REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SOLID BANK CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 5408

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
APR 14 1999

x - x

DECISION

This is a petition for review filed by the petitioner, SOLID BANK CORPORATION, against respondent Commissioner of Internal Revenue, for the latter's inaction on petitioner's claim for refund/tax credit of the amount of ₱2,355,180.15 which was later increased to P3,174,913.65 in the Amended Petition for Review filed on April 18, 1997. The amount of P3,174,913.65 allegedly represents petitioner's overpaid gross receipts taxes for 1994.

As represented, petitioner is a banking institution duly organized and existing under the laws of the Republic of the Philippines, with principal office located at 777 Paseo de Roxas Ave., Makati City.

For the four quarters of 1994, petitioner filed with respondent its quarterly percentage tax returns and paid the corresponding gross receipts tax (GRT) for each of the said quarters, hereunder summarized, the tax base of

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which allegedly includes the passive income which was subjected to twenty percent (20%) final taxes, already withheld and paid to respondent by the various clients of petitioner.

Period Covered	GRT	Date Paid	Exh.
1st Qtr. (Jan. to March, 1994)	P10,828,574.14	4-20-94	B
2nd Qtr. (April to June, 1994)	9,712,474.02	7-20-94	C
3rd Qtr. (July to Sept. 1994)	13,345,471.07	10-20-94	D
4th Qtr. (Oct. to Dec., 1994)	9,598,669.41	1-20-95	E

After taking into account the decision of this Court dated January 30, 1996, in the case of Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720, which ruled that the 20% final withholding tax on interest income should not form part of the taxable gross receipts, petitioner filed with the respondent on July 19, 1996 an application for a tax refund/tax credit of its alleged overpaid GRT for the year 1994 in the aggregate amount of P2,355,180.15 (see page 113 to 116, CTA Records).

Gross Receipts Subjected to the Final Tax Derived from Passive Investment	P318,258,030.00
	x 20%
20% Final Tax Withheld at Source	P 47,103,603.00
	x 5%
Overpaid 5% Gross Receipts Tax	P 2,355,180.15

As can be seen from the above computation made by the petitioner's tax consultant, SGV and Co., there appears to be an error in the final amount of

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P47,103,603.00 which allegedly represents the 20% final tax withheld from P318,258,030.00. The correct amount should have been P63,651,606.00. This error in computation was repeated in petitioner's original petition for review filed in this Court on July 19, 1996. Petitioner later rectified this mistake in its Amended Petition for Review filed on April 18, 1997 where petitioner now claims that the amount of gross receipts derived from passive income which was actually subjected to 20% final tax for taxable year 1994 was P317,491,365.44 and not P318,258,030.00 as mentioned in the earlier petition. Thus, it said that its claim for refund for its overpaid gross receipts tax for 1994 should be increased to P3,174,913.65, computed as follows:

Gross Receipts Subjected to the Final Tax Derived from Passive Income	P317,491,365.44
	x 20%
20% Final Tax Withheld at Source	P 63,498,273.01
	x 5%
Overpaid 5% Gross Receipts Tax	P 3,174,913.65

Petitioner presents the proposition as reason of the petition for review that the gross receipts tax it paid in the year 1994 were based on the total gross receipts, inclusive of the passive income which were subjected to the 20% final withholding tax at source, thus, it stressed that in the light of this Court's ruling in the Asian Bank case, *supra*, which states that the 20% final

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withholding tax on interest income should not form part of the taxable gross receipts, petitioner has actually overpaid the amount legally due from it insofar as its GRT obligations are concerned, hence, a refund is therefore, in order.

