REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

BPI FAMILY SAVINGS BANK, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 5456

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
APR 07 1999

x - x

DECISION

This case involves a claim for refund of the amount of ₱1,052,687.00 allegedly representing overpaid gross receipts taxes for the fourth quarter of 1994.

Petitioner is a domestic savings and mortgage banking corporation duly organized and existing under the laws of the Philippines with head office at the BPI Family Bank Bldg, Paseo de Roxas corner de la Rosa Streets, Makati City.

On January 20, 1995, Petitioner filed its Quarterly Percentage Tax Return reflecting gross earnings in the amount of ₱758,197,625.27 and payment of ₱28,038,279.75 as gross receipts tax for the fourth quarter of 1994. (Exh. "A")

Petitioner alleges that the amount of ₱758,197,625.27 as taxable gross receipts comprised all of its gross receipts and earnings including the twenty percent (20%) final taxes allegedly withheld by its various clients on the interest and other passive income which were subsequently remitted to the Bureau of Internal Revenue.

After taking into consideration the decision of this Court, dated January 30, 1996, in the case of **Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720,** where "it was held that the 20% final withholding tax on bank's interest and other passive income should not form part of its taxable gross receipts for purposes of computing gross receipts tax," the Petitioner, on September 24, 1996, filed with the Bureau of Internal Revenue a claim for refund in the amount of P4,171,157.00 representing alleged overpaid gross receipts tax for the calendar year 1994.

The aforesaid claim for refund was not acted upon by Respondent. Thus, on January 17, 1997, Petitioner filed with this Court the instant Petition for Review focusing its claim on the refund of P1,052,587.00 allegedly representing overpaid gross receipts tax for the fourth quarter of 1994. However, in a Memorandum filed on February 23, 1998, Petitioner submitted a reduced claim for refund in the amount of P913,373.87.

Petitioner reiterates its proposition that the 20% final withholding tax on the interest and other passive income which were already withheld and remitted to the Bureau of Internal Revenue were erroneously included in its taxable gross receipts, thus, it stressed that on the strength of the aforementioned ruling of this Court in the Asian Bank case, *supra*, it has actually overpaid the amount legally due from it insofar as its gross receipts' tax obligations are concerned, hence, a refund is therefore in order.

Respondent, on the other hand, by way of Special and Affirmative Defenses alleges that: a) the ruling of this Court in the case of Asian Bank Corporation vs. CIR is not applicable in Petitioner's case; b) following the principle of uniformity of taxation, the withholding taxes on petitioner's gross receipts should be imposed under similar circumstances as the withholding taxes imposed on compensation income; c) Claims for refund are construed strictly against the claimant; d) it is incumbent upon Petitioner to show compliance with the provisions of Section 230, NIRC, as amended, and; e) that Petitioner's claim has already prescribed.

In order to support its claim for refund, Petitioner presented the following evidence, to wit:

a. Quarterly Percentage Tax Return for the fourth quarter of 1994 (Exh. "A")

b. Corporation Annual Income Tax Return for the calendar year 1994 (Exh. "C")

c. Certification issued by Joaquin Cunanan and Company dated June 25, 1997 (Exh. "E")

d. Schedule of Passive and Interest Income for the fourth quarter of 1994 (Exhs. B, B-1)

e. Demand letter for refund dated September 20, 1996 (Exh. "D")

The issue in this case is whether or not Petitioner is entitled to the claim for refund in the amount of ₱913,373.87 allegedly representing overpaid gross receipts taxes for the fourth quarter of 1994.

