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

**PHILIPPINE STOCK EXCHANGE, INC.,**
Petitioner,

**- versus -** **C.T.A. CASE NO. 5995**

**COMMISSIONER OF INTERNAL REVENUE,**
Respondent.

**Promulgated:**
OCT 15 2002

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## DECISION

This case involves assessments for alleged deficiency income, withholding, and donor's taxes in the total amount of P15,560,306.30 for the calendar year ended December 31, 1995.

The facts as borne out by the records and pleadings of the case are as follows:

Petitioner is a domestic, non-stock corporation duly organized and existing under the laws of the Republic of the Philippines. It was registered with the Securities and Exchange Commission on July 17, 1992 (*Exhibit "MM"*). Its primary purpose is to provide and maintain a convenient, economical and suitable market for the exchange, purchase and sale of stocks, bonds and other securities of established companies and/or corporations; options in such stocks, bonds, and such other securities as defined under the Revised Securities Act (*Exhibit "NN"*).

On April 15, 1996, petitioner filed its Corporation Annual Income Tax Return for the calendar year ended December 31, 1995 (*Exhibit "D"*).

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On August 12, 1996, petitioner received Letter of Authority No. 131684 signed by Revenue District Officer Aguinaldo L. Miravalles, authorizing Revenue Officer Eduardo S. Morato of Revenue District No. 43 to examine its books of accounts and other accounting records for "income/VAT/withholding/Doc. Stamp" taxes for the period January 1, 1995 to December 31, 1995 (*Annex B, Petition for Review, paragraph 2, Stipulation of Facts, page 68, CTA records*). On August 25, 1997, Mr. Miravalles also authorized Revenue Officer Melba N. Gador to assist Revenue Officer Eduardo S. Morato in the investigation of all internal revenue taxes of petitioner for the same year (*page 214, BIR records*).

Subsequently, petitioner received four (4) assessment notices together with their corresponding demand letters, all dated February 19, 1999, issued by Revenue Region No. 7 of the Bureau of Internal Revenue through the Chief of its Assessment Division, Ruth Vivian G. Gadia (*Exhibits "E" to "L"*), covering the following deficiency tax assessments: (*paragraph 3, Stipulation of Facts, pages 68 and 69, CTA records*)

| Particulars | Basic Tax | Surcharge | Interest | Total |
|---|---|---|---|---|
| Deficiency income tax | P 8,482,789.47 | | P 4,788,534.66 | P 13,271,324.13 |
| Deficiency withholding tax at source | | | | |
| - deficiency tax | 320,680.05 | | 195,262.08 | 515,942.13 |
| - surcharge and interest | | P 207,018.08 | 1,521.96 | 208,540.04 |
| Deficiency donor's tax | 1,000,000.00 | | 564,500.00 | 1,564,500.00 |
| Totals | P 9,803,469.52 | P 207,018.08 | P 5,549,818.70 | P 15,560,306.30 |

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On April 19, 1999, petitioner, through its counsel Tan & Venturanza Law Offices, filed its protest letter dated April 16, 1999, requesting for reconsideration of the aforementioned final assessments (*Annex G, Petition for Review, paragraph 4, Stipulation of Facts, page 69, CTA records*).

On June 18, 1999, petitioner submitted additional documents in support of its protest pursuant to Section 228 of the 1997 Tax Code (*paragraph 5, Stipulation of Facts, page 69, CTA records*).

On January 14, 2000, within thirty days from the lapse of 180-day period given to respondent to decide the protest, reckoned from June 18, 1999, the day when petitioner submitted its supporting documents to the protest, petitioner filed the instant petition for review.

