REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION

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EDISON (BATAAN) COGENERATION CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 7142

Members:

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

Promulgated:

OCT 06 2010; 3:57pm

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DECISION

BAUTISTA, *J.*:

This is a Petition for Review filed on February 9, 2005 by petitioner due to the inaction of respondent on its protest of the assessments of deficiency income tax, value-added tax (VAT), withholding tax on compensation, expanded withholding tax (EWT), final withholding tax (FWT), and increments for filing and paying in the wrong venue covering taxable year 2001 in the aggregate amount of P70,193,676.37.

Petitioner Edison (Bataan) Cogeneration Corporation is a corporation duly organized and existing under Philippine laws, with principal office located at Luzon Ave., Bataan Economic Zone (BEZ), Mariveles, Bataan. It is also registered with the Bureau of Internal Revenue (BIR) Revenue District Office (RDO) No. 20,[1] bearing the Taxpayer Identification No. 002-825-292-000.[2]

Its primary purposes are to own, operate and manage a power plant at the Export Processing Zone in Bataan; to engage in private power generation in the Philippines as project developers, managers, operators and owners, of electric power plants employing all technologies such as but not limited to diesel, thermal, coal, combined cycle, hydro, geothermal and woodwaste; to enter into contracts for the financing, acquisition, construction, operation and management of such power plant; and to enter into power supply and energy conversion contracts with government, quasi-government, energy companies, private utilities, and private companies on a built, operation and transfer and built, operate and own and other variation basis.[3]

Petitioner is registered with the Philippine Economic Zone Authority (PEZA) as an ECOZONE Utilities Enterprise.[4]

On the other hand, respondent Commissioner of Internal Revenue is the official authorized under Section 4 of the National Internal Revenue Code (NIRC) of 1997 to assess and collect internal revenue taxes, as well as the power to decide disputed assessments, among others, subject to the exclusive appellate jurisdiction of this Court. Respondent holds office at the 5th Floor, BIR National Office Building, Agham Road, Diliman, Quezon City.

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[1] Par. 2, Stipulation of Facts, JSFI, docket p. 101; Annex "A", Petition for Review, docket, p. 24
[2] Annex "B", Petition for Review, docket, p. 25
[3] Exhibit "B"
[4] Par. 3, Stipulation of Facts, JSFI, docket p. 101; Annex "C", Petition for Review, docket, p. 26

After several meetings with respondent examiners and after protesting the preliminary assessment notice issued against it, respondent issued Formal Letter of Demand and Final Assessment Notice dated April 15, 2004.[5]

On April 21, 2004, petitioner received the Formal Letter of Demand and Final Assessment Notice (FAN) dated April 15, 2004, assessing petitioner for alleged deficiency income tax, VAT, withholding tax on compensation, EWT, FWT and increments for alleged filing and paying in the wrong venue for taxable year 2001 in the aggregate amount of P 70,193,676.37, broken down as follows:[6]

Tax Type	Amount (inclusive of interest and penalties)
Income Tax	P 60,013,809.92
Value-Added Tax	164,775.77
Withholding Tax on Compensation	68,474.49
Expanded Withholding Tax	478,548.41
Final Withholding Tax	9,384,314.27
Increments for Filing and Paying in the Wrong Venue	83,753.51
TOTAL	**P 70,193,676.37**

On May 20, 2004, petitioner protested the foregoing assessment by filing a letter-protest addressed to respondent. Subsequently, petitioner had several meetings with respondent's examiners, during which time it provided additional documents pursuant to the various requests of the examiners.[7]

As of the date of filing of the instant Petition on February 9, 2005, respondent has not rendered a decision on the said protest, prompting

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[5] Exhibit "EEE"
[6] Annexes "D" to "D-5" of Petition for Review, docket, pp. 27-35; Par. 7, Stipulation of Facts, JSFI, docket, pp. 101 and 102
[7] Exhibit "EEE", docket p. 522; Par. 8 and 9, Stipulation of Facts, JSFI, docket, p. 102

petitioner to institute the present action in order to protect its right to refute or protest the afore-mentioned assessment.

Respondent filed his Answer[8] on March 28, 2005, alleging the following Special and Affirmative Defenses:

"**SPECIAL AND AFFIRMATIVE DEFENSES**

INCOME TAX.

3. Sale of electricity to both Philippine Economic Zone Authority (PEZA) and National Power Corporation (NPC) is subject to the normal income tax rate of 32% for the following reasons:

3.1 A PEZA-registered enterprise shall only be imposed a 5% special tax based on gross income earned, in lieu of all taxes, except real property tax (Section 1, Rule XIV, Rules and Regulations implementing R.A. No. 7916, issued by the Board of Directors of PEZA). However, this tax incentive only applies in respect of the registered enterprise's operation within the ECOZONE. This fact is bolstered by the provision of Section 5, Rule XII of the Rules and Regulations as aforecited, which provides that incentives granted by the PEZA shall apply only to registered operators of the Ecozone enterprise and only during the period of its registration inside the ECOZONE. Petitioner is indeed a PEZA-registered enterprise as evidenced by its Certificate of Registration No. 96-01-U dated October 22, 1996, where it is stated therein that the registered activity of petitioner is to engage in the installation, operation and maintenance of all electric generating facility (power station) that will supply the power requirements at the Bataan Economic Zone (BEZ) located at Mariveles, Bataan. It is very clear under the foregoing provisions of the PEZA Law (RA 7916) and its implementing rules and regulations, as well as the provisions of petitioner's Certificate of Registration issued by PEZA, that the services must be provided and consumed within the

[8] Docket pp. 61-68

ECOZONE. In other words, the electricity generated by petitioner must be sold to PEZA-registered enterprises within the ECOZONE. Hence, selling electricity to both PEZA and to NPC, which is a non-PEZA registered enterprise, is a patent violation of the provisions of RA 7916 and its implementing rules and regulations and provisions/conditions for the issuance of petitioner's Certificate of Registration with PEZA.

3.2 Section 1(m) of Republic Act 7916 defines Ecozone Utilities Enterprise as a business entity or concern within the Ecozone duly registered with and/or franchised/licensed by the PEZA with or without the incentives provided under Republic Act No. 6957, as amended (the Build-Operate-Transfer Law) and/or with or without financial exposure on the part of the PEZA, such as contractors/operators of **light and power systems**, water supply and distribution systems, communications and transportation systems within the Ecozone and other similar or ancillary activities as may be determined by the PEZA Board. Investigation conducted revealed that revenues generated from petitioner's sale of electricity come from two (2) sources, one from NPC and the second from PEZA. In fact, sale of electricity to NPC is 56% of the total revenues of petitioner. The registered activity of petitioner is to engage in the installation, operation and maintenance of an electric generating facility (power station) that will supply the power requirements at the Bataan Ecozone (BEZ) located at Mariveles, Bataan. Definitely, the sale of energy to NPC is not a registered activity as contemplated under Section 5 of RA 7916 for NPC is not a locator (sic) and is not operating inside the Bataan Economic Zone. In the definition of what an Ecozone Utilities Enterprise is, it is clear that what is being contemplated is that the contractors/operators of light and power system, of which petitioner is one, are within the Ecozone, which means that the services must be rendered within the Ecozone, specifically, locators (sic) of the Ecozone. There is no record showing that NPC is a PEZA-registered utilities enterprise. Therefore, since petitioner's operation is not within the purview of its registered activity granted under RA 7916, the income from its operation is taxable under Section 27 (A) of the Tax Code of 1997.

