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

**FEB INVESTMENTS, INC.,**
**Petitioner,**

**- versus –** **C.T.A Case No. 5758**

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

**Promulgated:**
NOV 20 2001

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# D E C I S I O N

This is a Petition for Review seeking for the refund or for the issuance of a tax credit certificate in the amount of THREE MILLION TWO HUNDRED SIXTY SIX THOUSAND SEVEN HUNDRED TWENTY TWO & 96/100 PESOS (P 3,266,722.96) allegedly representing the overpaid gross receipts tax covering the first to fourth quarters of the year 1997.

The facts of the case are as follows:

Petitioner is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines. It is engaged in financing activities with office address located at Far East Bank Center, Sen. Gil J. Puyat Avenue, Makati City.

Records show that for the first to fourth quarters of the year 1997, Petitioner reported gross receipts in the aggregate amount of P 438,385,347.72 for which it allegedly paid P 21,919,267.40 as gross receipts tax detailed as follows:

| Period Covered | Date Filed | Gross receipts | Gross receipts Tax |
|---|---|---|---|
| 1Q Jan-Mar 1997 | April 21, 1997 | P 99,319,187.52 | P 4,965,959.39 |
| 2Q Apr-Jun 1997 | July 21, 1997 | 86,157,859.80 | 4,307,892.99 |
| 3Q Jul-Sept 1997 | Oct 20, 1997 | 128,088,771.80 | 6,404,438.59 |
| 4Q Oct-Dec 1997 | Jan 20, 1998 | 124,819,528.60 | 6,240,976.43 |
| T O T A L | | P 438,385,347.72 | P 21,919,267.40 |

The aforesaid Gross receipts of P 438,385,347.72, which was subjected to the GRT for the taxable year 1997 included the gross receipts derived by Petitioner from passive income which had already been subjected to the 20% final tax withheld from passive income. Accordingly, of the total gross receipts of P438,385,347.72, the amount of P65,334,459.17 corresponds to the 20% final tax withheld on passive income and which was further subjected to the 5% gross receipts tax amounting to P 3,226,722.96, detailed as follows:

| SECURITY | FINAL TAX WITHHELD | GROSS RECEIPTS TAX |
|---|---|---|
| Private Securities | | |
| Commercial Papers (PSCPs) | P 38,522,890.78 | P 1,926,144.54 |
| Floating rate Treasury Notes | 108,677.79 | 5,433.89 |
| Fixed Rate Treasury Notes | 14,027,398.92 | 701,369.95 |
| Treasury Bills | 5,059,742.53 | 252,987.13 |
| Savings Deposits/Funds | 7,615,749.15 | 380,787.46 |
| TOTAL | P 65,334,459.17 | P 3,226,722.96 |

On January 11, 1999, Petitioner filed with the Respondent BIR an administrative claim for refund of the overpaid GRT for the period covering the first to fourth quarter of 1997 in the total amount of P 3,226,722.96 (Item No. 7, Joint Stipulation of Facts and Issues, p. 34, CTA Records). The aforementioned claim for refund was therefore filed within the reglementary period pursuant to Section 204 (3) of the Tax Code (now Section 204 (C) of the National Internal Revenue Code of 1997) (Item No. 8, Joint Stipulation of Facts and Issues). To date, the Respondent has not yet acted on the Petitioner's administrative claim for refund (Item No. 9, Joint Stipulation of Facts and Issues). This inaction of the Respondent prompted the Petitioner to elevate the matter to this Court by way of Petition for Review on March 30,1999.

