REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	CTA EB No. 1473 (CTA CASE No. 8115)
-versus-	
HOYA GLASS DISK PHILIPPINES, INC., *Respondent.*	

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HOYA GLASS DISK PHILIPPINES, INC., *Petitioner,*	CTA EB No. 1474 (CTA CASE No. 8115)
-versus-	*Present*: DEL ROSARIO, P.J., CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN, and MANAHAN, *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: NOV 17 2017 4:21 p.m.

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DECISION

MINDARO-GRULLA, J.:

Submitted for decision are Petitions for Review for the Court *En Banc* under *Section 4(b), Rule 8*[1] *of the 2005 Revised Rules of the Court of Tax Appeals (RRCTA), as amended,* of the Decision dated March 8, 2016[2] and the Resolution dated May 27, 2016,[3] rendered by the Third Division of this Court, the dispositive portions of which read as follows:

Decision dated March 8, 2016:

"**WHEREFORE,** premises considered, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, respondent's deficiency VAT assessment against petitioner for FY 2005 in the amount of ₱529,797.79 is hereby **CANCELLED AND WITHDRAWN**. However, respondent's deficiency IT and FWT assessments against petitioner for FY 2005 are hereby **AFFIRMED WITH MODIFICATIONS**. Petitioner is hereby **ORDERED TO PAY** respondent the amount of **THIRTY MILLION SIX HUNDRED NINETY-EIGHT THOUSAND EIGHT HUNDRED FORTY-SIX PESOS AND 29/100 (₱30,698,846.29)** representing basic deficiency IT and FWT and the 25% surcharge imposed under Section248(A)(3) of the NIRC of 1997, as amended:

	BASIC	SURCHARGE	TOTAL
Income Tax	₱ 903,148.69	₱ 225,787.17	₱ 1,128,935.86
Final withholding tax	23,655,928.34	5,913,982.09	29,569,910.43
Total	**₱24,559,077.03**	**₱6,139,769.26**	**₱30,698,846.29**

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[1] SEC. 4. *Where to appeal; mode of appeal.* –

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

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[2] Penned by Associate Justice Esperanza R. Fabon-Victorino concurred in by Associate Justice Lovell R. Bautista; Associate Justice Ma. Belen M. Ringpis-Liban inhibited from the case, *En Banc No. 1474* Docket, pp. 11-53.

[3] *Ibid.*, pp. 54-62.

In addition, petitioner is hereby **ORDERED TO PAY:**

(a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency income tax and FWT computed from June 15, 2005 and April 14, 2005, respectively, 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 ₱30,698,846.29 and on the 20% deficiency interest which have accrued as afore-stated in (a), computed from June 10, 2010 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED."

Resolution dated May 27, 2016:

"**WHEREFORE**, the Motion For Partial Reconsideration (Re: Decision dated 8 March 2016) dated March 31, 2016 filed by respondent, as well as the Motion For Partial Reconsideration dated April 1, 2016 filed by petitioner, are hereby **DENIED**, for lack of merit.

SO ORDERED."

The facts of the case, as recited by the Third Division in its Decision, read as follows:

"Petitioner Hoya Glass Disk Philippines, Inc. is a domestic corporation with Securities and Exchange Commission (SEC) Registration No. A199609700. It is located at 111 East Main Avenue, Laguna Technopark, Special Export Processing Zone (SEPZ), Binan, Laguna. It is into manufacturing, processing, wholesale selling and exporting of glass disk for hard

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disk drives and other memory devices and other activities incidental thereto.

Petitioner is a registered taxpayer with (BIR) Certificate of Registration No. IRC0000414340 dated February 19, 1997. It is also a Philippine Economic Zone Authority (PEZA) registered entity with Certificate No. 97-010 dated May 7, 2004.

On the other hand, respondent is the head of the BIR, with authority to assess and collect all internal revenue taxes, fees and charges, and to enforce all forfeitures, penalties and fines connected with such taxes, fees and charges. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

Petitioner was previously known as NSG Phils., Inc. and was wholly owned by Japanese Corporation Nippon Sheet Glass Co., Ltd. (NSGC).

