REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

ASIAN TRANSMISSION CORPORATION,
Respondent.

CTA EB NO. 1519
(CTA Case No. 8366)

Present:

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

Promulgated:
DEC 15 2017 1:10pm

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DECISION

RINGPIS-LIBAN, J.:

Before the Court *En Banc* is a Petition for Review filed by petitioner[1] Commissioner of Internal Revenue (CIR) under Sec. 3(b), Rule 8 of the Revised Rules of the Court of Tax Appeals seeking the nullification of the Decision[2] dated March 16, 2016 (Assailed Decision), the dispositive portion thereof reads:

[1] Respondent in CTA Case No. 8366.
[2] Rollo CTA EB Case No. 1519, pp. 21-57.

"**WHEREFORE**, in light of the foregoing considerations, the instant petition for Review is **PARTIALLY GRANTED**. Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of ₱3,999,957.67, representing basic deficiency withholding tax on compensation and the 25% surcharge imposed under Section 248(3) of the NIRC of 1997, broken down as follows:

Basic Deficiency Withholding Tax on Compensation	₱ 3,199,966.14
25% Surcharge	799,991.53
Total	**₱ 3,999,957.67**

In addition, petitioner is **ORDERED TO PAY** delinquency interest at the rate of twenty percent (20%) per annum on the said total amount of ₱3,999,957.67, computed from July 31, 2011 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997.

SO ORDERED."

and the Resolution[3] dated August 30, 2016 of the same First Division of the Court (Court in Division) denying petitioner's Motion for Reconsideration, the dispositive portion thereof reads:

"**WHEREFORE**, premises considered, the respective Motion for Reconsideration of the parties are **DENIED** for lack of merit.

SO ORDERED."

THE FACTS

The facts as stated in the assailed Decision are as follows:

"Petitioner[4] Asian Transmission Corporation is a corporation duly organized and existing under Philippine laws with business address at Carmelray Industrial Park, Canlubang, Calamba City, Laguna. It was organized and registered with the Securities and Exchange Commission on January 29, 1973.

Respondent is the Commissioner of Internal Revenue of the Bureau of Internal Revenue (BIR) with office at BIR National Office Building, Agham Road, Diliman, Quezon City.

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[3] Rollo pp. 58-64.
[4] Respondent in this case.

In June 2003, petitioner received the Letter of Authority (LOA) No. 00002564 dated June 11, 2003, informing it that certain revenue officers from the Large Taxpayers Audit and Investigation Division 1 of the BIR have been authorized to examine its books of accounts and other accounting records of the taxable year 2001.

On November 20, 2003, petitioner, through a certain Mr. Roderick M. Tan, who is designated as VP-Personnel & Legal executed a *Waiver of the Defense of Prescription Under the Statute of Limitations of the National Internal Revenue Code.*

On December 9, 2003, petitioner received another LOA bearing No. 2000-00003516 dated December 1, 2003, informing it of the continuation of the Investigation against it to be conducted by revenue officers L. Nagrampa / R. Ariola under Group Supervisor E. Formalejo.

Petitioner further executed, again through Mr. Tan, *Waiver of the Defense of Prescription Under the Statute of Limitations of the National Internal Revenue Code* on the following dates: September 8, 2004, March 3, 2005, November 10, 2005, March 21, 2006, November 16, 2006, April 18, 2007, and October 25, 2007.