Respondent, on his part, filed his answer through registered mail on May 11, 1999 and raised the following Special and Affirmative Defenses, thus:

"4. Petitioner's claim for tax refund is under verification/investigation by Respondent Commissioner of Internal Revenue;

5. Petitioner must show that taxes were paid erroneously or collected illegally. Failure to sustain this burden is fatal to the action for refund;

6. Claims for refund are construed strictly against the claimants since they are in the nature of exemptions from taxation *(Manila Electric Co. vs. Commissioner of Internal Revenue, 67 SCRA 351).*

7. Taxes are presumed to have been paid and collected in accordance with law."

In the Joint Stipulation of Facts and Issues duly approved by this Court on August 13, 1999, the parties agreed to limit the issues to be resolved on the following:

1. Whether or not Petitioner has earned interest income subject to the 20% final withholding tax for the first to the fourth quarter of 1997;

2. Whether or not the 20% final withholding tax on said interest income earned by Petitioner from the first to fourth quarter of 1997 was withheld at source;

3. Whether or not the said 20% final withholding tax was reported as part of the gross receipts of Petitioner for 1997; and

4. Whether or not the 5% gross receipts tax (GRT) due was paid by Petitioner on its reported gross receipts for 1997.

In order to substantiate its claim for refund of gross receipts tax, Petitioner formally offered the following documents as evidence:

| Exhibit | Description |
|---|---|
| A, B, C, D | Quarterly Percen age Tax Returns for the 1st, 2nd and 3rd quarters of 1997 |

| | |
|---|---|
| E | Quarterly Breakdown of the excess GRT payments for taxable year 1997 |
| G | Letter-Certification prepared by the independent auditor pursuant to CTA Circular 1-95 |
| G-2, G-3, G-4 G-5, G-6 and Submarkings | Summary of Interest Income and Trading Gain realized and reported by Petitioner from LTCPs, FRTNs, FXTNs, Treasury Bills and Bank Deposits including supporting schedules/summaries |
| H-1 to O-55 | Various Confirmations of Sale, Schedule of Outstanding Sales, Confirmations of Purchases, Schedules of Accrued Interest Receivables and Interest Income |
| P-1 to P-55 | Subsidiary Ledgers for Accrual of Interests for the year 1997 |
| Q-1 to Q-2 | Certification of Final Tax Withheld |

Respondent on the other hand, did not present any evidence but instead submitted the instant case based on the pleadings.

In its memorandum, Petitioner explained that the overpaid gross receipts tax was the result of the erroneous inclusion of the 20% final withholding tax on the interest income derived by the Petitioner from their passive investments. It is their view that said amount, which represents the final withholding tax, should not have been included in their gross receipts as this was not actually received by them but instead went to the coffers of the government. In contending that it is indeed entitled to the refund of the overpaid gross receipts tax, Petitioner mainly relied on the decision of this Court in the case of ***Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720, January 30, 1996*** which in gist, provides that the twenty percent (20%) final withholding tax on a bank's passive income should not form part of the bank's taxable gross receipts for the purpose of computing the gross receipts tax (GRT).

The decision in the Asian Bank case has for its legal basis Section 4(e) of Revenue Regulations No. 12-80 dated November 7, 1980, which states, thus:

> "**Section 4.** x x x x x x x x x
>
> (e) Gross receipts tax on banks, non-bank financial intermediaries, financing companies, and other non-bank financial intermediaries not performing quasi-banking activities. The rates of taxes to be imposed on the gross receipts of such financial institutions shall be based on all items of income actually received. Mere accrual shall not be considered, but once payment is received on such accrual or in cases of overpayment then the amount actually received shall be included in the tax base of such financial institutions, as provided hereunder." (Underscoring supplied)

However, it is significant to note that the aforequoted legal anchor, Section 4(e) of Revenue Regulations No. 12-80, had already been amended, superseded and omitted in the amendatory Revenue Regulations No. 17-84 dated October 12, 1984. Verily, the citation of Section 4(e) of Revenue Regulations No. 12-80 as cited by Petitioner's counsel in the Asian Bank case was erroneous and which misled this Court to adopt Petitioner's legal basis. The applicable legal basis that should have been cited is Section 8(c) of Revenue Regulations No. 12-80 which became Section 7(c) of Revenue Regulations No. 17-84 which provides:

> "**Section 8.** x x x x x x x x x
>
> If the recipient of the above-mentioned items of income are financial institutions, the same shall be included as part of the tax base upon which the gross receipts tax is imposed."

