REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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PRUDENTIAL BANK,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 7251

Members:

ACOSTA, *Chairperson,*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:

JUL 11 2007 ; 1:05PM

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D E C I S I O N

ACOSTA, P.J.:

This Petition for Review seeks the withdrawal and cancellation of the Formal Letter of Demand and Assessment Notice No. 00-000029, dated August 27, 2004, issued by the Commissioner of Internal Revenue against petitioner, for the collection of deficiency Gross Receipts Tax (GRT) on Foreign Currency Deposit Unit (FCDU) transactions for the year 2000 in the amount of **Six Million Three Hundred Sixty Eight Thousand Seven Hundred Forty Two Pesos** (P6,368,742.00), inclusive of interest, surcharge and compromise penalty.

The facts as culled from the records and jointly stipulated by the parties are as follows:

Petitioner is a banking corporation organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office at Prudential Bank Building, Ayala Avenue, Makati City. Respondent, on the other hand, is the agency of the government tasked with the enforcement of revenue laws and the collection of taxes and duties.

On December 18, 2003, petitioner received from respondent a Preliminary Assessment Notice dated November 17, 2003, demanding payment for alleged deficiency Documentary Stamp Taxes (DST) on Special Savings Account and Gross Receipts Tax (GRT) on petitioner's Foreign Currency Deposit Unit (FCDU) transactions, covering taxable year 2000, in the amounts of P7,099,383.00 and P5,057,259.23 respectively.

And on January 5, 2004, petitioner filed a position paper, requesting the cancellation of the said Preliminary Assessment Notice for lack of legal and factual bases.

In response, respondent sent a Revised Preliminary Assessment Notice dated May 5, 2004, which petitioner received on June 15, 2004, informing the latter of its deficiency GRT on its FCDU transactions in the amount of P6,147,051.99, excluding the assessment for alleged deficiency DST.

On June 30, 2004, petitioner again filed a position paper, this time questioning the Revised Preliminary Assessment Notice and praying that it be withdrawn and cancelled, still for lack of factual and legal bases and prescription.

However, on September 21, 2004, petitioner received from respondent a Formal Letter of Demand and Assessment Notice No. 00-000029 dated August 27, 2004, reiterating the demand for the payment of its deficiency GRT on FCDU transactions for taxable year 2000, in the amount of P6,368,742.00, including surcharge, interest and compromise penalty.

Then on October 15, 2004, petitioner,filed an administrative protest dated October 11, 2004 against the said Formal Letter of Demand and Assessment Notice alleging among others that petitioner's FCDU transactions are not subject to any kind tax save for the 10% final tax under the National Internal Revenue Code.

On April 25, 2005, petitioner received a copy of respondent's Final Decision dated March 9, 2005, denying the protest and demanding the payment the assessment in the amount of P6,368,742.00, plus interest from October 1, 2004, until the time of actual payment.

Unfazed, this Petition for Review was filed on May 13, 2005.

On July 8, 2005, respondent filed an Answer alleging the following Special and Affirmative Defenses:

> "3. Section 28(A)(7)(b) of the **Tax Reform Act of 1997**, as amended, provides:
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> > Section 28. **Rates of Income Tax on Foreign Corporations.-**
> >
> > (A) Tax on Certain Incomes Received by a Resident Foreign Corporation.-
> > xxx.
> > xxx.
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> > (b) Income Derived under the Expanded Foreign Currency Deposits *(sic)* System. – Income derived by a depository bank under the expanded foreign currency deposit system from foreign currency transactions with local commercial banks including branches of foreign banks that may be authorized by the Bangko Sentral ng Pilipinas (BSP) to transact business with foreign currency deposit system units end *(sic)* other depository banks under the expanded foreign currency deposit system, including interest income from foreign currency loans granted by such depository banks under said expanded foreign currency deposit system to residents *(sic)* shall be subject to final income tax at he *(sic)* rate of ten percent (10%) of such income.
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> 4. Justices Jose C. Vitug and Ernesto D. Acosta, in their book **Tax Law Jurisprudence** *(sic)*, Second Edition [2000], page 86 thereof, simplified the rules on foreign currency transactions, thus:
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> > <u>Special Rules on Foreign Currency Transactions</u>

i. Income derived by offshore banking units authorized by the Bankgo Sentral ng Pilipinas from foreign currency transactions with: (a) Local commercial banks and (b) Branches of foreign banks duly authorized by the Bangko Sentral ng Pilipinas to transact business with offshore banking units are subject to 10% final tax.