Thereafter, respondent, through Nestor S. Valeroso, Assistant Commissioner, Large Taxpayers Service, issued an undated Preliminary Assessment Notice (PAN), assessing petitioner of the following deficiency taxes, including increments, to wit:

Type of Tax	Amount
Income Tax	₱ 40,391,143.31
Value-Added Tax	₱ 3,544,074.43
Expanded Withholding Tax	₱ 1,476,211.94
Withholding Tax on Compensation	₱ 15,834,400.65

On April 25, 2007, respondent, again through Mr. Valeroso, issued the Formal Letter of Demand, with accompanying Assessment Notices, assessing petitioner of the following deficiency taxes, including increments, to wit:

Type of Tax	Amount
Income Tax	₱ 42,148,723,36
Value-Added Tax	₱ 3,694,074.43
Expanded Withholding Tax	₱ 1,544,343.61

Withholding Tax on Compensation	₱ 15,632,797.59

Consequently, on June 14, 2007, petitioner filed its Protest addressed to Mr. Valeroso, assailing the above-stated assessments, and requesting for the cancellation thereof. Petitioner likewise filed its supplemental protest addressed to the Chief of the Large Taxpayers Service, on August 13, 2007.

On July 15, 2008, petitioner received a copy of the undated Final Decision on Disputed Assessment (FDDA), containing the decision of the BIR, signed by Olivia O. Lao, OIC-Head Revenue Executive Assistant (Excise), Large Taxpayers Service, finding the Protest and Supplemental Protest filed by petitioner unmeritorious.

Subsequently, on July 24, 2008, petitioner paid the amount of P1,751,201.23, representing alleged deficiency withholding tax liability for the year 2001. Apparently, this payment corresponds to the assessment for the Expanded Withholding Tax.

Nonetheless, petitioner appealed the said FDDA directly to respondent on August 14, 2008, requesting for the reconsideration and/or cancellation of the deficiency withholding tax on compensation issued against petitioner for taxable year 2001.

On July 1, 2011, respondent issued her Decision on petitioner's administrative appeal, denying petitioner's request for reconsideration and ordering petitioner to pay the amount of P17,775,818.59, representing deficiency Withholding Tax on Compensation for taxable year 2001.

On November 3, 2011, Asian Transmission Corporation (ATC) filed a Petition for Review before the Court in Division.[5]

In the Answer[6], the CIR interposed the following as Special and Affirmative Defenses: ATC is liable to pay its deficiency withholding taxes for calendar year 2001 in the total amount of Seventeen Million Seven Hundred Seventy-Five Thousand Eight Hundred Eighteen Pesos and 59/100 (₱17,775,818.59) including penalties and interests; the petition should not be given due course by the Court because of lack of jurisdiction; the petition was filed out of time; the petition was filed after 3 years, 2 months, 3 weeks and 1 day from receipt of the FDDA; assuming that ATC's right to appeal has not yet prescribed, the assessment for taxable year 2001 was issued in accordance with law and regulations; and ATC is

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[5] CTA Case No. 8366, Docket, pp. 10-32, with Annexes.
[6] Ibid. pp. 163-181.

estopped from assailing the validity of the waiver with respect to the assessment of its deficiency withholding tax.

On December 13, 2011, ATC filed its Reply,[7] arguing that the Petition for Review was filed on time; that it can raise the issue on the validity of the waiver even for the first time on appeal; and that it cannot be held in estoppel from raising the invalidity of the waiver.

In the Joint Stipulation of Facts and Issues[8], the parties agreed that the issues to be resolved by the Court in Division are as follows:

> 1. Whether or not the *Waivers of the Defense of Prescription Under the Statute of Limitations of the National Internal Revenue Code* validly extended the government's right to assess deficiency taxes against the petitioner.
> 2. Whether or not the right of the government to issue the challenged assessment has already prescribed.
> 3. Whether the instant petition was filed out of time.
> 4. Whether or not petitioner is liable for the deficiency withholding taxes for calendar year 2001 in the total amount of Seventeen Million Seven Hundred Seventy-Five Thousand Eight Hundred Eighteen Pesos and Fifty-Nine Centavos (Php17,775,818.59) including penalties and interests.
> 5. Whether or not ATC failed to substantiate by clear and convincing evidence its position that a substantial portion of the salaries and expense accounts reflected in its Financial Statements for the year 2001 in the amount of Php31,248,351.27 represented non-compensation items and whether the same is subject to withholding tax.
> 6. Whether or not the BIR examiners erred in not including in their analysis the termination pay benefits granted by the petitioner to some of its employees in the amount of Php7,281,409.79 despite being included under the term "Employees' Benefits" in its Financial Statements for the year 2001.
> 7. Whether or not the Honorable Court has jurisdiction over the instant petition.
> 8. Whether or not the petitioner's act of paying alleged deficiency withholding tax as reflected in the Final Decision on Disputed Assessment a few days after receipt thereof renders the petitioner estopped from questioning the validity of the waiver.