Respondent on the other hand, by way of special and affirmative defenses, alleges that (1) petitioner's claim for tax refund/credit is still undergoing administrative routinary investigation/examination by respondent's Bureau; (2) the alleged refundable/creditable gross receipt taxes were collected and paid pursuant to law and pertinent BIR implementing rules and regulations, hence, the same is not refundable. x x x; (3) petitioner's allegation that it erroneously and excessively paid its gross receipt tax during the year under review does not *ipso facto* warrant the refund/credit. x x x; (4) petitioner must likewise prove that the alleged refundable/creditable gross receipt taxes were neither automatically applied as tax credit against its tax liability for the succeeding quarter/s of the succeeding year nor included as creditable taxes declared and applied to the succeeding taxable year/s; (5) claims for tax refund/credit are construed in *strictissimi juris* against the taxpayer as it partakes the nature of an exemption from tax and it is incumbent upon the petitioner to prove that it is entitled thereto under the

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law; and (6) petitioner must prove that it has complied with the provision of Section 230 of the Tax Code.

The legal issue which is presented for our consideration is whether or not the 20% final withholding tax on certain passive income of the petitioner should be excluded in the taxable gross receipts.

We find merit in petitioner's contention that the 5% gross receipts tax should be based on the gross receipts net of the 20% withholding tax already paid by petitioner on its passive income.

This is not the first time that this Court has been confronted with such an issue at hand. As correctly stated by the petitioner, this Court has resolved the same issue in the case of **Asian Bank Corporation vs. Commissioner of Internal Revenue,** ***supra***, which is anchored on similar factual circumstances and on all fours with the case at bar. Hence, we find no cogent justification to depart from the wisdom of our decision in said case, which states in part, to wit:

> "The assessment for GRT is based on Section 119 of the Tax Code, quoted hereunder thus:
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> > **SEC. 119.** ***Tax on banks and non-bank financial intermediaries.*** -There shall be collected a tax on gross receipts derived from sources within the Philippines by all banks and non-bank financial intermediaries in

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accordance with the following schedule:

(a) On interest, commissions and discounts from lending activities as well as income from financial leasing, on the basis of remaining maturities of instruments from which such receipts are derived.

Short-term maturity not in excess of two (2) years	5%
Medium-term maturity-over two years but not exceeding four (4) years	3%
Long-term maturity: (i) Over four (4) years but not exceeding seven (7) years	1%
(ii) Over seven (7) years	0%

(b) On dividends 0%

(c) On royalties, rentals of property, real or personal, profits from exchange and all other items treated as gross income under Section 28 of this Code 5%

Provided, however, That in case the maturity period referred to in paragraph (a) is shortened thru pretermination, then the maturity period shall be reckoned to end as of the date of pretermination for purposes of classifying the transaction as short, medium or long term and the correct rate of tax shall be applied accordingly.

Nothing in this Code shall preclude the Commissioner from imposing the same tax herein provided on persons performing similar banking activities.

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The aforequoted provision of the law speaks of gross receipts as the basis of the 5% bank tax or GRT, and it is petitioner's contention that the interest income included as part of such gross receipts should be computed minus the final tax already withheld by various withholding agents for the reason that such amount did not actually go to its funds, hence was not actually received by them.

We agree with the petitioner that the 20% final withholding tax on its interest income should not form part of its taxable gross receipts.

Revenue Regulations No. 12-80 dated November 7, 1980 on Taxation of Certain income Derived from Banking Activities provides that the rates of tax to be imposed on the gross receipts of such financial institution; shall be based on all items of <u>income actually received</u>, thus:

> SEC. 4. xxx xxx xxx
>
> (e) *Gross receipts tax on banks, non-bank financial intermediaries, financing companies, and other non-bank financial intermediaries not performing quasi-banking activities.*-The rates of taxes to be imposed on the gross receipts of such financial institutions <u>shall be based on all items of income actually received</u>. Mere accrual shall not be considered, but once payment is received on such accrual or in cases of prepayment, then the amount actually received shall be included in the tax base of such financial institutions, as provided hereunder. (Underscoring supplied)

