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

***EN BANC***

**COMMISSIONER OF INTERNAL REVENUE,**
Petitioner,

-versus-

**SONY PHILIPPINES, INC.,**
Respondent.

C.T.A. EB NO. 90
(C.T.A. Case No. 6185)

Present:

***Acosta, P.J.***
***Castañeda, Jr.***
***Bautista,***
***Uy,***
***Casanova, and***
***Palanca-Enriquez, JJ.***

Promulgated:
MAY 1 7 2007

x-----------------------------------------------------------------------------------------------x

## *D E C I S I O N*

***BAUTISTA, J.:***

### *The Case*

Before the Court *En Banc* is a Petition for Review filed by the Commissioner of Internal Revenue praying for the reversal of:

1. The Decision of the First Division of this Court ("Court in Division") promulgated on October 26, 2004 in C.T.A. Case No. 6185 entitled *"Sony Philippines, Inc. vs. Commissioner of Internal Revenue,"* which partially granted herein respondent's Petition for Review. The Court in Division ordered the cancellation of the deficiency assessment for value-added tax ("VAT") for taxable year 1997 but upheld the deficiency assessments for expanded withholding tax ("EWT") amounting to P1,035,879.70 and penalties for late remittance of internal revenue taxes amounting to P1,269,593.90; and
2. The Resolution of the Court in Division dated April 28, 2005 which denied herein petitioner's Motion for Partial Reconsideration.

## ***Antecedent Facts***

The Petition at bench stemmed from the following factual milieu as summarized by the Court in Division:

> "Petitioner[1] is a corporation duly organized and existing under the laws of the Republic of the Philippines with principal office located at 26th Floor, The Enterprise Center Tower I, Ayala Avenue corner Paseo de Roxas, Makati City.
>
> On November 24, 1998, petitioner received Letter of Authority No. 000019734 issued by then BIR Commissioner Beethoven Rualo authorizing Revenue Officers A. Aluquin, M.A. Perez, G.L. Samoy, T. Villamor, S. Villarin & A. See to be supervised by Group Head G. Urot of Special Team created pursuant to RSO 673-98, to examine its books of accounts and other accounting records for all internal revenue taxes for the period 1997 and unverified prior years (*Exhibit 1*).
>
> On December 6, 1999 petitioner received a preliminary assessment notice for the proposed assessments for 1997 deficiency taxes and penalties in the gross amount of P15,462,527.51 (*Exhibit 3*). Petitioner protested the aforesaid proposed assessments on December 21, 1999 (*Exhibit 4*).
>
> After taking into account petitioner's protest on the preliminary assessment notice (*Exhibit 5*), respondent[2] issued the final assessment notices, formal letter of demand and details discrepancies *(sic)* on January 1, 1999 holding petitioner liable

---

[1] Herein respondent.
[2] Herein petitioner.

for the following deficiency taxes and penalties for late remittance of internal revenue taxes, to wit: (*1154 to 1161, BIR records*)

**DEFICIENCY VALUE-ADDED TAX**
**(Assessment No. ST-VAT-97-0124-2000)**

| | | |
|---|---|---|
| Basic Tax Due | | P7,958,700.00 |
| Add: Penalties | | |
| Interest up to 3-31-2000 | P3,157,314.41 | |
| Compromise | 25,000.00 | 3,182,314.41 |
| Deficiency Value-Added Tax Due | | P11,141,014.41 |

**DEFICIENCY EXPANDED WITHHOLDING TAX**
**(Assessment No. ST-EWT-97-0125-2000)**

| | | |
|---|---|---|
| Basic Tax Due | | P1,416,976.90 |
| Add: Penalties | | |
| Interest up to 3-31-2000 | P550,485.82 | |
| Compromise | 25,000.00 | 575,485.82 |
| Deficiency EWT Due | | P1,992,462.72 |

**LATE REMITTANCE OF VAT ON ROYALTY PAYMENTS**
**(Assessment No. ST-LR1-97-0126-2000)**

| | | |
|---|---|---|
| Basic Tax Due | | P - |
| Add: Penalties | | |
| Surcharge | P359,177.80 | |
| Interest up to 3-31-2000 | 87,580.34 | |
| Compromise | 16,000.00 | 462,758.14 |
| Penalties Due | | P 462,758.14 |

