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

***SECOND DIVISION***

**COMMISSION ON ELECTIONS, Represented by ATTY. MARIA NORINA S. TANGARO-CASINGAL, Acting Director IV of the Law Department,**
*Petitioner,*

**CTA CASE NO. 8929**

- versus-

**Members:**

Castañeda, Jr., *Chairperson*
Casanova, and
Cotangco-Manalastas, *JJ.*

**COMMISSIONER OF INTERNAL REVENUE,**
*Respondent.*

**Promulgated:**
AUG 02 2016 1:00 p.m.

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

**DECISION**

**COTANGCO-MANALASTAS, *J.:***

This involves a Petition for Review filed by the Commission on Elections, represented by Atty. Esmeralda Amora-Ladra, Director IV of the Law Department. The Petition prays for the cancellation of an assessment for deficiency expanded withholding tax (EWT) for taxable year 2008, in the amount of P49,082,867.69 plus increments that may have legally accrued, issued by respondent Commissioner of Internal Revenue against petitioner.

## FACTS

Petitioner Commission on Elections (COMELEC) is a constitutional commission mandated to "enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum, and recall.[1]

Respondent Commissioner of Internal Revenue (CIR) is the government authority duly designated to collect all taxes, grant refunds, issue and abate tax assessments, and examine books of accounts and returns filed with it to determine the correctness of taxes paid under the National Internal Revenue Code.[2]

The events leading up to the instant assessment were narrated in the parties' Joint Stipulation of Facts[3], as follows:

1. Republic Act No. 8436, as amended by Republic Act No. 9369, authorized the Commission on Elections to use an Automated Election System in the 11 May 1998 National and Local Elections, and in subsequent national or local elections thereafter. Section 10 of R.A. No. 9369 provides:

   SEC. 10. Section 8 of Republic Act No. 8436 is hereby amended to read as follows:

   "SEC. 12. Procurement of Equipment and Materials. – To achieve the purpose of this Act, the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent, or other forms of acquisition, supplies, equipment, materials, software, facilities and other services, from local or foreign sources <u>free from taxes and import duties</u>, subject to accounting and auditing rules and regulations. xxx"

2. On 09 May 2008, Petitioner entered into a Contract with Smartmatic Sahi Technology, Inc. for the lease, with option to purchase, of optical mark readers relative to the conduct of the August 2008 Autonomous Region for Muslim Mindanao (ARMM) Regional Election;

[1] Petitioner's Memorandum, p. 2; docket, p. 282.
[2] Joint Stipulation of Facts and Issues, par. 7, docket, p. 248.
[3] Id, pp. 247-249.

3. On 15 May 2008, Petitioner entered into a Contract of Lease with Option to Purchase of Optical Mark Readers with Avante International Technology, Inc. (Avante) for the August 2008 ARMM Regional Election;

4. Both contracts of lease involved the procurement of at least three thousand fifty (3,050) units of electronic voting machines free from import tariffs and duties and other taxes pursuant to RA 8436, as amended by RA 9369;

5. For both contracts of lease, COMELEC paid the amount of Php525,091,672.46 to Smartmatic and Php87,519,180.00 to Avante International;

6. xxx

7. xxx

8. On 23 April 2010, Petitioner received Letter of Authority No. 00000716 dated 20 April 2010, which was revalidated on 17 March 2011 with electronic Letter of Authority No. SN eLA 201000044346, authorizing Revenue Officers Yzarina D. Brana, Lina B. Maaliw and Ma. Aileen Labiga under Group Supervisor Marvin C. Sevilla of Revenue District Office No. 33, Intramuros-Ermita-Malate, to examine the books of accounts and other accounting records of the petitioner for all withholding taxes covering taxable year 2008;

9. As a result of the investigation, Petitioner was found to be liable for Expanded Withholding Tax (EWT) in the amounts of P26,269,583.62 and 4,375,959.00 *(sic)* failure to deduct, withhold and remit the required expanded tax on income payments made by Petitioner on account of the lease of properties from Smartmatic Sahi Technology, Inc. (Smartmatic) and Avante International, Inc. (Avante), respectively;

10. A Notice of Informal Conference dated 8 December 2010 was issued and received by Petitioner on 10 December 2010 reiterating the abovestated EWT assessments and requesting