From the foregoing, it is but logical to infer that the final tax, not having been received by the petitioner but instead went to the coffers of the government, should no longer form part of its gross receipts for the purpose of computing the GRT. This conclusion is in accord with the interpretation of the Supreme Court in the case entitled **Collector of Internal Revenue vs. Manila Jockey Club,** 108 Phil. 821, as quoted by this Court in disposing of a similar issue in the case entitled **Compania Maritima vs. Acting Commissioner of Internal Revenue,** CTA Case No. 1426 dated November 14, 1966, thus:

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In the second place, the highest tribunal of the land interpreted the term "gross receipts: to mean all receipts of a taxpayer excluding those which have been especially earmarked by law or regulation for the government or some person other than the taxpayer. Thus, it was held:

> "xx xx. The government could not have meant to tax as gross receipt of the Manila Jockey Club the 1/2 % which it directs same club to turn over to the Board of Races. The latter being a Government institution, there would be double taxation, which should be avoided unless the statute admits of no other interpretation. In the same manner, the Government could not have intended to consider as gross receipt the portion of the funds which it directed the Club to give, to winning horses and Jockeys-admitted 5%. It is true that the law says that out of the total wager funds 12 1/2 % shall be set aside as the 'Commission' of the track owners but the law itself takes official notice, and virtually approves or directs payment of the portion that goes to owners of horses as prizes and bonuses of jockeys, which portion is admittedly 5% out of the 12 1/2 % commission. As it did not at that time contemplate the application of 'gross receipts' revenue principle, the law in making a distribution of the total wager funds, took no trouble of separating one item from the other; and for convenience, grouped three items under one common denomination.
>
> "Needless to say, gross receipts of the proprietor of the amusement place should not include any money which although delivered to the amusement place has been especially earmarked by law or regulation for some person other than the proprietor." (The Commissioner of Internal Revenue vs. Manila Jockey

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> Club, Inc., G.R. Nos. L-13890 & L-13887, June 30, 1960)
>
> It is to be noted that, under Section 260 of the Tax Code, a race-track is subject to an amusement tax of 20% of its gross receipts and the term 'gross receipts' embraces all the receipts of the proprietor, lessee, or operator of the amusement place." Notwithstanding the broad and all-embracing definition of the term "gross receipts" found in our amusement tax law, our Supreme Court did not adopt a literal interpretation of the said term in the case of the Manila Jockey Club, Inc., *supra*."

The legal issue having been settled, what remains to be resolved by this Court now involves factual matters and that is whether or not petitioner has established by evidence its claim for refund.

It must be declared at the outset that petitioner's claim for refund relating to the first quarter of the taxable year 1994, falls outside the two-year prescriptive period for claiming a refund based on Section 230 of the Tax Code, as amended, in relation to Section 125 (a) (1) of the same code. In counting for the two-year prescriptive period, the filing of the quarterly percentage tax return should be considered. The records show that petitioner filed its Quarterly Percentage Tax Return for the first quarter of 1994 on April 20, 1994 while the instant petition for review was filed on July 19, 1996. Clearly, it can be concluded that the portion of the claim referring to the first quarter can no longer be considered in the ultimate analysis due to prescription.

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As to the rest of the three quarters of 1994, We find that petitioner is not entitled to the refund being claimed.

A minutiose scrutiny of the petitioner's evidence, reveals that the evidence adduced by the petitioner did not clearly establish the accuracy of the claimed refund. The Court was not properly guided by petitioner as to how much of its gross sales/receipts/earnings corresponding to the passive investments were subjected to 5% tax rate, how much were subjected to 3% tax rate and how much were subjected to 1 and 0 percent rate. It appears in the case at bar that petitioner used the flat rate of 5%. It is to be noted that in the Quarterly Percentage Tax Returns offered as Exhibits "B","C","D" and "E", the amount of gross receipts were clearly subdivided into 5%,3% and 1%, but this represents the totality of the gross receipts of petitioner. What this Court would like to know is what portion of the income derived from passive investments was subjected to 5%,3% and 1%. Petitioner did not apprise Us of this important aspect. Furthermore, Petitioner failed to show to this Court how the refundable amount of P3,174,913.65 was arrived at and it failed to attach thereto the source documents of the same. In other words, there is no way by which this Court can determine how much petitioner is legally entitled to.

