REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

SAN PAOLO DEVELOPMENT CORPORATION,
Petitioner,

- *versus* -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA *EB* NO. 1388
(CTA Case No. 8521)

Present:

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

Promulgated:
MAR 15 2017 2:35 pm

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DECISION

BAUTISTA, J:

This is a Petition for Review[1] filed pursuant to *Section 2*[2], *Rule 4 of the 2005 Revised Rules of the Court of Tax Appeals ("RRCTA")*, as amended, seeking review and reversal of Court of Tax Appeals ("CTA") Second Division's ("Court in Division") June 30, 2015

[1] *Rollo, CTA EB No. 1388, Petition for Review,* pp. 6-84, with annexes.
[2] "SEC. 2. *Cases within the jurisdiction of the Court en banc.* – The Court *en banc* shall exercise exclusive appellate jurisdiction to review by appeal the following:

> (a) Decisions or resolutions on motions for reconsideration or new trial of the Court in Divisions in the exercise of its exclusive appellate jurisdiction over:
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> xxx xxx xxx
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> (d) Decisions, resolutions or orders on motions for reconsideration or new trial of the Court in Division in the exercise of its exclusive original jurisdiction over tax collection cases;"

Decision[3] which only partially cancelled the assessment against petitioner for deficiency income tax, value-added tax ("VAT"), and expanded withholding tax ("EWT") for taxable year 2008; and November 5, 2015 Resolution[4], denying petitioner's Motion for Reconsideration.

The Parties

Petitioner San Paolo Development Corporation is a corporation duly organized and existing under the laws of the Philippines, with principal address at Victoria Building, 1670 Quezon Avenue, South Triangle, Quezon City; and is engaged in the acquisition by purchase, lease, donation or otherwise, and to own, use, improve, develop, subdivide, sell, mortgage, exchange, lease, develop and hold for investment or otherwise, real estate of all kinds, whether improve, manage or otherwise dispose of buildings, houses, apartments, and other structures of whatever kind, together with their appurtenances.[5] It is duly registered with the Securities and Exchange Commission with Certificate of Registration No. AS095-006659, and with the Bureau of Internal Revenue ("BIR") with Tax Identification No. 004-614-551-000.[6]

Respondent Commissioner of Internal Revenue ("CIR") is duly appointed and empowered to perform the duties of his office including, among others, the power to decide, cancel, and abate tax liabilities, as provided by law.[7] He holds office at BIR National Office, Diliman, Quezon City.[8]

The Facts

The facts of the case as found by the Court in Division are as follows:[9]

Petitioner received a Preliminary Assessment Notice[10] ("PAN") with Details of Discrepancies on October 28, 2011.

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[3] *Rollo, Decision,* pp. 38-71; penned by Associate Justice Caesar A. Casanova, with Associate Justices Juanito C. Cantañeda, Jr. and Amelia R. Cotangco-Manalastas concurring.
[4] *Id., Resolution,* pp. 73-84; penned by Associate Justice Caesar A. Casanova, with Associate Justice Juanito C. Cantañeda, Jr. concurring and Associate Justice Amelia R. Cotangco-Manalastas on leave.
[5] *Records, CTA Case No. 8521, Vol. 2, Decision,* pp. 854-855.
[6] *Id.* at 855.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 855-860.

On November 29, 2011, petitioner received a Formal Letter of Demand[11] ("FLD") with attached Final Assessment Notices[12] ("FAN") assessing petitioner for deficiency income tax, VAT and EWT for taxable year 2008 in the total amount of Php6,652,245.27.

On December 29, 2011, petitioner filed its Protest Letter with the BIR. However, respondent denied petitioner's Protest in the Final Decision on Disputed Assessment[13] ("FDDA") dated June 21, 2012.

Petitioner filed its appeal[14] to the Court in Division on July 27, 2012. Within the extended time granted, respondent filed his Answer[15] on September 17, 2012.

The parties proceeded to trial, after which, on June 30, 2015, the Court in Division rendered the assailed Decision, the dispositive portion[16] thereof states the following:

> **WHEREFORE,** premises considered, the instant Petition for Review is **PARTIALLY GRANTED**. The compromise penalty assessed by respondent against petitioner in the amount of [Php]2,000.00 is hereby **CANCELLED**. On the other hand, the assessments issued by respondent against petitioner for taxable year 2008 covering deficiency income tax, value-added tax, and expanded withholding tax are **AFFIRMED** with some modifications. Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of **FIVE MILLION ONE HUNDRED FORTY TWO THOUSAND TWO HUNDRED FOUR PESOS AND TWENTY THREE CENTAVOS ([PHP]5,142,204.23)** for taxable year 2008, inclusive of the 25% surcharge imposed under Section 248[(A)](3) of the NIRC of 1997, as amended, computed as follows:

Tax Type	Basic Tax		25% Surcharge		Total	
Income Tax	[Php]	6,541.34	[Php]	1,635.34	[Php]	8,176.68
Value-Added Tax		4,107,173.04		1,026,793.26		5,133,966.30
Expanded Withholding Tax		49.00		12.25		61.25
Total	[Php]	4,113,763.38	[Php]	1,028,440.85	[Php]	5,142,204.23

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[10] *Records, Vol. 2, Exhibit "C,"* pp. 471-473.
[11] *Id., Exhibit "D"*, pp. 474-475.
[12] *Id., Exhibits "D-1,""D-2,""D-3," and "D-4,"* pp. 476-479.
[13] *Id., Exhibit "G,"* p. 486.
[14] *Id., Vol. 1, Petition for Review,* pp. 6-22, with annexes.
[15] *Id., Vol. 1, Answer,* pp. 57-60.
[16] *Records, Vol. 2, Decision,* pp. 885-886.

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

(a) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency income tax, value-added tax, and expanded withholding tax computed from the dates indicated below until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended:

Tax Type	Basic Tax	Deficiency Interest Computed From
Income Tax	[Php] 6,541.34	April 15, 2009
Value-Added Tax	4,107,173.04	January 25, 2009
Expanded Withholding Tax	49.00	January 15, 2009

(b) Delinquency interest at the rate of 20% per annum on the total amount of [Php]5,142,204.23 and on the 20% deficiency interest which have accrued as aforestated in (a), computed from December 21, 2011 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED.[17]

Petitioner's Motion for Reconsideration[18] filed on July 20, 2015 was likewise denied in the assailed Resolution[19] dated November 5, 2015. The dispositive portion[20] is reproduced, to wit:

WHEREFORE, finding no compelling reason to reverse the ruling of this Court in the assailed Decision, petitioner's **Motion for Reconsideration** is hereby **DENIED** for lack of merit.

SO ORDERED.[21]

Petitioner received the November 5, 2015 Resolution on November 11, 2015.[22] On November 26, 2015, petitioner filed a Motion for Extension of Time to File Petition for Review[23], which the

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[17] Emphases retained.
[18] *Records, Vol. 2,* pp. 888-896.
[19] *Id., Resolution,* pp. 904-915.
[20] *Id.* at 915.
[21] Emphases retained.
[22] *Records, Vol. 2,* p. 903.
[23] *Rollo,* pp. 1-4.

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Court *En Banc* granted,[24] giving petitioner until December 11, 2015 to file its Petition for Review.

Petitioner timely filed the instant Petition for Review[25] on December 11, 2015. Respondent, despite notice,[26] failed to file his Comment.[27] The parties were not required to submit their respective memoranda, instead the Petition was submitted for the Court *En Banc*'s decision on April 27, 2016;[28] hence, this Decision.

The Issues

Petitioner submitted the following nine (9) issues for the Court *En Banc*'s consideration:

WHETHER PETITIONER'S CHARITABLE CONTRIBUTIONS ARE DEDUCTIBLE;

WHETHER THE SALARIES AND WAGES ARE SUBJECT TO INCOME TAX;

WHETHER THE EXPENSES IN CONNECTION WITH PETITIONER'S PROFESSION, TRADE OR BUSINESS ARE ALLOWABLE DEDUCTIONS FROM GROSS INCOME;

WHETHER PETITIONER IS A REAL ESTATE LESSOR;

WHETHER THE PROPERTY INVOLVED IS A CAPITAL ASSET OR AN ORDINARY ASSET;

WHETHER THE PROPERTY IN QUESTION IS PRIMARILY HELD FOR SALE OR LEASE IN THE REGULAR COURSE OF TRADE OR BUSINESS;

WHETHER THE SALE OF THE PROPERTY IN QUESTION IS SUBJECT TO VAT;

WHETHER THERE IS LEGAL BASIS IN THE DISALLOWANCE OF PETITIONER'S INPUT TAX; AND

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[24] *Rollo*, p. 5.
[25] *Id., Petition for Review*, pp. 6-84, with annexes.
[26] *Id.* at 87-88.
[27] *Id.* at 89.
[28] *Id.* at 91-92.

WHETHER THE FAN IS VALID.[29]

In sum, the sole issue to be resolved by the Court *En Banc* is:

WHETHER THE COURT IN DIVISION CORRECTLY UPHELD THE VALIDITY OF THE ASSESSMENTS AGAINST PETITIONER FOR DEFICIENCY INCOME TAX, VAT, AND EWT FOR TAXABLE YEAR 2008.

