REPUBLIC OF THE PHILIPPINES
Court Of Tax Appeals
QUEZON CITY

SECOND DIVISION

GMA NETWORK, INC., *Petitioner,*	**C.T.A. CASE NO. 7055**
	Members:
-versus-	CASTAÑEDA, JR., Chairperson UY, and PALANCA-ENRIQUEZ, JJ.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	**Promulgated:** JUL 2 6 2007

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DECISION

PALANCA-ENRIQUEZ, J.:

Is petitioner GMA Network, Inc. a withholding agent, liable to withhold and remit the ten percent (10%) value-added tax on its income payments made to its foreign suppliers, pursuant to *Section 114(c) of the NIRC of 1997, as amended*?

THE CASE

This issue is before Us in this Petition For Review filed by GMA Network, Inc. (hereafter "petitioner"), which seeks to declare null and void the Formal Letter of Demand and to cancel the Assessments issued

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by the Bureau of Internal Revenue for deficiency final withholding tax in the amount of P514,903.15 and for value-added tax in the amount of P18,242,593.45, inclusive of surcharges and interests.

THE FACTS

In their "Joint Stipulation of Facts and Issues", the parties agreed on the following facts:

"1. Petitioner is engaged in the broadcast industry and operates television station Channel 7. As part of its operations as a television network, petitioner avails of goods and services subject to Value Added Tax ('VAT') such as program rights to motion pictures and the likes from local and foreign suppliers. Accordingly, petitioner is VAT-registered taxpayer;

2. Moreover, on 15 November 2002, petitioner took advantage of the BIR's Voluntary Assessment and Abatement program ('VAAP') for its VAT for calendar year 2000 and availed of the benefits offered by the said program by paying the amount of P21,037.50 in addition to what it has already paid for the four (4) quarters of calendar year 2000;

3. On 22 December 2003, petitioner received a Preliminary Assessment Notice ('PAN') from the BIR Large Taxpayers Service, LTS-Audit and Investigation Division-1;

4. In the said PAN, petitioner was assessed by respondent with deficiency withholding tax on compensation, expanded withholding tax and final withholding taxes for the calendar year 2000, the details of which are as follows:

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Kind of Tax	Basic	Surcharge	Interest	Compromise	Total
WTx				25,000.00	25,000.00
Expanded	785,543.84		462,538.26	25,000.00	1,273,082.10
Final WTx	915,856.91		375,543.15		1,291,400.06
FWTx on VAT	9,155,720.26	2,288,930.07	75,252.50		11,519,902.83
					-
Total	**10,857,121.01**	**2,288,930.07**	**913,333.91**	**50,000.00**	**14,109,384.99**

5. Annex A-1 of the PAN issued to petitioner detailed the alleged deficiency taxes as follows:

'DETAILS OF DISCREPANCIES
Assessment No. _______________

1. **Penalty for non-filing of Alpha List of Executive Employees (P25,000.00)** – Verification disclosed that above mentioned taxpayer failed to submit alphabetical list of executive employees, hence a penalty was imposed pursuant to RMO 1-90 as Amended by RMO 17-90.

Assessment No. _________________

1. **Various Expenses not subject to EWT (P107,954,880.11)** – Verification disclosed that these expenses were not subjected to expanded withholding tax, hence, the taxpayer is assessed on said deficiency pursuant to RR-2-98 as Amended.

Assessment No. _________________

1. **Payment to Foreign Companies on Program Rights (P2,463,839.08)** – Verification disclosed that income payments to non-resident foreign corporations were not subjected to final withholding tax hence, subject taxpayer is assessed pursuant to Section 57(A), NIRC, as amended.

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> 2. **Cash Dividends Paid to Individuals (P62,456.04)** – The taxpayer failed to withhold final tax on dividends paid to individuals as prescribed under Sec. 57(A) of the Code of 1997, thus the company is assessed.
>
> 3. **Interest on Foreign Loans (P1,717,004.25)** – Verification disclosed that interest on foreign loans amounting to P1,717,004.25 was not subjected to the 10% final tax pursuant to Section 57 (A) of the Code.
>
> 4. **VAT Withholding on Payment to Foreign Program Rights (P230,536,324.39)** – Verification disclosed that the said taxpayer failed to withhold and remit 10% value-added tax on income payments to foreign suppliers pursuant to Section 8(b) of Revenue Regulation 10-94 and Section 4.102(a) (7)(8) of Revenue Regulation 7-95 in relation to R.A. 7716 which took effect on January 1, 1996."