Hereunder is the illustration of petitioner's revenue:

	Sales-PEZA	Sales-NPC	TOTAL	% of Sales
2000	245,869,464.13	320,561,217.47	566,430,681.60	56.59%
2001	289,380,475.79	368,680,335.08	58,060,810.87	56.02%

3.3 Petitioner's income tax returns for both the years 2000 and 2001 show that the reported income constitutes total revenues from NPC and PEZA plus the realized FOREX gain. Thus, the sale of scrap, sludge and gain on sale of vehicle were added in computing the correct taxable income. These were also subjected to the normal tax rate since these are considered as not registered activities of petitioner.

3.4 The unrealized foreign exchange losses for both years were disallowed because there is no actual loss sustained by petitioner. It did not deduct this loss in its income tax return because this is not considered as a direct cost allowable as a deduction in computing the gross income as taxable base subject to the 5% preferential rate. However, this was considered in the computation of the taxable base subject to the normal tax rate of 32%.

VALUE-ADDED TAX

4. The sale of scrap, sludge and sale of vehicle were subjected to value-added tax since these are not registered activities of petitioner.

FINAL WITHHOLDING TAX (FWT)

5. Petitioner was assessed a final tax on its interest payments made (1) on its dollar loans with various lenders and (2) on loans from Ogden Power International Holdings, Inc. , a non-resident affiliate. Petitioner claims that it is not liable to remit any final tax on interest payments unless the interests have been paid. However, it was assessed on the basis of the provisions of Revenue Regulations No. 2-98 wherein withholding taxes are required to be remitted at the time an income is paid or payable, whichever comes first. Secondly, it has long been recognized under the principles of taxation that a business entity

enjoying exemption or enjoying preferential tax rate can not extend this privilege to other business operations simply for the reason that this privilege is applicable only to its own income the tax on which it is directly liable; nor can it be exempted from withholding the proper and correct amount of withholding tax on its income payments, for what is sought to be taxed is the income of the recipient and not the income of a business entity enjoying exemption or preferential tax rate. This principle is amplified and given wide dissemination under Revenue Regulations No. 20-2002 which states that 'income payments made by a PEZA-registered enterprise to an entity in the customs territory shall not be subjected to the preferential tax rates or tax exemption enjoyed by the registered enterprise'. Thus, the interest payments made to Ogden shall be subject to the appropriate tax rate of 15% (following the tax rate in the RP-US Tax Treaty).

EXPANDED WITHHOLDING TAX (EWT)

6. The petitioner remits its EWT only upon actual payment of the expense. It was assessed deficiency EWT based on the provisions of Revenue Regulations No. 2-98 as discussed in paragraph 5 above.

WITHHOLDING TAX ON COMPENSATION

7. Verification disclosed that there was under-remittance of taxes withheld from compensation.

8. Filing of returns and paying the tax in the wrong venue are subject to 25% surcharge.

9. The assessment was issued in accordance with law and regulations.

15. All presumptions are in favor of the correctness of tax assessments **(CIR vs. Construction Resources of Asia, Inc., 145 SCRA 671 [1986]).**"

During trial, petitioner presented several witnesses. Thereafter, petitioner filed its Formal Offer of Evidence[9] on May 27, 2008, submitting Exhibits "B", "F' to "M", "O" to "R", "T" to "V", " X", "Z", "AA" to "GGG", inclusive of sub-markings;

[9] Docket, pp. 279-296

which this Court admitted in the Resolutions dated July 16, 2008[10], September 8, 2008[11] and February 5, 2009[12]. Petitioner also filed its Supplemental Formal Offer of Evidence[13] on October 17, 2008, submitting Exhibits "HHH" and "HHH-1", which was approved by this Court in the Resolution dated December 4, 2008.[14]

On September 3, 2008, petitioner filed a Motion for Leave of Court to Serve Supplemental Petition Upon Respondent and to Present Additional Evidence[15], together with the attached Supplemental Petition[16], which was granted in the Resolution[17] dated January 29, 2009.

In its Supplemental Petition, petitioner alleged that on December 27, 2007, petitioner availed of the tax amnesty under Republic Act (R.A.) No. 9480. Thus, petitioner averred that it is entitled to all the immunities, and privileges under Section 6, RA 9480, such as the cancellation of the assessment for income tax, VAT, and increments for filing and paying in the wrong venue (as well as the interests and surcharges) for the year 2001 in the amounts of P60,013,809.92, P164,775.77, and P83,753.51, respectively.

On March 3, 2009 petitioner filed its Supplemental Formal Offer of Evidence[18], submitting Exhibits "HHH" to "PPP-1", in relation to its availment of the Tax Amnesty Program under R.A. No. 9480. This Court admitted said exhibits in a Resolution[19] dated July 1, 2009.

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[10] Docket, pp. 527-528
[11] Docket, pp. 697-698
[12] Docket, pp. 746-747
[13] Docket, p. 726-729
[14] Docket, p. 733
[15] Docket, pp. 631-635
[16] Docket, pp 636-640
[17] Docket, p. 744
[18] Docket, pp. 870 to 874
[19] Docket, p. 938

In the Resolution dated July 29, 2009, respondent was considered by the Court to have waived his right to present evidence.[20] Thus, the Court directed petitioner to submit its Memorandum within thirty (30) days from July 23, 2009 and respondent to submit his Memorandum within thirty (30) days from receipt of the said Resolution dated July 29, 2009.

On October 9, 2009, this case was submitted for decision, considering petitioner's Memorandum filed through registered mail on September 22, 2009, *sans* respondent's Memorandum.

The following are the parties' jointly stipulated issues[21] submitted for this Court's resolution:

"**<u>Deficiency Income Tax</u>:**

I. WHETHER OR NOT INCOME PAYMENTS BY THE NATIONAL POWER CORPORATION (NPC) TO PETITIONER ARE SUBJECT TO THE 5% PREFERENTIAL TAX RATE.

II. WHETHER OR NOT PETITIONER HAS UNDECLARED INCOME OF P15,190,720.20.

III. WHETHER OR NOT PETITIONER'S SALE OF SLUDGE, SCRAP, SALES-OTHERS AND GAIN ON SALE OF VEHICLE AMOUNTING TO P998,374.84 WERE NOT REPORTED AS PETITIONER'S TAXABLE INCOME FOR TAXABLE YEAR 2001.

IV. WHETHER OR NOT PETITIONER DEDUCTED THE AMOUNT OF P29,584,558.33 AS UNREALIZED FOREIGN EXCHANGE LOSS FOR THE TAXABLE YEAR 2001.

V. WHETHER OR NOT PETITIONER HAS UNSUPPORTED TAX CREDITS AMOUNTING TO P396,670.00 WITHHELD FOR THE TAXABLE YEAR 2001.

VI. WHETHER OR NOT PETITIONER HAS UNSUPPORTED QUARTERLY INCOME TAX PAYMENT OF P1,329,016.80.

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[20] Docket, p. 941
[21] Docket, pp. 107-108

VII. WHETHER OR NOT PETITIONER'S ALLEGED TAX CREDITS PAID TO LOCAL GOVERNMENT UNITS (LGU) SHOULD BE DISALLOWED.

Deficiency VAT:

WHETHER OR NOT PETITIONER, A PEZA-REGISTERED ENTERPRISE, SHOULD BE SUBJECT TO THE 10% VAT.