Clearly, there is no doubt that the 20% FWT is legally included as part of Petitioner's gross receipts for purposes of computing the gross receipts tax. Petitioner's counsel purposely did not cite said section because certainly it won't be able to get a refund or tax credit for the alleged overpaid gross receipts tax for obvious reasons. Section 4(e) of Revenue Regulations No. 12-80, as worded, is not a computation which is determinative of the amount to be used as basis of the 5% gross receipts tax. Rather, said Revenue Regulations No. 12-80 merely authorize the determination of the amount of gross receipts on the basis of the method of accounting being adopted by the taxpayer. Said methods of accounting comprise a set of rules for determining when and how to report income and deduction ***(Consolidated Mines, Inc. vs. Court of Tax Appeals, L-18843, August 29, 1974).*** Thus, under the cash receipts and disbursements method, the income earned by the taxpayer is not included in gross income until received and expenses are not deducted until paid within the taxable year. And in the case of the accrual method, income is included in gross income when earned, whether received or not, and expenses are allowed as deductions when incurred although not paid within the year ***(BIR Ruling No. 35-98, April 13, 1998).***

The 5% gross receipts tax under Section 120 of the Tax Code is collectible from all finance companies doing business in the Philippines from interests, discounts and all other items treated as gross income under the Tax Code. Accordingly, the income derived from investing the excess funds in short-term market placements through commercial banks constitute income, hence, subject to the 5% gross receipts tax under said section. The fact that it has been subjected to the 20% final withholding tax under Section 50(a) is immaterial. Besides, the withholding tax is imposed under

Title II of the Tax Code while the finance tax is provided under Title V thereof (BIR Ruling No. 223, November 2, 1989). The fact that the same income is subjected to two (2) different kinds of taxes would not make such payments a case of double taxation.

By quoting a superseded revenue regulation, Petitioner in the Asian Bank case, led this Court to believe that indeed the basis of the gross receipts tax is total gross receipts exclusive of the 20% final withholding tax deducted and withheld under Section 50(a) of the Tax Code. Section 7(c) of Revenue Regulations No. 17-84 clearly and categorically provides that the basis of such tax is inclusive of the final withholding tax.

The High Court's decision in the case of **Commissioner of Internal Revenue vs. The Manila Jockey Club, Inc., 108 Phil. 821, June 30, 1960**, which was reaffirmed by the said Court in the case of **Visayan-Cebu Terminal Co., Inc. vs. Commissioner of Internal Revenue, 13 SCRA 357, February 27, 1965** cannot be considered as precedent cases, hence, inapplicable to the two cases decided by this Honorable Court in the cases of **Compania Maritima vs. Acting Commissioner of Internal Revenue, CTA Case No. 1426 dated November 14, 1966 and Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720 dated January 30, 1996**, for the following reasons:

> In the Manila Jockey Club, Inc. case, the Club was authorized to operate horse races in which betting was made through the sale of tickets to the public. The total amount of bets called "wager fund" were distributed pursuant to Executive Order No. 320 and Republic Act No. 309, as follows:
>
> 87% as dividends to holders of winning tickets
>
> $12^1/_2$ as "commissions" of the Manila Jockey Club, of which $^1/_2$ % was assigned to the Board on Races and 5% was

> distributed as prizes for owners of winning horses and authorized bonus for jockeys.

According to the above-mentioned distribution of the "wager fund", the then Collector of Internal Revenue assessed the Club on the whole amount of its "commission" of $12^1/_2$. But since the Club had already paid the amusement tax based on its 7% share of the "commission", the amount assessable pertains only to the $5^1/_2$% for the period from November 1946 to October 1950. On various instances, the Club protested the proposed assessments and was sustained by the opinions of the Secretary of Justice rendered on three different occasions (Opinion No. 345, series of 1941; Opinion No. 249, series of 1952 and Opinion No. 340, series of 1955).