6. On 16 January 2004, petitioner paid the assessment for withholding tax deficiency, including interest computed up to 30 December 2002 pursuant to the computation made by the Bureau of Internal Revenue ('BIR') examiner Marisol Girang;

7. Thereafter on 21 January 2004, petitioner filed a letter with the BIR stating that it is contesting the assessment pertaining to the failure to withhold final tax on dividends paid to individuals nor is it amenable to the assessment for withholding of VAT on foreign program rights.

8. Petitioner received a copy of the BIR's undated Formal Letter of Demand on 28 January 2004 assessing the total amount of P18,757,496.60, broken down as follows:

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(1) 'Assessment No. WV-00-000002
FINAL WITHHOLDING TAX ON VAT

Basic still Due	9,155,720.26
Surcharge	2,288,930.07
Interest up to 3.30.04	6,797,943.12
Total Final Withholding Tax Deficiency	**P18,242,593.45**
	=========='

(2) Assessment No. FWT-00-0000021
FINAL WITHHOLDING TAX

Basic still Due	206,245.00
Interest up to 3.30.04	308,657.55
Total Final Withholding Tax Deficiency	**P514,903.15**
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9. The BIR based its assessment against petitioner for final withholding tax on VAT in the amount of P18,242,593.45, inclusive of penalties and surcharges, on the alleged failure to remit and withhold value added tax (VAT) due on income payments to foreign suppliers pursuant to Section 114C of the National Internal Revenue Code ('NIRC') and Section 8(b) of Revenue Regulation 10-94 and Section 4.102(a)(7)(8)(b) of Regulation 7-95 in Relation to Republic Act No. 7716;

10. The assessment against petitioner for final withholding tax on VAT for the calendar year 2000 in the amount of P18,242,593.45 is broken down by the BIR as follows:

	Current Obligation Program Rights Debit	10% Withholding	Surcharge	Interest up to 3/30/04	Total
Beginning Bal.					
January	8,807,638.88	880,763.89	220,190.97	728,942.72	1,829,897.58
February	8,996,641.44	899,664.14	224,916.04	729,590.65	1,854,170.83
March	8,918,666.77	891,866.68	222,966.67	708,402.78	1,823,236.12
April	7,753,105.90	775,310.59	193,827.65	602,901.34	1,572,039.58
May	8,512,921.59	851,292.16	212,823.04	647,798.33	1,711,913.52
June	6,964,523.31	696,452.33	174,113.08	518,364.07	1,388,929.48

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July	6,355,016.90	635,501.69	158,875.42	462,407.28	1,256,784.39
August	8,793,831.60	879,383.16	219,845.79	625,205.29	1,724,434.24
September	6,727,175.59	672,717.56	168,179.39	467,062.58	1,307,959.53
October	5,786,922.49	578,692.25	144,673.06	392,136.67	1,115,501.98
November	10,163,514.69	1,016,351.47	254,087.87	671,766.55	1,942,205.89
December	3,777,243.45	377,724.35	94,431.08	243,364.86	715,520.29
	91,557,202.61	9,155,720.26	2,288,930.06	6,797,943.11	**18,242,593.45**

11. On the other hand, the BIR based its additional assessment against petitioner for final withholding tax deficiency in the amount of P514,903.15 on (a) the alleged failure of petitioner to pay the basic final withholding tax on dividends in the amount of P206,245.60; (b) the alleged failure to pay interest thereon in the amount of P132,882.44; and (c) for the alleged failure to pay in full the interest on withholding tax deficiency in the amount of P175,775.11 when petitioner paid only P1,282,593.48;

12. Petitioner timely filed its letter of protest with the BIR on 25 February 2004 protesting the above-mentioned Formal Letter of Demand;

