REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

SPLASH CORPORATION,
Petitioner,

CTA CASE NO. 8530

Members:

- versus -

CASTAÑEDA, JR., *Chairperson, and*
CASANOVA, *JJ.*

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

OCT 12 2016
10:45 a.m.

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AMENDED DECISION

CASTAÑEDA, JR., *J.*:

For this Court's resolution are the following:

1. respondent's **Motion for Partial Reconsideration (Re: Decision dated 19 May 2016)**, filed on June 6, 2016, with petitioner's **Comment/Opposition (To Respondent's Motion for Partial Reconsideration dated June 6, 2016)**, filed on July 4, 2016; and

2. petitioner's **Motion for Partial Reconsideration**, filed on June 6, 2016, with respondent's **Comment (Re: Motion for Partial Reconsideration dated 6 June 2016)**, filed on July 12, 2016.

Both respondent and petitioner seek reconsideration of the Court's Decision promulgated on May 19, 2016 (assailed Decision)[1], the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, the instant Petition for Review is **PARTIALLY GRANTED**. Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of **FORTY-FIVE MILLION ONE HUNDRED SEVENTY-FIVE THOUSAND SIX HUNDRED TWELVE PESOS AND 45/100 (₱45,175,612.45)**, inclusive of the twenty-five percent (25%) surcharge imposed under Section 248(A)(1) of the NIRC of 1997, as amended, and the twenty percent (20%) deficiency interest imposed under Section 249(B) of the same Code, computed as follows:

	Basic Tax	25% Surcharge	20% Interest	Total
	(In Philippine Pesos)			
Income Tax	12,165,482.90	3,041,370.73		15,206,853.63
VAT	14,933,021.20	3,733,255.30		18,666,276.50
EWT	742,048.43	185,512.11		927,560.54
Subtotal	**27,840,552.53**	**6,960,138.14**	**-**	**34,800,690.67**
Increments for late filing of return and payment of Percentage Tax		8,479,280.00	1,895,641.78	10,374,921.78
Subtotal	**-**	**8,479,280.00**	**1,895,641.78**	**10,374,921.78**
Total	**27,840,552.53**	**15,439,418.14**	**1,895,641.78**	**45,175,612.45**

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

a) Deficiency interest at the rate of 20% per annum on the basic deficiency **income tax, VAT** and **EWT** 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

ja

[1] Docket, Vol. V, pp. 1748-1814.

Deficiency Income Tax	₱ 12,165,482.90	April 15, 2008
Deficiency VAT	14,933,021.20	January 25, 2008
Deficiency EWT	742,048.43	January 15, 2008

b) Delinquency interest at the rate of 20% per annum on the total amount of ₱34,800,690.68, representing basic deficiency **income tax, VAT** and **EWT**, plus 25% surcharge, computed from December 22, 2011 until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended;

c) Delinquency interest at the rate of 20% per annum on the increments for late filing of return and payment of **percentage tax** in the amount of ₱10,374,921.78, computed from December 22, 2011, until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended; and

d) Delinquency interest at the rate of 20% per annum on the 20% deficiency interest which have accrued as afore-stated in (a), computed from December 22, 2011, until full payment thereof pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED."[2]

Petitioner's Motion for Partial Reconsideration

Petitioner raises the following grounds for reconsideration:

A. The assessment is void there being no valid issuance and re-validation of a Letter of Authority (LOA); *jr*

[2] Docket, Vol. V, pp. 1797-1798.

B. The Final Assessment Notice (FAN) sent to the petitioner was defective since no categorical demand for payment was stated therein;

C. The assessments arising from the following are not valid for failure to state the facts and the law on which the assessments were based:

a. disallowed cost of sales (₱33,335,564.00) from Crown Asia Properties, Inc.

b. imposition of VAT on ₱105,000,000 cash sale from Crown Asia Properties, Inc.

D. There is no undeclared sales to HBC. The alleged difference between petitioner's Sales to HBC per Note 17 of the 2007 AFS as against Sales per SLS does not translate to Sales not subjected to VAT;

E. Assuming that there is basis for the computed deficiency income tax, VAT and EWT, 25% surcharge cannot be imposed;

F. Assuming arguendo that the assessment issued against the petitioner is valid, the amounts pertaining to deficiency EWT and VAT should not be subjected to deficiency interest;

G. Deficiency interest should not be simultaneously imposed with delinquency interest.

Respondent, in his comment, maintains that it is not always the case that the revenue officers indicated in the original LOA would be able to complete their audit investigation. There will be instances where the revenue officers would either retire, be reassigned, be taken ill, or die, prior to the completion of the audit investigation, hence, referral memoranda, memorandum of assignments and/or revalidation of LOAs are given to other revenue officers to continue the audit investigation. Respondent further asserts that petitioner is estopped from questioning the authority of the revenue officer after petitioner actively participated in all stages of the audit investigation. As regards the other issues raised by petitioner in its Motion, respondent agrees with the findings of the Court. *jr*

The Court denies petitioner's Motion for Partial Reconsideration.