There is no doubt as to the legality of Petitioner's claim as this controversy has already been resolved in the earlier case of **Asian Bank Corporation vs. Commissioner of Internal Revenue, *supra***, which is likened under similar facts and circumstances obtaining in the case at bar. Hence, We find no valid reason to deviate from our Decision in said case, which states in this wise:

> "We agree with the petitioner that the 20% final withholding tax on its interest income should not form part of its taxable gross receipts.
>
> Revenue Regulations No. 12-80 dated November 7, 1980 on Taxation of Certain Income Derived from Banking Activities provides that the rates of tax to be imposed on the gross receipts of such financial institution; shall be based on all items of <u>income actually received</u>, thus:
>
>> SEC. 4. x x x x x x x x x
>>
>> (e) *Gross receipts tax on banks, non-bank financial intermediaries, financing companies, and other non-bank financial intermediaries not performing quasi-banking activities.*-The rates of taxes to be imposed on the gross receipts of such financial institutions <u>shall be based on all items of income actually received</u>. Mere accrual shall not be considered, but once payment is received on such accrual or in cases of prepayment,

> then the amount actually received shall be included in the tax base of such financial institutions, as provided hereunder. (Underscoring supplied)

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

> In the second place, the highest tribunal of the land interpreted the term "gross receipts: to mean all receipts of a taxpayer excluding those which have been especially earmarked by law or regulation for the government or some person other than the taxpayer. Thus, it was held:
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> "x x x x. The Government could not have meant to tax as gross receipt of the Manila Jockey Club the 1/2% which it directs same Club to turn over to the Board of Races. The latter being a Government institution, there would be double taxation, which should be avoided unless the statute admits of no other interpretation. In the same manner, the Government could not have intended to consider as gross receipt the portion of the funds which it directed the Club to give, to winning horses and Jockeys-admitted 5%. It is true that the law says that out of the total wager funds 12 1/2% shall be set aside as the 'commission' of the track owners but the law itself takes official notice, and virtually approves or directs payment of the portion that goes to owners of horses as prizes and bonuses of jockeys, which portion is admittedly 5% out of the 12 1/2% commission. As it did not at that time contemplate the

application of 'gross receipts' revenue principle, the law in making a distribution of the total wager funds, took no trouble of separating one item from the other; and for convenience, grouped three items under one common denomination.

"Needless to say, gross receipts of the proprietor of the amusement place should not include any money which although delivered to the amusement place has been especially earmarked by law or regulation for some person other than the proprietor." (**The Commissioner of Internal Revenue vs. Manila Jockey Club, Inc., G.R. Nos. L-13890 & L-13887, June 30, 1960**)

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

Having resolved the legal issue of whether or not the 20% final withholding taxes should not form part of the gross receipts of the Petitioner, We are now tasked to settle the factual issue as to whether or not Petitioner is entitled to a refund of the amount of ₱913,373.87 representing gross receipts taxes alleged to have been paid erroneously by Petitioner for the fourth quarter of 1994 based on the evidence at hand.

A thorough and careful examination of the records of this case and the evidence presented fails to show convincingly that the amount being claimed for refund has indeed been paid to the Respondent and that the gross receipts on interest and other passive income corresponding to such overpaid gross receipts taxes have been duly reported.

Petitioner failed to present proof of the individual transactions from which the alleged interest and other passive income were sourced. Mere Certification of an auditing firm, Joaquin Cunanan & Co. (Exh. E) and a Summary of Interest and other Passive Income (Exh. B) without presenting the pre-marked exhibits of the individual transactions supporting said Certification and the schedule contained therein are not enough to bolster Petitioner's claim. These documents which were the basis of the summary and Certification of the independent Auditor must be submitted before Us and adduced in evidence whether voluminous or not. We have already mandated that the receipts, invoices and other documents covering the accounts or payments must be pre-marked by the party concerned and submitted to this Court in order to be made accessible to the adverse party whenever he/she desires to check and verify the correctness of the summary and CPA certification (CTA Circular No. 1-95). Unfortunately, Petitioner failed to comply with such

Circular. Thus, We have no way of verifying the correctness of the CPA Certification and schedule contained therein. In other words, there is no way by which this Court can determine how much of the total gross receipts derived from interest and other passive income were subjected to final withholding tax at source at the rate of 20% and how much Petitioner is legally entitled thereto.