On January 1, 1998, petitioner and NSGC entered into a Know-How License Agreement, whereby petitioner would pay royalties to NSGC in exchange for the right "to manufacture and sell the Licensed Products in the Territory" using the Know-How, as defined in the agreement.

On September 17, 2003, Hoya Corporation, a Japanese corporation, acquired the shares of NSGC. Consequently, Hoya Corporation became petitioner's parent corporation.

Hoya Corporation restructured petitioner's operations in the Philippines resulting in the termination of the Know How License Agreement between NSGC and petitioner via a Termination Agreement dated March 1, 2004. As a result, petitioner no longer made royalty payments to NSGC.

Subsequently, petitioner and Hoya Corporation entered into a Technology Development Delegation Agreement (TDDA), effective until March 31, 2005, whereby Hoya Corporation would perform research and technology development for petitioner in exchange for delegation fees. The TDDA expressly provided that it shall be "governed by and construed in accordance with the laws of Japan."

On July 11, 2005, petitioner filed its Annual Income Tax Return (ITR) for fiscal year ending March 31, 2005. Subsequently, respondent issued Letter of Authority No. 00098729, for the audit and investigation of all internal revenue taxes of petitioner for fiscal year ending March 31, 2005.

In relation to the audit, petitioner executed five (5) Waivers of the Defense of Prescription under the Statute of Limitations of the National Internal Revenue Code (NIRC), as amended, on the following dates:

	DATE EXECUTED	**EXPIRY DATE**
First Waiver	September 26, 2007	March 1, 2008
Second Waiver	October 9, 2007	September 30, 2008
Third Waiver	March 28, 2008	March 31, 2009
Fourth Waiver	February 12, 2009	December 31, 2009
Fifth Waiver	September 18, 2009	June 30, 2010

On March 19, 2009, petitioner received a Preliminary Assessment Notice (PAN) dated March 2, 2009, to which it filed a letter reply dated March 30, 2009.

On April 20, 2009, petitioner received the Final Assessment Notice (FAN) and Formal Letter of Demand with Details of Discrepancies. On May 19, 2009, petitioner protested the FAN and requested for a reinvestigation of the assessment.

On September 1, 2009, petitioner received an undated Notice for Informal Conference, with attached Amended Deficiency Taxes for deficiency IT, VAT, and FWT in the sum of ₱61,442,120.38 for the fiscal year April 1, 2004 to March 31, 2005, detailed as follows:

DEFINICENCY TAXES (AMENDED)		
INCOME TAX		
Taxable gross income per return		374,237,215.00
Add: Disallowed deductions – COS		
Repairs & Maintenance - Jan. 2005 - March 2005	79,470,133.07	
Others - Jan. 2005 - March 2005	8,198,568.72	87,668,701.79

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Adjusted taxable income		461,905,916.79
Rate of tax		5%
Tax due		23,095,295.84
Less: 5% filed & paid		22,192,147.15
Deficiency IT		903,148.69
Interest (7/15/2005 to 9/15/2009)		753,696.14
Compromise		20,000.00
TOTAL		**1,676,844.83**
VALUE-ADDED TAX		
Sales per VAT returns		7,428,675.20
Add: Other income		2,734,561.00
Sales per audit		10,163,236.20
Rate of tax		10%
Tax due		1,016,323.62
Add: Disallowed input tax		64,130.99
VAT due		1,080,454.61
Less: Filed & paid		806,998.51
Deficiency VAT		273,456.10
Interest (4/25/2005 to 9/15/2009)		240,341.69
Compromise		16,000.00
TOTAL		**529,797.79**
FINAL WITHHOLDING TAX		
Interest expense (₱10,708,536.00 x 15%)		1,606,280.40
Research & Devt. (Royalty ₱125,454,915.00 x 25%)		31,363,728.75
TOTAL FWT DUE		32,970,009.15
Less: Filed & paid		1,593,957.49
Deficiency FWT		31,376,051.66
Interest (4/20/2005 - 9/15/2009)		27,834,426.10
Compromise		25,000.00
TOTAL		**59,235,477.76**
GRAND TOTAL DEFICIENCY TAXES (AMENDED)		**61,442,120.38**

On September 16, 2009, petitioner filed a supplemental protest letter together with relevant supporting documents.