ii. Income derived by depository banks under the expanded foreign currency deposit system from foreign currency transactions with (a) Local Commercial banks, (b) branches of foreign banks, and (c) Other depository banks under the expanded foreign currency deposit system are subject to 10% final income tax.

iii. Interest from foreign currency loans granted to residents (by offshore banking units or depository banks under the expanded foreign currency deposit system) shall be subject to 10% final tax.

iv. Income of non-residents whether individual or corporation from transactions with said offshore banking units are tax-exempt.

v. Interest income derived by a domestic or a resident foreign corporation from a depository bank under the expanded currency deposit system shall be subject to a final tax of 7.5%.

5. Thus, onshore income on FCDU transactions are now subject to gross receipts tax in view of the deletion of the phrase 'exempt from all taxes' from Section 28 (D)(3) of the National Internal Revenue Code of 1997.

6. In **ING Bank [Manila Branch] vs. Commissioner of Internal Revenue**, CTA Case No. 6017, March 11, 2002, this Honorable Court held:

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Prior to the amendment introduced by the Tax Reform Act of 1997, Section 25(a)(6)(B) of the 1997 Tax Code provides:

(B) **Income derived under the Expanded Foreign Currency System**. – Income derived by a depository bank under the expanded foreign currency deposit system from foreign transactions with non-residents, offshore banking units in the Philippines, local commercial

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> banks including branches of foreign banks that may be authorized by the Central Bank of the Philippines to transact business with foreign currency deposit system units and other depository banks under the expanded foreign currency deposit system shall be exempt from all taxes except taxable income from such transactions as may be specified by the Secretary of Finance, upon recommendation of he *(sic)* Monetary Board to be subject to the usual income tax payable by banks: Provided, That interest income from foreign currency loans granted by such depository banks under said expanded system to residents (other than offshore expanded banking units in the Philippines or other depository banks under the expanded system shall be subject to a 10% tax.
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> xxx. *(Underscoring supplied)*

The above exemption, as implementation *(sic)* by Revenue Regulations No. 10-76, included *(sic)* exemption from documentary and science stamp tax, gross receipts tax and branch profit remittance tax.

With the advent of the Tax Reform Act of 1997, the phrase 'exempt from taxes' has been deleted in section 28(A)(7)(b), to wit:

> (b) **Income Derived under the Expanded Foreign Currency Deposit System**.- Income derived by a depository bank under the expanded foreign currency deposit system from foreign currency transactions with local commercial banks that may be authorized by the Bangko Sentral ng Pilipinas (BSP) to transact business with foreign currency depository system units and other depository banks under the expanded foreign currency deposit system, including interest income from foreign currency loans granted by such depository banks under said expanded foreign currency deposit system to residents, foreign currency deposit system to residents shall be subject to a final income tax at the rate of ten percent (10%) of such income.
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> Any income of nonresidents whether individuals or corporations, from transactions