Respondent filed his Answer on February 24, 2000, claiming by way of Special and Affirmative Defenses:

> 8. That he reiterates and repleads the preceding paragraphs of this Answer as part of his Special and Affirmative Defenses;
>
> 9. That investigation of the petitioner's internal tax liabilities for the year 1995 revealed a tax obligation of P13,271,324.13 as deficiency income tax, P515,942.13 and P208,540.04 as deficiency withholding tax and P1,564,500.00 as deficiency donor's tax;
>
> 10. That the subject deficiency income, donor's and withholding taxes assessment No. 43158 dated February 19, 1999 was issued in accordance with law and pertinent regulations;
>
> 11. That all presumptions are in favor of the correctness of tax assessments (CIR vs. Construction Resources of Asia, Inc., 145 SCRA 671) and the burden of proof to prove otherwise is upon the petitioner.

The jointly stipulated issues to be resolved by the court are the following:

> 6. Whether the Assessment is null and void for having been issued without stating the law and the facts on which the Assessment is based as required by Sec. 228 of the National Internal Revenue Code of 1997.
>
> 7. Whether the assessment for deficiency income tax in the amount of P13,271,324.13, inclusive of increments, has basis in fact and in law. Such assessment is broken down as follows:
>
> > 7.1. Whether there is unrecognized income of P6,766,958.74 on account of Petitioner's suspension of and non-collection from its members' monthly membership fees for the fourth quarter of 1995.
> >
> > 7.2. Whether the donation by Petitioner to the Philippine Stock Exchange Foundation, Inc. in the amount of P10,000,000.00 is a deductible expense in 1995.
> >
> > 7.3. Whether the interest expense of P7,469,583.33 incurred and paid by Petitioner on bank loans is a proper deduction against income.
>
> 8. Whether the assessment for deficiency expanded withholding tax at source in the amount of P515,942.13, inclusive of increments, has basis in fact and in law.
>
> 9. Whether the assessment for surcharge and interest on the late remittance of the expanded withholding tax and withholding tax on compensation in the amount of P208,540.04 is considered waived.
>
> 10. Whether the assessment for deficiency donor's tax in the amount of P1,564,500.00, inclusive of increments, for donations made by Petitioner to the Philippine Stock Exchange Foundation, Inc. has legal basis.

Petitioner argued that the present assessments for deficiency income, withholding and donor's taxes are null and void for having been issued without stating the law and the facts from which the assessments were made as provided under Section 228 of the 1997 Tax Code which states:

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> **SEC. 228.** *Protesting of Assessment.* - When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: *Provided, however*, That a pre-assessment notice shall not be required in the following cases:
>
> xxx xxx xxx
>
> The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.
>
> xxx xxx xxx

Petitioner pointed out that the four assessment notices and their corresponding demand letters (all numbered 43158) failed to state the law and the facts upon which the assessments were based. According to petitioner, it could only presume that the same issues discussed with the BIR examiners during the preliminary investigation were the same issues raised in the questioned assessments.

After a meticulous review of the records of the case, we do not agree with the petitioner that it was not informed of the law and the facts from which the assessments were based for if it was not informed, it could not have protested the assessments in detail.

The BIR records show that petitioner was given an opportunity to controvert the findings of the respondent's examiners thrice[1] through a series of informal conferences set for the purpose (*pages 218, 220 and 225, BIR records*). In one of those conferences, petitioner even submitted a written comment on the issues raised in the report of investigation, through its counsel Tan & Venturanza Law Offices (*pages 228 to 232, BIR*

[1] The first on October 28, 1997, the second on February 18, 1998, and the third on September 4, 1998.

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*records*). Had it not been informed of the law and the facts upon which the assessments were based, it could not have posed any written objections or comments thereto. Moreover, the computations attached to the pre-assessment notice dated January 29, 1999 clearly show the specific provisions of law from which the assessments were based and the facts on how the amounts of the deficiency taxes were arrived at (*page 219, 257 to 259, BIR records*). Therefore, petitioner did not merely presume but in fact knew the bases of the assailed assessments considering that petitioner's protest basically contained the same arguments raised in its comments on the preliminary assessments of the examiners.

