**REPUBLIC OF THE PHILIPPINES**
**COURT OF TAX APPEALS**
**QUEZON CITY**

***EN BANC***

**COMMISSIONER OF INTERNAL REVENUE,**
Petitioner,

**CTA EB NO. 1210**
(CTA Case NO. 8382)

- versus -

**OFFICEMETRO PHILIPPINES, INC. (formerly REGUS CENTRES, INC.),**
Respondent.

x-----------------------------------------x

**OFFICEMETRO PHILIPPINES, INC. (formerly REGUS CENTRES, INC.)**
Petitioner,

**CTA EB NO. 1213**
(CTA Case NO. 8382)

- versus -

**COMMISSIONER OF INTERNAL REVENUE,**
Respondent.

Present:

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

Promulgated:

JUL 01 2016 4:09 p.m.

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# RESOLUTION

For resolution of the Court *En Banc* is petitioner Commissioner of Internal Revenue's **Motion for Reconsideration** filed through registered mail on March 15, 2016, with respondent Officemetro Philippines, Inc.'s **Comment/Opposition to the Motion for Reconsideration** filed on May 13, 2016.

Petitioner Commissioner of Internal Revenue (CIR) assails the Decision of the Court *En Banc* dated March 7, 2016,[1] the dispositive portion of which reads:

> "**WHEREFORE**, in view thereof, the Petition for Review filed by Commissioner of Internal Revenue in CTA EB No. 1210 and the Petition for Review filed by Officemetro Philippines, Inc. in CTA EB No. 1213, are hereby **DISMISSED**, for lack of merit. Accordingly, the Decision dated June 3, 2014 is hereby **AFFIRMED**.
>
> **SO ORDERED.**"

Petitioner CIR reiterates in her Motion for Reconsideration that Officemetro Philippines, Inc.'s (Officemetro) condominium dues are subject to EWT because the previous BIR Rulings exempting it from EWT was already repealed by Revenue Memorandum Circular No. 65-2012 (RMC 65-2012). Moreover, she asserts that she may revoke, repeal or abrogate the acts or previous rulings of her predecessor in office and that there is no factual basis to declare that Officemetro will suffer prejudice.

Officemetro, on the other hand, manifests that it filed a Petition for Voluntary Liquidation before the Regional Trial Court of Makati City (RTC) on April 15, 2013. Consequently, the RTC issued an Order stating that Officemetro's case for voluntary liquidation is deemed closed and terminated and, pursuant thereto, the Securities and Exchange Commission issued a resolution approving the change of status of Officemetro as dissolved corporation. Thus, Officemetro posits that said circumstances render the instant case moot and academic.

After considering the pleadings submitted by both parties, the Court *En Banc* is confronted with the following issues: (1) Whether the voluntary liquidation of Officemetro renders this case moot and academic; and (2) Whether Officemetro's condominium dues are subject to EWT.

We *deny* the instant motion.

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[1] Court *En Banc* Docket, pp. 146-161.

**Officemetro's obligation to pay its unpaid taxes subsists albeit the alleged voluntary liquidation**

The Court *En Banc* shall first rule whether the voluntary liquidation of Officemetro rendered this case moot and academic or, in other words, whether Officemetro's voluntary liquidation extinguished its obligation to the government.

In *Anthony S. Yu, et al. v. Joseph S. Yukayguan, et al.*,[2] the Supreme Court explained the concept of liquidation as follows:

> "xxx Liquidation is a necessary consequence of the dissolution of a corporation. It is specifically governed by Section 122 of the Corporation Code, which reads:
>
> > **SEC. 122.** *Corporate liquidation.* Every corporation whose charter expires by its own limitation or is annulled by forfeiture or otherwise, or whose corporate existence for other purposes is terminated in any other manner, shall nevertheless be continued as a body corporate for three (3) years after the time when it would have been so dissolved, for the purpose of prosecuting and defending suits by or against it and enabling it to settle and close its affairs, to dispose of and convey its property and to distribute its assets, but not for the purpose of continuing the business for which it was established.
> >
> > At any time during said three (3) years, said corporation is authorized and empowered to convey all of its property to trustees for the benefit of stockholders, members, creditors, and other persons in interest. From and after any such conveyance by the corporation of its property in trust for the benefit of its stockholders, members, creditors and others in interest, all interest which the corporation had in the property terminates, the legal interest vests in the trustees, and the beneficial interest in the stockholders, members, creditors or other persons in interest.
> >
> > Upon winding up of the corporate affairs, any asset distributable to any creditor or stockholder or member who is unknown or cannot be found shall be escheated to the city or municipality where such assets are located.