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> with depository banks under the expanded system shall be exempt from income tax.
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> By the clear import of the present law, income derived by a branch of a foreign bank that may be authorized by the Bangko Sentral ng Pilipinas to transact business with foreign currency deposit system units, like herein Petitioner, shall be subject to a final tax of 10%. The phrase 'exempt from all taxes' has been deleted by the legislators. The amendment by deletion of certain words or phrases in a statute indicated that the legislative intended to change the meaning of the statute *(Gloria vs. Court of Appeals, 306 SCRA 287)*. By virtue of such deletion, Revenue Regulations No. 10-76, which implemented the old law is no longer applicable. In other words, the payment of 10% final tax on FCDU income does not exempt Petitioner from the payment of branch profit remittance tax or other taxes for that matter.
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> xxx.
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> Taxes are the lifeblood of the nation; the Court has always applied the doctrine of strict interpretation in construing tax exemptions. Furthermore, a claim a *(sic)* statutory exemption from taxation should be manifest and unmistakable from the language of the law on which it is based. Thus, the claimed exemption must expressly be granted in a statute stated in a language too clear to be mistaken *(Commissioner of Internal Revenue vs. Court of Appeals, 298 SCRA 83)*.
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> Petitioner would like Us to consider that despite the plain provision of the present tax law the phrase 'exempt from all taxes' still applies to its FCDU income.
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> It cannot be overemphasized that under the 1997 Tax Code, 'tax exemption from all taxes' relative to FCDUs can no longer be found. Hence, there is no construction to speak of in the first place. Besides, even if there is such a tax exemption, the same should be strictly construed against the taxpayer. Petitioner's existence *(sic)* that it is still covered by the tax-exempt *(sic)* provision of the old law as implemented by Revenue Regulations No. 10-76 is quite absurd and contrary to sound reasoning. xxx.

7. The gross interest income from onshore transactions is subject to the ten percent (10%) final tax (Hector S. De Leon and Hector M.

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De Leon, Jr., **The National Internal Revenue Code Annotated**, 8th edition [2003], p. 214).

8. The assessment was issued in accordance with law and regulations. It was not arbitrary but based on actual audit conducted pursuant to Audit Notice No. 1160006711561 dated April 25, 2002.

9. Contrary to petitioner's allegation that returns have already been filed for percentage tax purposes, it was the requirement and petitioner's practice to file separate returns for RBU and for FCDU as in the case of Income Tax. Thus, petitioner's contention that it has filed returns for the purpose is without basis. Hence, the prescriptive period to assess is ten (10) years from the discovery of the failure to file returns as provided in Section 222 of the Tax Code.

10. Assuming *arguendo* that petitioner filed percentage tax returns, its failure to declare its onshore income on FCDU transactions rendered the returns false. Hence, the period to assess is ten (10) years from the discovery of the falsity of the returns (Section 222, Tax Code).

11. The twenty five percent (25%) surcharge has been imposed pursuant to the provision of Section 248 of the Tax Code.

12. The twenty percent (20%) interest per annum has been imposed pursuant to the provision of Section 249(b) of the Tax Code.

13. Finally, all presumptions are in favor of the correctness of tax assessments. The good faith of tax assessors and the validity of their actions presumed. They are presumed to have taken into consideration all the facts to which their attention was called ***(CIR vs. Construction Resources of Asia, Inc.,** 145 SCRA 671 [1986]).* It is incumbent upon the taxpayer to prove the contrary ***(Mindanao Bus Company vs. CIR**, 1 SCRA 538, [1961]; **CIR vs. Tuason, Inc.**, 173 SCRA 397 [1989])* and failure to do so shall vest legality to respondent's actions and assessments."

On January 2, 2006, petitioner filed its Formal Offer of Evidence, consisting of Exhibits "A and A-1 to A-3". On the other hand, respondent, during the hearing on February 22, 2007, submitted this case for decision based on the pleadings.

On April 4, 2007, this case was submitted for decision, with only petitioner's Memorandum filed on March 27, 2007.

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The core of the controversy is the correctness of the assessment for Gross Receipts Tax (GRT) against petitioner for its Foreign Currency Deposit Unit (FCDU) transactions and corollary thereto, whether such assessment has already been barred by prescription.