Authority of Examining Officer

It is petitioner's stance that the assessment is void for lack of valid LOA. According to petitioner, the examination of its books of accounts was not authorized under the law considering that Revenue Officer (RO) Nicasio Lumagui, Jr., who conducted the examination of petitioner's books of accounts, was not duly armed with a valid LOA. It insists that while allegedly, an LOA was issued, the name of RO Nicasio Lumagui, Jr. was not indicated therein. Petitioner denies the receipt of the revalidated LOA and maintains that the revalidation was defective. Hence, petitioner asserts that the assessment is void.

The Court cannot sustain petitioners' change of theory at the later stage of the proceeding.

An examination of the instant Petition for Review[3], as well as petitioner's Pre-Trial Brief[4], and the parties Joint Stipulation of Facts and Issues[5] reveals that the issue on the authority of the examining officer was never challenged as it was not part of the stipulated issues of the parties. In fact, when petitioner questioned the FAN, thru the submission of its Request for Reconsideration dated January 5, 2012[6], the authority of RO Nicasio Lumagui, Jr. was not disputed.

It was only in petitioner's Memorandum[7] where the issue surfaced and the theory was changed. As mentioned earlier, the alleged lack of LOA was not part of the stipulated issue during the pre-trial. Thus, in the case of *Licomcen, Inc. vs. Engr. Salvador Abainza*[8], the Supreme Court held:

> "Under Section 1, Rule 9 of the Rules of Court, defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived, with the following exceptions: (1) lack of jurisdiction over the subject matter; (2) *litis pendentia*; (3) *res judicata*; and (4) prescription of the action. Clearly, petitioner cannot

[3] Docket, Vol. I, pp. 6-37.
[4] Docket, Vol. I, pp. 210-221.
[5] Docket, Vol. I, pp. 239-245.
[6] Petitioner's Exhibit "R".
[7] Docket, Vol. IV, pp. 1690-1740.
[8] G.R. No. 199781, February 18, 2013.

change its defense after the termination of the period of testimony and after the exhibits of both parties have already been admitted by the court. The non-inclusion of this belated defense in the pre-trial order barred its consideration during the trial. To rule otherwise would put the adverse party at a disadvantage since he could no longer offer evidence to rebut the new theory. Indeed, **parties are bound by the delimitation of issues during the pre-trial**. As held in *Villanueva v. Court of Appeals:*

> 'Pre-trial is primarily intended to insure that the parties properly raise all issues necessary to dispose of a case. The parties must disclose during pre-trial all issues they intend to raise during the trial, except those involving privileged or impeaching matters. Although a pre-trial order is not meant to catalogue each issue that the parties may take up during the trial, issues not included in the pre-trial order may be considered only if they are impliedly included in the issues raised or inferable from the issues raised by necessary implication. The basis of the rule is simple. Petitioners are bound by the delimitation of the issues during the pre-trial because they themselves agreed to the same.'"

Moreover, in the case of *Rodolfo M. Agdeppa vs. Honorable Office of the Ombudsman, et al.,*[9] the Supreme Court discussed that a party cannot raise a substantial issue for the first time in its Memorandum, to wit:

> "We likewise reviewed petitioners' Reply and we note that the discussion therein referred only to the denial of the motion for extension. No discussion whatsoever was made as regards the substantial merits of the case. In fact, as we have mentioned before, it was only in petitioners' Memorandum where they raised for the first time the issue that their appeal is meritorious. Jz

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[9] G.R. No. 146376, April 23, 2014 citing *Heirs of Ramon Garayes vs. Pacific Asia Overseas Shipping Corp.,* G.R. No. 178477, July 16, 2012.

> **This is not only unfair to the respondents who were deprived of the opportunity to propound their arguments on the issue. It is likewise not allowed by the rules.** In the June 23, 2008 Resolution, the Court reminded the parties that 'no new issues may be raised by a party in the memorandum.' The rationale for this was explained by the Court in *Heirs of Cesar Marasigan v. Marasigan,* thus:
>
>> This Court significantly notes that the first three issues, alleging lack of jurisdiction and cause of action, are raised by petitioners for the first time in their Memorandum. No amount of interpretation or argumentation can place them within the scope of the assignment of errors they raised in their Petition.
>>
>> The parties were duly informed by the Court in its Resolution dated September 17, 2003 that ***no new issues may be raised by a party in his/its Memorandum and the issues raised in his/its pleadings but not included in the Memorandum shall be deemed waived or abandoned.*** The raising of additional issues in a memorandum before the Supreme Court is irregular, because said memorandum is supposed to be in support merely of the position taken by the party concerned in his petition, and the raising of new issues amounts to the filing of a petition beyond the reglementary period. The purpose of this rule is to provide all parties to a case a fair opportunity to be heard. No new points of law, theories, issues or arguments may be raised by a party in the Memorandum for the reason that to permit these would be offensive to the basic rules of fair play, justice and due process."

It is axiomatic in pleadings and practice that no new issue in a case can be raised in a pleading which by due diligence could have been raised in previous pleadings.[10] Here, since petitioner raised for the first time in its Memorandum that the tax assessment is void for lack of LOA arising from lack of authority of the examining officer, the Court will not consider the said argument. As mentioned above, to do so would be contrary to the basic rules of fair play, justice and due process.

