REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

BANK OF COMMERCE,
Petitioner,

- versus -

C.T.A. CASE NO. 5415

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
APR 27 1999

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DECISION

The case before Us presents another occasion for reaffirming what has been elaborately discussed and repeatedly ruled upon in a number of cases.

This case involves a claim for refund or issuance of tax credit certificate representing gross receipts taxes alleged to have been paid erroneously by petitioner for the years 1994 and 1995 in the total amount of EIGHT HUNDRED FIFTY THREE THOUSAND EIGHT HUNDRED FORTY TWO PESOS (P853,842.00).

The antecedent facts of this case are not disputed.

Petitioner is a banking institution duly organized and existing by virtue of the laws of the Philippines, with principal office located at 6764 Ayala Ave., Makati City. In the years 1994 and 1995, petitioner allegedly earned/derived passive income in the form of interest or discount from its investments in government securities

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(such as treasury bills/notes) as well as from private commercial papers.

Records show that the petitioner paid on different occasions from the period 1994 and 1995, the amount representing the 5% gross receipts tax on income earned/derived during the taxable year 1994 and 1995, as evidenced by its Quarterly Percentage Tax Returns (Exhs. "A" to "I"), inclusive.

For the taxable years covered in this case, petitioner paid the 5% tax on the reported gross receipts as reflected in the aforementioned Quarterly Percentage Tax Returns which allegedly included its gross receipts from passive investments amounting to ₱85,384,254.51. This amount according to the petitioner, had already been subjected to 20% final tax.

On July 19, 1996, petitioner filed an administrative claim for refund with the respondent Commissioner for its alleged overpaid gross receipts tax covering the years 1994 and 1995 (Exhibit "L") in the aggregate amount of ₱853,842.00 computed as follows:

Gross receipts subjected to Final Tax Derived from Passive Investment	₱85,384,254.51
	x 20%
20% Final Tax Withheld at Source	₱17,070,850.90
	x 5%
	₱ 853,842.54

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On its claim for refund, petitioner relied heavily on the decision rendered by this Court in the case of **Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720, January 30, 1996,** where We categorically ruled that the 20% final tax on interest income withheld from the bank should not form part of its taxable gross receipts for Gross Receipts Tax (GRT) purposes.

Without waiting for the decision of the Commissioner of Internal Revenue on the formal claim for refund and/or issuance of tax credit certificates, petitioner filed the instant petition for review before this Court lest it be barred by the mandatory two-year prescriptive period under Section 230 of the Tax Code (now Section 229 of the Tax Reform Act of 1997).

Respondent, unable to file his Answer to the petition for review on time due to extremely heavy pressure of work and the exorbitant assiduity of its counsel in attending to other cases of equal importance, filed a motion for extension of time to file Answer. This Court granted the motion and allowed a fifteen-day extension for the respondent to file his Answer to the Petition for Review. On August 26, 1996, the respondent filed his Answer and maintained the following pro-forma Special and Affirmative Defenses:

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4) Petitioner's claim for tax refund/credit is still undergoing administrative routinary investigation/ examination by respondent's Bureau;

5) The alleged refundable/creditable gross receipts taxes were collected and paid pursuant to law and pertinent BIR implementing rules and regulations, hence, the same are not refundable. Petitioner must prove that the income from which the refundable/creditable taxes were paid from, were declared and included in its gross income during the taxable year under review;

6) Petitioner's allegation that it erroneously and excessively paid its gross receipt tax during the year under review does not ipso facto warrant the refund/credit. Petitioner must prove that the exclusions claimed by it from its gross receipts must be an allowable exclusion under the Tax Code and its pertinent implementing Rules and Regulations. Moreover, it must be supported by evidence;

7) Petitioner must likewise prove that the alleged refundable/creditable gross receipt taxes were neither automatically applied as tax credit against its tax liability for the succeeding quarter/s of the succeeding year nor included as creditable taxes declared and applied to the succeeding taxable year/s;

8) Claims for tax refund/credit are construed in strictissimi juris against the taxpayer as it partakes the nature of an exemption from tax and it is incumbent upon the petitioner to prove that it is entitled thereto under the law. Failure on the part of the petitioner to prove the same is fatal to its claim for tax refund/credit;

9) Furthermore, petitioner must prove that it has complied with the provision of Section 230 (now Section 229) of the Tax Code, as amended.