Petitioner's Arguments[30]

Petitioner argues that the Court in Division's Decision and Resolution are contrary to law and jurisprudence and should be reversed.

It claims that the sale of the property should not be subject to VAT since said property is a capital asset; that the property should not automatically be considered as ordinary asset even though petitioner is in the real estate business; and that the revenue of Php299,309.29 should not be subject to VAT and that the said assessment has no factual or legal basis.

Petitioner posits that its charitable contributions and expenses in connection with its profession, trade, or business, should be allowed as deductions; and that the salaries and wages should not be subjected to income tax.

Finally, petitioner claims that it was deprived of due process in the assessment; that respondent's right to assess has prescribed; and that, in relation thereto, fraud cannot be presumed but must be proven as fact.

Respondent's Counter-Arguments[31]

Respondent did not file his comment despite notice and opportunity.

However, in the proceedings before the Court in Division, respondent argued that the assessments for deficiency income tax, VAT, and EWT were issued in compliance with the provisions of

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[29] *Rollo, Petition for Review*, pp. 10-11.
[30] *Id.* at 11-29.
[31] *Records, Vol. 1, Answer*, pp. 58-59.

Section 228[32] *of the 1997 National Internal Revenue Code, as amended ("1997 NIRC")*. Respondent asserts that petitioner was informed of the factual and legal bases upon which the assessments were made.

With respect to the items of assessment on income tax, respondent claimed that since petitioner was at a net loss at the end of the taxable year, its charitable contributions cannot be claimed as deductions from gross income; that a portion of the salaries and wages were not subjected to withholding tax and therefore disallowed as a deduction; and that petitioner claimed income tax payments with no proof as to such payments and therefore also disallowed as a deduction.

As to the assessment for VAT, respondent found a difference between petitioner's revenue *per* FS as against its VAT returns, and subjected said difference to VAT. Finally, respondent assessed VAT on petitioner's sale of land.

The Ruling of the Court En Banc

The Court *En Banc* finds no merit in the Petition for Review.

The Court *En Banc* has jurisdiction over the present case.

On November 11, 2015, petitioner received the Court in Division's Resolution dated November 5, 2015. Petitioner filed a

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[32] "Sec. 228. *Protesting of Assessment.* - When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however,* That a preassessment notice shall not be required in the following cases:

xxx xxx xxx

The taxpayer shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.

Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.

Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable."

Motion for Extension of Time to File Petition for Review[33] on November 26, 2015, praying for an extension of fifteen (15) days, or until December 11, 2015 to file its Petition for Review.

The Court *En Banc* granted the extension[34], and petitioner timely filed its Petition for Review on December 11, 2015.[35] Hence, the Court *En Banc* has jurisdiction.

There is no compelling reason to reverse or modify the Court in Division's Decision, which partially upheld the assessments.

A perusal of petitioner's arguments show that these are a mere rehash of the arguments raised before the Court in Division, and were already considered and thoroughly threshed out in the assailed Decision and reiterated in the assailed Resolution.

Most of the assessments were sustained based on the Court in Division's findings that petitioner failed to present sufficient evidence to support its contentions.

Proceeds from Sale of Land – Php33,975,000.00

The Court *En Banc* reiterates the Court in Division's findings that the proceeds from the sale of land amounting to Php33,975,000.00 is subject to VAT.[36]

While petitioner argues that the parcel of land sold is a capital asset, considering that it is a vacant and idle real property[37], the Court in Division correctly found said property to be an ordinary

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[33] *Rollo*, pp. 1-4.
[34] *Id.* at 5.
[35] *RULE 8. PROCEDURE IN CIVIL CASES*
"SEC. 3. *Who may appeal; period to file petition.* –
xxx xxx xxx
(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review."
[36] *Records, Vol. 2, Decision*, pp. 875-878.
[37] *Rollo, Petition for Review*, pp. 13-15.

asset pursuant to *Revenue Regulations ("RR") No. 07-03*[38], specifically *Section 3(e)* thereof, which provides:

> **SEC. 3. GUIDELINES IN DETERMINING WHETHER A PARTICULAR REAL PROPERTY IS A CAPITAL ASSET OR ORDINARY ASSET. -**
>
> xxx xxx xxx
>
> e. ***Treatment of abandoned and idle real properties*. -** Real properties formerly forming part of the stock in trade of a taxpayer engaged in the real estate business, or formerly being used in the trade or business of a taxpayer engaged or not engaged in the real estate business, which were later on abandoned and became idle, shall continue to be treated as ordinary assets. Real property initially acquired by a taxpayer engaged in the real estate business shall not result in its conversion into a capital asset even if the same is subsequently abandoned or becomes idle.[39]

It is clear from the foregoing section, that the parcels of land acquired, and subsequently sold, by petitioner, as an entity engaged in the real estate business, continues to be an ordinary asset and is not converted into a capital asset even if the same has not been used and remains idle.