Moreover, Petitioner should have endeavored to prove that the alleged receipts of interest and other passive income were the ones duly reported and incorporated as such in its Quarterly Percentage Tax Return (Exh. A). When Petitioner earned its income, it is of course expected to have in its possession documents and records of each and every transaction it has entered into, such as passbook, bank statements, and certificates of final taxes withheld and from which the aggregate amount of gross receipts as declared in its Quarterly return was based.

As Petitioner failed to fully substantiate its claim for refund, granting Petitioner's prayer will be at naught. Settled is the rule in this jurisdiction that a claim for refund is in the nature of a claim for exemption, hence should be construed in *strictissimi juris* against the Taxpayer. (Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd. 244 SCRA 335).

WHEREFORE, in view of the foregoing, the herein Petition for Review is hereby **DISMISSED** for insufficiency of evidence.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

(Dissenting)
AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals

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DISSENTING OPINION

This Petition for Review seeks the refund of the amount of ₱1,052,687.00 representing alleged overpaid gross receipts tax for the fourth quarter of 1994.

The majority concluded that although Petitioner's claim rests on firm legal grounds, the evidence was not sufficient to convince them of the amount being claimed, hence the refund was denied.

In my humble opinion, I believe that the claim for refund should be denied for lack of legal basis and not on the ground of insufficiency of evidence.

The ruling in the Asian Bank case which declared that the 20% final withholding tax on the bank's interest and other passive income should not form part of the taxpayer's gross receipts, is, to my mind erroneous as there is no provision in the Tax Code or any special law which excludes the 20% final withholding tax from the total gross receipts for purposes of computing the 5% gross receipts tax.

Section 8(c) of Revenue Regulations No. 12-80, dated November 7, 1980, as amended by Section 7(c) of Revenue Regulations No. 17-84, dated October 12, 1984 have the same provisions, thus:

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

Clearly, there is no doubt that the 20% final withholding tax is legally includible as part of the gross receipts for purposes of computing the gross receipts tax.

The petitioner cited the case of **Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720, dated January 30, 1996,** where this Court has upheld the petitioner's contention that the interest income included as part of such gross receipts should be computed minus the 20% final tax already withheld and deducted by various withholding agents for the reason that the amount did not go to its funds, hence, was not actually received by them. And the Court approved the petitioner's citation of Section 4(e) of Revenue Regulations No. 12-80, dated November 7, 1980, thus:

> "Gross receipts tax on banks, non-bank financial intermediaries, financing companies, and other non-bank financial intermediaries not performing quasi-banking activities. - The rates of taxes to be imposed on the gross receipts of such financial institutions shall be based on all items of income actually received. Mere accrual shall not be considered, but once payment is received on such accrual or in cases of overpayment then the amount actually received shall be included in the tax base of such financial institutions, as provided hereunder."

This Court concluded in said case that from the aforestated provisions it can logically be inferred that the amount representing the final tax, not having been received by the petitioner but instead went to the coffers of the government, should no longer form part of its gross receipts for purposes of computing the gross receipts tax. Such conclusion in law is legally objectionable for two (2) reasons, to wit:

> 1) Section 4(e) of Revenue Regulations No. 12-80 is not a computation determinative of the amount of gross receipts as basis of the gross receipts tax under Section 119 of the Tax Code. Said revenue regulations merely authorize the determination of the amount of gross receipts on the basis of the method of accounting being used by the taxpayer under Section 37 of the Tax Code. Such accounting methods for tax purposes comprise a set of rules for determining when and how to report income and deductions (**Consolidated Mines, Inc. vs. CTA, L-18843, August 29, 1974**). The two principal accounting methods expressly and impliedly recognized by the Tax Code and the Income Tax Regulations are:
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> > (a) Cash receipts and disbursement method or cash basis. - Income earned by the taxpayer is not included in gross income until received and expenses are not

deducted until paid within the taxable year; and

(b) Accrual basis. - Income is included in gross income when earned, whether received or not, and expenses are allowed as deductions when incurred although not yet paid within the year.