The FAN is valid.

Petitioner insists that the FAN was defective since no categorical demand for payment was stated therein. It also argues that the assessments are not valid for failure to state the facts and the law on which they were based.

The Court is not convinced. A perusal of the FAN shows that there was indeed a clear demand for payment, to wit:

> " xxx xxx xxx
>
> In view thereof, you are requested to pay your aforesaid deficiency internal revenue tax liabilities through the duly authorized agent bank in which you are enrolled within the time shown in the enclosed assessment notice.
>
> We hope that you will give this matter your preferential attention."[11]

Furthermore, it was indicated in the Audit Result/Final Assessment Notices[12], attached to the FAN, the due date for payment of said taxes, *i.e.*, on December 20, 2011.

Hence, petitioner cannot argue that there was no categorical demand for payment.

The deficiency income tax assessment on the disallowed cost of sales of ₱33,335,564.00 and deficiency VAT assessment in the *fr*

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[10] *Toshiba Information Equipment (Phils.), Inc. vs. Commissioner of Internal Revenue*, G.R. No. 157594, March 9, 2010.
[11] Respondent's Exhibit "12", BIR Records, p. 1151.
[12] BIR Records, pp. 1140-1155.

amount of ₱105,000,000.00 have legal and factual basis.

Petitioner submits that the deficiency income tax and Value Added Tax (VAT) assessments in the amounts of ₱33,335,564.00 and ₱105,000,000.00, respectively, both of which pertain to petitioner's sale of land to Crown Asia Properties, Inc., are void for lack of legal and factual basis.

The Court is not convinced.

Section 228 of National Internal Revenue Code (NIRC) of 1997, as amended, provides that the taxpayer must be informed in writing of the law and the facts upon which a tax assessment is based; otherwise, the assessment is void. As part of the due process requirement, the taxpayer needs to know the nature of the examiner's findings in order to be able to properly contest the same and submit supporting documents.

Here, petitioner was sufficiently apprised of the factual and legal bases of the subject assessments as can be seen in the Details of Discrepancies[13] and Audit Result/Final Assessment Notices[14] attached to the FAN.

Moreover, respondent provided the detailed computations of the disallowed cost of sales of ₱33,335,564.00, which are reproduced herein below:[15]

Total Cost of Land to be allocated:

Acquisition Cost per Books	₱ 241,800,000.00
Less: Overstatement of Acquisition Cost	10,075,000.00
Acquisition Cost per Deed of Sale	231,725,000.00
Add: Capitalized Incidental Charges	7,156,454.00
Cost of Parcel of Land to be Allocated	**₱ 238,881,454.00**

Jr

[13] Respondent's Exhibit "12", Annex "A", Details of Discrepancies, items I.c. and II.b, BIR Records, pp. 1147 to 1150.

[14] BIR Records, pp. 1143 to 1144.

[15] Respondent's Exhibit "12", Annex "A", Details of Discrepancies, item I.c., BIR Records, pp. 1148 to 1149.

Assigned Value to the Condominium Units to be Received:

Per agreement, Splash Corporation shall receive 3,383.4 sq. m. of the office/condotel areas and 26 parking slots or 7.5% of the condominium building, whichever is greater.

No. of sq.m. of office/condotel areas	3,383.40
Add: No. of sq.m. of 12 parking lots at 12 sq.m. each	312.00
Total no. of sq.m. of office/condotel/parking slots	3,695.40
Multiply by zonal value per sq.m.	₱ 65,000.00
Assigned value to the condominium units to be received	**₱ 240,201,000.00**

Attribution of the Cost of Land:

	Values	Percentage
Assigned value of the condominium units to be received	₱ 240,201,000.00	70%
Cash consideration of intangible property	105,000,000.00	30%
Total consideration in exchange of land	**₱345,201,000.00**	**100%**

Cost of Land to be allocated as follows:

	Values	Percentage
Cost of condominium units	₱ 167,217,018.00	70%
Cost of intangible property	71,664,436.00	30%
Cost of parcel of land	**₱ 238,881,454.00**	**100%**

Disallowed Cost of Sales:

Cash consideration of intangible property	₱ 105,000,000.00
Allocated cost of sales of the intangible property	71,664,436.00
Disallowed cost of sales	**₱ 33,335,564.00**

Contrary to petitioner's claim, respondent clearly indicated the source or how the amounts in the above computations were arrived at. Respondent specified that the figures appearing in the computations were taken from petitioner's books[16] and the related Deed of Absolute Sale[17].

The cost of the land used by respondent in the amount of ₱238,881,454.00 originated from the ₱241,800,000.00 acquisition cost/book value of the land reflected in petitioner's books. The latter amount was the very same figure to which the following amounts representing payments for transfer tax, documentary stamp tax and registration tax, were added resulting to the ₱246,956,454.00[18] cost of the land reported in the Audited Financial Statements (AFS), thus:[19]

Acquisition cost/Book value of Land - Ortigas Pasig	₱ 241,800,000.00
Add: Payment of Documentary Stamp	3,475,875.00
Payment of Transfer Tax for Land in Ortigas	1,158,625.00
Payment of Registration Tax for Land in Ortigas	521,954.25
Total Cost of Land per AFS	₱ 246,956,454.25

Since petitioner failed to explain the discrepancy between the ₱241,800,000.00 acquisition cost/book value of the land and the ₱231,725,000.00 purchase price of the same land per Deed of Absolute Sale, respondent's recomputed cost of the land in the amount of ₱238,881,454.00 shall be upheld.

