REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THE PHILIPPINE BANKING CORPORATION,
Petitioner,

- versus - **C.T.A. CASE NO. 6080**

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
NOV 06 2000

x - x

RESOLUTION

For resolution is Respondent's "Motion to Dismiss" filed on September 27, 2000 on the ground of prescription. Petitioner filed its opposition thereto on October 12, 2000.

This case involves a claim for refund of creditable withholding tax for the year 1997 in the amount of P1,070,168.00. Under Section 230 (now 229) of the Tax Code, as amended, claims for refund should be filed within two years from the date of payment of the tax. And it is decretal that the two-year prescriptive period is counted from the date the taxpayer filed its final adjustment return. This is so, because it is only at that time when the taxpayer can ascertain whether it has to pay additional income tax or is entitled to a refund of overpaid income taxes. (Commissioner of Internal

Revenue vs. Court of Appeals, G.R. No. 117254, January 21, 1999).

Based on the evidence on record, Petitioner filed its 1997 annual income tax return on April 1, 1998 (Annex QQ). Therefore, it has only until April 1, 2000 within which to file a judicial claim for refund. However, Petitioner filed the administrative claim for refund on April 13, 2000 (Annex RR) and the instant petition on April 14, 2000. Thus, it is without a doubt that the case at bar was filed beyond the period allowed by law. Section 230 (now 229) of the Tax Code is quite clear on the matter, to wit:

> SEC. 230. *Recovery of tax erroneously or illegally collected.* - No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> In any case, no such suit or proceeding shall be begun after the expiration of two years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment. *Provided, however*, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return

> upon which payment was made such payment appears clearly to have been erroneously paid. (Underscoring supplied.)

Petitioner in its opposition reasons that Respondent waived the defense of prescription when he failed to file a motion to dismiss on said ground before filing his answer.

We do not agree.

Petitioner overlooked the provision of the 1997 Rules of Civil Procedure, particularly Section 1 of Rule 9 hereunder quoted, which provides that the defense of prescription is not waivable.

> SECTION 1. *Defenses and objections not pleaded.* - Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. <u>However, when it appears</u> from the pleadings or <u>on the evidence on record</u> that the court has no jurisdiction over the subject matter, that there is another action pending between the same parties for the same cause, or <u>that the action is barred by a prior judgment or by statute of limitations, the court shall dismiss the claim.</u> (Emphasis Ours.)

The above proviso once and for all puts an end to Petitioner's arguments. *A fortiori*, even if Respondent failed to file the instant motion and the parties proceeded to present their respective evidence, this Court would still dismiss or deny the petition for being barred by the statute of limitations.

Finally, reliance by the Petitioner on Section 1112 of the New Civil Code is misplaced. Considering that this is a tax case, the provision of the Tax Code, which is a special law, prevails over the provision of the

Civil Code, which is general in nature (see Article 18, Civil Code of the Phil.).

WHEREFORE, in view of the foregoing, the Motion to Dismiss is hereby **GRANTED**. Accordingly, the Petition for Review is **DISMISSED** for being filed out of time.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

AMANCIO Q. SAGA
Associate Judge

RAMON O. DE VEYRA
Associate Judge