2) That the non-inclusion of the 20% final withholding income tax from the gross interest income for purposes of the gross receipts tax operates as an exemption from tax. Being an exemption from tax, the same must be construed strictly not against the government but against the one who asserts the claim of exemption. Tax exemption can only be given effect when the grant is clear and categorical inasmuch as taxation is the rule and exemption is the exception, Section 26, Tax Code. The holding therefore in the Asian Bank Corporation to the effect that the non-inclusion of the 20% final withholding income tax from the gross receipts can logically be inferred from the wordings of said Section 4(e) of Revenue Regulations No. 12-80, is misplaced.

Tax statutes are to receive a reasonable construction with a view to carrying out their purpose and intent (**51 Am Jur 361**). It should not be construed as to permit the taxpayer to easily evade the payment of the tax (**Cabon Steel Co. vs. Lewelyn, 251 U.S. 501**). Thus, the good faith of the taxpayer is not sufficient justification for exemption from the payment of surcharges imposed by law (**Commissioner vs. Royal Interocean Lines and CTA, L-26506, July 30, 1970**). A tax statute should be construed to avoid the possibilities of tax evasion (**Lorenzo vs. Posadas, 64 Phils. 353**).

The High Court's decision in the case of **Commissioner of Internal Revenue vs. The Manila Jockey Club, Inc. 108 Phils. 821, June 30, 1960**, which was reaffirmed by the said Court in the case of **Visayan-Cebu Terminal Co., Inc. vs. Commissioner of Internal Revenue,**

13 SCRA 357, February 27, 1965 cannot be considered as precedent cases, hence, inapplicable to the two cases decided by this Honorable Court in the cases of **Compania Maritima vs. Acting Commissioner of Internal Revenue, CTA Case No. 1426 dated November 14, 1966** and **Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720 dated January 30, 1996,** for the following reasons:

> 1) In the Manila Jockey Club, Inc. case, the Club was authorized to operate horse races in which betting was made through the sale of tickets to the public. The total amount of bets called "wager fund" were distributed pursuant to Executive Order No. 320 and Republic Act No. 309, as follows:
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> 87½% as dividends to holders of winning tickets
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> 12½% as "commissions" of the Manila Jockey Club, of which ½% was assigned to the Board on Races and 5% was distributed as prizes for owners of winning horses and authorized bonus for jockeys.

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

Notwithstanding the opinions of the Secretary of Justice to the effect that the amount corresponding to the 5½% was held only by the Club in trust for the owners of winning horses and authorized bonuses of jockeys, the then Collector of Internal Revenue demanded payment of amusement taxes for the period November 1946 to October 1950. Said demand letter was timely appealed to the Court of Appeals wherein a unanimous judgment was obtained reversing the Collector's stand on the matter. In the High Court, the position of the Secretary of Justice was sustained thereby upholding the Court of Tax Appeals' decision.

Accordingly, gross receipts of the proprietor of the amusement place should not include any money which, although delivered to the amusement place was "<u>especially earmarked</u>" by law or legal rule or regulations for some persons other than the proprietor. Undeniably, they are money received by the racing club but they are moneys earmarked by law or regulations for winning horse owners and jockeys and never for a minute become the property of the race track. The same is true in the case of the ½% which the law directs the club to deliver to the Board on

Races. The High Court therefore agrees with the stand of the Court of Tax Appeals that such funds representing 5½% of the 12½% "commissions" of the race track do not form part of the gross receipts, hence not subject to the amusement tax of 20%.