**LATE REMITTANCE OF FINAL WITHHOLDING TAX**
**(Assessment No. ST-LR2-97-0127-2000)**

| | | |
|---|---|---|
| Basic Tax Due | | P - |
| Add: Penalties | | |
| Surcharge | P1,729,690.71 | |
| Interest up to 3-31-2000 | 508,783.07 | |
| Compromise | 50,000.00 | 2,288,473.78 |
| Penalties Due | | P2,288,473.78 |

**LATE REMITTANCE OF INCOME PAYMENTS**
**(Assessment No. ST-LR3-97-0128-2000)**

| | | |
|---|---|---|
| Basic Tax Due | | P - |
| Add: Penalties | | |
| 25% Surcharge | P 8,865.31 | |
| Interest up to 3-31-2000 | 58.29 | |
| Compromise | 2,000.00 | 10,923.60 |
| Penalties Due | | P 10,923.60 |

| | |
|---|---|
| **GRAND TOTAL** | **P15,895,632.65** |

On February 2, 2000, petitioner filed its protest requesting the cancellation and/or reconsideration of the aforementioned final assessments (*pages 1222 to*

*1229, BIR records*). On February 16, 2000, petitioner submitted relevant documents to support its protest (*pages 1230 to 1246, BIR records*).

On October 24, 2000, within thirty (30) days after the lapse of one hundred eighty (180) days from submission of supporting documents with the respondent, petitioner filed the present Petition for Review."

### *The Ruling of the Court in Division*

After trial on the merits, the Court in Division rendered its assailed Decision on October 26, 2004. In canceling the deficiency assessment for deficiency VAT against herein respondent, the Court in Division ruled that the subsidized advertising expense paid by respondent and covered by a VAT invoice yielded an input VAT credit. However, the reimbursement of such expense does not involve a sale, barter or an exchange of goods or properties under Section 100 of the National Internal Revenue Code ("NIRC") of 1993, as amended. Neither was there an exchange of services. Consequently, there is no basis for the imposition of the ten percent (10%) VAT on the amounts reimbursed.

The Court in Division also stated that, assuming herein respondent is liable for the 10% VAT, still the deficiency assessment will not prosper, since the revenue examiners went beyond the authority conferred upon them by Letter of Authority ("LOA") No. 19734. The said LOA covered the period 1997 and unverified prior years but the deficiency VAT assessment was for fiscal year ended March 31, 1998. A deficiency assessment issued without a valid authority is a nullity. Anent the deficiency tax assessments the source of which the Court in Division could not verify based on the available records, the Court in Division assumed that the same were issued within the scope of LOA No. 19734. This is in consonance with the subsequent act of herein respondent in offering a tender of payment relative to the findings of herein petitioner on respondent's tax liability.[3]

However, the Court in Division sustained the EWT deficiency assessment on herein respondent's motor vehicles because respondent did not assail the validity of the said deficiency in its protest. It also affirmed the EWT deficiency assessment on professional fees paid to general professional partnerships since respondent failed to present relevant documents to support such claimed payments.

The Court in Division likewise subjected the amounts paid to sales agents as commission to five percent (5%) EWT pursuant to Section 1(g) of Revenue Regulations ("RR") No. 6-85. However, it invalidated the EWT assessment on rental expense since records show that the total rental deposit of P10,523,821.99 was incurred by herein respondent during the period January 1998 to March 1998. Such period was not covered by LOA No. 19734.

The Court in Division further held herein respondent liable for the penalties for the late payment of VAT on royalties in the amount of P429,242.07 except for the compromise penalty, in view of the admission of respondent. It likewise held respondent liable for penalties for the late remittance of final withholding tax ("FWT") on royalty as of December 1997.

Lastly, the Court in Division affirmed the imposition of penalties, except for the compromise penalty, for the late remittance of EWT by some of herein respondent's branches.

