,731.00		
Photo Reproduction	22,372.00		
Professional Fees	958,160.00		
Rental	56,271,292.00		

Training Seminars	298,188.00	
Total	P77,999,775.00	7,799,977.50
VAT Still Due		P 62,694,284.47
Less: VAT Paid per Return		6,712,745.04
TOTAL VALUE ADDED TAX STILL DUE		P 55,981,539.43
50 Surcharge Fraud Penalty		27,990,769.71
Interest (1/25/99 to 7/25/01)		27,990,769.71
TOTAL AMOUNT STILL DUE		P111,963,078.85

On April 22, 2002, petitioner filed with respondent a letter protesting the alleged deficiency income tax, EWT and VAT assessments for the fiscal year ended June 30, 1998 and requesting that they be withdrawn and/or cancelled for reasons stated in the letter *(Joint Stipulation of Facts and Issues, par. 7)*.

On November 18, 2002, petitioner elevated the disputed assessment to this Court by way of a Petition for Review *(Original Docket, p. 1)*.

In his Answer, respondent, by way of special and affirmative defenses, alleged that the assessments were issued within the prescriptive period; petitioner filed fraudulent returns arising from under-declaration of income equivalent to more than 30% of the gross rental income reported per return, accordingly, the prescriptive period to assess is ten years from the discovery of the fraud; prior to the issuance of the Formal Letter of Demand, respondent issued Preliminary Assessment Notice to petitioner with complete details regarding the contested assessment; the Audit Results/Assessment Notices stated the provisions of law on which the assessments were based.

As regards the deficiency income tax in the aggregate amount of P368,413,118.23, verification and comparison of the total creditable withholding taxes claimed for the year with the gross income reported in the Income Tax Return disclosed that there was an under declaration of rental income amounting to P129,845,160.00 for fiscal year ending June 30, 1998 and petitioner failed to submit documentary evidence to show that part of those creditable withholding tax certification were for prior years; verification disclosed that the total consideration for the sale of lease rights amounted to P136,093,080.23, however, for the year under audit, petitioner declared the amount of P113,347,208.00 only, resulting to an understatement of income by P21,745,872.23; verification disclosed that there was an unaccounted variance of the construction in progress account in the amount of P102,612,011.00; verification disclosed that there was an unexplained expense variance per Income Tax Return and Financial Statement on the Common Usage Service Area ('CUSA') Expense account in the amount of P43,370,331.00; rent expense paid to Philippine National Railways ('PNR') amounting to P38,432,625.00 was disallowed for failure to withhold the proper tax due, considering that under *Section 27 (c) of the NIRC of 1997, as amended,* only the following corporations are exempted from withholding tax: GSIS, SSS, PHIC, PCSI and PAGCOR; and PNR is not one them; professional fees amounting to

P906,610.00 and commission expense amounting to P3,975,795.40 were disallowed for failure to withhold the proper tax due; interest expense amounting to P3,951,921.50 was disallowed for lack of supporting documents; income payments to top 5,000 corporations amounting to P22,727,818.11, talent fees amounting to P288,396.50, professional fees paid to juridical persons amounting to P4,240,043.20, payments made to contractors and subcontractors amounting to P137,191,353.00, awards prizes and winnings exceeding P3,000.00 amounting to P180,194.35, and other payments to corporations amounting to P10,173,771.20 were all added back to the gross income for petitioner's failure to account for the variance between the amount of expense appearing in the Financial Statements and amount per expanded withholding tax return.

As to deficiency value added tax in the aggregate amount of P111,963,078.85, the undeclared rent income per Creditable Withholding Tax ('CWT') amounting to P129,845,160.00, undeclared income from sale of lease rights amounting to P21,745,872.23 and unaccounted variance per construction in progress amounting to P102,612,011.00 were added back as part of gross income for VAT purposes; and upon verification, only the total amount of P7,799,977.50 can be allowed as input tax.

As to deficiency withholding tax in the aggregate amount of P5,146,610.62, the EWT on rent income amounting to P1,921,631.25 was based on the annual rental of PNR to petitioner since the *NIRC of 1997, as amended*, has repealed all other laws granting tax exemption to government owned and controlled corporations, including PNR; the deficiency EWT on professional and technical fees amounting to P90,881.00, the deficiency expanded withholding tax on commission to real estate broker amounting to P198,79.80, and the deficiency expanded withholding tax on advertising expense amounting to P185,175.00 were all assessed due to the difference in the professional and technical fees expense, commission expense on real estate broker and advertising expense, as shown in the financial statements, respectively, vis-a-vis the amounts appearing in the EWT return; the deficiency EWT on management fees amounting to P427,725.48, the deficiency EWT on professional entertainers amounting to P33,770.27, and the deficiency income payments made to top 5,000 corporations amounting to P83,167.55 were all assessed due to the difference in the management fees per alpha list, professional entertainers per alpha list and income payments made to top 5,000 corporations per alpha list vis-a-vis the management fees per EWT return, professional entertainers per EWT return and income payments made to top 5,000 corporations per EWT return, respectively.

Petitioner presented Cecille Aringo, its Accounting Manager, Ruben Rubio, the Court-commissioned Independent Certified Public Accountant, and Myrna Revilla, its Assistant Manager for Accounting, as witnesses, and documentary evidence, marked as Exhibits *'A'* to 'ZZZZZZ,' inclusive of their submarkings, which were all admitted by the Court.

On the other hand, for the repeated failure of counsel for respondent to appear despite notice, upon motion of counsel for petitioner, respondent was deemed to have waived his right to present evidence and to have rested his case. Thereafter, both parties were granted fifteen days from notice within which to file their simultaneous memoranda, afterwhich the case shall be deemed submitted for decision.

Petitioner having filed its Memorandum on July 5, 2006, and respondent on December 4, 2006, the case was deemed submitted for decision."[6]

The Ruling of the Court in Division

The following issues were submitted by the parties for resolution by the Court in Division:

"I

WHETHER OR NOT THE ASSESSMENTS WERE ISSUED WITHIN THE PRESCRIPTIVE PERIOD.

II

WHETHER OR NOT PETITIONER[7] WAS INFORMED OF THE LAW AND THE FACTS ON WHICH THE ASSESSMENTS WERE MADE.

III

WHETHER OR NOT PETITIONER FILED FRAUDULENT OR FALSE RETURNS ARISING FROM UNDER-DECLARATION OF INCOME EQUIVALENT TO MORE THAN 30% OF THE GROSS RENTAL INCOME REPORTED PER RETURNS.

IV

WHETHER OR NOT PETITIONER IS LIABLE FOR THE PAYMENT OF DEFICIENCY INCOME, EXPANDED WITHHOLDING AND VALUE-ADDED TAXES FOR THE FISCAL YEAR ENDED JUNE 30, 1998."[8]

Being interrelated, the Court in Division discussed the first and third issues jointly. It resolved both issues in favor of the CIR.

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[6] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), pp. 35 - 44.
[7] Tutuban Properties, Inc.
[8] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), pp. 44 - 45.

According to the Court, the assessments made by the CIR were issued within the ten-year prescriptive period provided for in Section 222 (a) of the National Internal Revenue Code of 1997 ("NIRC"), as amended. The Court in Division applied the ten-year prescriptive period to TPI's deficiency income tax assessment because it found the latter's income tax for fiscal year ended June 30, 1998, to be a false and a fraudulent return. It said that TPI's failure to report sales, receipts, or income in an amount exceeding thirty percent (30%) of that declared per return, rendered it liable for substantial under-declaration of sales, receipts, or income, which constituted *prima facie* evidence of a false or a fraudulent return. The Court in Division also used the same prescriptive period for the deficiency VAT and EWT assessments. It considered the VAT returns of TPI to be false, if not fraudulent returns, since TPI's declared gross receipt does not reflect the undeclared rental income of P129,845,160.00, subject to VAT. The EWT returns for the fiscal year 1998 were likewise found to have deviated from the truth, making the same false returns within the purview of Section 222 (a) of the NIRC, as amended. To the mind of the Court in Division, TPI intentionally neglected to disclose several of its income payments in the total amount of P1,672,177.50, which should have been subjected to EWT. In addition, the Court in Division discovered that the commission expense accrued in fiscal year 1998, but which remained unpaid as of fiscal year end amounting to P5,129,877.18, was not subjected to EWT, in violation of Section 2.57.4 of Revenue Regulations No. 2-98 ("RR 2-98").