Deficiency Withholding Tax on Compensation:

WHETHER OR NOT PETITIONER DULY REMITTED ITS TAXES WITHHELD ON COMPENSATION FOR THE TAXABLE YEAR 2001.

Deficiency Expanded Withholding Tax:

WHETHER OR NOT PETITIONER DULY WITHHELD AND REMITTED ITS EXPANDED WITHHOLDING TAXES FOR THE TAXABLE YEAR 2001.

Deficiency Final Withholding Tax:

I. WHETHER OR NOT THE FINAL WITHHOLDING TAX ON PETITIONER'S DOLLAR-DENOMINATED SYNDICATED LOAN HAS BEEN DULY WITHHELD AND REMITTED TO THE BIR.

II. WHETHER OR NOT PETITIONER ERRED IN WITHHOLDING THE FINAL WITHHOLDING TAX ON INTEREST FROM THE INTER-COMPANY LOAN WITH OGDEN POWER INTERNATIONAL HOLDINGS, INC. ('OGDEN') AT THE RATE OF 5%.

Increments for Filing and Paying in the Wrong Venue:

WHETHER OR NOT PETITIONER SHOULD BE HELD LIABLE FOR SURCHARGES FOR FILING AND PAYING IN THE WRONG VENUE DESPITE PAYMENT OF THE SAME."

The ultimate issue is whether or not petitioner is liable to pay the aggregate amount of P70,193,676.37 inclusive of interest and penalties, representing deficiency income tax, value-added tax, withholding tax on compensation, expanded withholding tax, final withholding tax, and increments for filing and paying in the wrong venue covering taxable year 2001.

This Court finds it appropriate to determine first whether or not petitioner is entitled to all the immunities, and privileges under Section 6 of R.A. No. 9480, such as the cancellation of the assessment for income tax, VAT, and increments for filing and paying in the wrong venue (as well as the interests and surcharges) for the year 2001 in the amounts of P60,013,809.92, P164,775.77, and P83,753.51, respectively.[22]

The law governing the subject tax amnesty is Republic Act No. 9480 entitled "An Act Enhancing Revenue Administration and Collection by Granting an Amnesty on All Unpaid Internal Revenue Taxes Imposed by the National Government for Taxable Year 2005 and Prior Years", the pertinent part of which are quoted as follows:

> "SECTION 1. *Coverage.* — There is hereby authorized and granted a tax amnesty which shall cover all national internal revenue taxes for the taxable year 2005 and prior years, **with or without assessments** duly issued therefor, that have remained unpaid as of December 31, 2005: *Provided, however,* That the amnesty hereby authorized and granted shall not cover persons or cases enumerated under Section 8 hereof.
>
> xxx xxx xxx
>
> **SECTION. 4. *Presumption of Correctness of the SALN.* — The SALN as of December 31, 2005 shall be considered as true and correct except where the amount of declared networth is understated to the extent of thirty percent (30%) or more as may be established in proceedings initiated by, or at the instance of, parties other than the BIR or its agents: *Provided,* That such proceedings must be initiated within one year following the date of the filing of the tax amnesty return and the SALN.** Findings of or admission in congressional hearings, other administrative agencies of government, and/or courts shall be admissible to prove a thirty percent (30%) under-declaration.

[22] Supplemental Petition for Review, docket, pp. 636 to 640

SECTION. 5. *Grant of Tax Amnesty.* — Except for the persons or cases covered in Section 8 hereof, any person, whether natural or juridical, may avail himself of the benefits of tax amnesty under this Act, and pay the amnesty tax due thereon, based on his networth as of December 31, 2005 as declared in the SALN as of said period, in accordance with the following schedule of amnesty tax rates and minimum amnesty tax payments required:

xxx xxx xxx

SECTION. 6. *Immunities and Privileges.* — Those who availed themselves of the tax amnesty under Section 5 hereof, and have fully complied with all its conditions shall be entitled to the following immunities and privileges:

(a) The taxpayer shall be immune from the payment of taxes, as well as additions thereto, and the appurtenant civil, criminal or administrative penalties under the National Internal Revenue Code of 1997, as amended, arising from the failure to pay any and all internal revenue taxes for taxable year 2005 and prior years." *(Emphasis supplied)*

A perusal of the documents presented by petitioner showed that it availed of the tax amnesty on December 27, 20007.

Petitioner submitted and offered as exhibits its Notice of Availment of Tax Amnesty dated and filed December 21, 2007[23], Statement of Assets, Liabilities and Networth (SALN) as of December 31, 2005[24], Statement of Assets, Liabilities and Networth (SALN) as of December 31, 2005 (amended declaration)[25], Tax Amnesty Return[26], Tax Amnesty Payment Form (BIR Form No. 0617)[27], RCBC BTR-BIR Tax Deposit Payment Slip[28], Audited Financial

[23] Exhibit "HHH"
[24] Exhibit "III"
[25] Exhibit "JJJ"
[26] Exhibit "KKK"
[27] Exhibit "LLL"
[28] Exhibit "MMM"

Statements[29] as of December 31, 2005 prepared by C.L. Manabat & Co., and Annual Income Tax Return[30] for taxable year 2005. As shown from Exhibits "LLL" and "MMM", petitioner paid the total amount of P500,000.00 to the BIR as its amnesty tax. Thus, petitioner satisfactorily complied with the provisions of R.A. No. 9480, its Implementing Rules and Regulations (Department Order No. 29-07), and Revenue Memorandum Circular No. 19-2008.

Moreover, the one-year period provided under Section 4 of Republic Act No. 9480 had already lapsed without anyone challenging the correctness of petitioner's SALN. Petitioner availed of the Tax Amnesty Program on December 27, 2007; hence, any party other than the BIR or its agents has one year from date of availment or until December 27, 2008 to subject such availment to administrative investigation. Thus, the failure of any party other than the BIR or its agents to challenge petitioner's availment of the Tax Amnesty Program within the said period warranted the presumption of correctness of SALN, pursuant to Section 4 of Republic Act No. 9480.

Consequently, petitioner should be deemed immune from the payment of taxes, as well as the appurtenant civil, criminal or administrative penalties under the National Internal Revenue Code of 1997, as amended, arising from the failure to pay any and all internal revenue taxes for taxable year 2005 and prior years, pursuant to Section 6 of R.A. No. 9480, and as held in the case of

[29] Exhibit "NNN"
[30] Exhibit "OOO"

Philippine Banking Corporation (Now: Global Business Bank, Inc.) vs. Commissioner of Internal Revenue[31].

In addition, petitioner sufficiently proved that the assessment issued by respondent representing increments for filing and paying in the wrong venue was already paid. Petitioner offered testimonial[32] and documentary evidence, particularly three (3) BIR Payment Forms (Form No. 0605)[33] and three (3) BIR Deposit Slips[34] dated March 29, 2004, showing that petitioner paid the total amount of P83,753.51 to support its claim of valid payment of the above-said increments.