The dispositive portion of the assailed Decision reads as follows:

> "**WHEREFORE**, the petition for review is hereby ***PARTIALLY GRANTED***. Respondent is **ORDERED** to **CANCEL** and **WITHDRAW** the deficiency assessment

---

[3] Pages 117 to 118, CTA Records.

for value-added tax for 1997 for lack of merit. However, the deficiency assessments for expanded withholding tax and penalties for late remittance of internal revenue taxes are **UPHELD**.

Accordingly, petitioner is **DIRECTED** to **PAY** the respondent the deficiency expanded withholding tax in the amount of P1,035,879.70 and the following penalties for late remittance of internal revenue taxes in the sum of P1,269,593.90:

| | | |
|---|---|---|
| 1. | VAT on Royalty | P 429,242.07 |
| 2. | Withholding Tax on Royalty | 831,428.20 |
| 3. | EWT of Petitioner's Branches | 8,923.63 |
| Total | | P1,269,593.90 |

plus 20% delinquency interest from January 17, 2000 until fully paid pursuant to Section 249(C)(3) of the 1997 Tax Code.

**SO ORDERED.**"

Herein petitioner filed a Motion for Partial Reconsideration which was denied by the Court in Division in its Resolution dated April 28, 2005.

## *The Issues*

Hence, petitioner initiated this Petition for Review, raising the following issues:

"1. Whether or not respondent is liable for the deficiency VAT the *(sic)* amount of P11,141,014.41;

2. Whether or not the commission expense in the amount of P2,894,797.00 should be subjected to 10% withholding tax instead of the 5% tax rate;

3. Whether or not the withholding assessment with respect to the 5% withholding tax on rental deposit in the amount of P10,523,821.99 is proper; and

4. Whether or not the remittance of final withholding tax on royalties covering the period January to March 1998 was filed outside of time."

## *The Ruling of the Court En Banc*

The Petition for Review is bereft of merit.

We shall take up the issues in the order they are presented.

### *First Issue: Deficiency VAT Assessment*

***The revenue examiners acted without authority in arriving at the deficiency VAT assessment***

Herein petitioner avers that the period appearing in LOA No. 19734 should be understood to cover fiscal year ended March 31, 1998. He claims that when the revenue officers requested for the documents to be examined, herein respondent submitted those for the period April 1, 1997 to March 31, 1998. The period covered was allegedly never questioned by respondent in its protest letter filed with the BIR and in its Petition for Review. Hence, it should not be an issue in this case as matters not raised in the administrative level cannot be raised for the first time on appeal.

We disagree.

Indeed, it is axiomatic that facts not raised in the lower court cannot be taken up for the first time on appeal. Nonetheless, such rule is not absolute as the High Tribunal has ruled as follows:

> "The Supreme Court may review such matters as may be necessary to serve the interest of justice; it has ample authority to review and resolve matters not specifically raised or assigned as error by the parties if it finds that the consideration and determination of the same is necessary in arriving at a just resolution of a case. **Where the issues already raised also rest on other issues not specifically presented, as long as the latter issues bear relevance and close relation to the former and as long as they arise from matters on record, the Court has the authority to include them in its discussion of the controversy as well as to pass upon them**." [4](*Emphasis supplied*)

In the same vein, this Court is not precluded from resolving matters not specifically raised when the same are relevant and necessary in arriving at a just resolution of a case. The validity of LOA No. 19734 has a close relation to the validity of the deficiency assessments involved in this case and it arises from matters on record. Hence, the Court in Division did not err in ruling on the validity of LOA No. 19734 and We quote with approval its discussion on this issue in its assailed Decision, *viz*:

---

[4]Commissioner of Internal Revenue v. Hon. Court of Appeals and Atlas Consolidated Mining and Development Corporation, G.R. No. 106913, May 10, 1994, 232 SCRA 321.