As regards the second issue, the Court in Division ruled that the Formal Letter of Demand and Assessment Notices have factual and legal bases and that TPI was duly informed of these. It said that the detailed breakdown of the deficiency income tax, VAT and EWT assessments clearly explains to TPI the composition and computation of each deficiency assessment. It went on to say that by reason of the Formal Letter of Demand and Assessment Notices, TPI was able to prepare a comprehensive Protest Letter, controverting each item in the deficiency income tax, VAT and EWT assessments.

Finally, as to whether TPI is liable for the payment of deficiency income tax, VAT and EWT for the fiscal year ended June 30, 1998, the Court in Division made the following findings:

Deficiency Income Tax Assessment

Out of the aggregate amount of P368,413,118.23 assessed by the CIR as TPI's deficiency income tax, only the amount of P104,571,996.38 was found to be substantiated by the evidence. The computation of the Court in Division is as follows:

Income Before Income Tax Per F/S			P 6,256,531.00
Add: 1. Undeclared Rent Income:			
Creditable Withholding Tax During the year (P16,203,275.00/5%)		P324,065,500.00	
Less: Rent Income per ITR		194,220,340.00	129,845,160.00
2. Undeclared income from sale of lease right:			
Sale of Leaseright (Prime block)		P135,093,080.23	
Less: Sale of Leaseright per ITR		121,519,024.00	13,574,056.23
3. Disallowed Professional Fees			18,900.00
4. Disallowed Commission Expense			3,975,795.40
TAXABLE INCOME			P153,670,442.63
Income Tax Due July 1-Dec. 31, 1997	P76,835,221.32 @ 35%	P 26,892,327.46	
June 1-June 30, 1998	P76,835,221.31 @34%	26,123,975.25	P 53,016,302.71
Less: Tax paid per ITR			2,158,503.00
INCOME TAX STILL DUE			P 50,857,799.71
Add: 50% Surcharge:			25,428,899.85
20% Interest (10/15/98 to 7/25/01)			28,285,296.82

TOTAL AMOUNT STILL DUE	104,571,996.38[9]

Deficiency VAT Assessment

The Court in Division agreed with the findings of the Court-commissioned independent CPA that TPI's gross receipts amounted to P318,516,175.80, and that only the amount of P129,845,160.00, representing the undeclared rent income, and the amount of P13,574,056.23, representing the undeclared sales of lease rights, should be added to TPI's gross receipts of P318,516,175.80 to form part of its gross receipts subject to output VAT. The Court in Division concurred with the findings of the Court-commissioned Independent CPA that TPI is entitled to deduct its input VAT in the amount of P25,255,762.43 from its total output tax due. Consequently, the Court in Division declared that TPI is liable to pay deficiency VAT for the fiscal year 1998 in the reduced amount of P28,453,960.74, computed as follows:

Gross Sales/Receipts		P318,516,175.80
Add: Undeclared Rental Income per CWT		129,845,160.00
Undeclared Income from Sale of Lease rights		13,574,056.23
Total Gross Sales/Receipts		P461,935,392.03
Output VAT Due @ 10%		P 46,193,539.20
Less: Allowable Input Tax	P 25,255,762.43	
VAT Paid Per Return	6,712,745.04	31,968,507.47
OUTPUT VAT STILL DUE		P 14,225,031.73
Add: 50% Surcharge		7,112,515.87
20% Interest (01/25/99 to 07/25/01)		7,116,413.14
TOTAL AMOUNT STILL DUE		P 28,453,960.74[10]

Deficiency EWT Assessment

The Court in Division further declared that TPI is liable to pay deficiency EWT for fiscal year 1998 in the reduced amount of P568,655.18, broken down as follows:

[9] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), p. 88.
[10] *Id.*, pp. 95 – 96.

1.	Professional Fees	P 18,900.00	
	Multiply by Tax Rate	0.10	P 1,890.00
2.	Accrued Commissions	P3,975,795.40	
	Multiply by Tax Rate	0.05	198,789.77
3.	Advertising Expense	P1,672,177.50	
	Multiply by Tax Rate	0.05	83,608.88
TOTAL WITHHOLDING TAX STILL DUE			P284,288.65
Add: 50% Surcharge			142,144.32
20% Interest (1/25/99 to 7/25/01)			142,222.21
TOTAL AMOUNT STILL DUE			P568,655.18[11]

In view of the foregoing findings, the Court in Division disposed of the case in this manner:

> "**WHEREFORE,** premises considered, the present Petition For Review is **PARTIALLY GRANTED**. Accordingly, petitioner[12] is hereby **ORDERED** to pay respondent Commissioner of Internal Revenue the reduced amounts of ONE HUNDRED FOUR MILLION FIVE HUNDRED SEVENTY ONE THOUSAND NINE HUNDRED NINETY SIX AND 38/100 PESOS (P104,571,996.38), representing deficiency income tax, FIVE HUNDRED SIXTY EIGHT THOUSAND SIX HUNDRED FIFTY FIVE AND 18/100 PESOS (P568,655.18), representing deficiency EWT, and TWENTY EIGHT MILLION FOUR HUNDRED FIFTY THREE THOUSAND NINE HUNDRED SIXTY AND 74/100 PESOS (P28,453,960.74), representing deficiency value-added tax, or the total amount of ONE HUNDRED THIRTY THREE MILLION FIVE HUNDRED NINETY FOUR THOUSAND SIX HUNDRED TWELVE AND 30/100 PESOS (P133,594,612.30), broken down as follows:

	DEFICIENCY TAX DUE			
	Income Tax	EWT	VAT	TOTAL
Basic	P 50,857,799.71	P284,288.65	P14,225,031.73	P 65,367,120.09
Surcharge	25,428,899.85	142,144.32	7,112,515.87	32,683,560.04
Interest	28,285,296.82	142,222.21	7,116,413.14	35,543,932.17
Total	**P104,571,996.38**	**P568,655.18**	**P28,453,960.74**	**P133,594,612.30**

> In addition, petitioner is hereby **ORDERED** to pay respondent 20% delinquency interest per annum on the total amount, of P133,594,612.30, computed from December 13, 2002 until full payment thereof, pursuant to *Section 249 (C) of the NIRC of 1997, as amended.*
>
> SO ORDERED."[13]

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[11] *Rollo,* C.T.A. EB No. 389 (C.T.A. Case No. 6570), p. 108.
[12] Tutuban Properties, Inc.
[13] *Rollo,* C.T.A. EB No. 389 (C.T.A. Case No. 6570), pp. 108 - 109.

On January 7, 2008, TPI filed a "Motion for Reconsideration,"[14] while on January 10, 2008, the CIR filed a "Motion for Partial Reconsideration."[15]

On January 23, 2008, TPI filed an Opposition to the "Motion for Partial Reconsideration."[16]

On January 31, 2008, TPI filed a "Supplemental Motion,"[17] praying that it be granted leave to present evidence in support of its allegations and arguments in its Motion for Reconsideration.

On February 8, 2008, the CIR filed his Comment[18] to the "Motion for Reconsideration" and the "Supplemental Motion."

On March 6, 2008, TPI availed of the benefits under Republic Act No. 9480 ("RA 9480"), otherwise known as "An Act Enhancing Revenue Administration and Collection by Granting an Amnesty on all Unpaid Internal Revenue Taxes Imposed by the National Government for Taxable Year 2005 and Prior Years."[19]

On March 13, 2008, TPI filed a "Motion for Partial Withdrawal of Petition,"[20] to which the CIR filed his Comment.[21] TPI, in turn, filed a Comment.[22]

On April 21, 2008, the Court in Division promulgated a Partial Amended Decision,[23] resolving TPI's "Motion for Reconsideration" and "Motion for Partial Withdrawal of Petition," and the CIR's "Motion for Partial Reconsideration."

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[14] *Records*, C.T.A. Case No. 6570, pp. 559 – 579.
[15] *Id.*, pp. 545 – 558.
[16] *Id.*, pp. 582 – 591.
[17] *Id.*, pp. 593 – 597.
[18] *Id.*, pp. 598 – 601.
[19] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570),p. 260.
[20] *Records*, pp. 602 – 655.
[21] *Id.*, pp. 656 – 660.
[22] *Id.*, pp. 661 – 664.
[23] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), pp. 111 – 126.