It bears stressing that the purpose of Section 228 of the 1997 Tax Code in requiring that "(t)he taxpayer be informed of the law and facts on which assessment is made" is to give the taxpayer the opportunity to refute the findings of the examiner and give a more accurate and detailed explanation regarding the proposed assessment(s) **(*Belle Corporation vs. Commissioner of Internal Revenue, CTA Case No. 5930,* April *4, 2002*).** The purpose of the said law having been served in the instant case, Section 228 of the 1997 Tax Code is deemed to have been complied with. Therefore, the assessments for income, withholding and donor's taxes issued against the petitioner are not null and void.

We now proceed to the merits of the disputed assessments.

**1. DEFICIENCY INCOME TAX P13,271,324.00**

The deficiency income tax in the total amount of P13,271,324.00 was brought about by three factors, namely: (1) an unrecognized income, (2) unallowable donation; and (3) interest expense, computed as follows:

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| | | |
|---|---|---|
| Net Business Income | | P28,693,125.00 |
| Add: Discrepancies | | |
| Unrecognized Income (Sec. 28) | P 6,766,958.74 | |
| Donation & Contribution | | |
| - 1996 expense | 10,000,000.00 | |
| Interest Expense (Sec. 29) | 7,469,583.33 | 24,236,542.07 |
| Taxable Income | | P52,929,667.07 |
| | | |
| Tax Due | | P18,525,383.47 |
| Less Tax Paid | | 10,042,594.00 |
| Deficiency Tax | | P 8,482,789.47 |
| Add: Interest 04-16-96 to 01-12-99 | | 4,788,534.66 |
| Total Amount Due & Collectible | | P13,271,324.13 |

Corollary thereto, we have to re-examine the correctness of the above items of discrepancies.

*a. Unrecognized income of P6,766,958.74.*

The unrecognized income in the amount of P6,766,958.74 was explained by the revenue examiners as follows: (BIR records, pages 251 and 252).

> A. Unrecognized income from October to December, 1995 – The taxpayer actually recognized consistently its income from January to September 1995 on the same year but for no plausible reason it stopped to recognize its income for the last quarter of 1995 amounting to P6,766,958.74. The reason for its failure to recognize income can be deduced as an apparent purpose of avoiding the payment of income tax. This can be interpreted as plain and simple tax evasion. It, however, resumed to recognize its income the following January, 1996. This is a palpable violation of consistent application of accounting principle and procedure aside from it is a violation of proper matching of income and expenses. If not recognizing income is a management prerogative, then, for the sake of argument, expenses should not also be allowed. But in this case the taxpayer recognized expenses but did not recognize income.

Petitioner, on the other hand, argued that such income cannot be recognized as revenue in the year 1995 because its Board of Directors suspended the collection of fees and dues from its members during the period October to December 1995 (*pages 13-15,*

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*TSN, August 9, 2000*) allegedly due to the fact that petitioner had already collected sufficient money for the first nine months of the year 1995 to sustain its operations for the remaining months. Accordingly, petitioner did not and could not have received income from the collection of such membership dues.

Given the above altercations, this court finds the reason of the respondent meritorious.

Petitioner was not able to prove that the collection during the last quarter of 1995 was indeed suspended. Petitioner did not bother to present corroborative evidence such as Minutes of the Board of Directors' Meeting or a Board Resolution, with an attached Secretary's Certificate, or any document that will prove the alleged suspension of collection. Neither did the evidence of petitioner lead the court to believe that it has sufficient funds to finance the expenses of the last quarter of 1995. What can be drawn from the records is that petitioner is in need of working capital. This is evident in petitioner's Schedule of Cash Requirements and Cash Balances for the year 1995 (*Exhibit "R"*), to wit:

(In Thousand Pesos)

| 1995 | Clearing Fund Size Requirement | Working Fund Requirement | Cash Requirement | Actual Cash Balances | Deficiency |
|---|---|---|---|---|---|
| Jan | P 229,505 | P 10,000 | P 239,505 | P194,139 | P 45,366 |
| Feb | 305,035 | 10,000 | 315,035 | 210,380 | 104,655 |
| Mar | 230,308 | 10,000 | 240,308 | 156,015 | 84,293 |
| Apr | 212,269 | 10,000 | 222,269 | 86,066 | 136,203 |
| May | 289,683 | 10,000 | 299,683 | 89,667 | 210,016 |
| Jun | 278,560 | 10,000 | 288,560 | 129,928 | 158,632 |
| Jul | 325,999 | 10,000 | 335,999 | 246,624 | 89,375 |
| Aug | 363,003 | 10,000 | 373,003 | 251,905 | 121,098 |
| Sep | 361,589 | 10,000 | 371,589 | 258,461 | 113,128 |
| Oct | 374,350 | 10,000 | 384,350 | 284,067 | 100,283 |
| Nov | 348,189 | 10,000 | 358,189 | 237,165 | 121,024 |

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| | | | | | |
|---|---|---|---|---|---|
| Dec | 367,124 | 10,000 | 377,124 | 145,141 | 231,983 |

Thus, anent petitioner's allegation that it has sufficient funds to sustain its operations during the last quarter of the year 1995, the records prove otherwise.

*b. Donations and contribution – P10,000,000.00*

Petitioner executed a Deed of Donation (*Exhibit "M"*) in favor of the Philippine Stock Exchange Foundation, Inc. (PSEFI) for the sum of P10,000,000.00 on December 29, 1995. This was accepted by the donee on the same date as acknowledged before Notary Public Atty. Cecilio C. Casalla.

The revenue examiners are of the opinion that the aforementioned donation should be properly recognized in the year 1996 because the money was delivered only on January 6, 1996. Petitioner, however, avers that the donation should be recognized in the year 1995, the year when the deed of donation was perfected.

The issue here lies on when should petitioner recognize the donation, as an expense, in its books of accounts.

Generally, expense is deductible in the year it was "paid or accrued" or "paid or incurred" as provided under Section 39 of the Tax Code:

> SEC. 39. *Period for which deductions and credits taken.* - The deductions provided for in this Title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred" dependent upon the method of accounting upon the basis of which the net income is computed, **unless** in order to clearly reflect the income the deductions should be taken as of a different period. (Underlining supplied).

Records show that petitioner is adopting the accrual method of accounting (TSN, August 9, 2000. p. 18) which requires the recording of income as it is earned and the

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recording of an expense as it is incurred. Under this method, the determination of period income and financial position depends on measurement of economic resources and obligations and changes in them as the changes occur rather than simply on recording receipts and payments of money (*paragraph 8, Section D, Statement of Financial Accounting Standards No. 1*). Cash need not be received or paid to be able to record an income or expense, respectively, as long as the obligation to receive or pay is determinable. However, the deductibility of donation is not governed by the ordinary rules on deductibility of an expense. Donation is recognized as a deduction from gross income in the year such donation was *actually paid or made* pursuant to the provisions of then Section 29(h) of the Tax Code, thus:

> Sec. 29. Deductions from gross income. -xxx
>
> (h) Charitable and other contributions. – (1) In general. – Contributions or gifts ***actually*** *paid or made within the taxable year* to, or for the use of the Government of the Philippines or any of its agencies or any political subdivision thereof for exclusive for exclusively public purposes, xxx. (Emphasis ours.)

It can be inferred from the foregoing law that donation must be both perfected and consummated before it can be allowed as an expense. Irrespective of the accounting method used, contributions or gifts are deductible only from petitioner's gross income in the year they were *actually* paid or made.

Moreover, under Section 11 of the BIR-NEDA Regulations No. 1-81, as amended by BIR-NEDA Regulations No. 1-82, donors claiming deduction from their taxable income for authorized donations should submit evidence to the BIR showing submission of the Certificate of Donation and/or Notice of Donation, thus:

> SEC.11. **Verification procedure and substantiation requirements.**

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> A. *For Donors.* Donors claiming deduction from their taxable income for donations authorized by Batas Pambansa Blg. 45 should submit evidence to the BIR showing submission of the Certificate of Donation and/or Notice of Donation.
>
> (a) actual receipt by the donee of the donation and the date of receipt thereof; and
>
> (b) the amount of the donation, if in cash; if real property, the value thereof at the time of donation, xxx.