"Even assuming that petitioner[5] is liable to output VAT, still the deficiency assessment will not prosper. The court noted that the revenue examiners went beyond the authority conferred to them by LOA No. 19734. **Pursuant to RAMO 2-95, a Letter of Authority authorizes or empowers a designated Revenue Officer to examine, verify and scrutinize a taxpayer's books and records in relation to his internal revenue tax liabilities for a particular period. In the present case, the letter of authority, the examiners were authorized to examine petitioner's books of accounts and other accounting records for the period "1997 & unverified prior years". However, the respondent's[6] basis for the deficiency value-added tax for year 1997 was the year 1998.**

Records disclose that petitioner is adopting a fiscal year ending March 31. The period specified in the letter of authority was for the year 1997 and prior years. If we harmonized the two, it follows that the examination should have been limited to the fiscal year ended March 31, 1997 and prior years. But since petitioner commenced its business operations only on October 1, 1997, it would render the letter of authority invalid because there was no business operation yet. Neither could we construe that the period referred in the letter of authority covered the fiscal year ended March 31, 1998 and prior years. As discussed, the period covered by the subject letter of authority was 1997 and prior years which was legibly typed-written thereon. **At most, the revenue examiners were authorized to examine transactions of petitioner for the period October 1997 to December 1997. Clearly then, the revenue examiners acted without authority in arriving at the deficiency VAT assessment. Thus, the same should be considered without force and effect. A deficiency assessment issued without a valid authority is a nullity.**"[7] *(Emphasis supplied)*

and in its assailed Resolution, *to wit*:

"The respondent in issuing the letter of authority had full knowledge of what period was subject of the investigation for purposes of an assessment. **Had the respondent wanted to include the year 1998 or the fiscal year ended March 31, 1998, he should have done so in accordance with Section 7 of the National Internal Revenue Code of 1993. And had there been a mistake in the issuance thereof, the revenue examiners could easily ask for the required authority from the respondent and not just make an investigation without proper authority.** That petitioner was willing to present documents for fiscal year ended March 31, 1998 did not cure the invalid act. It should emanate from the processes provided for by law. The rule is that a void act cannot be validated or ratified ***(Sps. Federico L. Reyes and Maxima Dela Paz, et al., vs. Court of Appeals and The Republic of the Philippines, G.R. No. 94524, September 10, 1998)***. An illegal act confers no rights, creates no duties, and in the eyes of the law, it is as if the same had never existed ***(Ismael A. Mathay, Jr. vs. Victor C. Macalincag, et al., G.R. No. 97618, December 16,1993).***"[8] (*Emphasis supplied*)

---

[5] Herein respondent.
[6] Herein petitioner.
[7] Pages 11 to 12, Decision dated October 26, 2004, C.T.A. Case No. 6185.
[8] Pages 3 to 4, Resolution dated April 28, 2005, C.T.A. Case No. 6185.

In addition, records show that LOA No. 19734 was issued for the examination of respondent's books of accounts and other accounting records for all internal revenue taxes *for the period from 1997 and unverified prior years.*[9] This is in blatant violation of Section C of Revenue Memorandum Order No. 43-90 dated September 20, 1990[10] which provides:

> "3. **A Letter of Authority should cover a taxable period not exceeding one taxable year. The practice of issuing L/As covering audit of "unverified prior years" is hereby prohibited.** If the audit of a taxpayer shall include more than one taxable period, the other periods or years shall be specifically indicated in the L/A." (*Emphasis supplied*)

***Reimbursed advertising expense is not subject to VAT***

We shall now proceed to discuss the deficiency VAT assessment which arose from petitioner's disallowance of input VAT credits from the advertising expense of respondent.

Petitioner argues that a subsidized advertising expense does not yield any input VAT credit. When a particular expense account, which has been previously paid, is later reimbursed by its parent company, the same reimbursed expense account is not the deduction contemplated by law as deductible for income tax purposes nor allowed as creditable input tax for VAT purposes.

Petitioner also asserts that assuming *arguendo* that the questioned input taxes are creditable, the amounts reimbursed constitute income on the part of respondent which is subject to output VAT at 10% by citing the case of *Philippine Mining Service Corporation vs. Commissioner of Internal Revenue, CTA Case No. 5725, July 25, 2002.*

We are not swayed by petitioner's contentions.

---

[9] Exhibit 1, Page 1125, BIR Records.
[10] Amendment of Revenue Memorandum Order No. 37-90 prescribing revised policy guidelines for Examination of Returns and Issuance of Letters of Authority to Audit.