The Court *En Banc* also agrees with the Court in Division that petitioner treated the said parcels of land as ordinary assets when petitioner treated the gain from the sale as an ordinary income reported in its Annual Income Tax Return.[40] Thus, for petitioner's failure to subject the proceeds of the sale to VAT, the assessment was rightfully sustained.

Revenue from lease rentals – Php299,309.29

The assessment arose from the discrepancy of Php299,309.29 when the declared revenue *per* Financial Statements was compared

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[38] Providing the Guidelines in Determining Whether a Particular Real Property is a Capital Asset or an Ordinary Asset Pursuant to Section 39(A)(1) of the National Internal Revenue Code of 1997 for Purposes of Imposing the Capital Gains Tax under Sections 24(D), 25(A)(3), 25(b) and 27(D)(5), or the Ordinary Income Tax under Sections 24(A), 25(A) & (B), 27(A), 28(A)(1) and 28(B)(1), or the Minimum Corporate Income Tax (MCIT) under Sections 27(E) and 28(A)(2) of the same Code, December 27, 2002.

[39] Underscoring ours.

[40] *Records, Vol. 2, Decision*, p. 878.

against the VAT returns. Petitioner claimed that the discrepancy arose out of timing differences in revenue recognition. However, the Court in Division correctly found that petitioner failed to present evidence that would reconcile said timing difference; hence the assessment is sustained.[41]

Charitable Contributions – Php46,337.00

Respondent disallowed petitioner's deductions for charitable contributions. Again, the Court *En Banc* finds the Court in Division's evaluation proper when it ruled that petitioner failed to prove that the donee, Roman Scholarship Fund, Inc., is a qualified and accredited donee for the purpose of deductibility.[42] Thus, respondent was correct in disallowing the deduction.

Salaries and Wages – Php50,472.94

Respondent disallowed the deduction for salaries and wages amounting to Php50,472.94, which is the difference between the salaries and wages declared in the Financial Statements and Income Tax Return *versus* the salaries and wages shown in the alphalist. Petitioner failed to reconcile the discrepancy or to explain the reason for not subjecting the same to withholding tax. Therefore, the disallowance was correctly sustained by the Court in Division.[43]

Unsupported Tax Payments – Php51,565.77

Respondent disallowed the claim for tax payments due to absence of proof of payment, and that the same could not be verified in the Integrated Tax System. Petitioner on the other hand alleges that respondent did not provide the details and the nature of payment which was disallowed, and therefore failed to state the facts and law upon which the assessment was made.

The Court in Division found that said disallowed tax payment is shown in petitioner's tentative Annual Income Tax Return for taxable year 2008 as income tax payments for the first three quarters.[44] Unfortunately, petitioner failed to present any proof to

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[41] *Records, Vol. 2, Decision,* p. 878.
[42] *Id.* at 867.
[43] *Id.* at 868-869
[44] *Id.* at 869.

support these tax payments; hence the disallowance was correctly sustained.[45]

Due process, prescription, and fraud

Petitioner argues that respondent did not provide sufficient bases or details regarding the assessments; and that the FAN failed to state the specific facts that led to the assessments. Further, with respect to the VAT assessment, petitioner argues that the same has prescribed and that the ten (10)-year prescriptive period should not apply as respondent failed to prove that there is fraud or falsity in petitioner's returns. Petitioner also claims that the alleged falsity of the VAT returns is merely based on the presumption that the deficiency VAT assessment is correct.

The Court *En Banc* finds that the Court in Division did not err in ruling that respondent complied with the due process requirement.[46] The bases of the assessments can simply be determined from the Details of Discrepancies, attached as Schedule "1," to the FLD.[47] The figures used by respondent could easily be traced to petitioner's financial statements and/or tax returns. Those assessments which could not be traced therein, or had no basis as an assessment for taxable year 2008 were cancelled by the Court in Division.[48]

Finally, the Court *En Banc* finds no reason to reverse the application of the ten (10)-year prescriptive period for the VAT assessment. As discussed by the Court in Division, petitioner failed to prove that the land sold is a capital asset and that the lease rentals were the result of timing differences. Since the land sold is an ordinary asset, petitioner clearly did not report the sale in its VAT returns. Also, the discrepancy in the lease rentals, which arose from lower lease rental revenue being recognized in the VAT returns, clearly show that some revenues were not reported in the VAT returns. These undeclared revenues rendered petitioner's VAT returns "false" under the doctrine in *Aznar v. Court of Tax Appeals*[49], which classifies as "false" a return which deviates from the truth, whether intentional or not.