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[2] G.R. No. 177549, June 18, 2009.

> Except by decrease of capital stock and as otherwise allowed by this Code, no corporation shall distribute any of its assets or property except upon lawful dissolution and after payment of all its debts and liabilities.

> Following the voluntary or involuntary dissolution of a corporation, **liquidation is the process of settling the affairs of said corporation, which consists of adjusting the debts and claims, that is, of collecting all that is due the corporation, the settlement and adjustment of claims against it and the payment of its just debts.** More particularly, it entails the following:

> Winding up the affairs of the corporation means the collection of all assets, the payment of all its creditors, and the distribution of the remaining assets, if any among the stockholders thereof in accordance with their contracts, or if there be no special contract, on the basis of their respective interests. The manner of liquidation or winding up may be provided for in the corporate by-laws and this would prevail unless it is inconsistent with law.

> It may be undertaken by the corporation itself, through its Board of Directors; or by trustees to whom all corporate assets are conveyed for liquidation; or by a receiver appointed by the SEC upon its decree dissolving the corporation."[3] *(Emphasis supplied)*

Essentially, liquidation is the process of settling the affairs of a corporation which consists of adjusting the debts and claims, that is, of collecting all that is due the corporation, the settlement and adjustment of claims against it and the payment of its just debts.

Here, Officemetro contends that the termination of the proceedings before the RTC regarding its Petition for Voluntary Liquidation renders the instant case moot and academic. However, the declaration made by the RTC does not render this case moot and academic precisely because the purpose of liquidation is to settle the obligations of petitioner, *i.e.*, unpaid taxes. Officemetro is yet to settle what is due to the government.

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[3] Id., citing *China Banking Corp. v. M. Michelin & Cie,* 58 Phil 261, 266 (1933) and Campos, THE CORPORATION CODE: COMMENTS, NOTES AND SELECTED CASES (Vol. 2, 1990 ed.), p. 415, 415-416.

Moreover, the RTC is yet to issue a Liquidation Order. Republic Act No. 10142, otherwise known as the Financial Rehabilitation and Insolvency Act (FRIA) of 2010, respectively provides:

> "**Section 90.** *Voluntary Liquidation.* - An insolvent debtor may apply for liquidation by filing a petition for liquidation with the court. The petition shall be verified, shall establish the insolvency of the debtor and shall contain, whether as an attachment or as part of the body of the petition;
>
> (a) a schedule of the debtor's debts and liabilities including a list of creditors with their addresses, amounts of claims and collaterals, or securities, if any;
>
> (b) an inventory of all its assets including receivables and claims against third parties; and
>
> (c) the names of at least three (3) nominees to the position of liquidator.
>
> At any time during the pendency of court-supervised or pre-negotiated rehabilitation proceedings, the debtor may also initiate liquidation proceedings by filing a motion in the same court where the rehabilitation proceedings are pending to convert the rehabilitation proceedings into liquidation proceedings. The motion shall be verified, shall contain or set forth the same matters required in the preceding paragraph, and state that the debtor is seeking immediate dissolution and termination of its corporate existence.
>
> If the petition or the motion, as the case may be, is sufficient in form and substance, the court shall issue a Liquidation Order mentioned in Section 112 hereof."
>
> "**(A) The Liquidation Order.**
>
> **Section 112.** *Liquidation Order.* - The Liquidation Order shall:
>
> (a) declare the debtor insolvent;
>
> (b) order the liquidation of the debtor and, in the case of a juridical debtor, declare it as dissolved;
>
> (c) order the sheriff to take possession and control of all the property of the debtor, except those that may be exempt from execution; gr