In a recent case, the Supreme Court succinctly explained the VAT system of taxation as follows:

> "**Input VAT or input tax represents the actual payments, costs and expenses incurred by a VAT-registered taxpayer in connection with his purchase of goods and services.** Thus, "input tax" means the value-added tax paid by a VAT-registered person/entity in the course of his/its trade or business on the importation of goods or local purchases of goods or services from a VAT-registered person.
>
> **On the other hand, when that person or entity sells his/its products or services, the VAT-registered taxpayer generally becomes liable for 10% of the selling price as output VAT or output tax.** Hence, "output tax" is the value-added tax on the sale of taxable goods or services by any person registered or required to register under Section 107 of the (old) Tax Code.
>
> The VAT system of taxation allows a VAT-registered taxpayer to recover its input VAT either by (1) passing on the 10% output VAT on the gross selling price or gross receipts, as the case may be, to its buyers, or (2) if the input tax is attributable to the purchase of capital goods or to zero-rated sales, by filing a claim for a refund or tax credit with the BIR.
>
> Simply stated, a taxpayer subject to 10% output VAT on its sales of goods and services may recover its input VAT costs by passing on said costs as output VAT to its buyers of goods and services but it cannot claim the same as a refund or tax credit, while a taxpayer subject to 0% on its sales of goods and services may only recover its input VAT costs by filing a refund or tax credit with the BIR."[11] *(Emphasis supplied)*

In relation to the foregoing, deductions for input taxes from output taxes must be supported by a VAT invoice or receipt which must be issued in the name of the person to whom the service was rendered.[12] In the case of *Atlas Consolidated Mining & Development Corporation vs. Commissioner of Internal Revenue*,[13] the Supreme Court had the occasion to elucidate that "[i]t is clear that a VAT invoice can be used only for the sale of goods and services that are subject to VAT. The corresponding taxes thereon shall be allowed as input tax credits for those subject to VAT."

---

[11] Commissioner of Internal Revenue v. Benguet Corporation, G.R. No. 145559, July 14, 2006, 495 SCRA 59.
[12] Victor A. Deoferio, Jr. and Victorino C. Mamalateo, The Value Added Tax in the Philippines, First Edition, 2000, page 247.
[13] G.R. No. 134467, November 17, 1999, 318 SCRA 386.

As aptly pointed out by the Court in Division, an advertising expense is a legitimate business expense. Thus, once incurred and a VAT invoice is issued, the purchaser or buyer is entitled to input VAT credits pursuant to Section 104 of the 1993 NIRC.[14]

In the instant case, the subject advertising expenses that were incurred by respondent were evidenced by invoices issued to respondent by advertising companies.[15] Hence, based on the discussion above, We agree with the conclusion reached by the Court in Division that respondent is entitled to input VAT credits.

This brings Us to the bone of contention which is whether or not the subsidized advertising expense is an income on the part of respondent that is subject to output VAT under Section 100 of the 1993 NIRC, as amended by Republic Act No. 7716.[16]

We rule in the negative.

The rule is that a transaction will be subject to VAT if it involves a sale or lease of goods or properties or the performance of services in the course of trade or business pursuant to Section 99 of the 1993 NIRC[17], which provides:

> "SEC. 99. Persons Liable. — Any person who, in the course of trade or business, sells, barters, exchanges, leases goods or properties, renders services, and any person who imports goods shall be liable to the value-added tax (VAT) imposed in Sections 100 to 102 of this Code. xxx"

According to the Court in Division, the fact that the subject advertising expense is subsidized or reimbursed by Sony International Singapore does not make the same subject to output VAT as there was no sale, barter or exchange of goods or properties. This is pursuant to Section 100 of the 1993 NIRC which states:

> "SEC. 100. Value-Added Tax on Sale of Goods or Properties. —

---

[14] Now Section 110 of the 1997 NIRC.
[15] pages 8 to 9, Decision dated October 26, 2004, C.T.A. Case No. 6185.
[16] Now Section 106 of the 1997 NIRC.
[17] Now Section 105 of the 1997 NIRC.