In a letter dated April 29, 2010 which petitioner received on June 10, 2010, BIR Revenue Region No. 9 affirmed the foregoing assessments against petitioner. A similar letter dated June 4, 2010 from the Revenue

District Officer of RDO No. 57 bearing the same information was received by petitioner on June 10, 2010, to which it replied on June 25, 2010.

On June 28, 2010, petitioner filed the instant Petition for Review."

In her Answer, the then CIR argues that Hoya Glass Disk Philippines, Inc. (Hoya Glass) is estopped from assailing the validity of the waivers; that Hoya Glass cannot deny the authority of its signatory to the waivers; and that those who accepted the waivers on her behalf were all authorized.

In its reply, Hoya Glass insists the invalidity of the waivers. It also denied liability to pay deficiency income tax for the repairs and maintenance expense, and that the "other expense" were properly considered part of its cost of sales in connection with the computation of its gross income subject to the 5% preferential income tax rate. In addition, it claims that it already paid value-added tax (VAT) on its scrap sales despite belief that the said transactions were not subject to VAT. Lastly, the imposition of deficiency final withholding tax (FWT) on interest expense, and delegation fees under the Technology Development Delegation Agreement (TDDA) is improper and without basis. It contends that by virtue of the TDDA, Hoya Glass paid Hoya Corporation delegation fees as compensation for research and development services rendered in its favor which the CIR erroneously treated as royalty fees subject to FWT. It argues that delegation fees were not royalty fees since the proprietary rights on the result of the services rendered by Hoya Corporation belonged to Hoya Glass. Moreover, delegation fees were not subject to FWT since Hoya Corporation performed the services in Japan or outside the Philippines.

The Third Division adopted the Supreme Court ruling in the case of *Commissioner of Internal Revenue vs. Next Mobile Inc. (formerly Nextel Communications Phils., Inc.)*[4] *(the "Next Mobile Case"),* concluding that since both parties are considered *in pari delicto,* upholding the validity of the waivers is proper.

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[4] G.R. No. 212825, December 7, 2015.

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The same Court sustained the disallowed repairs and maintenance expenses since Hoya Glass failed to prove that such expenses were attributable to its PEZA registered activities to allow the expenses as deduction. As to the "other expenses," Hoya Glass failed to prove that these expenses were not deducted from gross income for tax purposes.

On the other hand, Hoya Glass satisfactorily proved that the scrap sales assessed by the CIR as "other income" were accordingly subjected to VAT. Thus, said assessment was cancelled by the Court's Third Division.

The Court in Division also ruled that the CIR disallowed input tax without providing legal and factual bases and that the said amount came from the prescribed quarterly VAT return for the first quarter of 2005. In sum, the Court ruled that Hoya Glass is not liable for any deficiency VAT.

For the deficiency final withholding tax (FWT) on interest expense, the Court found out through the ICPA report, that out of ₱10,708,536.00, only the amount of ₱10,626,329.90 was subjected to FWT, leaving ₱82,205.10 to be taxed for FWT. However, out of the said amount, only ₱41,819.78 must be subjected to tax since the rest of the said amount can no longer be assessed because of prescription.

As to royalties assessed by the CIR, the Court in Division ruled that the payment of Hoya Glass to Hoya Corporation by virtue of TDDA are not royalties but instead, compensation for services rendered, since the latter has no proprietary interest in the results of the Technology Development it undertook to furnish Hoya Glass. However, since Hoya Glass failed to prove that Hoya Corporation's income was not derived in the Philippines, the Court subjected the said income to 32% FWT. Out of the total amount of ₱125,454,914.80 for the payment of research and development, ₱51,549,741.77 thereof has already prescribed, leaving an assessable amount of ₱73,905,173.03 to be taxed at the rate of 32%.