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Furthermore, to be entitled to the refund sought, petitioner is beholden to prove to this Court that(1) it paid GRT to the respondent; (2) that the same is over or in excess of the GRT required by law; and (3) that it complied with Section 230 (now 229) of the Tax Code on the filing of the claim for refund(BPI Capital vs.Commissioner of Internal Revenue, CTA Case No. 5457,March 1, 1999). Moreover, it is also the bounden duty of petitioner to prove to this Court that the total amount of the 20% final withholding taxes on interest income (which were allegedly deducted from gross receipts/sales/earnings of petitioner for the period in question as a result of the Asian Bank ruling of this Court to arrive at the correct GRT and the claimed refundable amount) were withheld and remitted by its withholding agents to the herein respondent(Bank of the Philippine Islands vs. Commissioner of Internal Revenue, CTA Case No. 5458, February 15, 1999) To comply with these requirements, petitioner must present the Statements or Certificates of Tax Withheld at Source issued by its withholding agents, together with a summary of the same, as these documents will clearly show how much final taxes were withheld and remitted by the withholding agents to the respondent, for the account of the petitioner. The total of these 20% final taxes withheld from petitioner's interest income will be the

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basis of the amount which will be deducted from the total gross receipts of the petitioner for the period in question, before the same will be subjected to the 5%, 3%, 1%, 0% GRT rate as required by Sec. 119, ***supra***, and as discussed in the Asian Bank case. In the case at bar petitioner presented no evidence to this effect. Although petitioner presented a Summary of the passive investments made and the corresponding income earned on these investments (Exhibit "G"), this is not sufficient to prove the fact of payment of the 20% withholding tax on said passive income. No proof was given by the petitioner to this effect. This Court finds further that petitioner failed to prove to this Court how much of the total gross receipts derived from passive income were subjected to final withholding tax at source at the rate of 20%. The certification from the Bangko Sentral ng Pilipinas (Exhibit "F") pertains only to the final taxes withheld from petitioner's purchases of Treasury Bills. The records clearly show that petitioner not only earned interest income from government securities but also from trading commercial papers (see Exibit "G-36-a1). This fact was even admitted by the petitioner's witness, Ed Oliveros during the hearing held on April 30, 1997 (see Tsn dated April 30, 1997, pages 8 to 9). The amount of final taxes withheld from these transactions (trading of commercial papers) could not be determined because of the

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failure of petitioner to present supporting documents. Furthermore, petitioner did not present the documents denominated as Confirmation of Purchase/Sale, Trading Sheets to support the data indicated in the Summary of Income-Investments for the year 1994 pertaining to Trading Gain.

A comparative analysis of the figures found in the Summary of Petitioner's Subsidiary Ledger (Exhibit "G") with the actual entries found in the Subsidiary Ledger (Exhibits "G-1" to "G-89") also reveals that petitioner purchased government securities for various clients, in fact the bulk of the entries pertain to entities other than Solidbank (petitioner herein). This gives rise to the possibility that petitioner acted as an investment manager and that the money used in purchasing the securities were sourced from other clients, thus the interest income accrued to said clients instead of the petitioner. It is simple logic then to conclude that these amounts cannot be included in the present claim for refund as these taxes pertaining to said income were not paid by petitioner. In the instant case, petitioner did not present a plausible explanation, by way of documentary or testimonial evidence, to shed light on the doubts which these documents created.

While it is true that in the case at bar petitioner adduced some documents to support its claim for refund,

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the Court finds the same insufficient to grant the desired relief of petitioner. Plainly stated petitioner fell short in its obligation to submit the evidence which would have worked to its advantage.