> (A) Rate and Base of Tax. — There shall be levied, assessed and collected on **every sale, barter or exchange of goods or properties**, a value-added tax equivalent to ten percent (10%) of the gross selling price or gross value in money of the goods or properties sold, bartered or exchanged, such tax to be paid by the seller or transferor. (*Emphasis supplied*)

We agree with the ruling of the Court in Division that there is no reason for the imposition of output VAT on respondent's advertising expense since it is clear from the afore-cited provision that the 10% VAT is imposed only when there is a sale, barter or an exchange of goods or properties, none of which is present in the case at bar.

In its assailed Resolution, the Court in Division correctly explained that the case of *The Philippine Mining Service Corporation*, *supra*, relied upon by petitioner is not on all fours with the present case. In the said case, there was an exchange of goods for the service rendered. Dolomite Mining Corporation (DMC) was paying Philippine Mining Service Corporation (PMSC) in the form of dolomite ore in exchange for the latter's service. The payment of reimbursement of expense arose from the offsetting of charges between the parties which is absent in the instant case since there was no exchange of goods or services.

Moreover, as pointed out by respondent in its Comment, the PMSC case involves the issue of liability for output VAT based on the fact that the expenses incurred by the petitioner therein formed part of its taxable gross receipts subject to VAT. The Court ruled therein that reimbursable expenses that are evidenced by receipts in the name of the petitioner were subject to output VAT. On the other hand, the case at bar involves the issue of disallowance of input VAT on receipts for advertising expenses issued in the name of herein respondent.

Furthermore, there was likewise no exchange of services in the instant case. The Court in Division determined that the reason for the reimbursement by Sony

International Singapore of the advertising expense was the adverse economic condition experienced by respondent during that time.[18]

In this connection, the case of *Commissioner of Internal Revenue v. Court of Appeals and Commonwealth Management and Services Corporation*[19] *("COMASERCO")*, cited by petitioner does not apply to the present case as aptly discussed by the Court in Division in its assailed Decision, *to wit*:

> "The respondent's reliance on the Supreme Court's decision in the case of ***Commissioner of Internal Revenue vs. Court of Appeals and Commonwealth and Services Corporation (COMASERCO for brevity), G.R. No. 125355, March 30, 2000***, is misplaced. Pertinent portion of the said pronouncement reads as follows:
>
> > It is immaterial whether the primary purpose of a corporation indicates that it receives payments for **services rendered** to its affiliates on a reimbursement-on-cost basis only, without realizing profit, for purposes of determining liability for VAT **on services rendered**. As long as the entity provides service for a fee, renumeration or consideration, then the **service rendered** is subject to VAT.(*Emphasis supplied*)
>
> It is clear from the above ruling that there was a sale. COMASERCO rendered services to its affiliates. What were being taxed were these services rendered to its affiliates. Thus, the Supreme Court ruled that COMASERCO was liable to output VAT.
>
> It must be clarified that the payment on a "reimbursement-on-cost basis only, without realizing profit" was a manner of billing by COMASERCO to its affiliates. Such mode of pricing is not equivalent to the 'reimbursement' of advertising expense in the case at bar. Considering that there was no sale, barter or exchange of goods or properties in the instant case, the imposition of output VAT on subsidized advertising expense has no leg to stand on." (*Underscoring supplied*)

***Second Issue: Deficiency EWT Assessment on Commission Expense***

Petitioner avers that in the schedule of Selling, General and Administrative Expenses submitted by respondent to the BIR, the commission expense is captioned as "commission/dealer salesman incentive," hence, the imposition of the 10% EWT. RR No. 2-98 provides that if the recipient of the commission expense is a natural person, the 10% rate is applicable. Otherwise, the 5% rate for juridical persons shall be

---

[18] Page 1227, BIR records.
[19] G.R. No. 125355, March 30, 2000, 329 SCRA 237.

imposed. The 5% EWT provided in Section 1 (g) of RR No. 6-85 on commission paid to commercial brokers finds no application in the instant case as the payments made by respondent in the amount of P2,894,797.00 refers to payments made to individual salesmen and not to brokers.

Respondent, in its Comment, points out that the Appellate Division of the BIR in its Memorandum presented as *Exhibit "C"* of petitioner, admitted the erroneous imposition by the examiners of the 10% tax rate on commission payments made to sales agents or brokers. This was affirmed by the officers of the BIR during the review process (*Page 5 of Exhibit "D" of petitioner*).

