REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PHILIPPINE AMUSEMENT AND GAMING CORPORATION,
Petitioner,

-versus-

THE BUREAU OF INTERNAL REVENUE, THE COMMISSIONER OF INTERNAL REVENUE and THE REGIONAL DIRECTOR, REVENUE REGION NO. 6, in their official capacities as officers of the BUREAU OF INTERNAL REVENUE,
Respondents.

CTA EB No. 844
(CTA Case No. 7880)

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

Promulgated:
NOV 16 2017 2:05 p.m.

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RESOLUTION

CASTAÑEDA, JR., *J.* :

Before this Court is a remanded case, "for the determination of the final amount to be paid by petitioner Philippine Amusement and Gaming Corporation (PAGCOR) after the imposition of surcharge and delinquency interest."[1]

To recall, the Bureau of Internal Revenue (BIR) assessed the Philippine Amusement and Gaming Corporation (PAGCOR) of deficiency

[1] CTA EB Docket (*Rollo*), Vol. II, p. 768.

fringe benefits tax (FBT) for the taxable year 2004 in the aggregate amount of ₱48,589,507.65. PAGCOR received the Final Assessment Notice (FAN) on January 17, 2008[2] and filed its administrative protest on January 24, 2008. On March 11, 2009, PAGCOR filed its judicial protest before the Court of Tax Appeals (CTA).[3] In its decision promulgated on July 6, 2011, the CTA First Division dismissed PAGCOR's Petition for Review for having been filed out of time.[4] PAGCOR subsequently filed a Motion for Reconsideration which was denied for lack of merit in a resolution dated October 13, 2011.[5] PAGCOR then filed a Petition for Review before the CTA *En Banc*[6] but, in a decision dated February 18, 2013, the same was dismissed for lack of merit and the assailed CTA First Division decision and resolution were affirmed.[7] PAGCOR filed a Motion for Reconsideration which was again denied for lack of merit in a resolution dated July 23, 2013.[8]

Dissatisfied, PAGCOR elevated its petition before the Supreme Court (SC) on October 14, 2013. This case was docketed in the SC as G.R. No. 208731, "*Philippine Amusement and Gaming Corporation v. Bureau of Internal Revenue, Commissioner of Internal Revenue, and Regional Director, Revenue Region No. 6.*[9] In a decision dated January 27, 2016, the Highest Court of the land denied PAGCOR's petition.

The dispositive portion of the January 27, 2016 Decision in G.R. No. 208731,[10] reads as follows:

> "**WHEREFORE,** we **DENY** the petition. The Decision promulgated on 18 February 2013 and the Resolution promulgated on 23 July 2013 by the Court of Tax Appeals – En Banc in CTA EB No. 844 are **AFFIRMED** with the **MODIFICATION** that the denial of Philippine Amusement and Gaming Corporation's petition is due to lack of jurisdiction because of premature filing. We **REMAND** the case to the Court of Tax Appeals for the determination of the final amount to be paid by PAGCOR after the imposition of surcharge and delinquency interest.
>
> **SO ORDERED.**"

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[2] Paragraph 8, Joint Stipulation of Facts, CTA Case No. 7880, Docket Vol. I, p. 127.
[3] CTA Case No. 7880, Docket Vol. I, pp. 1-15.
[4] *Rollo*, Vol. I, pp. 138-158.
[5] *Id.*, pp. 188-193.
[6] *Id.*, pp. 5-44.
[7] *Id.*, pp. 320-327.
[8] *Id.*, pp. 357-362.
[9] *Rollo*, Vol. II, pp. 367-394.
[10] *Id.*, p. 765.

Plain reading of the dispositive portion of the said SC decision shows that the Decision and Resolution of the CTA *En Banc* in CTA EB No. 844 were affirmed with the modification that "the denial of Philippine Amusement and Gaming Corporation's petition is due to lack of jurisdiction because of premature filing." The SC then ordered the case to be remanded to the CTA for the determination of the final amount to be paid by PAGCOR after the imposition of surcharge and delinquency interest.

On May 29, 2017, this Court received a copy of the Entry of Judgment[11] and Decision in G.R. No. 208731.[12]

Pursuant to CTA A.M. No.18-6-2015 dated June 23, 2015, "all remanded cases from the SC shall be referred to the *ponente* of the *en banc* case who shall determine what course of action shall be taken, whether to refer the case to the Court in Division for further proceedings or to retain the case at the *en banc* level for decision." The *ponente*[13] in CTA EB No. 844 had already retired, thus, this case was re-raffled for study and report on June 20, 2017, thus, a new *ponente.*

Although this Court was found to be without jurisdiction because of premature filing, this Court shall determine the final amount to be paid by PAGCOR after the imposition of surcharge and delinquency interest as ordered by the SC.

In compliance with the order of the Supreme Court, this Court computed PAGCOR's liability based on the Assessment Notice and Demand Letter attached as annexes to its Petition for Review.[14] Examination of the foregoing shows that the total amount should be ₱46,589,507.65 instead of ₱48,589,507.65, computed thus:

Car plan granted	₱ 53,514,975.00
Divided by	0.68
Grossed-up monetary value	₱ 78,698,492.65
Multiply by rate	0.32
Deficiency tax due	₱ 25,183,517.65
25% Surcharge	6,295,879.41*
20% Interest	15,110,110.59
Total amount due	**₱ 46,589,507.65**

**Shown as ₱8,295,879.41 in the Assessment Notice and Demand Letter.*

[11] *Rollo*, Vol. II, p.768.
[12] *Id.*, pp. 737-749; On May 26, 2016, this Decision became final and executory and was recorded in the Book of Entries of Judgments.
[13] Associate Justice Amelia R. Cotangco-Manalastas compulsorily retired on September 11, 2016.
[14] Annexes "D" and "D-1" of the Petition for Review, CTA Case No. 7880, Docket Vol. I, pp. 22-23.