Thus, the Court in Division correctly held, as follows:

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[45] *Records, Vol. 2, Decision,* p. 870.
[46] *Id.* at 862.
[47] *BIR Records, CTA Case No. 8521, Formal Letter of Demand, Exhibit "6-a,"* pp. 139-142.
[48] *Records, Vol. 2, Decision,* pp. 871-872, 881-883, and 885.
[49] G.R. No. L-20569, August 23, 1974, 58 SCRA 519.

> Following the doctrine in the Aznar case, it is evident that herein petitioner committed falsity in its 2008 Quarterly VAT Returns as it did not declare substantial sales/receipts from its rental and sale of real properties for the said year. There is a deviation from the truth and it follows that the applicable prescriptive period would be ten years from the discovery of the falsity, which should be reckoned from the issuance of the Preliminary Assessment Notice (PAN) on October 27, 2011. Since the FLD and FAN were issued on December 21, 2011, it follows that the deficiency VAT assessment had not yet prescribed.[50]

In sum, the Court *En Banc* finds no cogent reason to reverse the findings of the Court in Division.

WHEREFORE, premises considered, the present Petition for Review is hereby **DENIED** for lack of merit.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

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

JUANITO C. CASTAÑEDA, JR.
Associate Justice

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

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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[50] *Records, Vol. 2, Decision*, pp. 880-881, citations omitted.

CIELITO N. MINDARO-GRULLA
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

(With Concurring and Separate Opinion)
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.

ROMAN G. DEL ROSARIO
Presiding Justice

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MINDARO-GRULLA,
RINGPIS-LIBAN, *and*
MANAHAN, *JJ.*

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CONCURRING AND DISSENTING OPINION

DEL ROSARIO, P.J.:

I concur with the *ponencia* in denying the Petition for Review filed by petitioner San Paolo Development Corporation (SPDC).

I am of the view that the Court in Division's Decision dated June 30, 2015 should be affirmed but only in so far as it ordered SPDC to pay respondent Commissioner of Internal Revenue (CIR) the amount of Php5,142,204.23, representing basic deficiency income tax, value added tax (VAT) and expanded withholding tax (EWT) in the total amount of Php4,113,763.38, plus the 25% surcharge in the amount of Php1,028,440.85, 20% deficiency interest on said deficiency income tax and surcharge, and 20% delinquency interest.

With due respect, I dissent on the *ponencia*'s conclusion that the 10-year prescriptive period to assess SPDC of deficiency VAT does not apply.

In its Petition for Review, SPDC argues that the 10-year prescriptive period to assess it for VAT is not applicable as it will only apply when there is a false and fraudulent return filed by a taxpayer or when the taxpayer failed to file the same. SPDC posits that it timely filed all its returns for the taxable year 2008. SPDC claims that the falsity attributable to it was merely based on its *alleged* non-declaration or substantial under-declaration for the taxable year 2008 which resulted to the alleged non-payment of correct taxes. For SPDC, such allegation of non-declaration or substantial under-declaration was based merely on the presumption that the assessments were correct but does not establish *per se* that SPDC filed false and fraudulent returns.

To my mind, the fact that SPDC, a taxpayer engaged in the real estate business, knowingly failed to declare substantial sales/receipts from its rental activities and the proceeds from the sale of its land in its VAT returns makes said returns fraudulent. The non-declaration clearly shows SPDC's intent to evade the payment of VAT on said vatable transactions. SPDC's argument that the land sold was a capital asset is patently without basis as it is very clear in Revenue Regulations (RR) No. 07-03 that SPDC is subject to VAT on the sale of its real properties as the same are regarded as ordinary assets notwithstanding that they were neither held for sale or lease nor used by SPDC in its business or they subsequently became idle properties. Section 3 of RR No. 07-03 states:

> "SECTION 3. Guidelines in Determining Whether a Particular Real Property is a Capital Asset or Ordinary Asset. —
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> a. Taxpayers engaged in the real estate business. — Real property shall be classified with respect to taxpayers engaged in the real estate business as follows:
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> 1. Real Estate Dealer. — **All real properties acquired by the real estate dealer shall be considered as ordinary assets.**
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> 2. Real estate Developer. — All real properties acquired by the real estate developer, whether developed or undeveloped as of the time of acquisition, and all real properties which are field by the real estate developer primarily for sale or for lease to customers in the ordinary course of his trade or business or which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year and all real properties used in the

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trade or business, whether in the form of land, building, or other improvements, shall be considered as ordinary assets.