On the other hand, to further prove its entitlement to a refund, petitioner, assiduously presented the following evidence:

1) Quarterly Percentage Tax Return for the period 1994 to 1995 (Exhs. "A" to "I", inclusive);

2) Summary of Tax Paid Income for the taxable year 1994/1995 (Exhs. "J" and "K");

3) Portion of Exhibit "J" showing the amount of P49,221,901.31 and P9,944,360.26 to prove the amount of 20% final tax that was withheld from petitioner's passive income for the year 1994 (Exhs. "J-1", "J-2");

4) Portion of Exhibit "K" showing the amount of P36,162,453.20 and P7,232,490.64 to prove the amount of 20% final tax withheld from petitioner's passive income for the year 1995 (Exhs. "K-1", "K-2");

5) Name and Signature of Ms. Marissa Fournier and Ms. Socorro L. Abesamis to prove the authenticity and due execution of Exhibits "J" and "K" (Exhs. "J-3", "J-4", "K-3", "K-4");

6) Letter-claim for refund filed by the petitioner with the BIR on July 19, 1996 (Exh. "L");

7) Copies of various debit and credit advices and certificates of Final Income Tax Withheld issued by the BSP to the petitioner for the year 1995 (Exhs. "M" to "BB", inclusive);

8) Copies of various debit and credit advices and certificates of Final Income Tax Withheld issued by the BSP to the petitioner for the year 1994 (Exhs. "B", "C" to "FF", inclusive);

9) An annualized summary consisting of 7 pages (each) the actual computation per books (Head Office) of the gross income declared by petitioner in 1994 and 1995 for GRT purposes (Exhs. "J" and "KK");

10) Name and Signature of Ms. Marissa Fournier to prove the due execution and authenticity of

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exhibits "JJ" and "KK" (Exhs. "JJ-1" and "KK-1"); and

11) Bracketed portion of Exhibit "JJ" showing in detail the tax paid interest income of petitioner for 1994 and 1995 with reference to Specific GL Codes (Exhs. "JJ-2", "KK-2" and "KK-3").

All the aforementioned evidence were included in the petitioner's Formal Offer of Evidence, dated April 29, 1998, to which the respondent, by way of comment, respectfully stated that he has no objection to their admissions, without however, necessarily admitting their relevancy, materiality and probative value for which the exhibits were offered in evidence.

This case was, thereafter, submitted for decision *sans* the memoranda of both parties.

The vortex of the controversy, legal and factual, posed for consideration by this Court are:

1) Whether or not the Final Income Tax Withheld forms part of the gross receipts of the taxpayer for GRT purposes;

2) Whether or not petitioner is entitled to a refund of ₱853,842.00.

Petitioner contends that its "gross receipts", for purposes of computing the gross receipts tax, should exclude the 20% final withholding tax. This is predicated upon the ruling of this Court in the aforecited case of **Asian Bank Corporation vs.**

Commissioner of Internal Revenue where We emphatically ruled, thus:

x x x

"We agree with the petitioner that the 20% final withholding tax on its interest income should not form part of its taxable gross receipts.

Revenue Regulations No. 12-80, dated November 7, 1980, on taxation of Certain Income Derived from Banking Activities provides that the rates of tax to be imposed on the gross receipts of such financial institutions shall be based on all items of income actually received; thus:

"SEC. 4. xxx xxx xxx

(e) Gross receipts or tax on banks, non-bank financial intermediaries not performing quasi-banking activities, the rates of taxes to be imposed on the gross receipts of such financial institutions <u>shall be based on all items of income actually received.</u> Mere accrual shall not be considered, but once payments is received on such accrual or in cases of prepayments, then the amount actually received shall be included in the tax base of such financial institutions, as provided hereunder. (Underscoring supplied)

From the foregoing, it is but logical to infer that the final tax, not having been received by the petitioner but instead went to the coffers of the government, should no longer form part of its gross receipts for the purpose of computing the GRT. This conclusion is in accord with the interpretation of the Supreme Court in the case entitled Collector of Internal Revenue vs. Manila Jockey Club, 108 Phil. 821, as quoted by this Court in disposing similar issue in the case entitled Compania Maritima vs. Acting Commissioner of Internal

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Revenue, CTA Case No. 1426, dated November 14, 1966, thus:

> "In the second place, the highest tribunal of the land interpreted the term <u>"gross receipts" to mean all receipts of a taxpayer excluding those which have been especially earmarked by law or regulation for the government or some person other than that of the taxpayer.</u> (Underlining Ours)
>
> x x x. The government could not have meant to tax as gross receipt of the Manila Jockey Club the ½ % which it directs same club to turn over to the Board of Investment. The latter being a government institution, there would be double taxation which should be considered unless the statute admits of no other interpretation. x x x
>
> "Needless to say, gross receipts of the proprietor of the amusement place should not include any money which although delivered to the amusement place has been earmarked by law or regulation for some person other than the proprietor." (The Commissioner of Internal Revenue vs. Manila Jockey Club, Inc. G.R. Nos. L-13890 and L-13887, June 30, 1960).