(d) order the publication of the petition or motion in a newspaper of general circulation once a week for two (2) consecutive weeks;

(e) direct payments of any claims and conveyance of any property due the debtor to the liquidator;

(f) prohibit payments by the debtor and the transfer of any property by the debtor;

(g) direct all creditors to file their claims with the liquidator within the period set by the rules of procedure;

(h) authorize the payment of administrative expenses as they become due;

(i) state that the debtor and creditors who are not petitioner/s may submit the names of other nominees to the position of liquidator; and

(j) set the case for hearing for the election and appointment of the liquidator, which date shall not be less than thirty (30) days nor more than forty-five (45) days from the date of the last publication."

"**Section 113.** *Effects of the Liquidation Order.* - Upon the issuance of the Liquidation Order:

(a) the juridical debtor shall be deemed dissolved and its corporate or juridical existence terminated;

(b) legal title to and control of all the assets of the debtor, except those that may be exempt from execution, shall be deemed vested in the liquidator or, pending his election or appointment, with the court;

(c) all contracts of the debtor shall be deemed terminated and/or breached, unless the liquidator, within ninety (90) days from the date of his assumption of office, declares otherwise and the contracting party agrees;

(d) no separate action for the collection of an unsecured claim shall be allowed. Such actions already pending will be transferred to the Liquidator for him to accept and settle or contest. If the liquidator contests or disputes the claim, the court shall allow, hear and resolve such contest except when the case is already on appeal. In such a case, the suit may proceed to judgment, and any final and executor judgment therein for a claim against the debtor shall be filed and allowed in court; and

> (e) no foreclosure proceeding shall be allowed for a period of one hundred eighty (180) days."

In the instant case, Officemetro attached an Order from the RTC stating that Officemetro's case for voluntary liquidation is deemed closed and terminated. However, said Order is not the Liquidation Order contemplated under Section 112, in relation to Sections 90 and 113, respectively, of the FRIA. Consequently, there is more reason to conclude that Officemetro's liquidation process has not yet attained finality because its liabilities, including its liabilities to the government, are yet to be settled pursuant to a Liquidation Order under Section 112 of the FRIA.

Considering the foregoing, *We* find Officemetro's contention untenable.

**Officemetro's condominium dues are *not* subject to EWT**

Petitioner CIR still asserts that Officemetro's condominium dues are subject to EWT pursuant to RMC 65-2012, and that there is no evidence presented by Officemetro that the imposition of EWT will cause it undue prejudice.

It is noteworthy that the CIR merely rehashed her arguments. As succinctly explained by the Court *En Banc* in the assailed Decision, Officemetro is not liable for EWT on condominium dues, as follows:

> "It is noteworthy that the covered period subject of the instant case is taxable year 2005. At that time, RMC No. 65-2012 was still inexistent. The prevailing rule then, through the various BIR Rulings, is that condominium dues are not subject to income tax and to withholding tax. Likewise, RMC No. 65-2012 was still inexistent at the time when the FAN and FDDA was issued on September 23, 2009 and on October 24, 2011, respectively. In other words, at the time the subject assessments were issued, respondent was not armed with any legal basis to support the assessments. Thus, the reversal of the CIR's previous and consistent position that condominium dues are not subject to income tax and to withholding tax in RMC No. 65-2012, will cause undue prejudice to Officemetro in this case.
>
> It is true under Section 7(B) of the NIRC of 1997, as amended, that the CIR has 'the power to issue rulings of first impression or to reverse, revoke or modify any existing ruling

> of the Bureau'. However, this power of the CIR should be read in conjunction with Section 246 of the same law, where it is provided for that any revocation, modification or reversal of any of the rules and regulations promulgated by the CIR shall not be given retroactive application if such will cause prejudice to taxpayers. This is consistent with the hornbook rule that 'BIR Rulings have no retroactive effect where a grossly unfair deal would result to the prejudice of the taxpayer.'"