The records of the case showed no evidence to prove that petitioner submitted to the BIR the required Certificate/Notice of Donation. Neither was there any submission of document (in the BIR or in this court) proving the actual receipt of the donee of the amount donated in the year 1995.

Therefore, the donation should be properly recognized in the year 1996, the year when petitioner actually paid the amount donated.

*c. Interest Expense P7,469,583.33*

The interest expense arose from the loans obtained by petitioner during the year 1995. The examiners disallowed the said interest expense for failure to prove that such loans are necessary and ordinary in petitioner's business operations. According to respondent, this account was incurred when the taxpayer was very solvent and there was no need to secure loans much less incur such interest expense. To support his argument, respondent alleged that petitioner even derived interest income in the total amount of P20,907,285.00 which was subjected to 20% final tax (*page 251, BIR records*).

Petitioner, on its part, contends that the interest expense of P7,169,583.33 it incurred and paid on bank loans to cover its guarantee for the punctual and full payment of all trades done in the stock exchange is a proper deduction against income.

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Generally, an interest expense in order to be deductible from gross income must be in connection with the taxpayer's profession, trade or business pursuant to Section 29(b)(1) of the Tax Code which provides:

> **SECTION 29**. *Deductions from gross income*. – xxx.
>
> (a) *Expenses.* xxx.
>
> (b) *Interest*. – (1) In general. – The amount of interest paid or accrued within a taxable year on indebtedness *in connection with the taxpayer's profession, trade or business,* except on indebtedness incurred or continued to purchase or carry obligation the interest upon which is exempt from taxation as income under this Title.

Records show that the primary purpose of the PSE as stated in its Articles of Incorporation is:

> (a) To provide and maintain a convenient, economical and suitable market for the exchange, purchase and sale of stocks, bonds and other securities of established companies and/or corporations; options in such stocks, bonds and such other securities as defined under the Revised Securities Act;

In addition, Section 22 of the Revised Securities Act (RSA) enumerates the duties of a securities exchange as follows

> (1) To comply and enforce compliance by its members with the provisions of the RSA, and any amendment thereto, and the implementing rules or regulations made or to be made thereunder;
>
> (2) To furnish the Securities and Exchange Commission (SEC) copies of any amendments to the rules of the exchange forthwith upon their adoption;
>
> (3) In the event that a member firm becomes insolvent or when the exchange shall have found that it cannot readily meet the demands of its customers for the delivery of securities and/or payment of sales proceeds, the exchange shall, upon order of the SEC, take over the operation of the insolvent member firm and immediately proceed to settle the member firm's liabilities to its customers.

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To effectuate the aforementioned duties, petitioner guarantees the liabilities of its member firms in case they become insolvent by entering into contracts with the clearing houses, Rizal Commercial Banking Corporation and Equitable Banking Corporation, to wit:

*CLEARING HOUSE AGREEMENT*

> **SECTION 9.** *Guarantee* – PSE guarantees that the Brokers shall make good defective deliveries to the CLEARING HOUSE.
>
> PSE also guarantees absolutely and irrevocably the punctual and full payment to the CLEARING HOUSE (RCBC and/or EBC) of all service fees which it is entitled to charge and collect by virtue of the CLEARING HOUSE AGREEMENT and the prompt reimbursement of any and all transfer fees and stamps advanced or paid by RCBC or EBC for the account of the various member-brokers transacting business with RCBC or EBC in conduct of the business in the exchange.
>
> PSE further guarantees unto RCBC and EBC the full and faithful performance and observance by its members of all rules, regulations, instructions and conditions applicable to or imposed upon said members in carrying on transactions and in their business in the exchange.
>
> It is distinctly understood that the guaranty herein constituted is primary and absolute and shall continue until any and all claims which RCBC and/or EBC may have under or by virtue of the CLEARING HOUSE AGREEMENT shall have been settled and discharged in full. (*Exhibits "O" and "P"*).