Notwithstanding the opinions of the Secretary of Justice to the effect that the amount corresponding to the $5^1/_2$% was held only by the Club in trust for the owners of winning horses and authorized bonuses of jockeys, the then Collector of Internal Revenue demanded payment of amusement taxes for the period November 1946 to October 1950. Said demand letter was timely appealed to the Court of Appeals wherein a unanimous judgment was obtained reversing the Collector's stand on the matter. In the High Court, the position of the Secretary of Justice was sustained thereby upholding the Court of Tax Appeals' decision.

Accordingly, gross receipts of the proprietor of the amusement place should not include any money which, although delivered to the amusement place <u>was "especially earmarked</u>" by law or legal rule and regulations for some persons other than the proprietor. Undeniably, they are money received by the racing club but they are moneys earmarked by law or regulations for winning horse owners and jockeys and never for a minute become the property of the race track. The same is true in the case of the $^1/_2$% which the law directs the club to deliver to the Board on Races. The High

Court therefore agrees with the stand of the Court of Tax Appeals that such funds representing $5^1/_2\%$ of the $12^1/_2\%$ "commissions" of the race track do not form part of the gross receipts, hence not subject to the amusement tax of 20%.

The above-mentioned decision of the High Court was also applied in the case of **Visayan Cebu Terminal Co., Inc. vs. Commissioner of Internal Revenue, 13 SCRA 357, Nos. L-19530 and L-19444, February 27, 1965.** The legal issue involved in this case is the interpretation of the management contract entered into by and between the Bureau of Customs and Visayan Cebu Terminal Co., Inc. whereby the latter as contractor was appointed the sole manager of the Arrastre Service at the Port of Cebu City. In the said Management Contract, it was further agreed and understood that in consideration of the rights and privileges granted the Contractor for the management of the Arrastre Service, the Bureau of Customs shall receive twenty eight (28%) percent of the total monthly gross income derived from whatever source in connection with the operations of the Arrastre Service, payable within ten (10) days of the succeeding month. The main legal issue involved in this case is whether or not the gross receipts corresponding to the 28% of the total gross income of the Service Contractor delivered to the Bureau of Customs within ten (10) days of the following month should form part of the gross receipts subjec to 3% contractor's tax under Section 191 of the Tax Code. The Court of Tax Appeals ruled in favor of the Petitioner, holding the view that the said 28% payment by the Arrastre Contractor based on its monthly gross income should not form part of the gross receipts subject to 3% contractors tax and that paragraph 23 of the said Management Contract can legally be construed as a "<u>regulation</u>". As the learned trial court has aptly observed: "x x x the government could not have intended to consider as gross receipts the 28%

that went to one of its institutions, the Bureau of Customs, and thereby collect percentage tax on it from Petitioner. To hold Petitioner liable for the payment of percentage tax is unquestionably unjust and not contemplated by Section 191 of the Tax Code."

All the above-mentioned decisions of the High Court made specific reference to gross receipts which are especially "<u>earmarked by law or legal rule or regulation</u>" as not forming part of the taxable gross receipts for purposes of the gross receipts tax under the Tax Code. For this purpose, it is pertinent to define the word "earmark" as a mark put upon a thing to distinguish it from another. Property is said to be earmarked when it can be identified or distinguished from other property of the same nature. To set apart from others (Black's Law Dictionary, 6$^{th}$ Edition, p. 508). In the case of the Manila Jockey Club, Inc. Executive Order No. 320 and Republic Act No. 309 made the specific "earmarking" for distribution of the total wager fund to different persons other than the proprietor. The same is true in the case of Visayan Cebu Terminal Co., Inc. where the specific earmarking of the 28% of the total monthly gross income to be delivered to the Bureau of Customs by the Contractor was provided in paragraph 23 of the Management Contract. Such specific earmarking of the twenty percent (20%) final income tax as not included in the gross receipts for purposes of the gross receipts tax was not provided by any law or legal rule or regulations, hence the non-applicability of the above-cited High Court decisions to the Asian Bank Corporation case. This legal observation is also in point in the case of Compania Maritima case where the non-inclusion of the 10% reserve from the total cash collection to avoid the claim for refund on freight and passengers' tickets not taken is not provided by any law or legal rule or regulations.