After trial on the merits wherein both parties presented their respective evidence, and upon the submission of the parties' respective memorandum,[9] the case was submitted for decision.

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[7] Ibid. pp. 226-237.
[8] Filed by the parties on February 27, 2012.
[9] ATC filed its memorandum on September 23, 2014, while the CIR filed on September 29, 2014.

On March 16, 2016 and August 30, 2016, the Court in Division rendered the questioned Decision and Resolution.

Aggrieved, the CIR filed before the Court *En Banc* this Petition for Review[10] on September 30, 2016.

In the Resolution[11] dated November 15, 2016, ATC was directed by the Court *En Banc* to file its comment in this case.

On December 1, 2016, ATC filed its "Comment."

In the Resolution dated January 19, 2017,[12] the Court gave due course to the Petition for Review. In view thereof, the instant case was deemed submitted for decision.

THE ISSUES

The issues raised by the CIR in his Petition for Review are as follows:

1. Whether ATC is liable for the deficiency withholding taxes for calendar year 2001 in the total amount of Seventeen Million Seven Hundred Seventy-Five Thousand Eight Hundred Eighteen Pesos and Fifty-Nine Centavos (₱17,775,818.59), including penalties and interests;

2. Whether ATC fully substantiated by clear and convincing evidence its position that a substantial portion of the salaries and expense accounts reflected in its Financial Statements for the year 2001 in the amount of ₱31,248,351.27 represented non-compensation items and whether the same is subject to withholding tax.

The issues can be summarized into one issue, that is, whether the Court in Division erred in partially granting the Petition for Review and holding ATC liable to pay only the amount of ₱3,999,957.67, representing basic deficiency withholding tax on compensation and the 25% surcharge imposed under Section 248(3) of the NIRC of 1997, and delinquency interest at the rate of twenty percent (20%) per annum, on the said total amount, computed from July 31, 2011 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997.

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[10] Rollo CTA EB Case No. 1519, pp.8-20, with Annexes.
[11] Ibid pp. 70-71.
[12] Ibid pp. 82-83.

THE ARGUMENTS

The CIR contends that ATC is liable to pay its deficiency withholding tax on compensation in accordance with Sections 79 and 80 of the NIRC; that since ATC failed to present the complete list of its employees, the maximum tax rate of 32% must be applied; and that ATC, as withholding agent, must be held liable, in addition of other penalties, to a penalty equal to the total amount of tax not withheld or not accounted for and remitted in accordance with Section 251 of the NIRC of 1997.

On the other hand, ATC argues that the CIR failed to advance any argument to dispute the findings of the Court in Division that ₱7,870,532.35 of the alleged discrepancy found by the CIR actually pertains to ATC's contribution to its employees' Hospitalization, SSS, Pag-Ibig, Medicare, Employees Compensation and Rice Allowance, all of which are not taxable under the law; that the findings of the Court in Division are fully supported by documentary evidence on record; that the effective rate of 19.98% was logically arrived at through valid estimation "based on the total withholding tax on compensation paid divided by the total amount of taxable gross compensation reported during taxable year 2001; and that the additional penalty provided by law applies only in a criminal case for violation of Section 251 of the NIRC, as amended.