Accordingly, the assessments for deficiency income tax, value-added tax, and increments for erroneous filing and paying in the wrong venue (as well as the interests and surcharges) for the year 2001 are hereby cancelled and set aside in view of petitioner's availment of the Tax Amnesty Program under R.A. No. 9480 and petitioner's payment of the increments for erroneous filing and paying in the wrong venue.

Considering the above findings, this Court's evaluation will now go to the remaining issues pertaining to assessments of withholding tax on compensation, expanded withholding tax, and final withholding tax for taxable year 2001.

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[31] G.R. No. 170574, January 30, 2009.
[32] Exhibits "YY" and "YY-1", Amended Judicial Affidavit of Jennifer Urriquia dated Dec. 6, 2006, docket, pp. 508 to 509.
[33] Exhibits "QQ" for P57,038.61, "RR" for P22,249.14, and "SS" for P4,465.76, docket, pp. 496 to 498.
[34] Exhibits "TT" for P57,038.61, "UU" for P22,249.14, and "VV" for P4,465.76, docket, pp. 499 to 501.

1. Deficiency Withholding Tax on Compensation – P68,474.49

The assessment for deficiency withholding tax on compensation was computed as follows:[35]

Withholding tax due on compensation per alphalist	P 3,374,981.86
Less: Remittances per Returns	3,326,086.88
Deficiency Withholding Tax	P 48,894.98
Add: 20% p.a. Interest (1-26-02 to 4-15-04)	19,579.51
Total Amount Due	**P 68,474.49**

Respondent's verification, as reflected in the above assessment, disclosed that there was under-remittance of taxes withheld from compensation amounting to P48,894.98. Petitioner, on the other hand, asserted that it paid the correct amount of withholding tax due on the compensation of its employees. However, records do not show if indeed the correct amount of withholding tax due on the compensation of petitioner's employees was already paid. Petitioner failed to present relevant documents such as alphalist of its employees, Monthly Remittance Return of Income Taxes Withheld on Compensation and Annual Information Return of Income Tax Withheld on Compensation. The said documents should have been submitted to prove that indeed petitioner filed and paid the correct amount of withholding tax. Mere allegations without adducing documentary evidence are not sufficient. Allegation is not synonymous with proof.[36]

As already held in various cases, assessments are prima facie presumed correct and made in good faith. It is the taxpayer and not the Bureau of Internal Revenue who has the duty of proving otherwise. It is an

[35] Par. 16, Stipulation of Facts, JSFI, docket, p. 105
[36] Ernesto Martin vs. Hon. Court of Appeals and Manila Electric Company, G.R. No. 82248, January 30, 1992.

elementary rule that in the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed. All presumptions are in favor of tax assessments. Verily, failure to present proof of error in assessments will justify judicial affirmance of said assessment.[37] Hence, for petitioner's failure to sufficiently prove that it paid the correct amount of withholding tax due on the compensation of its employees, the assessment is presumed to be valid and correct, and petitioner is liable for the basic deficiency withholding tax of P48,894.98, computed as follows:

Withholding tax due on compensation per alphalist	P3,374,981.86
Less: Remittances per Returns	3,326,086.88
Deficiency Withholding Tax	**P 48,894.98**

2. <u>Deficiency Expanded Withholding Tax – P478,548.41</u>

Respondent computed the deficiency EWT assessment as follows:[38]

	Amount	**Rate**	**EWT Due**
Professional Fees	P 584,231.11	10%	P 58,423.11
Professional Fees	228,200.00	5%	11,410.00
Repairs & Maintenance	12,183,709.39	1%	121,837.09
Repairs & Maintenance	13,578,678.36	2%	271,573.57
Rent Expense	99,646.82	5%	4,982.34
Laboratory Expense	134,887.00	1%	1,348.87
Laboratory Expense	18,426.70	2%	368.53
Brokerage Fees	333,423.16	5%	16,671.16
Brokerage Fees	205,287.19	10%	20,528.72
Janitorial & Security	1,730,258.20	1%	17,302.58
Janitorial & Security	607,963.50	2%	12,159.27
EWT Due			536,605.24
Less: Remittances			194,892.34
Deficiency Expanded Withholding Tax			341,712.90

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[37] Commissioner of Internal Revenue vs. Court of Appeals, *et al.*, G.R. No. 104151, March 10, 1995 and Atlas Consolidated Mining and Development Corporation vs. Court of Appeals, *et al.*, G.R. No. 105563, March 10, 1995

[38] Par. 18, Stipulation of Facts, JSFI, docket, p. 105

Add: 20% p.a. Interest (1-26-02 to 4-15-04)			136,835.51
TOTAL AMOUNT DUE			**P 478,548.41**

Petitioner alleged that subsequent to the issuance of the FAN, respondent reduced the assessment for deficiency EWT to P7,054.04 (sans interest) upon examination of petitioner's supporting documents. The reduction of the assessment for EWT is stated in the Memorandum for respondent signed by Ma. Elizabeth Neri, Dahlia V. Nitura, Edwin Sulit, and Josephine S. Virtucio, the Task Force Coordinators of the National Task Force on Independent Power Producers, to wit:[39]

> "This has reference to the protest letter of subject taxpayer dated March 3, 2004 xxx stating therein that Edison Bataan Cogeneration Corporation (EBCC) is not liable for the deficiency taxes being assessed for taxable year 2001 amounting to P70,193,676.37. The IPP audit team reiterates their assessment with some adjustments after taxpayer submitted some pertinent documents. The revised computation is shown hereunder (basic tax only):

TYPE OF TAX	2001 ASSESSMENT	
	ORIGINAL	**REVISED**
Income Tax	P42,867,007.09	P 38,005,976.61
Final Withholding Tax	6,700,975.60	5,473,190.00
Withholding Tax on Compensation	48,894.98	34,595.97
Expanded Withholding Tax	**341,712.90**	**7,054.04**
VAT	99,837.48	no revision

The reason for the reduction of the EWT assessment was explained and computed, as follows:[40]

	Amount	Rate	EWT Due
Professional Fees	234,731.00	10%	P 23,473.10
Professional Fees	228,200.00	5%	11,410.00
Repairs & Maintenance	6,185,120.53	1%	61,851.20

[39] Petitioner's Memorandum, docket, pp. 1014 to 1015
[40] Exhibit "V-1"

Repairs & Maintenance	2,614,108.10	2%	52,282.16
Rent Expense	99,646.82	5%	4,982.34
Laboratory Expense	97,462.00	1%	974.62
Laboratory Expense	17,876.70	2%	357.53
Brokerage Fees	333,423.16	5%	16,671.16
Brokerage Fees	205,287.19	10%	20,528.72
Janitorial & Security	1,574,591.70	1%	15,745.92
Janitorial & Security	722,315.41	2%	14,446.31
EWT Due			P 218,409.67
Less: Remittances			211,355.63
Deficiency Expanded Withholding Tax			**P 7,054.04**
Add: 20% p.a. Interest (1-26-02 to 4-15-04)			3,950.26
Compromise			1,500.00
TOTAL AMOUNT DUE			**P 12,504.30**

"The taxpayer submitted the following for various expenses that are not subject to withholding taxes:

a) Purchase orders and invoices as proof of payment of services to non-resident corporations.
b) Official receipts as proof of payment of services to government agencies.
c) Proof of payment of services on the following year and the corresponding withholding tax were also remitted on the following year. Therefore, penalties for late remittance were assessed for taxable year 2001 amounting to P8,553.33. The taxpayer paid the said amounts even if this did not form part of the previous assessments."