In addition, it has been held that income means all the wealth which flows into the taxpayer other than a mere return on capital.[4] For taxation purposes, in order for tax to be validly imposed on income, the following elements must be present: (1) *there must be gain or profit*, (2) that *the gain or profit is realized or received, actually or constructively*, and (3) it is not exempted by law or treaty from income tax.[5]

Here, there is no evidence presented by petitioner CIR that there was a flow of wealth, gain or profit which can be properly categorized as income *vis-a-vis* the condominium dues. In the absence of proof that the condominium dues paid to the recipient constitutes income, Officemetro cannot be held liable for EWT because there is no income on which tax may be imposed.

With respect to the prejudice that may be caused to Officemetro, suffice it to state that the imposition of EWT on its condominium dues will necessarily lead to Officemetro's prejudice because its imposition is without factual or legal basis.

Considering the foregoing, *We* find no cogent reason the disturb the assailed Decision.

***Section 247(a) in relation to Section 249(B) of the 1997 NIRC authorizes the imposition of deficiency interest on all taxes under the NIRC.***

In order to fully dispose of the case, *We* deem it necessary to discuss the propriety of imposing deficiency interest against Officemetro.

[4] *Chamber of Real Estate and Builders Associations, Inc. v. The Hon. Executive Secretary Alberto Romulo*, G.R. No. 160756, March 9, 2010.
[5] *Commissioner of Internal Revenue v. The Court of Appeals*, G.R. No. 108576, January 20, 1999.

Section 247(a) of the National Internal Revenue Code of 1997, as amended (NIRC of 1997, as amended), provides:

**"TITLE X**
**STATUTORY OFFENSES AND PENALTIES**

**CHAPTER I**
**ADDITIONS TO THE TAX**

SECTION 247. *General Provisions.* —

(a) <u>The additions to the tax or deficiency tax prescribed in this Chapter shall apply to **all taxes**, fees and charges **imposed in this Code**</u>. The amount so added to the tax shall be collected at the same time, in the same manner and as part of the tax." *(Emphasis and underscoring supplied)*

The text of Section 247(a) states without any doubt that the additions under Chapter I, Title X are applicable to *all taxes* imposed under the NIRC of 1997, as amended. The authority to impose additions under that provision clearly extends to *all taxes* regardless of the title under which they are classified.

Therefore, the law does *not* limit these additions *only* to the three (3) types of internal revenue taxes, namely, income (Title II), estate (Title III) and donor's tax (Title III). Their imposition applies with equal force and effect to the other taxes under the 1997 NIRC such as the value-added tax (Title IV), other percentage taxes (Title V), excise tax (Title VI) and documentary stamp tax (Title VII).

Accordingly, the addition to the tax or deficiency tax, *i.e.*, *Deficiency Interest* under Section 249(B), is applicable to the deficiency EWT, deficiency final withholding on VAT (FWVAT) and deficiency final withholding tax (FWT) of Officemetro.

It may be argued that because there are no definitions for *deficiency* withholding tax, value-added tax, percentage tax, excise tax or documentary stamp tax unlike those provided for *income tax* in Section 56(B), for *estate tax* in Section 93 and for *donor's tax* in Section 104 then no deficiency interest can be imposed on other kinds of taxes provided under the 1997 NIRC. The *lacuna* or the missing definition was precisely addressed by Section 247(a) when this provision was first legislated as a revision[6] to the

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[6] Presidential Decree No. 1994. Please refer to the subsequent discussions in the opinion.

*1977 NIRC* and then subsequently reenacted in the NIRC of 1997, as amended.

The Supreme Court discussed the history of this provision in *Paper Industries Corporation of the Philippines (PICOP) v. Court of Appeals, et al.*[7]

In that case, the Supreme Court held that PICOP was *not* liable for interest and surcharge on the unpaid transaction tax because the 1977 Tax Code applicable at that time authorized the imposition of interest and surcharge *only* on taxes within Title II of the Code (Income Tax). Therefore, since transaction tax was embraced under a *different* title, Title V (Taxes on Business), the Court concluded that said transaction tax was not one of the taxes on which interest and surcharge could be imposed. *Nonetheless, it further expounded that this inadvertence in the 1977 NIRC was cured subsequently by legislative fiat.* Thus:

> "The CIR, both in its petition before the Court of Appeals and its Petition in the instant case, points to Section 51(e) of the 1977 Tax Code as its source of authority for assessing a surcharge and penalty interest in respect of the thirty-five percent (35%) transaction tax due from Picop.
>
> x x x x x x x x x
>
> <u>It will be seen that Section 51(c)(1) and (e)(1) and (3), of the 1977 Tax Code, authorizes 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*.'</u> 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. <u>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.</u>

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[7] G.R. No. 106949-50, December 1, 1995 consolidated with *Commissioner of Internal Revenue v. Paper Industries Corporation of the Philippines (PICOP), et al.*, G.R. No. 106984-85, December 1, 1995.