13. Despite the lapse of the 180-day period on 23 August 2004, respondent Commissioner of Internal Revenue failed to act upon petitioner's letter of protest. From August 23, 2004, petitioner has thirty (30) days or until September 22, 2004 within which to file a petition for review under Sec. 228 of the Tax Reform Act of 1997 (R.A. No. 8424 and Sec. 9 of R.A. No. 9282). Hence, petitioner filed a petition for review within the reglementary period provided for in the NIRC;

14. On 16 October 2003, petitioner, through its Vice-President for finance, Mr. Ronaldo P. Mastrili, executed a Waiver of Statute of Limitations up to 31 January 2004 for withholding tax liabilities of the petitioner;

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15. The statute of limitations waived by the petitioner through its Vice President for Finance pertains only to its withholding tax liabilities;

16. On 11 September 2002, petitioner availed of the Voluntary Assessment and Abatement program (VAAP) pursuant to Revenue Regulations No. 12-2002 for the taxable year 2000 but only for its income and VAT liabilities."

In his answer, respondent alleged by way of special and affirmative defenses that:

"5. On September 11, 2002, petitioner availed of the Voluntary Assessment and Abatement Program (VAAP) pursuant to Revenue Regulations No. 12-2002 for the taxable year 2000 but only for its income and VAT liabilities.

6. Through a Preliminary Assessment Notice received by the petitioner on December 22, 2003, respondent notified the former of its deficiency withholding taxes on compensation, expanded withholding and final withholding taxes for the calendar year 2000, arrived at as follows:

Kind of Tax	Basic	Surcharge	Interest	Compromise	Total
WTx				25,000.00	25,000.00
Expanded	785,543.84		462,538.26	25,000.00	1,273,082.10
Final WTx	915,856.91		375,543.15		1,291,400.06
FWTx on VAT	9,155,720.26	2,288,930.07	75,252.50		11,519,902.83
					-
Total	**10,857,121.01**	**2,288,930.07**	**913,333.91**	**50,000.00**	**14,109,384.99**

7. Petitioner sent a reply on January 20, 2004.

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8. In a Formal Letter of Demand duly received by the petitioner on January 28, 2004, petitioner was assessed with a total final withholding tax deficiency on VAT in the amount of P18,242,593.45 and a final withholding tax deficiency amounting to P514,903.15, computed as follows:

Assessment No. WV-00-000002
FINAL WITHHOLDING TAX ON VAT

Basic still Due	9,155,720.26
Surcharge	2,288,930.07
Interest up to 3.30.04	6,797,943.12
Total	**18,242,593.45**

Assessment No. FWT-00-0000021
FINAL WITHHOLDING TAX

Basic still Due	206,245.00
Interest up to 3.30.04	308,657.55
Total	**514,903.15**

9. On February 23, 2004, Ronaldo P. Mastrili, Vice-President for Finance of GMA Network, Inc., sought reconsideration of the assessment.

10. On December 3, 2003, petitioner, again, through its Vice President for Finance, executed a Waiver of the Statute of Limitations up to January 31, 2004 for withholding tax liabilities of the petitioner.

11. Under date of January 16, 2004, petitioner paid deficiency tax in the amount of P1,282,593.48.

12. The assessments for deficiency withholding taxes in the amount of P18,242,593.45 and deficiency final withholding tax in the amount of P514,903.15 for the calendar year 2000 were issued in accordance with law and regulations. OW

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13. Petitioner readily admits its execution of the aforementioned Waiver of the Statute of Limitations but is now denying the applicability of such waiver and invoking prescription of the right to assess by stating, thus:

> *It cannot be contended that petitioner, through its Vice-President for Finance, Mr. Ronaldo P. Mastrili, executed a Waiver of the Statute of Limitations up to 31 January 2004. The waiver executed by Mr. Mastrili clearly qualified that the* ***coverage for the waiver is only for withholding tax liabilities*** *which is a tax on income completely different in nature from value-added tax.* (emphasis supplied)

14. In effect, petitioner is claiming that its waiver up to January 31, 2004 does not apply to its withholding tax liabilities on VAT, as per the assessment and the formal letter of demand issued by the respondent on January 28, 2004, well within the period waived, because the assessment is allegedly not for a withholding tax deficiency.