In the Asian Bank Corporation case, Petitioner bank alleges that subjecting the gross receipts to the 20% final withholding income tax and later to the 5% gross receipts tax is not only oppressive and obnoxious but even a confiscatory form of double taxation. Double taxation has been defined "as the taxing of the same item or piece of property twice on the same person, or taxing it as the property of one person and again as the property of another, but this does not include the imposition of different taxes concurrently on the same property or income (e.g. federal and state income taxes), nor the taxation of the same piece of property to different persons when they hold different interests in it or when it represents different values in their hands, as when both the mortgagor and mortgagee of property are taxed in respect to their interests in it, or when a tax is laid upon the profits of the corporation and also upon the dividends paid to its stockholders" (Black's Law Dictionary, 6th Edition, p. 491). This acceptable form of double taxation is reflected in BIR Ruling No. 223 dated November 2, 1989, thus:

> "The 5% gross receipts tax under Section 120 of the Tax Code is collectible on all finance companies doing business in the Philippines from interests, discounts, and all other items treated as gross income under the Tax Code. Accordingly, your income derived from investing the excess funds in short-term market placements through commercial banks constitutes income hence, subject to the 5% gross receipts tax under said Section. The fact that it has been subjected to the 20% final withholding income tax under Section 50(a) is immaterial. Besides, the withholding tax is imposed under Title II of the Tax Code while the finance tax is provided under Title V thereof." (BIR Ruling No. 223, November 2, 1989)

For purposes of the amusement tax under Section 260 of the Tax Code, the term 'gross receipts' embraces 'all the receipts' of the proprietor, lessee, or operator of the amusement place. The words 'all the receipts' refer to the total amount of cash received which becomes part of the funds of the taxpayer and does not include any money, which has been specially earmarked by any law or legal rule or regulation for some other person other than the proprietor, lessee or operator of the amusement place. Receipts means actually received (**Philippine Long Distance Telephone Co. vs. Collector of Internal Revenue, G.R. No. L-3222, January 21, 1952**).

In his *"Annotations and Jurisprudence on the National Internal Revenue Code as amended,"* former Commissioner of Internal Revenue Jose Arañas defined gross receipts under then Section 260 (previously Section 249 and now Section 121) of the Tax Code as follows:

> Sec. 260 (3). Meaning of "gross receipts. - The term "gross receipts" provided for in Section 249 of the Tax Code should be interpreted to mean "as the whole amount received without deductions," otherwise, it will be considered as "net receipts". (*National City Bank of New York vs. CIR*, BTA Case No. 52, July 12, 1952).
>
> Profits derived from the sale of miscellaneous accounts, whether it is in connection with the banking business of the banking institution or not, so long as they were earned or derived from its fund, as a banking institution, should be included in gross receipts. (Ibid). Arañas, *Annotations and Jurisprudence on the National Internal Revenue Code as amended*, 6th ed. (1983), Vol. II, p. 479.

In his Commentaries and Jurisprudence on the National Internal Revenue Code of the Philippines, Jose N. Nolledo draws the same conclusion:

> No deductions are allowed from gross income before the 5% tax is imposed as otherwise, the tax is based on net receipts. (See National City Bank of New York vs. CIR, BTA Case No. 52, July 12, 1952). Nolledo, *Commentaries and Jurisprudence on the National Internal Revenue Code of the Philippines*, 1976 Revised Edition, p.1127.