**It is not without reluctance that we reach the above conclusion on the basis of what may well have been an inadvertent error in legislative draftsmanship**, a type of error common enough during the period of Martial Law in our country. Nevertheless, we are compelled to adopt this conclusion. We consider that the authority to impose what the present Tax Code calls (in Section 248) *civil penalties* consisting of additions to the tax due, must be expressly given in the enabling statute, in language too clear to be mistaken. The grant of that authority is not lightly to be assumed to have been made to administrative officials, even to one as highly placed as the Secretary of Finance.

The state of the present law tends to reinforce our conclusion that Section 51(c) and (e) of the 1977 Tax Code did not authorize the imposition of a surcharge and penalty interest for failure to pay the thirty-five percent (35%) transaction tax imposed under Section 210(b) of the same Code. The corresponding provision in the *current* Tax Code very clearly embraces failure *to pay all taxes imposed in the Tax Code*, without any regard to the Title of the Code where provisions imposing particular taxes are textually located. Section 247(a) of the NIRC, as amended, reads:

> Title X
> Statutory Offenses and Penalties
>
> Chapter I
> Additions to the Tax
>
> SECTION 247. *General Provisions.* — (a) The additions to the tax or deficiency tax prescribed in this Chapter shall *apply to all taxes, fees and charges imposed in this Code*. The amount so added to the tax shall be collected at the same time, in the same manner and as part of the tax. . . .
>
> SECTION 248. *Civil Penalties.* — (a) There shall be imposed, *in addition to the tax required to be paid, penalty equivalent to twenty-five percent (25%) of the amount due*, in the following cases:
>
> xxx xxx xxx

> (3) failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment; or
>
> xxx xxx xxx
>
> (c) the penalties imposed hereunder shall form part of the tax and the entire amount shall be subject to the interest prescribed in Section 249.
>
> SECTION 249. *Interest.* — (a) *In General.* — There shall be assessed and collected *on any unpaid amount of tax, interest* at the rate of *twenty percent (20%) per annum* or *such higher rate as may be prescribed by rules and regulations*, from the date prescribed for payment until the amount is fully paid. . . ..' (Emphases supplied)

In other words, Section 247(a) of the current NIRC supplies what did not exist back in 1977 when Picop's liability for the thirty-five percent (35%) transaction tax became fixed. **We do not believe we can fill that legislative *lacuna* by judicial fiat. There is nothing to suggest that Section 247(a) of the present Tax Code, which was inserted in 1985, was intended to be given retroactive application by the legislative authority**." *(Underscoring and emphases supplied; citations omitted)*

In fact, this Court *En Banc*, through the *ponencia* of J. Mindaro-Grulla in *Takenaka Corporation Philippine Branch v. CIR*,[8] relied upon the same *PICOP* holding. To stress its point, the Court cited *PICOP* and stated that the deficiency interest imposed under Section 249(B) of the NIRC of 1997, as amended, does *not* apply merely to deficiency income, deficiency estate and deficiency donor's tax *by virtue* of Section 247(a) of the same law. It reads:

> "Anent the issue on the applicability of deficiency interest under Section 249(B) of the NIRC of 1997, as amended, only to deficiency income tax, deficiency estate tax, and deficiency donor's tax, as held by the Court a quo, petitioner asseverates that such an interpretation would result to absurd conclusions as it would mean triple imposition of 20% interest under Sections 249(A), 249(B), and 249(C) of the NIRC of 1997, simultaneously, effectively giving rise to at least 60% interest *per annum*. Ju

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[8] CTA EB Case No. 745, September 4, 2012.