3. Real Estate Lessor. — All real properties of the real estate lessor, whether land and/or improvements, which are for lease/rent or being offered for lease/rent, or otherwise for use or being used in the trade or business shall likewise be considered as ordinary assets.

4. Taxpayers habitually engaged in the real estate business. — All real properties acquired in the course of trade or business by a taxpayer habitually engaged in the sale of real estate shall be considered as ordinary assets. Registration with the HLURB or HUDCC as a real estate dealer or developer shall be sufficient for a taxpayer to be considered as habitually engaged in the sale of real estate. If the taxpayer is not registered with the HLURB or HUDCC as a real estate dealer or developer, he/it may nevertheless be deemed to be engaged in the real estate business through the establishment of substantial relevant evidence (such as consummation during the preceding year of at least six (6) taxable real estate sale transactions, regardless of amount; registration as habitually engaged in real estate business with the Local Government Unit or the Bureau of Internal Revenue, etc.).

A property purchased for future use in the business, even though this purpose is later thwarted by circumstances beyond the taxpayer's control, does not lose its character as an ordinary asset. Nor does a mere discontinuance of the active use of the property change its character previously established as a business property.

xxx xxx xxx.

e. **Treatment of abandoned and idle real properties. — Real properties formerly forming part of the stock in trade of a taxpayer engaged in the real estate business, or formerly being used in the trade or business of a taxpayer engaged or not engaged in the real estate business, which were later on abandoned and became idle, shall continue to be treated as ordinary assets. Real property initially acquired by a taxpayer engaged in the real estate business shall not result in its conversion into a capital asset even if the same is subsequently abandoned or becomes idle.**

Provided however, that properties classified as ordinary assets for being used in business by a taxpayer engaged in business other than real estate business as defined in Section 2(g) hereof are automatically converted into capital assets upon showing of proof that the same have not been used in business for more than two (2) years prior to the consummation of the taxable transactions involving said properties.

xxx xxx xxx."

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For filing fraudulent VAT returns with manifest intent to evade the payment of VAT, I submit that that the 10-year prescriptive period to assess SPDC for VAT is indeed applicable.

With regard to the imposition of 20% deficiency interest on the deficiency VAT and EWT, I reiterate the positions 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:
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> > "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.

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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.

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> **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."

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 VAT and EWT assessed against SPDC.**

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 <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.

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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.

In her Concurring and Separate Opinion, my esteemed and learned colleague, the Honorable Associate Justice Catherine T. Manahan *in esse* opined that the definitions or mechanics provided in Sections 56(B), 93 and 104 of the NIRC are not the only situations where a "deficiency" may occur in the NIRC. Allegedly, said Sections are merely descriptive of how a deficiency may arise in such types of taxes but do not provide the sole basis for determining deficiency in the national internal revenue taxes. Applying the plain meaning rule or *verba legis*, she is of the view that the provision on interest, both deficiency and delinquency interest, applies to all taxes imposed in the NIRC.

With due respect to Associate Justice Manahan's opinion, I submit that 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 deficiency interest 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.

Notably, 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 did not provide the same qualification as that which is stated in Section 249(B) of the NIRC. 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 any qualification</u> similar to that provided in Section 249(B) of the NIRC. In the same vein, delinquency interest provided in Section 249 of the NRIC is imposed <u>without qualification</u> on the amount of the tax due, or on 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.

On the other hand, 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 therein, 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 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."

Incidentally, reliance on *Takenaka Corporation Philippine Branch vs. Commissioner of Internal Revenue, CTA EB No. 745, September 12, 2012* is misplaced as the same - - having been rendered by the CTA and not the Supreme Court - - does not constitute a binding precedent. In *Commissioner of Internal Revenue vs. San Roque Power Corporation,*[6] *Taganito Mining Corporation vs. Commissioner of Internal Revenue,*[7] *and Philex Mining Corporation vs. Commissioner of Internal Revenue,*[8] the Supreme Court elucidated, *viz.*:

> "There is also the claim that there are numerous CTA decisions allegedly supporting the argument that the filing dates of the administrative and judicial claims are inconsequential, as long as they are within the two-year prescriptive period. Suffice it to state that CTA decisions do not constitute precedents, and do not bind this Court or the public. That is why CTA decisions are appealable to this Court, which may affirm, reverse or modify the CTA decisions as the facts and the law may warrant. Only decisions of this Court constitute binding precedents, forming part of the Philippine legal system. As held by this Court in *The Philippine Veterans Affairs Office v. Segundo*:
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> > x x x Let it be admonished that decisions of the Supreme Court "applying or interpreting the laws or the Constitution . . . form part of the legal system of the Philippines," and, as it were, "laws" by their own right because they interpret what the laws say or mean. **Unlike rulings of the lower courts, which bind**

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[6] G.R. No. 187485, February 12, 2013.
[7] G.R. No. 196113, February 12, 2013.
[8] G.R. No. 197156, February 12, 2013.