The Court in Division denied TPI's "Motion for Partial Withdrawal of Petition." It said:

> "A perusal of petitioner's[24] 'Motion for Partial Withdrawal of Petition' shows that on March 6, 2008, petitioner availed of the Tax Amnesty Law under RA 9480. Attached to said motion are Development Bank of the Philippines BIR Tax Payment Deposit Slip amounting to P500,000.00, Tax Amnesty Payment Form/Acceptance of Payment Form (BIR Form 0617), showing the tax amnesty payable in the amount of P500,000.00, Notice of Availment of Tax Amnesty indicating with previous SALN/Balance Sheet, Statement of Assets and Liabilities and Networth as of June 30, 2005, received on March 6, 2008, Statement of Assets Liabilities and Networth as of June 30, 2005 (Restated), also received on March 6, 2008, and Tax Amnesty Return (BIR Form 2116), showing the amnesty tax due of P500,000.00.
>
> It must be noted that the amount of tax amnesty due paid by petitioner was on the pretext that it had previously filed a balance sheet/SALN, together with its income tax return for 2005. However, a perusal of the documents attached by the petitioner to its Motion for Partial Withdrawal of Petition shows that the SALN dated June 30, 2005 was filed only on March 6, 2008, the same date when petitioner applied for tax amnesty. Also, petitioner did not attach its 2005 income tax return. Said requirements are necessary to determine the increase in petitioner's networth considering that petitioner paid the tax amnesty using the amnesty rate under paragraph (d), Section 5 of RA 9480, which is 5% of the alleged increase in its networth. Since petitioner failed to comply with the prescribed requirements of the law, petitioner cannot base the 5% rate on the alleged net increase of its networth, which is allegedly P708,922.00, but it should be based on the networth of its June 2005 SALN. Considering that petitioner's networth in its June 2005 SALN amounts to P437,042,785.00, the amount of petitioner's tax amnesty should be P21,852,139.25 (P437,042,785.00 multiplied by 5%), and not only P500,000.00. Since petitioner only paid the amount of P500,000.00, which is the higher amount vis-à-vis P35,446.10 (5% of the increase in networth amounting to P708,922.00), the amount of P500,000.00 cannot be considered as complete payment of petitioner's tax amnesty.
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> xxx xxx xxx
>
> Considering that petitioner only paid the amount of P500,000.00 and not the full amount of P21,852,139.25, petitioner cannot be considered to have fully complied with the requirements of RA 9480. xxx

[24] Tutuban Properties, Inc.

For the foregoing reasons, petitioner's 'Motion for Partial Withdrawal of Petition' as regards its deficiency assessments for income and value added taxes must perforce be denied."[25]

Likewise denied was the "Motion for Partial Reconsideration" filed by the CIR. The allegations in the Motion were found by the Court in Division to be mere general averments.

On the other hand, the "Motion for Reconsideration" filed by TPI was partially granted. The Court in Division acknowledged that the advertising expense of TPI should have been subjected to a 1% EWT, instead of the 5% rate used in the Decision, pursuant to RR 2-98. For this reason, the Court in Division had to amend its Decision insofar as TPI's deficiency EWT on advertising is concerned. It recomputed the deficiency EWT, as follows:

Advertising Expense	P1,672,177.50
Multiply by the Tax Rate	1%
Basic Deficiency EWT on Advertising	P 16,721.78[26]

The liability of TPI was thus reduced to the amount of P434,743.52, broken down as follows:

DEFICIENCY EWT

1.	Professional Fees	P 18,900.00	
	Multiply by Tax Rate	0.10	P 1,890.00
2.	Accrued Commission	P3,975,795.40	
	Multiply by Tax Rate	0.05	P198,789.77
3.	Advertising Expense	P1,672,177.50	
	Multiply by Tax Rate	0.01	P 16,721.78
DEFICIENCY EWT			P217,401.54
Add:	50% Surcharge		108,700.77
	20% Interest (1/25/99 to 7/25/01)		108,641.21

[25] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), pp. 116 – 120.
[26] *Id.*, p. 123.

TOTAL EWT STILL DUE	**P434,743.52**[27]

Accordingly, the *fallo* of the Decision dated December 20, 2007 was partially amended, to wit:

> "WHEREFORE, premises considered, the present Petition for Review is PARTIALLY GRANTED. Accordingly, petitioner[28] is hereby ORDERED to pay respondent Commissioner of Internal Revenue the reduced amounts of ONE HUNDRED FOUR MILLION FIVE HUNDRED SEVENTY ONE THOUSAND NINE HUNDRED NINETY SIX AND 38/100 PESOS (P104,571,996.38), representing deficiency income tax, **FOUR HUNDRED THIRTY FOUR THOUSAND SEVEN HUNDRED FORTY THREE AND 52/100 PESOS (P434,743.52)**, representing deficiency EWT, and TWENTY EIGHT MILLION FOUR HUNDRED FIFTY THREE THOUSAND NINE HUNDRED SIXTY AND 74/100 PESOS (P28,453,960.74), representing deficiency value-added tax, or the total amount of **ONE HUNDRED THIRTY THREE MILLION FOUR HUNDRED SIXTY THOUSAND SEVEN HUNDRED AND 64/100 PESOS (P133,460,700.64)**, broken down as follows:

DEFICIENCY TAX DUE

	Income Tax	EWT	VAT	TOTAL
Basic	P50,857,799.71	**P217,401.54**	P14,225,031.73	**P65,300,232.98**
Surcharge	25,428,899.85	**108,700.77**	7,112,515.87	**32,650,116.49**
Interest	28,285,296.82	**108,641.21**	7,116,413.14	**35,510,351.17**
Total	**P104,571,996.38**	**P434,743.52**	**P28,453,960.74**	**P133,460,700.64**

> In addition, petitioner is hereby ORDERED to pay respondent 20% delinquency interest per annum on the total amount of **P133,460,700.64**, computed from December 13, 2002 until full payment thereof, pursuant to *Section 249 (C) of the NIRC of 1997, as amended.*
>
> SO ORDERED."[29]

The Issues

Dissatisfied, the parties filed their respective Petitions for Review with the Court *En Banc.*

On May 13, 2008, TPI filed its Petition for Review *Ad Cautelam*, docketed as C.T.A. EB No. 391, interposing the following issues:

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[27] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), p. 123.
[28] Tutuban Properties, Inc.
[29] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570),pp. 124 – 125.

"A. WHETHER OR NOT THE ASSESSMENTS WERE ISSUED WITHIN THE PRESCRIPTIVE PERIOD

B. WHETHER OR NOT PETITIONER[30] FILED FRAUDULENT OR FALSE RETURN(S) ARISING FROM UNDER-DECLARATION OF INCOME EQUIVALENT TO MORE THAN 30% OF THE GROSS RENTAL INCOME REPORTED PER RETURNS

C. WHETHER OR NOT PETITIONER WAS INFORMED OF THE LAW AND THE FACTS ON WHICH THE ASSESSMENTS WERE MADE

D. WHETHER OR NOT PETITIONER IS LIABLE FOR THE PAYMENT OF DEFICIENCY INCOME, EXPANDED WITHHOLDING TAX, AND VALUE-ADDED TAX FOR THE FISCAL YEAR ENDED 30 JUNE 1998"[31]

On May 26, 2008, the CIR filed his Petition for Review, docketed as C.T.A. EB No. 389, where he raised the following issues:

"1. Whether or not respondent[32] is liable for the amount of P485,522,897, assessed as deficiency income tax, VAT and EWT liabilities for the fiscal year ended June 30, 1998.

2. Whether or not respondent's availment of the tax amnesty under R.A. 9480 is valid."[33]

On June 4, 2008, the CIR filed his Comment to TPI's Petition for Review docketed as C.T.A. EB No. 391.[34] To this, TPI filed a Reply on June 10, 2008.[35]

On June 23, 2008, TPI filed its "Comment with Motion for Consolidation of Cases."[36] In the Motion, TPI prayed that C.T.A. EB Case No. 389 and C.T.A. EB Case No. 391 be consolidated considering that both cases involve the same parties and the same issues.

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[30] Tutuban Properties, Inc.
[31] *Rollo*, C.T.A. EB No. 391 (C.T.A. Case No. 6570), p. 10.
[32] Tutuban Properties, Inc.
[33] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), p. 21.
[34] *Rollo*, C.T.A. EB No. 391 (C.T.A. Case No. 6570), pp. 181 - 184.
[35] *Id.*, pp. 185 - 189.
[36] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), pp 133 - 172.