15. The assessment does not pertain to petitioner'sVAT liability but to its failure to withhold the VAT on its income payments to foreign suppliers. Thus, the waiver it executed operated to extend the prescriptive period for assessing the deficiency withholding tax on VAT.

16. It must be stressed herein that the Supreme Court has pointed out that a withholding agent, such as the petitioner in this case, is in fact the agent of both the taxpayer and the government, such that it is not an ordinary government agent. The law sets no condition for the personal liability of the withholding agent to attach. The reason is to compel the withholding agent to withhold

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the tax under all circumstances. In effect, the responsibility for the collection of the tax as well as the payment thereof is concentrated upon the person whom the government has jurisdiction. With respect to the collection and/or withholding of the tax, he is the Government's agent. In regard to the filing of the necessary income tax return and the payment of the tax to the Government, he is the agent of the taxpayer (**CIR vs. Procter and Gamble**, 204 SCRA 377 [1991]).

17. In any case, since no return was ever filed by the petitioner for the withholding of the 10% VAT on income payments to foreign suppliers, as required under Section 4.102-1(a)(7)(8) and 4.110-3 (b) of Revenue Regulations No. 7-95, the prescriptive period to assess is ten (10) years from the discovery of its failure to file a return, as provided in Section 222(a) of the Tax Code.

18. Section 4.102(a)(7)(8) of Revenue Regulations No. 7-95 provides:

> **SEC. 4.102.1 – Value-Added Tax on the sale of services and use or lease of properties. –**
> *(a) Sale or exchange of services, as well as the use or lease of properties, as defined in Section 102(a) of the Code shall be subject to VAT.*
>
> *xxx xxx*
>
> *The phrase 'sale or exchange of services' shall likewise include:*
> *xxx xxx*
>
> *(7)The lease of motion picture films, film tapes and dices;* ovl

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> *(8)The lease or the use of or the right to use radio, television, satellite transmission and cable television time;*
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> *xxx xxx*

19. Section 4.110-3(b) of Revenue Regulation No. 7-95 states:

> **SEC. 4.110-3. – Withholding of Creditable Value-Added Tax. – xxx**
>
> (b)The lessee or licensee, with respect to lease or use of property or property rights owned by the non-residents, or the local insurance company, with respect to reinsurance premiums payable to non-resident reinsurance companies, **shall before making payment, withhold and remit the 10% VAT due thereon by filing a separate VAT return for and in behalf of the payee**. (emphasis supplied)

20. Certainly, petitioner's insistence that it paid the VAT due for each quarter of calendar year 2000 and that it availed of the benefits under VAAP for its VAT liabilities is not the issue here. The assessment was issued for petitioner's failure to withhold the value-added tax as a withholding agent of the government. In other words, petitioner, as a withholding agent, should have withheld and remitted the VAT imposed on the income of the non-resident. Such is entirely and distinctly different from petitioner's income and VAT liabilities as a statutory taxpayer.

21. Based on the schedule submitted by the

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petitioner, it was assessed a deficiency for failure to withhold the 10% final withholding tax on dividends declared and paid to individuals for taxable year 2000, as mandated by Section 57(A) of the Tax Code.

22. Petitioner claims that the dividends paid to individuals were not subjected to the 10% final withholding tax because the dividends declared came from income forming part of the retained earnings of 1997 and prior years amounting to P555 million, hence, not taxable.

23. Such self-serving ratiocination by the petitioner runs counter to the provisions of Section 73(c) of the National Internal Revenue Code, to wit:

> ***Dividends Distributed are Deemed Made from the Most Recently Accumulated Profits. -*** *Any distribution made to the shareholders or members of the corporation shall be deemed to have been made from the most recently accumulated profits or surplus, and shall constitute a part of the annual income of the distributee for the year in which received.*

24. Undoubtedly, the provision stands to prevent the circumvention of the tax law, without which, taxpayers can always claim that the dividends were taken from the prior year's surplus.