We find no merit in petitioner's arguments.

In its assailed Decision, the Court in Division ruled on the subject deficiency EWT on commission expense as follows:

> "Petitioner, through counsel, objects to the imposition of 10% expanded withholding tax on its commission expense in the amount of P2,904,997.00. It expounds that: (*page 1226, BIR records*)
>
> > 2. The commission expense as per our client's records show an amount of P10,200 only (and not P2,904,997); furthermore, the 10% withholding tax rate applied on commission payments to sales agents or broker is erroneous since the rate applicable to broker is only 5% pursuant to Section 2.7.2(G) of Revenue Regulations No. 2-98.
>
> From the above explanation, it can be deduced that **petitioner is questioning only the rate applied by respondent to the sum of P2,894,797.00 (P2,904,997.00 less P10,200.00) in arriving at the deficiency EWT as it conceded that the commission expense in the amount of P10,200.00 was subject to 10% EWT. In view thereof, we are limiting our review on the correctness of the applicable rate under the category of sales agents and brokers.**
>
> Section 1(g) of Revenue Regulations No. 6-85 provides:
>
> > (g) Amounts paid to certain Brokers and Agents. — On gross payments to customs, insurance, real estate and commercial brokers and agents of professional entertainers — five per centum (5%).
>
> Based on the above regulation, the correct withholding tax on commission paid to brokers and agents is 5%. Applying this rate to the instant case will result to a total deficiency withholding tax of P145,759.85, computed as follows:

| | | Amount | Rate | Withholding Tax |
|---|---|---|---|---|
| 1. | Commission Expense | P10,200.00 | 10% | P1,020.00 |
| 2. | Broker, Dealer | 2,894,797.00 | 5% | 144,739.85 |
| | Total | P2,904,997.00 | | P145,759.85 |

(*Emphasis supplied*)

In its assailed Resolution, the Court in Division addressed the issue at hand in this wise:

> "While the commission expense in the schedule of Selling, General and Administrative expenses submitted by petitioner to the BIR (*page 1042, BIR records*) is captioned as "commission/dealer salesman incentive" the same does not justify the automatic imposition of flat 10% rate. As itemized by petitioner, **such expense is composed of 'Commission Expense' in the amount of P10,200.00 and 'Broker, Dealer' of P2,894,797.00** (*page 1226, BIR Records*)." (*Emphasis supplied*)

We concur with the foregoing disquisitions of the Court in Division. The real issue is the proper EWT rate on amounts paid to certain Brokers and Agents and the correct EWT rate is 5% as discussed above. Parenthetically, the applicable regulation is RR No. 6-85 as amended by RR No. 12-94 and not RR No. 2-98 as the subject assessment covers the taxable period 1997. Assuming *arguendo* that Section 2.57.2(G) of RR No. 2-98 applies, the EWT rate on amounts paid to certain Brokers and Agents therein is also 5% since such rate was increased to 10% only in the year 2001 pursuant to RR No. 6-2001 dated July 31, 2001.

***Third Issue: Deficiency EWT Assessment on Rental Deposit***

Petitioner submits that the 5% EWT assessment on rental deposit covering the period January 1998 to March 1998 is covered by LOA No. 19734 hence, the assessment is valid. It further notes that respondent did not question the period covered by the deficiency EWT on rental deposit.

As previously discussed, LOA No. 19734 was issued for the year 1997 and prior years. It is clear therefore, that the period January 1998 to March 1998 was not covered by the said LOA. Consequently, the subject 5% EWT assessment on rental deposit is invalid as correctly ruled by the Court in Division.

***Fourth Issue: Remittance of FWT on Royalties***

Petitioner insists that FWT on royalties covering the period January to March 1998 was filed outside of time. The same should have been remitted on or before April 10, 1998 following the provisions of Section 3 of RR No. 5-82 and Sections 2.57.4 and 2.58 (A) (2) (a) of RR No. 2-98. The agreement by Sony Philippines and Sony Japan as to the payment of royalty is different from what the law contemplates as the deadline for the remittance of the tax due. The due date for the remittance of the tax is not dependent on the agreement of the parties but rather on what the law provides for the due date of its remittance. Records of the respondent disclosed that it made accruals of royalty payments pertaining to the first quarter of 1998 in its Journal Voucher, and not in June 1998. The liability of the respondent as a withholding agent is different from its liability to its parent company wherein in the former, the tax becomes due at the time of its accrual.