On July 7, 2008, the Court *En Banc* issued a Resolution, directing TPI to file its Motion for Consolidation in C.T.A. EB No. 391, the case bearing the higher docket number, for the proper consolidation of the same with C.T.A. EB No. 389, pursuant to the 2002 Revised Manual for Clerk of Courts, in relation to Section 1, Rule 7, of the Revised Rules of Court of Tax Appeals and 2002 Internal Rules of the Court of Appeals, as amended.[37]

In compliance with the Resolution dated July 7, 2008, TPI filed a "Motion for Consolidation of Cases"[38] in C.T.A. EB No. 391 on July 14, 2008.

On July 30, 2008, the Court *En Banc* issued a Resolution ordering the consolidation of C.T.A. EB No. 391 with C.T.A. EB No. 389, the case bearing the lower docket number. The parties were then ordered to submit their simultaneous memoranda within thirty (30) days from receipt of the Resolution.[39]

Both parties moved for the deferment of the submission of their respective memorandum until the issues in another case, C.T.A. EB No. 418, are resolved.[40]

It appears that TPI, aside from filing the Petition for Review, docketed as C.T.A. EB No. 391, also filed with the Court in Division a "Motion for Reconsideration *Ad Cautelam*"[41] of the denial of its "Motion for Partial Withdrawal of Petition," in relation to its availment of tax amnesty. Acting on the Motion, the Court in Division promulgated a Resolution on August 1, 2008,[42] denying the Motion filed by TPI and directing the same "to file anew its

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[37] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), pp. 174 - 175.
[38] *Rollo*, C.T.A. EB No. 391 (C.T.A. Case No. 6570), pp. 190 - 193.
[39] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), pp. 178 - 179.
[40] *Id.*, pp. 180 - 185; 186 - 190.
[41] *Rollo*, C.T.A. EB No. 418 (C.T.A. Case No. 6570), pp. 40 - 48.
[42] *Id.*, pp. 49 - 50.

Application for Amnesty" with the Court *En Banc*. TPI then filed an "Urgent Motion for Clarification of the 1 August 2008 Resolution"[43] with the Court in Division. However, without waiting for the Resolution of its Urgent Motion, TPI filed on August 22, 2008 a Petition for Review *En Banc*, docketed as C.T.A. EB No. 418, in order to prevent the denial of its "Motion for Partial Withdrawal of Petition" from becoming final.[44]

In the Petition for Review docketed as C.T.A. EB No. 418, TPI raised the following issues:

"I.

WHETHER OR NOT THE COURT IN DIVISION HAS AUTHORITY TO RESOLVE PETITIONER'S[45] MOTION FOR RECONSIDERATION *AD CAUTELAM* (RE: DENIAL OF PETITIONER'S MOTION FOR PARTIAL WITHDRAWAL OF PETITION)

II.

WHETHER OR NOT PETITIONER HAS COMPLIED WITH THE REQUIREMENTS OF REPUBLIC ACT NO. 9480 AND RELATED ADMINISTRATIVE ISSUANCES WITH RESPECT TO THE VALID AVAILMENT OF TAX AMNESTY"[46]

On August 26, 2008, the Court in Division resolved TPI's "Urgent Motion for Clarification of the 1 August 2008 Resolution," and directed it to file its "Motion for Partial Withdrawal of Petition" with the Court *En Banc* for appropriate action.[47]

On August 28, 2008, TPI moved for the consolidation of C.T.A. EB No. 418 with C.T.A. EB Nos. 391 and 389, which the Court granted on October 17, 2008.[48]

[43] *Rollo*, C.T.A. EB No. 418 (C.T.A. Case No. 6570), pp. 51 - 54.
[44] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), p. 181.
[45] Tutuban Properties, Inc.
[46] *Rollo*, C.T.A. EB No. 418 (C.T.A. Case No. 6570), p. 8.
[47] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), p. 264.
[48] *Rollo*, C.T.A. EB No. 418 (C.T.A. Case No. 6570), pp. 57 – 61; 63 – 65.

On November 28, 2008, the Court *En Banc* promulgated a Resolution ordering the parties to file their respective Consolidated Memorandum within a non-extendible period of thirty (30) days from receipt thereof.[49]

On December 2, 2008, TPI filed its "Compliance with Motion."[50] In compliance with the Resolution dated August 26, 2008 of the Court in Division, TPI submitted the following documents:

(1) Development Bank of the Philippines BIR Tax Payment Deposit Slip in the amount of P500,000.00 [Annex "A"];

(2) Tax Amnesty Payment Form/Acceptance of Payment Form (BIR Form 0617) in the amount of P500,000.00 [Annex "B"];

(3) Notice of Availment of Tax Amnesty under Republic Act No. 9480 [Annex "C"];

(4) Tax Amnesty Return (BIR Form 2116) [Annex "D"]; and

(5) SALN as of June 30, 2005 and supporting schedules [Annex "E"].

In view of its compliance, TPI prayed that C.T.A. EB No. 391 be withdrawn, save for the portion on its alleged liability for deficiency EWT, and that C.T.A. EB No. 418 be also withdrawn as it has become moot.

On January 5, 2009, TPI filed its Memorandum,[51] while on January 7, 2009, the CIR filed a Manifestation,[52] stating that he is adopting his Petition for Review as his Memorandum.

[49] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), pp. 193 - 194.
[50] *Id.*, pp. 195 - 249.
[51] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), pp. 250 - 293.
[52] *Id.*, pp. 294 - 301.

On January 28, 2009, the Court *En Banc* issued a Resolution[53] resolving TPI's "Compliance and Motion." The dispositive portion of the Resolution reads:

> "**WHEREFORE,** premises considered:
>
> 1) As regards petitioner Tutuban's Petitions for Review, docketed as C.T.A. EB Nos. 391 and 418, pertaining to its deficiency assessments on income tax and VAT for taxable year 1998, said petitions are deemed withdrawn, subject to the provisions of RA 9480;
>
> 2) As regards the remaining case, C.T.A. EB No. 389, considering that on January 5, 2009, respondent Tutuban filed its Memorandum, and on January 7, 2009, petitioner Commissioner of Internal Revenue filed a Manifestation stating that the Commissioner is adopting the statements of facts, case, issues and discussions stated in his Petition for Review in C.T.A. EB No. 389, as his Memorandum in the instant case, in compliance with the Court *En Banc's* Resolution dated November 28, 2008, C.T.A. EB No. 389, as regards the remaining deficiency assessment on EWT, is now deemed submitted for decision.
>
> **SO ORDERED.**"[54]

As the Court En Banc sees it then, the issues for resolution are:

(1) Whether or not the Court of Tax Appeals ("CTA") has jurisdiction over TPI's availment of the tax amnesty program; and

(2) Whether or not TPI is liable to pay the deficiency EWT in the reduced amount of P434,743.52.

The Ruling of the Court En Banc

The Court *En Banc* affirms the ruling of the Court in Division in its Partial Amended Decision dated April 21, 2008, insofar as the deficiency EWT assessment is concerned.

[53] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), pp. 304 - 312.
[54] *Id.*, pp. 311 - 312.

The Court *En Banc* shall first resolve the jurisdictional issue.

Tax Amnesty

The CIR is adamant that there is no provision in RA 9480 or in Department Order No. 29-07, the implementing rules of RA 9480, which vests the CTA with jurisdiction to decide on whether a party validly availed of the provisions of the law. And even if the CTA has jurisdiction, it would still violate the doctrines of primary jurisdiction and exhaustion of administrative remedies.

The Court En Banc does not agree.

Section 7 of Republic Act No. 9282, amending, RA 1125 expressly states that:

> "Sec. 7. ***Jurisdiction.*** – The CTA shall exercise:
>
> (a) Exclusive appellate jurisdiction to review by appeal, as herein provided:
>
> (1) Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue or other laws administered by the Bureau of Internal Revenue; *(Emphasis supplied)*
>
> xxx xxx xxx"

Clearly, the appellate jurisdiction of the CTA is not limited to cases which involve decisions of the CIR on matters relating to assessments or refunds. The second part of the provision covers other cases that arise out of the NIRC or related laws administered by the Bureau of Internal Revenue ("BIR"),[55] which includes RA 9480.