Thus, applying the settled rule in this jurisdiction that, a claim for refund is in the nature of a claim for exemption, hence should be construed in strictissimi juris against the taxpayer, (***Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd., 244 SCRA 332***), we rule the issue in the negative.

IN THE LIGHT OF ALL THE FOREGOING, the instant petition is **DISMISSED,** for insufficiency of evidence, with costs against petitioner.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

RAMON O. DE VEYRA
Associate Judge

(Dissenting)
AMANCIO Q. SAGA
Associate Judge

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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DISSENTING OPINION

The conclusion embodied in this decision denied the entire claim for refund due to insufficiency of evidence.

I humbly submit that the denial should have been based on the claim for refund's lack of legal basis, instead of dismissing the petition on the ground of insufficient evidence to substantiate the claim.

The petitioner anchored its claim on the ruling of this Court in the case of **Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720 dated January 30, 1996** where this Court upheld the petitioner's contention that the interest income included as part of such gross receipts should be computed minus the 20% final tax already withheld and deducted by various withholding agents.

I find the aforementioned Asian Bank ruling erroneous.

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Section 8(c) of Revenue Regulations No. 12-80 dated November 7, 1980, as amended by Section 7(c), Revenue Regulations No. 17-84 dated October 12, 1984, clearly provides:

> "If the recipient of the above-mentioned items of income are financial institutions, the same shall be included as part of the tax base upon which the gross receipts tax is imposed."

It can be concluded from the aforementioned provision that the taxable base for purposes of gross receipts tax is the gross-up amount, inclusive of the 20% final income tax withholding.

Furthermore, contrary to the declaration made by this Court in the aforecited Asian Bank case, the Supreme Court's decision in the case of **Commissioner of Internal Revenue vs. The Manila Jockey Club, Inc. 108 Phils. 821, June 30, 1960,** which was reaffirmed by the said Court in the case of **Visayan-Cebu Terminal Co., Inc. vs. Commissioner of Internal Revenue, 13 SCRA 357, February 27, 1965** cannot be considered as precedent cases, hence, inapplicable to the two cases decided by this Honorable Court in the cases of **Compania Maritima vs. Acting Commissioner of Internal Revenue, CTA Case No. 1426 dated November 14, 1966 and Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720 dated January 30, 1996,** for the following reasons:

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1) In the Manila Jockey Club, Inc. case, the Club was authorized to operate horse races in which betting was made through the sale of tickets to the public. The total amount of bets called "wager fund" were distributed pursuant to Executive Order No. 320 and Republic Act No. 309, as follows:

87½% as dividends to holders of winning tickets

12½% as "commissions" of the Manila Jockey Club, of which ½% was assigned to the Board on Races and 5% was distributed as prizes for owners of winning horses and authorized bonus for jockeys.

According to the above-mentioned distribution of the "wager fund", the then Collector of Internal Revenue assessed the Club on the whole amount of its "commission" of 12½%. But since the Club had already paid the amusement tax based on its 7% share of the "commission", the amount assessable pertains only to the 5½% for the period from November 1946 to October 1950. On various instances, the Club protested the proposed assessments and was sustained by the opinions of the Secretary of Justice rendered on three different occasions (Opinion No. 345, series of 1941; Opinion No. 249, series of 1952 and Opinion No. 340, series of 1955).

Notwithstanding the opinions of the Secretary of Justice to the effect that the amount corresponding to the 5½% was held only by the Club in trust for the owners of winning horses and authorized bonuses of jockeys, the then Collector of Internal Revenue demanded payment of

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amusement taxes for the period November 1946 to October 1950. Said demand letter was timely appealed to the Court of Appeals wherein a unanimous judgment was obtained reversing the Collector's stand on the matter. In the High Court, the position of the Secretary of Justice was sustained thereby upholding the Court of Tax Appeals' decision.