Petitioner was assessed for its deficiency gross receipts tax on its foreign currency deposit unit transactions for the taxable year 2000. It submits that it is not liable thereto, based on the following grounds, to quote:

1. Absent any express repeal by the 1997 Tax Code, the provisions of the Foreign Currency Deposit Act subjecting FCDU transactions to 10% final tax and exempting the same from all other taxes remain effective.[1]

2. Republic Act 9294, restoring the tax exemption of OBUs and FCDUs is a curative statute which should be applied retroactively effective upon the enactment of the 1997 Tax Code.[2]

3. The parties are bound by the Waiver of the Defense of Prescription.[3]

4. The amount indicated in the Formal Letter of Demand/Assessment Notice No. 00-000029 is arbitrary and lacks factual basis.[4]

5. The alleged deficiency GRT assessed against the Bank not being legally due, no surcharge, interest or compromise penalties may also be assessed. Moreover, no compromise penalty may be imposed on petitioner as compromise requires mutual consent of the parties.[5]

Petitioner asserts that Congress did not intend to remove the exemption of FCDUs from taxes. Petitioner claims that "the deletion of the exemption of FCDU's income from all taxes other than the 10% final tax under the 1997 Tax Code does not subject FCDUs to other taxes imposed under the Tax Code."[6] According to petitioner, similar to the other Tax Codes, the 1997 Tax Code does not expressly repeal the provisions in PD 1035 granting an exemption to FDCUs from all taxes, other than a final tax on certain income. Moreover, adds petitioner, repeal by implication is generally frowned upon.

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[1] *Pages 5-6, Petition for Review.*
[2] *Pages 14-15, supra.*
[3] *Page 17, supra.*
[4] *Page 19, supra.*
[5] *Page 20, supra.*
[6] *Page 12, supra.*

This allegedly finds support in the enactment of Republic Act No. 9294,[7] where during the deliberations a categorical statement was made regarding the lack of intent to replace the original decree PD 1035, so as to give basis for FCDUs and OBUs continued enjoyment of exemption from taxes. Petitioner implies that the same is an admission on the part of the Government that there was a mistake in the drafting of the 1997 Tax Code.

Petitioner also maintains that Republic Act No. 9294 is a curative statute sought to remedy the defect in the 1997 Tax Code and thus, should be applied retroactively.

On the issue of the FCDU's taxability, the Court is not swayed by petitioner's ratiocinations.

Prior to the amendment introduced by the National Internal Revenue Code (NIRC) of 1997, Section 25(a)(6)(B) of the 1977 Tax Code provides that:

> **(B) Income derived under the Expanded Foreign Currency Deposit System. — Income derived by a depository bank under the expanded foreign currency deposit system** from foreign currency transactions with non-residents, offshore banking units in the Philippines, local commercial banks including branches of foreign banks that may be authorized by the Central Bank of the Philippines to transact business with foreign currency depository system units and other depository banks under the expanded foreign currency deposit system **<u>shall be exempt from all taxes</u>**, except taxable income from such transactions as may be specified by the Secretary of Finance, upon recommendation of the Monetary Board to be subject to the usual income tax payable by banks: Provided, That interest income from foreign currency loans granted by such depository banks under said expanded system to residents (other than offshore banking units in the Philippines or other depository banks under the expanded system) shall be subject to a 10% tax.
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> Any income of non-residents from transaction with depositary banks under the expanded system shall be exempt from income tax. *(Underscoring supplied)*

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[7] *Act Restoring the Tax Exemption of Offshore Banking Units (OBUs) and Foreign Currency Deposit Units (FCDUs), amending for the purpose Section 27 (D)(3) and Section 28, Paragraphs (A)(4) and (A)(7)(b) of the National Internal Revenue Code, as amended.*

With the amendments introduced in the 1997 NIRC, the phrase "exempt from taxes" has been deleted, as can be seen from Section 27 (D)(3),[8] the provision on Expanded Foreign Currency Deposit Units:

> **(3) Tax on Income Derived under the Expanded Foreign Currency Deposit System.** — **Income derived by a depository bank under the expanded foreign currency deposit system** from foreign currency transactions with local commercial banks, including branches of foreign banks that may be authorized by the Bangko Sentral ng Pilipinas (BSP) to transact business with foreign currency depository system units and other depository banks under the expanded foreign currency deposit system, including interest income from foreign currency loans granted by such depository banks under said expanded foreign currency deposit system to residents, shall be subject to a final income tax at the rate of ten percent (10%) of such income.
>
> Any income of nonresidents, whether individuals or corporations, from transactions with depository banks under the expanded system shall be exempt from income tax.