As to the computation of the ₱240,201,000.00 assigned value of the condominium units to be received by petitioner, it was indicated that respondent used the zonal value of ₱65,000.00 per square meter. The zonal value per square meter at the time (October 2002) of purchase of the land upon which the condominium units were to be built, as reflected in the Certificate Authorizing Registration (CAR)[20] was ₱60,000.00[21] per square meter. When the land was sold in 2007, respondent used the zonal value of the land in the amount of ₱65,000.00 per square meter. In the absence of contrary evidence, the Court sustains respondent's findings.

Once again the Court reiterates that "tax assessments by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of

[16] BIR Records, p. 556.
[17] BIR Records, pp. 552 to 554.
[18] Petitioner's Exhibit "Y", Notes to Financial Statements, Notes 9 and 11.
[19] BIR Records, p. 556.
[20] BIR Records, p. 551.
[21] ₱120,900,000.00 ÷ 2,015 square meters.

any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments[22].

Meanwhile, in disallowing the cost of sales amounting to ₱33,335,564.00, respondent cited Revenue Regulations (RR) No. 2 as his legal basis. While it is true that RR No. 2 entitled "Income Tax Regulations" is very broad, however, Section 166 thereof states that:

> *SEC. 166. General Rule.* – The method of accounting regularly employed by the taxpayer in keeping his books, **if such method clearly reflects his income is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for**. If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner of Internal Revenue clearly reflects it. xxx (*Emphasis supplied*)

Relative to RR No. 2, Section 43 of the NIRC of 1997, as amended, provides:

> SEC. 43. *General Rule.* — The taxable income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or **if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner clearly reflects the income.** If the taxpayer's annual accounting period is other than a fiscal year, as defined in Section 22(Q), or if the taxpayer has no annual accounting period, or does not keep books, or if the taxpayer is an individual, the taxable income shall be computed on the basis of the calendar year. (*Emphasis supplied*) *ju*

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[22] *Commissioner of Internal Revenue vs. Traders Royal Bank*, G.R. No. 167134, March 18, 2015.

Based on the foregoing provisions, if the method of accounting employed by the taxpayer does not clearly reflect its income for the taxable period, the taxpayer's income shall be computed in such manner as the opinion of the Commissioner of Internal Revenue clearly reflects it.

In the present case, petitioner adopts the "cost recovery method" in accounting for the income on its sale of land to Crown Asia Properties, Inc.[23] However, upon weighing the evidence presented by both parties, such method was not reflective of petitioner's true income on the ₱105,000,000.00 cash consideration for the land sold to Crown Asia Properties, Inc. in the year 2007. Accordingly, respondent, in determining petitioner's true income, properly allocated the cost of the land between the cash consideration of ₱105,000,000.00 and the office/condotel units and parking slots to be received by petitioner from Crown Asia Properties, Inc. in exchange for the land.

With regard to the deficiency VAT assessment on the cash consideration of ₱105,000,000.00, the Court cannot subscribe to petitioner's argument that respondent failed to mention any provision of law or rule or regulation upon which the assessment was made. In the Audit Result/Final Assessment Notice[24] with Assessment Number LTEAD II VT-07-00006 dated December 21, 2011, which was attached to the FAN, respondent cited as legal bases for the total deficiency VAT assessment of ₱40,924,784.91, Sections 106, 108 and 113 of the NIRC. Since the amount of ₱105,000,000.00 involves the sale of real property, the applicable law is Section 106 of the NIRC of 1997, as amended.

In fine, the deficiency income tax assessment on the disallowed cost of sales of ₱33,335,564.00 and deficiency VAT assessment in the amount of ₱105,000,000.00 were validly issued in accordance with Section 228 of the NIRC of 1997, as amended.

Petitioner had no undeclared sales to HBC, Inc.

In the Details of Discrepancies attached to the FAN, one of the findings of respondent in relation to the alleged deficiency VAT liability of petitioner for the year 2007 relates to alleged undeclared

[23] Petitioner's Exhibit "Y", Notes to Financial Statements, Note 11.
[24] BIR Records, p. 1143.

sales to HBC, Inc. in the amount of ₱77,867,333.19. This was arrived at by comparing the sales to HBC, Inc. under Note 17 of petitioner's 2007 AFS in the amount of ₱148,071,540.00 as against the sales per Summary List of Sales (SLS) in the amount of ₱70,204,206.81.