On the basis of the above ruling, petitioner submits that inasmuch as it erroneously included in its gross receipts for the years 1994 and 1995 the final tax withheld from its passive income which it did not actually receive having been earmarked as taxes to the government, thus, it is entitled to a refund or issuance of tax credit certificates.

Traversing petitioner's contentions, the respondent, in his memorandum, posits the view that while it is true that while the Supreme Court defined "gross receipts" as "all receipts of taxpayers excluding those which have been especially earmarked by law or regulation for the government or some person other than the taxpayer", it should be noted that said definition was applied only with reference to the gross receipts of a proprietor of an amusement place and not to a banking institution such as the petitioner in this case. Respondent avers that a banking institution is entirely distinct from an amusement place and as such this Court's ruling in the Manila Jockey Club case is not applicable to the case at bar.

We cannot agree with the respondent.

While it is true that the Manila Jockey Club case involves gross receipts of amusement places, it is not plausible to assume that the same ruling does not apply to banking institutions such as the petitioner in this case. It must be observed that the legitimate concern of this Court in the case at bar is to resolve whether or not final income tax withheld by the withholding agent which has already been paid should still be included in the bank's gross receipts for GRT purposes. Respondent concluded with its sweeping pontifications that it would make a difference if the petitioner is an amusement place instead of a banking institution.

These statements strike us as both presumptuous and in the nature of a *petitio precipii*, couched in generalities and short of any supporting evidence to boost their verity. The term "gross receipts", no matter how and when it is applied shall be defined, absent any decision of the Supreme Court interpreting the same differently, as, "all receipts of the taxpayers excluding those which have been especially earmarked by law or regulation for the government or some other person other than the taxpayer.

While it is true that the interpretation of a statute by the courts is not so sacrosanct as to be beyond modification or nullification, equally settled is the fact that, by statutory fiat, rulings of the court of last resort applying or interpreting a statute become part of the statute itself. *LEGIS INTERPRETATO LEGIS VIM OBTINET.*

This Court therefore refuses to overthrow the long continued construction of the term "gross receipts" enunciated in the case of Collector of Internal Revenue vs. Manila Jockey Club, 108 Phil. 821, as quoted by the Supreme Court in the case entitled Compania Maritima vs. Acting Commissioner of Internal Revenue, CTA Case No. 1426, that the term "gross receipts" shall mean "all receipts of a taxpayer excluding those which have been especially earmarked by law or regulation for the government or some person other than the taxpayer. Thus, we reiterate that the 20% final withholding tax no longer form part of the gross receipts for purposes of the 5% gross receipts tax. **(China Banking Corporation vs. Commissioner of Internal Revenue, CTA Case No. 5433, October 7, 1998; Equitable Banking Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720, January 30, 1996)**

After setting the legal issue involved in this case, we are now tasked to resolve based on the evidence adduced, whether or not the petitioner is entitled to a refund of the amount of ₱853,842.00 representing gross receipts taxes alleged to have been paid erroneously by petitioner for the taxable years 1994 and 1995.

A thorough and scrupulous review of the records of this case and the evidence presented reveals that the petitioner is entitled only to a partial refund amounting to ₱355,258.99 as this represents the claim which was filed within the two (2) year mandatory period of prescription and substantiated by material and relevant evidence. This is pursuant to Section 204(3) of the National Internal Revenue Code, which provides:

> "Sec. 204. ***Authority of the Commissioner to compromise, abate, and refund/credit taxes.*** - The Commissioner may: x x x
>
> (3) Credit or refund taxes erroneously or illegally received, penalties imposed without authority, refund the value of internal revenue

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> stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction.
>
> No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty." (Underlining Ours)

Clearly from the above-quoted provision, the claim for refund shall be filed within the two-year period from the time of payment, otherwise, the same is deemed barred by prescription.