THE RULINGS OF THE COURT EN BANC

TIMELINESS OF THE PETITION

On March 18, 2016, the CIR received the Decision of the Court in Division. On April 4, 2016, the CIR filed a Motion for Partial Reconsideration of the said Decision. On August 30, 2016, the Court in Division issued the assailed Resolution denying the CIR's motion. Said resolution was received by the CIR on August 31, 2016.

From receipt of the said Resolution on August 31, 2016, the CIR has until September 15, 2016 within which to file the Petition for Review. On September 15, 2016, the CIR filed before this Court a "Motion for Extension of Time to File Petition for Review," praying for an extension of fifteen (15) days from September 15, 2016 or until September 30, 2016, within which to file the Petition for Review. On September 19, 2016, the Court *En Banc* issued a Minute Resolution granting the CIR's motion.

On September 30, 2016, the CIR filed the instant Petition for Review. Hence, this Petition for Review was timely filed.

The Court shall now proceed to determine the merits of the Petition for Review.

After a careful review of petitioner CIR's arguments and the records of the case, the Court *En Banc* finds no reason to reverse the Decision and Resolution of the Court in Division. The records of the case show that the Court in Division had fully and exhaustively resolved the issues raised in the petition. This Court notes that the arguments presented are a mere rehash of the arguments presented by the CIR in his Motion for Partial Reconsideration.

Whether ATC is liable to pay withholding tax in the amount of P17,775,818.59 according to the Final Decision on Disputed Assessment (FDDA) issued by the CIR

The CIR argues that ATC is liable to pay its deficiency withholding tax on compensation in accordance with Sections 79 and 80 of the NIRC. In the assailed Decision, the Court in Division recognized ATC's liability as a withholding agent. However, its liability was in a reduced amount than that assessed by the BIR.

The Court *En Banc* agrees with the findings of the Court in Division that ATC is liable to pay withholding tax on compensation but only in the amount of P3,199,966.14.

As aptly discussed in the assailed Decision:

> "Based on the submitted supporting documents, the ICPA found that petitioner is liable for deficiency withholding tax on compensation in the amount of ₱337,673.89 on the unsubstantiated amount of ₱1,055,230.90.

Accounts	Contested Amount	Verified Amount	Difference	WT Rate	WT Due
Hospitalization Company Contribution	₱3,565,810.25	₱3,345,258.50	₱220,551.75	32%	₱70,576.56
Group Insurance	376,157.69	335,035.28	41,122.41	32%	13,159.17
SSS Contribution	3,642,154.30	3,621,197.10	20,957.20	32%	6,706.30
Medicare Contribution	593,881.25	584,431.25	9,450.00	32%	3,024.00
Employee Compensation Insurance	62,840.00	62,840.00	-	32%	-
Pag-Ibig Contribution	645,680	639,164.00	6,516.00	32%	2,085.12
Rice	3,098,891.74	2,962,900.00	135,991.74	32%	43,517.36
Employee Uniform	1,156,534.39	1,244,314.55	-	32%	-
Retirement Plan Contribution	17,459,628.63	17,392,689.85	66,938.78	32%	21,420.41
Canteen Allowance	301,977.38	93,070.00	208,907.38	32%	66,850.36
Maintenance Expense	156,660.42	-	156,660.42	32%	50,131.33
Tools Expense	188,135.22	-	188,135.22	32%	60,203.27
TOTAL	**₱31,248,351.27**	**₱30,280,900.53**	**₱1,055,230.90**		**₱337,673.89**

This Court, however, does not totally agree with the foregoing findings.

Section 2.78.1 of Revenue Regulations (RR) No. 02-98, as amended by RR Nos. 08-00 and 10-00, states the following:

"SECTION 2.78.1. Withholding of Income Tax on Compensation Income. – The withholding of tax on compensation income is a method of collecting the income at source upon receipt of the income. It applies to all employed individuals whether citizens or aliens, deriving income form compensation for services rendered in the Philippines. The employer is constituted as the withholding agent.