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The compromise penalty was also cancelled as a taxpayer cannot be compelled to pay it because it is a mutual agreement by nature. In sum, Hoya Glass is liable for a reduced amount of income tax and FWT.

In its Motion for Partial Reconsideration,[5] Hoya Glass claims that the *Next Mobile Case* should not apply to it as it is not on all fours with its case; that the Court cannot impose FWT on the income of Hoya Corporation different from that assessed by the CIR as royalties and that the simultaneous imposition of deficiency and delinquency interests is unconscionable and excessive.

On the other hand, CIR's Motion for Partial Reconsideration[6] raised that there was a valid extension made for the assessment of VAT, thus the said assessment cannot be invalidated due to prescription and that the Court erred in disallowing the assessment for scrap sales and input VAT.

Both motions were denied in the assailed Resolution, hence, the Petitions for Review were filed before this Court.

In his Petition for Review,[7] the CIR claims that Hoya Glass filed false FWT returns, hence, the ten-year prescriptive period provided under Section 222(a)[8] of the National Internal Revenue Code of 1997 (NIRC of 1997) is applicable. Moreover, even assuming that the returns are not false, the prescriptive period under the NIRC of 1997 is inapplicable since the FWT being assessed is a penalty, not

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[5] *Division* Docket, pp. 3091-3108, filed on April 1, 2016.
[6] *Division* Docket, pp. 3080-3085, filed on March 31, 2016.
[7] *En Banc no. 1473* Docket, pp. 7-21.

[8] SEC. 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes. -

(a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

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Hoya Glass' tax deficiency, Hoya Glass being a mere tax collector and not a taxpayer.

On the other hand, Hoya Glass claims in its Petition for Review[9] that the *Next Mobile* Case is not applicable to it; that the waivers are void; that the FWT returns are not false and thus, the three-year prescriptive period should apply; that the CIR cannot raise the issue on assailed fraudulent FWT returns for the first time on appeal; that the delegation fees are not subject to FWT; that the assessed tax on repairs and maintenance, and others must be disallowed; and that the simultaneous imposition of deficiency and delinquency interests is unconscionable and excessive.

This Court rules to deny both petitions.

As to the claim of the CIR that the ten-year prescriptive period to assess under Section 222(a) of the NIRC of 1997 is applicable in this case, this Court calls the attention of the parties to the case of *ESS Manufacturing Company, Inc. vs. Commissioner of Internal Revenue.*[10] In the said case, the CIR insisted to apply the exceptional ten-year prescriptive period, alleging false return as the amount indicated therein was deficient. However, this Court, citing the Supreme Court case of *Aznar vs. Court of Appeals,*[11] reiterated that it is quite easy for revenue officials to claim that there was falsity in the return, and mere falsity does not automatically apply the exceptional 10-year prescriptive period, unless there is proof that the return was made with design to mislead or deceive on the part of the taxpayer, or at the very least, show culpable negligence. Hence, this Court ruled that the general rule of 3-year prescriptive period to assess applies.

The false or fraudulent return as an exception to the period of limitation must be actual not constructive.[12] It must be intentional, consisting of deception willfully and deliberately done or resorted to.[13] As stated in the case of

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[9] *En Banc no. 1474 Docket,* pp. 64-97.
[10] CTA Case No. 7958, February 14, 2014.
[11] G.R. No. L-20569, August 23, 1974.
[12] *Commissioner of Internal Revenue vs. Obayashi Philippines Corporation,* CTA Case No. 6222, July 22, 2004.
[13] *Ibid.*

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Commissioner of Internal Revenue vs. Ayala Hotels, Inc.,[14] "A mistake, not culpable in respect of its value would not constitute a false return."