Respondent, in its Comment, asserts that under the Manufacturing License Agreement between respondent and Sony Japan, royalties related to the sales for the period January to March 1998 are payable on August 1998. Since respondent paid the royalty at an earlier date (June 1998), respondent properly remitted the withholding tax on July 10, 1998 (within ten days following the end of the month of such payment). The provisions of RR 2-98 were controlling at the time of withholding hence, petitioner cannot apply the provisions of RR 12-2001 dated September 7, 2001 to the instant case where it is required that the withholding be done at the time of accrual.

We cannot give credence to petitioner's contentions.

It must be emphasized that since the period in question pertains to royalty for January to March 1998, the applicable regulation is RR No. 2-98 prior to its amendment by RR No. 12-2001.

The obligation of the payor to withhold arises at the time an income is paid or payable, whichever comes first. Such rule is provided in Section 2.57.4 of RR No. 2-98, which reads as follows:

> "SECTION 2.57.4. Time of Withholding. — The obligation of the payor to deduct and withhold the tax under Section 2.57 of these regulations arises at the time an income is paid or payable, whichever comes first. The term "payable" refers to the date the obligation become due, demandable or legally enforceable."

To determine when the subject royalty is "paid or payable", it is necessary to refer to the terms of the Manufacturing License Agreement between respondent and Sony-Japan.[20] Article X(5) thereof provides:

> "(5) **Within two (2) months following each semi-annual period ending June 30 and December 31, the LICENSEE shall furnish to the LICENSOR a statement,** certified by an officer of the LICENSEE, showing quantities of the MODELS sold, leased or otherwise disposed of by the LICENSEE during such respective semi-annual period and amount of royalty due pursuant this ARTICLE X therefor, and **the LICENSEE shall pay the royalty hereunder to the LICENSOR concurrently with the furnishing of the above statement**."[21] *(Emphasis supplied)*

As correctly deduced by the Court in Division, the obligation of herein respondent to pay royalty to Sony-Japan arises within two months following each semi-annual period ending June 30 and December 31. Thus, royalty is payable (at the latest) at the end of August and February. Since there was an accrual of royalty as of June 1998, the corresponding FWT should have been paid and remitted on or before July 10, 1998 pursuant to Section 2.58 of RR No. 2-98, *viz*:

> "Section 2.58. RETURNS AND PAYMENT OF TAXES WITHHELD AT SOURCE. —

[20] Pages 317 to 354, CTA Records.
[21] Page 326, CTA Records.

*(A) Monthly return and payment of taxes withheld at source*

xxx xxx xxx

(2) WHEN TO FILE —

(a) The withholding tax return, whether creditable or final, shall be filed and payments should be made within 10 days after the end of each month except for taxes withheld for December which shall be filed or before January 25 of the following year."

Since herein respondent remitted the subject FWT on royalty payments for the period January to March 1998 on July 8, 1998, then there was indeed no late remittance of FWT.

In fine, We see no cogent reason to reverse the assailed Decision promulgated on October 26, 2004 and the Resolution dated April 28, 2005.

**WHEREFORE**, the instant petition is hereby **DISMISSED.** Accordingly, the assailed Decision and Resolution are hereby **AFFIRMED**.

**SO ORDERED**.

**LOVELL R. BAUTISTA**
Associate Justice

***WE CONCUR:***

**ERNESTO D. ACOSTA**
Presiding Justice

**JUANITO C. CASTAÑEDA, JR.**
Associate Justice

**ERLINDA P. UY**
Associate Justice

**CAESAR A. CASANOVA**
Associate Justice

**OLGA PALANCA-ENRIQUEZ**
Associate Justice

## CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of this Court.

**ERNESTO D. ACOSTA**
Presiding Justice