[55] Philippine Journalist, Inc. v. Commissioner of Internal Revenue, G.R. No. 162852, 447 SCRA 214, December 16, 2004.

Besides, TPI's availment of the tax amnesty program of the BIR is a consequence of the tax assessments issued by the CIR. And since the CTA has jurisdiction to hear disputed assessment cases, necessarily, any consequence that may arise is still within its jurisdiction.[56] It bears stressing that once jurisdiction has been acquired, it is not lost until the Court shall have disposed of the case in its entirety.[57]

In light of the foregoing, the CTA En Banc and in Division could not have violated the doctrine of primary jurisdiction. This doctrine holds that if a case is such that its determination requires the expertise, specialized training, and knowledge of an administrative body, relief must first be obtained in an administrative proceeding before resort to the courts is had, even if the matter may well be within their proper jurisdiction.[58] But in this case, the Court in Division already acquired jurisdiction over the case even before TPI availed of the tax amnesty program. Hence, the doctrine of primary jurisdiction does not apply.

In the same vein, no violation was committed under the doctrine of exhaustion of administrative remedies, which states that recourse through court action cannot prosper until after all such administrative remedies have first been exhausted.[59] It is well to note that the doctrine of exhaustion of administrative remedies and the corollary doctrine of primary jurisdiction, which are based on sound public policy and practical considerations, are not inflexible rules. There

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[56] Professional Services, Inc. v. Commissioner of Internal Revenue, C.T.A. Case No. 7361, August 1, 2008.
[57] Morales v. Subic Shipyard & Engineering, Inc., G.R. No. 148206, 531 SCRA 66, 71, August 24, 2007.
[58] Euro-Med Laboratories, Phil., Inc. v. Province of Batangas, G.R. No. 148106, 495 SCRA 301, July 17, 2006.
[59] Teotico v. Baer, G.R. No. 147464, 490 SCRA 279, June 8, 2006.

are many accepted exceptions, one of which is when the issue of non-exhaustion of administrative remedies has been rendered moot.[60] Such is the situation in this case. Given that there is already a pending case with the Court in Division, there is no need for TPI to comply with the doctrine of exhaustion of administrative remedies. And since the Court in Division already acquired jurisdiction over the case, it is duty-bound to resolve all incidents in relation thereto, including the validity of TPI's availment of the tax amnesty program.

Having said that, the CTA, En Banc and in Division, clearly has jurisdiction to rule on whether TPI properly availed of the tax amnesty program. Under RA 9480, any person, natural or juridical, who wishes to avail himself of the tax amnesty authorized and granted under this Act shall file with the BIR a notice and Tax Amnesty Return accompanied by a SALN as of December 31, 2005, in such form as may be prescribed in the implementing rules and regulations ("IRR") of this Act, and pay the applicable amnesty tax within six months from the effectivity of the IRR.[61]

In this case, TPI submitted all the documents required under RA 9480 to the Court En Banc in compliance with the Resolution dated August 26, 2008 of the Court in Division, directing it to file its "Motion for Partial Withdrawal of Petition" with the Court En Banc. After examining the documents submitted, the Court En Banc found that TPI had indeed previously filed its SALN in the form of a Balance Sheet for the fiscal year ended June 30, 2005, and its Income Tax Return for the same fiscal year with the BIR on October 25, 2005. Considering

[60] Republic v. Lacap, G.R. No. 158253, 517 SCRA 255, March 2, 2007.
[61] Section 2, RA 9480.

that TPI had complied with all the other requirements set forth in RA 9480, the Court En Banc in its Resolution dated January 28, 2009 ordered the withdrawal of the Petitions for Review, docketed as C.T.A. EB Nos. 391 and 418, pertaining to TPI's assessments on income tax and VAT for taxable year 1998.

The CTA, in Division and En Banc, has resolved that taxpayers found to have fully complied with the documentation requirements of RA 9480 are entitled to the immunities as found under Section 6 thereof.[62] In fact, in the recent case of Philippine Banking Corporation (Now: Global Business Bank, Inc.) v. Commissioner of Internal Revenue,[63] the Supreme Court echoed the same pronouncement that: "Considering that the completion of these requirements (enumerated in RA 9480) shall be deemed full compliance with the tax amnesty program, the law mandates that the taxpayer shall thereafter be immune from payment of taxes, and additions thereto, as well as the appurtenant civil, criminal or administrative penalties under the NIRC of 1997, as amended, arising from failure to pay any and all internal revenue taxes for taxable year 2005 and prior years." (Words in parenthesis supplied)

Moreso in this case where the one-year period, stated in Section 4 of RA 9480,[64] for investigation or audit of the documents and/or representations made by taxpayer in connection with the availment of the tax amnesty benefit, had already lapsed. Records show that TPI availed of the tax amnesty program on

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[62] Metropolitan Bank & Trust Company v. Commissioner of Internal Revenue, C.T.A. EB No. 354 (C.T.A. Case No. 7144), August 29, 2008.
[63] G.R. No. 170574, January 30, 2009.
[64] SECTION 4. *Presumption of Correctness of the SALN.* — The SALN as of December 31, 2005 shall be considered as true and correct except where the amount of declared networth is understated to the extent of thirty percent (30%) or more as may be established in proceedings initiated by, or at the instance of, parties other than the BIR or its agents: Provided, That such proceedings must be initiated within one year following the date of the filing of the tax amnesty return and the SALN. Findings of or admission in congressional hearings, other administrative agencies of government, and/or courts shall be admissible to prove a thirty percent (30%) under-declaration.

March 6, 2008, and to date there is nothing in the records which would show that proceedings have been filed under the said section.

All told, there is nothing to prevent the Court En Banc from granting TPI's "Motion for Partial Withdrawal of Petition." Hence, as the Court En Banc has aptly ruled in its previous Resolution dated January 28, 2009, the Petitions for Review, docketed as C.T.A. EB Nos. 391 and 418, are deemed WITHDRAWN, insofar as TPI's deficiency assessments on income tax and VAT for taxable year 1998 are concerned, pursuant to RA 9480.

With that, the Court En Banc shall now proceed to discuss the remaining assessment for deficiency EWT for the fiscal year ended June 30, 1998.

Deficiency EWT Assessment

The CIR contends that the Court in Division erred in reducing the tax assessment for deficiency EWT for the fiscal year ended June 30, 1998 based merely on the findings of the Court-commissioned independent CPA. He claims that contrary to the findings of the Court in Division, TPI failed to refute the findings of his revenue examiners. He insists that the findings of his revenue examiners should have been given full weight and credit in the absence of proof of error in the assessment. Following the doctrine of presumption of correctness of assessment, the assessment made by his revenue examiners is presumed correct and made in good faith.

TPI, for its part, maintains its stand that the tax assessment for deficiency EWT for the fiscal year ended June 30, 1998 was issued beyond the applicable prescriptive period. It asserts that the Court in Division erred in applying the ten-year prescriptive period in Section 222 (a) of the NIRC, as amended, instead of the three-year prescriptive period in Section 203 of the same Code, as there is no evidence to show that it is guilty of intentionally misleading or deceiving the government. It further argues that it was not duly informed of the facts and the law upon which the assessment was based. As a final point, assuming that it is liable for deficiency EWT, TPI avers that there is no factual or legal basis for the imposition of the 50% surcharge for the reason that the CIR failed to present any evidence to prove that the returns filed by it were false or fraudulent.

The Court En Banc shall first discuss the applicable prescriptive period.