On the basis of the revised computation of deficiency EWT, petitioner paid the total amount due of P12,504.30, as evidenced by BIR Payment Form[41] and BIR Deposit Slip[42].

However, the Court finds, and so holds, that petitioner is still liable for the deficiency EWT based on the original computation of the BIR examiners in the amount of P341,712.90 and not the revised amount of P7,054.04.

[41] Exhibit "WW"
[42] Exhibit "XX"

The Court cannot take cognizance of the alleged Memorandum since it was not formally offered and none of the signatories thereon confirmed by way of testimony or judicial affidavit the contents of the said alleged Memorandum. More importantly, it appears that the Memorandum prepared by the officers concerned contained mere recommendation which has not been approved by respondent. Thus, the findings in the said Memorandum do not bind respondent. At most, the payment made by petitioner reduced the deficiency EWT to P334,658.86, computed as follows:

	Amount	Rate	EWT Due
Professional Fees	584,231.11	10%	P 58,423.11
Professional Fees	228,200.00	5%	11,410.00
Repairs & Maintenance	12,183,709.39	1%	121,837.09
Repairs & Maintenance	13,578,678.36	2%	271,573.57
Rent Expense	99,646.82	5%	4,982.34
Laboratory Expense	134,887.00	1%	1,348.87
Laboratory Expense	18,426.70	2%	368.53
Brokerage Fees	333,423.16	5%	16,671.16
Brokerage Fees	205,287.19	10%	20,528.72
Janitorial & Security	1,730,258.20	1%	17,302.58
Janitorial & Security	607,963.50	2%	12,159.27
EWT Due			**P 536,605.24**
Less: Remittances			(194,892.34)
Payment			(7,054.04)
Deficiency Expanded Withholding Tax			**P 334,658.86**

3. <u>Deficiency Final Withholding Tax – P9,384,314.27</u>

For failure to properly subject the following income payments to final withholding tax, respondent assessed petitioner for deficiency final withholding tax pursuant to the provisions of R.R. No. 2-98, as amended, to wit: [43]

	Amount	Rate	FWT Due
Syndicated Loan in Dollars	P 10,815,091.81	10%	P 1,081,509.18
Inter-company loan from Ogden	65,971,425.27	15%	9,895,713.80
Final Withholding Tax			10,977,222.98
Less: Remittances			4,276,247.38
Deficiency Final Withholding Tax			6,700,975.60
Add: 20% p.a. Interest (1-26-02 to 4-15-04)			2,683,338.67
TOTAL AMOUNT DUE			**P9,384,314.27**

A. Inter-company loan from Ogden

As stipulated by the parties, the deficiency final withholding tax is partly comprised of the amount of P9,895,713.80, representing 15% withholding tax on the amount of P65,971,425.27 referred to as Inter-company loan from Ogden. Petitioner contended that the assessment has no basis. First, petitioner averred that under its loan agreement with Ogden, it was agreed that petitioner shall assume payment of the tax on interest paid to Ogden. Since it had assumed the tax payment on interest, the applicable final tax rate is five percent (5%) and not fifteen percent (15%) as claimed by respondent, in accordance with petitioner's status as an Ecozone Utilities Enterprise registered with the PEZA and pursuant to Section 24, Republic Act No. 7916, otherwise known as "The Special Economic Zone Act of 1995", which provides:

> "SECTION 24. *Exemption from Taxes Under the National Internal Revenue Code.* — Any provision of existing laws, rules and regulations to the contrary notwithstanding, no taxes, local and national, shall be imposed on business establishments

[43] Par. 20, Stipulation of Facts, JSFI, docket, p. 106

> operating within the ECOZONE. **In lieu of paying taxes, five percent (5%) of the gross income earned by all businesses and enterprises within the ECOZONE shall be remitted to the national government.** xxx" *(Emphasis supplied)*

Likewise, petitioner invoked BIR Ruling No. 085-95 dated June 13, 1995, which ruled that the 5% preferential tax rate is a commutation tax which effectively accords the grantee exemption from all other taxes. Thus, in the case of interest income remitted to a Subic Bay Freeport (SBF) enterprise's US bondholders where the SBF enterprise undertook to pay interest to the holders of the notes it issued under an Indenture Agreement and assumed liability for withholding the taxes due on such interest, the SBF enterprise should withhold 5% as final withholding tax on the interest instead of the regular final withholding tax rate. Below is the pertinent portion of BIR Ruling No. 085-95:

> "1. In Suggestion 5 of Revenue Memorandum Circular No. 46-77, this Bureau has recognized and stated that it is aware of the market convention that the local borrower assumes the tax on the creditor's income in a foreign loan agreement. Thus, the Bureau adopted measures for local institutions to be at par with non-resident creditors. In this connection, a withholding agent is held to be directly and independently liable for the tax that, by law, it should withhold. (Commissioner of Internal Revenue vs. Procter & Gamble Philippine Manufacturing Corporation and the Court of Tax Appeals, G.R. 66838, December 2, 1994). Pursuant to Republic Act No. 7227, Subic Bay Freeport (SBF) Enterprises, such as SPC, are subject to the maximum tax rate of 5% in lieu of all other national or local taxes. The 5% tax of SBF Enterprises is a commutation tax which effectively accords the grantee exemption from all other taxes. (Philippine Air Lines vs. Commissioner of Internal Revenue, CTA Case No. 5 dated February 8, 1956; PNRC vs CIR, G.R. 10045, 34 Phil 401). Such being the case, your opinion that SPC should withhold 5% as final withholding tax on the interest income remitted to U.S.

> bondholders in connection with its 'Rule 144A' offering in the U.S., is hereby confirmed."

Respondent, in his Answer to the Petition for Review, stated that it has long been recognized, under the principles of taxation, that a business entity enjoying exemption or enjoying preferential tax rate can not extend this privilege to other business operations simply for the reason that this privilege is applicable only to its own income, the tax on which it is directly liable; nor can it be exempted from withholding the proper and correct amount of withholding tax on its income payments, for what is sought to be taxed is the income of the recipient and not the income of a business entity enjoying exemption or preferential tax rate. This principle is amplified and given wide dissemination under Revenue Regulations No. 20-2002, which states that "income payments made by a PEZA-registered enterprise to an entity in the customs territory shall not be subjected to the preferential tax rates or tax exemption enjoyed by the registered enterprise". Thus, the interest payments made to Ogden shall be subject to the appropriate tax rate of 15% (following the tax rate in the RP-US Tax Treaty).

This Court agrees with respondent.

Section 28(B)(5)(a) of the NIRC of 1997, as amended, imposes a twenty percent (20%) final withholding tax on interest on loans obtained from a non-resident foreign corporation, to wit:

> "SEC. 28. *Rates of Income Tax on Foreign Corporations.* -
>
> xxx xxx xxx
>
> (B) *Tax on Nonresident Foreign Corporation.* -

xxx xxx xxx

(5) *Tax on Certain Incomes Received by a Nonresident Foreign Corporation.* -

(a) *Interest on Foreign Loans.* - A final withholding tax at the rate of **twenty percent (20%)** is hereby imposed on the amount of interest on foreign loans contracted on or after August 1, 1986." (*Emphasis supplied*)

However, pursuant to the RP-US Tax Treaty dated January 1, 1983, the foregoing rate was reduced to 15% with respect to non-resident foreign corporation organized and existing under US laws. The relevant provisions of the RP-US Tax Treaty state:

"ARTICLE 12
INTEREST

(1) Interest by a resident of one of the Contracting States from sources within the other Contracting State may be taxed by both Contracting States.