The above-mentioned decision of the High Court was also applied in the case of Visayan Cebu Terminal Co., Inc. vs. Commissioner of Internal Revenue, 13 SCRA 357, Nos. L-19530 and L-19444, February 27, 1965. The legal issue involved in this case is the interpretation of the management contract entered into by and between the Bureau of Customs and Visayan Cebu Terminal Co., Inc. whereby the latter as contractor was appointed the sole manager of the Arrastre Service at the Port of Cebu City. In the said Management Contract, it was further agreed and understood that in consideration of the rights and privileges granted the Contractor for the management of the Arrastre Service, the Bureau of Customs shall receive twenty eight (28%) percent of the total monthly gross income derived from whatever source in connection with the operations of the Arrastre Service, payable within ten (10) days of the succeeding month. The main legal issue involved in this case is whether or not the gross receipts corresponding to the 28% of the total gross income of the Service Contractor delivered to the Bureau of Customs within ten (10) days of the following month should form part of the gross receipts subject to 3% contractor's tax under Section 191 of the Tax Code. The Court of Tax Appeals ruled in favor of the petitioner, holding the view that the said 28% payment by the Arrastre Contractor based on its monthly gross income should not form part of the gross receipts subject to 3% contractors tax and that paragraph 23 of the said Management Contract can legally be construed as a "regulation". As the learned trial court has aptly observed: "x x x the government could not have intended to consider as gross receipts the 28% that went to one of its institutions, the Bureau of Customs, and thereby collect percentage tax on it from petitioner. To hold petitioner liable for the payment of percentage tax is unquestionably unjust and not contemplated by Section 191 of the Tax Code."

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

In the Asian Bank Corporation case, petitioner bank alleges that subjecting the gross receipts to the 20% final withholding income tax and later to the 5% gross receipts tax is not only oppressive and obnoxious but even a confiscatory form of double taxation. Double taxation has been defined "as the taxing of the same item or piece of property twice to the same person, or taxing it as the property of one person and again as the property of another, <u>but this does not include the imposition of different</u> taxes concurrently on the same property or income (e.g. federal and state income taxes), nor the taxation of the same piece of property to different persons when they hold different interests in it or when it represents different values in their hands, as when both the mortgagor and mortgagee of property are taxed in respect to their interests in it, or when a tax is laid upon the profits of the corporation and also upon the dividends paid to its stockholders" (Black's Law Dictionary, 6th Edition, p. 491). This acceptable form of double taxation is reflected in BIR Ruling No. 223 dated November 2, 1989, thus:

> "The 5% gross receipts tax under Section 120 of the Tax Code is collectible on all finance companies doing business in the Philippines from interests, discounts, and all other items treated as gross income under the Tax Code. Accordingly, your income derived from investing the excess funds in short-term market placements through commercial banks constitutes income hence, subject to the 5% gross receipts tax under said Section. The fact that it has been subjected to the 20% final withholding income tax under Section 50(a) is immaterial. Besides, the withholding tax is imposed under Title II of the Tax Code while the finance tax is provided under Title V thereof." (BIR Ruling No. 223, November 2, 1989)

For as long as the basis for the claim for refund or tax credit certificate is based on the non-inclusion of the amount representing the final withholding income tax under Section 50(a) as part of the gross income subject to gross receipts tax, this dissenting opinion will stand. The fact that petitioner-claimant is able to establish by competent documentary and testimonial evidence is of no moment. For purposes of the amusement tax under Section 260 of the Tax Code, the term 'gross receipts' embraces 'all the receipts' of the proprietor, lessee, or operator of the amusement place. The words 'all the receipts' refer to the total amount of cash received which becomes part of the funds of the taxpayer and does not include any money which has been specially earmarked by any law or legal rule or regulation for some other person other than the proprietor, lessee or operator of the amusement place. Receipts means actually received (Philippine Long Distance Telephone Co. vs. Collector of Internal Revenue, G.R. No. L-3222, January 21, 1952) for itself and not for others, for otherwise they would not be receipts (Manila Jockey Club, Inc. vs. Collector of Internal Revenue, CTA Case No. 205, April 15, 1958; Jai Alai Corporation of the Philippines vs. Araneta, CTA Case No. 108, July 31, 1956 (Annotated, NIRC by Commissioner Jose Arañas, 1988 Edition, p. 687).

IN VIEW OF ALL THE FOREGOING, I hereby register my dissent to the majority opinion and vote for the denial of the entire claim for refund for lack of legal bases.

AMANCIO Q. SAGA
Associate Judge