Sections 203 and 222 (a) of the NIRC, as amended, read:

> "**SECTION. 203.** ***Period of Limitation Upon Assessment and Collection. —*** Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided,* That in case where a return is filed beyond the period prescribed by law, the three-year prescriptive period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.
>
> xxx xxx xxx"
>
> "**SECTION 222.** ***Exceptions as to Period of Limitation of Assessment and Collection of Taxes. —***
>
> (a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: *Provided,* That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.
>
> xxx xxx xxx"

From the foregoing, it is clear that the law prescribes a period of three years from the date the return was actually filed or from the last date prescribed by law for the filing of such return, whichever comes later, within which the BIR may assess an internal revenue tax. However, there are three (3) instances when the running of the three-year prescriptive period does not apply. These are: (1) filing a false return, (2) filing a fraudulent return with intent to evade tax or (3) failure to file a return. In these cases, the period within which to assess deficiency taxes is ten years from discovery of the fraud, falsification or omission.[65]

In the case at bar, the Court in Division applied the ten-year prescriptive period because it found the returns filed by TPI to be both false and fraudulent returns. It explained that:

> "The examination of the Court-commissioned independent CPA reveals that the following income payments by petitioner[66] were not subjected to EWT:

a. Payments to advertising agency representing amount charged by media (e.g., newspaper, radio)	P1,265,032.30
b. Payments for advertisement in souvenir program	28,645.45
c. Payments to PLDT for telephone charges and directory advertisement	201,855.44
d. Represents replenishment of petty cash fund	69,743.30
e. Liquidation of cash advances	244,284.20
f. Payments of membership dues	3,500.00
g. Represents offsetting of expense	7,418.18
h. Represents advances which were previously subjected to EWT	202,272.73
i. Adjustment/reversals to advertising and promotion expense account	(350,574.10)
Total	P1,672,177.50

(Exhibit 'GGGGGG ', Original Docket, pp. 277-278)

[65] Commissioner of Internal Revenue v. Tulio, G.R. No. 139858, 474 SCRA 147, October 25, 2005.
[66] Tutuban Properties, Inc.

Upon a careful examination of the records of this case, this Court agrees with the findings of the Court-commissioned independent CPA that petitioner failed to withhold the EWT due on the aforesaid amount of P1,672,177.50. **It cannot be argued by petitioner that it believes that the foregoing items are not subject to withholding tax, since if petitioner really believes in good faith that said items are not subject to withholding tax, it should have reported the same in the annual information return/alpha list of income payments not subjected to withholding tax. However, a perusal of the documents attached to the ITR and EWT returns shows that only the following items were included in the alpha list of income payments not subject to and/or exempt from withholding tax for the year ended December 31, 1997 and for the year 1998, respectively** *(Attachments to Exhibit 'S')*:

Cayanga, Zuniga, Angel & Associates
Sycip Gorres Velayo & Co. (SGV & Co.), and
Romulo Law Offices

The Court, therefore, not only finds the returns to have deviated from the truth, making the same false returns within the purview of Section 222 (a) of the NIRC of 1997, as amended, but also finds petitioner to have intentionally neglected to disclose the items amounting to P1,672,177.50, not subject to expanded withholding tax, required by BIR Form 1701-B1.

Furthermore, upon verification and examination of the evidence on record, the Court finds that the commission expense accrued in fiscal year 1998, but which remained unpaid as of fiscal year end amounting to P5,129,877.18, was not subjected to EWT. Section 2.57.4 of Revenue Regulations 2-98 provides for the obligation of the payor to deduct and withhold the tax:

> '*SEC. 2.57.4. Time of withholding.* — The obligation of the payor to deduct and withhold the tax under Section 2.57 of these regulations arises at the time an income is paid or payable, whichever comes first, the term "payable" refers to the date the obligation becomes due, demandable or legally enforceable.'

Specifically, BIR Ruling DA-016-97 clarified the obligation of the payor to withhold and pay the income tax withheld at source to be at the time of accrual of the payment:

> 'In reply, please be informed that:
>
> (1) The appropriate time to withhold taxes arises at the time the amount is paid or payable, whichever is earlier. Hence, for Philippine internal revenue tax purposes, the liability to withhold and pay the income tax withheld at source from certain payments attaches at the time of the accrual of said payments and not at the time of actual remittance of payment thereof (BIR Ruling No. 71-003). Upon withholding the required

tax, the withholding agent shall be required to remit the same within ten (10) days after the end of each calendar month.'

The foregoing BIR regulation and ruling explicitly require petitioner to withhold the tax on the accrued commission expense of P5,129,877.18. However, petitioner failed to do so. Despite the express mandate of the law, petitioner's non-withholding indicates its deliberate intent to evade the payment of taxes due thereon, thus, making petitioner's EWT returns for the fiscal year 1998 not only fraudulent, but also false for being not reflective of the truth, within the purview of *Section 222 (a) of the NIRC of 1997, as amended.* Therefore, the deficiency EWT assessment is also subject to the ten-year prescriptive period.

Considering that petitioner filed its annual income tax return on October 15, 1998 and petitioner having received the Formal Letter of Demand dated February 11, 2002 on March 25, 2002, the deficiency assessment for EWT was made within the ten-year prescriptive period.

Lastly, it bears stressing that when an examination/audit was conducted by the respondent,[67] petitioner did not submit the necessary accounting records and documents to respondent until after a subpoena *duces tecum* was served to petitioner *(BIR Records, p. 703).* Petitioner cannot claim, therefore, that the assessment had already prescribed, when petitioner itself failed to comply with its obligation on time and contributed to the delay of the assessment."[68] *(Emphasis supplied)*

The Court *En Banc* sustains the findings of the Court in Division.

TPI's non-withholding of the EWT due on the amount of P1,672,177.50, coupled with its failure to report the same in the annual information return/alpha list of income payments not subjected to withholding tax, is a clear indication of its intention to evade the payment of tax. Without a doubt, TPI intentionally neglected to disclose the amount in its returns in order to reduce its tax liability. It therefore submitted false and fraudulent returns to evade tax, which justifies the application of the ten-year prescriptive period provided for in Section 222 (a) of the NIRC, as amended.

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[67] Commissioner of Internal Revenue.
[68] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570) pp. 51 - 55.

In this connection, the Court in Division correctly imposed the 50% surcharge under Section 248 (B) of the NIRC, as amended, which states that:

> "**SECTION 248.** *Civil Penalties.* –
>
> xxx xxx xxx
>
> (B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud: xxx"

Furthermore, the contention of TPI that it was not duly informed of the facts and the law upon which the deficiency EWT assessment was based is belied by the findings of the Court in Division that the Formal Letter of Demand and the Assessment Notices have factual and legal bases. The Court in Division pointed out that the deficiency EWT was assessed on the basis of Section 57 of the NIRC, as amended, due to TPI's non-withholding of the mandatory EWT on certain expenses claimed. It further said that the composition and computation of the deficiency assessment were clearly explained in the detailed breakdown of the deficiency EWT assessment. It also noted that if TPI was not sufficiently informed of the facts and the law on which the assessment was based, it would not have been able to prepare a comprehensive Protest Letter.

As to the reduction of the deficiency EWT, the Court in Division justified its action in this wise:

> "Going now to the last assessment of Deficiency Withholding Tax in the aggregate amount of P5,146,610.62, the assessment arose from the following findings of the respondent:[69]

[69] Commissioner of Internal Revenue.

a. EWT on rent income amounting to P1,921,631.25;

b. EWT on professional and technical fees amounting to P90,661.00;

c. EWT on commission to real estate broker amounting to P198,789.80;

d. EWT on advertising expense amounting to P185,175.00;

e. EWT on management fees amounting to P427,725.48;

f. EWT on professional entertainers amounting to P33,770.27; and

g. Income payments made to top 5,000 corporations (local suppliers) amounting to P83,167.55.

a. Expanded withholding tax on rent income amounting to P1,921,631.25

With regard to EWT on rent income, respondent maintains that petitioner[70] is liable to pay 5% EWT on rental payments made to PNR amounting to P38,432,625.00. The EWT on rent income was based on the annual rental of P76,865,250.00 divided by 2 or 6 months period, from January to June 1998. Respondent argues that under *Section 27 (C) of the Tax Code*, only the following corporations are exempt from withholding tax: GSIS, SSS, PCSI, and PAGCOR, and that the PNR is not among the enumerated exempt corporations.

To reiterate, petitioner maintains that PNR is a public utility corporation, owned and controlled by the Government of the Philippines, and pursuant to *Section 32 (B) (7) (b) of the Tax Code*, its income shall not be included in gross income and shall be exempt from taxation.

As extensively discussed in the related income tax assessment, this Court ruled that PNR, being a public utility, its income derived from petitioner is exempt from taxation. Under *Section 2.57.5 (B) of Revenue Regulations 2-98*, the withholding of creditable tax shall not apply to persons enjoying exemption from payment of income taxes, pursuant to the provisions of any law. Therefore, the assessment for deficiency withholding tax in the amount of P1,921,631.25 against petitioner is without legal and factual basis. Said assessment is hereby cancelled.