25. As regards the issue of unpaid interest on the withholding tax deficiency, the interest paid by the petitioner was only up to December 30, 2002. However, the petitioner actually paid the interest only on January 16, 2004, thus, the deficiency.

26. The assessment was pursuant to Section 249 of the National Internal Revenue Code, which provides:

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> ***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 the 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****.* (emphasis supplied)

27. Under BIR Ruling No. 48-98, the acceptance by the Bureau of the payment of deficiency does not preclude the BIR from conducting an investigation/verification of the taxpayer's liability and for issuing as assessment notice against it if it is found out that there is a deficiency in the payment made.

28. Furthermore, the government is never estopped from collection legitimate taxes because of mistakes or errors on the part of its agents (Visayan Cebu Terminal, Inc., vs. CIR, 13 SCRA 257 [1965]).

29. Finally, it is a well-settled rule in taxation that assessments are prima facie presumed correct and made in good faith. The taxpayer has the duty of proving otherwise, and in the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed."

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Petitioner presented Rolando G. Sonico, Jr. and Renee Rose B. Tolentino-Layug, as witnesses, and documentary evidence, marked as *Exhibits "A" to "W"*, together with their submarkings.

On the other hand, at the hearing on October 18, 2006, counsel for respondent manifested that he is submitting the case for decision, without presenting any evidence. Upon joint motion of the parties, both parties were granted thirty (30) days from October 18, 2006 within which to file their simultaneous memoranda.

Only counsel for petitioner complied and filed his "Memorandum For Petitioner" on December 15, 2006. The case was deemed submitted for decision on January 2, 2007.

ISSUES

As stipulated upon by the parties, the following are the issues for this Court's consideration:

I

WHETHER OR NOT THE ASSESSMENT IN THE SUM OF P18,242,593.45 FOR THE YEAR 2000 IS BARRED BY PRESCRIPTION.

II

WHETHER OR NOT PETITIONER IS LIABLE FOR THE

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CALENDAR YEAR 2000 DEFICIENCY ASSESSMENT IN THE AMOUNT OF P18,242,593.45.

III

WHETHER OR NOT PETITIONER IS LIABLE FOR THE ASSESSMENT IN THE AMOUNT OF P514,903.15 FOR DEFICIENCY WITHHOLDING TAX ON CASH DIVIDENDS DECLARED AND PAID TO INDIVIDUALS IN THE YEAR 2000.

IV

WHETHER OR NOT PETITIONER IS LIABLE FOR THE ASSESSMENT IN THE SUM OF P175,775.11 ON UNPAID INTEREST ON WITHHOLDING TAX DEFICIENCY.

Principal Issue

The above stipulated issues boil down to the principal issue of whether or not petitioner as withholding agent is liable to withhold and remit the ten percent (10%) value-added tax on its income payments made to its foreign suppliers, pursuant to *Section 144(c) of the NIRC of 1997, as amended.*

Petitioner's Arguments

Petitioner argues that it is not liable to pay the deficiency assessments for VAT covering the calendar year 2000, and its corresponding interests and penalties in the total amount of

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P18,242,593.45, on the ground that its tax liabilities for value-added tax had already been extinguished both by the payment of the VAT and through the availment of the VAAP. Petitioner contends that it had duly filed its 2000 Quarterly VAT Returns with respondent's office and in fact, it paid the total amount of P34,919,864.93 representing its total VAT for the year 2000. Aside from its payment of VAT, petitioner likewise availed of the BIR's Voluntary Assessment and Abatement Program (VAAP) on November 15, 2002 for VAT for the year 2000.

Petitioner further maintains that it is no longer liable for the interests and surcharges assessed by respondent considering that another benefit offered under the VAAP is the abatement or cancellation of penalties which would otherwise be imposed to the taxpayer with respect to the applicable taxes due from the underdeclared sales disclosed, which penalties include the imposition of the 50% surcharge, 20% interest per annum and compromise penalties.

THE COURT'S RULING

The petition is bereft of merit.