A careful perusal of the records of this case reveals that the amount of ₱397,184.07 representing the 5% gross receipts taxes on the 20% final tax on passive income earned/derived during the first and second quarters of 1994 (Exhibits A and B) had already prescribed, the Quarterly Returns having been filed with the BIR on April 20, 1994 and July 20, 1994 respectively, and the judicial claim for refund was filed only with this Court on July 31, 1996. Likewise, the claim for refund in the amount of ₱88,341.43 representing gross receipts tax paid on interest income due from local banks and Interbank call loans receivable shall be denied in the absence of supporting documents such as passbook, bank statements or certificates of withholding taxes. The petitioner also failed to present evidence that its 1995 branch income subject to final tax amounting to

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₱1,305,804.71 was included in its 1995 quarterly payments. Thus, the amount of ₱13,058.05 representing the 5% gross receipts tax on such income shall likewise be deducted from its aggregate claim of ₱853,842.55.

WHEREFORE, in view of all the foregoing, respondent is hereby **ORDERED** to **REFUND** in favor of petitioner Bank of Commerce the amount of ₱355,258.99 representing validly proven erroneously withheld taxes from interest income derived from its investments in government securities for the years 1994 and 1995.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

RAMON O. DE VEYRA
Associate Judge

(Dissenting)
AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

I hereby certify that the above 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

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ANNEX A

Based on Section 230 in relation to Section 125 of the Tax Code the following amounts have prescribed, to wit:

Qtr.	Exh.	Per Return Amount	Per Return Date Filed	Date of Claim for Refund BIR	Date of Claim for Refund CTA
1st	A	P6,074,340.21	04.24.94	07.19.96	07.31.96
2nd	B	6,749,040.22	07.20.94	07.19.96	07.31.96

ANNEX B

Total Amount Per Claim			P853,842.55
Less: Adjustments			
1) Prescribed claim			
1994 - 1st quarter			
(21,603,049.76 x 20% x 5%) (Exh. "J")	P216,030.50		
2nd quarter			
(18,115,356.67 x 20% x 5%) (Exh. "J")	181,153.57	P397,184.07	
2) Without supporting documents			
a. Due from local banks - tax paid			
1994 - 3rd quarter			
(43,050.57 x 20% x 5%) (Exh. "J")	430.51		
4th quarter			
(377,142.65 x 20% x 5%) (Exh. "J")	3,771.43		
1995 - (55,740.23 x 20% x 5%) (Exh. "K")	557.40	4,759.34	
b. Interbank Call Loans Receivable - tax paid			
1994 - 3rd quarter			
(3,054,365.16 x 20% x 5%) (Exh. "J")	30,543.65		
	53,038.44	83,582.09	
3) 1995 Branch income subject to final tax included per claim but was not included in 1995 quarterly payments			
(1,305,804.71 x 20% x 5%) (Exh. "K-1")		13,058.05	498,583.56
TAX REFUNDABLE			P355,258.99

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DISSENTING OPINION

Majority of my esteemed colleagues decided to grant petitioner's claim for refund in the amount of P355,258.99 representing alleged overpaid gross receipts tax for the taxable years 1994 and 1995.

I disagree with their conclusion and vote for the denial of the petition for review for lack of merit.

Numerous cases with similar issues have already been decided by this Court which uphold the ruling enunciated in the case of Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720, January 20, 1996. I humbly suggest that the aforecited Asian Bank ruling be re-examined and consequently abandoned for the following reasons:

1) Section 8(c) of Revenue Regulations No. 12-80 dated November 7, 1980, as amended by Section 7(c), Revenue Regulations No. 17-84 dated October 12, 1984, clearly provides:

> "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."

It can be concluded from the aforementioned provision that the taxable base for purposes of gross receipts tax is the gross-up amount, inclusive of the 20% final income tax withholding;

2) Contrary to the Asian Bank ruling, the High Court's decision in the case of **Commissioner of Internal Revenue vs. The Manila Jockey Club, Inc., 108 Phils. 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:
>
> $8^1/_2$% 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.

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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 subject 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 "regulation". 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 "earmarked by law or legal rule or regulation" 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. Originally and literally, a mark upon the ear, a mode of marking sheep and other animals. 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, 6th 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 includible 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 claim for refund on freight and passengers tickets not taken is not provided by any law or legal rule or regulations.

WHEREFORE, in view of the foregoing, I hereby register my dissent to the majority opinion and vote to **DENY** the petition for lack of legal basis.

AMANCIO Q. SAGA
Associate Judge