Petitioner to appear for an informal conference to present its side of the case. The informal conference was held on December 21, 2010 where it was agreed that COMELEC has until January 10, 2011 to file its position paper on the said EWT assessments;

11. On 21 January 2011, Petitioner submitted its position paper praying for the cancellation of subject EWT assessments;

12. On 8 June 2011, a Preliminary Assessment Notice (PAN) was issued which was received by Petitioner on 13 June 2011, demanding payment of the total amount of P45,592,340.89 as Deficiency Expanded Withholding Tax (EWT) for the taxable year 2008. Petitioner duly responded to the PAN through a letter dated 28 June 2011;

13. Thereafter, Final Assessment Notice No. 33-08-WE-1678 with the corresponding Formal Letter of Demand both dated 13 January 2012 were issued by Revenue Region No. 6, Manila against Petitioner which it received on the same date, demanding payment of the deficiency EWT for the taxable year 2008;

14. The deficiency expanding withholding tax assessment was issued for failure of COMELEC to present proof of EWT payments on the lease contracts with Smartmatic and Avante, pursuant to Section 57 of the National Internal Revenue Code, as amended, in relation to Revenue Regulations No. 2-98, as amended;

15. On 13 February 2012, Petitioner filed a protest letter dated 10 February 2012 and was later supplemented by another letter dated 12 April 2012 with an attached Letter of Termination No. 9643 and Memorandum of Regional Director of Revenue Region No. 1, Calasiao, Pangasinan, as supporting documents;

16. On 15 October 2012, the protest against the Final Assessment Notice was denied for lack of merit by OIC-Regional Director Simplicio A.

Madulara of Revenue Region No. 6, which Petitioner received on October 30, 2012. It further reiterated the immediate payment of the assessment issued against Petitioner;

17. On 14 November 2012, a Motion to Suspend Collection of Payment of the EWT was filed by Petitioner which was subsequently denied by the OIC-Regional Director on 21 November 2012;

18. Petitioner then filed an administrative appeal on the denial of its administrative protest with the Office of the Commissioner, Bureau of Internal Revenue which was served through registered mail as evidenced by Registry Receipt No. 72989 dated 29 November 2012;

19. On October 16, 2014, the Commission on Elections received the Decision of the BIR Commissioner Jacinto-Henares dated October 7, 2014 denying its appeal with an Order to pay the assessed deficiency EWT; xxx

The instant Petition was filed on November 18, 2014, with respondent's Answer, filed on December 23, 2014.[4]

The Court issued its Pre-Trial Order on July 3, 2015.[5] On the first hearing date, set on August 3, 2015, petitioner's counsel manifested that the sole issue in the case is purely a question of law, which manifestation was confirmed by respondent's counsel. As prayed for, the Court granted the parties thirty days within which to submit their memoranda.[6]

After an extension was granted, petitioner and respondent filed their respective Memoranda on September 18, 2015.[7] The case was deemed submitted for decision on September 21, 2015.[8]

[4] Docket, pp. 148-156.
[5] Docket, pp. 253-257.
[6] Docket, p.260.
[7] Docket, pp. 269-280, and pp. 281-295.
[8] Docket, p. 299.

## ISSUES

The sole issue raised by the parties is:

> "Whether or not the COMELEC, pursuant to Republic Act 8436 as amended by Republic Act 9369, is liable for deficiency expanded withholding tax for taxable year 2008 under Final Assessment Notice No. 33-08-WE-1678 dated January 13, 2012."[9]

## DISCUSSION/RULING

In the case at bar, the assessment involves deficiency expanded withholding tax (EWT) for taxable year 2008, covering COMELEC's payments to Smartmatic and Avante under the lease contracts entered into for the August 2008 ARMM Regional Election.

COMELEC admits that it did not impose or withhold EWT from its payments to Smartmatic and Avante, on the ground that COMELEC enjoys a tax-exempt status under RA 9369.

COMELEC argues that it is granted tax-exempt status on all taxes and import duties in relation to the procurement of an automated election system. COMELEC bases its position on Republic Act No. 8436, Section 12[10], which is quoted below:

> "Sec. 12. Procurement of Equipment and Materials. – To achieve the purpose of this Act, the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities and other services, from local or foreign sources <u>free from taxes and import duties</u>, subject to accounting and auditing rules and regulations. xxx

[9] Docket, p. 250.