In the United States, whose jurisprudence has persuasive effect in this jurisdiction, the term "gross receipts" has long had this established meaning:

> "Gross income," "gross proceeds" and "gross receipts" all mean the same, it has been held, although "gross earnings" are

> sometimes distinguished from "gross receipts." Gross receipts ordinarily mean the total receipts before anything is deducted for the expenses of management." Cooley, *The Law on Taxation, 4th ed.* (1924), Vol. II, pp. 1789-1790, citing State v. Illinois Cent. R. Co., 246 Ill. 188, 92. N.E. 814.
>
> "Gross earnings means entire earnings from all operations and not earnings less operating expenses, taxes and bad debts. State v. United Electric Light & Water Co., 90 Conn. 452, 97 Atl. 857" Cooley, The Law on Taxation, 4th ed. (1924), Vol. II, p. 1790.

Excise tax has not been allowed as a deduction for purposes of determining gross receipts. In interpreting the term "gross receipts", Mertens, Law of Federal Income Taxation, has this to say:

**& 3.37. Construction of Specific Words**

x x x x x x x x x

Gross Receipts

> In determining "gross receipts" such descriptions as "the total amount received or accrued" have been applied. That gross receipts represent the total amount received or accrued is plain; with respect to inventory, it is the amount the customer paid and not such amount reduced by any excise tax for which the seller is responsible. This definition of gross receipts - not subtracting the excise payments - has been applied in formulas for DISCs. Mertens, Law of Federal Income Taxation, 1995 edition, Chapter 3, page 54, Section 3.37, citing Lucky Lager Brewing Co. v. Comm., 26 TC 836 (1956), affd 246 F2d 621 (CA9 1957) and Brown-Forman Corp. v. Comm., 94 TC 419 (1990).

In the aforecited **Lucky Lager Brewing Co. vs. Commissioner of Internal Revenue, 246 F 2d 621 (CA9 1957)**, the United States Court of Appeals ruled:

> "The contention of petitioner is that the word "gross" in the term "gross receipts" means what the buyer paid for the beer less what the manufacturer paid to the government prior to its sale under the excise tax, enacted in 1939. x x x.
>
> We do not agree. The language of paragraph (5) of Section 435(e) that "gross receipts" are "the total amount received or accrued ***from the sale*** of stock in trade" [emphasis supplied] is irrefutably plain. It is a logical absurdity to contend that the "total amount received" from the sales is not what the customer paid but a

> lesser amount determined by a deduction of a particular tax paid, here requited to be paid and in fact paid by the seller, before the delivery of the beer. *Lucky Lager Brewing Co. vs. Commissioner of Internal Revenue*, United States Court of Appeals, Ninth Circuit, June 24, 1957, 246 F2d 621 (CA9 1957).

The exclusion of the 20% FWT would seriously erode the GRT base. In effect it would reduce by 20% the tax on gross receipts under Sections 121 (Tax on Banks and Non-bank Financial Intermediaries and 122 (Tax on Finance Companies). Tax exemptions are strictly construed against the taxpayer. There is no provision in the Tax Code or any special laws which excludes the 20% final income tax withholding under Section 50 (a), as no longer forming part of the gross receipts for purpose of the 5% gross receipts tax. Hence, in the absence of any clear provision of law excluding the 20% FWT from the tax base for GRT purposes, we cannot conclude that such 20% FWT should be excluded for purposes of GRT computation.

In fine, for purposes of computing the gross receipts tax of banks and other financial institutions, the 20% final withholding tax on their certain passive income shall form part of their gross receipts.

Considering that this Court has passed upon the legal issue of Petitioner's claim for refund, this Court finds it no longer necessary to delve into the factual issue as there is no longer basis for such claim.

**WHEREFORE,** in view of the foregoing, the Petition for Review is hereby **DENIED** for lack of merit.

**SO ORDERED.**

AMANCIO Q. SAGA
Associate Judge

**WE CONCUR:**

**(with Dissenting Opinion)**
**ERNESTO D. ACOSTA**
Presiding Judge

Juanito C. Castañeda, Jr.
**JUANITO C. CASTAÑEDA, JR.**
Associate Judge

## C E R T I F I C A T I O N

I hereby certify that this decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

**ERNESTO D. ACOSTA**
Presiding Judge