In this case, there was no imputation of filing of false returns made by the CIR, nor did he present evidence to prove such falsity. To clarify, the fact that a taxpayer is being assessed by the government, it means that there was alleged falsity in its return filed.[15] If there will be no distinction between a mere false return, and a false return with intent to mislead or deceive on the part of taxpayer, then the difference between the 3-year and 10-year prescriptive period to assess would be rendered nugatory.[16]

More so, this issue of filing a false return to apply the 10-year prescriptive period was never raised by the then CIR in her Answer and Pre-trial Brief, or other pleadings filed before the Division.[17] An issue not raised before the lower court could not be raised for the first time on appeal.[18]

As to CIR's argument that the FWT assessed is but a penalty and not a tax and thus the prescriptive period under the NIRC does not apply, Revenue Regulations No. 02-98 have imposed the very same penalties in withholding taxes collected by agents like Hoya Glass as that imposed under the NIRC of 1997 in case of non-payment. Thus, there is no reason for this Court to disregard the amount assessed as tax, subject to the same prescriptive periods as that required under the Tax Code.

On the other hand, Hoya Glass argues that the *Next Mobile Case* does not apply on all fours in this case, and even on the assumption that it does, the said case should be applied prospectively, as this was promulgated after the filing of its Petition for Review before the Division.

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[14] *CA-G.R. SP No. 70025, April 19, 2004.*
[15] *Commissioner of Internal Revenue vs. Transnational Plans, Inc.* (CTA EB No. 1337), consolidated with *Transnational Plans, Inc. vs. Commissioner of Internal Revenue* (CTA EB No. 1339), March 27, 2017.
[16] *Ibid.*
[17] *Ibid.*
[18] *Commissioner of Internal Revenue vs. Obayashi Philippines Corporation,* CTA EB No. 42 (CTA Case No. 6222), June 10, 2005, citing *Victorias Milling Co., Inc., vs. Court of Appeals*, 333 SCRA 663; *Jimenez vs. Patricia*, Inc., 340 SCRA 525

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This Court is not persuaded.

Hoya Glass asserts the alleged misplaced application of the *Next Mobile* Ruling in the case at bar. It insists that the ruling laid down in the *Next Mobile Case* should be prospective and should affect only petitions to be filed after such decisions. Nonetheless, a careful perusal would show that the claim in the *Next Mobile Case* involves waivers executed in years 2004 and 2005, when the prevalent ruling was strict compliance with the requirements on valid execution of waivers as those stated in several Supreme Court cases.[19] The questioned waivers in *Next Mobile* were even executed prior to the waivers of Hoya Glass. Yet, the Supreme Court, applied outrightly the present ruling in *Next Mobile* and ruled on the validity of the waivers therein.

Significantly, on the application of the *Next Mobile* ruling, it should be remembered that, "Judicial interpretation becomes part of the law *as of the date that law was originally passed.*"[20] Considering that the waivers involved in this case were executed between years 2007 and 2009, the applicable law is Section 222(b)[21] of 1997 NIRC, which took effect on January 1, 1998, in relation to Revenue

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[19] *Philippine Journalists, Inc., vs. Commissioner of Internal Revenue,* G.R. No. 162852, December 16, 2004; *Commissioner of Internal Revenue vs. Kudos Metal Corporation*, G.R. No. 178087, May 5, 2010; *Commissioner of Internal Revenue vs. FMF Development Corporation*, G.R. No. 167765, June 30, 2008; *Commissioner of Internal Revenue vs. The Stanley Works Sales (Phils.), Incorporated*, G.R. No. 187589, December 3, 2014; *Commissioner of Internal Revenue vs. Standard Chartered Bank*, G.R. No. 192173, July 29, 2015.

[20] *Cemco Holdings, Inc., vs. National Life Insurance Company,* G.R. No. 171815, August 7, 2007, citing *Serrano vs. National Labor Relations Commission*, 387 Phil. 345, 357 (2000).