(A) Compensation Income Defined. – In general, the term 'compensation' means all remuneration for services performed by an employee for his employer under an employer – employee relationship, unless specifically excluded by the Code.

xxx xxx xxx

(2) Living quarters or meals. – If a person receives a salary as remuneration for services rendered, and in addition thereto, living quarters are provided, the value to such person of the quarters and meals so furnished shall be added to the remuneration paid for the purpose of determining the amount of compensation subject to withholding. However, if living quarters or meals are furnished to an employee for the convenience of the employer, the value thereof need not be included as part of compensation income.

(3) Facilities and privileges of relatively small value. – Ordinarily, facilities and privileges (such as entertainment, medical services, or so-called "courtesy discounts" on purchases), otherwise known as "*de minimis benefits,*" furnished or offered by an employer to his employees, are not considered as compensation subject to income tax and consequently to withholding tax, if such facilities are offered or furnished by the employer merely as means of promoting the health, goodwill, contentment, or efficiency of his employees.

The following shall be considered as '*de minimis*' benefits not subject to withholding tax on compensation income of both managerial and rank and file employees" x x x

(c) Rice subsidy of P1,000.00 or one (1) sack of 50-kg rice per month amounting to not more than P1,000.00.

(d) Uniforms and clothing allowance not exceeding P3,000.00 per annum; x x x

(j) Daily meal allowance for overtime work not exceeding twenty five percent (25%) of the basic minimum wage.

xxx xxx xxx

(A) Exemptions form withholding tax on compensation. – The following income payments are exempted from the requirements of withholding tax on compensation:

xxx xx xxx

(12) GSIS, SSS, MEDICARE and other contributions.- GSIS, SSS, Medicare and Pag-Ibig contributions, and union dues of individual employees." *(Emphases and underscoring supplied)*

Based on the foregoing provisions, it is clear that the withholding tax on compensation income is a method of collecting the income at source *"upon receipt of the income"*. Income, in turn, is defined, and the elements for the imposition of income tax thereon is stated in *Commissioner of Internal Revenue vs. Court of Appeals, et.al.,* as follows:

"xxx. **Income in tax law is an amount of money <u>coming to a person</u> within a specified time,** whether as payment for services, interest, or profit form investment. It means cash of its equivalent. It is gain derived and severed from capital, from labor or from both combined xxx.

xxx xxx xxx

The three (3) elements in the imposition of income tax are: (1) there must be gain or profit, (2) **<u>that the gain or profit is realized or received, actually or constructively,</u>** and (3) is it not exempted by law or treaty form income tax. xxx."

Thus, unless specifically exempted from withholding tax on compensation, for a compensation income to be subjected thereto, the said income must *"come to the person"* or must be realized or received by the same person, *"actually or constructively"*. In this connection, there is constructive receipt, when the consideration for the articles sold, exchanged or leased, or the services rendered has already been placed under the control of the person who sold the goods or rendered the services without any restriction by the payor.

In applying the foregoing rules, the burden of proof rests on petitioner. In appeals to this Court, the determination of respondent is presumed correct and it behooves the taxpayers to rebut such presumption.

In this case, considering that *SSS, Medicare, Pag-Ibig Contributions and Employee Compensation Insurance* are income payments specifically exempted by the above-quoted Section 2.78.1 (B)(12) of RR No. 2-98, the Courts finds that the same should not be subjected to withholding tax on compensation, detailed as follows:

Accounts	Verified Amount
SSS Contribution	₱3,621,197.10
Medicare Contribution	584,431.25
Employee Compensation Insurance	62,840.00
Pag-Ibig Contribution	639,164.00
Total exempted contributions	**₱4,907,632.35**

Anent the other contributions, *i.e., Hospitalization Company Contribution, Group Insurance, and Retirement Plan Contribution,* since the same are not specifically exempted from withholding tax on compensation, it must have been shown by petitioner that such contributions are not subject to the requirement of withholding tax on compensation. Specifically, petitioner should have established by clear and convincing evidence that said contributions were not realized or received, actually or constructively, by its employees. However, it failed to do so, and thus, the withholding tax assessment thereon must be sustained.