> **the parties to specific cases alone, our judgments are universal in their scope and application, and equally mandatory in character**. Let it be warned that to defy our decisions is to court contempt.

The same basic doctrine was reiterated by this Court in *De Mesa v. Pepsi Cola Products Phils., Inc.*:

> The principle of *stare decisis et non quieta movere* is entrenched in Article 8 of the Civil Code, to wit:
>
> ART. 8. Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines.
>
> It enjoins adherence to judicial precedents. **It requires our courts to follow a rule already established in a final decision of the Supreme Court**. That decision becomes a judicial precedent to be followed in subsequent cases by all courts in the land. The doctrine of *stare decisis* is based on the principle that once a question of law has been examined and decided, it should be deemed settled and closed to further argument."

In fine, the afore-mentioned decision of the CTA may not be relied upon as a doctrinal pronouncement that is binding upon the courts.

All told, I vote to DENY the Petition for Review filed by SPDC, and to AFFIRM the assailed Decision dated June 30, 2015 of the Court in Division WITH MODIFICATION relating to the imposition of 20% deficiency interest on the deficiency VAT and EWT which should appropriately be CANCELLED AND SET ASIDE.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

SAN PAOLO DEVELOPMENT CORPORATION *Petitioner,*	**CTA *EB* NO. 1388** (CTA Case No. 8521)
	Present:
-*versus*-	**DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, RINGPIS-LIBAN,** *and* **MANAHAN,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Promulgated: MAR 15 2017 2:38pm

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CONCURRING AND SEPARATE OPINION

MANAHAN, J.:

I respectfully concur with the majority in upholding the decision of the Court in Division to partially cancel the tax assessments issued by the Commissioner of Internal Revenue against the Petitioner, San Paolo Development Corporation, with particular emphasis and discussion on the application of the ten (10) year prescriptive period on the VAT assessment and the imposition of both deficiency and delinquency interest with additional civil penalties on the filing of a false or fraudulent VAT return.

The ten (10) year prescriptive period on VAT assessments

It is obvious from the records that the land sold is an ordinary asset as revealed by Petitioner's Articles of Incorporation (AOI) and

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Annual Income Tax Return. First, the AOI clearly states that it is engaged in the real estate business and that the sale of land was in pursuance of this purpose. Second, Petitioner recognized the land as an ordinary asset when it treated the income from such sale as an ordinary gain as evidenced in its annual income tax return. This substantial and intentional non- declaration of the sale in its VAT returns constitutes the filing of a false or fraudulent return justifying the applicability of the ten-year prescriptive period to assess provided under the National Internal Revenue Code (NIRC).[1] On this aspect, I agree with the Concurring Opinion of Justice del Rosario which amply discussed the legal basis of the validity of the assessment on VAT which was well within the ten- year period.

I would also like to add that in case of a false or fraudulent return, a civil penalty of 50% of the tax or of the deficiency tax must be imposed along with the other additions to the tax. The NIRC provides that in case a false or fraudulent return is willfully made, the penalty to be imposed is 50% of the tax or of the deficiency tax, as the case may be. [2] This is all the more apt in the light of the substantial under declaration of sales of more than 30% of that declared in the VAT return of the taxpayer in the instant case.[3] I will not however belabor this particular point as the then Commissioner of Internal Revenue herself did not impose such a civil penalty in the VAT assessment issued against the taxpayer.

Imposition of the deficiency and delinquency interest as additions to the tax to be paid by the taxpayer

I also fully agree with the Majority Decision that in addition to the deficiency taxes to be paid by Petitioner, a deficiency and delinquency interest must be imposed both at the rate of 20% per annum as correctly provided in the original decision dated 30 June 2015.

With all due respect, I also wish to present a Separate Opinion to specify my points of disagreement with the Dissenting Opinion of Justice del Rosario on this matter.

The imposition of deficiency interest is under a separate Title of the Tax Code (Title X) entitled "Statutory Offenses and Penalties" specifically Chapter I "Additions to the Tax" which clearly covers all types of taxes covered by the NIRC. This was reiterated in Section 247 thereof which states that "these additions to the tax or

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[1] Section 222 NIRC.
[2] Section 248 (B).
[3] Id.