By the clear import of the present law, income derived by a depository bank under the foreign currency deposit units from foreign currency transactions with local commercial banks shall be subject to a final tax of 10%. And the phrase **"exempt from all taxes"** has definitely been deleted by the legislators.

The amendment by deletion of certain words or phrases in a statute indicates that the legislature intended to change the meaning of the statute.[9] It is a basic rule in statutory construction that there is no safer nor better canon of interpretation than that when the language of the law is clear and unambiguous, it should be applied as written.[10]

Petitioner cannot argue that there was no intent on the part of Congress to delete the phrase "exempt from all taxes". In the August 11, 1997 deliberations of the Senate, anent

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[8] *And Section 28 (A)(7)(b) of the same Code*
[9] *Gloria vs. Court of Appeals, 306 SCRA 287*
[10] *Bank of America NT & SA vs. Court of Appeals, 234 SCRA 302*

Section 28(A)(7)(b) of the NIRC of 1997, of which Senator Enrile was the author, this intent was clearly present, to quote[11]:

> "Senator Angara: Yes, Mr. President. Let me move to my next point, and that is the lifting of the preferential tax treatment of FCDUs as well as OBUs.
>
> Mr. President, would this not cause some drastic consequences on offshore as well as foreign currency deposits which I understand today are the prime sources of our current account spending? Many of our exporters depend on this FCDUs and OBUs for their foreign exchange needs, and if we remove the preferential tax treatment that we (sic) have been enjoying all these years, are we not going to drive away the foreign currency deposits and OBUs from our shore?
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> Senator Enrile: Mr. President, money goes to a place where it can make money. Whether we have the tax on FCDUs or OBUs, if depositors can make a margin that is favorable to them, they will be here. Business makes profit because it assumes risk.
>
> I do not subscribe to the theory that these people will run away. In fact, they are saying that because of the announcement we made, on this FCDUs, deposits are flying away from the country. But if we look at the figures, Mr. President, out of a total of P17 billion or so, only a little over P200 million left the country. But, I think, this P200 million left the country to pay for obligations in order to stave off a potential increase in the peso equivalent of the foreign currency obligation, and not because of the effort to tax FCDUs. That is one.
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> Two, we are not discussing here a problem of competition between pesos and dollars or deutschmark or francs. **We are talking here of equity in taxation, Mr. President. These are the more affluent members of the taxable community and yet, they get away with their tax burden. Another thing that I cannot take is, as a member of this Senate and as a member of the community, that we should tax depositors of our own currency in banks and exclude from taxation depositors of foreign currencies. We are insulting our own currency.**
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> Senator Angara: Mr. President, I can accept all the reasons given by the sponsor. But this repeal of the exemption to me is a very strong signal that we are changing policies in the middle of the stream. We attracted these FCDUs as well as OBUs on the premise that their income will be subject to special tax or in some cases, the offshore income of FCDUs will be exempt from any taxation. Now we are saying, "No, we do not need you anymore."

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[11] *Transcript of the Senate Session on the Tax Reform Act on August 11, 1997*

> Unfortunately, Mr. President, based on our representation in the past, they come here and they have transacted business, they have helped exporters and other Filipinos needing foreign exchanges, and now we are saying "No more".
>
> Is it not a very drastic message we send to the financial market of the world?
>
> Senator Enrile: Mr. President, it is good that this point was raised by the distinguished gentleman from Aurora.
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> **I would like to put into the *Record* that the exemption of FCDUs from paying income tax in the Philippines as well as the secrecy of their bank deposits was introduced in 1977, on November 21, 1977, under Presidential Decree No. 1246 by the then President Ferdinand E. Marcos. I would like to remind the nation and this Chamber that they have been enjoying this tax concession since then.**
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> **But what have they done at a time when we were in crisis? In 1983, 1984, 1985, 1986 all the way to 1990, they all flew away. They left the country. So it is not really a question of taxation that is involved here. It is a question of whether the economy is stable enough, strong enough to lessen the risk. They will withdraw from this country even if we give them all these tax concessions and the secrecy for as long as they feel that they are going to risk their capital because of the economic weakness of the country—not because we are taxing them. They will remain here as other foreign businessmen and Filipino businessmen will remain in business even if we tax them if they can make money."**