As cases filed before this Court are litigated de novo, party-litigants should prove every minute aspect of their cases.

As for the *Rice Allowance*, petitioner's documents substantiating the same in the amount of ₱2,962,900.00 sufficiently established the fact of purchase of rice and the corresponding list of employees which were entitled for such benefit. Accordingly, the rice allowance given to each of petitioner's employees amounted to either ₱890 or

₱900 per month during 2001, well within the threshold set forth in Section 2.78.1(A)(3)(c) of RR No. 02-98 as *de minimis* benefits. Thus, the Rice Allowance in the verified amount of ₱2,962,900.00 is exempt form withholding tax on compensation.

However, this Court cannot extend the same ruling on *Employee Uniforms*, since the documents presented by petitioner failed to prove the number/listing of employees which were given with uniforms, hence, the Court cannot verify whether said allowance was within the threshold per employee as set forth in the earlier quoted Section 2.78.1(A)(3)(d) of RR No. 2-98. We are then constrained to rule that the assessment on the deficiency withholding tax on compensation arising from the alleged *Employee Uniforms* must be upheld.

With regard to the *Canteen Allowance*, the same should likewise be subjected to withholding tax on compensation. This must be so because petitioner failed to prove that the *"meals"* were furnished *"for the convenience of the employer"*, as required by the above-quoted Section 2.78.1(A)(2) of RR No. 2-98, for the value thereof to be not included as part of compensation income. Moreover, there is no showing that the said amount represents *"daily meal allowance for overtime work"* considered as *de minimis* benefits under Section 2.78.1(A)(3)(j) of RR No. 2-98.

As regards the *Maintenance and Tool Expenses* in the amounts of ₱156,660.42 and ₱188,135.22, respectively, petitioner neither presented any supporting documents, nor explained the nature of these expenses. Hence, the assessments thereto must no longer be disturbed.

In sum, the deficiency withholding tax on compensation assessed against petitioner is determined anew as follows:

Discrepancy as found by respondent		₱23,966,941.48
Less: Items not subject to withholding tax on compensation:		
SSS Contribution	₱3,621,197.10	
Medicare Contribution	584,431.25	
Employee Compensation Insurance	62,840.00	
Pag-Ibig Contribution	639,164.00	
Rice	2,962,900.00	7,870,532.35
Amount subject to withholding tax on compensation		**₱16,096,409.13**

The above unaccounted compensation of ₱16,096,409.13 should be subjected to withholding tax on compensation based on the graduated tax rates of 5% to 32%. We note, however, that the BIR used the highest tax rate of 32%, in computing the deficiency withholding tax on compensation. Since the employees to whom the compensation pertained to were not individually identified, the appropriate tax rate to be used should be the effective rate computed based on the total withholding tax on compensation paid divided by the total amount of taxable gross compensation reported during the taxable year 2001, as shown below:

Total Withholding Tax on Compensation	₱34,803,195.66
Total Taxable Gross Compensation	÷ ₱175,094,802.20
Effective Tax Rate	**19.88%**

In fine, petitioner is liable to pay basic deficiency withholding on compensation for taxable year 2001 in the amount of ₱3,199,966.14, computed as follows:

Amount subject to withholding tax on compensation	₱ 16,096,409.13
Multiply by effective tax rate	19.88 %
Basic deficiency withholding tax on compensation	**₱ 3,199,966.14**

Lastly, the compromise penalty imposed by respondent for the deficiency withholding tax on compensation in the amount of ₱50,000.000 must be cancelled. Pursuant to RMO No. 01-90, compromise penalties are only amounts suggested in settlement of criminal liability, and may not be imposed or exacted on the taxpayer in the event that a taxpayer refuses to pay the same. It is well-settled that the Court has no jurisdiction to compel a taxpayer to pay the compromise penalty because by its very nature, it implies a mutual agreement between the parties in respect to the thing or subject matter that is so compromised, and the choice of paying or not paying it distinctly belongs to the taxpayer. Absent a showing that herein petitioner consented to the compromise penalty, its imposition should be deleted. The imposition of the same without the conformity of the taxpayer is illegal and unauthorized."