[70] Tutuban Properties, Inc.

b. EWT on Professional & Technical Fees amounting to P90,661.00

Respondent contends that petitioner did not pay 10% EWT on the amount of P906,610.00 representing professional and technical fees paid to its independent auditor and legal counsel *(Joint Stipulation of Facts and Issues)*. Respondent allegedly compared the Professional & Technical Fees expense per Financial Statements with the Professional & Technical Fees per EWT and the difference was assessed as additional EWT *(BIR Records, p. 1135)*.

On the other hand, petitioner maintains that expenses for legal and audit services are not subject to EWT because they are payments made to general professional partnership.

As previously discussed in the related income tax assessment, We find petitioner's arguments partly meritorious, pursuant to the well settled rule that income of general professional partnerships is not subject to income tax. Being not subject to income tax, there is no obligation on the part of petitioner to withhold any tax due thereon.

Likewise, We also ruled that the related withholding taxes were withheld and remitted in the following accounts: payments to 'other recipients of talent fees-individual,' payments for 'rentals,' and 'other payments to corporations.'

However, as regards the amount of P18,900.00 representing adjustments to the Professional Fees account, We disallowed the same as deduction from petitioner's gross income, since We cannot ascertain its nature for lack of supporting documentary evidence. Likewise, We cannot determine whether the corresponding withholding tax has been withheld and properly remitted. Thus, for petitioner's failure to rebut respondent's assessment of deficiency withholding tax with regard to the amount of P18,900.00, We uphold respondent's assessment only to the corresponding withholding tax thereon, in the amount of P1,890.00.

c. EWT on Commission to Real Estate Broker amounting to P198,789.80

Respondent claims that petitioner failed to pay 5% EWT on commissions paid to real estate brokers in the amount of P3,975,796.00 *(Joint Stipulation of Facts and Issues)*. Respondent made a comparison of the Commission Expense on Real Estate Broker per Financial Statements with a Commission Expense on Real Estate Broker per EWT and the difference was assessed for an additional expanded withholding tax.

In relation with the income tax assessment, We sustain this item of assessment considering that petitioner failed to withhold the expanded withholding tax on P5,129,877.18 (pertaining to the commission expense accrued in fiscal year 1998, but remains unpaid as of the end of fiscal year).

d. EWT on Advertising Expense amounting to P185,175.00

Respondent avers that petitioner failed to pay 1% EWT on the P3,703,500.00 worth of advertising expense. Respondent compared the advertising expense per Financial Statements with the advertising expense per EWT return and the difference was assessed, as additional EWT *(BIR Records, p. 1134)*.

Petitioner contends that its advertising expense is part of the Advertising and Promotions account, as reported in its Financial Statements. The other items included in this account are talent fees, promotions, marketing, public relations, sponsorships and prizes. Petitioner further argues that its advertising expense, for instance, the expense incurred for its four-day sale, night market, kids' fun time and other advertisements are not subject to EWT because they were paid directly to media and not to any advertising agency. Accordingly, being paid directly to the media, these are not subject to EWT, under *Section 2.57.2 (E) (4) (h) of Revenue Regulations 2-98.*

The Court-commissioned independent CPA accounted, the discrepancy of P3,703,500.00 *(Exhibit 'ZZZ')*, as follows:

			Reference
1.	Income payments which were not subjected to EWT		
	Pursuant to applicable EWT Regulations		
	a. Payments to advertising agency representing amount charged by media (e.g., newspaper, radio)	P1,265,032.30	Exhibit ZZZ-2-a
	b. Payments for advertisement in souvenir program	28,645.45	Exhibit ZZZ-2-b
	c. Payment to PLDT for telephone charges and directory advertisement	201,855.44	Exhibit ZZZ-2-c
	d. Represents replenishment of petty cash fund	69,743.30	Exhibit ZZZ-2-d
	e. Liquidation of cash advances	244,284.20	Exhibit ZZZ-2-e
	f. Payments of membership dues	3,500.00	Exhibit ZZZ-2-f
	g. Represents offsetting of expense	7,418.18	Exhibit ZZZ-2-g
	h. Represents advances which were previously subjected to EWT	202,272.73	Exhibit ZZZ-2-h
	i. Adjustment/reversals to advertising and promotion expense account	(350,574.10)	Exhibit ZZZ-2-i
	Sub-total	1,672,177.50	
2.	Income payments which were subjected to withholding tax		
	a. Income payments representing awards and prizes exceeding P3,000 and other winnings subjected		

	to final withholding tax (FWT) of 20%	158,319.33	Exhibit ZZZ-2-j
	b. Income payments to prime contractors and/or subcontractors subjected to EWT at 1%	323,685.89	Exhibit ZZZ-2-k
	c. Income payments to other recipient of talent fees subjected to EWT at 10%	158,827.78	Exhibit ZZZ-2-l
	d. Professional fees paid to taxable juridical persons subjected to EWT at 5%	372,180.52	Exhibit ZZZ-2-m
	e. Income payments to local supplier of goods subjected to EWT at 1%	1,016,729.95	Exhibit ZZZ-2-n
	f. Income payments to customs, real estate, insurance and commercial brokers and agents of professional entertainers subjected to EWT at 5%	1,578.95	Exhibit ZZZ-2-o
	Subtotal	2,031,322.42	
3.	Unaccounted difference	0.08	
Total		P3,703,500.00	

(Exhibit 'GGGGGG,' Original Docket, pp. 277-279).

After a careful review of the evidence on record, the Court agrees with the findings of the Court-commissioned independent CPA that the income payments made by petitioner, recorded as Advertising and Promotions Expense amounting to P2,031,322.42, were actually subjected to withholding taxes (i.e. final withholding tax, EWT), but at different rates depending on the nature of the payments.

With regard to the income payment which was not subjected to EWT amounting to P1,672,177.50, it must be noted that petitioner failed to submit any evidence, such as the general ledger and source documents for purposes of comparison with the summary *(Exhibit 'ZZZ')*, so verification can be made as to whether the reconciling items/transactions listed therein really exists. Without these material evidence, petitioner's claim must necessarily fail.

Therefore, respondent's assessment of this item due to petitioner's failure to withhold the 1% EWT on the P1,672,177.50 advertising expense is hereby upheld.

e. EWT on Management Fees amounting to P427,725.48

Respondent avers that petitioner did not pay EWT on the amount of P8,554,509.54, representing management fees paid to GHPI for the fiscal year ended June 30, 1998. Respondent compared the amount of Management Fees per Alpha List with the Management Fees per EWT return and the difference was assessed, as additional expanded withholding tax.

On the other hand, petitioner claims that the management fees paid to GHPI are reflected in the withholding tax returns.

The Court-commissioned independent CPA accounted the discrepancy of P8,554,509.54 as follows:

			Reference
1.	Professional fees paid to juridical persons as Disclosed in the EWT Returns but were considered by the BIR as payment of management fees per Alphalist	(9,125,955.80)	Exhibit AAAA-1
2.	Payments to broker per EWT Returns but Classified by the Company in its Alphalist as Payment of professional fees to juridical persons, thus, considered by the BIR as Payment of management fees	(26,450.00)	Exhibit AAAA-2
3.	Rental payments per EWT Returns but Classified by the Company in its Alphalist as payment of professional fees to juridical persons, thus, considered by the BIR as Payment of management fees.	(19,157.89)	Exhibit AAAA-3
4.	Payments of professional fees to juridical persons considered by the BIR as payment of management fees per EWT Returns but were not considered as such by the BIR per Alphalist	617,054.15	Exhibit AAAA-4
Total		(8,554,509.54)	

(Exhibit 'GGGGGG,' Original Docket, pp. 279-280).

The Court finds that the abovementioned reconciling items were reported as income payments, subjected to EWT in the Alpha List and were actually subjected to EWT based on the monthly EWT Returns.

Thus, this item of assessment is hereby cancelled.

f. Expanded Withholding Tax on Professional Entertainers amounting to P33,770.27

Respondent alleges that petitioner failed to pay EWT on the amount of P337,702.71 representing expenses for professional entertainers *(Joint Stipulation of Facts and Issues)*. The Professional Entertainers per Alpha List was compared with the Professional Entertainers per Expanded Withholding Tax and the difference was assessed, as additional expanded withholding tax *(BIR Records, p.1134)*

Contrary to respondent's computation, petitioner argues that it has already withheld 10% EWT on talent fees paid to professional entertainers. The talent fees form part of its Advertising and Promotions account, an expense account reported in the financial statement. Petitioner further contends that the alleged variance in the computation of EWT on talent fees per Alphalist of Income Payments Subject to Tax and per Monthly Withholding Tax Returns has no basis because the Alphalist of income payments covers calendar year 1998 (i.e. July 1, 1997 to June 30, 1998), as such, the amount of income payments as recorded in these reports will never match.