In the assailed Decision, the Court ruled that since prescription had set in, respondent's right to assess petitioner for deficiency VAT would only be limited to the alleged discrepancy pertaining to the 2nd, 3rd and 4th quarters of 2007 in the amount of ₱67,232,626.51, computed as follows:

	Per FAN	Less: Prescribed 1st Qtr 2007	Unprescribed (2nd, 3rd and 4th Qtrs. 2007)
Sales to HBC per Note 17 of 2007 FS	₱ 148,071,540.00	₱ 11,706,640.18	₱ 136,364,899.82
Sales to HBC per SLS	70,204,206.81	1,071,933.50	69,132,273.31
Difference	**₱ 77,867,333.19**	**₱10,634,706.68**	**₱67,232,626.51**

After considering various sales returns and sales discounts, the Court found that petitioner's net sales to HBC, Inc. for the last three quarters of 2007 as reported in Note 17 of the 2007 AFS amounted to ₱58,374,410.39 which when compared with that reflected per petitioner's SLS in the amount of ₱69,132,273.31 would show an unaccounted difference of ₱10,757,862.92, computed as follows:

Gross Sales	₱149,888,915.25	₱ 13,820,014.98	₱ 136,068,900.27
Less: Sales Discounts	(21,863,801.09)	(1,991,215.56)	(19,872,585.53)
Net Returns	(57,944,063.59)	(122,159.24)	(57,821,904.35)
Net Sales per Note 17 of the 2007 Notes to AFS	₱ 70,081,050.57	₱ 11,706,640.18	₱ 58,374,410.39
Net Sales per SLS			69,132,273.31
Unaccounted Difference			**₱(10,757,862.92)**

The Court held that for failure to account for the HBC, Inc.'s sales discrepancy of ₱10,757,862.92, petitioner shall be assessed of the corresponding deficiency VAT.

Petitioner, however, contends that there is no basis for the imposition of VAT on the ₱10,757,862.92 discrepancy. According to petitioner, the theory in the assessment was that the amount of sales per books was higher than that reported for VAT purposes, as shown in the amount per SLS. Since the amount of sales per books was higher than the amount reported for VAT purposes, then the difference may not have been reported for VAT purposes, hence, the assessment for VAT.

Petitioner asserts that since the Court found that the amount per books/AFS is actually lower than the amount reported for VAT purposes, it would in fact appear that there is an overpayment of VAT since the sales per VAT reporting is higher than the sales per AFS. Hence, petitioner maintains that there is no basis to impose VAT on the discrepancy of ₱10,757,862.92.

The Court agrees with petitioner on this point, thus, the deficiency VAT on the discrepancy of ₱10,757,862.92 originally assessed against petitioner in the assailed Decision should be cancelled.

The imposition of 25% surcharge is proper.

Petitioner avers that in the FAN, except for the assessment for percentage tax, the assessment for income tax, VAT and expanded withholding tax (EWT) did not include surcharges. Thus, petitioner submits that in the absence of an assessment for surcharge, the Court cannot impose the same on any remaining deficiency taxes due.

Petitioner further reasons that under Section 248(A)(1) of the NIRC of 1997, there must be both failure to file return and failure to pay the tax on the prescribed date, for the 25% surcharge to be imposable. In the present case, petitioner states that there was no finding that it had failed to file any return for income tax, VAT and EWT on time. Hence, petitioner posits that respondent was correct in not imposing 25% surcharge.

The Court is not persuaded.

The delay in the payment of the deficiency tax within the time prescribed for its payment in the notice of assessment justifies the imposition of a 25% surcharge in consonance with Section 248(A)(3) of the NIRC of 1997, as amended,[25] which states:

> SEC. 248. *Civil Penalties.* —
>
> (A) There shall be imposed, in addition to the tax required to be paid, a penalty equivalent to twenty-five percent (25%) of the amount due, in the following cases:
>
> (1) xxx
>
> (2) xxx
>
> (3) Failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment; or
>
> xxx xxx xxx

The payment of the surcharge is mandatory and the BIR is not vested with any authority to waive the collection thereof.[26] This is justified because the intention of the law is precisely to discourage delay in the payment of taxes due to the State and, in this sense, the surcharge and interest charged are not penal but compensatory in nature — they are compensation to the State for the delay in payment, or for the concomitant use of the funds by the taxpayer beyond the date he is supposed to have paid them to the State. [27]

Hence, the imposition of the 25% surcharge was proper.

Deficiency interest is imposable on all internal revenue taxes and the simultaneous imposition of deficiency interest and delinquency interest is based on law.

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[25] *Dr. Felisa L. Vda. de San Agustin, in substitution of Jose Y. Feria, in his capacity as Executor of the Estate of Jose San Agustin vs. Commissioner of Internal Revenue,* G.R. 138485, September 10, 2001.

[26] *Philex Mining Corporation. vs. Commissioner of Internal Revenue, et al.,* G.R. No. 125704, August 28, 1998.

[27] *Philippine Refining Company (now known as "Unilever Philippines [PRC], Inc.") vs. Court of Appeals, et al.,* G.R. No. 118794, May 8, 1996 citing *Republic vs. Philippine Bank of Commerce,* G.R. No. L-20951, July 31, 1970.