The Court *En Banc* notes, however, that the assailed Decision failed to impose upon ATC a deficiency interest at a rate of 20% per annum on the basic deficiency withholding tax on compensation.

Section 249(B) of the NIRC of 1997 provides:

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

Thus, the Court shall impose Deficiency Interest at a rate of twenty percent (20%) on the basic deficiency Expanded Withholding Tax on Compensation in the amount of ₱3,199,966.14.

WHEREFORE, the Petition for Review is hereby **PARTIALLY GRANTED.** The Decision dated March 16, 2016 and Resolution dated August 30, 2016 are hereby **AFFIRMED**, with modification.

Accordingly, ATC is **ORDERED TO PAY** deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency Expanded Withholding Tax on Compensation computed from January 15, 2002 until full payment thereof, pursuant to Section 249(B) of the NIRC of 1997, as amended.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

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

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

LOVELL R. BAUTISTA
Associate Justice

I Join PJ's CDO
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA EB NO. 1519** (CTA CASE NO. 8366)
	Present:
-versus-	**DEL ROSARIO, *P.J.*,** **CASTANEDA, JR.,** **BAUTISTA,** **UY,** **CASANOVA,** **FABON-VICTORINO,** **MINDARO-GRULLA,** **RINGPIS-LIBAN,** and **MANAHAN**, *JJ.*
ASIAN TRANSMISSION CORPORATION, *Respondent,*	Promulgated: DEC 15 2017 1:10 pm

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CONCURRING AND DISSENTING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* in affirming the assailed Decision and Resolution of the Court in Division but only insofar as it orders Asian Transmission Corporation to pay the deficiency withholding tax on compensation (WTC) in the total amount of ₱3,999,957.67 inclusive of the 25% surcharge, and 20% delinquency interest based on the aforestated amount.

With due respect to the *ponencia*, I am of the view that **deficiency interest at the rate of 20% may not be imposed on the assessed deficiency WTC.** I reiterate the 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:

> "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.
> >
> > xxx xxx xxx
> >
> > **Thus, where the issue involved was not raised nor presented to the court and not passed upon by the court in the previous case, the decision in the previous case is not *stare decisis* of the question presented."** (Emphasis supplied)

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[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), 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.

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

> **"It will be seen that Section 51 (c) (1) and (e) (1) and (3), of the 1977 Tax Code, authorize the imposition of surcharge and interest only in respect of a *"tax imposed by this Title,"* that is to say, Title II on "Income Tax."** It will also be seen that Section 72 of the 1977 Tax Code imposes a surcharge only in case of failure to file a return or list *"required by this Title,"* that is, *Title II on "Income Tax."* **The thirty-five percent (35%) transaction tax is, however, imposed in the 1977 Tax Code by *Section 210 (b) thereof which Section is embraced in Title V on "Taxes on Business"* of that Code.** Thus, while the thirty-five percent (35%) transaction tax is in truth *a tax imposed on* interest *income* earned by lenders or creditors purchasing commercial paper on the money market, the relevant provisions, *i.e.,* Section 210 (b), were *not* inserted in Title II of the 1977 Tax Code. The end result is that the thirty-five percent (35%) transaction tax is *not* one of the taxes in respect of which Section 51 (e) authorized the imposition of surcharge and interest and Section 72 the imposition of a fraud surcharge." (Emphases supplied)