The discrepancy amounting to P337,702.71, as found by the Court-commissioned independent CPA, is as follows:

			Reference
1.	Rental payments per EWT returns but classified by the Company in its Alphalist as professional fees paid to entertainers, thus, considered by the BIR as per Alphalist but were not in the computation of professional fees paid to entertainers	(15,789.52)	Exhibit BBBB-1
2.	Payments of professional fees to individuals per EWT returns but classified by the Company in its Alphalist as professional fees paid to entertainers, thus, considered by the BIR as professional fees paid to entertainers per Alphalist	(55,555.56)	Exhibit BBBB-2
3.	Payments of professional fees paid to juridical persons per EWT returns but classified by the Company in its Alphalist as professional fees paid To entertainers, thus, considered by the BIR as professional fees paid to entertainers per Alphalist	(305,263.16)	Exhibit BBBB-3
4.	Payments to other recipients of talent fees per EWT Returns but classified by the Company in its Alphalist as professional fees paid to individuals, thus, not considered by the BIR as payments of professional fees to entertainers per Alphalist	38,905.53	Exhibit BBBB-4
Total		(337,702.71)	

(Exhibit 'GGGGGG,' Original Docket, pp. 280-281)

A review of the records reveals that the commissioned independent CPA did not err in finding that the reconciling items were reported as income payments subjected to EWT in the Alphalist and were actually subjected to EWT based on the monthly EWT returns.

Therefore, this item of assessment is also cancelled.

g. On the alleged failure to withhold 1% EWT on Income Payments made to top 5,000 Corporations (Local suppliers) P83,167.55

Respondent maintains that petitioner failed to withhold 1% EWT from the amount of P8,316,755.31 which represents income payments made by petitioner to its local suppliers. The income payments made to the top 5,000 corporations (local suppliers), per Alpha List was compared with the Income Payments made to top 5,000 Corporations per EWT, and the difference was assessed, as additional expanded withholding tax based on Section 57 (B), NIRC, as amended *(Joint Stipulation of Facts and Issues, and BIR Records, p. 1134).*

On its part, petitioner argues that the income payments to its local suppliers had already been subjected to EWT and respondent failed to detect such payments because the Alphalist that was used as basis for assessing EWT on this item covers the calendar year dated December 31, 1998 instead of the fiscal year ended June 30, 1998, its correct accounting period.

The discrepancy of P8,316,755.31 as accounted by the Court-commissioned independent CPA, is as follows:

			Reference
1.	Income payments to local supplier of goods Subjected to EWT at 1% reported both in the Alphalist and in the monthly EWT returns. However, the amount of EWT base reported in the Alphalist is higher than the amount reflected in the EWT returns due to some reclassification of the Nature of income payments made in the Preparation of the Alphalist.	4,636,272.03	Exhibit CCCC-3-a
2.	Income payments to local supplier of goods subjected to EWT at 1% reported in the Alphalist As payment to local supplier of goods but classified under different category of income payments in the monthly EWT returns.	5,526,787.38	Exhibit CCCC-4-a
3.	Income payments to local supplier of goods subjected to EWT at 1% reported in the EWT returns as income payment to local supplier of Goods but classified as payment to contractors/subcontractors in the Alphalist	(1,846,302.49)	Exhibit CCCC-4-b
4.	Unaccounted difference	(1.61)	
Total		8,316,755.31	

(Exhibit 'GGGGGG', Original Docket pp. 281-282)

We agree with the above findings of the Court-commissioned independent CPA that the amount of income payments made by petitioner to its local suppliers of goods, as classified and reported in its Alphalist of Income Payments Subjected to EWT, were actually subjected to EWT, although some items were classified under different categories in the EWT Returns, hence, were not considered by the BIR in its assessment. Consequently, this item of assessment is likewise cancelled."[71]

As a result, the deficiency EWT of TPI was reduced to P434,743.52, broken down as follows:

DEFICIENCY EWT

1.	Professional Fees	P 18,900.00	
	Multiply by Tax Rate	0.10	P 1,890.00
2.	Accrued Commission	P3,975,795.40	
	Multiply by Tax Rate	0.05	P198,789.77

[71] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), p. 96 – 108.

3.	Advertising Expense	P1,672,177.50	
	Multiply by Tax Rate	0.01	P 16,721.78
DEFICIENCY EWT			P217,401.54
Add:	50% Surcharge		108,700.77
	20% Interest (1/25/99 to 7/25/01)		108,641.21
TOTAL EWT STILL DUE			**P434,743.52**[72]

After a careful study of the records, the Court *En Banc* finds no reason to deviate from the foregoing findings of the Court in Division. The presumption of correctness of assessment relied upon by the CIR is a disputable or rebuttable presumption which may be overcome by clear, strong and convincing evidence.

In the disquisition of the Court in Division, TPI was able to refute the findings of the revenue examiners pertaining to its deficiency EWT on its rent income, management fees, professional entertainers expense, and income payments made to the top 5,000 corporations (local suppliers). As to its deficiency EWT assessment on advertising expense and professional & technical fees, it was able to prove that the same should be reduced.

Also, the Court *En Banc* imputes no error on the part of the Court in Division in giving more credence to the findings made by the Court-commissioned independent CPA than to the findings made by the revenue examiners. The Court in Division is allowed to commission independent CPAs under Section 1, Rule 13 of the Revised Rules of the Court of Tax Appeals.[73] Although the findings and conclusions of the independent CPA are not conclusive upon the Court in Division, as these may be challenged by the parties,

[72] *Rollo*, C.T.A. EB No. 389 (C.T.A. Case No. 6570), p. 123.
[73] SECTION 1. *Appointment of independent Certified Public Accountant (CPA).* – A party desiring to present voluminous documents in evidence before the Court may secure the services of an independent Certified Public Accountant (CPA) at its own expense. The Court shall commission the latter as an officer of the Court solely for the purpose of performing such audit functions as the Court may direct.

nevertheless, the Court in Division may at its discretion, in whole or in part, adopt such findings and conclusions subject to verification.[74] It has been often said that the question of whether or not the evidence submitted by a party is sufficient to warrant the granting of its prayer lies within the sound discretion and judgment of the Court.[75] And in the absence of the Court's abuse or improvident exercise of authority, findings of facts made by the Court in Division must be accorded deference and respect.[76] Thus, considering that the reduction of TPI's deficiency EWT assessment is supported by the evidence and the law, the Court *En Banc* affirms the findings of the Court in Division.

WHEREFORE, the Petitions for Review, docketed as C.T.A. EB Nos. 389 and 391, pertaining to the EWT assessment, are hereby **DISMISSED.** Accordingly, the Partial Amended Decision dated April 21, 2008 is **AFFIRMED,** insofar as it orders Tutuban Properties, Inc. to pay the Commissioner of Internal Revenue the reduced amount of **FOUR HUNDRED THIRTY FOUR THOUSAND SEVEN HUNDRED FORTY THREE AND 52/100 PESOS (P434,743.52)**, representing deficiency EWT.

In addition, Tutuban Properties, Inc. is **ORDERED** to pay the Commissioner of Internal Revenue 20% delinquency interest per annum on the amount of P434,743.52, computed from December 13, 2002 until full payment thereof, pursuant to Section 249 (c) of the NIRC of 1997, as amended.

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[74] Rule 13, Section 3 of the Revised Rules of Court of Tax Appeals.
[75] El Greco Ship Manning and Management Corporation v. Commissioner of Customs, C.T.A. EB No. 172 (C.T.A. Case No. 6618), March 14, 2007.
[76] Union Refinery Corporation v. Commissioner of Customs, C.T.A. EB No. 149 (C.T.A. Case No. 5917), January 15, 2007.

The assessments for deficiency income tax and VAT issued by the Commissioner of Internal Revenue against Tutuban Properties, Inc. are hereby **CANCELLED**, pursuant to RA 9480.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of this Court.

ERNESTO D. ACOSTA
Presiding Justice