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On the Principal Issue

A perusal of the assailed Formal Letter of Demand clearly shows that petitioner was assessed for deficiency final withholding tax on VAT in the total amount of P18,242,593.45. As an entity engaged in the broadcast industry, petitioner does not dispute that it avails of goods and services subject to VAT, such as program rights to motion pictures and the like, both from local and foreign suppliers. In this regard, petitioner was assessed the assailed deficiency taxes for its failure to withhold and remit the ten percent (10%) value-added tax on its income payments made to its foreign suppliers, pursuant to *Section 114(C) of the NIRC of 1997, in relation to Sections 4.102(a)(7)(8), 4.102(b) and 4.110.3(b) of Revenue Regulations No. 7-95*, which provide as follows:

> "**SEC. 114. Return and Payment of Value-Added Tax. –**
>
> (C) Withholding of Creditable Value-Added Tax. - The government or any of its political subdivisions, instrumentalities or agencies, including government-owned or controlled corporations (GOCCs) shall, before making payment on account of each purchase of goods from sellers and services rendered by contractors which are subject to the value-added tax imposed in Sections 106 and 108 of this Code, deduct and withhold the value-added tax due at the rate of three percent (3%) of the gross payment for the

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purchase of goods and six percent (6%) on gross receipts for services rendered by contractors on every sale or installment payment which shall be creditable against the value-added tax liability of the seller or contractor: Provided, however, That in the case of government public works contractors, the withholding rate shall be eight and one-half percent (8 ½%): Provided, further, That the **payment for lease or use of properties or property rights to nonresident owners shall be subject to ten percent (10%) withholding tax at the time of payment**. For this purpose, the payor or person in control of the payment shall be considered as the withholding agent.

The value-added tax withheld under this Section shall be remitted within ten (10) days following the end of the month the withholding was made." (*Emphasis supplied*)

"SEC. 4.102.1 – Value-Added Tax on the sale of services and use or lease of properties. –

(a) Sale or exchange of services, as well as, use or lease of properties, as defined in Section 102(a) of the Code shall be subject to VAT.

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The phrase 'sale or exchange of services' shall likewise include:

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(7) The lease of motion picture films, film tapes and discs;
(8) The lease or the use of or the right to use television, satellite transmission and cable television time;

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(b) The VAT on rental and/or royalties payable to non-resident foreign corporations or owners for the sale of services and use or lease of properties in the Philippines shall be based on the contract price agreed upon by the licensor and the licensee. **The licensee shall be responsible for the payment of VAT on such rentals and/or royalties in behalf of the non-resident foreign corporation or owner by filing a separate VAT declaration/return for this purpose.** The duly validated VAT declaration/return is sufficient evidence in claiming input tax credit by the licensee." (*Emphasis supplied*)

"**SEC. 4.110-3. – Withholding of Creditable Value-Added Tax. –**

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(b) The lessee or licensee, with respect to lease or use of property or property rights owned by the non-residents, or the local insurance company, with respect to reinsurance premiums payable to non-resident reinsurance companies, **shall before making payment, withhold and remit the 10% VAT due thereon by filing a separate VAT return for and in behalf of the payee**." (*Emphasis supplied*)

Verily, petitioner's deficiency tax assessments arose from its failure to withhold and remit the 10% VAT on income payments to its foreign suppliers. Petitioner, in this case, is not the party liable for the tax, but rather, it acts as a withholding agent for the government, to withhold and remit the VAT imposed on the income of its non-resident

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suppliers. This is entirely different and distinct from petitioner's income and VAT liabilities as a taxpayer.

In the case of *Commissioner of Internal Revenue vs. The Court of Appeals, Court of Tax Appeals and A. Soriano Corp., 301 SCRA 170,* the Supreme Court enunciated the importance of the withholding tax system, thus:

> "In the operation of the withholding tax system, the withholding agent is the payor, a separate entity acting no more than an agent of the government for the collection of the tax in order to ensure its payments; the payer is the taxpayer – he is the person subject to tax imposed by law; and the payee is the taxing authority. In other words, the **withholding agent is merely a tax collector, not a taxpayer**. Under the withholding system however, the agent-payor becomes a payee by fiction of law. His (agent) liability is direct and independent from the taxpayer, because the income tax is still imposed on and due from the latter. The agent is not liable for the tax as no wealth flowed into him – he earned no income. **The Tax Code only makes the agent personally liable for the tax arising from the breach of its legal duty to withhold as distinguished from its duty to pay tax since;**
>
> > **'the government's cause of action against the withholding agent is not for the collection of income tax, but for the enforcement of the withholding provision of Section 53 of the Tax Code, compliance with which is imposed on the withholding agent and *not* upon the taxpayer.'**

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> Codal provisions on withholding tax are mandatory and must be complied with by the withholding agent. The taxpayer should not answer for the non-performance by the withholding agent of its legal duty to withhold unless there is collusion or bad faith. The former could not be deemed to have evaded the tax had the withholding agent performed its duty. xxx"

Pursuant to the aforecited decision, petitioner is merely an agent acting for the government to ensure the collection of taxes. Its liability to withhold and remit taxes is personal and direct. Petitioner shall be answerable for its failure to comply with the withholding tax provisions of the Tax Code, which is to deduct and withhold from the payees and to remit to the government the withholding tax due. The provisions on the withholding taxes are mandatory and must be complied with by the withholding agent. Thus, for petitioner's failure to withhold the taxes due, respondent therefore has factual and legal bases to issue the deficiency tax assessments against petitioner.

Moreover, petitioner's arguments as regards the applicability of its VAAP availment cannot be sustained. As heretofore discussed, petitioner was assessed deficiency final withholding tax on VAT for its failure to withhold and remit the 10% VAT on the income payments of its foreign

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suppliers. It bears stressing that the availment of the VAAP is for any underpayment of VAT due to sales discrepancies or underdeclaration of sales. Clearly, both are entirely distinct and different in nature. As admitted by petitioner, one of the benefits of the VAAP is to avail of the guarantee of "last priority in audit" regarding the type of tax subject of the availment. Being a "last priority" does not mean that petitioner can no longer be subjected to the hassles of audit. On the contrary, petitioner is not exempted from the audit. However, there is the advantage of being the last in priority. Thus, contrary to petitioner's assertion, respondent did not violate the last priority rule under the VAAP when he issued the subject assessment.

Anent the issue on the penalties and interests, petitioner is liable to the twenty five percent (25%) late payment surcharge, pursuant to *Section 248(A) of the NIRC of 1997, as amended.* Both the 25% surcharge and the twenty percent (20%) interest per annum imposed under *Sections 248 and 249 of the NIRC of 1997, as amended,* cannot be waived for the same are imposed to compensate the government for its inability to utilize the taxes during the time such taxes remain unpaid.

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Third Issue

Petitioner claims that it is not liable for the alleged deficiency withholding tax and interest penalties for cash dividends distributed from the retained earnings on the ground that these dividends were paid from its earnings for the year 1997 and prior years. It maintains that pursuant to *Section 24(B)(2) of the NIRC of 1997*, it is clear that the withholding tax on dividends paid to individuals is taxable only if the dividends declared are (1) distributed to individuals, and (2) come from retained earnings as of 31 December 1997, regardless of the fact that these dividends were distributed after 1 January 1998."

Petitioner's contention is devoid of merit.

The provisions of *Section 24(B)(2) of the NIRC of 1997* are clear and explicit. The tax on dividends shall apply only to income earned on or after January 1, 1998. Income forming part of retained earnings as of December 31, 1997 shall not be subject to the tax, even if declared or distributed on or after January 1, 1998 (*Section 24(B) (2), NIRC of 1997, as amended*).

To satisfy these requirements, petitioner offered in evidence its financial statements for the years 1997 to 2000 (*Exhibits "P to "S"*). The

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financial statements show that petitioner's retained earnings balance as of December 31, 1997 amounted to P555Million, while the dividends declared from 1998 to 2000 amounted only to P88Million, thereby leaving a balance of P467Million in retained earnings that were accumulated in 1997 and prior years. Consequently, by applying the "first-in, first-out" method provided under the generally accepted accounting principles, the dividends declared in the year 2000 came from petitioner's retained earnings for the year 1997 and prior thereto.