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deficiency tax prescribed in this Chapter (Additions to the Tax) shall apply to *all taxes*, fees and charges imposed in this Code. Section 249 (A) of the same chapter is also explicit when it provides, thus:

> "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 per annum or such higher rate as may be prescribed for payment until the amount is fully paid." (italics ours)

I believe that the plain meaning rule or "verba legis" in statutory construction should apply here because the statute remains to be clear, plain and free from ambiguity, that is, the provision on interest, both deficiency and delinquency interest, applies to all taxes imposed in the NIRC covering both value-added tax and (VAT) and expanded withholding tax (EWT). Where the words of a statute are clear, plain and free from ambiguity, it must be given its literal meaning and applied without attempted interpretation. [4]

It is well established that construction of a statute or the Constitution belong to the Judiciary but if there is no ambiguity in the words of the statute, there is no room for construction or interpretation. [5]

The history and rationale of the imposition of both deficiency and delinquency interest was comprehensively discussed by this Court in the case of Takenaka Corporation Philippine Branch vs. CIR. [6] In this case, the term" deficiency" was distinguished from "delinquency." Deficiency is defined as the amount still due and collectible from a taxpayer upon audit or investigation while delinquency is the failure of the taxpayer to pay the tax due on the date fixed by law as indicated in the assessment notice or letter of demand. These two terms/concepts are different in nature hence strictly speaking, there is no double imposition of interest to justify judicial interpretation of the statute.

Another interesting point worthy of debate is the contention that deficiency interest refers only to income tax, donor's tax and estate tax because the term "deficiency" appears or is defined only in the Chapters pertaining to these types of taxes. Thus, the Dissenting Opinion posits the theory that Section 247 (a) and Section 249 (A) must be read in conjunction with Section 249 (B) which is worded as follows:

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[4] Commissioner of Internal Revenue vs. Central Luzon Drug, G.R. No. 159647 April 15, 2005; Republic vs. Lacap, G.R.. No. 158253 March 2, 2007.
[5] Aparri vs. Court of Appeals, G.R. No. 30057 January 31, 1884.
[6] CTA EB No. 745 September 12, 2012.

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(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)

I beg to disagree.

The meaning of "deficiency" provided in Section 56 (B) (income tax), Section 93 (estate tax) and Section 104 (donor's tax) of the NIRC all contain identical wordings descriptive of how a deficiency may arise in these three types of taxes. Being in the nature of direct taxes, such operational definition of "deficiency" on income, estate and donor's taxes may not apply to indirect taxes. This may be the reason why this codal provision is not echoed in the Chapter on VAT or on Excise Tax (for that matter) because both are indirect taxes. EWT, although not classified as an indirect tax, is a withholding tax on income payments which likewise has a certain peculiarity in terms of how a deficiency could arise therefrom which is not akin to direct taxes.

To my mind, the definitions or mechanics provided in Sections 56 (B)[7], 93[8] and 104[9] are not the only situations where a

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[7] Section 56. Payment and Assessment of Income Tax for Individuals and Corporations. –
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(B) xxx xxx xxxx

As used in this Chapter, in respect of a tax imposed by this Title, the term "deficiency" means:
The amount by which the tax imposed by this Title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amount previously abated, credited, returned or otherwise repaid in respect of such tax; or
If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency but such amounts previously assessed or collected without assessment shall first be decreased by the amounts previously abated, credited, returned or otherwise repaid in respect of such tax.
[8] Section 93. Definition of Deficiency. – As used in this Chapter, the term "deficiency" means:

The amount by which the tax imposed by this Title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amount previously abated, credited, returned or otherwise repaid in respect of such tax; or
If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency but such amounts previously assessed or collected without assessment shall first be decreased by the amounts previously abated, credited, returned or otherwise repaid in respect of such tax.
[9] Section 104. Definitions.

"deficiency" may occur in the NIRC. If at all, these sections or provisions are merely descriptive of how a deficiency may arise in such types of taxes but do not provide the sole basis for determining deficiency in the national internal revenue taxes.

On this basis, I concur with the Majority Opinion affirming partially the assessments issued against the Petitioner plus the imposition of both delinquency and deficiency interest as additions to the tax.

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

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The term "deficiency" means:

The amount by which the tax imposed by this Title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amount previously abated, credited, returned or otherwise repaid in respect of such tax; or
If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency but such amounts previously assessed or collected without assessment shall first be decreased by the amounts previously abated, credited, returned or otherwise repaid in respect of such tax.