Further, the fact remains that Congress passed a new law incorporating the amendment introduced by Senator Enrile. This removed the tax exemption of OBUs and FCDUs on their foreign currency transactions. The intent of Congress to subject OBUs and FCDUs to tax is thus clear. There being no effective exemption to speak of in this case, all applicable taxes became due.

The enactment of a subsequent law restoring the tax exemption is of no moment. It does not necessarily follow that the true intent of Congress, during the time when the amendment deleting the phrase "exempt from all taxes" was shown when Republic Act No.

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9294[12] was enacted, even if it restored the tax exemption of FCDUs and OBUs. Nor does it follow that the restoration of such exemption would give rise to the retroactive application of the tax exemption of FCDUs and OBUs.

In other words, prior to the effectivity of the subsequent law restoring the subject tax exemption, there was no longer a tax exemption to speak of, in view of the amendment removing such exemption.

To reiterate, under the NIRC of 1997, the phrase "shall be tax exemption from all taxes" relative to FCDUs can no longer be found. And the petitioner's insistence that it is still covered by the tax-exempt provision of the old law is quite absurd and contrary to sound reasoning.[13] The same is diametrically opposed to the clear provision of the law.

Since taxes are the lifeblood of the nation, this Court has always applied the doctrine of strict interpretation in construing claim for tax exemptions. Furthermore, a claim of statutory exemption from taxation should be manifest and unmistakable from the language of the law on which it is based. Hence, the claimed exemption must expressly be granted in a statute stated in a language too clear to be mistaken.[14]

Petitioner also argues that the assessment has prescribed. As provided under Section 203 of the 1997 NIRC, the government must assess not later than three (3) years, counted from and after the period fixed by law for the filing of the tax return or the date of actual filing, whichever is the later date, subject to exceptions provided under Section 222 of the same code. Under this provision, the period to assess may be extended by an agreement in writing of the Commissioner and the taxpayer.

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[12] *An Act Restoring the Tax Exemption of Offshore Banking Units (OBUs) and Foreign Currency Deposit Units (FCDUs), amending for the purpose Section 27(D)(3) and Section 28, paragraph (A)(4) and (A)(7)(b) of the National Internal Revenue Code*
[13] *ING Bank vs. Commissioner of Internal Revenue, CTA Case No. 6017, March 11, 2002*
[14] *Commissioner of Internal Revenue vs. Court of Appeals, 298 SCRA 83*

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According to petitioner, it was on January 5, 2004, when the Waiver of the Defense of Prescription was signed, giving respondent until February 29, 2004 to assess any tax deficiency against it. Thus, the Formal Letter of Demand issued on August 27, 2004, is already barred by prescription.

On the other hand, respondent counters that the ten year prescriptive period applies, due to petitioner's failure to file a return as provided by Section 222 of the Tax Code. Further, according to respondent, even assuming for the sake of argument that petitioner indeed filed percentage tax returns, its failure to declare its onshore income on its FCDU transactions rendered the returns false, making the ten year prescriptive period to assess, still applicable.

In this regard, Section 203 of the National Internal Revenue Code of 1997, as amended, provides:

> SEC. 203. Period of Limitation Upon Assessment and Collection. — Except as provided in Section 222, **internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return**, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day. *(Emphasis Supplied)*

Pursuant to the said provision, the three-year period to assess commences from the date of actual filing of the return or from the last date prescribed by law for the filing of such return, whichever comes later. Relative thereto, under Section 128(A)(1), NIRC of 1997, in relation to Section 121 of the same code, Gross Receipts Tax (GRT) returns are filed on a quarterly basis and the tax due thereon paid within twenty five days after the end of each taxable quarter.