[21] SEC. 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes. –

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> (b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.

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Memorandum Order (RMO) No. 20-09, the same laws applied in the *Next Mobile Case*. Furthermore, the *Next Mobile Case* has been decided by no less than the Supreme Court from whose decisions all other courts should take their bearings.[22] As it is the final arbiter of all justiciable controversies, its decisions deserve utmost respect and adherence. Hence, this Court has no other recourse but to uphold the ruling of the Supreme Court in the *Next Mobile Case* as it is applicable to the case at bench.[23] Such judicial doctrine does not amount to the passage of a new law but consists merely of a construction or interpretation of a pre-existing one, as is the situation in this case.[24]

It is noted that Hoya Glass never raised the validity of waivers when it filed its protest[25] and supplemental protest[26] during the administrative claim. Hoya Glass never questioned the validity of the waivers before the BIR, as well as the prescription of the CIR's right to assess Hoya Glass for deficiency taxes. Only upon its frustration after the administrative claim did it realize to raise the said matter before this Court. Hoya Glass should not be allowed to benefit from the flaws in its own waivers and successfully insist on their invalidity in order to evade its responsibility to pay taxes.[27] As correctly observed by the Court in Division:

> "Note that petitioner voluntarily executed and submitted the subject Waivers, one after the other and never raised a single objection thereto, only to impugn their validity after the issuance of the assessment on the ground that its own representative had no authority to sign the Waivers. The sly approach was obviously intended to escape tax liability for it was highly incredible that petitioner was unaware of the requirements of a valid Waiver since it already secured the services of counsel from the start of the BIR audit. Significantly, the signatories in the

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[22] *Kepco Philippines Corporation vs. Commissioner of Internal Revenue,* CTA EB Case No. 736, January 10, 2012, citing *Commissioner of Internal Revenue vs. Michel J. Lhuillier Pawnshop, Inc.*, G.R. No. 150947, July 15, 2003.
[23] *Ibid.*
[24] *Roos Industrial Construction Inc. and Oscar Tocmo vs. NLRC and Jose Martillos,* G.R. No. 172409, Feb. 4, 2008 citing *Columbia Pictures, Inc. vs. Court of Appeals,* 329 Phil. 875, 907-908.
[25] Division Docket, pp. 1727-1753.
[26] Division Docket, pp. 1756-1763.
[27] *Next Mobile, supra* note 4.

> said Waivers were not mere employees but responsible ranking officers of petitioner.
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> For obvious reason, petitioner should not be allowed to benefit from its own wrongdoing and should be deemed estopped from questioning the validity of the Waivers only after the assessment against it was issued."[28]

In the present case, some of the waivers were not dated and all the waivers executed failed to present the authorities of the signatories therein. Later on, the authorities of the representatives who signed the waivers were questioned by Hoya Glass itself, the very same entity that cause said representatives to sign such in the first place.[29] Thus, it is clear that Hoya Glass violated RMO 20-90, which states that in case of a corporate taxpayer, the waiver must be signed by its responsible officials.[30] Hoya Glass actually executed five defective waivers, delivered to the BIR one after the other. Following the recent ruling of the Supreme Court in the case of *Next Mobile*, Hoya Glass allowed the CIR to rely on them and did not raise any objection against their validity until the CIR assessed taxes and penalties against it. Thus, Hoya Glass is estopped from questioning the validity of its waivers.

Hence, Hoya Glass cannot now invoke the said argument in order to benefit from its wrongdoing.[31] It is upon this omission subsequent to the execution of waivers that constitute estoppel on the part of Hoya Glass in claiming that the waivers are invalid. This sets this case apart from the case of *Commissioner of Internal Revenue vs. Kudos Metal Corporation (the "Kudos Metal Case"),*[32] where the Supreme Court noted that there was no positive act on record to show that the taxpayer therein persuaded the BIR to postpone the issuance of an assessment. As stated therein, "there is no showing that respondent made any request to persuade the BIR to postpone the issuance of the assessments."