Petitioner claims that the deficiency interest under Section 249 of the NIRC of 1997 applies only to three (3) types of internal revenue taxes, namely, income tax, estate tax and donor's tax, pursuant to Sections 56(B), 93 and 104 of the NIRC of 1997, and that the imposition of deficiency interest on its alleged VAT and EWT liabilities is without basis.

Petitioner further insists that deficiency interest should not be simultaneously imposed with delinquency interest because the NIRC of 1997, as amended, provides that absent any rules and regulations, the penalty interest to be imposed on any unpaid amount of tax should only be up to a maximum rate of 20%. It argues that the imposition of 40% interest per annum on unpaid tax is grossly excessive and onerous, and that the proper computation should be that the 20% deficiency interest runs from the date prescribed for the payment of the unpaid or deficiency tax until only the date prescribed by the FAN issued by respondent. After which, only the delinquency interest (on the deficiency tax, deficiency interest and surcharge), is imposed on the taxpayer which will run until final payment of the total amount due.

We do not agree.

In the consolidated case of *Liquigaz Philippines Corporation vs. Commissioner of Internal Revenue and Commissioner of Internal Revenue vs. Liquigaz Philippines Corporation*[28], the CTA *En Banc* ruled that the deficiency interest is imposable not just on deficiency income tax but also on deficiency VAT, EWT and withholding tax on compensation (WTC), thus:

> "On the issue of imposition of deficiency interest, the case of *Takenaka Corporation Philippine Branch vs. Commissioner of Internal Revenue* (the 'Takenaka Case') is in order:
>
>> 'The issue is no longer novel as the same was sufficiently discussed by the Supreme Court in *Paper Industries Corporation of the Philippines (PICOP) v. Court of Appeals, et al.* The Supreme Court held that Section 247(a) of the NIRC of 1977,

[28] CTA EB Case Nos. 1117 and 1119 (CTA CASE No. 8149), June 3, 2016.

as amended [now Section 247(a) of the NIRC of 1997, as amended], very clearly embraces failure *to pay all taxes imposed in the Tax Code*, without any regard to the Title of the Code where provisions imposing particular taxes are textually located.' (Italicized in the original)

Thus, deficiency interest must be imposed not just on deficiency income tax **but also on deficiency VAT, EWT** and WTC."[29] *(Emphasis supplied)*

In the cited case of *Takenaka*[30], the CTA *En Banc* thoroughly explained the basis on the simultaneous imposition of deficiency and delinquency interests, to wit:

"The applicable provision for imposition of civil interests is explicitly stated in Section 249 of NIRC of 1997, as amended, which reads:

'SEC. 249. Interest. –

(A) *In General.* - There shall be assessed and collected on any unpaid amount of tax, interest at the rate of twenty percent (20%) per annum, or such higher rate as may be prescribed by rules and regulations, **from the date prescribed for payment <u>until the amount is fully paid</u>**.

(B) ***<u>Deficiency Interest</u>*** - 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 <u>until the full payment thereof</u>**.

[29] CTA EB Case Nos. 1117 & 1119, June 3, 2016.
[30] CTA EB Case No. 745 (CTA Case No. 7701), September 4, 2012.

(C) ***Delinquency Interest***.- In case of failure to pay:

(1) The amount of the tax due on any return to be filed, or

(2) The amount of the tax due for which no return is required, or

(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**.

A careful perusal of the foregoing provision reveals that there is no double imposition of interests as the law clearly differentiates deficiency interest from delinquency interest. *Deficiency* is defined as the amount still due and collectible from a taxpayer upon audit or investigation; whereas *delinquency* is defined as the failure of the taxpayer to pay the tax due on the date fixed by law or indicated in the assessment notice or letter of demand.

Consequently, *deficiency interest* is imposed upon any tax that is still due and unpaid to the government. Such interest is imposed by the fact that a portion of the tax imposed by law, which is the 'deficiency tax', is still withheld by the taxpayer. Otherwise stated, it is imposed on the amount short of the full tax due and should be paid to the government, which is the deficiency tax.

Delinquency interest, on the other hand, is the interest imposed on failure to pay (i) the amount of tax due on any return required to be filed, (ii) the amount of tax due for which no return is required, or (iii) deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner. It is the interest upon the delay in the payment of the amount of tax due whether return is required to be filed or not, or delay in the payment of deficiency tax, surcharges and interests thereon.

Further, as to when the deficiency and delinquency interests legally accrue, Section 249 (B) and (C)(3) of the NIRC of 1997, as amended, evidently states that the deficiency interest on any deficiency tax shall be assessed *'from the date prescribed for its payment* ***until the full payment thereof'***; while the assessment of the delinquency interest that is imposed upon failure to pay a deficiency tax, or any surcharge or interest thereon, shall be reckoned from *'the due date appearing in the notice and demand of the Commissioner* ***until the amount is fully paid'***.

Clearly, these two (2) interests are different in nature. **Deficiency interest is imposed for the *shortage* of taxes paid, while delinquency interest is imposed for the *delay* in payment of taxes.** Hence, having different nature for their existence, petitioner cannot assail double imposition of interests as the law itself allows the simultaneous imposition of these two kinds of interests.