We agree with petitioner.

> The issue is no longer novel as the same was sufficiently discussed by the Supreme Court in *Paper Industries Corporation of the Philippines (PICOP) v. Court of Appeals, et al.* The Supreme Court held that Section 247(a) of the NIRC of 1977, as amended [**now Section 247(a) of the NIRC of 1997, as amended**], very clearly embraces failure to pay **all taxes imposed in the Tax Code**, without any regard to the Title of the Code where provisions imposing particular taxes are textually located." (emphases and underscoring supplied; citations omitted)

In sum, Officemetro's deficiency EWT, FWVAT and FWT were properly subjected to deficiency interest pursuant to Section 249 of the NIRC of 1997, as amended.

To conclude, there is no basis to declare that Officemetro's liability was extinguished by reason of the termination of its voluntary liquidation case before the RTC. On the other hand, petitioner CIR failed to convince *Us* that Officemetro's condominium dues should be subject to EWT.

**WHEREFORE**, in view thereof, the instant Motion for Reconsideration is hereby **DENIED**, for lack of merit.

**SO ORDERED.**

**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

**WE CONCUR:**

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

**LOVELL R. BAUTISTA**
Associate Justice

(I Join P.J. Del Rosario's Concurring and Dissenting Opinion)
**ERLINDA P. UY**
Associate Justice

**(On Official Business)**
**CAESAR. A. CASANOVA**
Associate Justice

(On Leave)
**ESPERANZA R. FABON-VICTORINO**
Associate Justice

**(On Official Business)**
**CIELITO N. MINDARO-GRULLA**
Associate Justice

**AMELIA R. COTANGCO-MANALASTAS**
Associate Justice

**MA. BELEN M. RINGPIS LIBAN**
Associate Justice

REPUBLIC OF THE PHILIPPINES
**Court of Tax Appeals**
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**OFFICEMETRO PHILIPPINES INC. (formerly REGUS CENTRES, INC.),**
*Petitioner,*

*-versus-*

**COMMISSIONER OF INTERNAL REVENUE,**
*Respondent.*

**CTA EB No. 1213**
*(CTA Case No. 8382)*

*Present:*

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

Promulgated:
JUL 01 2016 4:09 p.m.

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## CONCURRING AND DISSENTING OPINION

***DEL ROSARIO, PJ:***

I concur with the *ponencia* in denying the Motion for Reconsideration of the Commissioner of Internal Revenue ("CIR"), and in finding that Officemetro Philippines Inc.'s ("Officemetro") obligation to pay its unpaid taxes subsists albeit the alleged voluntary liquidation and that Officemetro's condominium dues are not subject to Expanded Withholding Tax ("EWT"). With due respect, however, I maintain my Dissenting Opinion dated March 7, 2016 to the assailed Decision of the Court *En Banc* of the same date.

The point of my dissent relates to the *ponencia's* imposition of 20% deficiency interest on the total deficiency tax of ₱3,738,644.01, representing deficiency EWT, Final Withholding Value-Added Tax ("FWVAT"), Final Withholding Tax ("FWT") amounting to ₱90,058.90, ₱1,039,038.60, ₱2,609,546.51, respectively. With due respect, I submit that the 20% deficiency interest cannot be imposed on EWT, FWVAT and FWT.

In this regard, I reiterate my previous Dissenting Opinion in the Court *En Banc's* Decision and quote below the recent position I have taken in the consolidated cases of *Commissioner of Internal Revenue vs. Philippine Tobacco Flue-Curing & Redrying Corporation*[1] on the imposition of deficiency interest:

> "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*

[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.

*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)

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

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

> 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."

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 EWT, FWVAT and FWT assessed against Officemetro.**

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

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

All told, I vote to DENY the Motion for Reconsideration of the CIR, and to AFFIRM the assailed Decision of the Court *En Banc* WITH MODIFICATION relating to the assessed 20% deficiency

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

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interest on the assessed basic EWT, FWVAT, and FWT, which should appropriately be CANCELLED AND SET ASIDE.

**ROMAN G. DEL ROSARIO**
Presiding Justice