(2) Interest derived by a resident of one of the Contracting States from sources within the other Contracting State shall not be taxed by the other Contracting State at a **rate in excess of 15 percent** of the gross amount of such interest.

(3) Interest derived by a resident of one of the Contracting States from sources within the other Contracting State with respect to public issues of bonded indebtedness shall not be taxed by the other Contracting State at a rate in excess of 10 percent of the gross amount of such interest.

xxx xxx xxx

(5) Paragraphs (2), (3), and (4) shall not apply if the recipient of interest from sources within one of the Contracting States, being a resident of the other Contracting State, carries on business in the first-mentioned Contracting State through a permanent establishment situated therein or performs in all other State independent personal services from a fixed base situated therein and the debt claim in respect of which the interest is paid is

effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 8 (Business Profits) or Article 15 (Independent Personal Services), as the case may be, shall apply.

(6) Where an amount is paid to a related person and would be treated as interest but for the fact that it exceeds an amount which would have been paid to an unrelated person, the provisions of this Article shall apply only to so much of the amount as would have been paid to an unrelated person. In such a case, the excess amount may be taxed by each Contracting State according to its own law, including the provisions of this Convention where applicable.

(7) The term '**interest**' as used in the Convention means **income from debt-claims of every kind,** whether or not secured by mortgage, and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures, as well as income assimilated to income from money lent by the taxation law of the Contracting State in which the income arises including interest on deferred payment sales."

The tax prescribed under the foregoing provisions of Section 28(B)(5)(a) of the NIRC of 1997, as amended, is in the nature of a final withholding tax. Under the final withholding tax system, the amount of income tax withheld by the withholding agent is constituted as **full and final payment of the income tax due from the payee on the said income** and the liability for **payment of the tax rests primarily on the payor as a withholding agent**. Thus, in case of failure to withhold the tax or in case of underwithholding, the deficiency tax shall be collected from the payor/withholding agent.[44]

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[44] Section 2.57(A) of Revenue Regulations No. 2-98, as amended

In **Commissioner of Internal Revenue vs. The Court of Appeals, *et al.***[45], the Supreme Court explained as follows:

> "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.'
>
> **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" (*Emphasis supplied*)

Clearly, from the foregoing law and jurisprudence, what is being taxed in the instant case is the interest income earned by Ogden, being the non-resident foreign corporation lender or payee and not the income of petitioner, being the borrower or payor. Petitioner merely acts as a collection agent of

[45] G.R. No. 108576, January 20, 1999

the government and it is mandated to withhold and remit to the BIR the 15% final tax on its loan interest payments to Ogden in accordance with Section 57(A) in relation to Section 58(A), of the NIRC of 1997, as amended, to wit:

> "SEC. 57. *Withholding Tax at Source.* —
>
> (A) *Withholding of Final Tax on Certain Incomes.* — Subject to rules and regulations the Secretary of Finance may promulgate, upon the recommendation of the Commissioner, requiring the filing of income tax return by certain income payees, the tax imposed or prescribed by Sections xxx **28(B)(5)(a)** xxx of this Code on specified items of income **shall be withheld by payor-corporation** and/or person and paid in the same manner and subject to the same conditions as provided in Section 58 of this Code.
>
> SEC. 58. *Returns and Payment of Taxes Withheld at Source.* —
>
> (A) *Quarterly Returns and Payments of Taxes Withheld.* — Taxes deducted and withheld under Section 57 by withholding agents shall be covered by a return and paid to, except in cases where the Commissioner otherwise permits, an authorized agent bank, Revenue District Officer, Collection Agent, or duly authorized Treasurer of the city or municipality where the withholding agent has his legal residence or principal place of business, or where the withholding agent is a corporation, where the principal office is located.
>
> **The taxes deducted and withheld by the withholding agent shall be held as special fund in trust for the government until paid to the collecting officers.**
>
> The return for final withholding tax shall be filed and the payment made within twenty-five (25) days from the close of each calendar quarter, while the return for creditable withholding taxes shall be filed and the payment made not later than the last day of the month following the close of the quarter during which withholding was made: *Provided,* **That the Commissioner, with the approval of the Secretary of Finance, may require these withholding agents to pay or deposit the taxes deducted or withheld at more frequent intervals when necessary to protect the interest of the government.**" (*Emphasis supplied*)

The above provisions were implemented by Section 2.58 of Revenue Regulations No. 2-98, as amended, which provide:

> "**SECTION 2.58.** ***Returns and Payment of Taxes Withheld at Source.***
>
> **(A)** ***Monthly return and payment of taxes withheld at source —***
>
> (1) ***WHERE TO FILE*** — Creditable and final withholding taxes deducted and withheld by the withholding agent shall be paid upon filing a return in duplicate with the authorized agent banks located within the Revenue District Office (RDO) having jurisdiction over the residence or principal place of business of the withholding agent. In places where there is no authorized agent banks, the return shall be filed directly with the Revenue District Officer, Collection Officer or the duly authorized Treasurer of the city or municipality where the withholding agent's residence or principal place of business is located, or where the withholding agent is a corporation, where the principal office is located except in cases where the Commissioner otherwise permits.
>
> (2) ***WHEN TO FILE*** —
>
> (a) The withholding tax return, whether creditable or final, shall be filed and payments should be made within ten (10) days after the end of each month except for taxes withheld for December which shall be filed on or before January 25 of the following year.
>
> (b) For large taxpayers, the filing of the return and the payment of tax shall be made within twenty five (25) days after the end of each month.
>
> (c) The return for final withholding taxes on interest from any currency bank deposit and yield or any other monetary benefit from deposit substitutes and from trust funds and similar arrangements shall be filed and the payment made within twenty five (25) days from the close of each calendar quarter."

As correctly pointed out by respondent, the preferential rate of 5% granted under Section 24 of Republic Act No. 7916 applies only to business enterprises operating within the ECOZONES and does not in any way extend to non-resident foreign corporations-creditors dealing with business enterprises operating within the ECOZONES.

In fact, Part VII, Rule XIII, Section 5 of the Rules and Regulations to Implement R.A. No. 7916 explicitly states that:

PART VII
Incentives to Ecozone Enterprises
Rule XIII
Application and Entitlement

xxx xxx xxx

> SECTION 5. *Limitation of Entitlement to Incentives* - Incentives granted by the PEZA shall apply only to registered operations of the ECOZONE Enterprises and only during the period of its registration with PEZA."

In addition, while the PEZA-registered enterprises shall pay only a final tax of five percent, in lieu of national and local taxes, it is clear that the term "national taxes" shall, however, not include withholding taxes on income payments to persons other than a registered ECOZONE enterprise, subject to the withholding tax at source under Section 57(A) of the NIRC of 1997, as amended. Section 2(h) of Revenue Regulations No. 12-97 defines "national taxes" as follows:

> "h. '*National Taxes*' shall refer to all internal revenue taxes, including the regular income taxes, otherwise due and collectible from a registered ECOZONE enterprise under the National Internal Revenue Code and customs duties and import charges under the Tariff and Customs Code. National taxes shall, however, not include withholding taxes on salaries of employees or on income payments to persons other than a registered ECOZONE enterprise, subject to the withholding tax at source under Section 50(b) of the Tax Code, as amended."