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It may be argued that the simultaneous imposition of at least 40% interest per annum on any unpaid tax is grossly excessive and unjust, which may not be reflective of the real intent of the law in imposing interest on any unpaid tax due to the government. However, it is noted that both P.D. No. 1705, which provides that deficiency interest should be assessed only *'to the date the deficiency assessed'* and its amending statute, P.O. No. 1994, which established the rule on assessment of deficiency interest *'until full payment thereof'*, were issued by then President Ferdinand E. Marcos during Martial Law. At this juncture, the eloquent words of former Associate Justice Florentino P. Feliciano in *Paper Industries Corporation of the Philippines (PICOP) v. Court of Appeals, et al.* are enlightening:

'It is not without reluctance that we reach the above conclusion on the basis of what may well have been an inadvertent error in legislative draftsmanship, a type of error common enough during the period of Martial Law in our country. Nevertheless, we are compelled to adopt this conclusion. xxx'

The law could not be any clearer. It states that the interests, both deficiency and delinquency interests, shall be assessed **until full payment thereof**. 'It bears stressing that the first and fundamental duty of the Court is to apply the law. When the law is clear and free from any doubt or ambiguity, there is no room for construction or interpretation.' As has been the Supreme Court's consistent ruling, where the law speaks in clear and categorical language, there is no occasion for interpretation; there is only room for application."

Moreover, in *Medicard Philippines, Inc. ("Medicard") vs. Commissioner of Internal Revenue*[31] citing *Philippine Aerospace Development Corporation vs. Commissioner of Internal Revenue*[32], the CTA *En Banc* discussed that deficiency and delinquency interests may be imposed simultaneously, to wit:

"The propriety of the simultaneous imposition of deficiency and delinquency interests was more definitively resolved in April 2013. This was in *First Lepanto Taisho Insurance Corporation v. Commissioner of Internal Revenue,* where the Supreme Court upheld a 2011 decision of this Court affirming the imposition of delinquency interest under Section 249(c)(3) of the 1997 NIRC. The Supreme Court ruled this imposition 'to be proper, because failure to pay the deficiency tax assessed within the time prescribed for its payment justifies the imposition of interest at the rate of twenty percent (20%) per annum, which interest shall be assessed and collected from the date prescribed for its payment until full payment is made.

[31] CTA EB No. 1224, September 2, 2015
[32] CTA EB No. 1035, March 11, 2015.

Earlier in 2011, the Supreme Court sustained the 2005 rulings of this Court imposing 20% delinquency tax on deficiency taxes, inclusive of deficiency interest, in *Rizal Commercial Banking Corporation v. Commissioner of Internal Revenue.*

In 2006, the Supreme Court also upheld a 2004 Court of Appeals decision where the latter imposed delinquency interest at 20% per annum in addition to the interest on deficiency VAT and deficiency documentary stamp tax, in *Michel J. Lhuiller Pawnshop, Inc. v. Commissioner of Internal Revenue,* although without discussion of the propriety of multiple simultaneous interests.

And even earlier, in 2000, the Supreme Court likewise upheld the imposition of 20% annual delinquency interest on deficiency amusement tax, inclusive of 20% deficiency interest, in *Philippine Basketball Association v. Court of Appeals, Court of Tax Appeals, and Commissioner of Internal Revenue.*

Actually, double interests have been sustained by the Supreme Court at least as early as 1971, in *Commissioner of Internal Revenue v. Connel Bros. (Phil.) and Court of Tax Appeals.* Under the tax law at the time, R.A. No. 2343 of 1959, these were the 'interest on deficiency' and what may be referred to as 'additional interest' (in case of non-payment within the prescribed period), at the rates of 6% per annum and 1% per month, respectively.

It is abundantly clear, from the foregoing discussion of the law and jurisprudence, that under the circumstance laid down by Section 249(c)(3) of the Tax Reform Act of 1997- *i.e.,* in case of failure to pay a deficiency tax, or any surcharge or interest on such deficiency tax - delinquency interest of 20% per annum shall be assessed and collected.

The petitioner asked whether or not simultaneous deficiency and delinquency interests 'are allowed by law and equity.' The answer is in the law itself, which does *gc*

> not merely allow but prescribes simultaneous imposition under the aforecited circumstance. As this is undoubtedly proper under the law - and petitioner has not assailed the validity of the law itself - there is neither need nor duty for this Court to expand the discussion to the realm of equity, for 'equity is applied only in the absence of, and never against, statutory law, and the rule is that 'equity follows the law.'"

Based on the foregoing, deficiency interest is imposable on all internal revenue taxes and the simultaneous imposition of deficiency interest and delinquency interest is based on law.

Respondent's Motion for Partial Reconsideration

Respondent raises the following issues for reconsideration:

A. The right to assess has not prescribed with regard to the first quarter for Value-Added Taxes;

B. Expanded Withholding Tax not barred by prescription; and

C. Petitioner not entitled to the Tax Exemption granted in RA No. 7495 with regard to their Net Taxable Income in the amount of ₱175,486,383.00.