Accordingly, gross receipts of the proprietor of the amusement place should not include any money which, although delivered to the amusement place was "<u>especially earmarked</u>" by law or legal rule or regulations for some persons other than the proprietor. Undeniably, they are money received by the racing club but they are moneys earmarked by law or regulations for winning horse owners and jockeys and never for a minute become the property of the race track. The same is true in the case of the ½% which the law directs the club to deliver to the Board on Races. The High Court therefore agrees with the stand of the Court of Tax Appeals that such funds representing 5½% of the 12½% "commissions" of the race track do not form part of the gross receipts, hence not subject to the amusement tax of 20%.

The above-mentioned decision of the High Court was also applied in the case of Visayan Cebu Terminal Co., Inc. vs. Commissioner of Internal Revenue, 13 SCRA 357, Nos. L-19530 and L-19444, February 27, 1965. The legal

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issue involved in this case is the interpretation of the management contract entered into by and between the Bureau of Customs and Visayan Cebu Terminal Co., Inc. whereby the latter as contractor was appointed the sole manager of the Arrastre Service at the Port of Cebu City. In the said Management Contract, it was further agreed and understood that in consideration of the rights and privileges granted the Contractor for the management of the Arrastre Service, the Bureau of Customs shall receive twenty eight (28%) percent of the total monthly gross income derived from whatever source in connection with the operations of the Arrastre Service, payable within ten (10) days of the succeeding month. The main legal issue involved in this case is whether or not the gross receipts corresponding to the 28% of the total gross income of the Service Contractor delivered to the Bureau of Customs within ten (10) days of the following month should form part of the gross receipts subject to 3% contractor's tax under Section 191 of the Tax Code. The Court of Tax Appeals ruled in favor of the petitioner, holding the view that the said 28% payment by the Arrastre Contractor based on its monthly gross income should not form part of the gross receipts subject to 3% contractors tax and that paragraph 23 of the said Management Contract can legally be construed as a "regulation". As the learned trial court has aptly

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observed: "x x x the government could not have intended to consider as gross receipts the 28% that went to one of its institutions, the Bureau of Customs, and thereby collect percentage tax on it from petitioner. To hold petitioner liable for the payment of percentage tax is unquestionably unjust and not contemplated by Section 191 of the Tax Code."

All the above-mentioned decisions of the High Court made specific reference to gross receipts which are especially "earmarked by law or legal rule or regulation" as not forming part of the taxable gross receipts for purposes of the gross receipts tax under the Tax Code. For this purpose, it is pertinent to define the word "earmark" as a mark put upon a thing to distinguish it from another. Originally and literally, a mark upon the ear, a mode of marking sheep and other animals. Property is said to be earmarked when it can be identified or distinguished from other property of the same nature. To set apart from others (Black's Law Dictionary, 6th Edition, p. 508). In the case of the Manila Jockey Club, Inc. Executive Order No. 320 and Republic Act No. 309 made the specific "earmarking" for distribution of the total wager fund to different persons other than the proprietor. The same is true in the case of Visayan Cebu Terminal Co., Inc. where the specific earmarking of the 28% of the total monthly gross income to be delivered to the Bureau of Customs by the Contractor was provided in paragraph 23 of the Management Contract. Such specific earmarking of the twenty (20%) percent final income tax as not includible in the gross receipts for purposes of the gross receipts tax was not provided by any law or legal rule or regulations, hence the non-applicability of the above-cited High Court decisions to the Asian Bank Corporation case. This legal observation is also in point in the case of Compania Maritima case where the non-inclusion of the 10% reserve from the total cash collection to avoid claim for refund on freight and passengers tickets not taken is not provided by any law or legal rule or regulations.

With due respect to the opinion held by my esteemed colleagues, I vote to **DENY** the petition.

AMANCIO Q. SAGA
Associate Judge

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