By reason of the foregoing guarantees and the heavy volume of trades in 1995, petitioner's cash position was not considered enough in case it had to comply with its guarantees. Since petitioner estimated its cash requirement at an average of one billion pesos a day, it alleged that it had to resort to borrowings to cover such guarantees. The statistical probability of a failed trade or transaction and the amount thereof was determined by the clearing fund size computation (*Exhibit "Q"*).

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Based on the foregoing reason, we agree that interest expense is related to petitioner's trade. Indeed, the borrowing was motivated by petitioner's guarantees under its charter, the Revised Securities Act, and the Clearing House Agreement. It bears stressing that petitioner is a non-stock corporation; hence, it has a limited source of capital and will be incapable of meeting the cash requirement in case its members become insolvent. Moreover, the reason of the examiners for the disallowance of interest expense is too shallow and bereft of merit. The law does not prohibit the deductibility of interest expense from gross income for the sole reason that the loans from which the interest expense were based were earning interest income.

Since petitioner was able to prove that it has complied with the requirements of deductibility of interest expense as provided under Section 29(b)(1) of the Tax Code, there is no reason to disallow said expense.

**2. DEFICIENCY WITHHOLDING TAX AT SOURCE P724,482.17**

The deficiency withholding tax at source in the gross amount of P724,482.17 represents:

> (1) The difference between the expanded withholding tax at source per alpha list and expanded withholding tax per monthly remittance returns; and
>
> (2) Surcharge for late remittance of withholding taxes for the months of April, September, and November 1995,

detailed as follows:

a. Deficiency expanded withholding tax (creditable) based on the difference between amount reflected in alpha list and monthly remittance returns

| | |
|---|---|
| EWT per Alpha List | P1,977,778.88 |
| Less: EWT per Monthly Remittance | |

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| | |
|---|---|
| Returns | 1,657,098.83 |
| *Basic Deficiency Withholding Tax* | *P 320,680.05* |
| Add: Additions to Tax | |
| Interest (01-26-96 to 02-12-99) | 195,262.08 |
| Amount Due & Collectible | P 515,942.13 |

b. Late remittance of withholding tax on compensation

| Month | Surcharge | Interest | |
|---|---|---|---|
| April | P104,884.77 | P 585.40 | |
| October | 88,132.30 | 710.74 | |
| December | 14,001.01 | 225.82 | |
| Total | P207,018.08 | P1,521.96 | P 208,540.04 |

| | |
|---|---|
| TOTAL AMOUNT DUE & COLLECTIBLE | P 724,482.17 |

The difference between the amounts appearing in the Alpha List (*Exhibit Z-1*) and that of the monthly remittance returns of income taxes withheld in the sum of P320,680.05 was explained by petitioner as follows:

| | |
|---|---|
| 1. Overstatement in Alpha list attached to BIR Form 1743-IR (*Exhibit "Z-2"*) of "Amount of Income Payment" and "Amount of Tax Withheld" on license fee payments to Inter-National Computer Services, Inc. | P319,685.54 |
| 2. Adjustment in foreign exchange rate of Bengoechea fee | 194.45 |
| 3. Overstatement in Alpha List attached to BIR Form 1743-IR (*Exhibit "Z-3"*) of "Amount of Income Payment" and "Amount of Tax Withheld" on management fees paid to PRHC Property Managers, Inc. | 800.00 |
| Unlocated difference | 0.06 |
| Total | P320,680.05 |

After a careful scrutiny of the documents supporting the above details of discrepancy (*Exhibits "T," "U," "V," "X-1," "Z-1," "Z-2," "Z-3," "AA," "BB," "CC,"*

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*"DD," "EE," "FF," "GG," "HH," "YY-1," "YY-2," "BBB," and "CCC"*) as well as the testimony of Mrs. Corazon A. Padua, petitioner's Vice-President for Finance and Investments Group (*TSN, January 24, 2001*), the court is convinced that the assessment for the discrepancy between the amounts of withholding tax remitted and that of the alpha list should be cancelled. Petitioner was able to explain and establish the error in the preparation of the alpha list which can be traced from the documents submitted.