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[28] *Supra* note 2, p. 22.
[29] *Next Mobile, supra* note 4.
[30] *Ibid.*
[31] *Commissioner of Internal Revenue vs. Universal Weavers Corporation*, CTA EB No. 1348 (CTA Case No. 8566), February 9, 2017.
[32] G.R. No. 178087, May 5, 2010, stated in page 8 of the *Next Mobile* Decision.

Records show that there was a reduction in petitioner's tax liabilities contained in the assessment issued by the CIR within the extended period provided in the assailed waivers. The PAN[33] and FAN[34] indicated a total amount of ₱113,124,991.72 as alleged deficiency tax. From the said amount, it was reduced to ₱61,442,120.38.[35] Upon receiving benefit from the extension of the statute of limitations, Hoya Glass is deemed to have impliedly admitted the validity of the subject waivers. Since it actually benefited from the extended period, thus, the doctrine of estoppel clearly finds application in the instant case.

Also to emphasize is the fact that the Supreme Court did not overrule the previous rulings, but merely made an exception in *Next Mobile.* It even emphasized that the deficiencies in the waivers in *Next Mobile* were the same as the defects in the waivers in the previous case of *Kudos Metal,* where the Supreme Court ruled that there should be strict compliance with the requirements of waiver. Nonetheless, the Supreme Court explained in *Next Mobile* that since both parties are at fault, despite having the same defects in the waivers in *Kudos Metal Case,* the validity of these waivers in *Next Mobile* must be upheld.

On the other hand, BIR has its own faults too, *viz*:

> "Similarly, the BIR violated its own rules and was careless in performing its functions with respect to these Waivers. It is very clear that under RDAO 05-01 it is the duty of the authorized revenue official to ensure that the waiver is duly accomplished and signed by the taxpayer or his authorized representative before affixing his signature to signify acceptance of the same. It also instructs that in case the authority is delegated by the taxpayer to a representative, the concerned revenue official shall see to it that such delegation is in writing and duly notarized. Furthermore, it mandates that the waiver should not be accepted by the concerned BIR office

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[33] Division Docket pp. 1698-1670.
[34] Division Docket pp. 1722-1724.
[35] Division Docket pp. 1754-1755.

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and official unless duly notarized."[36] (Emphasis omitted.)

Vis-a-vis the five Waivers it received from Hoya Glass, the BIR has failed five times to perform its duties in relation thereto.[37] The BIR allowed Hoya Glass to submit, and it duly received, five defective Waivers when it was its duty to exact compliance with RMO 20-90 and RDAO 05-01 and follow the procedure dictated therein.[38]

As to the FWT on delegation fees, in the Joint Stipulation of Facts and Issues[39] itself, both parties agreed to submit for the determination of the Court in Division whether the imposition of FWT on delegation fees paid to Hoya Corporation is proper.

As to Hoya Glass' claim that it was not given opportunity to prove that the delegation fees were not subject to FWT since Hoya Corporation performed the services outside the Philippines, it is no less than Hoya Glass, through its own witnesses, Ma. Anita A. Policarpio,[40] and Director of Hoya Glass, Mr. Tatsuji Kohama,[41] that insists that the delegation fees are not royalties, instead, compensation for research and development. In Ms. Policarpio's affidavit, she answered:

> "Q: Where did Hoya Corporation perform the service of technology development?
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> A: The technology development service contemplated under the TDDA, which was perfected in the (*sic*) Japan, was performed in Japan. Thus, all research and development activities conducted by Hoya Corporation pursuant to the TDDA are performed entirely outside of the Philippines."

On the other hand, Mr. Kohama explained:

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[36] *Next Mobile, supra* note 4.
[37] *Ibid.*
[38] *Ibid.*
[39] Division Docket, p.394, par. 3.3.2.
[40] Exhibit JJ, Hoya Glass' Formal Offer of Evidence, p. 13.
[41] Exhibit LL, Hoya Glass' Formal Offer of Evidence, p. 3.