In this case, it is undisputed that petitioner received the Formal Letter of

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Demand/Assessment Notice No. 00-000029 dated August 27, 2004, on September 21, 2004. The same was clearly issued beyond the three-year period prescribed by law within which the respondent could issue an assessment against petitioner. Further, even assuming that the Waiver of the Defense of Prescription is valid, the same extended the period to assess up to only February 29, 2004, thus, the assessment was still issued belatedly.

However, the Court finds merit in respondent's allegation that the ten year prescriptive period should apply in this case. Section 222 of the NIRC provides for exceptions to the period of limitations on the assessment and collection of taxes and applicable is paragraph (a) thereof, which reads:

> "In the case of a **false or fraudulent return with intent to evade tax or of failure to file a return**, **the tax may be assessed**, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within **ten (10) years after the discovery of the falsity, fraud or omission**: *Provided*, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof." *(Emphasis Supplied)*

Put differently, in cases of (1) fraudulent returns; (2) false returns with intent to evade tax; and (3) failure to file a return, the period within which to assess tax is ten years from discovery of the fraud, falsification or omission, as the case may be.

With regard to the first circumstance, it has been consistently held that in order to render a return made by a taxpayer a "false return" within the meaning of Section 222, there must appear, a design to mislead or deceive on the part of the taxpayer, or at least culpable negligence. Moreover, the burden of proving fraud is with respondent, for one of the disputable presumptions provided the Revised Rules of Court is that the law has been obeyed.

In this case, there is no iota of evidence presented by the respondent as to any fraud or falsity on the return with intent to evade payment of tax. Fraud is a question of fact and the circumstances constituting fraud must be alleged and proved. It is never lightly presumed

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because it is a serious charge.[15]

As can be seen from the records, petitioner failed to file a return for the taxes being assessed against it. Hence, respondent correctly argued that due to such failure, the period within which to assess tax is ten years from the discovery of such omission, as provided in Section 222 (a), as above-quoted.

Finally, as regards the correct amount of tax liability, this Court finds partial merit in petitioner's argument. It is stressed that a compromise penalty presupposes an arrangement or agreement between the parties as to the payment of the amount due. The essence of a compromise penalty is mutuality and its unilateral imposition is without legal basis.[16] It is illegal and unauthorized.[17] As mutuality is not present in this case, no compromise penalty may be imposed. Thus, reduction of the amount of petitioner's tax liability by P25,000.00, representing compromise penalty, is in order.

Accordingly, the subject Petition for Review is hereby **PARTIALLY GRANTED**. Petitioner is hereby **ORDERED TO PAY** respondent the modified amount of **SIX MILLION THREE HUNDRED FORTY THREE THOUSAND SEVEN HUNDRED FORTY TWO PESOS** (P6,343,742.00), representing deficiency gross receipts tax on FCDU for taxable year 2000, computed as follows:

Gross Receipts for the period	P63,881,170.62
Tax Rate	.05
Tax Due	3,194,058.53
Less: Payments	0
Basic Deficiency FCDU GRT	3,194,058.53
Add: Surcharge	798,514.63
Interest	2,351,168.84
TOTAL DEFICIENCY GRT	**P6,343,742.00**

In addition, a twenty (20%) percent delinquency interest per annum, from October 1,

[15] *Commissioner of Internal Revenue vs. Ayala Securities Corporation, 70 SCRA 204*
[16] *Commissioner of Internal Revenue vs. Lianga Bay Logging Co., 193 SCRA 86, quoting Collector vs. UST, 100 Phil 1062, Phil. International Fair vs. Collector, G.R. Nos. L-12928 and L-12932, March 1962.*
[17] *Supra.*

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2004, as demanded by respondent in the Final Decision on the Disputed Assessment is hereby imposed pursuant to Section 249 of the NIRC of 1997, as amended, until such amount is fully paid.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

WE CONCUR:

LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ERNESTO D. ACOSTA
Presiding Justice