With regard to the assessment for surcharge and interest for late remittance of withholding taxes on compensation for the months of April, October, and December 1995, the court finds the same to be in order.

Petitioner indeed belatedly filed its monthly remittance returns on compensation for the months of April, October, and December 1995, to wit:

| Period | BIR Records, Page | Date Filed | Should Be | Amount |
|---|---|---|---|---|
| April 1995 | 108 | 05-12-95 | 05-10-95 | P384,885.81 |
| October 1995 | 68 | 11-13-95 | 11-10-95 | 352,529.19 |
| December 1995 | 50 | 01-31-96 | 01-25-95 | 56,004.06 |
| Total | | | | P793,419.06 |

The justification of petitioner that it has availed of the Voluntary Assessment Program (VAP) under Revenue Memorandum Order No. 59-97, as amended by RMO No. 63-97, for the said for the months holds no water.

A review of the provisions of said revenue memorandum orders reveals that petitioner cannot avail of the benefits of the program. The persons who may avail and who are not covered were specifically provided in numbers 2 and 3, respectively, of Part II of Revenue Memorandum Order No. 59-97, quoted as follows:

2. Who may avail

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> Any person liable to pay any of the above-cited internal revenue taxes for the above specified period, who due to inadvertence or otherwise, has under declared his internal revenue tax liabilities or has not filed the required tax return may avail of the benefits under VAP.
>
> 3 Persons/Cases not covered
>
> The following shall be excluded from the coverage of the VAP under this Order.
>
> 3.1. Dealers of petroleum products xxx.
> 3.2. Withholding agents with respect to their withholding tax liabilities;
> 3.3. Persons to whom a validly issued Letter of Authority has been served;
> 3.4. Persons under investigation as result of verified information xxx.
> 3.5. Tax cases filed in Court.

The above order is explicit. Petitioner cannot avail of the program for there was no underdeclaration of withholding taxes for the months of April, October and November 1995 as can be gleaned from the computations it made on the corresponding Voluntary Assessment Forms (*Exhibits "II", "JJ", "KK", and "LL"*) and neither was there non-filing of the required tax return. Petitioner in fact filed the returns but not on time. Moreover, when petitioner filed its the applications for VAP on December 29, 1997, a letter of authority had already been served on August 12, 1996. Thus, it is excluded from the coverage of the VAP.

Hence, this court finds the assessment for surcharge for late remittance of withholding taxes for the months of April, October and December 1995 proper.

**3. DEFICIENCY DONOR'S TAX P1,564,500.00**

The examiners assessed petitioner for the deficiency donor's tax based on the premise that the donation made to PSEFI (an item which was earlier discussed) is subject to donor's tax. To controvert the opinion of the examiners, petitioner presented the

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certification issued by the Bureau of Internal Revenue addressed to Tan & Venturanza confirming that the donations made to PSEFI, a qualified donee institution, are exempt from donors's tax (Exhibit "N"), pertinent portions of which read as follows:

> "This refers to your letter dated November 27, 1995, requesting a ruling to the effect that the Philippine Stock Exchange Foundation, Inc. (Foundation), a non-stock, non-profit corporation organized under Section 26(e) of the Tax Code, as amended, is a tax-exempt donee institution.
>
> Documentary evidence submitted disclosed that the Foundation is a non-stock, non-profit corporation, organized and registered with the Securities and Exchange Commissioner for the following purposes:
>
> > (1) To initiate, develop, administer, promote, encourage, support, finance and assist programs and projects or undertakings of philanthropic, charitable, educational, scientific, civic, social welfare and eleemosynary nature or a combination thereof; xxx
>
> xxx xxx xxx
>
> In reply thereto, <u>please be informed that as a corporation organized and operated for philanthropic, charitable, educational, scientific and social welfare purposes, **donations to the Foundation are exempt from the payment of donor's tax pursuant to Section 94(a)(3) of the Tax Code**, as amended, subject to the condition that not more than 30% of the said gifts shall be used by the donee Foundation for administration purposes</u>.
>
> On the other hand, Section 29(h)(2)(C) of the Tax Code, as amended by Batas Pambansa Blg. 45, as implemented by BIR-NEDA Regulations No. 1-81, as amended by Revenue Regulations Nos. 1-82 and 10-82 provides that donations to a private foundation which means a non-profit domestic corporation or association organized and operated exclusively for scientific, research, educational, character building, and youth and sports development, health, social welfare, cultural or charitable purposes or a combination thereof, no part of the net income of which inures to the benefit of any private individual shall be deductible in full from the taxable business income of the donor.
>
> xxx xxx xxx
>
> In view thereof, this Office is of the opinion as it hereby holds that for income tax purposes, contributions and donations in favor of the

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> Foundation by individual donors/contributors shall not be deductible from their gross income; and that since the Foundation is a private foundation organized and operated for philanthropic, charitable, scientific, educational and social welfare purposes, contributions and donations in its favor shall be deductible in full from the gross income of corporate donors/contributors. (Underlining supplied).

The above certification is clear that the donation to PSEFI is exempt from donor's tax *provided* that the donee corporation meets the condition "(t)hat not more than thirty per centum of said gifts shall be used by such donee for administration purposes" pursuant to Section 94(a)(3) of the Tax Code.

A verification of the 1996 audited financial statements of PSEFI (*Exhibit "QQ"*) disclosed that out of the P10,000,000.00 donation made by petitioner, only the sum of P120,993.00[2] was spent for its administrative operations or only 1.21% (P120,993.00 ÷ P10,000,000.00) of the total gift. Thus, the condition stated in Section 94(a)(3) of the Tax Code was faithfully complied with by PSEFI making the donation of petitioner as tax exempt.

Besides, as discussed earlier, the subject donation should only be recognized in the year 1996. Consequently, there should be no donor's tax due in the year 1995.

**WHEREFORE**, in the light of all the foregoing, the court finds herein petitioner still liable for the deficiency income tax in the amount of P9,186,914.89, computed as follows:

Deficiency income tax

| | |
|---|---|
| Net Business Income | P28,693,125.00 |

[2] Representing the sum of administrative expenses such as board of meeting expenses, professional fees, representation and entertainment, club membership and miscellaneous.

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| | | |
|---|---|---|
| Add: Unallowable Deductions | | |
| 1. Unrecognized Income | P 6,766,958.74 | |
| 2. Donation | 10,000,000.00 | 16,766,958.74 |
| Total Taxable Income | | P45,460,083.74 |
| | | |
| Tax Due (P45,460,083.74 x 35%) | | P15,911,029.31 |
| Less: Tax Paid | | 10,042,594.00 |
| Basic Deficiency Income Tax Due | | P 5,868,435.31 |
| Add: 20% Interest (4-16-96 to 2-12-99) | | 3,318,479.58 |
| TOTAL AMOUNT DUE & COLLECTIBLE | | P 9,186,914.89 |

plus 20% delinquency interest per annum from March 22, 1999 until fully paid pursuant to Section 249(c) of the Tax Code. In addition, petitioner is also liable for the deficiency tax assessment for the late remittance of withholding tax on compensation in the amount of P208,540.04 as appearing in the corresponding assessment notice and demand letter of the Commissioner. However, the deficiency assessments for withholding tax in the amount of P515,942.13, representing the discrepancy between the amounts reflected per alpha list and monthly remittance returns of withholding taxes; and the deficiency assessment for donor's tax in the amount of P1,564,500.00 are hereby **CANCELLED** for lack of merit.

**SO ORDERED.**

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

**I CONCUR:**

**ERNESTO D. ACOSTA**
Presiding Judge

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## 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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