Finally, this Court finds petitioner's reliance on BIR Ruling No. 085-95 dated June 13, 1995 erroneous as it is not consistent with the provisions of Section 28(B)(5)(a) of the NIRC, which categorically taxes the interest income received by a non-resident foreign corporation at the final withholding tax rate of twenty percent (20%). Indeed, administrative issuances must not override, supplant or modify the law, but must be consistent with the law they intend to carry out.[46]

Rulings issued by the Commissioner of Internal Revenue command respect and are generally adopted. However, such rulings are not conclusive upon the courts and will be ignored if found to be incorrect. Hence, in the case of **Philippine Bank of Communications vs. Commissioner of Internal Revenue, *et al.***[47], the Supreme Court, in disregarding a Revenue Memorandum Circular issued by the Commissioner of Internal Revenue, held:

> "It bears repeating that Revenue memorandum-circulars are considered administrative rulings (in the sense of more specific and less general interpretations of tax laws) which are issued from time to time by the Commissioner of Internal Revenue. It is widely accepted that the interpretation placed upon a statute by the executive officers, whose duty is to enforce it, is entitled to great respect by the courts. Nevertheless, such interpretation is not conclusive and will be ignored if judicially found to be erroneous. Thus, courts will not countenance administrative issuances that override, instead of remaining consistent and in harmony with, the law they seek to apply and implement.
>
> In the case of *People vs. Lim*, it was held that rules and regulations issued by administrative officials to implement a law cannot go beyond the terms and provisions of the latter.

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[46] Michel J. Lhuillier Pawnshop, Inc. vs. Commissioner of Internal Revenue, G.R. No. 166786, May 3, 2006
[47] G.R. No. 112024, January 28, 1999

> '(O)f course, in case of discrepancy, the basic Act prevails, for the reason that the regulation or rule issued to implement a law *cannot go beyond* the terms and provisions of the latter. . . . In this connection, the attention of the technical men in the offices of Department Heads who draft rules and regulations is called to the importance and necessity of closely following the terms and provisions of the law which they are intended to implement, this to avoid any possible misunderstanding or confusion as in the present case.'

> Further, fundamental is the rule that the State cannot be put in estoppel by the mistakes or errors of its officials or agents.

> xxx xxx xxx

> Article 8 of the Civil Code recognizes judicial decisions, applying or interpreting statutes as part of the legal system of the country. But administrative decisions do not enjoy that level of recognition. A memorandum-circular of a bureau head could not operate to vest a taxpayer with a shield against judicial action. For there are no vested rights to speak of respecting a wrong construction of the law by the administrative officials and such wrong interpretation could not place the Government in estoppel to correct or overrule the same. Moreover, the non-retroactivity of rulings by the Commissioner of Internal Revenue is not applicable in this case because the nullity of RMC No. 7-85 was declared by the respondent courts and not by the Commissioner of Internal Revenue. xxx"

Second, for the year 2001, petitioner alleged that it made two interest payments on its inter-company loan from Ogden Power International Holdings, Inc. (Ogden) and taxes thereon were withheld at the rate of 5%. The interest payments were made in June 2001, in the amount of P55,214,232.40 and in September 2001, in the amount of P28,530,783.80; for which the corresponding 5% taxes were withheld and remitted to the BIR in the amounts of P2,760,711.62 and P1,426,539.19, respectively, as evidenced by petitioner's Monthly Remittance Return of Final Income Taxes Withheld[48] and RCBC Official Receipts[49].

It is noteworthy that the aforesaid remittances totaling P4,187,250.81 (P2,760,711.62 plus P1,426,539.19) together with the amount of P88,996.57[50], representing 10% final withholding tax on petitioner's interest payment on its syndicated loan in dollars with Philippine National Bank (PNB) in the sum of P4,276,247.38 were considered and deducted by respondent's examiners in arriving at the basic deficiency final withholding tax due of P6,700,975.60.

Section 2.57.4 of Revenue Regulations No. 2-98 provides when the obligation to withhold arises. The said Section reads:

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

The above provision was amended by Section 2.57.4 of Revenue Regulations No. 12-01, which states:

> "SECTION 4. *Time of Withholding.* — Section 2.57.4 of RR 2-98, is hereby amended to read as follows:
>
> **'Sec. 2.57.4. *Time of withholding.* — The obligation of the payor to deduct and withhold the tax under Section 2.57 of these Regulations arises at the time an income *payment* is paid or payable, *or the income payment is accrued or recorded as an expense or asset, whichever is applicable, in the payor's books*, whichever comes first. The term 'payable' refers to the date the**

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[48] Exhibits "GG" and "HH"
[49] Exhibits "II" and "JJ"
[50] Exhibit "PP"

obligation becomes due, demandable or legally enforceable.

Provided, however, that where income is not yet paid or payable but the same has been recorded as an expense or asset, whichever is applicable, in the payor's books, the obligation to withhold shall arise in the last month of the return period in which the same is claimed as an expense or amortized for tax purposes.

Example — X Corporation, a domestic corporation which reports income and expenses on a calendar year basis, issues 2-Year bonds with face value of P100,000,000 at a discount amounting to P6,000,000 on January 1, 2002 to twenty five (25) investors. It records in its books the amortized portion of the discount as expense in the amount of P250,000/month (P6,000,000 divided by 24 months).

'Since the discount is not yet paid or payable but the aliquot portion of which has already been recorded as expense for tax purposes, the withholding of the 20% final tax shall be done on the last month of the quarter when the same has been claimed as an expense in the quarterly income tax returns/final adjustments returns filed by X Corporation.

Thus, in the above illustration, the amortized discount to be recorded by X Corporation for the months of January, February and March 2002 amounting to P750,000 shall be subject to 20% final tax of P150,000 come March 2002, which tax shall be remitted within 10 days after the quarter ending March 2002 (that is, on or before April 10, 2002). The said withholding tax shall be reported in its Monthly Remittance Return of Final Income Taxes Withheld required to be filed in April 2002. On the other hand, for the calendar quarter ending December 2002, the withholding of the final tax for the amortized discount pertaining to the months of October, November and December shall be done in December 2002 and the remittance thereof shall be on or before January 15, 2003. The said withholding tax shall be reported in its Monthly Remittance Return of Final Income Taxes Withheld required to be filed in January 2003." (Emphasis supplied)

As stated in **Section 8 of R.R. No. 12-01**, the foregoing provisions shall take effect with respect to money/income payments that are paid or payable or accrued/recorded as expense/asset in the books of accounts in October 2001 the withholding taxes of which are required to be paid/submitted to the BIR within the month of November 2001.

Based on Section 2.57.4 of Revenue Regulations No. 2-98, for the period January to September 2001, the duty of petitioner to withhold arises when the loan interests were paid or payable, whichever comes first. However, pursuant to Section 2.57.4 of Revenue Regulations No. 12-01, for the period October to December 2001, the obligation of petitioner to withhold arises when the loan interests were paid, becomes payable or were accrued/recorded as expense in petitioner's books, whichever comes first.