True, the Supreme Court in *PICOP* declared that the present provision of the NIRC mentions that **additions** on tax applies to all taxes. While such pronouncement may not be construed beyond the context in which it was made, *PICOP* simply confirmed that *in general*, certain penalties and charges are applicable to all types of tax or deficiency tax; **PICOP, however, did**

not categorically construe the provision of Section 249 (B) that deals with "deficiency interest" on the type of tax "as defined in [the] Code." Note that the present NIRC is explicit with respect to the type of tax on which deficiency interest may be imposed, viz:

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

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

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

Finally, Sections 247 (a) and 249 (A) are **general provisions** that impose "additions" to the tax and "interest" thereon. Both sections may not be read in isolation from the relevant and **specific provision** of Section 249 (B) with respect to the imposition of "deficiency" interest, more so as all these provisions fall within the same Chapter I of Title X of the NIRC of 1997, as amended.

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

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

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

> **additional tax burden should not simply be presumed. Thus, the obligation to pay deficiency interest may not be applied to taxes other than income tax, donor's tax and estate tax, irrespective of whether an assessment is issued or not. After all, the deficiency tax assessed is still subject to the delinquency interest rate of 20% per annum until fully paid. Truth be told, the delinquency interest rate of 20% is way more than the legal interest of 12% per annum.**"

The power of taxation is sometimes called also the power to destroy. Therefore, it should be exercised with caution to minimize injury to the proprietary rights of a taxpayer. It must be exercised fairly, equally and uniformly, lest the tax collector kills the "hen that lays the golden egg."[5] Indeed, the imposition of 20% deficiency interest per annum on a tax not clearly within the context of the law, in addition to 20% delinquency interest per annum <u>and</u> a surcharge of 25% on the amount due under Section 248 of the NIRC of 1997, as amended, is too burdensome for a taxpayer to survive and continue its business affairs.

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

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

[5] *Commissioner of Internal Revenue vs. SM Prime Holdings, Inc.*, G.R. No. 183505, February 26, 2010, *citing Roxas vs. Court of Tax Appeals*, G.R. No. L-25043, April 26, 1968.

the deficiency tax, or on any surcharge or interest thereon. Reasonably construed, in the absence of aforestated qualification, the "additions" to tax apply to all forms of tax.

While additions to tax that are "qualified" must be limited to the type of "deficiency in the tax due as the term is defined in the Code", to impose or demand payment of 20% deficiency interest on all deficiency tax liabilities would render senseless the unequivocal qualification in Section 249(B) of the NIRC that deficiency interest shall be imposed only on *"any deficiency in the tax due as the term is defined in [the National Internal Revenue] Code."* Had it been the intention to impose deficiency interest on all deficiency tax liabilities, this specific qualification would not have been incorporated at all, similar to Sections 248 and 249 (C) of the NIRC.

Since it is only with respect to the donor's tax, income tax and estate tax which incorporate provisions that specifically **define "deficiency"** and considering that Section 249(B) of the NIRC is categorical that deficiency interest shall be imposed only on any deficiency in the tax due **as the term is defined in the NIRC**, I reiterate that the deficiency interest must be imposed only on these three (3) types of taxes. The liability to pay deficiency interest springs from Section 249(B) of the NIRC and its imposition must be strictly made in accordance with its precepts. This is consistent with Article 1158 of the Civil Code of the Philippines which provides that "**Obligations derived from law are not presumed**. Only those expressly determined in this Code or in special laws are demandable, and shall be regulated by the precepts of the law which establishes them; xxx xxx xxx."

In sum, deficiency interest may be imposed only on tax specifically covered and defined by the relevant provisions of the NIRC, *i.e., income tax, donor's tax and estate tax*; **conversely, deficiency interest may not properly be imposed on the WTC assessed against respondent.**

All told, **I VOTE to DENY** the Petition for Review filed by the Commissioner of Internal Revenue for lack of merit.

ROMAN G. DEL ROSARIO
Presiding Justice