It is worthy to mention that when CIR issued the July 18, 2011 letter, CIR sought to collect from PAGCOR the amount ₱ 46,589,507.65, which consisted of tax, surcharge and interest.[15]

In the determination of the final amount to be paid by PAGCOR, pertinent provisions are Sections 248(A)(3) and 249 of the 1997 National Internal Revenue Code, as amended, which read, as follow:

> "SEC. 248. Civil Penalties. -
>
> (A) There shall be imposed, **in addition to the tax required to be paid,** a 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."
>
> "SEC. 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.
>
> (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.**
>
> (C) Delinquency Interest. - **In case of failure to pay**:
>
> (1) The amount of the tax due on any return to be filed, or
>
> (2) The amount of the tax due for which no return is required, or

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[15] *Philippine Amusement and Gaming Corporation v. Bureau of Internal Revenue, Commissioner of Internal Revenue, and Regional Director, Revenue Region No.6,* G.R. No. 208731, January 27, 2016, p. 7; *Rollo*, Vol. II, p. 761.

(3) A deficiency tax, or any surcharge or interest thereon **on the due date appearing in the notice and demand of the Commissioner**, there shall be assessed and collected **on the unpaid amount, interest at the rate prescribed in Subsection (A) hereof until the amount is fully paid**, which interest shall form part of the tax." *(Emphases Supplied.)*

Applying the foregoing provisions, aside from the basic deficiency FBT for taxable year 2004, PAGCOR shall also be liable for the 25% surcharge of the amount due, the 20% deficiency interest per annum from the date prescribed for payment of the deficiency FBT until the full payment thereof, and the 20% delinquency interest per annum reckoned from the date prescribed on the due date appearing in the notice and demand of the Commissioner.

WHEREFORE, PAGCOR is liable for deficiency FBT for taxable year 2004 in the aggregate amount of ₱31,479,397.06, inclusive of 25% surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended, computed as follows:

Car plan granted	₱ 53,514,975.00
Divided by	0.68
Grossed-up monetary value	₱ 78,698,492.65
Multiply by rate	0.32
Deficiency tax due	₱ 25,183,517.65
25% Surcharge	6,295,879.41
Total	**₱ 31,479,397.06**

In addition, PAGCOR should be held liable to pay:

(a) Deficiency interest at the rate of 20% per annum on the basic deficiency FBT in the amount of ₱25,183,517.65, computed from January 10, 2005[16] until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended; and

(b) Delinquency interest at the rate of 20% per annum on the total amount of ₱31,479,397.06, representing the sum of the basic

[16] Section 5, Revenue Regulations No. 04-02.
"SECTION 5. *Time for Filing of Quarterly Remittance Return of Final Income Taxes Withheld On Fringe Benefits Paid to Employees Other than Rank and File.* — The tax imposed under Sec. 33 of the Tax Code shall be treated as a final income tax on the employee that shall be withheld and paid by the employer, whether a large taxpayer or non-large taxpayer, on or before the 10th day of the month following the calendar quarter in which the fringe benefits were granted, provided, however that with respect to employers, whether Large or Non-Large Taxpayers, enrolled with the Electronic Filing and Payment System (EFPS), the deadline for e-filing the Quarterly Remittance Return of Final Income Taxes Withheld On Fringe Benefits Paid to Employees Other than Rank and File (BIR Form No. 1603) and e-paying the tax due thereon shall be five (5) days later than the deadline set herein."

fringe benefit tax in the amount of ₱25,183,517.65 and 25% surcharge of ₱6,295,879.41, and on the deficiency interest which have accrued as aforestated in (a), computed from February 15, 2008[17] until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED.

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

WE CONCUR:

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

LOVELL R. BAUTISTA
Associate Justice

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

Ma. Belen
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

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[17] *Supra*, Note 14.

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DEL ROSARIO, *PJ*,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
RINGPIS-LIBAN, and
MANAHAN, *JJ.*

Promulgated:

NOV 16 2017 2:05 p.m.

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CONCURRING AND DISSENTING OPINION

DEL ROSARIO, PJ.:

I concur with the majority in holding that petitioner is liable for deficiency Fringe Benefits Tax (FBT) for the taxable year 2004 in the aggregate amount of P31,479,397.06, inclusive of 25% surcharge imposed under Section 248(A)(3) of the National Internal Revenue Code (NIRC) of 1997, as amended, computed as follows:

Car plan granted	P53,514,975.00
Divided by	0.68
Grossed-up monetary value	P78,698,492.65
Multiply by rate	0.32
Deficiency tax due	P25,183,517.65
25% Surcharge	6,295,879.41
Total	P31,479,397.06

Nonetheless, it appears that 20% deficiency interest was imposed on the assessed basic FBT, which respondent seeks to collect from petitioner.

In this regard, I quote below 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)
>
> 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

[1] CTA EB Nos. 1218 and 1220, April 11, 2016.
[2] G.R. Nos. 106949-50, December 1, 1995.
[3] G.R. No. 146486, March 4, 2005.

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 249.1nterest- (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 other words, 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 basic FBT assessed against petitioner.**

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

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

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.

Section 249 (B) of the NIRC is clear and explicit as when **deficiency interest** may be imposed, providing a specific qualification therein, that is, 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 NIRC is imposed **<u>without qualification</u>** on the amount of the tax due, or on 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 subject to qualification 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

[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.

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 in the tax due"** 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 exercised 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 FBT assessed against petitioner.**

All told, I concur with the *ponencia*, except for the imposition of 20% deficiency interest which I vote to be deleted.

ROMAN G. DEL ROSARIO
Presiding Justice