On the other hand, petitioner argues that the case of *Commissioner of Internal Revenue vs. Next Mobile, Inc.*[33] should not be made to apply to this case as it was meant to specifically apply to the facts in the said case. According to petitioner, the pronouncements in the case of Next Mobile should be applied prospectively. By mere execution of the waivers, petitioner cannot be said to have benefitted therefrom, and thus, could not be estopped from questioning their validity. It maintains that respondent's right to assess has already prescribed.

Petitioner further insists that its income from sales for taxable year 2007 is exempt form income tax pursuant to RA 7459, the

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

rulings of the BIR, and the final and executory judgment rendered by the CTA and the Supreme Court.

The Court denies respondent's Motion for Partial Reconsideration.

Prescriptive Period

Respondent contends that his right to assess has not prescribed with regard to the first quarter of VAT, insisting that since the discrepancy between the Summary of List filed and the assessment is more than 30%, there is substantial underdeclaration, which is a *prima facie* evidence of fraud. According to him, the right to assess does not prescribe until (ten) 10 years thereafter.

However, it must be noted that in respondent's Amended Answer[34], which he also adopted as his Memorandum for the instant case,[35] respondent did not mention anything about a substantial underdeclaration and/or a false or fraudulent return, which calls for the application of the 10-year prescriptive period. In fact, in the Amended Answer, respondent insisted that the assessment was made within the prescriptive period of three (3) years because by executing the Waivers of Statute of Limitations, petitioner is estopped from questioning the validity of the waivers.

From the foregoing, it can be seen that it was only in respondent's Motion where he raised the issue of the alleged substantial underdeclaration tantamount to a *prima facie* evidence of fraud. Hence, the Court cannot consider respondent's position that respondent has ten (10) years within which to assess petitioner, and that the assessment was done within the prescriptive period.

As regards the other arguments, the Court sufficiently and thoroughly discussed the same in the assailed Decision.

WHEREFORE, in view of the foregoing, respondent's **Motion for Partial Reconsideration (Re: Decision dated 19 May 2016)** is **DENIED.** Meanwhile, petitioner's **Motion for Partial Reconsideration** is **PARTIALLY GRANTED**. Accordingly, the

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[34] Docket, Vol. I, pp. 172-191.
[35] Docket, Vol. IV, pp. 741-743.

dispositive portion of the Decision promulgated on May 19, 2016 should be modified to read as follows:

WHEREFORE, premises considered, the instant Petition for Review is **PARTIALLY GRANTED.** Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of **FORTY-THREE MILLION FIVE HUNDRED SIXTY-ONE THOUSAND NINE HUNDRED THIRTY-THREE PESOS AND 1/100 (₱43,561,933.01),** inclusive of the twenty-five percent (25%) surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended, and the twenty percent (20%) deficiency interest imposed under Section 249(B) of the same Code, computed as follows:

	Basic Tax	**25% Surcharge**	**20% Interest**	**Total**
	(In Philippine Pesos)			
Income Tax	12,165,482.90	3,041,370.73		15,206,853.63
VAT	13,642,077.65[36]	3,410,519.41		17,052,597.06
EWT	742,048.43	185,512.11		927,560.54
Subtotal	**26,549,608.98**	**6,637,402.25**	**-**	**33,187,011.23**
Increments for late filing of return and payment of Percentage Tax		8,479,280.00	1,895,641.78	10,374,921.78
Subtotal	**-**	**8,479,280.00**	**1,895,641.78**	**10,374,921.78**
Total	**26,549,608.98**	**15,116,682.25**	**1,895,641.78**	**43,561,933.01**

In addition, petitioner should be **ORDERED TO PAY**:

a) Deficiency interest at the rate of 20% per annum on the basic deficiency **income tax**, **VAT**, and **EWT** computed from the dates indicated below until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended:

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Deficiency VAT due per Decision dated May 19, 2016	₱14,933,021.20
Less: Reconsidered amount	
(₱10,757,862.92 x 12%)	1,290,943.55
Adjusted Deficiency VAT due	**₱13,642,077.65**

Tax Type	Basic Tax	Deficiency interest computed from
Deficiency Income Tax	₱ 12,165,482.90	April 15, 2008
Deficiency VAT	13,642,077.65	January 25, 2008
Deficiency EWT	742,048.43	January 15, 2008

b) Delinquency interest at the rate of 20% per annum on the total amount of ₱33,187,011.23, representing basic deficiency **income tax**, **VAT** and **EWT**, plus 25% surcharge, computed from December 22, 2011 until full payment thereof pursuant to Section 249(C) of the 1997 NIRC, as amended;

c) Delinquency interest at the rate of 20% per annum on the increments for late filing of return and payment of **percentage tax** in the amount of ₱10,374,921.78, computed from December 22, 2011, until full payment thereof pursuant to Section 249(C) of the 1997 NIRC, as amended; and

d) Delinquency interest at the rate of 20% per annum on the 20% deficiency interest which have accrued as afore-stated in (a), computed from December 22, 2011, until full payment thereof pursuant to Section 249(C) of the 1997 NIRC, as amended.

SO ORDERED.

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

I CONCUR:

CAESAR A. CASANOVA
Associate Justice

ATTESTATION

I attest that the conclusions in the above Amended Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

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

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Amended 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