In the instant case, other than the Monthly Remittance Returns[51] and the related official receipts[52], petitioner did not submit in evidence its loan agreement with Ogden in order to determine how much and when the loan interests became due and payable. Petitioner also failed to present its books of accounts such as, but not limited to, the general ledger, cash disbursements book, and general journal, in order to determine how much loan interest was actually paid and accrued or claimed as expense on monthly/quarterly basis for tax purposes. Thus, for petitioner's failure to prove that it withheld and remitted the proper final withholding taxes on its interest payments to Ogden, respondent's assessment of deficiency final withholding tax should be upheld.

[51] Exhibits "GG" and "HH"
[52] Exhibits "II" and "JJ"

B. Syndicated Loan in Dollars

As to the assessment of deficiency FWT in the amount of P1,081,509.18, it appears that petitioner obtained a dollar-denominated syndicated loan with the Foreign Currency Deposit Unit (FCDU) of various lender banks. Petitioner claims that as industry practice, the lenders remitted to the BIR the ten percent (10%) final tax on interest. To prove remittance of the 10% final withholding tax on the interest on its dollar-denominated syndicated loan for the year 2001, petitioner submitted Certificates of Final Income Tax Withheld, Monthly Remittance Returns of Final Income Taxes Withheld, Certification and BIR Payment Form No. 0605 reflecting the following:

	Creditor	Exhibit	Tax Base	Rate	Tax Withheld
1.	Supported by Certificates of Final Income Tax Withheld				
	First Metro Investment Corp.	AAA	2,437,104.59	10%	P 243,710.46
	United Overseas Bank	GGG	707,725.46	10%	70,772.55
				Subtotal	**314,483.01**
2.	Supported by Monthly Remittance Returns of Final Income Taxes Withheld and Certification				
	United Coconut Planters Bank	MM/DDD	2,572,744.76	10%	257,274.48
	United Coconut Planters Bank	NN/DDD	989,250.30	10%	98,925.03
				Subtotal	**356,199.51**
3.	Supported by Monthly Remittance Returns of Final Income Taxes Withheld and BIR Payment Form 0605				
	Philippine National Bank	OO		10%	229,659.51
	Philippine National Bank	PP	889,965.70	10%	88,996.57
				Subtotal	**318,656.08**
4.	Supported by Annual Information Return of Income Taxes Withheld on Compensation and Final Withholding Taxes with attached Alphalist of Employees/Payees				
	Security Bank Corporation	ZZ/ZZ-4	1,780,591.70	10%	178,059.17
				Subtotal	**178,059.17**
				TOTAL	**P 1,167,397.77**

The Court cannot give credence or probative value to the Certificates of Final Income Tax Withheld from First Metro Investment Corporation and United Overseas Bank because the said certificates show that the income recipient/payee therein is the petitioner; while the withholding agent/payors are the First Metro Investment Corporation and the United Overseas Bank, instead of petitioner, which should be the payor/withholding agent under the above-cited law and revenue regulations. Even if the said certificates pertain to the withholding taxes subject of the assessment, still the same do not prove remittance of the subject withholding taxes.

The same holds true with the Security Bank Corporation's Annual Information Return of Income Taxes Withheld on Compensation and Final Withholding Taxes with attached Alphalist of Employees/Payees. These documents show the name of petitioner as the purported income recipient/payee; while the purported withholding agent/payor is Security Bank Corporation. Moreover, although the name of petitioner is indicated in the alphalist with the corresponding withholding taxes of P178,059.17, still it cannot be ascertained whether the amount of P178,059.17 was actually remitted to the BIR, because the total amount of P33,428,639.18 final withholding tax reflected in the alphalist does not tally with the P35,170,008.48 total final withholding remittances reflected in the annual information return.

Only the Monthly Remittance Returns of Final Income Taxes Withheld and Certification from the United Coconut Planters Bank, as well as the

Monthly Remittance Return of Final Income Taxes Withheld and BIR Payment Form 0605 from the Philippine National Bank can be considered valid proofs of the final withholding taxes of P356,199.51 and P318,656.08, respectively, in the sum of P674,855.59. However, as earlier stated, the amount of P88,996.57 representing 10% FWT on petitioner's interest payment on its dollar-denominated syndicated loan with PNB was already included in the total remittances of P4,276,247.38 deducted by the examiners in arriving at the basic deficiency FWT assessment of P6,700,975.60. Therefore, only the remaining substantiated FWT of P585,859.02 shall be deducted from the basic deficiency FWT assessment of P6,700,975.60.

Consequently, petitioner shall still be liable to pay basic deficiency final withholding tax of P6,115,116.58 for taxable year 2001, computed as follows:

	Amount	Rate	FWT Due
Syndicated Loan in Dollars	P10,815,091.81	10%	P 1,081,509.18
Inter-company loan from Ogden	65,971,425.27	15%	9,895,713.80
FWT Due			P 10,977,222.98
Less: Remittances			4,276,247.38
Substantiated FWT on the interest on petitioner's syndicated loan in dollars			585,859.02
Deficiency FWT			**P 6,115,116.58**

WHEREFORE, the instant Petition for Review is hereby **PARTIALLY GRANTED**. Accordingly, the assessments for deficiency income tax, value-added tax, and increments for erroneous filing and paying in the wrong venue (as well as the interests and surcharges) for the year 2001 are hereby **CANCELLED** and **WITHDRAWN** in view of petitioner's availment of the Tax

Amnesty under R.A. No. 9480 and petitioner's payment of the increments for erroneous filing and paying in the wrong venue.

However, the assessments for deficiency withholding tax on compensation, expanded withholding tax, and final withholding tax issued by respondent against petitioner for taxable year 2001 are hereby **AFFIRMED** with some modifications. Accordingly, petitioner is hereby **ORDERED** to **PAY** respondent the following amounts inclusive of the twenty-five percent (25%) surcharge imposed under Section 248(A)(3) of the NIRC of 1997, as amended:

Tax Type	Basic Tax	25% Surcharge	Total
Withholding Tax on Compensation	P 48,894.98	P 12,223.75	P 61,118.73
Expanded Withholding Tax	334,658.86	83,664.72	418,323.58
Final Withholding Tax	6,115,116.58	1,528,779.15	7,643,895.73
TOTAL	**P 6,498,670.42**	**P 1,624,667.61**	**P8,123,338.03**

Likewise, petitioner is liable to pay (a) deficiency interest at the rate of twenty percent (20%) *per annum* on the basic deficiency withholding tax on compensation, expanded withholding tax, and final withholding tax computed from January 25, 2002 until full payment thereof, pursuant to Section 249(B) of the NIRC of 1997, as amended;[53] and (b) delinquency interest at the rate of twenty percent (20%) *per annum* on the total deficiency taxes of P8,123,338.03 and on the 20% deficiency interest which have accrued as

[53] Deficiency Interest of P3,950.26 paid by petitioner per BIR Payment Form (Exhibit "WW") and BIR Deposit Slip (Exhibit "XX") shall have to be deducted from the total deficiency interest to be paid by petitioner

aforestated in (a) computed from April 15, 2004 until full payment thereof, pursuant to Section 249(C) of the NIRC of 1997, as amended.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 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
Chairperson, First Division