However, this Court is not convinced. Although petitioner's financial statements show that it has retained earnings in the amount of P555Million as of December 31, 1997, it does not follow that the cash dividends distributed to its individual stockholders in the year 2000 came from this amount. Petitioner failed to convince this Court that the questioned cash dividends declared in the calendar year 2000 were paid from its retained earnings for the year 1997 and prior thereto.

Furthermore, petitioner's contention is also self-serving. No other document to substantiate petitioner's allegation was presented to convince this Court otherwise. Absent any clear and convincing proof, this Court sustains the validity of the assessment against petitioner. It is

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well settled that assessments are presumed correct and made in good faith and the taxpayer has the burden of proving that there is any irregularity in the performance of the official duties in issuing the same.

Issue on Prescription

Petitioner claims that the subject assessment in the amount of P18,242,593.45 for VAT for the calendar year 2000 is already barred by prescription. It contends that pursuant to *Section 203 of the NIRC of 1997, as amended*, internal revenue taxes, including VAT, shall be assessed within three (3) years after the last day prescribed by law for the filing of the return. Thus, when petitioner filed its Quarterly VAT Returns for calendar year 2000 on April 25, 2000, July 25, 2000, October 25, 2000 and January 25, 2001, as required under *Section 114(A) of the NIRC of 1997*, respondent only had until April 25, 2003, July 25, 2003, October 25, 2003 and January 24, 2004, respectively, within which to assess petitioner for deficiency VAT. When respondent, therefore, issued his Formal Letter of Demand for deficiency VAT on January 28, 2004, his right to assess had already prescribed. Petitioner further contends that its Waiver of the Statute of Limitations cannot be applied in this case. It submits that the said waiver categorically qualified that the coverage of

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the waiver is only for withholding tax liabilities, which is a tax on income completely different in nature from the value-added tax.

Petitioner's contentions cannot be sustained.

As a general rule, internal revenue taxes must be assessed within three (3) years after the last day prescribed for the filing of the return, as provided under *Section 203 of the NIRC of 1997, as amended*, to wit:

> "**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."

The above provision applies in cases where a return is filed. However, a different prescriptive period applies in case the return filed is false, fraudulent, or the taxpayer fails to file a return, as provided under *Section 222 of the same Code*, to wit:

> "**SEC. 222. – Exceptions as to Period of Limitation of Assessment and Collection of Taxes.** –

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(a) In the case of a false or fraudulent return with intent to evade tax or of failure to file 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*)

Pursuant to the above provision, if the taxpayer fails to file a return, the Commissioner of Internal Revenue is then authorized to assess within ten (10) years after the discovery of the omission to file the return (*The Commissioner of Internal Revenue vs. CTA Eastern Extension Australasia and China Telegraph Company, Ltd, 195 SCRA 444*). In the case at bench, as heretofore discussed, petitioner was assessed for its failure to withhold and remit the 10% VAT on its income payments to its foreign suppliers. In effect, there was no return filed by petitioner, thus, *Section 222 of the NIRC of 1997, as amended,* applies. Conformably to the aforecited provision, the prescriptive period to assess petitioner only started to run at the time respondent discovered petitioner's failure to withhold and remit the subject deficiency tax. It is clear, therefore, that the period to assess in this case has not yet prescribed.

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WHEREFORE, premises considered, the present Petition for Review is hereby **DISMISSED**. Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of **EIGHTEEN MILLION SEVEN HUNDRED FIFTY SEVEN THOUSAND FOUR HUNDRED NINETY SIX AND 60/100 PESOS (P18,757,496.60)**, representing petitioner's deficiency withholding tax for the taxable year 2000, inclusive of 25% surcharge and 20% deficiency interest.

In addition, petitioner is **ORDERED TO PAY** 20% delinquency interest per annum on the P18,757,496.60 computed from April 1, 2004 until the amount is fully paid, pursuant to *Section 249(c)(3) of the NIRC of 1997, as amended.*

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

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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.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson, Second Division

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.

Ernesto Acosta
ERNESTO D. ACOSTA
Presiding Justice

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