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> "Q: Where did Hoya Corporation perform the service of technology development?
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> A: The technology development service contemplated under the TDDA was performed in Japan, where appropriate facilities and human resources with expertise are available. Thus, all development activities conducted by Hoya Corporation pursuant to the TDDA are performed entirely outside in Japan."

Having this in mind, its argument to refute CIR's assessment of FWT against the delegation fees as royalties, Hoya Glass had the opportunity to raise, prove and conclude that the income of Non-resident Corporation came from services rendered outside the Philippines. Unfortunately, it failed to do so. As correctly ruled by the Court in Division:

> "xxx The Court examined the Debit Notes issued by Hoya Corporation as billing to petitioner for the delegation fees. These documents however merely proved the existence of service transactions rendered by Hoya Corporation to petitioner and the subsequent billing thereof. Nothing therein showed the place where the services were performed to satisfactorily convince the Court that the services were performed in Japan and the income arising from such performance were derived from Japan. Consequently, the Court deems the said services as performed in the Philippines and the income was derived also in the Philippines. As such, petitioner must pay the corresponding FWT at 32%."

Lastly, as to the imposition of surcharge and interests, it is unfortunate for Hoya Glass that the CIR is given three years by law to assess taxpayers, and interests run from the date prescribed for payment until such is fully paid, thus, this Court simply applies Section 249 of the NIRC of 1997, to wit:

> "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.
>
> "(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:
>
> xxx xxx xxx
>
> "(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.
>
> xxx xxx xxx" (Underlining supplied.)

All other issues raised by both parties are upheld and this Court cannot disturb the ruling of the Division without prolific arguments to reverse it.

WHEREFORE, premises considered, the Petitions for Review are hereby **DENIED** for lack of merit. The Assailed Decision and Resolution in CTA Case No. 8115 are hereby **AFFIRMED.**

SO ORDERED.

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

WE CONCUR:

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

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

(I join Presiding Justice Del Rosario's Concurring and Dissenting Opinion)
ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

(Inhibited)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CATHERINE T. MANAHAN
Associate Justice

CERTIFICATION

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

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA EB NO. 1473** (CTA CASE NO. 8115)
-versus-	
HOYA GLASS DISK PHILIPPINES, INC., *Respondent,*	

x--x

HOYA GLASS DISK PHILIPPINES, INC., *Petitioner,*	**CTA EB NO. 1474** (CTA CASE NO. 8115)
	Present:
-versus-	**DEL ROSARIO,** ***P.J.,*** **CASTANEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** and **MANAHAN**, JJ.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: NOV 17 2017 4:21 p.m.

X--X

CONCURRING AND DISSENTING OPINION

DEL ROSARIO, PJ.:

I concur with the *ponencia* in affirming the assailed Decision and Resolution of the Court in Division but only insofar as it orders Hoya Glass Disk Philippines, Inc. to pay the following: (i) deficiency income tax, and final withholding tax (FWT) in the total amount of P30,698,846.29, inclusive of the 25% surcharge; (ii) 20% deficiency interest on the basic deficiency income tax; and, (iii) 20% delinquency interest based on the aforesaid amount of P30,698,846.29, and on the 20% deficiency interest on the basic deficiency income tax.

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 FWT.** 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

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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.

> **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 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 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

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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.

the Tax"; yet, these Sections **did not provide the same qualification** 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, **without qualification** 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 **without qualification** 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 "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 FWT assessed against Hoya.**

All told, **I VOTE to PARTIALLY GRANT** the Petition for Review filed by Hoya Glass Disk Philippines, Inc. in CTA EB No. 1474; to DENY the Petition for Review filed by the CIR in CTA EB No. 1473; and to affirm the assailed Decision of the Court in Division with modification relating to the assessed twenty percent (20%) deficiency interest on the deficiency FWT which should appropriately be **CANCELLED** and **SET ASIDE**.

ROMAN G. DEL ROSARIO
Presiding Justice