[10] Previously Section 8 of RA 8436, until re-numbered and amended by Section 10 of Republic Act No. 9369.

COMELEC argues that the aforesaid exemption was provided to support the implementation of the automation project and to avoid the situation of getting the money from one pocket of the government and putting the same in the other.[11] COMELEC also argues that the exemption did not distinguish what kind of tax it is exempted from, and given that the withholding tax is still a tax, it should not be faulted for its failure to withhold such tax.[12]

On the other hand, respondent Commissioner of Internal Revenue (CIR) argues that the assessment has become final and executory, and thus no longer appealable to the Court of Tax Appeals. Further, respondent argues that the exemption provided to the COMELEC is limited only to the payment of duties and taxes related to COMELEC's purchase, lease, rent or acquisition of election materials and equipment but does not cover withholding taxes on payments made to local supplier of goods and services.[13] Respondent notes that COMELEC's tax liability is separate and distinct from its duty as withholding agent. COMELEC may be free from the payment of all kinds of taxes and import duties as a taxpayer, but it can still be held liable for its obligation as a withholding agent.

The Court agrees with respondent.

Under the creditable withholding tax system, taxes withheld on certain income payments are intended to equal or at least approximate the tax due of the payee on said income.[14] The persons required to deduct and withhold include all government offices.[15] COMELEC is one such office which is required to deduct and withhold the creditable withholding tax on its income payments to local suppliers.

In Commissioner of Internal Revenue vs. Philippine Long Distance Telephone Company[16], the Supreme Court held:

> "It may be so that in Maceda vs. Macaraig, Jr., the Court held that an exemption from "all taxes" granted to the National Power Corporation (NPC) under its

[11] Docket, p. 290.
[12] Docket, p. 291.
[13] Docket, p. 274.
[14] Revenue Regulations 2-98, as amended, Section 2.57.B.
[15] Id., Section 2.57.3(C).
[16] G.R. 140230, December 15, 2005.

> charter includes both direct and indirect taxes. But far from providing PLDT comfort, Maceda in fact supports the case of herein petitioner, the correct lesson of Maceda being that an exemption from "all taxes" excludes indirect taxes, unless the exempting statute, like NPC's charter, is so couched as to include indirect tax from the exemption." (*underscoring ours, citations omitted*)

The Court went on to differentiate direct and indirect taxes, as follows:

> "In context, direct taxes are those that are exacted from the very person who, it is intended or desired, should pay them; they are impositions for which a taxpayer is directly liable on the transaction or business he is engaged in.
>
> On the other hand, indirect taxes are those that are demanded, in the first instance, from, or are paid by, one person in the expectation and intention that he can shift the burden to someone else. Stated elsewise, indirect taxes are taxes wherein the liability for the payment of the tax falls on one person but the burden thereof can be shifted or passed on to another person, such as when the tax is imposed upon goods before reaching the consumer who ultimately pays for it. When the seller passes on the tax to his buyer, he, in effect, shifts the tax burden, not the liability to pay it, to the purchaser as part of the price of goods sold or services rendered." (*citations omitted*)[17]

By analogy, COMELEC's exemption which is phrased as "free from taxes and import duties" refers only to the direct taxes imposed upon the purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities and other services, from local or foreign sources, absent any showing that indirect taxes are included therein.

Assuming even, that indirect taxes are included in COMELEC's exemption, this would not be of help to COMELEC in the instant case as what is involved is a deficiency assessment for its failure to withhold expanded withholding tax on its lease contract payments to its suppliers.

The deficiency expanded withholding tax is not a direct tax on COMELEC, neither is it an indirect tax that has been

---

[17] *Id.*

passed on to COMELEC by its suppliers. Rather, as explained by the Supreme Court in LG Electronics Philippines, Inc. vs. Commissioner of Internal Revenue[18], withholding taxes are different and distinct from income tax and indirect taxes, to wit:

> "In the seminal case of Fisher v. Trinidad, this court defined income tax as 'a tax on the yearly profits arising from property, professions, trades, and offices.' Otherwise stated, income tax is the 'tax on all yearly profits arising from property, professions, trades or offices, or as a tax on a person's income, emoluments, profits and the like.'
>
> On the other hand, withholding tax is a method of collecting income tax in advance. 'In the operation of the withholding tax system, the payee is the taxpayer, the person on whom the tax is imposed, while the payor, a separate entity, acts no more than an agent of the government for the collection of the tax in order to ensure its payment. Obviously, the amount thereby used to settle the tax liability is deemed sourced from the proceeds constitutive of the tax base.'
>
> xxx
>
> > 'Indirect taxes, like VAT and excise tax, are different from withholding taxes. To distinguish, in indirect taxes, the incidence of taxation falls on one person but the burden thereof can be shifted or passed on to another person, such as when the tax is imposed upon goods before reaching the consumer who ultimately pays for it. On the other hand, in case of withholding taxes, the incidence and burden of taxation fall on the same entity, the statutory taxpayer. The burden of taxation is not shifted to the withholding agent who merely collects, by withholding, the tax due from income payments to entities arising from certain transactions and remits the same to the government.' (*underscoring ours, citations omitted*)

Thus, based on the foregoing Supreme Court pronouncements, the exemption granted to COMELEC does

[18] G.R. No. 165451, December 3, 2014.

not include an exemption from its duty to withhold taxes from its income payments to its suppliers.

Petitioner COMELEC has stated that it did not impose or withhold the expanded withholding tax from its payments to Smartmatic and Avante.[19] This is a failure on the part of COMELEC to perform its duty to withhold the tax and remit the same to the government. Therefore, the assessment must be upheld, but only with respect to the basic deficiency tax.

With respect to the additions and increments to the basic tax, Sections 249 and 247 of the National Internal Revenue Code (NIRC) of 1997, as amended, are instructive.

Section 249 provides for the imposition of interest, as follows:

> "Sec. 249. Interest. –
>
> (A) In General. – There shall be assessed and collected on any unpaid amount of tax, interest at the rate of twenty percent (20%) per annum, or such higher rate as may be prescribed by rules and regulations, from the date prescribed for payment until the amount is fully paid.
>
> (B) Deficiency Interest. – Any deficiency in the tax due, as the term is defined in this Code, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof.
>
> (C) Delinquency Interest. – In case of failure to pay:
>
> (1) The amount of the tax due on any return to be filed, or
>
> (2) The amount of the tax due for which no return is required, or
>
> (3) A deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner, there shall be assessed and

[19] Docket, p. 17.

> collected on the unpaid amount, interest at the rate prescribed in Subsection (A) hereof until the amount is fully paid, which interest shall form part of the tax."

Relative hereto is Section 247 of the NIRC of 1997, which states that:

> "Sec. 247. General Provisions. –
>
> (a) The additions to the tax or deficiency tax prescribed in this Chapter shall apply to all taxes, fees and charges imposed in this Code. The Amount so added to the tax shall be collected at the same time, in the same manner and as part of the tax.
>
> (b) <u>If the withholding agent is the Government or any of its agencies</u>, political subdivisions or instrumentalities, or a government-owned or controlled corporation, <u>the employee thereof responsible for the withholding and remittance of the tax shall be personally liable for the additions to the tax prescribed herein</u>.
>
> (c) The term 'person', as used in this Chapter, includes an officer or employee of a corporation who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs." (*Underscoring ours*)

Based on the afore-quoted provisions, it is petitioner's employee responsible for the withholding and remittance of the tax that will be personally liable for the accrued interest, deficiency interest and/or delinquency interest on the deficiency tax imposed on petitioner.

**WHEREFORE**, the instant Petition for Review is hereby **PARTIALLY GRANTED**.

Finding that petitioner COMELEC has the duty to withhold and remit the expanded withholding tax from its payments to its suppliers, the assessment for such failure to withhold and remit the withholding taxes is **UPHELD** with respect to the basic deficiency expanded withholding tax assessment. Accordingly, petitioner COMELEC is **ORDERED**

**TO PAY** the respondent the amount of P49,082,867.69 as deficiency expanded withholding tax for taxable year 2008.

However, petitioner shall not be held liable for the interests in addition to the basic tax due, pursuant to Sections 247(b) and 249 of the NIRC of 1997, as amended.

**SO ORDERED.**

**AMELIA R. COTANGCO-MANALASTAS**
Associate Justice

**WE CONCUR:**

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

**CAESAR A. CASANOVA**
Associate Justice

**ATTESTATION**

I attest 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.

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

## CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution and the Division Chairperson's Attestation, 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.

**ROMAN G. DEL ROSARIO**
Presiding Justice